UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE WEATHERFORD INTERNATIONAL SECURITIES LITIGATION	11 Civ. 1646 (LAK) (JCF) CLASS ACTION

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

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Court-appointed Lead Counsel Kessler Topaz Meltzer & Check, LLP ("Lead Counsel") respectfully submits this memorandum in support of its motion, pursuant to Rule 23(h) of the Federal Rules of Civil Procedure, for an award of attorneys' fees and reimbursement of litigation expenses that were reasonably and necessarily incurred by Plaintiffs' Counsel[1] in connection with prosecuting and resolving the above-captioned action ("Action"). Lead Counsel's request for expenses includes a request for reimbursement pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA") for costs and expenses incurred by the proposed Settlement Class Representatives, American Federation of Musicians and Employers' Pension Fund ("AFME") and Georgia Firefighters' Pension Fund ("GFPF"), in connection with their representation of the Settlement Class.[2]

I. <u>PRELIMINARY STATEMENT</u>

The settlement of this Action for $52,500,000 represents a substantial recovery for the Settlement Class. This recovery was achieved through the skill, tenacity and effective advocacy of Plaintiffs' Counsel, who vigorously litigated this Action for nearly three years against highly skilled defense counsel. For the efforts undertaken on behalf of the Settlement Class, Lead Counsel, on behalf of Plaintiffs' Counsel, respectfully requests an award of attorneys' fees in the amount of $12.6 million—an amount which approximates Plaintiffs' Counsel's total aggregate

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[1] The term "Plaintiffs' Counsel" refers collectively and solely to Lead Counsel and court-appointed local counsel, the Law Offices of Curtis V. Trinko, LLP.

[2] Lead Counsel is simultaneously submitting the Declaration of Eli R. Greenstein in Support of (A) Plaintiffs' Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation and (B) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Greenstein Declaration" or "Greenstein Decl."). The Court is respectfully referred to the Greenstein Declaration for a detailed description of, *inter alia*, the history of the Action; the nature of the claims asserted; the negotiations leading to the Settlement; the value of the Settlement to the Settlement Class, as compared to the risks and uncertainties of continued litigation; and a description of the extensive efforts undertaken by Lead Counsel on behalf of the Settlement Class. Unless otherwise noted, capitalized terms have the meanings set out in the Greenstein Declaration and in the Stipulation of Settlement and Release dated as of January 28, 2014 (ECF No. 240-1) (the "Stipulation"), all emphasis is added and internal citations and footnotes are omitted.

lodestar of $12,912,708.50 and corresponds with the amount permitted under Lead Counsel's retainer agreement with AFME, a sophisticated institutional Lead Plaintiff, negotiated at the outset of this Action.[3] As set forth below, Lead Counsel's fee request is fully supported by the factors set forth in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 51 (2d Cir. 2000), and under the lodestar approach permitted by the Second Circuit. *See McDaniel v. County of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010). Lead Counsel also requests reimbursement of Plaintiffs' Counsel's litigation expenses in the amount of $1,381,724.59 as well as reimbursement to the proposed Settlement Class Representatives for their costs and expenses incurred in connection with their representation of the Settlement Class in the aggregate amount of $19,935.69.

The Settlement of this Action was achieved only after the substantial completion of fact discovery (scheduled to end on January 24, 2014) and just prior to the parties' exchange of expert reports on February 24, 2014. In reaching this point in the litigation, Lead Counsel undertook extensive efforts and devoted substantial resources on a wholly contingent basis to investigating, prosecuting and resolving Plaintiffs' claims. These efforts included, among other things: (i) thoroughly reviewing and analyzing publicly available information regarding Weatherford; (ii) conducting detailed investigative interviews of non-party witnesses, including numerous former Weatherford employees and contractors; (iii) developing a robust factual record and filing a consolidated complaint and two proposed amended complaints for violations of the federal securities laws; (iv) conducting extensive research of the applicable law for claims

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[3] *See* Declaration of Maureen B. Kilkelly, Executive Director of American Federation of Musicians and Employers' Pension Fund in Support of (A) Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation; (B) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses; and (C) Plaintiffs' Request for Reimbursement of Costs and Expenses (the "Kilkelly Decl.") at ¶8, attached as Exhibit 3 to the Greenstein Declaration.

asserted in this Action and the potential defenses thereto; (v) opposing two motions to dismiss; (vi) consulting with, and obtaining reports and analyses from, multiple experts; (vii) researching and filing extensive class certification briefing and expert market efficiency analysis to certify a class of allegedly damaged investors; (viii) responding to substantial discovery propounded by Defendants and defending the depositions of both Settlement Class Representatives and Plaintiffs' expert on market efficiency; (ix) conducting extensive discovery, including issuing comprehensive party and non-party discovery requests and reviewing and analyzing approximately 2.3 million pages of documents produced by Defendants and various non-party witnesses such as E&Y, PwC, Deloitte, a law firm, former employees, and securities analysts; (xi) researching, preparing and briefing seven separate motions to compel discovery, all of which were granted in part; and (xii) conducting, defending or preparing to take the depositions of 24 witnesses, including some of the most senior officers of the Company and multiple audit firms. *See* Greenstein Decl. at ¶¶21-76.

The Settlement is a particularly favorable result when considered in light of the substantial risks and challenges confronted in the Action. Notably, when the Settlement was reached, there were several critical motions pending before this Court—*e.g.*, Plaintiffs' Class Certification Motion and Motion to Amend the Complaint. Greenstein Decl. at ¶11. In addition, there was (and still is) tremendous uncertainty regarding the Supreme Court's ongoing review of the fraud-on-the-market presumption of reliance recognized in *Basic Inc. v. Levinson*, 485 U.S. 224, 108 S. Ct. 978 (1988). *Id.* at ¶11, 36-38, 96; *see Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317, 134 S. Ct. 636 (Mem) (Nov. 15, 2013) ("*Halliburton II*"). The Settlement avoids both the uncertainty of *Halliburton II* and the possibility of an adverse ruling on

Plaintiffs' Class Certification Motion and/or Motion to Amend the Complaint by this Court—either of which could limit or negatively impact any future recovery for the Settlement Class.

In addition to the foregoing risks, Plaintiffs faced substantial hurdles to successfully establishing Defendants' liability, loss causation and the Settlement Class's damages. Greenstein Decl. at ¶¶88-93. With respect to loss causation, because Plaintiffs' claims were limited to those arising from the Internal Controls Misstatements, there was significant risk that Plaintiffs would be unable to disaggregate the portion of the losses attributable to the Internal Controls Misstatements from the losses attributable to other "confounding information," *i.e.*, disclosures related to the Tax Accounting Misstatements, the restatement of financial results, future earnings guidance and/or oil prices in the Middle East. *See id*. at ¶88 and § II.B.3 herein.

With respect to Defendants' scienter, Plaintiffs had to overcome the considerable risk that the Court or a jury could find that Weatherford's tax accounting errors and internal control problems were the result of negligence or mismanagement at a Company that simply grew too quickly and became too complex. Plaintiffs also faced the risk of proving that the single remaining Individual Defendant who made actionable statements in the case, CFO Becnel, was sufficiently aware of tax accounting errors or material weaknesses in internal controls at the time he filed certifications under Sarbanes-Oxley. *Id*. at ¶94. Finally, to the extent Plaintiffs could prove that lower-level tax personnel were reckless in disregarding accounting errors or internal control deficiencies, there was still a risk that Plaintiffs could not establish liability either because those employees made no statements or were not senior enough to impute scienter to the Company. *Id*. at ¶95. In light of these risks, Lead Counsel respectfully submits that the Settlement is a testament to Plaintiffs' Counsel's hard work and the quality of their representation.

Pursuant to the Court's Order Concerning Proposed Settlement dated April 1, 2014 (ECF No. 249) (the "Notice Order"), more than 660,000 copies of the Notice have been mailed to potential Settlement Class Members and nominees, and the Summary Notice was published once in the national edition of *The Wall Street Journal* and *Investor's Business Daily*, placed on the settlement website at www.WeatherfordSecuritiesLitigationSettlement.com and transmitted over *PR Newswire*. *See* Affidavit of Jose C. Fraga Regarding (A) Mailing of the Notice and Proof of Claim Form; (B) Publication of Summary Notice; and (C) Requests for Exclusion Received to Date, attached as Exhibit 1 to the Greenstein Declaration ("Fraga Aff."), at ¶¶2-11, 13. The Notice advises potential Settlement Class Members that Lead Counsel would be seeking attorneys' fees in an amount not to exceed $12.6 million and reimbursement of Litigation Expenses in an amount not to exceed $1.5 million, which amount includes an estimate of reimbursement to Plaintiffs in an amount not to exceed $25,000 in the aggregate. *See* Fraga Aff. Exhibit A at 1. While the deadline set by the Court for Settlement Class Members to object to the requested attorneys' fees and expenses has not yet passed, to date, only one objection to the amount of attorneys' fees and expenses set forth in the Notice has been received from an individual investor. *See* Greenstein Decl. at ¶¶101 & n.4, 130.[4]

As detailed more fully below, Lead Counsel respectfully requests that the Court approve its application for an award of attorneys' fees and reimbursement of litigation expenses,

[4] A copy of the objection submitted by Stephen Shoeman is attached as Exhibit 2 to the Greenstein Declaration. Mr. Shoeman generally objects to the amount of attorneys' fees and expenses set forth in the Notice. Lead Counsel will post this memorandum, along with the other documents in support of the Settlement and fee request, including the Greenstein Declaration which details the extensive time and effort expended by Lead Counsel during the pendency of this Action, on the website www.WeatherfordSecuritiesLitigationSettlement.com for review by Settlement Class Members. The deadline for the submission of objections is June 13, 2014. Lead Counsel will address any additional objections received after this submission, along with Mr. Shoeman's objection, in Plaintiffs' reply brief to be filed with the Court on June 20, 2014.

including reimbursement to Plaintiffs for reasonable costs and expenses incurred in connection with their representation of the Settlement Class.

II. THE FEE REQUESTED IS FAIR AND REASONABLE AND SHOULD BE APPROVED

A. Plaintiffs' Counsel Are Entitled to an Award of Attorneys' Fees 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, 100 S. Ct. 745, 749 (1980); *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1550 (2013); *see also Goldberger*, 209 F.3d at 47. 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.

Courts have recognized that, in addition to providing just compensation, awards of fair attorneys' fees from a common fund should "serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons," and therefore "to discourage future alleged misconduct of a similar nature."[5] Indeed, the Supreme Court has emphasized that private securities actions, such as the instant Action, are "an essential supplement to criminal prosecutions and civil enforcement actions" brought by the SEC and

[5] *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 585 (S.D.N.Y. 2008); *see also In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695, 2007 WL 4115808, at *2 (S.D.N.Y. Nov. 7, 2007) (same); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 165 (S.D.N.Y. 2011) (an award of appropriate attorneys' fees should "provid[e] lawyers with sufficient incentive to bring common fund cases that serve the public interest" and "attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so").

DOJ.[6] Compensating plaintiffs' counsel for the risks they take in bringing these actions 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." *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 142 (S.D.N.Y. 2008).

B. The *Goldberger* Factors Strongly Support the Requested Fee

The Second Circuit has set forth the following criteria that courts should consider when analyzing the reasonableness of a request for attorneys' fees in a common fund case: (1) the magnitude and complexities of the action; (2) the litigation risks involved; (3) the quality of class counsel's representation; (4) the size of the requested fee in relation to the recoveries obtained; (5) the time and labor expended by class counsel; and (6) public policy considerations. G*oldberger*, 209 F.3d at 50. Each of these factors weighs in favor of Lead Counsel's present fee request.

1. The Time and Labor Expended by Plaintiffs' Counsel Support the Requested Fee

a. Plaintiffs' Efforts on Behalf of the Settlement Class

Over the course of nearly three years, Lead Counsel marshaled considerable resources and time in the research, investigation, prosecution and ultimate resolution of the Action. Indeed, it was not until after Lead Counsel developed a comprehensive record through substantial fact discovery, and moved to amend the operative complaint to incorporate the fruits of this discovery, that the parties were able to reach agreement to settle the Action. As discussed in the

[6] *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1201 (U.S. 2013); *accord Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310, 105 S. Ct. 2622, 2628 (1985) (private securities actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplemental to [SEC] action.'" (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432, 84 S. Ct. 1555, 1560 (1964))).

Greenstein Declaration, as part of its substantial efforts in the Action, Lead Counsel, among other things:

- conducted an extensive investigation into the facts underlying the Action, including the review of thousands of pages of publicly-available documents regarding Weatherford, interviews with nearly 20 non-party witnesses which included Weatherford employees and contractors, and consultation with forensic accounting experts, and drafted a detailed consolidated complaint based on this investigation (Greenstein Decl. at ¶¶21-23);

- opposed motions to dismiss the Complaint filed by Defendants and Ernst & Young, LLP ("E&Y") ("Motions to Dismiss") and opposed E&Y's subsequent motion for the entry of a final judgment pursuant to Rule 54(b) (*id*. at ¶¶24-31);

- reviewed and challenged Defendants' first answer to the Complaint resulting in Defendants' filing of a second and third answer to the Complaint (*id*. at ¶33);

- consulted with multiple experts and consultants in several fields, including tax accounting, intercompany divided eliminations, internal controls pursuant to Sarbanes-Oxley, forensic accounting, economics, and damages (*id*. at ¶¶73-76);

- researched and filed extensive class certification briefing and expert market efficiency analysis to certify a class of allegedly damaged investors (*id*. at ¶¶35-38);

- responded to substantial discovery propounded by Defendants in connection with Plaintiffs' motion for class certification, including preparing for and defending depositions of the proposed Settlement Class Representatives, as well as Plaintiffs' expert on market efficiency (*id*. at ¶¶48-51);

- pursued multiple avenues of discovery from Defendants, including several sets of document requests, interrogatories and numerous requests for admissions (*id*. at ¶41), and issued subpoenas to 25 third parties, including Weatherford's auditors, financial advisors, consultants, the law firm representing Weatherford's Audit Committee and numerous financial analysts (*id*. at ¶¶45-47);

- engaged in extensive document discovery which included the review and analysis of approximately 2.3 million pages of documents produced by Defendants and third parties as well as the development and implementation of a thorough document review protocol for the effective and efficient review of such documents (*id*. at ¶¶42-44);

- researched, prepared and briefed seven separate affirmative motions to compel discovery and extensively briefed legal issues pertaining to Defendants' discovery motions and confidentiality designations (*id*. at ¶¶52-60);

- drafted substantial correspondence and conferred with Defendants on numerous discovery disputes (*id*. at ¶¶61-62);
- conducted, defended and/or prepared to take the depositions of 24 witnesses, including some of the most senior officers of the Company, as well as a Rule 30(b)(6) deposition of E&Y related to various topics such as the scope of its engagement with Weatherford and Weatherford's SOX process (*id*. at ¶¶37, 63-67); and
- researched and filed extensive briefing seeking to amend or supplement the Complaint to incorporate important factual developments and evidence obtained in discovery (*id*. at ¶¶68-72), and submitted multiple proposed amended complaints.

Substantial time and effort was also required to negotiate the Settlement. The first attempt to resolve the Action took place in June 2011 when the case was referred, for purposes of discussing settlement, to Magistrate Judge Francis. Two years later, in June 2013, the parties participated in formal mediation under the auspices of the Hon. Daniel H. Weinstein (Ret.), a former judge and an experienced and highly respected mediator. In conjunction with the mediation, the parties submitted detailed mediation statements and during the mediation the parties made robust presentations regarding the merits of the Action. Although too far apart in their respective positions at the time the formal mediation concluded, the parties continued their settlement negotiations as the case neared the discovery cutoff. With the assistance of Judge Weinstein, the parties reached their agreement-in-principle to settle the Action in January 2014. Greenstein Decl. at ¶80.

b. Lead Counsel's Fee Request is Reasonable Under a Lodestar Analysis

Among other methods, the Second Circuit has authorized district courts to perform a lodestar analysis in awarding attorneys' fees in common fund cases. *See*, *e.g*., *Goldberger*, 209 F.3d at 50. The "lodestar" is calculated by multiplying the number of hours each particular attorney or paraprofessional expended on the litigation by the timekeeper's current hourly rate, and then totaling the amounts to arrive at a lodestar for all timekeepers.[7] In cases of this nature, fees representing multipliers above the lodestar are typically and properly awarded to reflect the contingency fee risk and other relevant factors. *See*, *e.g.*, *In re FLAG Telecom Holdings*, *Ltd. Sec. Litig.*, No. 02 Civ. 3400, 2010 WL 4537550, at *26 (S.D.N.Y. Nov. 8, 2010) ("Under the lodestar method, a positive multiplier is typically applied to the lodestar in recognition of the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors."); *In re Comverse Tech.*, *Inc. Sec. Litig.*, No. 06-cv-1825, 2010 WL 2653354, at *5 (E.D.N.Y. June 24, 2010) ("Where . . . counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar."); *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 761 (S.D. Ohio 2007) ("the Court rewards [] lead counsel that takes on more risk, demonstrates superior quality, or achieves a greater settlement with a larger lodestar multiplier").[8]

Here, Plaintiffs' Counsel expended 30,325.46 hours performing work for the benefit of the Settlement Class, for an aggregate lodestar of $12,912,708.50. *See* Greenstein Decl. at ¶113, Exs. 5 and 6. Thus, Lead Counsel's fee request, if approved, would yield a slightly negative

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7 Both the Supreme Court and courts in this Circuit have long approved the use of current hourly rates to calculate the base lodestar figure as a means of compensating for the delay in receiving payment that is inherent in class actions, inflationary losses, and the loss of access to legal and monetary capital that could otherwise have been employed had class counsel been paid on a current basis during the pendency of the litigation. *See In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989); *Veeco*, 2007 WL 4115808, at *9; *Missouri v. Jenkins*, 491 U.S. 274, 284, 109 S. Ct. 2463, 2469 (1989).

8 *See also In re Lehman Brothers Sec. Litig.*, No. 08 Civ. 05523 (LAK) (GWG), slip op. at 3 (S.D.N.Y. June 29, 2012) ECF No. 431 (awarding a multiplier of 1.5 in connection with the fee request for the director and officer settlement and underwriter settlements); *In re Lehman Brothers Sec. Litig.*, No. 08 Civ. 05523 (LAK) (GWG), slip op. at 2 (S.D.N.Y. Apr. 1, 2014) ECF No. 563 (awarding a multiplier of 1.25 in connection with the fee request for the structured note settlement).

multiplier of 0.98 on the total lodestar. *Id*.[9] As such, this multiplier "affords additional evidence that the requested fee is reasonable." *City of Providence v. Aeropostale, Inc*., No. 11 Civ. 7132 (CM) (GWG), 2014 WL 1883494, at *13 (S.D.N.Y. May 9, 2014). Indeed, the negative lodestar multiplier here falls well below the range of multipliers awarded in other complex cases, including other securities class actions. *See*, *e.g*., *Wal-Mart Stores, Inc. v. VISA U.S.A. Inc*., 396 F.3d 96, 123 (2d Cir. 2005) (upholding multiplier of 3.5 as reasonable on appeal). *See also* *Cornwell v. Credit Suisse Grp*., No. 08 Civ. 03758 (VM), Order Awarding Attorneys' Fees And Expenses (EFC No. 117) at 4 (S.D.N.Y. July 20, 2011) (awarding fee representing a multiplier of 4.7); *Comverse*, 2010 WL 2653354, at *5 (awarding fee representing a 2.78 multiplier); *In re Bisys Sec. Litig*., No. 04 Civ. 3840 (JSR), 2007 WL 2049726, at *3 (S.D.N.Y. July 16, 2007) (awarding fee representing 2.99 multiplier and finding that the multiplier "falls well within the parameters set in this district and elsewhere"); *In re NASDAQ Market-Makers Antitrust Litig*., 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (awarding 3.97 multiplier, and finding fee awards of 3 to 4.5 to be "common").

Lead Counsel respectfully submits that the amount, substance and quality of work performed weighs strongly in favor of the requested fee.

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

Courts have long recognized that securities class action litigation is "notably difficult and notoriously uncertain." *Aeropostale*, 2014 WL 1883494, at *5. Here, the claims against Defendants were unquestionably complex—involving technical tax accounting issues and financial restatements over the course of four fiscal years, difficult issues regarding varying degrees of "deficiencies" in internal controls, the uncertain interplay between GAAP and tax

[9] In addition, no hours were incurred on confirmatory discovery following the resolution of the Action and no time relating to the fee request is included in the lodestar. Greenstein Decl. at ¶¶117-118.

reporting, and a labyrinthine corporate tax structure underlying all of the accounting and internal control issues in the case. As discussed below, Plaintiffs confronted numerous complexities and risks in pursuing the claims in this Action. *See also*, Greenstein Decl. at ¶¶88-96.

3. The Risks of the Litigation Support the Requested Fee

The Second Circuit has identified "the risk of success as 'perhaps the foremost' factor to be considered in determining [a reasonable award of attorneys' fees]." *Goldberger*, 209 F.3d at 54; *see also Telik*, 576 F. Supp. 2d at 592 ("Courts have repeatedly recognized that 'the risk of the litigation' is a pivotal factor in assessing the appropriate attorneys' fees to award to plaintiffs' counsel in class actions."); *McDaniel*, 595 F.3d at 424 ("[t]he level of risk associated with litigation . . . is 'perhaps the foremost factor' to be considered in assessing the propriety of a multiplier") (quoting *Goldberger*, 209 F.3d at 54). "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).

From the outset of the Action, Lead Counsel recognized the considerable risks it would face by pursuing claims against Defendants.[10] These risks were heightened by the Court's ruling on Defendants' Motions to Dismiss—dismissing claims against E&Y entirely and narrowing Plaintiffs' remaining claims to those arising from Defendants' Internal Controls Misstatements. In addition to the substantial risks in proving loss causation, scienter and damages (*see infra*; Greenstein Decl. at ¶¶88-95), yet another significant risk to recovery is the Supreme Court's

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[10] *See, e.g.*, *In re Alstom S.A. Sec. Litig.*, Master File No. 03-CV-6595 (VM) (after years of litigation and millions of dollars in litigation expenses, class membership severely reduced based on the Supreme Court's decision in *Morrison v. National Bank of Australia*, 130 S. Ct. 2869 (2010)); *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, No. 07–61542–CIV, 2011 WL 1585605, at *24 (S.D. Fla. Apr. 25, 2011) (favorable jury verdict procured after a six week trial vacated by the court on a motion for judgment as a matter of law).

forthcoming decision in *Halliburton II* regarding the applicability, scope and contours of fraud-on-the-market presumption recognized in *Basic*. Greenstein Decl. at ¶¶11, 36-38, 96. Although Lead Counsel worked diligently and succeeded in developing a compelling factual record through vigorous discovery and motion practice, Lead Counsel recognized that there were significant uncertainties and risks with respect to liability, loss causation and damages at multiple future stages of the litigation.

For example, regardless of whether Plaintiffs could ultimately establish liability for the remaining Internal Controls Misstatements, Plaintiffs faced significant challenges in establishing loss causation and damages for their remaining claims. Defendants were certain to challenge Plaintiffs' ability to disaggregate damages—*i.e.*, to separate and apportion the losses attributable to the Internal Controls Misstatements from the losses attributable to the Tax Accounting Misstatements, financial restatement claims and macroeconomic factors relating to oil prices. *Id.* at ¶88. Further, even if Plaintiffs could prove that the Internal Controls Misstatements were a factor in causing losses, they still faced a significant risk that the Court and/or a jury would find that only a small fraction of the alleged total damages was attributable to Defendants' Internal Controls Misstatements. *Id.* at ¶90. Plaintiffs would also have to overcome Defendants' anticipated proportional fault defense. *Id.* at ¶92.

Lead Counsel was also aware of the challenges and defenses Plaintiffs would face in attempting to establish Defendants' liability, particularly in attempting to show that the one remaining Individual Defendant, Becnel, acted intentionally or recklessly as opposed to negligently or innocently. *Id.* at ¶94. Defendants would have argued, among other things, that Becnel relied heavily on numerous tax executives, accountants, consultants, external auditors and Internal Audit personnel in certifying the Company's financial results and reaching the conclusion that no material weakness existed in Weatherford's internal controls. *Id*. at ¶95. Moreover, even if Plaintiffs could prove that lower-level or mid-level employees in Weatherford's Tax or Internal Audit Department were reckless as to the underlying accounting errors and internal control deficiencies, there was no guarantee that Plaintiffs could impute those employees' scienter to Weatherford or Becnel, especially given that Weatherford's Tax and Internal Audit employees neither made statements nor signed any SEC filing. *Id*.

4. **The Quality of Plaintiffs' Counsel's <u>Representation Supports the Requested Fee</u>**

The skill and quality of legal counsel also supports the requested fee. Lead Counsel is among the nation's preeminent law firms in class action securities litigation and has successfully litigated these actions on behalf of large institutional investors in courts throughout the country.[11] Lead Counsel respectfully submits that its experience in complex securities class action litigation, along with its vigorous prosecution of the Action on behalf of the Settlement Class, provided the necessary leverage to negotiate the outstanding recovery obtained for the Settlement Class. *See Shapiro v. JPMorgan Chase & Co., et al.*, Nos. 11 Civ. 8331 (CM) (MHD), 11 Civ. 7961 (CM), 2014 WL 1224666, at *22 (S.D.N.Y. Mar. 24 2014) (the skill and prior experience of counsel in the field is relevant to determining fair compensation). Local Counsel also has substantial expertise in prosecuting complex litigation.[12]

[11] *See* Declaration of David Kessler in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses in Connection with the Weatherford Settlement, Filed on Behalf of Kessler Topaz Meltzer & Check, LLP (the "Kessler Decl.") attached as Exhibit 5 to the Greenstein Declaration. *See also*, *e.g.*, *In re Southern Peru Copper Corp. Derivative Litigation*, *Consol*. CA No. 961-CS (Del. Ch.); *In re: Lehman Brothers Securities and ERISA Litigation*, Master File No. 09 MD 2017–LAK (S.D.N.Y.); *In re Bank of America Corp. Securities*, *Derivative*, *and ERISA Litig*., Master File No. 09 MD 2058-PKC (S.D.N.Y.).

[12] *See* Declaration of Curtis V. Trinko in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses Filed on Behalf of the Law Offices of Curtis V. Trinko, LLP (the "Trinko Decl.") attached as Exhibit 6 to the Greenstein Declaration.

The quality of opposing counsel is also important in evaluating the quality of the services rendered. *See*, *e.g.*, *In re Marsh ERISA Litig*., 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement"); *In re Adelphia Commc'ns Corp*. *Sec*. *and Derivative Litig*., No. 03 MDL 1529 LMM, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006) ("The fact that the settlements were obtained from defendants represented by 'formidable opposing counsel from some of the best defense firms in the country' also evidences the high quality of lead counsels' work."). In this Action, Defendants are represented by a highly experienced defense firm, Latham and Watkins, LLP, which is known for obtaining high-profile loss causation decisions in this Circuit (*see In re Omnicom Group*, *Inc*. *Sec*. *Litig*., 597 F.3d 501 (2d Cir. 2010)) and has vigorously defended its clients and spared no effort or expense in such defense. Greenstein Decl. at ¶121. In the face of this formidable opposition, Lead Counsel developed Plaintiffs' case so as to persuade Defendants to agree to a favorable financial recovery for the Settlement Class.

5. The Fee Request Is Fair and Reasonable in Relation to the Settlement Amount

"When determining whether a fee request is reasonable in relation to a settlement amount, 'the court compares the fee application to fees awarded in similar securities class-action settlements of comparable value.'" *Comverse*, 2010 WL 2653354, at *3 (quoting *In re Marsh & McLennan Cos*., *Inc*. *Sec*. *Litig*., No. 04 Civ. 814, 2009 WL 5178546, at *19 (S.D.N.Y. Dec. 23, 2009). Here, Lead Counsel seeks to recover a fee that approximates the reasonable value of Plaintiffs' Counsel's services measured by their hourly rates and the number of hours devoted to the task. The resulting multiplier represented by the fee request here falls well within the "range of reasonableness" based on fees awarded by this and other Courts across the nation, in this and other large securities cases.

Lead Counsel's request for attorneys' fees represents 24% of the Settlement Fund, reflecting the fee agreement negotiated by Lead Plaintiff. The requested fee is reasonable in light of the circumstances of this case, including the substantial recovery obtained for the Settlement Class in the face of significant risks, and is further supported by the fact that it approximates Plaintiffs' Counsel's lodestar.

6. **Public Policy Considerations Support the Requested Fee**

Courts in the Second Circuit have held that "[p]ublic policy concerns favor the award of reasonable attorneys' fees in class action securities litigation." *Aeropostale*, 2014 WL 1883494, at *17. Public policy supports granting attorneys' fees that are sufficient to encourage plaintiffs' counsel to bring securities class actions that supplement the efforts (if any) of the SEC and other governmental agencies and help deter future wrongdoing. *See Maley v. Del. Global Techs. Corp.*, 186 F. Supp. 2d 358, 373 (S.D.N.Y. 2002) ("In considering an award of attorney's fees, the public policy of vigorously enforcing the federal securities laws must be considered."); *JPMorgan Chase*, 2014 WL 1224666, at *23 (recognizing "the importance of private enforcement actions and the corresponding need to incentivize attorneys to pursue such actions on a contingency fee basis").

Lead Counsel's willingness to assume the risks of this litigation resulted in a substantial benefit to the Settlement Class. To Lead Counsel's knowledge, the Settlement represents the *only* recovery for the Settlement Class arising from the claims alleged in the Action. Indeed, despite the fact that the SEC and DOJ have been investigating Defendants' alleged conduct since 2011, neither agency has brought charges or claims of any kind—let alone fraud allegations—

against Defendants based on the facts underlying this Action. Greenstein Decl. at ¶8. Thus, public policy favors granting Lead Counsel's request for attorneys' fees and expenses here.

C. <u>Plaintiffs Have Approved the Requested Fee</u>

Lead Counsel is submitting its fee request with the prior approval of Lead Plaintiff—a sophisticated institutional investor—and this application is, in all respects, in accordance with the retainer agreement entered into by Lead Plaintiff and Lead Counsel at the outset of the Action. *See* Kilkelly Decl. at ¶8.[13] Under the retainer agreement, Lead Counsel agreed to undertake the litigation on an entirely contingent basis, meaning that Lead Counsel would not be compensated at all, or reimbursed for any expenses incurred on behalf of the Settlement Class, unless it obtained a recovery for the Settlement Class. Generally, the retainer agreement provided that attorneys' fees would be based on a "fee grid" in which attorneys' fees would be adjusted based upon the amount recovered, with the permissible fee percentage decreasing with the size of the settlement amount. *Id*.

The fact that the requested attorneys' fees are based upon a retainer agreement negotiated with Lead Plaintiff at the outset of the Action supports the reasonableness of the requested fee. The PSLRA was intended to encourage sophisticated institutional investors like Plaintiffs to assume control of securities class actions in order to "increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel." H.R. Conf. Rep. No. 104-369, at *27 (1995), reprinted in 1995

[13] Proposed Settlement Class Representative GFPF also approves Lead Counsel's fee request. *See* Declaration of James R. Meynard, Former Executive Director of Georgia Firefighters' Pension Fund in Support of (A) Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation; (B) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses; and (C) Plaintiffs' Request for Reimbursement of Costs and Expenses (the "Meynard Decl.") at ¶¶8-9, attached as Exhibit 4 to the Greenstein Declaration.

U.S.C.C.A.N. 730, 731. Congress believed these institutions would be in the best position to monitor the ongoing prosecution of the litigation and assess the reasonableness of counsel's fee request. As set forth in their respective declarations (*see* Greenstein Decl. Exs. 3 and 4), each of the Plaintiffs was actively involved in the prosecution and resolution of the Action and has a firm basis for assessing the reasonableness of the fee request before approving it.

While a district court is not required to adhere to such a retainer agreement, *see Visa*, 396 F.3d at 123-24, Courts have found that such agreements should be given deference. "[W]hen class counsel in a securities lawsuit have negotiated an arm's-length agreement with a sophisticated lead plaintiff possessing a large stake in the litigation, and when that lead plaintiff endorses the application following close supervision of the litigation, the court should give the terms of that agreement great weight." *In re Bear Stearns Cos.*, 909 F. Supp. 2d 259, 272 (S.D.N.Y. 2012); *see also In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 466 (S.D.N.Y. 2004) ("in class action cases under the PSLRA, courts presume fee requests submitted pursuant to a retainer agreement negotiated at arm's length between lead plaintiff and lead counsel are reasonable").

Here, Plaintiffs' approval of the present fee request lends additional support to Lead Counsel's request and should be considered in the Court's determination of a reasonable fee in this case.

D. <u>The Reaction of the Settlement Class to Date Supports the Requested Fee</u>

The Settlement Class's reaction to the proposed settlement to date reinforces the reasonableness of the requested fee. As of May 21, 2014, the Court-appointed claims administrator has mailed over 660,000 copies of the Notice Packet to potential members of the Settlement Class or nominees, informing them of, *inter alia*, Lead Counsel's intention to apply to the Court for an award of attorneys' fees not to exceed $12.6 million, an amount that approximates Plaintiffs' Counsel's total lodestar for their services on behalf of the Settlement Class. *See* Fraga Aff. at ¶10. While the time to object to Lead Counsel's fee request does not expire until June 13, 2014, to date, only one objection to the amount of attorneys' fees set forth in the Notice—submitted by Stephen Shoeman—has been received. Lead Counsel will address Mr. Shoeman's objection, along with any additional objections received after this submission, in its reply brief to be filed with the Court on June 20, 2014.

III. THE LITIGATION EXPENSES INCURRED ARE REASONABLE AND WERE NECESSARY TO ACHIEVE THE SETTLEMENT

Lead Counsel requests reimbursement of litigation expenses that were reasonably incurred by Plaintiffs' Counsel and necessary to the prosecution and resolution of the Action. These expenses are properly recovered by counsel. *See In re Am. Int'l Group, Inc. Sec. Litig.*, 293 F.R.D. 459, 467 (S.D.N.Y. 2013) (in a class action, attorneys may 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."). Plaintiffs' Counsel incurred a total of $1,381,724.59 in litigation expenses on behalf of the Settlement Class. Greenstein Decl. at ¶¶124, 132; *see also* declarations submitted on behalf of Plaintiffs' Counsel attached to the Greenstein Declaration as Exhibits 5 and 6. Reimbursement of these expenses is fair and reasonable.

Of the total expenses, a significant amount—$786,394.45, or approximately 57%—was incurred for experts and consultants. Greenstein Decl. at ¶135; *see also* Kessler Decl., Ex. 2. Specifically, Lead Counsel retained multiple experts and consultants in several disciplines whose work was critical to the development of the case. Greenstein Decl. at ¶¶73-76. During the course of the litigation, these experts and consultants assisted Plaintiffs in, *inter alia*: preparing the Complaint and the PAC; analyzing extensive discovery; preparing for depositions and an anticipated motion for summary judgment; forensically deciphering the complex tax transactions at issue in this case; preparing a market efficiency report in support of class certification; analyzing estimated damages in connection with the mediation and further settlement negotiations; and preparing the proposed Plan of Allocation. *Id.*

Another large component of the expenses—$204,868.97, or approximately 15%—was for an outside vendor to provide the necessary services for electronic database hosting and document review that enabled Lead Counsel to efficiently and effectively search, review and perform analytics on the approximately 2.3 million pages of documents received by Plaintiffs, as well as detect any technical or substantive deficiencies or gaps in Defendants' productions, custodian lists or search term proposals. Greenstein Decl. at ¶136; *see also* Kessler Decl., Ex. 2. In addition, $60,573.59, or approximately 4% of Plaintiffs' Counsel's expenses reflect fees assessed by the mediator in this matter, Judge Weinstein. Greenstein Decl. at ¶138.

The expenses detailed above as well as the other expenses for which Plaintiffs' Counsel seek reimbursement (*i.e.*, online legal and factual research, court fees, travel expenses, court reporting services, reproduction costs (printing, copying and scanning), facsimile charges, and postage and delivery expenses) are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the hour.[14] These expense items are billed separately, and such charges are not duplicated in the firm's hourly billing rates.

[14] *See Aeropostale*, 2014 WL 1883494, at *19 ("The [] expenses [] attributable to such things as travel for depositions and for mediation, the costs of computerized research, duplicating documents, and other incidental expenses…were critical to Lead Plaintiff's success in achieving the proposed Settlement."); *Global 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'

The Notice advised potential Settlement Class Members that Lead Counsel would be seeking reimbursement of Litigation Expenses, including reimbursement of Plaintiffs' costs and expenses in connection with their representation of the Settlement Class, in an amount not to exceed $1.5 million. As discussed above, one objection to the maximum expense figure set forth in the Notice has been received and will be addressed in Plaintiffs' reply on June 20, 2014. In sum, Lead Counsel respectfully submits that the expenses sought here ($1,381,724.59) were all reasonably and necessarily incurred by Plaintiffs' Counsel, are of the type customarily reimbursed in securities cases, and should thus be approved.

IV. AFME AND GFPF SHOULD BE AWARDED THEIR REASONABLE COSTS AND EXPENSES UNDER 15 U.S.C. § 78U-4(A)(4)

In connection with its request for reimbursement of litigation expenses, Lead Counsel also seeks reimbursement of $19,935.69 for the costs and expenses incurred by the Settlement Class Representatives directly related to their representation of the Settlement Class. The PSLRA specifically provides that an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be granted to "any representative party serving on behalf of a class." 15 U.S.C. §78u-4(a)(4). As required and envisioned by the PSLRA, Plaintiffs' claims for reimbursement of expenses are based upon the substantial amount of time devoted to the Action by employees of Plaintiffs. *See* Declaration of Maureen B. Kilkelly (on behalf of AFME) and James R. Meynard (on behalf of GFPF) attached as Exhibits 3 and 4 to the Greenstein Declaration.[15]

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reimburses attorneys [and] [f]or this reason, they are properly chargeable to the Settlement fund.").

[15] The hourly rates for which reimbursement is sought are based on the annual salaries of the respective Plaintiff personnel who worked on this Action. *See* Kilkelly Decl. at ¶13; Meynard Decl. at ¶13.

As set forth in the declarations of representatives for AFME and GFPF, Plaintiffs have been committed to pursuing the Settlement Class's claims against the Defendants. These large institutions have actively and effectively fulfilled their obligations as representatives of the Settlement Class, complying with all of the many demands placed upon them, and providing valuable assistance to Lead Counsel. As part of their oversight of, and participation in, this Action on behalf of the Settlement Class, Plaintiffs, among other things: (i) participated in discussions with Lead Counsel concerning significant developments in the litigation, including case strategy; (ii) reviewed material pleadings and briefs; (iii) in the case of AFME, appeared at the hearing on Defendants' motions to dismiss, (iv) supervised the production of discovery responsive to multiple requests propounded by Defendants, including gathering and reviewing documents in response to discovery requests; (v) prepared and sat for Rule 30(b)(6) depositions in furtherance of Plaintiffs' motion for class certification; and (vi) monitored the protracted settlement negotiations on behalf of the Settlement Class. *See* Kilkelly Decl. at ¶¶5-6; Meynard Decl. at ¶¶5-6.

The Settlement Class Representatives' declarations further establish that the time dedicated to the Action by their employees was time that these salaried employees could not devote to other work for Plaintiffs and thus, resulted in a tangible cost to the institutional Plaintiffs. As Judge Sweet observed in *In re Gilat Satellite Networks, Ltd.*, "[s]ince the tasks undertaken by employees of Lead Plaintiffs reduced the amount of time those employees would have spent on other work and these tasks and rates appear reasonable to the furtherance of the litigation, the motion for . . . expenses for Lead Plaintiffs is granted." No. CV-02-1510 (CPS)(SMG), 2007 WL 2743675, at *19 (E.D.N.Y. Sept. 18, 2007). Similarly, in *In re American International Group, Inc. Securities Litigation*, Judge Batts found that "the request of [lead plaintiffs] OPERS and STRS Ohio for reimbursement of $71,910.00 in lost wages related to their active participation in this action is reasonable," No. 04 Civ. 8141 (DAB), 2012 WL 345509, at *6 (S.D.N.Y. Feb. 2, 2012).[16]

The Notice advises recipients that the Litigation Expenses requested by Lead Counsel may include the reasonable costs and expenses of Plaintiffs. To date, there have been no objections to this specific request.[17] Lead Counsel respectfully request that the Court award $13,790.58 to AFME and $6,145.11 to GFPF as compensation for their reasonable costs and expenses incurred in representing the Settlement Class. The reimbursement sought by Plaintiffs is reasonable and fully justified under the PSLRA based on their involvement in the Action and should be granted.

V. CONCLUSION

For the foregoing reasons, Lead Counsel respectfully requests that the Court grant its request for: (i) attorneys' fees in the amount of $12.6 million from the Settlement Fund, plus interest thereon; (ii) reimbursement of $1,381,724.59 in expenses incurred by Plaintiffs' Counsel in connection with the prosecution and resolution of this Action, plus interest thereon; and (iii) reimbursement to the Settlement Class Representatives, in the aggregate amount of $19,935.69, for their reasonable costs and expenses directly related to their representation of the Settlement Class.

16 *See also Marsh & McLennan*, 2009 WL 5178546, at *21 (awarding $144,657 to the New Jersey Attorney General's Office and $70,000 to certain Ohio pension funds, to compensate them "for their reasonable costs and expenses incurred in managing this litigation and representing the Class" and noting that these efforts were "precisely the types of activities that support awarding reimbursement of expenses to class representatives"); *In re Satyam Computer Servs. Ltd. Sec. Litig.*, No. 09-MD-2027-BSJ, slip. op. at 3-4 (S.D.N.Y. Sept. 13, 2011), ECF No. 365 (awarding an aggregate amount of $195,111 as reimbursement for the costs and expenses of class representatives directly relating to their services in representing the class).

17 Mr. Shoeman—who submitted the only objection to date—objects to the requests for reimbursement of litigation expenses generally. *See* n.4 above.

Dated: May 27, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 27th day of May, 2014, I hereby caused a true and correct copy of the foregoing document to be served via Overnight Mail upon:

Mr. Stephen Schoeman
101 Jefferson Avenue
Westfield, NJ 07090

s/ Eli R. Greenstein
ELI R. GREENSTEIN

Addendum of Unpublished Authorities

In re Adelphia Commc'ns Corp. Sec. and Derivative Litig.,
No. 03 MDL 1529 LMM, 2006 WL 3378705 (S.D.N.Y. Nov. 16, 2006)

In re Am. Int'l Group, Inc. Sec. Litig.,
No. 04 Civ. 8141 (DAB), 2012 WL 345509 (S.D.N.Y. Feb. 2, 2012)

In re BankAtlantic Bancorp, Inc. Sec. Litig.,
No. 07–61542–CIV, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011)

In re Bisys Sec. Litig.,
No. 04 Civ. 3840 (JSR), 2007 WL 2049726 (S.D.N.Y. July 16, 2007)

City of Providence v. Aeropostale, Inc.,
No. 11 Civ. 7132 (CM) (GWG), 2014 WL 1883494 (S.D.N.Y. May 9, 2014)

In re Comverse Tech., Inc. Sec. Litig.,
No. 06-cv-1825, 2010 WL 2653354 (E.D.N.Y. June 24, 2010)

Cornwell v. Credit Suisse Grp.,
No. 08 Civ. 03758 (VM), Order Awarding Attorneys' Fees And Expenses, ECF No. 117 (S.D.N.Y. Jul. 20, 2011)

In re Flag Telecom Holdings, Ltd. Sec. Litig.,
No. 02 Civ. 3400, 2010 WL 4537550 (S.D.N.Y. Nov. 8, 2010)

In re Gilat Satellite Networks, Ltd.,
No. CV-02-1510(CPS)(SMG), 2007 WL 2743675 (E.D.N.Y. Sept. 18, 2007)

In re Lehman Brothers Sec. Litig.,
No. 08 Civ. 05523 (LAK)(GWG), slip op. (S.D.N.Y. Apr. 1, 2014) ECF No. 563

In re Lehman Brothers Sec. Litig.,
No. 08 Civ. 05523 (LAK)(GWG), slip op. (S.D.N.Y. June 29, 2012) ECF No. 431

In re Marsh & McLennan Cos., Inc. Sec. Litig.,
No. 04 Civ. 814, 2009 WL 5178546 (S.D.N.Y. Dec. 23, 2009)

In re Satyam Computer Servs. Ltd. Sec. Litig.,
No. 09-MD-2027-BSJ, slip. op. (S.D.N.Y. Sept. 13, 2011), ECF No. 365

Shapiro v. JPMorgan Chase & Co., et al.,
Nos. 11 Civ. 8331 (CM) (MHD), 11 Civ. 7961 (CM),
2014 WL 1224666 (S.D.N.Y. Mar. 24, 2014)

Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.,
No. 01-cv-11814(MP), 2004 WL 1087261 (S.D.N.Y. May 14, 2004)

In re Veeco Instruments Inc. Sec. Litig.,
No. 05 MDL 01695, 2007 WL 4115808 (S.D.N.Y. Nov. 7, 2007)

United States District Court,
S.D. New York.
In re ADELPHIA COMMUNICATIONS CORPORATION SECURITIES AND DERIVATIVE LITIGATION

No. 03 MDL 1529 LMM, 03 Civ.5755, 03 Civ.5758, 03 Civ.5761, 03 Civ .5764, 03 Civ.5768, 03 Civ.5771, 03 Civ.5776, 03 Civ.5781, 03 Civ.5785, 03 Civ.5790, 03 Civ.5756, 03 Civ.5759, 03 Civ.5762, 03 Civ .5765, 03 Civ.5769, 03 Civ.5774, 03 Civ.5778, 03 Civ.5783, 03 Civ.5786, 03 Civ.5791, 03 Civ.5757, 03 Civ.5760, 03 Civ.5763, 03 Civ .5766, 03 Civ.5770, 03 Civ.5775, 03 Civ.5780, 03 Civ.5784, 03 Civ.5787, 03 Civ.5792.
Nov. 16, 2006.

MEMORANDUM AND ORDER

MCKENNA, J.

***1** THIS MEMORANDUM AND ORDER APPLIES TO 03 Civ. 5755, 03 Civ. 5756, 03 Civ. 5757, 03 Civ. 5758, 03 Civ. 5759, 03 Civ. 5760, 03 Civ. 5761, 03 Civ. 5762, 03 Civ. 5763, 03 Civ. 5764, 03 Civ. 5765, 03 Civ. 5766, 03 Civ. 5768, 03 Civ. 5769, 03 Civ. 5770, 03 Civ. 5771, 03 Civ. 5774, 03 Civ. 5775, 03 Civ. 5776, 03 Civ. 5778, 03 Civ. 5780, 03 Civ. 5781, 03 Civ. 5783, 03 Civ. 5784, 03 Civ. 5785, 03 Civ. 5786, 03 Civ. 5787, 03 Civ. 5790, 03 Civ. 5791, 03 Civ. 5792.

On November 10, 2006, the Court approved class settlements, in this consolidated class action brought on behalf of persons and entities who purchased or otherwise acquired securities of Adelphia Communications Corporation ("Adelphia") in the period August 16, 1999 through June 10, 2002, between plaintiffs and (i) defendant Deloitte & Touche LLP ("Deloitte") and (ii) a number of defendant banks (identified in, *e.g.,* Plaintiffs' Memorandum in Support of Proposed Settlements, at 1-2, n. 2) ("the Banks"), for, respectively, (i) $210 million and (ii) $244,953,437. Counsel for lead plaintiffs now move for an award of legal fees and expenses (with respect to both settlements) in the amount of 21.4% of the total of the settlements plus expenses of $1,455,130.81.FN1 The fee is to be taken from the settlements proportionately.

FN1. In the notice to the members of the class describing both the proposed settlements and the expected application for fees and expenses, the members of the class were advised that counsel would apply for fees not exceeding 25% of the settlement funds and expenses not to exceed $3.3 million.

> The fee sought will encompass work on "responses to the potential appeals of objectors ... and continuing implementation and the monitoring of the Settlements and the settlement administration process to ensure that the Settlement Funds are appropriately distributed." Plaintiffs' Memorandum in Support of Proposed Settlements, at 68.

Objections to the fees sought, as excessive, have been filed by (i) Leonard and Claire Tow and related entities; (ii) the Commonwealth of Pennsylvania Public School Employees' Retirement System; and (iii) the New York State Teachers' Retirement System ("NYSTRS").

The fee application will be "assessed based on scrutiny of the unique circumstances of [this] case, and 'a jealous regard to the rights of those who are interested in the fund." ' *Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43, 53 (2d Cir.2000) (quoting *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 469 (2d Cir.1974)).

The Court will consider a fee based upon a percentage of the common fund achieved, subject to consideration of the lodestar as a "cross check." *See id.* at 50. FN2 The fee application is considered in light of the *Goldberger* factors: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 121-22 (2d Cir.2005) (citing *Goldberger,* 209 F.3d at 50).

FN2. The Court concurs with the observation that the pure lodestar calculation of fees can be a "disincentive to early settlements." *Goldberger* at 48 (citing *Savoie v. Merchants Bank,* 166 F.3d 456, 461 (2d Cir.1999)).

The Court has had the benefit of considering the helpful declarations of law professors John C. Coffee, Jr. (of Columbia University Law School, submitted by plaintiffs) and Michael A. Perino (of St. John's University School of Law, submitted by NYSTRS), which give a very thorough overview of what federal courts have been doing in recent years on fee applications in class actions. Ultimately, of course, each case must be evaluated individually. An average of percentages in (more or less) similar cases should not be used as a "benchmark." *See Goldberger,* 209 F.3d at 51-52.

***2** The first *Goldberger* factor ascertains the time and labor expended by counsel. Plaintiffs' counsel-*i.e.,* lead counsel and others working under their direction-have (to the date of the application) expended 83,038.33 hours on this litigation. (Joint Declaration of Arthur N. Abbey and Jeffrey H. Squire ("Joint Declaration"), ¶ 263.) FN3 Those hours, at the hourly rates of the various participants, represent $33,686,468 in billable time. *Id.*

FN3. Paralegal time is included. *See id.,* Appendix Ex. 2, p. 2. It represents less than 5% of the total time. *Id.*

As is set forth in detail in the Joint Declaration, lead counsel were required to perform services in the interest of the class in connection with other related proceedings: the bankruptcy of Adelphia and its subsidiaries, the civil action brought by the Securities and Exchange Commission ("SEC"), and the United States Attorney's prosecution of a number of Adelphia's principal shareholders and officers. (Joint Decl. ¶¶ 82-138.)

In addition, of course, lead counsel participated in the present case, drafting the consolidated class action complaint and participating substantially in responding to defendants' motions, and, most significantly, studying the discovery available (notwithstanding the discovery stay provisions of the Private Securities Litigation Reform Act) and consulting with accounting and damages experts, and, so prepared, engaging in the lengthy and difficult negotiations with Deloitte and the Banks, under mediator Daniel Weinstein, that resulted in the settlements.FN4

FN4. Counsel obtained very substantial discovery by participating in the Adelphia bankruptcy proceedings, through review of the SEC and criminal proceedings, and as a result of voluntary disclosure made by Deloitte and the Banks for settlement purposes. (Joint Decl. ¶ 139.)

Mr. Weinstein, a former Judge of the California Superior Court and an experienced mediator, has described the mediation as contentious, extensive, difficult and hard-fought. (Weinstein Decl. ¶¶ 5, 9, 11), and as resulting in "an excellent result for the class." (*Id.* ¶ 11.)

The second *Goldberger* factor focuses on the magnitude and complexities of the litigation.

The magnitude and complexity of the litigation is plain: these are over 60 cases in the MDL docket, many, but by no means all, subsumed in the consolidated class action complaint; counsel estimate approximately $5.5 billion in market losses; FN5 furthermore, the bankrupt issuer, Adelphia, and the allegedly principal wrongdoers, members of the Rigas family whose assets have been forfeited to the government, are not promising sources of any major recovery, so that plaintiffs have had to direct their principal efforts at the present defendants, who have arguable defenses, *e.g.,* under *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164 (1994), and its progeny, and that their proportionate Rule 10b-5 fault is relatively small.

FN5. *See* Joint Declaration, ¶ 18. Counsel there make clear that that estimate is not the result of "a strict loss causation analysis," and does not evaluate the strength of plaintiffs' claims.

Professor Perino calculates investor loss at $7.9 billion (Perino Decl. ¶ 23), "as the dollar value increase in the defendant firm's market capitalization from the trading day on which its market capitalization peaked during the class period to the first trading day immediately following the end of the class period." (*Id.* n. 13 (citation omitted).) That figure does not appear to include any causation analysis, no less an evaluation of the strengths and weaknesses of plaintiffs' claims.

NYSTRS argues that this case was not extremely risky.

The existence of wrongdoing was made clear early on through SEC investigations of Adelphia, its executives, and Deloitte, through the creditors' adversary proceeding against the banks, from the indictments of several key Adelphia executives, from Adelphia's civil lawsuit against Deloitte, and from public disclosures made by Adelphia itself.

(N.Y.STRS Opposition at 17.) Being aware that there had been massive fraud at Adelphia, however, is only the first step in bringing claims to a successful conclusion against parties in the positions of the settling defendants. "[T]he valuation of damages in securities class actions is not a 'hard science." ' *Goldberger,* 209 F.3d at 56 (citation omitted).

The facts relating to the third *Goldberger* factor-the risk of the litigation-are suggested in the discussion above of the second factor. Success, at least of the magnitude of the settlements at issue, was very far from assured. Some of the bank defendants might have escaped or reduced their exposure through releases in the Adelphia bankruptcy proceedings. *Central Bank* represented a serious barrier to overcome; the settling defendants' proportionate liability on the Rule 10b-5 claims might have been significantly reduced; there remained at the time of settlement serious limitations issues (*see Adelphia Comm. Corp. Sec. & Deriv. Lit .,* No 03 MDL 1529, 2005 WL 1278544 (S.D.N.Y. May 31, 2005)); and causation had to be established. The case had to be litigated, moreover, against large and extremely capable law firms deeply experienced in securities litigation.

***3** The fourth *Goldberger* factor looks at the quality of the representation. Here, lead counsel are two law firms well known and experienced in class action litigation. The quality of their work is, of course, best shown in the results they have achieved here: an all cash settlement of just under $455 million. The Court believes that Judge Cote's description of the achievement of counsel in the WorldCom litigation applies here as well: "If the Lead Plaintiff[s] had been represented by less tenacious and competent counsel, it is by no means clear that [they] would have achieved the success [they] did here on behalf of the Class." *In re WorldCom, Inc. Sec. Litig .,* 388 F.Supp.2d 319, 359 (S.D.N.Y.2005). The fact that the settlements were obtained from defendants represented by "formidable opposing counsel from some of the best defense firms in the country" also evidences the high quality of lead counsels' work. *Id.* at 358.

The fifth *Goldberg* factor looks at the requested fee in relation to the settlement.

The aggregate amount of the settlement here, almost $455 million, "represents a recovery of 27.5% of the $1.65 billion in realistically provable damages, according to the analysis of plaintiffs' experts." (Joint Decl. ¶¶ 201, 254.) That, in the Court's view, based upon all of the foregoing factors-and adding that the settlements are all cash and will be distributed in the relatively near future, not after (probably) several years of litigation and trial-is an excellent settlement.

Goldberger also includes as a relevant factor public policy considerations. Aside from the considerations mentioned under this head by Judge Cote in *WorldCom,* 388 F.Supp.2d at 359, which may also be applied here, the Court simply adds that, in addition to the size of the settlements, the fact that the funds will be distributed now rather than later is also a benefit to the class.

The Court concludes that the percentage proposed by Lead Counsel, 21.4%, is reasonable on the facts of this case and should be awarded. The lodestar multiplier (2.89) confirms the Court's conclusion. Larger lodestar multipliers have been awarded in (more or less) comparable cases. In *WorldCom* the lodestar multiplier was 4. 388 F.Supp.2d at 354.

The Court has considered the arguments of the objectors and does not find them persuasive.[FN6]

FN6. NYSTRS seeks additional time to respond to lead counsels' fee application "if the record is unclear or incomplete in any way material to the Court's decision." (N.Y.STRS Opposition at 24.) The Court does not find that any supplementation is necessary.

The requested fee is granted as set forth in the orders (one as to each settlement) of even date herewith.

Copies of this Memorandum and Order and the orders referred to above are being made available to the Abbey firm, which is directed to forthwith transmit copies by fax to counsel for the objectors and the settling defendants.

SO ORDERED.

S.D.N.Y.,2006.
In re Adelphia Communications Corp. Securities and Derivative Litigation
Not Reported in F.Supp.2d, 2006 WL 3378705 (S.D.N.Y.), Fed. Sec. L. Rep. P 94,128

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United States District Court,
S.D. New York.
In re AMERICAN INTERNATIONAL GROUP, INC. SECURITIES LITIGATION.
This Document Relates To: All Actions.

No. 04 CIV. 8141(DAB).
Feb. 2, 2012.

MEMORANDUM & ORDER
DEBORAH A. BATTS, District Judge.

***1** On January 31, 2012, the Court held a Fairness Hearing in this matter to consider Motion for Approval of the Settlement with Defendant American International Group, Inc. ("AIG"), and the Motion for Attorney's Fees and Reimbursement of Expenses. The Court's findings and rulings with regard to these Motions are set forth in this Order, the Transcript of the January 31, 2012 Hearing, the Order and Final Judgment as to American International Group, Inc ., the Order Approving Plan of Allocation, and the Order Approving Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Expenses and Lead Plaintiff's Request for Reimbursement of Expenses.

I. INTRODUCTION

A. Factual Background and Litigation History

This action, which was filed in 2004, arises from material misstatements and omissions allegedly made by Defendants in connection with disclosures of (1) AIG's alleged involvement in a scheme that included steering contingent commissions to, and rigging certain insurance bids with. Marsh & McLennan Companies, Inc.; and (2) an alleged accounting fraud at AIG that resulted in the Company restating nearly four years of earnings and adjusting earnings for a fifth year. Lead Plaintiff also alleged that AIG and Defendant Greenberg manipulated the market through the purchase of millions of shares of AIG stock.

During the more than seven years this action has been pending, this matter has been litigated vigorously. The litigation has involved: (1) fully-briefed motion practice, on two separate occasions, to determine the Lead Plaintiff; (2) Motions to Dismiss filed by 23 Defendants; (3) fact and expert discovery related to class certification, followed by a contested Motion for Class Certification involving four days of legal argument and hearings; (4) the review and analysis of more than 53.3 million pages of documents, including more than 12 million pages produced by Defendant AIG; and (5) 97 depositions of fact and expert witnesses.

The Settlement, which was negotiated at arm's length over many years with the help of several mediators, including the Hon. Layn R. Phillips (Ret.), creates a Settlement Fund of $725,000,000.00, The Distribution Amount, which is the Settlement Fund plus interest and less any expenses related to taxes, notice, and Settlement administration, and any attorneys' fees and expenses award or Lead Plaintiff's award approved by the Court, is to be distributed pursuant to the Plan of Allocation, which is set forth in pages ten through seventeen of the Notice distributed to Class Members.

The Settlement Class consists of: all persons and entities who purchased or otherwise acquired AIG Securities during the period from October 28, 1999 through

April 1, 2005, inclusive, as well as all persons and entities who held the common stock of HSB Group, Inc. ("HSB") at the time HSB was acquired by AIG in a stock for stock transaction, and all persons and entities who held the common stock of American General Corporation ("AGC") at the time AGC was acquired by AIG in a stock for stock transaction, and who were damaged thereby, excluding persons who made timely and valid requests for exclusion from the Class. Named Defendants, members of the immediate families of Named Defendants, parents, subsidiaries, affiliates, officers, or directors of AIG, any entity in which any of the foregoing has a controlling interest, or the legal representative, heirs, successors, and assigns of any of the foregoing, are precluded from making claims under the Settlement.

***2** In an Order dated October 5, 2011, this Court preliminarily approved the Settlement. The Court also approved the Notice for dissemination to Class Members. The Order set a Fairness Hearing for January 31, 2012, to consider the fairness, reasonableness and adequacy of the Settlement and Plan of Allocation.

B. Fairness Hearing and Consideration of Objections

A Fairness Hearing in this matter was held at 11:00 a.m. in Courtroom 24B on January 31, 2012. Steve A. Miller appeared on behalf of Objector Steve A. Miller, P.C. Profit Sharing Plan.[FN1] (*See* Docket # 607.) Mr. Miller objected that the claims procedure in this case was needlessly complicated, but conceded that in his particular case he had no trouble meeting the requirements for filing a claim. Lead Counsel confirmed that no complaints had been received from Class Members regarding the claims procedure. Accordingly, the Court overruled this objection as speculative.

> FN1. An additional objection from Rinis Travel Service Inc. Profit Sharing Trust (PST) U/A 06/01/89; Rinis Travel Service Inc. Profit Sharing Plan (PSP) U/A 06/01/89, Alan Rothstein, and Mollye Rothstein, was overruled prior to the Fairness Hearing by Order of this Court dated January 18, 2012 (Docket # 612).

Mr. Miller also objected that a 13.25% award of attorneys' fees was excessive. As set forth below, however, this Court found that a 13.25% attorneys' fee award was in line with awards in similar cases, reflected the complexity of this case and Lead Counsel's efforts, and actually resulted in a slightly negative lodestar. This objection was overruled.

In his written objection, Mr. Miller opined that any remaining amount in the Settlement Fund after all distributions have been made should not be returned to Defendant AIG. This Court agrees with Mr. Miller and directs that any funds remaining after all distributions have been made shall be distributed via cy pres distribution to a nonprofit chosen by the mediator. This objection was therefore SUSTAINED.

II. DISCUSSION

A. Class Certification

In order to certify finally the Class as defined by the Court's October 5, 2011 Order, the Court will consider the criteria of Federal Rule of Civil Procedure 23(a) and (b). The four prerequisites of Rule 23(a) are that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

The Court finds that the Class is so numerous that joinder of all members is impracticable. Claims Administrator Rust Consulting, Inc. ("Rust") mailed more than 2 million Notice Packets, including 1,756,227 to individual names and addresses and 1,925 to nominee names and addresses. (Miller Aff. Nov. 30, 2011 (Ex. 3 to Dubbs Decl. Dec. 2, 2011), ¶ 10; Miller Aff. Jan. 12, 2012 (Ex. 1 to Dubbs Reply Decl. Jan. 13, 2012), ¶ 3.)

The Court finds that there are questions of law or fact common to the Class. The Court also finds that under Rule 23(b)(3), these questions predominate over any questions affecting only individual Class Members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The central questions of whether Defendants made false and misleading statements in documents including periodic reports filed with the Securities and Exchange Commission, and whether those alleged misstatements caused AIG Securities to trade at artificially inflated prices during the Class Period, are common to the Class and predominate over questions affecting only individual members. (*See* Dubbs Decl. Dec. 2, 2011, ¶¶ 40–41.)

***3** The Court finds that the claims and defenses of the representative parties are typical of the claims and defenses of the Class. Lead Plaintiff, like all Class Members, purchased AIG Securities at allegedly artificially inflated prices during the Class Period and claims to have suffered damages because of AIG's alleged material misconduct. Accordingly, the legal theories and evidence Lead Plaintiff would advance to prove its claims would simultaneously advance the claims of other Class Members. (Mem.L.Supp.Mot, Prelim.Approval, p. 17.)

The Court finds that the representative parties will fairly and adequately protect the interests of the Class. Labaton Sucharow and Hahn Loeser, Court-appointed Lead Counsel for Lead Plaintiff the Ohio State Funds, have zealously and ably represented Lead Plaintiff on behalf of the proposed Class, having expended nearly 260,000 hours in prosecution and investigation of the claims against the settling Defendants, (Dubbs Decl. Dec. 2, 2011, ¶ 183.) There is no conflict or antagonism between the claims of the Ohio State Funds and the other members of the proposed Class.

Finding all criteria of Rule 23 satisfied, this Court finally certifies the Settlement Class for settlement purposes and appoints Lead Plaintiff as Settlement Class Representative and Lead Counsel as Settlement Class Counsel.

B. Fairness of the Settlement

Under Rule 23(e), to grant final approval of a settlement, the Court must determine whether the proposed settlement is fair, reasonable and adequate. In making this determination, the Court must review both the procedural and substantive fairness of a proposed settlement. To find a settlement procedurally fair, the Court must pay close attention to the negotiating process, to ensure that the settlement resulted from arm's-length negotiations, and that Plaintiff's Counsel possessed the experience and ability, and engaged in the discovery necessary for effective representation of the Class's interests. To find a settlement substantively fair, the Court reviews the nine *Grinnell* Factors. *City of*

Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir.1974).

Procedural Fairness: The Court finds that the Settlement resulted from "arm's length negotiations." Class Counsel possessed the requisite amount of experience and ability, and the parties engaged in the discovery necessary for effective representation of the Class's interests. See *D'Amato v. Deutsche Bank,* 236 F.3d 78, 85 (2d Cir.2001), citing *Weinberger v. Kendrick,* 698 F.2d 61, 74 (2d Cir.1982).

By the time the Settling Parties reached the Settlement, Lead Plaintiff, through able and experienced Lead Counsel, had (i) opposed Motions to Dismiss by 23 Defendants, including AIG; (ii) completed class discovery, involving many depositions; (iii) moved for class certification; and (iv) completed all fact discovery, including the review and analysis of many millions of pages of documents. (Dubbs Decl, Dec. 2, 2011, ¶¶ 71–139.) Over the course of the case, the Parties engaged in numerous discussions, both formal and informal, culminating in a mediation session with the Honorable Layn R. Phillips in June of 2010. (*Id.,* Ex. 7.)

***4** *Grinnell Factor 1:* The Court finds that the litigation is complex, and would likely be costly and lengthy in duration. Had the Parties not reached a Settlement, this case would have likely continued for many more years and would have involved continued discovery, summary judgment motions, and a lengthy and complex trial, all of which would involve considerable expense, and after which the Settlement Class might have obtained a result far less beneficial than the one provided by the Settlement. (Mem.L.Supp.Mot.Approval, p. 10.)

Grinnell Factor 2: The Court finds that the reaction of the Class to the Settlement has been positive. With more than 2 million Notice Packets mailed to potential members of the Settlement Class and nominees, there were only 70 requests for exclusion, of which 26 were timely and valid, and only two objections. (*See* Miller Aff. Jan. 12, 2012; Docket605, 607.)

Grinnell Factor 3: The Court finds that proceedings have progressed and sufficient discovery has been completed to understand Plaintiffs' claims and negotiate Settlement terms. As noted above, this litigation has taken years and has involved extensive discovery and briefing on Motions to Dismiss and class certification issues.

Grinnell Factors 4 and 5: The Court finds that the risks of establishing liability and damages are significant. One of the frauds alleged involved hundreds of separate insurance transactions. Proof of wrongdoing would have to be established for each allegedly improper transaction separately. Moreover, the case involves violations of complex accounting rules that might not be understood easily by a jury. (Mem.L.Supp.Approval, p. 14.)

Grinnell Factor 6: The Court finds that the risk of maintaining the class action through the trial neither weighs for nor against approving the Settlement in this case.

Grinnell Factor 7: The Court finds that Defendants' ability to withstand a judgment greater than the Settlement weighs in favor of approval. Over the course of this case, AIG was teetering on the brink of insolvency, and required a Government bailout in September 2008, (Dubbs Decl. Dec. 2, 2011, ¶¶ 58–70.)

Grinnell Factors 8 and 9: The Court finds that the Settlement is reasonable in light of: (a) Plaintiffs' best possible recovery, and (b) the attendant risks of litigation. The $725 million Settlement represents a recovery of 13.18% of the $5.5 billion in “maximum recoverable damages” in this case. (Coffee Decl. Nov. 30, 2011 (Dubbs Decl. Dec. 2, 2011, Ex. 8), ¶ 22.) In light of the significant risks involved in the litigation, the recovery is an excellent result for the Settlement Class.

Having considered the procedural and substantive factors, the Court find the proposed Settlement to be fair, reasonable and adequate under Rule 23 and THE SETTLEMENT IS HEREBY APPROVED.

C. Reasonablenss of the Plan of Allocation

“When formulated by competent and experienced class counsel,” a plan of allocation of net settlement proceeds “need have only a reasonable, rational basis.” *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 462 (S.D.N.Y.2004). Here, the Plan of Allocation, which is described in the Notice, apportions the recovery among Settlement Class Members. Those who purchased common stock and options will recover a larger portion of the Settlement than those who purchased the bonds, in recognition of the particular risks involved in establishing loss causation and market efficiency for the bonds. The Plan also apportions recovery to take into account the strength of potential claims relative to the time of the purchase or sale of AIG Securities, and to account for distributions from the Fair Fund created in *SEC v. American International Group, Inc.,* 06 Civ. 1000 (S.D.N.Y.) (LAP).

***5** As discussed above, the Plan of Allocation as set forth in the Notice allows for the possibility that unclaimed funds will be returned to Defendant AIG. The Court hereby directs that those funds shall instead be distributed via cy pres distribution to a nonprofit organization chosen by the mediator, Judge Layn R. Phillips.

In all other respects, the Plan of Allocation represents a fair and equitable method for allocating the Distribution Amount among Authorized Claimants and is HEREBY APPROVED.

D. Attorneys' Fees and Expenses

To ensure the appropriateness of attorneys' fees and costs, the Court will now review the six *Goldberqer* criteria. *Goldberqer v. Int. Resources,* 209 F.3d 43, 50 (2d Cir.2000).

Goldberqer Factors 1 and 2: As discussed in the “Procedural Fairness” section above, the Court finds that Counsel have expended considerable time and labor on behalf of Plaintiffs and the litigation is complex and of large magnitude.

Goldberqer Factor 3: As discussed in *Grinnell* factors 4, 5, and 6 above, the Court finds that the risks of litigation for Plaintiffs are substantial.

Goldberqer Factor 4: The Court finds that the representation of Class Counsel is of high quality. Lead Counsel have extensive experience in complex litigation and are nationally known leaders in the field of securities class actions. (Dubbs Decl. Dec. 2, 2011, ¶¶ 185–86.)

Goldberger Factor 5: The Court finds that in relation to the Parties' Settlement, the requested attorneys' fees of 13.25% are reasonable. As John C. Coffee points out in his Declaration to this Court, this Settlement is unique in that “it appears to have recovered a much higher percentage of the maximum estimated damages than characteristically occurs in securities class actions; and Lead Counsel is seeking to recover slightly less than its lodestar...." (Coffee Decl. Nov. 30, 2011, ¶ 2.)

The requested fee award in this case is well in line with fee awards in cases with similar settlement amounts. *See, e.g., In re Initial Pub. Offering Sec. Litiq.,* 671 F.Supp.2d 467, 516 (S.D.N.Y.2009) (awarding 33.30% on a Settlement Fund of $586 million); *Carlson v. Xerox Corp.,* 596 F.Supp.2d 400 (D.Conn.2009) (awarding 16% on a Settlement Fund of $750 million). Furthermore, Lead Counsel obtained a Settlement that reflects as much as 13.18% of the maximum recoverable damages in this case, while the typical recovery in class actions involving between $1 billion and $5 billion of investor losses is 1–2%. (Coffee Decl., ¶¶ 21–22.)

Goldberger Factor 6: The Court finds that public policy supports granting attorneys' fees "that are sufficient to encourage plaintiffs' counsel to bring securities class actions that supplement the efforts of the SEC." *In re Bristol–Myers Squibb Sec. Litig.,* 361 F.Supp.2d 229, 236 (S.D.N.Y.2005). This Court finds that an award of 13.25% of the Settlement Fund promotes the valuable public policy interests at stake.

***6** *Expenses:* "Attorneys may 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' of those clients." *In re Independent Energy Holdings PLC Sec. Litig.,* 302 F.Supp.2d 180, 183 (S.D.N.Y.2003). This Court finds that expenses in the amount of $8,257,111.29 were reasonable and necessary to the prosecution of this Action. The categories of expenses for which Counsel seek reimbursement are the types of expenses routinely charged to hourly paying clients including, *inter alia,* fees for experts and consultants, filing fees, and discovery expenses. (Dubbs Decl. Dec. 2, 2011, ¶¶ 128–32, 189–95.) Having conducted the *Goldberger* analysis, the Court finds attorneys' fees of 13.25% of the Settlement Fund to be reasonable and those attorneys' fees are HEREBY APPROVED. Likewise, the Court finds attorneys' expenses of $8,257,111.29 reasonable and those expenses are HEREBY APPROVED.

Class Representative Compensation: "Courts in this Circuit routinely award ... 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." *Hicks v. Stanley.* No. 01 Civ. 10071, 2005 WL 2757792, at *10 (S.D.N.Y. Oct.24, 2005); *see also In re Marsh & McLennan Cos., Inc. Sec. Litig.,* NO. 04 Civ. 8144, 2009 WL 5178546 (S.D.N.Y. Dec. 23, 2009), at *21. Here, the request of OPERS and STRS Ohio for reimbursement of $71,910.00 in lost wages related to their active participation in this action is reasonable, and those expenses are HEREBY APPROVED.

SO ORDERED.

S.D.N.Y.,2012.
In re American Intern. Group, Inc. Securities Litigation
Not Reported in F.Supp.2d, 2012 WL 345509 (S.D.N.Y.)

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Only the Westlaw citation is currently available.

United States District Court,
S.D. Florida.
In re BANKATLANTIC BANCORP, INC. Securities Litigation.

No. 07–61542–CIV.
April 25, 2011.

David Reich Chase, David R. Chase PA Penthouse 2, Fort Lauderdale, FL, Jules Brody, Stull Stull & Brody, Mark S. Arisohn, Michael W. Stocker, Serena W. Hallowell, Jonathan Gardner, Mindy Dolgoff, Labaton Sucharow LLP, New York, NY, Julie Prag Vianale, Kenneth J. Vianale, Vianale & Vianale, Boca Raton, FL, Ronald D. Shindler, Fowler White Burnett, Adam Michael Schachter, Stearns Weaver Miller Weissler Alhadeff & Sitterson, Miami, FL, Benjamin J. Hinerfeld, Mark S. Danek, Matthew Mustokoff, Michelle M. Newcomer, Nichole T. Browning, Andrew L. Zivitz, Barroway Topaz Kessler Meltzer & Check LLP, Radnor, PA, Jonathan Louis Alpert, The Alpert Law Firm PA, Miami Beach, FL, for Plaintiffs.

Eugene E. Stearns, Adam Michael Schachter, Andrea Naomi Nathan, Cecilia Duran Simmons, Gordon Mcrae Mead, Jr., Richard Bryan Jackson, James A. White, Stearns Weaver Miller Weissler Alhadeff & Sitterson, Miami, FL, for Defendants.

ORDER ON MOTION FOR JUDGMENT AS A MATTER OF LAW AND MOTION FOR NEW TRIAL

URSULA UNGARO, District Judge.

***1** THIS CAUSE is before the Court upon Defendants' Motion for Judgment as a Matter of Law and Defendants' Motion for New Trial. (D.E. 666 & 669.) Plaintiffs filed Responses in Opposition to both Motions, and Defendants filed Replies in Support of both Motions. (D.E. 674–75, 677 & 679.) Both Motions are ripe for disposition.

THE COURT has considered the Motions and the pertinent portions of the record and is otherwise fully advised in the premises.

AS SET FORTH BELOW, the Court will GRANT Defendants' Motion for Judgment as a Matter of Law and will CONDITIONALLY DENY Defendants' Motion for New Trial. Defendants are entitled to judgment in their favor as to all of Plaintiffs' claims.

I. Procedural Background

Plaintiffs are the class of individuals who purchased the common stock of Defendant BankAtlantic Bancorp, Inc. (Bancorp) between November 9, 2005 and October 25, 2007 (the Class).[FN1]

FN1. On February 4, 2008, the Court appointed State–Boston Retirement System as the Lead Plaintiff. (D.E.45.) State–Boston is an institutional investor claiming to have purchased shares in Bancorp during the class period and to have suffered over $1.8 million in losses. (D.E.45.) On October 19, 2009, the Court named State–Boston and Erie County Employees Retirement System as Co–Class Representatives. (D.E.153.)

Bancorp is the publicly traded parent company of BankAtlantic, a federally chartered bank offering consumer and commercial banking and lending services throughout Florida. The remaining Defendants are current and former officers and directors of Bancorp: (1) James A. White, the former Executive Vice

President and Chief Financial Officer (CFO) of Bancorp and former CFO of BankAtlantic; (2) John E. Abdo, the Vice–Chairman of the Board of Directors for Bancorp and BankAtlantic; (3) Valerie C. Toalson, CFO of Bancorp and Executive Vice President and CFO of BankAtlantic; (4) Jarett Levan, the President of BankAtlantic, and from January 16, 2007, the President of Bancorp and the Chief Executive Officer (CEO) of BankAtlantic; and, (5) Alan Levan, the former Chairman of the Board and CEO of Bancorp and former Chairman of the Board and President and CEO of BankAtlantic.

Plaintiffs contend that Defendants misrepresented and concealed the true quality and consequent value of certain assets in BankAtlantic's loan portfolio in violation of the Securities Exchange Act of 1934 (the Exchange Act), 15 U.S.C. § 78a *et seq.,* and caused Plaintiffs to suffer a loss when the truth was revealed.

A. *Pleadings & Class Certification*

Plaintiffs filed their initial Complaint on October 29, 2007 and their Consolidated Amended Complaint on April 22, 2008. On December 12, 2008, the Court dismissed the Consolidated Amended Complaint without prejudice pursuant to Defendants' motion and Federal Rules of Civil Procedure 9(b) and 12(b)(6). On January 12, 2009, Plaintiffs filed their First Amended Consolidated Complaint. And on May 12, 2009, the Court denied Defendants' motion to dismiss the First Amended Consolidated Complaint.

In the First Amended Consolidated Complaint, Plaintiffs sought damages under §§ 10(b), 20(a), and 20A of the Exchange Act, 15 U.S.C. §§ 78j(b), 78t(a) & 78t–1. (D.E.80.)

In Count I, Plaintiffs alleged that, throughout the class period, Defendants knowingly made materially false and misleading statements, in violation of § 10(b) of the Exchange Act as implemented by Exchange Act Rule 10b–5, 17 C.F.R. § 240.10b–5, regarding the value of its loan portfolio. Plaintiffs' Rule 10b–5 claims fell into three broad categories: misrepresentations and non-disclosures of the poor or deteriorating credit quality of BankAtlantic's land loan portfolio; misrepresentations and non-disclosures of its poor underwriting practices; and misrepresentations and non-disclosures of the adequacy of its loan loss reserves and the accuracy of its financial statements. The claims were further divided into two separate periods of damage ending with respective stock-price declines on April 26, 2007 and October 26, 2007.

***2** In Count II, Plaintiffs alleged that the individual Defendants were control persons of Bancorp and as such were liable for its Rule 10b–5 violations under § 20(a) of the Exchange Act. And in Count III, Plaintiffs alleged that Defendants Abdo and Alan Levan profited from the sale of Bancorp stock while in the possession of material, non-public information in violation of § 20A of the Exchange Act.

On October 20, 2009, after Defendants stated their non-opposition to Plaintiffs' motion to certify, the Court certified the Class. FN2 (D.E. 147 & 153.) At that time, the case had been pending for two years, the discovery deadline was May 21, 2010, and trial was scheduled to begin on August 16, 2010. (D.E.148.)

FN2. Defendants later reversed their position and moved to decertify the class at trial. (D.E.529.) The Court denied the motion. (D.E.694.)

Nevertheless, on April 22, 2010, nine months after the deadline to amend the pleadings and less than a month before the close of discovery, Plaintiffs moved to amend their complaint. (D.E. 208 & 210.) Plaintiffs offered three reasons for the amendment: shortening the class period to begin on October 19, 2006; discontinuing the insider trading claims under § 20A; and identifying additional public statements which all “relate[d] to Plaintiffs' original theory of liability, *i.e.,* fraudulent misrepresentations regarding the true risk of BankAtlantic's land loan portfolio.” (D.E.210.) The Court denied the motion.

In denying the motion, the Court agreed with Defendants to the extent they argued that shortening the class period and abandoning the § 20A claims would unfairly deny them a final adjudication of those issues. Further, the Court was unconvinced the remaining amendments were necessary as Plaintiffs had argued the additional statements were substantively indistinguishable from the claims in the First Amended Consolidated Complaint and offered no authority supporting the proposition that identification of the additional statements was required to state a legally sufficient claim. Moreover, the Court observed that, if required, Federal Rule of Civil Procedure 15(b) would allow for amendment of the pleadings at trial to conform to the evidence; in that regard, the Court stated “Defendants have been put on notice of these additional misstatements and omissions.” (D.E.242.) Accordingly, the case proceeded on the First Amended Consolidated Complaint.

B. ***Motions for Summary Judgment & to Exclude Expert Testimony***

In June 2010, the parties filed cross-motions for summary judgment. Defendants moved for summary judgment on all claims. And Plaintiffs moved for summary judgment only on the narrow issues of the falsity of four statements made by Alan Levan in a July 25, 2007 conference call. In its August 18, 2010 Omnibus Order, the Court granted Defendants' motion in part and Plaintiffs' partial motion in full. *In re BankAtlantic Bancorp, Inc. Sec. Litig.,* 2010 WL 6397500 (S.D.Fla. Aug.18, 2010.) In that order, the Court also granted in part Defendants' motion to exclude the proposed testimony of Plaintiffs' loss causation and damages expert, Candace Preston. *Id.*

***3** The order entitled Defendants to final summary judgment on the claims Plaintiffs previously attempted to abandon: the claims from the first year of the class period (pre-October 19, 2006) and the claims under § 20A of the Exchange Act. *Id.* The order also entitled Defendants to final summary judgment on claims arising from any statements regarding BankAtlantic's loan loss reserves and on claims of damages caused by Bancorp's October 29, 2007 stock-price decline. *Id.* Collectively, these rulings shortened the class period to October 19, 2006 through October 26, 2007, and finally adjudicated the claims of insider trading and accounting fraud in Defendants' favor. *Id.*

As to the balance of Plaintiffs' claims, Defendants strongly emphasized Plaintiffs' failure to produce credible, reliable evidence regarding loss causation and damages.[FN3] To that end, Defendants also moved to exclude Preston's testimony. The Court granted the motion to exclude in part; what survived from Preston's testimony was, in the Court's view, sufficient to create a genuine issue of fact as to loss causation and damages.[FN4]

FN3. Defendants also sought summary judgment based on the forward-lookingstatement safe harbor under § 27A of the Private Securities Litigation Reform Act, 15 U.S.C. § 78u–5. The Court denied that portion of the motion because “Defendants fail[ed] to identify any particular statement that falls within the protection of the safe harbor.” (D.E.411.)

FN4. The order allowed Preston's expert opinions on the following: the importance of information regarding a bank's credit and borrower quality to its valuation; the company-specific price declines to Bancorp stock following its April and October 2007 press releases and conference calls; the amount of the April 26, 2007 residual decline attributable to the disclosure of previously undisclosed negative information on April 25 and 26, 2007, and her belief that the entire October 26, 2007 residual decline was attributable to the disclosure of previously undisclosed negative information regarding BankAtlantic's land loan portfolio. *In re BankAtlantic,* 2010 WL 6397500.

Finally, the order entitled Plaintiffs to summary judgment as to the narrow issue of the objective falsity of four statements made by Alan Levan during a July 25, 2007 earnings conference call. The four statements at issue concerned the extent to which Alan Levan perceived weakness in certain portions of its loan portfolio. Plaintiffs presented undisputed evidence that those statements were objectively false. And Defendants came forward with no evidence that raised a genuine issue of material fact as to the objective falsity of the statements; rather Defendants focused their argument on the immateriality of the statements and the applicability of the forward-looking safe harbor of § 27A of the Private Securities Litigation Reform Act (the Reform Act), 15 U.S.C. § 78u, neither of which were at issue in Plaintiffs' Motion. Accordingly, the Court granted summary judgment in Plaintiffs' favor on the narrow issue of objective falsity; the Court did not address the materiality of the statements, whether they were made with scienter, or whether they came within the protection of the safe harbor.

C. *Pretrial & Trial*

Before trial the parties filed pre-trial stipulations, proposed jury instructions, and proposed verdict forms. In their joint pre-trial stipulation supplement,FN5 each side framed the issues of fact to be litigated at trial. (D.E.473.) Plaintiffs framed the issues as the elements of a Rule 10b–5 claim as they related to each of twenty-nine alleged misstatements and the individual Defendants' controlling-person status under § 20(a) with respect to each of those statements. Plaintiffs identified the twenty-nine alleged misstatements in a document attached to the supplement as Exhibit A and titled “Misstatements and Omissions Alleged by Plaintiffs.” It separately listed the twenty-nine statements and, for each statement, the date on which it was made, the document or conference call in which it was made, and the Defendants responsible for the statement.

FN5. The parties' initial joint pre-trial stipulation failed to conform to the requirements of the Court's trial order, and on September 1, 2010, the Court ordered the parties to supplement the filing. (D.E.470.)

***4** Defendants objected to Plaintiffs' framing of the issues, stating:

> Plaintiffs' statement of the issues to be tried reflected in their Exhibit A is entirely inconsistent with the issues framed by the Court as remaining to be tried in the Court's Omnibus Order, is outside the pleadings, and is inconsistent with what remains of Plaintiffs' damages expert's testimony.

(D.E.473.) Defendants sought to frame the issues around the assumptions of Plaintiffs' damages expert, Candace Preston, without reference to any particular misrepresentations. FN6

FN6. Preston, in her expert report, did not analyze or reference any specific fraudulent statements. Instead, Plaintiffs's counsel asked her to generally assume that Defendants misrepresented the true quality and value of the assets in BankAtlantic's commercial real estate portfolio, as follows:

a. At least from the beginning of, and throughout the Class Period, Defendants knew or recklessly disregarded the true state of the land loan portion of BankAtlantic's commercial real estate (“CRE”) portfolio.

b. At least from the beginning of, and throughout the Class Period, Defendants were aware of, misrepresented and failed to disclose the credit quality of their borrowers and the quality of the land loans in the land loan portion of the CRE portfolio.

c. During the Class Period Defendants provided the public with false and/or misleading information or omitted material information necessary to make other statements not misleading concerning the quality of the assets in the land loan portion of the company's CRE portfolio, the “conservative” nature of its underwriting, and the collateral supporting the loans.

d. By November 29, 2006 Defendants should have disclosed that, contrary to their assertions that they were unaware of any upcoming credit quality trends or problems and that they were comfortable with their borrowers, they were seeing an increase in problem loans ....

e. By April 26, 2007, Defendants should have disclosed that:

I. contrary to their assertions that their land bank portfolio presented risks not present in other segments of their CRE portfolio, the problem and potential problem loans were, in actuality, distributed throughout the land loan portion of the CRE portfolio;

ii. the number and dollar value of the land loan portion of the CRE problem loans on the loan watch list (“LWL”) and the potential problem loans as of April 26, 2007; and

iii the trends and concerns expressed by management as of the date, representative samples of which are detailed below.

(D.E.365, Ex. B, pp. 5–6.) The Court discusses Preston's trial testimony and the consequence of her reliance on these general assumptions below in the discussion of the Motion for Judgment as a Matter of Law. *See infra* Part III.

The Court held an initial pre-trial conference on September 10, 2010 in which the supplemental stipulation was briefly discussed. (D.E.483.) At the conference, Plaintiffs stated: “Our case is essentially 29 misstatements,” and Defendants complained: “There's no complaint that says 29 instances.” (D.E. 483, pp. 41 & 44.) The issue was raised again at a follow-up pre-trial conference on October 5, 2010. (D.E.518.) At that conference the Court attempted to understand Defendants' position on the twenty-nine statements and asked whether Defendants were highlighting a problem with new statements not contained in the First Amended Consolidated Complaint. Defendants made clear that they were not objecting to the twenty-nine statements because some were not in the pleadings, but because they did not conform to Preston's assumptions:

> It isn't a question whether they're new or old. There are some new ones. But that isn't really [our] point.
>
> Candace Preston, who's their damage expert, was asked to make certain factual assumptions. None of those statements were in her factual assumptions ....

(D.E.518, p. 15.) Defendants argued that Plaintiffs were precluded from proving their Rule 10b–5 claims based on any individual statement, but were instead required to prove the fraud generally articulated by Preston in her assumptions. Ultimately, the Court ruled that Plaintiffs could prove their Rule 10b–5 claims based on individual statements so long as the fraud proven by the individual statements fit with Preston's assumptions and overall opinion on loss causation and damages. At bottom, an action under Rule 10b–5 requires that the defendant made some *statement* which is misleading or is rendered misleading by the omission of further information. *See, e.g.,* § 78u–4(b)(1); *Roeder v. Alpha Indus., Inc.,* 814 F.2d 26–7 (1st Cir.1987).

Trial began on October 12, 2010. (D.E. 528 & 531.) Plaintiffs rested their case on October 28, 2010, and Defendants moved for judgment as a matter of law. (Tr. 2747.) During oral argument on the motion, Defendants reiterated their position that “this is not a case about 29 separate factual statements. This is a case based on Candace Preston's broad-brush assumptions.” (Tr. 2758.) The Court reserved ruling on the motion, but during the course of the arguments, Plaintiffs withdrew seven of the twenty-nine alleged misstatements. (Tr. 2776–77, 87, 99 & 2857.)

***5** Defendants next presented their evidence and rested their case on November 3, 2010. (Tr. 3638–39.) Because the Court and the parties had not completed drafting the jury instructions and verdict form, the Court instructed the Jury to return on a later date.

The ensuing charge conference was protracted due mainly to the Reform Act's requirements that the Jury allocate proportionate liability at the levels of primary and secondary liability depending upon its determinations of scienter with respect to each statement. Both parties had submitted proposed verdict forms, but neither adequately addressed the intricate demands of the Reform Act as they applied to this case—a numerous-statement, varying-defendant, Rule 10b–5 class action involving two separate damage periods atop which was layered a varying-defendant § 20(a) class action. Plaintiffs' proposed verdict form was structured around nineteen individual statements taken from the list of twenty-nine misstatements submitted as part of their pretrial stipulation.FN7 (D.E.593.) It asked the Jury to determine: whether each statement was a material misrepresentation on the part of any Defendant to whom it was attributed; the amount of per-share price inflation caused by any misrepresentation on each day of the class period; and, the controlling person status of each Defendant under § 20(a) of the Exchange Act. Defendants' proposed verdict form contained no reference to any particular misstatement. (D.E.593.) Instead, it asked the Jury to determine, for each period of damage, whether Plaintiffs proved Candace Preston's assumptions and, if so, to determine the earliest date on which any misrepresentation was made and the extent of each Defendant's liability. Defendants' form also asked the jury to determine, for each period, the amount of per-share price inflation caused by any misstatement, but not on a daily basis.FN8

FN7. Plaintiffs had effectively withdrawn an additional three statements of the original twenty-nine when they filed their proposed verdict form on November 1, 2010. (D.E.593.)

FN8. Defendants' proposed verdict form was unworkable because it failed to address the Reform Act's requirement that the jury make specific findings as to each Defendant's responsibility for each statement or omission. *See* 15 U.S.C. § 78u–4(f).

On November 9, 2010, the Court finalized the jury instructions and verdict form. The final jury instructions were lengthy, but not remarkably complex. (D.E.635.) The final verdict form, on the other hand, was both lengthy and complex—it was 75 pages long and contained over 150 questions. (D.E.632.) In the final verdict form, the Court adopted some components of both parties' proposals. (D.E.599.) The form divided the case into two separate periods as proposed by Defendants. But with respect to each period, rather than ask the Jury to determine the existence of some general type of fraud as assumed by Plaintiffs' damages expert, the form listed, in chronological order, each of 112 of the alleged misstatements (from Plaintiffs' list of nineteen). For each statement the Jury was asked a series of special interrogatories relating to the allocation of primary (Rule 10b–5) and secondary (§ 20(a)) liability under the Reform Act. Lastly, with respect to damages, the Court adapted Defendants' proposal that damages, if any, be assessed from the earliest date a misrepresentation was found to have been made; the verdict form instructed the Jury to determine, for each period, the damages, if any, resulting from the first misrepresentation it found to have been made in violation of Rule 10b–5. FN9

FN9. Defendants objected to the final verdict form in its entirety and in particular that no single alleged misstatement could support a damages finding given the assumptions on which Preston's opinion relied.

***6** On November 10, 2010, the parties delivered their closing arguments, and the Jury began its deliberations. (D.E. 641 & 643.) After five days of deliberations, on November 18, 2010, the Jury returned a verdict mainly in Defendants' favor. (D.E.665.) The Jury found no liability as to any Defendant for the first period FN10 and no liability as to Defendants Abdo, White and Jarrett Levan for the second. The Jury, however, found liability and damages as to Defendants Alan Levan and Bancorp for the second period; the Jury found that Statement 7, made by Alan Levan during the April 26, 2007 earnings conference call, violated § 10(b) and that the violation proximately caused damages of $2.41 per share. The Jury further found Statements 10, 13 through 17, and 19 to have been made in violation of § 10(b); all were attributed to Alan Levan (and Bancorp) except for Statement 19 which was attributed to Alan Levan and Toalson (and Bancorp).

FN10. Although the Jury found that several of the Defendants made materially false statements during this period, the Jury found no damages. Plaintiffs conceded prior to the discharge of the Jury that a finding of no liability as to this first period was the only possible interpretation of the verdict. (Tr. 4369.)

The Jury's special findings as to Statement 7, however, were inconsistent with both the general finding of liability and each other. The Jury specially found that Alan Levan "acted knowingly with respect to that statement" but also found that Alan Levan "acted in good faith and did not directly or indirectly induce the Section 10(b) violation" as a § 20(a) controlling person of Bancorp. The relevant portion of the verdict as to Statement 7 liability was as follows:

Question 7(a): With respect to Statement 7, do you find that Alan Levan (and therefore Bancorp) violated Section 10(b)?

Yes / No ___

Question 7(b): Do you find that Alan Levan acted knowingly with respect to that statement?

Yes / No ___

* * *

Question 7(d): For each Defendant for whom you answered "yes" in Question 7(e) [re Section 20(a) controlling person status], do you find that such Defendant acted in good faith and did not directly or indirectly induce the Section 10(b) violation?

Alan Levan: Yes / No ___

(D.E.665.) And the verdict as to damages was as follows:
Question II(B): What is the amount of damages per share proximately caused by the first Section 10(b) violation you found during the period from April 26, 2007 through October 26, 2007?

$*2.41* per share

(D.E.665.)

The Court recognized the inconsistency and addressed the issue with the parties before accepting the verdict. (Tr. 4348–49.) The Court suggested that the inconsistency was potentially irrelevant because the Jury also found Alan Levan and Bancorp liable for Statement 10—a statement from the same April 26, 2007 conference call—and because the damage finding reasonably could be applied to that statement. *Id.* The Court then stated its intention to accept and publish the verdict unless there was some objection. *Id.* No party objected, and the Court summoned the Jury.[FN11] *Id.* The Court published the verdict and discharged the Jury without either party requesting clarification from the Jury or otherwise objecting. (Tr. 4359–72.)

FN11. The relevant exchange was as follows:

THE COURT: [I]n terms of taking the verdict, there's only one place where I see that it's a little confusing. But I don't really think it matters. So that's on statement 7. So statement 7 is the April 26, '07 conference call. The next statement that they find to be associated with a 10(b) violation is from the same conference call.

So the way the case was conceptualized was if they found a 10(b) violation, it would be the first 10(b) violation in the period that damages would relate to, or relate back to. So, both those statements, statement 7 and statement 10, are both from the April 26th conference call.

The response to the questions, the series of questions that relate to 7, I think are difficult to reconcile, but, again, I don't think it matters in light of the fact that the jury found that the fraud entered the market on April 26th.

* * *

Okay. So, let's just bring the jury in. Unless there's something somebody wants me to do about this problem associated with the questions related to statement 7, my suggestion would be let's bring the jury in.

[No objections]

(Jury returns at 10:50 a.m.)

(Tr. 4348–49.)

II. Pending Judgment

***7** The parties agree on most of the judgment compelled by the verdict—all Defendants are entitled to judgment in their favor for the first period and Defendants Abdo, Jarett Levan, and White are entitled to judgment in their favor for the second. The parties dispute only the proper judgment regarding Defendants Bancorp, Alan Levan, and Toalson as to the second period.

The threshold issue is the effect of the inconsistent verdict as to Statement 7. For the reasons set forth below, the Court will disregard the liability finding for Statement 7 and attach the damages finding to the liability finding for Statement 10.

The resolution of verdict inconsistencies is governed by Federal Rule of Civil Procedure 49. Rule 49 separates verdict forms into two categories: special verdicts under Rule 49(a) and general verdicts, with or without special interrogatories, under Rule 49(b). The verdict form in this case is a general verdict form accompanied by special interrogatories under Rule 49(b).[FN12] *See Mason v. Ford Motor Co.,* 307 F.3d 1271, 1273–76 (11th Cir.2002). As explained above, while the Jury generally found Alan Levan (and Bancorp) violated § 10(b) as to Statement 7 and specially found that he did so knowingly, it also specially found that he acted in good faith as a controlling person as to the violation. The two special findings are inconsistent with each other, and the latter is inconsistent with the general finding.[FN13]

> FN12. Defendants argue it is a special verdict form under Rule 49(a). The Court disagrees. The verdict form asked the jury to make conclusory findings which involved application of the law to the facts, such as whether "Alan Levan (and therefore Bancorp) violated Section 10(b)" and to respond to special interrogatories as required by the Reform Act. *See* § 78u–4(f)(3). Accordingly, the verdict form is appropriately characterized as a general verdict form accompanied by special interrogatories under Rule 49(b). *See Mason v. Ford Motor Co.,* 307 F.3d 1271, 1273–76 (11th Cir.2002).

> FN13. There is no question the findings are inconsistent. The jury instructions required at least a finding of severe reckless disregard as to the falsity of the statement in order to find a § 10(b) violation. (D.E.635.) One cannot act either knowingly or with severe reckless disregard as to the falsity of a statement and at the same time act in good faith as a controlling person with respect to the same act.

Rule 49(b)(4) addresses the resolution of such inconsistencies as follows:

> *Answers Inconsistent with Each Other and the Verdict.* When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial.

Under this rule, the Court and the parties have two options: further deliberation or new trial. But a party that raises no objection to the inconsistency under Rule 49(b) prior to the discharge of the jury waives the objection. *E.g., Austin–Westshore Constr. Co. v. Federated Dep't Stores,* 934 F.2d 1217, 1226 (11th Cir.1991). And if the objection is waived the district court is no longer constrained by the two options contained in Rule 49(b).[FN14] *Austin v. Paramount Parks, Inc.,* 195 F.3d 715, 726 (4th Cir.1999) *cited in* 9B Charles Alan

Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2513 (3d ed.2008).

FN14. If this was not the case, the rule of waiver would be meaningless and its goal of efficient trial procedure would not be achieved because the Court would be left with no option but new trial. *See Coralluzzo v. Educ. Mgmt. Corp.,* 86 F.3d 185, 186 (11th Cir.1996).

The parties waived the objection in this case, and so the Court is unconstrained by Rule 49(b)(4) in resolving the inconsistency. Constrained only by reason and equity, the Court finds that the most fair and reasonable resolution is what the Court suggested at trial before the parties waived their objection—the Court will disregard the Statement 7 liability finding and, subject to the remaining Rule 50(b) and Rule 59 challenges, construe the Jury's verdict as finding $2.41–per–share damages caused by Statement 10.

***8** This resolution is more fair than a new trial both because it is essentially what the parties agreed to and also because granting a new trial (and selecting and swearing a new jury) now, when all the parties had to do was ask that the Jury clarify the inconsistency, would unnecessarily protract the final resolution of this complex, lengthy, and expensive dispute. *See Coralluzzo v. Educ. Mgmt. Corp.,* 86 F.3d 185, 186 (11th Cir.1996) ("To allow a new trial after the objecting party failed to seek a proper remedy at the only time possible [*i.e.,* before the jury is discharged] would undermine the incentives for efficient trial procedure and would allow the possible misuse of Rule 49 procedures ... by parties anxious to implant a ground for appeal should the jury's opinion prove distasteful to them.") (modification in original). And this resolution is reasonable for the reasons explained at trial regarding the conceptualization of the verdict form and the similarities of Statements 7 and 10, including the fact that Alan Levan made both in the same conference call.[FN15]

FN15. It is no impediment to this resolution that Statement 10 was not identified in the First Amended Consolidated Complaint. When Plaintiffs first submitted their list of twenty-nine statements as part of the pretrial stipulations, Defendants did note that some of the statements were not included in the First Amended Complaint. But when questioned further about their resistance to the twenty-nine statements, Defendants clarified that they were not concerned with the fact that statements were not pled, but that they were concerned about Preston's failure to reference any individual statement in her expert opinion. Most importantly, at no point did Defendants identify Statement 10 as a statement which was not pled or object to the inclusion of Statement 10 on the verdict form on that basis. Accordingly, regardless of whether or not the finding as to Statement 10 was sufficient to support a damages finding, it was at issue and properly submitted to the Jury. *See* Fed.R.Civ.P. 15(b)(2).

Having resolved the inconsistency, much of the remaining dispute as to the second period is now moot, *e.g.,* the disagreements regarding Statement 7 and the absence of a damages finding attached to Statement 10. And much of the remaining issues will become moot as the discussion below ensues. The Court begins with a discussion of Defendants' Motion for Judgment as a Matter of Law and then addresses the Motion for New Trial. Any argument not addressed in this order is rejected by the Court.

III. Motion for Judgment as a Matter of Law

Defendants make numerous arguments in support of their Motion for Judgment as a Matter of Law. Among other arguments, Defendants contend that Plaintiffs failed to put forth sufficient evidence at trial to support any of the elements of a Rule 10b–5 claim as to Statement 10 (or any other statement) and that Statement 10 falls within the forward-looking safe harbor of the Reform Act. The Court focuses its discussion on whether the evidence supported a finding that Statement 10 was an actionable misrepresentation or omission and, if so, whether the evidence supported a finding of loss causation or damages as to Statement 10. And because the Court agrees that the evidence of loss causation or damages was insufficient as to Statement 10, it does not address Defendants' remaining arguments.

A. *Rule 50(b) Standard*

Rule 50(a) allows a party, prior to the submission of the case to the jury, to move for judgment in its favor on the basis "that a reasonable jury would not have a legally sufficient evidentiary basis to find for the [opposing] party on that issue." If the Court does not grant the motion under Rule 50(a), a party may renew the motion under Rule 50(b) after the jury has returned a verdict.

"Regardless of timing, ... a district court's proper analysis is squarely and narrowly focused on the sufficiency of evidence." *Chaney v. City of Orlando,* 483 F.3d 1221, 1227 (11th Cir.2007). "The question before the district court regarding a motion for judgment as a matter of law remains whether the evidence is 'legally sufficient to find for the party on that issue,' regardless of whether the district court's analysis is undertaken before or after submitting the case to the jury." *Id.* (citations omitted). Generally, "any renewal of a motion for judgment as a matter of law under Rule 50(b) must be based upon the same grounds as the original request for judgment as a matter of law made under Rule 50(a) at the close of evidence and prior to the case being submitted to the jury." *Doe v. Celebrity Cruises, Inc.,* 394 F.3d 891, 903 (11th Cir.2004).

***9** "[I]n entertaining a motion for judgment as a matter of law, the court should review all the evidence of record." *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). "In so doing, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may *not* make credibility determinations or weigh the evidence." *Id.* (emphasis added). "Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 151. "That is, the court should give credence to evidence favoring the non-movant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from a disinterested witness." *Id.* (internal quotations omitted).

But "the non-movant must put forth more than a mere scintilla of evidence suggesting that reasonable minds could reach differing verdicts." *Nebula Glass Int'l, Inc. v. Reichhold, Inc.,* 454 F.3d 1203, 1210 (11th Cir.2006). "[T]he court should deny a motion for judgment as a matter of law if the plaintiff presents enough evidence to create a substantial conflict in the evidence on an essential element of the plaintiff's case." *Id.*

B. *Section 10(b) & Rule 10b–5*

Section 10(b) of the Exchange Act makes it unlawful "to use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." § 78j(b). In turn, Rule 10b–5 makes it unlawful for any person "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.” 17 C.F.R. § 240.10b–5(b).

Courts have long recognized the implicit private right of action created by § 10(b) and Rule 10b–5, “which resembles, but is not identical to, common-law tort actions for deceit and misrepresentation.” *Dura Pharms., Inc. v. Broudo,* 544 U.S. 336, 341, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005) (citations omitted). For cases involving publicly traded securities and purchases or sales in a public securities markets, the elements of the action include: (1) *a material misrepresentation (or omission);* (2) *scienter, i.e.,* a wrongful state of mind; (3) *a connection with the purchase or sale of a security;* (4) *reliance,* often referred to in cases involving public securities markets (fraud-on-the-market cases) as “transaction causation;” (5) *economic loss;* and (6) *loss causation, i.e.,* a causal connection between the material misrepresentation and the loss. *Id.* at 341–42 (citations omitted).

C. ***Actionable Misrepresentation or Omission***

Like all banks, BankAtlantic's income is substantially dependent on its borrowers' ability to make loan interest payments. And internal information that its borrowers might likely default on their obligations is highly relevant to BankAtlantic's prospects for future income and the value of Bancorp's stock. Plaintiffs contend that, in late 2006 and early 2007, Defendants had significant indications that the land loan portion of its construction loan portfolio would experience widespread defaults and collateral devaluations, but fraudulently misrepresented or concealed the true extent of this risk from investors. The Court agrees that a jury could have found Statement 10 to have been an actionable concealment of that risk under Rule 10b–5. The following facts are taken from the evidence introduced at trial and viewed in the light most favorable to Plaintiffs.

***10** In 2006 and 2007, BankAtlantic's commercial real estate loan (CRE) portfolio, valued at $1.2 to $1.3 billion dollars, was a major portion of its total loan portfolio. Included within the CRE portfolio was a portfolio of “land loans” valued at $400 to $500 million. (Tr. 272 & 1051–52; DX 5.)

At that time, BankAtlantic had several policies for the approval and monitoring of its CRE loans, including the land loan portfolio. (Tr. 275.) First, BankAtlantic's Major Loan Committee had to approve the initial grant and any modifications to loans in excess of $5 million.FN16 (Tr. 285.) Second, BankAtlantic monitored its loan portfolio through an internal loan-grading system in which loans were graded 1 through 13.FN17 (PX 151.) Grades 1 through 7 were passing; grade 10 loans were “specially mentioned assets,” which have “potential weaknesses that deserve management's close attention”; and, grade 11 loans were “substandard,” meaning that the “asset is inadequately protected by the current sound worth and paying capacity of the obligor or the collateral pledged, if any.” FN18 (PX 151; Tr. 317–19.) Additionally, if BankAtlantic determined that a borrower most likely would not repay his loan according to the terms of the original agreement, that loan was deemed “non-accrual,” regardless of the assigned grade. (Tr. 338.) Finally, BankAtlantic created a monthly report called the Loan Watch List to help management track significant potential problem loans. (Tr. 336.) The list included all loans risk-graded 10 or 11 and all non-accrual loans and was distributed monthly to BankAtlantic's senior management. (Tr. 329–30.)

FN16. Alan Levan and Abdo were members of the Major Loan Committee, and Alan Levan's approval was required for each loan presented to the committee. (Tr. 285 & 3523.)

FN17. The loan's sponsoring officer assigns a grade to each loan at the time it is made. (PX 151; Tr. 319–20.) After closing, the loan officer or Chief Credit Officer may adjust a loan's grade to reflect changes to its level of risk. (PX 151; Tr. 321–22.)

FN18. BankAtlantic employees testified inconsistently at trial as to whether loans graded 10 and higher or loans graded 11 and higher were considered "classified" assets. (*See* Tr. 319, 335, 471–74 & 2924.)

By early 2007, Defendants began to take notice of negative performance trends within the land loan portfolio. From January through March 2007, the Major Loan Committee approved payment extensions and modifications for at least nine land loans. (PX 122, 217, 340, 341, 342, 343, 344, 348; Tr. 1171–72 & 1175; DX 15.) On March 14, 2007, Alan Levan sent an email to members of the committee, referencing "a parade of land loans coming in for extentions [*sic*] recently." (PX 138.) He stated:

> I'm not sure what the purpose of the extentions [*sic*] are other than hoping that more time will solve their problems (and ours). Experience tells us that in these markets, it is better to force a resolution early rather than wait for the market to further deteriorate.... Later, with pressure from all the banks, the borrower will not be able to accommodate us.
>
> * * *
>
> I believe we are in for a long sustained problem in this sector.

(PX 138.) On March 20, 2007, Marcia Snyder, BankAtlantic's former chief of commercial real estate lending, sent an email to BankAtlantic's loan officers, noting that the Major Loan Committee had "significant concerns" about the land loan portfolio. (PX 124, Tr. 458–61.) Snyder informed the loan officers that the Bank would conduct a review of all the loans in the land loan portfolio.[FN19] (PX 124.)

FN19. As a result of that review, BankAtlantic determined that many of the land loans had depleted interest reserves which is an indication that the borrower will not be able to continue to pay down the loan. (Tr. 461–62, 1226–28 & 3563.)

***11** The Loan Watch List for March 31, 2007 indicated that two land loans aggregating $20.2 million were on non-accrual status and another $21.3 million loan was risk-grade 11. (PX 350; Tr. 342.) On April 7, 2007, seven additional land loans aggregating approximately $93.2 million were adjusted to grade 10 or 11 and added to subsequent Loan Watch Lists. (DX 15; PX 351 & 356; Tr. 343–47.) In response to concerns over land loans, in the first quarter of 2007, BankAtlantic created a special Land Loan Committee, which met twice monthly to monitor land loans. (Tr. 454.) In early April, Alan Levan authorized a "full legal review" of all the loans in the land loan portfolio, because of the possibility that the Bank would have "legal issues" with the entire portfolio. (Tr. 3563–64.)

As the deadline for filing the 2007 first-quarter financial results approached,[FN20] BankAtlantic began to distinguish between what came to be called the "builder land bank" or "BLB" loans and the remainder of the land loan portfolio. (Tr. 1071, 3390.) The BLB land loans were loans made to developers to acquire and develop parcels of land into finished lots; these borrowers, who had option contracts for the "take down" of the finished lots with large regional or national homebuilders, relied on the homebuilders to exercise the options on schedule in order to provide the borrowers with revenue to meet their loan obligations to BankAtlantic on a timely basis. (DX 6, p. 18.) The remaining, non-BLB land loans were made to developers to acquire land, develop it into finished lots, and sometimes build residential developments, but did not involve option contracts with national homebuilders. (Tr. 357–59; DX 6, p. 18.)

FN20. Each quarter, Bancorp publishes its quarterly financial results. The results are first announced in an 8–K press release filed with the Securities and Exchange Commission and are then discussed in an investor conference call. (Tr. 3318.) Conference calls are open to public participation; investment analysts participate in these calls and ask questions of management regarding its quarterly results. (Tr. 3312.) Conference calls provide management an opportunity to speak to investors and analysts and provide more information than is available in the quarterly financial results. (Tr. 3312.) After the conference call, the Company files a 10–Q quarterly earnings report with the Commission. (Tr. 3318.)

The problems Defendants observed in the land loan portfolio were not limited to either the BLB or non-BLB land loans—they were spread throughout the portfolio: the Major Loan Committee had approved extensions for both BLB and non-BLB land loans (PX 122, 217, 340, 341, 342, 343, 344 & 348; DX 15; Tr. 1171–72 & 1175); Marcia Snyder did not distinguish the categories of land loans in her email (PX 124, Tr. 458–61); both BLB and non-BLB land loans had depleted interest reserves (Tr. 461–62, 1226–28 & 3563); the March 31, 2007 Loan Watch List included one non-accrual BLB land loan and one non-accrual non-BLB land loan (PX 350; Tr. 342.); and the April 7, 2007 Loan Watch List additions included three BLB land loans and four non-BLB land loans (DX 15; PX 356; Tr. 343–47).

On April 26, 2007, Bancorp filed its first quarter 2007 financial results in an 8–K press release, which reported that BankAtlantic earned $5.7 million net income for the quarter. (DX 4.) Bancorp also announced an increase in non-accrual loans of $19.6 million from the first quarter of 2006, which related to loans in its CRE loan portfolio. (DX 4.) The release warned:

> The current environment for residential land acquisition and development loans is a concern, particularly in Florida, and represents an area where we remain very cautious in our credit management. In view of market conditions, we anticipate we may experience further deterioration in the portfolio over the next several quarters as the market attempts to absorb an oversupply of available lot inventory.

***12** (DX 4.)

The same day, Bancorp held its first-quarter earnings conference call. (DX 5.) In preparing for the call, Alan Levan asked James White, the then-CFO, to focus his discussion only on the BLB land loans.FN21 (PX 139; Tr. 1673–76 & 3565–66.) And during the call, Alan Levan emphasized the risks of the BLB land loans to the exclusion of the remaining land loans. He discussed a $19.6 million increase in non-accrual loans, which he attributed to two loans in the "land banking portfolio," and described that portfolio as follows:

FN21. In preparation for the first quarter 2007 conference call, Defendant Jim White, then Bancorp's Chief Financial Officer, had prepared to discuss concerns with entire land loan portfolio. (Tr. 1666–73.)

... those very simply are loans that we made to land developers, people that buy land in anticipation of selling that land to national developers, national or local developers. Generally at the time of borrowing, the borrower or developer had contracts with builders to buy a significant or a substantial portion of the property, which would have been used to pay down the loan in the normal course. As we all recognize, the housing market in the—nationally, but particularly in Florida, is suffering some economic distress. And the amount of deposits that homebuilders nationally in Florida that have walked away from these deposits is pretty high.

(DX 5, p. 4.) This was the first time Alan Levan or Bancorp publicly distinguished the BLB portfolio from the remainder of the land loan portfolio. FN22 (Tr. 3328–29 & 3568; DX 5, p. 23.) Alan Levan noted that this "portfolio" consisted of $140 to $160 million in loans and explained that it was a subject of concern because the national homebuilders had "slowed their takedown of lots" and many of the borrowers were requesting extensions "to give the builders more time to ultimately take down the lots." (DX 5, pp. 5 & 24.)

FN22. Coincidental with the announcement of the first quarter losses and the discussion of Bancorp's concerns with the BLB land loans, Bancorp's stock price declined $0.56 on April 26, 2007. (Tr. 2558.)

On May 10, 2007, Bancorp filed its 10–Q for the first quarter of 2007. The Company noted that the residential real estate market, both in Florida and nationally, "continued to deteriorate during the first quarter of 2007." (DX 6, p. 18.) The report identified the BLB portfolio as comprising $140 million of the $562 million "commercial real estate acquisition and development portfolio." (DX 6, p. 18.) With respect to the non-BLB loans in the portfolio, it stated:

The loans ... in this category are generally secured by residential and commercial real estate which will be fully developed by the borrower or sold to third parties. These loans generally involve property with a longer investment and development horizon and are guaranteed by the borrower or individuals and/or secured by additional collateral such that it is expected that the borrower will have the ability to service the debt under current conditions for a longer period of time.

(DX 6, p. 18.)

Alan Levan also stated as to the remainder of the CRE portfolio: "The portfolios that are buying land for their own development, those are proceeding in the normal course. We're not really seeing any difference in that portfolio than we've seen in the billion-and-a-half dollar portfolio." (DX 5, p. 24.) And when an investment analyst asked Alan Levan a question regarding the composition of the land loan portfolio, the following exchange ensued:

[ANALYST]: Hi. So just to follow up on the last set of questions, is it right to infer that your construction portfolio apart from the land bank is about $250 million? Is that the right inference, the construction loan portfolio?

* * *

ALAN LEVAN: I think we—if we—we'd probably have to get back to you on that. By deduction, that would certainly seem likely. If it's a $400 million portfolio and $140 million to $160 million is in this one, probably the rest of it is in some stage of development to our borrower. The answer to that is probably yes, but perhaps we can get back to you (unintelligible) ...

[ANALYST]: Okay, but that—I mean, that $400 million number that was referenced before would encompass all construction-related loans generally speaking?

***13** ALAN LEVAN: No, no, no. Other—I mean, the entire portfolio is $1.4 billion, $1.5 billion. So there's lots of construction in our portfolio. And Valerie noted today, she'll tell you as soon as I stop talking, we're—we'll have to tell you offline, there's a certain designation when we finance a land acquisition with the anticipation of a building going on that. It tends to get into this land portfolio. And it may recharacterize as we start to build, but lots of our portfolio is a construction portfolio that we're not in any way concerned about.

(DX 5, p. 29.) The last portion of the exchange is what Plaintiffs identified as Statement 10: "But lots of our portfolio is a construction portfolio that we're not in any way concerned about."

Given the context of the statement, a jury could have found that when Alan Levan professed a lack of concern as to "lots of our portfolio," he was essentially stating that he was only concerned with the BLB land loans and *not* with the entire land loan portfolio. Indeed, Plaintiffs argued to the Jury in closing that Statement 10 was misleading with respect to the non-BLB land loans *only.* (Tr. 4093–94.) And a jury also could have found that Alan Levan's professed lack of concern about the balance of the land loan portfolio was untrue.

But not every untrue statement is actionable under Rule 10b–5. Generally, a misstatement or omission is actionable under the Rule if it is of a definite factual nature. *See Va. Bankshares, Inc. v. Sandberg,* 501 U.S. 1083, 1095, 111 S.Ct. 2749, 115 L.Ed.2d 929 (1991). And, under certain circumstances, management statements couched as conclusory beliefs can be actionable. *Id.* "Such statements are factual in two senses: as statements that [managers] do hold the belief stated and as statements about the subject matter of the ... belief expressed." *Id.* at 1092. A statement of conclusory belief is actionable as a misrepresentation if a plaintiff demonstrates *both* the managers' disbelief and the falsity of the underlying facts. *Id.* at 1093–96.

In this case, the evidence supports a finding that Statement 10 is actionable. A jury could have found that Alan Levan was in fact concerned about the entire land loan portfolio and that certain of the same justifications he identified as the basis of his concern for the BLB loans existed (and were concealed) with respect to the remainder of the land loan portfolio.

With respect to the first point, Plaintiffs presented evidence that Alan Levan internally expressed undifferentiated concern regarding the entire land loan portfolio prior to the conference call. As detailed above, in a March 2007 email, Alan Levan stated that the land loan portfolio was facing "a long sustained problem," and in another March 2007 email, Marcia Snyder stated that the Major Loan Committee had "significant concerns" about both the BLB and non-BLB land loans. (PX 138 & 124.) Further, by the time of the conference call, BankAtlantic had created a special Land Loan Committee to review and address concerns regarding the entire land loan portfolio—twenty-nine loans were under review, nearly half of which were non-BLB land loans. Based on this evidence a jury could have found that Alan Levan falsely professed a lack of concern about the remainder of the land loan portfolio.

***14** With respect to the second point, the stated justification for his relative lack of concern was the distinction between the BLB and non-BLB land loans, namely the involvement of national homebuilders in the BLB loans. Alan Levan explained that the BLB loans were made to borrowers whose business model depended on the sale of lots to these national home builders. According to Alan Levan, because of a softening residential real estate market, these builders were not "taking down" lots from the borrowers as scheduled which, in turn, was causing the borrowers to request payment extensions and in a few instances causing the borrowers to miss payments, resulting in non-accrual classifications. Another distinction was that for some BLB loans, the equity component was comprised of a letter of credit from the national home builder as opposed to a cash deposit. In the conference call, Alan Levan claimed these characteristics were unique to the BLB loans.

Plaintiffs put forth evidence, however, that certain of these characteristics were not confined to the BLB loans and were present throughout the land loan portfolio. A jury could have found that, by the time of the conference call, one non-BLB land loan was also on non-accrual status—in fact, it could have found that one of the two non-accrual BLB loans Alan Levan identified during the conference call was actually a non-BLB land loan. And a jury could have found that eight of the nine land loan extensions and modifications the Major Loan Committee had approved by March 2007 were non-BLB land loans. (PX 122, 217, 340, 341, 342, 343, 344, 348; Tr. 1171–72 & 1175; DX 15.) In short, a jury could have found Statement 10 to be an actionable concealment of the risk of substantial losses to the non-BLB land loans.

D. *Loss Causation & Damages*

Plaintiffs contend that they suffered an actual loss when the true level of risk concealed by Statement 10 (the risk of substantial losses to the non-BLB land loans) was revealed on October 25 and 26, 2007 and the price of Bancorp's stock fell by $2.93. The issue therefore is whether Plaintiffs put forth sufficient evidence that their damages, if any, were "caused" by the concealment of this risk.

On October 25, 2007, Bancorp announced its third quarter 2007 financial results in a press release filed as an 8–K on October 26, 2007. (DX 11.) Bancorp suffered a loss from continuing operations of $29.6 million or $0.52 per diluted share and BankAtlantic suffered a net loss for the quarter of $27.1 million. The press release stated that BankAtlantic's loss:

> was driven by increased loan loss provisions and impairments of real estate owned and held for sale. Other factors contributing to the decline included net interest margin compression and costs associated with opening new stores, offset in part by an increase in non-interest income.
>
> (DX 11.)

Bancorp further announced that BankAtlantic's loan loss provision for the quarter was $48.9 million.[FN23] (DX 11.) The provision was required by an increase in non-performing loans; Bancorp specifically noted the placement of eleven commercial real estate loans on non-accrual status during the quarter. (DX 11, p. 2.) In the 8–K, Bancorp did not specify what amounts of the $48.9 million loan loss provision were attributable to specific, qualitative, or quantitative reserves, nor did it break down the provision across the various segments of its loan portfolio. However, for the first time, Bancorp detailed the deterioration across the entire land loan portfolio. The release stated:

FN23. BankAtlantic reserves funds for potential loan losses; the reserves are counted as losses against BankAtlantic's income in the quarter in which they are taken. (Tr. 2937.) Loan loss reserves include three components: specific reserves, qualitative reserves, and quantitative reserves. (Tr. 539–541.) Specific reserves are provisions for individual, large-balance loans. When BankAtlantic downgrades to a risk grade of 10 or 11 a loan whose balance exceeds a set amount, it may then determine that it is necessary to take a specific reserve for that loan. (Tr. 540–41.) BankAtlantic takes quantitative and qualitative reserves, when necessary, for groups of loans with similar characteristics. Quantitative reserves are determined based on the historic performance of the group of loans. (Tr. 539 & 2930.) Qualitative reserves are based on current and expected economic factors that may affect the repayment of a given group of loans. (Tr. 539–40 & 2931.) When BankAtlantic determines that it will not be able to collect all or a portion of a loan, it charges off that amount. (Tr. 2964–65.) If a specific reserve was previously taken for that loan, the reserved amount is applied to the charge off. (Tr. 2967–68.) If the specific reserve is insufficient to cover the charge off, the difference between the charge off and the reserve is counted as a loss against BankAtlantic's income. (Tr. 2967–68 & 3003–04.)

***15** "The categories within this 'Commercial Residential' portfolio where we believe we have exposure to the declines in the real estate market are as follows:

• Builder land bank loans [BLB land loans]: This category of 13 loans aggregates $149.3 million, of which five loans totaling $81.1 million are non-accrual and an additional three loans totaling $28.7 million were considered classified assets at quarter-end.

• Land acquisition and development loans [non-BLB land loans]: This category of 37 loans aggregates $218.5 million, of which three loans totaling $13.2 million are non-accrual and an additional five loans totaling $19.7 million were considered classified assets at quarter end.

• Land acquisition, development and construction loans [non-BLB land loans]: This category of 24 loans aggregates $165.3 million, of which seven loans totaling $62.0 million are non-accrual and an additional four loans totaling $41.9 million were considered classified assets at quarter end.

(DX 11.) The "classified" loans Bancorp disclosed in this 8–K included those graded 10 and 11. (Tr. 714–16.)

On October 26, 2007, Bancorp held its third quarter 2007 earnings conference call. (DX 12.) During the call, Alan Levan reiterated the results announced in the 8–K. Toalson noted that the loans placed on non-accrual status necessitated a specific reserve of $27.9 million and additional general reserves. *Id.* p. 12. She also noted that the value of BankAtlantic's real estate owned decreased by $6.7 million. *Id.* Coincidental with the announcement of third-quarter losses, Bancorp's stock price declined by $2.93 on October 26, 2007. (Tr. 2560.)

"Loss causation is the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff." *Lentell v. Merrill Lynch & Co.,* 396 F.3d 161, 172 (2d Cir.2005) (citation omitted). In order to prove loss causation in a fraud-on-the-market case, a plaintiff must show: (i) that the fraudulently concealed truth was revealed to the market and (ii) that the revelation caused, at least in substantial part, a decline in the market-price of the security. *See* *Dura,* 544 U.S. at 342–345; *Robbins v. Koger Props., Inc.,* 116 F.3d 1441, 1448–49 (11th Cir.1997). Based on the evidence at trial, a jury could have found the first part of the showing to have been satisfied, but not the second. The Court discusses both below.

(i) *Revelation of the Fraud*

In this case, Plaintiffs contend that Alan Levan, when he made Statement 10, concealed the risk of losses to the entire land loan portfolio by misrepresenting that the risk of significant losses was limited to the BLB loans and that this concealed risk was revealed to the market on October 25 and 26, 2007 when it materialized in the form of significant losses throughout the land loan portfolio. The materialization-of-the-risk theory is not new. Although the Eleventh Circuit has not expressly recognized the theory, FN24 numerous courts have recognized that a concealed risk can be revealed when the risk materializes. *See, e.g., Schleicher v. Wendt,* 618 F.3d 679, 683 (7th Cir.2010); *In re Vivendi Universal S.A. Sec. Litig.,* ––– F.Supp.2d ––––, 2011 WL 590915, –––– 35–36 (S.D.N.Y. Feb.17, 2011); *In re Scientific Atlanta Sec. Litig.,* ––– F.Supp.2d ––––, 2010 WL 4793386, –––– 24–26 (N.D.Ga. Nov.18, 2010). Its general purpose is to allow defrauded investors to prove loss causation and recover under Rule 10b–5 even where the defendant does not publicly correct his fraud, but instead the fraud is revealed through some other event. *See, e.g., Scientific Atlanta,* 2010 WL 4793386 at *26 (citing *Alaska Elec. Pension Fund v. Flowserve Grp.,* 572 F.3d 221, 230 (5th Cir.2009)). With this purpose in mind, the Court agrees with those decisions recognizing the theory and adopts it here.

FN24. The Eleventh Circuit has acknowledged the concept of the materialization-of-the-risk theory, but has not explicitly adopted it. *See* *La Grasta v. First Union Sec., Inc.,* 358 F.3d 840, 851 (11th Cir.2004); *Huddleston,* 640 F.2d 534.

***16** Further, the Court agrees that the evidence supports a finding that the disclosures on October 25 and 26, 2007 revealed that the risk of substantial losses was not limited to the BLB loans but existed throughout the entire land loan portfolio. In the 8–K, for instance, Bancorp announced that an almost equal amount of BLB and non-BLB land loans ($81.1 and $74.2 million, respectively) were in non-accrual and also that the majority of the classified land loans at the end of the third quarter were non-BLB land loans. A jury could have found that these announcements revealed information about the risk to the entire land loan portfolio that had been concealed by Alan Levan when he made Statement 10. *See* *Vivendi,* 2011 WL 590915 at *36.

(ii) *Price Decline Caused by the Revelation*

Plaintiffs next contend that the revelation of this risk was the sole cause of the $2.93 decline in Bancorp's stock price on October 26, 2007. Plaintiffs argue that the market-price of Bancorp's stock was artificially inflated by Alan Levan's concealment of the risk to the non-BLB portion of the land loan portfolio and that when the concealed risk was revealed to the market, the market-price corrected and the inflation was removed. And it was the market's release of this inflation which Plaintiffs claim caused the price decline on October 26, 2007. Plaintiffs rely exclusively on the unrebutted trial testimony of their expert, Candace Preston, to establish that the price decline resulted from the revelation.

At trial, Preston testified to the results of an "event study" she used to analyze the cause of the October 26, 2007 price decline. Preston began her event study by identifying two stock indices she thought best represented the general market and banking industry—the S & P 500 Index and the NASDAQ Bank Index. (Tr. 2550.) Preston explained that she first looked to these indices because Bancorp itself used them as benchmarks for market and industry performance comparisons in its public filings. (Tr. 2550–54.) Preston then confirmed that these indices historically had a "statistical fit" with the market-price of Bancorp's stock. (Tr. 2551.) In other words, through statistical regression analysis Preston confirmed a correlation between the general market and industry indices and the market-price of Bancorp's stock. *Id.*

Using this model, Preston was able to identify, on a daily basis, movements in Bancorp's stock price which were "statistically significant" because they did not correlate with the performance of the general market and industry indices. (Tr. 2557.) According to Preston, this statistical significance was a strong indication that the movement in Bancorp's stock price was caused by some Bancorp-specific event or information and not general market or industry information. (Tr. 2557–59.) Further according to Preston, the $2.93 decline in Bancorp's stock price on October 26, 2007 was statistically significant and, when measured against the expected market-price movement as predicted by the indices, represented a "residual decline" of $3.15. *Id.* Thus, Preston concluded that the decline was attributable to Bancorp-specific information.[FN25]

FN25. In reaching this conclusion, Preston also examined the trading volume of Bancorp stock, which, on October 26, 2007, soared above Bancorp's standard trading volume. (Tr. 2562.) Preston opined that this was further indication that Bancorp-specific information caused the $2.93 decline. *Id.*

***17** Preston next discussed her opinion that the entire decline was caused by the October 25, and 26, 2007 announcement in the 8–K and conference call of new, negative information regarding the land loan portfolio. (Tr. 2595–96.) Preston noted that on October 25 and 26, 2007 Bancorp published an 8–K with its third-quarter results and held a teleconference regarding those results. (Tr. 2594.) Preston further identified Bancorp's announcement of a significant increase in non-accrual and classified assets across the BLB and non-BLB portions of the land loan portfolio as the negative information to which the market reacted.[FN26] (Tr. 2595.) Preston explained that she reviewed over a hundred analyst reports, many of which identified the negative information about the land loan portfolio as a surprise. (Tr. 2599–608.) She referenced one analyst report which stated that, though some stress was expected, "a provision of this magnitude is, in our view, a surprise." (PX 632; Tr. 2600.) The analyst further noted that Bancorp's announcement that many of its land loans were classified assets suggested "the possibility of migration into nonaccruals in the coming quarter." (PX 632; Tr. 2601.) Another analyst report noted that the "pipeline of potential nonperforming loans implies more pain ahead." (PX 630; Tr. 2606.)

FN26. Specifically, Preston identified the information contained in the "three bullet points" on "page 3" of the 8–K as the information regarding non-accruals and classified assets which caused the price decline. (Tr. 2594–95.)

Preston acknowledged that Bancorp also announced other information that might have affected the stock price on October 26, 2007, including net interest margin compression, the curtailment of BankAtlantic's branch expansion, and changes in the performance of home equity loans; but she maintained that this other news did not contribute to the residual decline of Bancorp's stock price on October 26, 2007. (Tr. 2608–10.) Preston based this opinion on the analysts' overwhelming focus on the deterioration of the land loans; the fact that Bancorp attributed the net interest margin compression to challenges it faced in its land loan portfolio; and, the analysts' positive reaction to the curtailment of the branch expansion. *Id.*

Finally, Preston concluded that the $3.15 residual decline on October 26, 2007, which she opined was caused by the negative information regarding the land loan portfolio, represented the amount by which Bancorp's stock price was inflated, beginning on April 26, 2007, *i.e.,* "the amount that investors overpaid as a result of [the fraud]." (Tr. 2527 & 2620–22.) Preston also concluded that "the decline due to the release of inflation on October 26th was ... $3.15." (Tr. 2547–48.)

Defendants contend that neither Preston's testimony nor any other evidence is sufficient to support a finding of loss causation or damages. With respect to Preston's testimony, Defendants argue that Preston's underlying assumption of fraud relating to both the BLB and non-BLB land loans was rejected by the Jury's findings and, therefore, that the Jury could not have relied on her opinion. And even if a jury could have relied on her opinion, Defendants argue that it was insufficient to support a finding that the revelation of the fraudulently concealed risk caused the price decline because Preston failed to disaggregate the non-fraud effects of other negative information, including information regarding the risk to the BLB loans which was already known to the market.

***18** These arguments are not new. Defendants consistently raised them since the filing of their motions for summary judgment and to exclude Preston's testimony. And the Court first discussed them in its Omnibus Order addressing those motions:

> With respect to the company-specific decline of $3.15 per share on October 26, 2007, Preston opines that 100% of the decline is attributable to information regarding the credit quality of the entire land loan portfolio. Essentially, Preston's opinion is that there was no other bad news to disaggregate from the information regarding the credit quality of the land loan portfolio and, therefore, that 100% of the residual decline is attributable to the negative land loan information.
>
> Defendants argue that this opinion is inadmissible because Preston fails to disaggregate the confounding, non-fraudulent factors from the October announcements. Specifically, Defendants contend that Preston failed to disaggregate the loss related to BLB loans, the loss related to the increase in general reserves, and the loss attributable to market forces.
>
> In her affidavit, Preston explains that her opinion does not purport to focus only on the non-BLB land loans, but instead the entire land loan portfolio: "Defendants claim that the allegations are somehow limited to [LAD] and [LADC] loans—at the exclusion of the BLB loans. I am advised by Counsel that this is incorrect." Accordingly, the Defendants' arguments regarding the failure to disaggregate the BLB loan information do not go to the reliability of Preston's opinion because Preston is explicitly offering an opinion on the residual decline attributable to information regarding the entire land loan portfolio, including the BLB loans.

In re BankAtlantic, 2010 WL 6397500 at *17 (footnotes and citations omitted). The Court went on to note: "However, the Court will revisit this issue should it become apparent that Plaintiffs have put forth insufficient evidence to support a fraud claim relating to the BLB loans which extends past the April 2007 disclosures." *Id.* at *17 n. 26.

The Court did revisit the issue at trial in connection with Defendants' motion for judgment as a matter of law, but determined that as there was sufficient evidence in the record to support a finding of BLB fraud after April 2007, the Jury would have to decide the issue. (Tr. 3044.) But, again, the Court noted that it would reconsider the issue post-verdict if the Jury found no such BLB fraud:

> Now, in the end, though, I suspect that the Court is not going to be able to rule as a matter of law that there was BLB fraud after April 26th; that the jury is going to have to decide that.
>
> ... There is an issue down the road ... of what should the jury be told about its decision as to whether there was BLB fraud after April 26th and what to do if they find there is no BLB fraud after April 26th.
>
> (Tr. 3045.)

As it turns out, the verdict hinges on Statement 10 which, under *Virginia Bankshares,* does not support a finding of BLB fraud, but only a finding that the risk to the *remainder* (*i.e.,* the non-BLB portion) of the land loan portfolio was fraudulently concealed. *See* 501 U.S. at 1092–94. The Jury effectively rejected Preston's assumption, and so her testimony is—at best—incomplete because she failed to disaggregate the effect of the earlier disclosed negative BLB information on Bancorp's stock price.

***19** As the Supreme Court noted in *Dura,* even if a defrauded plaintiff sells his shares at a lower price after the truth of the fraud is revealed to the market "that lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price." 544 U.S. at 343. Accordingly, where a fraud is revealed contemporaneously with the announcement of other negative, but non-fraud-related information, plaintiffs bear the burden of disaggregating the effect of the unrelated negative information on the stock price. Simply, establishing that the price reacted in some statistically significant way "to the *entire bundle* of negative information ... suggests only market efficiency, not loss causation, for there is no evidence linking the *culpable* disclosure to the stock-price movement." *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.,* 487 F.3d 261, 271 (5th Cir.2007) (emphasis in original).

In this case, there is no question that Bancorp announced a bundle of negative information on October 25 and 26, 2007, some of it fraud-related and some of it not fraud-related. Preston herself testified that Bancorp announced negative information in addition to that regarding the land loans, but she claimed this information had no effect on the stock price. (Tr. 2609.) However, the negative information regarding the land loans was itself a bundle of information. For instance, in its October 25, 2007 8–K, Bancorp did not simply announce an increase in non-accrual and classified assets within the land loan portfolio, it announced the particular increases in each portion of the land loan portfolio. Preston freely admitted at trial that she did not attempt to disaggregate this bundle of negative land loan information because she assumed that it was all fraud related, *i.e.,* that the fraud related to the entire land loan portfolio, including the BLB loans.[FN27] (Tr. 2691.) Preston did qualify this admission by claiming that such a disaggregation could only have been conducted using information which was not publicly disclosed as of October 26, 2007—Preston claims that Bancorp did not publicly disclose the breakdown of the negative land loan information between BLB and non-BLB loans. (Tr. 2710–11.) This claim is simply untrue, and no jury could have found otherwise. Although there may have been some items of negative news which were not publicly broken down (*e.g.,* the $48.9 million loan loss provision), as explained above, the negative news to which Preston explicitly attributed the price decline in her direct testimony—*i.e.,* the three bullet points in the 8–K announcing the increase in non-accrual and classified assets-was publicly broken down, *in the 8–K,* into its BLB and non-BLB components.

FN27. In fact, on cross-examination, Preston testified that, without a finding supporting her assumption of continuing BLB fraud after April, her opinion was basically irrelevant:

Q. And those, in fact, are the assumptions that if those are true, you then rendered your opinion based on those facts?

A. That's correct.

Q. And if those opinions [*spoken error*] are not true, then your opinion on damages, I think you would agree, isn't of much moment?

A. Correct. If there is no liability, the there are no damages.

* * *

Q. So in other words, if the jury finds that the company did adequately warn of the risk of the builder land bank portfolio then your opinion as to the damages in October is wrong, correct?

A. The jury would not find liability, so they would not find damages.

* * *

Q. So we are perfectly clear, if the jury finds no fraud with the BLB portfolio from April to October, then your entire opinion dies?

A. In [*sic*] the jury finds no fraud related to the assumptions I have made regarding the land bank portfolio ..., then they not will find liability and than there will be no damages.

(Tr. 2691, 2713.) Preston may have avoided answering with a clear "yes," but her own assessment of the opinion is clear—without a finding in support of her assumption, it was not of much moment.

Moreover, the fact that neither Bancorp nor any analysts precisely quantified the effects of the negative BLB loan information versus the negative non-BLB information did not relieve Plaintiffs of the burden to disaggregate—the very nature of the task presumes that the competing factors will not always lend themselves to a mathematically precise disaggregation analysis. *See Dura,* 544 U.S. at 343. And Preston testified at trial that she was capable of a disaggregation analysis where the competing factors were not quantified. With respect to the first period, Preston claimed she was able to disaggregate from the $0.55 residual price decline on April 26, 2007, the effect of non-fraudulent information even though "that wasn't quantified by anyone"—not Bancorp and not the analysts. (Tr. 2588.) For that period, Preston arrived at a "conservative" estimate of $0.37 per share after disaggregation. (Tr. 2582–93.) Preston offered no explanation why a similar analysis would not have been possible to disaggregate the effects of the negative BLB loan information on the October 26, 2007 price decline.

***20** Given that a jury could not have found Statement 10 to include BLB fraud and Preston's admitted failure to disaggregate the effect of the negative information regarding the BLB loans, the Court agrees with Defendants that a jury could not have relied on her opinion—at least not with respect to Statement 10. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 242, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict."). This is fatal to the Jury's verdict because there is no other evidence from which a jury could have found loss causation.

Without Preston's opinion, a jury would be left with no more than the text of the 8–K and the conference call—both jumbles of qualitative and quantitative financial information—and several independently admitted analyst reports which point to the negative information regarding the land loan portfolio as a whole as the most important news. (PX 630, 632 & 638.) This evidence, however, was insufficient to allow the Jury to conclude that the fraud-related (*i.e.,* non-BLB information) affected the stock price. *See, e.g., Oscar,* 487 F.3d at 270–71 (holding that evidence of "analyst commentary" is "little more than well-informed speculation" as to whether a price decline is attributable to one piece of negative information or another). "[A]nalyst speculation about materiality, while better informed than a layman, more closely resembles the latter." *Id.* at 271. Expert testimony may not be required to prove loss causation in every Rule 10b–5 case, but where a tangle of fraud and non-fraud factors affect a stock's price, it usually is—and this case is no exception. *See, e.g., Archdiocese of Milwaukee Supporting Fund, Inc. v. Haliburton Co.,* 597 F.3d 330, 341 (5th Cir.2010) ("This showing of loss causation is a 'rigorous process' and requires both expert testimony and analytical research or an event study that demonstrates a linkage between the *culpable* disclosure and the stock-price movement.") (citations omitted).

Further, even if a jury could have relied on Preston's opinion up to a point—the point where she opined that the entire decline was attributable to the negative land loan information—it could not have completed the analysis and disaggregated the effects of the BLB information on its own. As explained above, the negative land loan information was itself a *bundle* of negative news—some regarding the BLB loans, some regarding the non-BLB loans, and some regarding both. Any attempt to attribute some price decline to one particular piece without expert testimony would also be impermissible speculation. *See id.* While it may be true that the negative land loan news was spread equally between the BLB and non-BLB portions, any inference that each had an equal effect on the stock price is only speculation. *See, e.g., Fener v. Operating Eng'rs Constr. Indus.,* 579 F.3d 401, 410 (5th Cir.2009) ("[F]raudulent practices could have resulted in 90% of the circulation decline, but if the stock price fell because the market was concerned with *only* the reason for the other 10%, loss causation could not be proven."). Accordingly, a jury could not have found loss causation with respect to Statement 10, and judgment as a matter of law will be entered for Defendants.

***21** In concluding that Plaintiffs failed to produce sufficient evidence from which the jury could find loss causation, this Court readily concedes that reasonable minds can differ on the nature and extent of a plaintiff's burden in proving loss causation in a fraud-on-the-market-case under Rule 10b–5.

In *Dura,* the Supreme Court rejected the Ninth Circuit's view that a securities plaintiff adequately pled and proved loss causation by proving that he purchased stock at an inflated price due to fraud and subsequently suffered a loss. While such a showing might show that the misrepresentation "touches upon" a later economic loss, it does not, according to Justice Breyer's opinion, adequately account for the "tangle of factors affecting stock price" such as "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events" taken separately or together. *Dura,* 544 U.S. at 343. However, in describing the plaintiff's burden, Justice Breyer merely stated: "it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the economic loss and proximate cause that the plaintiff has in mind." *Id.* at 347. He further stated: "We need not, and do not, consider other proximate cause or loss-related questions." *Id.* at 346. Yet, the greater weight of authority as reflected in many of the circuit and district court opinions that have followed *Dura* and are cited herein, is that a securities-fraud plaintiff can satisfy his burden of proving loss causation only by producing the testimony of an expert who has completed a reliable multiple-regression analysis, event study, and financial analysis in order to quantify the extent to which the claimed losses are the result of the alleged fraud.

Whether *Dura* actually requires this level of statistical and econometric analysis to prove loss causation is, in the view of this Court, a debatable proposition, and notwithstanding the conclusion herein that Plaintiffs' proof of loss causation failed, this Court has endeavored to apply a less rigorous standard in its consideration of Candace Preston's testimony and any other evidence relevant to the issue presented at trial. The evidence, however, ultimately failed in this case because Preston, on whose testimony proof of loss causation hinged, wholly failed to consider that the Jury would reject the assumption—the assumption that she was asked by Plaintiffs' counsel to make—that the BLB fraud persisted after April 26, 2007. The Jury therefore was left to impermissibly speculate as to the relative market effects of the various pieces of qualitative and quantitative land loan data contained in the 8–K and conference call. *See, e.g., Oscar,* 487 F.3d at 271 ("[P]laintiffs must, in order to establish loss causation ..., offer some empirically based showing that the corrective disclosure was more than just present at the scene. And this burden cannot be discharged by opinion bereft of the analysis plaintiff's own expert conceded was necessary."); *In re Williams Sec. Litig.,* 558 F.3d 1142–43 (10th Cir.2009).

***22** Further, Preston's testimony, even if sufficient to support a finding of loss causation, was insufficient to support a finding of damages—an essential element of Plaintiffs' claim. *See Dura,* 544 U.S. at 342. Where a plaintiff proves loss causation by demonstrating that the disclosure of the fraud was a substantial contributing cause of his loss, to prove damages, a more rigorous showing is required, because by the express terms of the Exchange Act, a plaintiff's recovery is limited to "actual damages on account of the act complained of." *See* § 78bb(a). And as stated by the Eleventh Circuit in *Robbins v. Koger Properties:* "as long as the misrepresentation is one substantial cause of the investment's decline in value, other contributing forces will not bar recovery under the loss causation requirement. But in determining recoverable damages, these contributing forces must be isolated and removed. This is often done ... with the help of an expert witness." *Robbins,* 116 F.3d at 1447 n. 5; *accord Miller v. Asensio & Co., Inc.,* 364 F.3d 223 (4th Cir.2004) (requiring a more rigorous disaggregation analysis to prove damages than loss causation).

Preston's testimony on damages fails for the same reasons as it does with respect to loss causation; she fails to adequately isolate the damages caused by the fraud. Without Preston's testimony, Plaintiffs failed to produce sufficient evidence for the Jury to find both the fact of proximately caused damage and the amount of proximately caused damage. *See In re Williams Sec. Litig.,* 496 F.Supp.2d 1195, 1276 (N.D.Okla.2007) (plaintiffs' failure to prove fact and amount of damages fatal to claims). Thus, even had Plaintiffs made a sufficient showing of loss causation, they did not produce sufficient evidence to support an award of damages in any amount.

D. *Remaining Statements*

Having determined that the verdict, which rested on Statement 10, was not supported by the evidence at trial, the question arises as to what should be done with the remaining statements for which the Jury found liability but was not asked to assess damages.[FN28] The simple answer is that these findings cannot support any judgment for Plaintiffs because there is no finding of damages attached to them.[FN29] Accordingly, the Court will enter a final judgment for Defendants as to all claims and statements. However, because the Court anticipates that Plaintiffs will move for a new trial on damages as to these remaining statements, the Court will also address under Rule 50(b), the insufficiency of the evidence supporting the liability findings as to these statements.

FN28. In addition to Statement 10, the jury found that Statements 13 through 17 and 19, were made in violation of Rule 10b–5 by certain Defendants, including Bancorp, Alan Levan, and Toalson.

FN29. Plaintiffs argue that "while the jury [was] asked to determine the first statement from which damages flowed, it was understood that any finding of damages would be constant and extend to any subsequent actionable misstatements and omissions." (D.E.675, p. 26.) The Court disagrees. The verdict form *only* asked the Jury to attach damages to "the first Section 10(b) violation [they] found," and, consequently, the Jury only found the amount of damages caused by the first Section 10(b) violation. (D.E. 665; Tr. 3951, 62.) In fact, the initial draft of the verdict form instructed the Jury to skip the remaining statements once the first violation was found in each damage period. (Tr. 3934–35.) Plaintiffs requested that the Jury be asked to adjudicate each statement regardless of whether they found a prior violation in case the first violation the Jury found was disregarded on appeal or in a post-trial motion. *Id.* And the Court accommodated the request. Also, the record is clear that Defendants never agreed that the Jury's finding of damages as to the first violation would automatically shift to the next violation if the first failed. (The resolution of the inconsistency as to Statement 7, on the other hand, was a completely separate issue governed by Rule 49 and for which their was a waiver by both parties. *See* Part II *supra.*)

As with Statement 10, these remaining statements do not fit with Preston's assumptions about the nature of the fraud. The result is a similar failure of proof regarding the causal relationship between the statements and any decline in the price of Bancorp's stock— *i.e.,* loss causation and damages.

Statements 13 through 17 are excerpts of comments made by Alan Levan during the July 25, 2007 second-quarter earnings conference call. (DX 8.) During the call, Alan Levan reiterated his concern for the BLB loans and his relative lack of concern for the remainder of the land loan portfolio.[FN30] *Id.*

FN30. As with the third-quarter earnings conference call, the transcript of the entire second-quarter earnings conference call was admitted into evidence at trial. The following are the relevant portions of Alan Levan's comments, embracing Statements 13 through 17:

> [ANALYST]: Basically what I'm trying to—ask you is the $135 million in the land loans that you are concerned about, are there other portfolios (unintelligible) focus you on the construction portfolio that you feel there might be some risk down the road as well.
>
> ALAN LEVAN: There are no asset classes that we are concerned about in the portfolio as an asset class. You know, we've reported all of the delinquencies that we have, which actually I don't think there are any other than the ones that we've, you know, that we've just reported to you.
>
> So the portfolio has always performed extremely well, continues to perform extremely well. And that's not to say that, you know, from time to time there aren't some issues as there always have, even though we've never taken losses in that—we've not taken—I won't say ever taken any losses, because that's probably never going to be a correct statement, but that portfolio has performed extremely well.
>
> The one category that we just are focused on is this land loan builder portfolio because, you know, just from one day to the next, the entire homebuilding industry, you know, went into a state of flux and turmoil and is impacting that particular class.
>
> But to our knowledge and in—just in thinking through, there are no particular asset classes that we're concerned about other than that one class.

* * *

> [ANALYST]: ... If I can just question you about the commercial portfolio for a second, for the construction portion of that, which I think you said was 63% of the portfolio, can you give us some sense of what the various delinquency buckets on that portion of the portfolio looks like at the end of June and how that's changed since the beginning of the year?
>
> ALAN LEVAN: I could be wrong, but I think it's zero. I don't think we have any delinquency in that portfolio, in the entire portfolio.

* * *

> Other than the non-accruals we've reported to you, there is, you know, there is no—there are no other delinquencies in that portfolio.
>
> And again, I'm—I could be—don't take it as an absolute, but I'm just telling you to date we have—we do not have any concern about the balance of the portfolio.

* * *

> Brian, we've confirmed that—while we were talking, somebody checked and to our knowledge, at this moment we have no delinquencies in the balance of the portfolio ... in the commercial portfolio.
>
> (DX 8, pp. 20–21, 32–33.)

***23** Thus, apart from the fact that these statements were made some three months after the April 26, 2007 conference call each of these statements, like Statement 10, is at best a fraudulent concealment of the risk to the non-BLB portion of the land loan portfolio. And like Statement 10, a jury could not have found them to be actionable misrepresentations or omissions regarding the BLB loans. Accordingly, Preston's opinion and the other evidence of loss causation and damages fails for the same reason: Preston's failure to disaggregate the non-fraudulent negative information related to the BLB loans from the bundle of negative information announced on October 25 and 26, 2007.

The sole remaining statement for which the Jury found liability, Statement 19, is different from the other misstatements submitted to the Jury. It is not taken from an earnings conference call but from the text of Bancorp's 2007 second quarter 10–Q, published on August 9, 2007. (DX 9.) It is also not a general statement about levels of risk or management concern regarding the land loan portfolio. Instead, it is a discrete statement about the amount of "Total Potential Problem Loans," *i.e.,* a statement that the amount of "Total Potential Problem Loans" amounted to $8.35 million.[FN31] *Id.* p. 23. At trial, Plaintiffs contended this figure was a fraudulent misrepresentation because one of its components, the amount of "Performing impaired loans" was greatly understated at $4.6 million. According to Plaintiffs, all of BankAtlantic's then-classified assets met the stated definition of performing impaired loans and should have been disclosed as such. The true amount of performing impaired loans, Plaintiffs argued, was tens of millions of dollars higher, as was revealed by the October 25 2007 8–K. (DX 9, p. 23; PX 151; Tr. 4107–08.)

FN31. The amount was listed in the following table:

	June 30, 2007
NON PERFORMING ASSETS	
Non-accrual:	
Tax Certificates	$ 711
Loans	21,806
Total non-accrual	22,517
Repossessed Assets:	
Real estate owned	23,886
Total nonperforming assets, net	$ 46,403
Allowances	
Allowances for loan losses	$ 54,754
Allowances for tax certificate loses [*sic*]	3,829
Total allowances	$ 58,583
POTENTIAL PROBLEM LOANS	
Contractually past due 90 days or more	$ 164
Performing impaired loans	4,596
Restructured loans	3,588

TOTAL POTENTIAL PROBLEM LOANS	$ 8,348

(DX 9, p. 23.)

Assuming this was an actionable misrepresentation, there is insufficient evidence to connect it to any decline in the price of BankAtlantic's stock. While it may be true that a jury could have found Statement 19 to be a misrepresentation of the amount of potential problem loans across the land loan portfolio, including the BLB portion, Preston offered no opinion on such a fraud. Preston's opinion was based on the assumption that Bancorp broadly misrepresented or concealed the risk of significant losses throughout the land loan portfolio *as of April 26, 2007,* not on the assumption that Bancorp concealed *only* the total amount of classified assets by failing to report them as "performing impaired loans" months later on August 9, 2007.FN32 (D.E. 365 Ex. B, p. 6.)

FN32. Indeed, it should be of no surprise that Preston's assumptions do not fit with Statement 19 because Statement 19 was not plead in the First Consolidated Amended Complaint—the pleading Preston claimed to have reviewed in formulating her opinion. (D.E. 365 Ex B., p. 4.) Preston's expert report predated Plaintiffs' motion to amend the complaint to include fraudulent understatement of the total potential problem loans in the 2007 second quarter 10–Q. (D.E. 210 & 365 Ex. B.) The importance of this point should not be understated; Preston herself testified at trial when asked why she reviewed the legal complaint: "I've [*sic*] just had to review the complaint, see what the allegations were .... I had to make sure I understand what the allegations are so I don't and up saying, without any basis, oh, the whole decline is related to that." (Tr. 2545.)

As with the previous statements, the divergence between Statement 19 and Preston's assumption about the fraud is fatal to her disaggregation analysis. Without accurate assumptions as to the nature, scope and duration of the fraud, Preston had no way of distinguishing fraudulent information from non-fraudulent information, much less disaggregating their effects on the stock price. FN33 In the end, the Jury is left to unreasonably speculate as to whether Preston's disaggregation opinion based on the assumed fraud is equally applicable to some other fraud. *See Brooke,* 509 U.S. at 242. The October 25, 2007 8–K for instance announced increases in classified assets, nonaccrual assets, and loan loss reserves relating to the entire land loan portfolio, but Statement 19 concealed only the true amount of total potential problem loans (or classified assets)—the total amount of non-accruals were separately disclosed in the 10–Q and was not found to have been false. *See* Table, *supra* note 31; (DX 9.) And Preston's opinion is silent as to why the increases in either the non-accrual assets or loan loss reserves did not require disaggregation.

FN33. Jeffrey Mindling, BankAtlantic's Chief Credit Officer, testified at trial that many of the loans that were risk-graded 11 were accounted for in the same table in the category "Allowance for loan losses." (Tr. 611–20.) This, then, is an example of the type of information that arguably should have been considered as part of the disaggregation analysis if liability flowed from Statement 19.

***24** Moreover, even if Statement 19 could be construed as an actionable misrepresentation or concealment of the general risk to the entire land loan portfolio, it is hard to conceive how a jury could find it to be a *material* misrepresentation as to the BLB portion, considering Bancorp's numerous warnings of risk and concern regarding the BLB loans up to that point. FN34 *See Basic Inc. v. Levinson,* 85 U.S. 224, 231 (1987). Thus, the original problem of Preston's failure to disaggregate the negative BLB information persists.

FN34. Bancorp continued to warn of the risk to the BLB loans in the 10–Q:

> Conditions in the residential real estate market nationally and in Florida in particular continued to deteriorate during the six months fo 2007.... The “builder land bank loan” segment, at approximately $135 million, consists of twelve land loans to borrowers who have or had option agreements with regional and/or national home builders. These loans were originally underwritten based on projected sales of the developed lots to the builders/option holders and timely repayment of the loans is primarily dependent upon the acquisition of the property pursuant to the options. If the lots are not acquired as originally anticipated, BankAtlantic anticipates that the borrower may not be in a position to service the loan with the likely result being an increase in nonperforming loans and loan losses in this category.
>
> (DX 9, p. 22.)

For the foregoing reasons, the Court will enter final judgment as a matter of law in favor of Defendants as to all claims and statements. FN35

FN35. Under § 20(a) of the Exchange Act, every person who directly or indirectly controls any person liable for a § 10(b) violation shall also be liable jointly and severally to the same extent as such controlled person. Because liability under § 20(a) is derivative upon liability under § 10(b), the failure to produce sufficient evidence to support a § 10(b) violation is necessarily fatal to a § 20(a) claim. *See Edward J. Goodman Life Income Trust v. Jabil Cir., Inc.,* 594 F.3d 783 (11th Cir.2010). Accordingly, because all Defendants are entitled to judgment as a matter of law in their favor on all Plaintiffs' claims under § 10(b) and Rule 10b–5, they are likewise entitled to judgment in their favor as to Plaintiffs' claims under § 20(a).

IV. Motion for New Trial

Along with their Motion for Judgment as a Matter of Law, in the alternative, Defendants move for a new trial pursuant to Federal Rule of Civil Procedure 59. Federal Rule of Civil Procedure 50(c) provides that, if the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. Accordingly, the Court addresses whether Defendants would be entitled to a new trial, should the judgment for Defendants be vacated or reversed. FN36 For the reasons stated below, the undersigned finds that, should the Court of Appeals reverse the Court's determination that Plaintiffs failed to put forth sufficient evidence of loss causation, Defendants would not be entitled to a new trial.

FN36. Specifically, the Court examines whether Defendants would be entitled to a new trial should the Court of Appeals reverse the Court's judgment for Defendants and hold that the evidence of loss causation was sufficient to support a finding of liability against Alan Levan and Bancorp with respect to

Statement 10.

The Court first addresses Defendants' arguments regarding evidentiary errors. The Court then discusses Defendants' argument that the Court failed to properly instruct the Jury on various points of law and to utilize their proposed verdict form. Finally, the Court discusses Defendants' argument that the Court's instruction on the falsity of Alan Levan's July 25, 2007 statements was prejudicial error.

A. *Rule 59 Standard*

Rule 59 provides that "the court may, on motion, grant a new trial on all or some of the issues ... after a jury trial for any reason for which a new trial has heretofore been granted in an action at law in federal court." A party may seek a new trial by arguing that "the verdict is against the great weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury." *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 251, 61 S.Ct. 189, 85 L.Ed. 147 (1940); *Steger v. Gen. Elec. Co.,* 318 F.3d 1066, 1081 (11th Cir.2003). But under Federal Rule of Civil Procedure 61, the court must disregard all errors and defects that do not affect any party's substantial rights.

B. *Evidentiary Errors*

Defendants argue that the Court made several evidentiary errors and that they are entitled to a new trial as a result. First, they argue that the exclusion of their proposed expert witnesses' testimony was erroneous. Second, Defendants argue that the Court improperly excluded testimony concerning disclosures made by other financial institutions. Finally, Defendants argue that the Court wrongly admitted various statements made in emails by a BankAtlantic employee, Perry Alexander.

***25** The admissibility of evidence is committed to the broad discretion of the trial court. *Walker v. NationsBank of Fla.,* 53 F.3d 1548, 1554 (11th Cir.1995). A new trial is not warranted due to evidentiary error unless the error substantially prejudiced the affected party. Fed R. Civ. P. 61; *Peat, Inc. v. Vanguard Research, Inc.,* 378 F.3d 1154, 1162 (11th Cir.2004).

(i) *Exclusion of Proposed Expert Testimony*

Prior to trial, Plaintiffs moved to exclude the proposed testimony of Defendants' three independent expert witnesses: Stephen Morrell, Jack DeWitt, and Michael Keable. (D.E. 312, 315 & 321.) Upon careful consideration of the Motions, the Court excluded all of Morrell's and DeWitt's proposed testimony and the majority of Keable's proposed testimony. (D.E. 466, 479 & 460.) Defendants contend that the Court's rulings on these matters constitute prejudicial error warranting a new trial.

In the instant Motion for New Trial, Defendants largely reargue issues raised in their responses to Plaintiffs' motions to exclude. (D.E. 366, 369 & 367.) The Court considered and addressed those arguments in its prior rulings and incorporates those findings in the instant order. (*See* D.E. 466, 479 & 460.) Below, the Court addresses only those additional arguments raised in Defendants' Motion for New Trial related to the Court's exclusion of their proposed experts.[FN37]

FN37. Because Defendants raise no new issues with respect to DeWitt's testimony, the Court incorporates by reference and relies on the rulings made and reasons provided in its Order on Motion to Exclude Expert Testimony of Jack DeWitt. (D.E.479.)

a. *Stephen Morrell*

Defendants argue that the exclusion of the proposed testimony of Stephen Morrell was erroneous and warrants a new trial. Defendants incorporate by reference the arguments from their Response to Plaintiffs' Motion to Exclude Morrell's testimony and further argue that the exclusion of Morrell's testimony affected their substantial rights, "because Morrell would have explained how the decline in Bancorp's stock price was driven by a depression in the Florida real estate market." (D.E.666, p. 25.)

The Court did not err in excluding Morrell's proposed testimony. In his report, Morrell offered two broad opinions: first, that the recession in Florida began earlier, lasted longer, and was more severe than that suffered in the rest of the nation; and second, that, few, if any, economists or analysts could have foreseen the depth and breadth of the recession in Florida while it was happening. (D.E. 313, Ex. A ¶¶ 1 & 16.) These opinions were based on Morrell's comparison of a variety of economic measures for Florida and the United States as a whole over dates ranging from 2006 through 2010.

The Court excluded Morrell's proposed testimony under Federal Rules of Evidence 401, 402, 702 and the standards provided by *Daubert v. Merrell Dow Pharms. Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). First, the Court found that Morrell failed to explain the connection between his opinions and the raw economic data cited in his report. (D.E. 466, pp. 5 & 7). Second, the Court found that Morrell's opinions would not assist the trier of fact in determining a fact in issue. (D.E. 466, pp. 6 & 8.) His data and the conclusory opinions derived therefrom related to the economic recession in Florida from 2006 through 2010. Such testimony was both too broad temporally to relate to the instant action and not sufficiently connected to the question of whether Defendants' alleged misrepresentations concerning BankAtlantic's land loans caused Bancorp's stock price to decline in 2007.

***26** Though Defendants argue that Morrell would have explained that Bancorp's share price decline was driven by the collapsing Florida real estate market, Morrell offered no opinion to that effect in his expert report. In fact, Morrell's expert report concerned itself with the Florida real estate market only in the most limited way. He stated that "[h]ousing markets in Florida are experiencing a depression versus a severe United States recession." (D.E. 313, Ex. A ¶ 13.) This opinion was apparently based on two measures: a comparison of the number of building permits for new housing units issued in Florida in 2005 and the number issued in 2009; and a comparison of housing price indices for the Miami and Tampa regions from 2006 through January 2010 against a nationwide index. *Id.* These data and Morrell's resultant opinion were not sufficiently connected to the facts in issue in this case to meaningfully assist the trier of fact. *See Boca Raton Comty. Hosp., Inc. v. Tenet Healthcare Corp.,* 582 F.3d 1227, 1233–34 (11th Cir.2009). The Court, thus, committed no error in excluding Morrell's proposed testimony.

b. *Michael Keable*

Defendants argue that the exclusion of the proposed expert testimony of Michael Keable was erroneous and warrants a new trial. Defendants offered Keable as an expert on loss causation and damages to counter Preston's testimony. Prior to trial, the Court determined that the bulk of Keable's opinions were inadmissible because they were insufficiently supported or explained and were not helpful to the trier of fact in deciding a question in issue. (*See* D.E. 460.) However, the Court ruled that Keable could offer at trial his "opinion regarding the false sense of precision in Preston's calculation of a $0.37 residual decline on April 26, 2007 attributable to negative information regarding the BLB loans." (D.E.460, p. 8.) Nonetheless, Defendants elected not to call Keable to testify at trial.

In their Motion for New Trial, Defendants raise no new arguments regarding the admissibility of Keable's testimony but argue that the Court's rulings on Keable's testimony "affected Defendants' substantial rights by eliminating their most direct answer to Candace Preston's damages analysis and exposing them to the argument made in closing that Alan Levan could not provide testimony to rebut her analysis because he was not an independent, third party expert." (D.E.666, p. 27.) To the extent that Defendants' argument addresses parts of Keable's testimony previously deemed inadmissible, the Court incorporates its earlier rulings. And insofar as Defendants chose not to present Keable's admissible testimony, any prejudice they suffered as a result is wholly self-inflicted and does not warrant a new trial.

(2) *Evidence of Other Banks' Disclosures*
Defendants argue that the Court erroneously excluded evidence and testimony that "few, if any, of the institutions included in the NASDAQ Bank Index made the sort of disclosure that Plaintiffs claimed should have been made here." (D.E.666, p. 27.) Specifically, Defendants sought to introduce evidence that other banks did not disclose the number or amounts of loans on internal watch lists or those rated special mention or substandard. The Court previously articulated its reasons for excluding such testimony at some length, both from the bench and in a written order. (*See* Tr. 3631–33; D.E. 527.) The Court incorporates those rulings here.

***27** In sum, the Court excluded such evidence because of its limited probative value and its potential to confuse the Jury. Plaintiffs did not claim that Defendants had an independent duty to disclose loans on internal watch lists; rather, they contended that Bancorp intentionally misrepresented the true quality and performance of its land loans, as reflected in the volume of land loans downgraded to special mention or substandard risk grades. Accordingly, evidence of what other banks disclosed would be irrelevant in the absence of a full presentation to the Jury of the types of loans made by those banks, how the loans were performing, and what representations those banks made regarding those assets, which would have required no less than a trial within a trial regarding the practices of unrelated banking institutions. The Court rightly excluded such evidence in light of its potential to confuse and mislead the jury. *See* Fed.R.Evid. 401 & 403.

Moreover, the evidence and testimony Defendants sought to introduce on this subject was incompetent. Defendants failed to lay a proper foundation for the testimony of any BankAtlantic employee who could have testified to a "consensus" among financial institutions regarding disclosure requirements. (*See* D.E. 526–3 & 527.) And Defendants sought to introduce a letter concerning regulatory disclosure requirements issued years after the end of the class period. (*See* D.E. 474, pp. 15–16 & Tr. 3631–33.) The Court committed no error in excluding this evidence.

(3) *Perry Alexander Emails*
Defendants argue that the Court erroneously allowed the introduction of statements contained in eight email exchanges sent by a BankAtlantic employee, Perry Alexander, and that the admission of such evidence warrants a new trial. Defendants contend that the statements were inadmissible hearsay and Plaintiffs did not meet their burden of showing that they fell within an exclusion or exception to the general rule against hearsay.[FN38]

FN38. Defendants do not articulate their objections to specific emails in their Motion for New Trial nor do they specify the basis for their objection;

rather, they incorporate by reference the arguments they raised in a pretrial Motion *In Limine* to exclude the emails of Alexander. In that Motion, Defendants argued that the emails were neither business records excepted from the hearsay rule under Federal Rule of Evidence 803(6) nor admissions by a party-opponent under Federal Rule of Evidence 803(d)(2)(D). (D.E.298.) The Court denied the Motion without prejudice, as it failed to indicate which of Alexander's emails were the subject of the Motion. (D.E.457.)

Hearsay evidence is generally inadmissible, except as provided by the Federal Rules of Evidence. Fed.R.Evid. 802. Rule 801(d) excludes several categories of statements from the definition of hearsay. A statement is not hearsay if it is offered against a party and is a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship. Fed.R.Evid. 801(d)(2)(D). Whether a statement falls under Rule 801(d)(2)(D) depends not on whether the statement was made in the scope of the declarant's agency or employment but on whether the statement concerns matters within the scope of the agency or employment. *Wilkinson v. Carnival Cruise Lines,* 920 F.2d 1560, 1565 (11th Cir.1991).

The statements in question were admissible against Bancorp as admissions by a party-opponent. Alexander's statements concerned the credit quality and performance of various land loans coming before BankAtlantic's Major Loan Committee for approval, review, or modification. Alexander was employed as a loan officer and market manager for BankAtlantic from 1995 through 2008 and served on the committee from the second quarter of 2004 through June 2007. (Tr. 1389–90, 1395 & 3525–26.) His position as a member of that committee required him to review the details of the loans that came before it for approval or modification. (Tr. 1396–1400.) Alexander's service on the committee covered the period when many of the land loans in question were first approved and the period when the committee approved extensions and term modifications of many of those loans. His contemporaneous comments on the performance of those land loans as well as the processes by which they were approved and reviewed, thus, concerned matters within the scope of his employment. *See Wilkinson,* 920 F.2d at 1565–66.

***28** Though Alexander was employed by BankAtlantic rather than Bancorp, the statements in the subject emails were nonetheless admissible against Bancorp. Statements made by employees of a subsidiary may be attributed to its corporate parent when the parent dominates the activities of the subsidiary. *Big Apple BMW, Inc. v. BMW of N. Am.,* 974 F.2d 1358, 1372 (3d Cir.1992). There was no dispute before or during trial that BankAtlantic is the wholly owned subsidiary of Bancorp and that Bancorp is a holding company, the primary asset of which is BankAtlantic. (*See* DX 3, pp. 1 & 7–8.) And Plaintiffs laid a sufficient foundation for the Court to find that Bancorp dominates BankAtlantic's activities.[FN39] (D.E.358.)

FN39. Though the statements in issue may only have been admissible against Bancorp and not against the individual Defendants, no Defendant requested a limiting instruction from the Court to that effect.

Defendants contend that Alexander's emails include "profanity, slang, gossip, and every other indication of unreliability imaginable." (D.E.666, p. 29.) The admissibility of statements by party-opponents as non-hearsay under Rule 801(d)(2) is the product of the adversary system, rather than the satisfaction of the conditions of the hearsay rule, such as the reliability of the statement. Fed.R.Evid. 801(d)(2)(D) advisory committee's note. Thus, no guarantee of trustworthiness is required in the case of an admission. *Id.* That Alexander's out-of-court statements may have included profanity and slang does not affect their admissibility under Rule 801(d)(2)(D).

Defendants' arguments that the statements should have been excluded as irrelevant and unduly prejudicial also fail. Alexander's statements concerned the underwriting, credit quality, and deterioration of land loans in BankAtlantic's portfolio, matters relevant to the Jury's determination of whether the alleged misstatements constituted material misrepresentations. And though he used colorful and sometimes profane language in expressing his observations and opinions, his manner of expression did not render the statements unduly prejudicial or confusing to the Jury. *See* Fed.R.Evid. 403. In any event, the Court required the redaction of several of Alexander's email exchanges to prevent the introduction of irrelevant and prejudicial material. (*See* Tr. 1376–85.)

Finally, even were Alexander's statements improperly admitted, Defendants fail to demonstrate that they are entitled to a new trial on this basis. Plaintiffs presented sufficient evidence, independent of Alexander's emails, for the Jury to find Alan Levan (and therefore Bancorp) liable for violating Rule 10b–5 with respect to Statement 10. The introduction of Alexander's statements was, thus, not vital to Plaintiffs' case and any error in admitting the statements was harmless. *Cf. Wilkinson,* 920 F.3d at 1564.

C. *Jury Instructions*

Defendants argue that the Court's failure to give several of their requested jury instructions constituted prejudicial error warranting a new trial. Specifically, Defendants argue that the Court should have submitted to the Jury a special interrogatory regarding Preston's assumptions and that the Court improperly instructed the Jury on: causation in a collapsing market; corrective disclosure and length of inflation; disaggregation and damages; and, the claimed amount of damages.

***29** The failure of a court to give a requested instruction is error only if the requested instruction is correct, is not adequately covered by the charge given, and deals with a point so important that the failure to give the instruction seriously impaired the defendant's ability to present an effective defense. *See Adams v. Sewell,* 946 F.2d 757, 767 (11th Cir.1991). A litigant is entitled to have the jury instructed on its theory of the case, so long as there was competent evidence to support the theory and the instruction is properly requested. *Ad–Vantage Tel. Directory Consultants v. GTE Directories Corp.,* 849 F.2d 1336, 1349 (11th Cir.1987). However, the Court need not give the requested instruction in the exact language requested. *Id.*

If the jury charge, as a whole, correctly instructs the jury on the law, no reversible error has been committed, even if a portion of the charge is technically imperfect. *Miller v. Universal City Studios, Inc.,* 650 F.2d 1365, 1372 (5th Cir. Jul.23, 1981). So long as the instructions accurately reflect the law, the court has wide discretion as to the style and wording. *Bateman v. Mnemonics, Inc.,* 79 F.3d 1532, 1543 (11th Cir.1996).

(1) *Preston's Assumptions*

Defendants argue that the Court should have submitted to the Jury a question as to whether Plaintiffs proved by a preponderance of the evidence the factual assumptions on which Preston premised her testimony. Defendants provide no legal support for the proposition that a jury must ratify an expert's assumptions via special findings in order to consider that expert's testimony. FN40

> FN40. The only legal support Defendants cite in their Motion is *Brooke Grp.,* 509 U.S. 209, 113 S.Ct. 2578, 125 L.Ed.2d 168, which has no bearing on the issue.

(2) *Causation in a Collapsing Market*

Defendants contend that the Court's instruction to the jury on corrective disclosures and materialization of the risk failed to make clear that "Defendants' argument was that the collapsing Florida real estate market severed the causal link." (D.E.666, p. 10.) Defendants' proposed instruction read, in relevant part:

> ... if the loss coincides with a market-wide phenomenon causing comparable losses to other investors, the prospect that the Plaintiffs' loss was caused by the alleged fraud decreases. Plaintiffs must prove that its loss was caused by the alleged fraud as opposed to intervening events.

(D.E.627.) The Court did not give Defendants' proposed instruction, but its instruction on corrective disclosures and materialization of the risk stated the following:

> Defendants contend that the Plaintiffs' losses were solely due to deteriorating conditions in the Florida real estate market, about which investors were forewarned. Defendants do not have the burden of proving this contention by a preponderance of the evidence; rather, it is Plaintiffs' burden, as stated above, to prove that the corrective disclosures and/or materialization of concealed risks, and not other factors, were significant contributing causes of their damages.

(D.E.635, pp. 21–22.) The Court's instructions adequately covered the law and Defendants' argument on causation in a collapsing market. *See Adams,* 946 F.2d at 767.

(3) *Corrective Disclosure & Length of Inflation*

***30** Defendants contend that the Court's failure to give their requested instruction titled "Corrective Disclosure and Length of Inflation" warrants a new trial. Defendants' proposed instruction included the following:

> If you find by a preponderance of the evidence that an alleged misrepresentation or omission artificially inflated the price of BankAtlantic Bancorp stock, you will also have to determine the length of time during which the inflation existed. To make this determination, you must decide the date on which information curing or correcting the alleged misrepresentation or omission was publicly announced or otherwise effectively disseminated to the market. Dissemination of the allegedly withheld or misrepresented information through a public announcement, a press release, or a press report will correct the previous misrepresentation or omission and terminate the period during which purchasers can seek to hold Defendants liable under the securities laws for the misrepresentation or omission. At that point, subsequent purchasers are charged with knowledge of the true state of affairs and the stock's market price is presumed to reflect its true value.

> (D.E.593–1, p. 14.)

The legal principle embedded in Defendants' requested instruction was sufficiently covered in the Court's instruction on corrective disclosures and the materialization of the risk. The Court instructed the Jury, in relevant part, that "Plaintiffs must prove by a preponderance of the evidence that a corrective disclosure or materialization of the concealed risk revealed the truth concealed by the misrepresentation or omission to the market *for the first time."* (D.E.635, p. 20) (emphasis added). The instruction further informed the jury that the alleged revelations of the truth occurred on April 25 and 26, 2007 and October 25 and 26, 2007. (D.E.635, pp. 20–21.)

The Court's instruction accurately and adequately advised the Jury that, if they found the Company revealed the truth concealed in the alleged misrepresentations prior to dates of the alleged revelations, they could not find that the misrepresentations caused the share price declines on April 26, 2007 and October 25, 2007. The Court, thus, committed no error in refusing to give the instruction in the language Defendants requested. *See Adams,* 946 F.2d at 767.

(4) *Disaggregation & Damages*

Defendants argue that the Court failed to make clear in its instructions that the Jury "needed to disaggregate non-fraud factors from any supposed loss...." (D.E.666, p. 12.) During the charge conference, Defendants proposed the following instruction to be added "to the end of the Court's proposed instructions":

> Defendants contend that the stock price declines that occurred were not caused as a result of any alleged misrepresentations or omissions, but were, instead, caused by deteriorating conditions in the Florida real estate market about which investors were forewarned. Any award of damages must subtract from the price declines the losses caused by such factors, and Plaintiffs carry the burden of proof to eliminate from their damage claim losses cause by non-fraud factors.

***31** (D.E.628.)

The first sentence of Defendants' requested instruction pertains more specifically to loss causation than to damages. And, in fact, this sentence was included almost verbatim in the Court's instruction to the Jury on loss causation. (D.E.635, p. 21.) The second part of the requested instruction relates to damages. The Court's instruction to the Jury on damages read, in pertinent part:

> There may be factors other than the alleged fraudulent statements and/or omissions that affected Bancorp's stock price on any given day. For example, market or industry conditions or bad news disclosed by Bancorp that was unrelated to the alleged fraud could have affected Bancorp's stock price. Defendants are not liable for any share price decline resulting from those other non-fraud related events. Plaintiffs bear the burden of disaggregating (or separating out) any share price declines that were caused by non-fraud related events or establishing that the entire share price decline was caused by the alleged fraud.
>
> Plaintiffs claim that the alleged fraud caused damages in the amount of 37 cents per share on April 26, 2007. Plaintiffs also claim that the alleged fraud caused damages in the amount of $2.93 per share on October 26, 2007.
>
> Defendants claim that Plaintiffs have failed to separate out price declines caused by market conditions, the conditions of the real estate market, and other conditions not related to the alleged fraud.
>
> (D.E.635, pp. 23–24.)

In line with the Defendants' requested instruction and the applicable law, the Court explicitly instructed the Jury that Plaintiffs could only recover damages actually caused by the misrepresentations and not by non-fraud related events. The instruction also placed the burden squarely on Plaintiffs to disaggregate from Bancorp's share price decline on the days in question the effect of any non-fraud events. And the Court informed the Jury of Defendants' theory, namely that Plaintiffs failed to disaggregate from the price decline the effect of market conditions. The Court committed no error in substituting language substantially equivalent to Defendants' proposed instruction. *See Adams,* 946 F.2d at 767.

(5) *$2.93 Damage Instruction*

Defendants argue that the Court's instruction that the Plaintiffs were seeking $2.93 per share in damages warrants a new trial.FN41 Defendants correctly point out that Plaintiffs' damages expert testified that, in her opinion, Bancorp stock was artificially inflated by $3.15 in the second part of the class period. Defendants contend that the Court's instruction on Plaintiffs' claimed damages, by not holding them to the $3.15 figure presented by Preston, relieved Plaintiffs of the burden of disaggregating non-fraud factors from their damages claim. Defendants argue that the $2.93 figure was based on speculation and conjecture and amounted to an unsupportable basis for a jury verdict.

> FN41. The Court instructed the Jury in relevant part: “Plaintiffs claim that the alleged fraud caused damages in the amount of $2.93 per share on October 26, 2007.” (D.E.635, p. 24.)

The Court's instruction on Plaintiffs' damages claim was not error. The $2.93 instruction was merely a recognition that, under the Exchange Act, damages in a securities fraud case are limited to those actually caused by the misrepresentation. *See* § 78bb; *Robbins,* 116 F.3d at 1447 n. 5. Expectation damages are generally not available to a prevailing plaintiff. Though Bancorp's residual decline on October 26, 2007 was, according to Plaintiffs' expert, $3.15 per share, all of which was caused by the revelation of the alleged fraud, the actual decline was $2.93. (Tr. 2596.) Plaintiffs were thus limited to that amount of per-share damages. The Court's instruction as to the amount Plaintiffs claimed in damages was not error.

D. ***Instruction on the Falsity of Alan Levan's Statements***

***32** Defendants argue that the Court committed prejudicial error by instructing the Jury on its pretrial ruling that four statements made by Alan Levan in the July 25, 2007 conference call were false. Defendants argue that the Court erred in its pretrial ruling, that the subject statements were protected by the Reform Act's safe harbor, and that the question of liability regarding those statements should not have been submitted to the Jury because Plaintiffs failed to prove scienter, loss causation and damages with respect to the statements. Accordingly, Defendants argue that the Court erred in instructing the Jury as to its finding and that such error warrants a new trial.

(1) *Summary Judgment: Falsity*

Defendants argue that the Court erred in granting Plaintiffs'

Motion for Partial Summary Judgment, and, accordingly, its instruction to the Jury on that ruling was prejudicial error. Prior to trial, Plaintiffs moved for partial summary judgment as to the falsity of four statements Alan Levan made during the July 25, 2007 earnings conference call discussing Bancorp's second-quarter 2007 financial results.FN42 The exchange that produced those statements proceeded as follows:

> FN42. Plaintiffs' motion had an extremely narrow focus. They stated:
>
> > As noted above, to establish Defendants' liability under Section 10(b) and Rule 10b–5, Plaintiffs must prove that Defendants issued: “(1) a misstatement or omission, (2) of a material fact, (3) made with scienter, (4) on which plaintiff relied, (5) that proximately caused his injury.” *Ziemba v. Cascade Int'l, Inc.,* 256 F.3d 1194,

> 1202 (11th Cir.2002).... Plaintiffs seek partial summary judgment only as to the first element—falsity—of Levan's July 25, 2007 earnings call statements.
>
> (D.E.237.)

[ANALYST]: [I]s the $135 million in the land loans that you guys are concerned about, are there other portfolios (unintelligible) focus you on the construction portfolio that you feel there might be some risk down the road as well.

ALAN LEVAN: **There are no asset classes that we are concerned about in the portfolio as an asset class.** You know, we've reported all of the delinquencies that we have, which actually I don't think there are any other than the ones that we've, you know, that we've just reported to you.

So, the portfolio has always performed extremely well, continues to perform extremely well. And that's not to say that, you know, from time to time there aren't some issues as there always have, even though we've never taken losses in that—we've not taken—I won't say ever taken any losses, because that's probably never going to be a correct statement, **but that portfolio has performed extremely well.**

The one category that we just are focused on is this land loan builder portfolio because, you know, just from one day to the next, the entire homebuilding industry, you know, went into a state of flux and turmoil and is impacting that particular class. But to our knowledge and in—just thinking through, there are no particular asset classes that we're concerned about other than that one class.

(D.E.338–20, pp. 22–23) (emphasis in original.) Plaintiffs argued that no genuine issue of fact existed as to the falsity of the four highlighted statements, and the Court granted summary judgment in their favor on that narrow issue.[FN43] (*See* D.E. 411.)

> FN43. These four statements were listed as Statements 13 through 16 on the verdict form.

The Court did not err in granting summary judgment on this issue. As discussed above, to prevail on a Rule 10b–5 claim, a plaintiff must show that a statement was false or misleading. *Basic Inc.,* 485 U.S. at 238. For a statement to be an actionable misrepresentation, it must be of a definite factual nature. *See Va. Bankshares,* 501 U.S. at 1095. Statements of opinion or belief can be actionable misrepresentations if the plaintiff shows that the speaker falsely stated his belief and shows the factual justification for the statement to be false. *Id.* at 1092. Though Plaintiffs alleged that four separate statements by Alan Levan on July 25, 2007 were false, the Court examined the statements in two categories because of the near identity of the statements. Specifically, the Court assessed the falsity of Alan Levan's statements that the portfolio had always performed and continued to perform extremely well and his statements that he was not concerned with any class of assets in the construction loan portfolio other than the BLB loans.

***33** As to the first category, Plaintiffs presented undisputed evidence of the falsity of Alan Levan's statement that the land loans other than the BLB loans had been and were performing extremely well.[FN44] First, within BankAtlantic, Alan Levan had undisputedly expressed that the land loan portfolio as a whole, including the non-BLB loans, was not performing extremely well, thus demonstrating the falsity of his public assessment regarding their performance. (D.E.338–19.)

FN44. Defendants argued in their Motion for Reconsideration and again in their Motion for New Trial that when Alan Levan stated in the July 25, 2007 conference call that the other loans in the portfolio were "performing extremely well," he was actually using a banking term of art, referring to loans that are "performing" as opposed to "non-performing," which is akin to non-accrual status. (D.E. 471, p. 6; D.E. 666, pp. 20–21.) However, at summary judgment (and even in connection with their Motion for Reconsideration), Defendants presented no evidence in support of this argument, let alone evidence that raised a genuine issue of material fact.

Moreover, Plaintiffs presented undisputed evidence of the falsity of the justification for Alan Levan's statements. His internal assessment of the poor performance of the BLB and non-BLB loans was based on the many requested extensions of those loans' maturity dates to the Major Loan Committee, indicating poor performance and possible repayment problems. (D.E.338–14, 15, 16, 17, 18, 83, 84, 104.) Also, by July 25, 2007, two non-BLB loans and one BLB loan were on non-accrual status; four more non-BLB and one more BLB loan had been downgraded to risk grade 11, indicating that the "asset [was] inadequately protected by the current sound worth and paying capacity of the obligor or collateral pledged"; and six more non-BLB and four more BLB loans had been downgraded to risk grade 10, indicating that they had "potential weaknesses.... If left uncorrected, these potential weaknesses may result in the deterioration of the repayment prospects for the asset...." (D.E. 338–27 & D.E. 338–2, p. 5669.) Defendants presented no evidence that raised a genuine issue of fact as to the whether the land loans in the portfolio apart from the BLB loans had been and were continuing to perform extremely well as of July 25, 2007.

As to the second category of statements, Plaintiffs presented undisputed evidence that Alan Levan's professed concern with the BLB portion of the construction portfolio, to the exclusion of the balance of the land loan portfolio, was false. First, they presented undisputed evidence that Alan Levan was concerned with the entire land loan portfolio, because he had expressed undifferentiated concern with the performance of the land loan portfolio in its entirety, including both BLB and non-BLB loans, prior to the July 25, 2007 conference call. (*See* D.E. 338–5 & 338–19.)

Plaintiffs also presented undisputed evidence of the falsity of the factual justification for such statements. Alan Levan stated during the conference call that his concern with the performance of the BLB loans was due to the effects of turmoil and flux in the homebuilding industry. (D.E.338–20, p. 23.) However, turmoil in the homebuilding industry was having the same effect on all the loans in the land loan portfolio, as evidenced by the negative performance trends and deterioration identified above, which were spread throughout the BLB and non-BLB portions of the land loan portfolio.

In response, Defendants argued that the statements in issue were not material and that they were subject to the protections of the Reform Act's safe harbor, neither of which were in issue in Plaintiffs' motion. As to falsity, Defendants argued that the BLB loans were subject to higher levels of risk than the other land loans and that, months after the July 2007 statements, the BLB loans ultimately suffered greater losses than the non-BLB land loans. These arguments, and the evidence offered in support thereof, failed to meet and rebut Plaintiffs' arguments that the statements were false. That the BLB loans were, perhaps, ex-posed to greater risk than the non-BLB loans did not raise a genuine issue of fact as to whether Alan Levan was, in fact, concerned with the poor performance of all the land loans. Likewise, the higher losses caused by the BLB loans in the third quarter of 2007 failed to raise a genuine issue of fact as to whether the non-BLB loans were performing poorly and causing concern as of July 2007.

***34** In their Motion for Reconsideration, Defendants argued that the four statements were statements of opinion and Plaintiffs, thus, should have and failed to adduce evidence that Alan Levan knew his statements were false. In denying the motion, the Court noted that Alan Levan's state of mind was not relevant to the inquiry, in that whether he acted with scienter was a separate inquiry left to the Jury. The Court also noted that, though the statements contained an evaluative component, they were not statements of pure opinion, but rather were tethered to objective factual justifications. Insofar as these were statements of belief, the falsity of his belief—though not his intent to deceive-was relevant to the falsity inquiry. *See Va. Bankshares,* 501 U.S. at 1092–96. And because, as discussed above, Plaintiffs had presented undisputed evidence to meet that requirement, in the form of emails by Alan Levan expressing his concern with the poor performance of the entire land loan portfolio, Defendants' argument did not warrant reconsideration.

For these reasons, as well as the additional reasons set forth in the Omnibus Order and Order on Reconsideration, the Court did not err in granting summary judgment to Plaintiffs on the narrow issue of the falsity of these statements. Plaintiffs were entitled to the benefit of the Court's ruling and an appropriate instruction to the Jury, as discussed below.

(2) *Safe Harbor*

Defendants argue that the four statements that were the subject of the Court's partial summary judgment for Plaintiffs were protected by the Reform Act's safe harbor and, thus should not have been submitted for the Jury's consideration. They further argue that, because the statements were immunized by the safe harbor, the Court's instruction on its partial summary judgment finding was unduly prejudicial.

Section 27A of the Reform Act provides a safe harbor from Rule 10b–5 liability for certain forward-looking statements. § 78u–5(c)(1). Corporations and individuals may avoid liability under Rule 10b–5 for forward-looking statements that are "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." § 78u–5(c)(1)(A)(I). Forward-looking statements include projections of revenues, income, or other financial items; statements of the plans and objectives of management for future operations; statements of future economic performance; or, any statement of the assumptions underlying or relating to such statements. § 78u–5(i)(1).

Defendants argue that the statements in issue were forward-looking statements. They contend that Alan Levan's answer to the analyst's question was, on the whole, forward-looking, and all statements of historical fact included in his answer also fall within the safe harbor as "assumptions underlying forward-looking statements." (D.E.666, p. 19.) Defendants broadly assert that "[s]tatements that include both forward-looking and factual factors must be treated as forward-looking." *Id.*

***35** Defendants' contention that the safe harbor applies to all statements which include both forward-looking and non-forward-looking components misinterprets the law in this circuit. In *Harris v. Ivax,* 182 F.3d 799 (11th Cir.1999), the Eleventh Circuit assessed the applicability of the safe harbor to a variety of allegedly false and misleading statements made by an issuing corporation. One of the allegedly misleading statements was a list of factors that the company stated "will influence [its] third quarter results." *Id.* at 805. The plaintiffs alleged that the list was misleading in that it did not include the possibility of a goodwill writedown, a circumstance which eventually came to pass and allegedly caused the company's stock price to plummet. The district court ruled that the list was entitled to the protection of the safe harbor.

The Eleventh Circuit affirmed the district court, holding that the list was a "mixed bag," including some sentences that were forward looking and some that were not, but concluding that the list, in its entirety, was to be treated as a forward-looking statement. *Id.* at 806. The court held that "when the factors underlying a projection or economic forecast include both assumptions and statements of known fact, and a plaintiff alleges that a material factor is missing, the entire list of factors is treated as a forward-looking statement." *Id.* at 807. The *Harris* court, however, made clear that its holding pertained only to alleged omissions of material risk factors. *Id.* (noting that "treating mixed lists as forward-looking may open a loophole for *misleading omissions"*) (emphasis added). The court further clarified that, "of course, if any of the individual sentences describing known facts ... were allegedly false, we could easily conclude that the smaller, non-forward-looking statement falls outside the safe harbor." *Id.* at 806.

Plaintiffs allege that the statements in issue were affirmative misrepresentations, not that Alan Levan's answer to the analyst's question was, on the whole, misleading because it omitted a material piece of information. (*See* D.E. 237.) Accordingly, each allegedly false statement must be evaluated to determine whether it is forward looking. *See Harris,* 182 F.3d at 806.

None of the four statements in issue was forward looking. In two of the subject statements, Alan Levan stated that Bancorp was not concerned with any class of loans in the construction portfolio other than the BLB loans. (DX 8, pp. 20–21.) These statements are assertions regarding the absence of *known* risk in the balance of the construction portfolio apart from the BLB portion. Statements regarding the *known* risk of an investment based upon observed facts, the truth of which are discernable at the time they are made, are not forward looking though they touch upon the future. *See Harris,* 182 F.3d at 805–06. The concept of risk touches upon the future, but whether management *knows* of a certain risk at a given time is ascertainable at that time.

***36** The other two statements concern the past and present performance of the construction portfolio; Alan Levan stated that the portfolio had always performed extremely well and "continues to perform extremely well." (DX 8, p. 20.) These statements, too, are expressions of observed facts, rather than assumptions or any kind of prediction. *See Harris,* 182 F.3d at 806. And the truth of these statements was also discernable at the time the they were made. Accordingly, these statements do not fall under the protection of the Reform Act's safe harbor.

(3) *Scienter*

Defendants argue that Plaintiffs failed to satisfy their burden of proof as to whether Alan Levan acted with scienter in making the four statements in issue. Accordingly, these statements could not support a finding of liability and should not have been submitted to the Jury.

To prove scienter, a plaintiff must show that the defendant made the alleged misrepresentations with "a mental state embracing intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 193, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). It is not enough for plaintiffs to prove that the defendant acted negligently. *Id.* at 214. A plaintiff must prove either that the defendant acted with the "intent to deceive, manipulate, or defraud," or that he acted with "severe recklessness." *Bryant v. Avado Brands, Inc.,* 187 F.3d 1271, 1284 (11th Cir.1999). Severe recklessness is

> limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that defendant must have been aware of it.

Id. at 1282 n. 18. Due to the difficulty of proving a defendant's state of mind in fraud cases, circumstantial evidence of scienter may be sufficient to support the inference that he acted with the requisite intent. *See Herman & MacLean v. Huddleston,* 459 U.S. 375, 391 n. 30, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983).

Though Defendants contend that Plaintiffs "failed to satisfy their burden of showing scienter" with respect to these statements, that question was for the Jury to resolve, because Plaintiffs presented sufficient evidence to support a finding of scienter. For example, Plaintiffs presented evidence that Alan Levan was aware of the significant deterioration of the land loan portfolio—including the non-BLB loans—before the July 2007 conference call, but chose to disclose only the issues with the BLB segment of the portfolio. Alan Levan also acknowledged the importance of investor conference calls as an opportunity for analysts to get information directly from management. (Tr. 3312.) Defendants' contention that the Court's instruction on the falsity of the July 25, 2007 statements was in error because of a failure of proof as to scienter, thus, fails.

(4) *Loss Causation and Damages*

***37** Defendants argue that Plaintiffs failed to present evidence linking Statements 13 through 16 to a loss. Because Plaintiffs failed to prove loss causation and damages with respect to these statements, they should not have been submitted for consideration to the Jury and the Court's instruction regarding their falsity was prejudicial error.

As discussed above, the Court finds that there was insufficient evidence to support the Jury's finding of loss causation and damages with respect to Statement 10. And though the Jury's damages finding was connected only with Statement 10, the Court further clarified that the loss causation problems with Statement 10 similarly afflict Statements 13 through 16. Thus, should the Court of Appeals reverse the Court's ruling on the sufficiency of the evidence of loss causation and damages as to Statement 10, the same conclusion would follow with respect to Statements 13 through 16. And, accordingly, Defendants would not be entitled to a new trial on this basis.

(5) *Prejudice of Court's Instruction*

Defendants argue that the Court's instruction to the Jury on its partial summary judgment ruling for Plaintiffs prejudiced the Jury such that it could not independently assess other questions of liability. The Court disagrees.

First, the Court precluded disclosure of the pretrial ruling until closing argument. (Tr. 123–26.) Though Plaintiffs mentioned the Court's ruling in connection with the four subject statements, it was not a prominent feature of their closing argument and they made no argument or implication that the Jury should draw inferences as to any other issues from the ruling. (*See* Tr. 4061, 4102–04 & 4255.) Then, the Court read to the Jury, as part of its final instructions, a carefully constructed paragraph explaining the limited nature of the pretrial ruling. The instruction to the Jury on this point read:

> Prior to trial, the Court also made a narrow ruling that four statements made by Alan Levan during a July 25, 2007 conference call were objectively misleading or false. You must also accept that these statements were, in fact, misleading or false. However, the Court has not made any determination regarding whether those statements were material, whether they were made with scienter, or whether they caused Bancorp's share price to decline. The Plaintiffs still must prove, and you will need to decide, the remaining elements of their claims with respect to these statements.
>
> These statements are entries 13, 14, 15, and 16 on the Table that is attached to the Verdict Form.
>
> (D.E.635, p. 30.)

There is no indication that Defendants suffered undue prejudice as a result of this instruction. The Court clearly instructed the Jury on the narrowness of its ruling, and the Court presumes the Jury followed its instructions as to this and every other matter. *See Johnson v. Breeden,* 280 F.3d 1308, 1319 (11th Cir.2002). Indeed, the Jury's findings strongly indicate that this presumption is correct. For example, the Jury found no § 10(b) violation as to Statements 8, 9, and 18, all attributed to Alan Levan. (D.E.665.) So it cannot be said that the instruction prejudiced the Jury against Alan Levan.[FN45]

> FN45. In fact, as explained above, the Jury found for Defendants on the majority of the issues.

***38** Further, the Jury's findings regarding Statements 13 through 16 are essentially superfluous to the conditional judgment. As discussed above, the award of damages in the amount of $2.41 per share is tied to Statement 10. A finding of no § 10(b) violation as to Statements 13 through 16 would not have affected the conditional judgment.[FN46]

> FN46. By the same token, there would be no prejudice to Defendants even if the Plaintiffs' Motion for Partial Summary Judgment was wrongly decided. Nevertheless, the ruling on Plaintiffs' Motion for Partial Summary Judgment was extremely narrow and, as set forth above, was warranted based on the parties' briefing of the motion and supporting evidence.

For the reasons stated above, in the event the Court's ruling on Defendants' Motion for Judgment as a Matter of Law is vacated or reversed, Defendants should not be entitled to a new trial.

V. Conclusion

Accordingly, it is

ORDERED AND ADJUDGED that Defendants' Motion for Judgement as a Matter of Law (D.E.669) is GRANTED. The Court will separately enter its Final Judgment in accordance with this Order and the Jury's Verdict. It is further

ORDERED AND ADJUDGED that Defendants' Motion for a New Trial (D.E.666) is CONDITIONALLY DENIED. It is further

ORDERED AND ADJUDGED that all pending motions are DENIED AS MOOT. It is further

ORDERED AND ADJUDGED that, in order for the Court to undertake its mandatory review of the record to determine whether sanctions for abusive litigation are appropriate under Federal Rule of Civil Procedure 11, the parties shall file their respective motions for sanctions, if any, within ten days hereof. The opposing party shall respond within ten days thereafter. Any replies shall be filed no later than five days after the filing of a response.

DONE AND ORDERED.

S.D.Fla.,2011.
In re BankAtlantic Bancorp, Inc.
Not Reported in F.Supp.2d, 2011 WL 1585605 (S.D.Fla.)

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
In re BISYS SECURITIES LITIGATION.

No. 04 Civ. 3840(JSR).
July 16, 2007.

MEMORANDUM ORDER
JED S. RAKOFF, U.S.D.J.

***1** At a hearing held on January 18, 2007, the parties in the above-captioned consolidated action moved for final certification of a class for settlement purposes and final approval of the class settlement and plan of allocation. In advance of the same hearing, the two law firms who served as co-counsel for the lead plaintiffs jointly applied to the Court for attorneys' fees in the amount of 30% of the $65,870,000 settlement (amounting to a request for $19,762.500 plus interest) and for a reimbursement of litigation expenses in the amount of $798,880.33, a figure subsequently reduced to $516,686.69 in a letter dated January 19, 2007.

No objection whatsoever has been made, orally or in writing, to the class certification or to the term of the settlement. Moreover, after careful review, and for the reasons stated from the bench, *see* transcript, 1/18/07, the Court finds the class arrangement, class, and plan of allocation, to be fair, reasonable, and adequate in all respects and fully consistent with the strictures of due process and Fed R. Civ. P. 23(a)(3) and 23(b)(3). Accordingly, they are all approved.

Regarding attorneys' fees, an objection was submitted by William Zorn, Esq., which raises several issues that warrant discussion.

First, Zorn contends that the Notice of Class Action Settlement ("Notice") did not provide the class with notice of attorneys' fees sufficient to comply with Rule 23(h), which requires that notice of a motion for fees be "directed to class members in a reasonable manner." Fed.R.Civ.P. 23(h). Specifically, the Notice did not specify the precise amount of attorneys' fees that lead counsel sought, but stated instead that counsel intended to "apply to the Court to award attorneys fees ... in an amount not greater than one-third (33%) of the settlement fund and for reimbursement of their expenses." The actual application for fees was not filed until after the deadline for objections had elapsed. As a result, no class member was on notice of the actual attorneys' fees requested at the time objections were due.

Nonetheless, members of the class were plainly on notice that the attorneys' fees might be as much as one-third of the fund and so had every reason to raise an objection if they thought this was excessive. While it might have been a better practice to provide them with more information relevant to evaluation of this request, not a single class member other than Zorn raised any objection-even though the class included numerous institutional investors who presumably had the means, the motive, and the sophistication to raise objections if they thought the one-third maximum fee was excessive, or short of that, if they thought the information given them as to the fees was inadequate. This in itself is a strong indication that the information about attorneys' fees was presented in a "reasonable manner." Nor is such a manner of notification unusual in this context. *See, e.g., In Re Elec. Carbon Prods. Antitrust Litig.,* 447 F.Supp.2d 389, 411 (D.N.J.2006); *Allapattah Servs. v. Exxon Corp.,* 454 F.Supp.2d 1185, 1194 (S.D.Fla.2006); *Hicks v. Morgan Stanley & Co.,* 2005 U.S. Dist. LEXIS 24890, at *10; (S.D.N.Y.2005). Overall, in the context of this case, the Court finds that there has been adequate compliance with Rule 23(h).

***2** Zorn also objects to the amount of the fee itself, calling it "excessive," and, in any event, the Court has an independent obligation to examine the fee to see if it is reasonable. *See Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43, 47 (2d Cir.2000) ("[A]ttorneys whose efforts created the fund are entitled to a reasonable fee-set by the court-to be taken from the fund.") The question of whether a particular fee is reasonable must be guided by consideration of such factors as "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy." *See Goldberger,* 209 F.3d at 50(citation omitted). Moreover, a "key consideration required by the PSLRA [FN1] 'is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members.' " *See Masters v. Wilhelmina Model Agency, Inc.,* 473 F.3d 423, 438 (2d Cir.2007) (quoting Advisory Comm. Notes to Fed.R.Civ.P. 23, 2003 Amendments).

FN1. Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub.L. No. 104-67, 109 Stat. 737 (1995) (codified in pertinent part at 15 U.S.C. § 78u-4(a)(6)).

Consistent with these guidelines, a reasonable attorneys' fee may be calculated using either the percentage method or the lodestar method, though the recent trend in this Circuit has been to use the percentage method. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.,* 396 F.3d 96, 122 (2d Cir.2005) . The percentage method, "though not without flaws, is often preferable to the lodestar method to determine attorneys' fees in class actions because it reduces the incentive for counsel to drag the case out [and] fewer judicial resources will be spent in evaluating the fairness of the fee petition." *Hicks v. Morgan Stanley & Co.,* 2005 U.S. Dist. LEXIS 24890, at *23 (S.D.N.Y. October 24, 2005). The lodestar method remains highly useful, however, as a "cross-check" to further ensure reasonableness. *See Goldberger,* 209 F.3d at 50 ("[T]he lodestar remains useful as a baseline even if the percentage method is eventually chosen.").

As already noted, class counsel here requested a fee 30% of the fund, *i.e.* $19,762.500 plus interest. As a general matter, "[a] 30% fee [would be] consistent with fees awarded in ... class action settlements in the Second Circuit." *See Hicks,* 2005 U.S. Dist. LEXIS 24890, at *24-25 (collecting cases).

It is true that most such case have involved smaller settlement funds and therefore have not bestowed so large a sum, in absolute terms, on class counsel. "Obviously, it is not ten times as difficult to prepare, and try or settle a 10 million dollar case as it is to try a 1 million dollar case." *Goldberger,* 209 F.3d at 52 (quotation marks omitted). Consequently, in many cases "with recoveries of between

$ 50 [million] and $ 75 million, courts have traditionally accounted for these economies of scale by awarding fees in the lower range of about 11% to 19%." *Id.* (citing William J. Lynk, *The Courts and the Plaintiff's Bar: Awarding the Attorney's Fee in Class-Action Litigation,* 23 J. Legal Stud. 185, 202 (1994)).

***3** Nonetheless, in this Court's experience, relatively few cases have involved as high level of risk, as extensive discovery, and, most importantly, as positive a final result for the class members as that obtained in this case. "The quality of representation is best measured by results ... calculated by comparing 'the extent of possible recovery with the amount of actual verdict or settlement,' " *see Goldberger,* 209 F.3d at 55 (quoting *Lindy Bros. Builders, Inc. of Philadelphia v. Am. Radiator & Standard Sanitary Corp.,* 540 F.2d 102, 118 (3d Cir.1976)), and an all-cash settlement of over $65 million, plus interest, is a very significant amount for the class members here, who can expect to recover roughly one-third of their damages in the settlement. By contrast, the more typical recovery rate in class actions is between 5% and 6%. *See In re Rite Aid Corp. Secs. Litig,* 146 F.Supp.2d 706, 715 (E.D.Pa.2001).

The reasonableness of the 30% figure is also confirmed by the resultant lodestar multiplier of 2.99 (calculated by comparing the percentage fee to what the work would have cost if billed at a standard hourly rate FN2), which accurately reflects "the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors." *See In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 468 (S.D.N.Y.2004). Such a multiplier falls well within the parameters set in this district and elsewhere. *See Wal-Mart Stores,* 396 F.3d at 123 ("[T]he lodestar yields a multiplier of 3 .5, which has been deemed reasonable under analogous circumstances."); *see also Welch & Forbes, Inc. v. Cendant Corp. (In re Cendant Corp. Prides Litig.),* 243 F.3d 722, 742 (3d Cir.2001).

> FN2. Lead Counsel expended a total of 16,632 hours on this case (including the time of attorneys, paralegals, and law clerks), resulting in a lodestar of $6,599,020 (if the time had been billed at rates well within the norm in such cases). *See* Joint Declaration of Gene Cauley and Jeffrey H. Squire, Exhibit 4.

Counsel's request for a fee reimbursement in the amount of $516,686.69 for out-of-pocket expenses incurred in connection with this action, as modified, is also approved. *See In re Independent Energy Holdings PLC Securities Litigation,* 302 F.Supp.2d 180, 183 n. 3 (S.D.N.Y.2003) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients.") (internal quotation marks omitted).

In summary, the settlement and plan of allocation are hereby approved. Counsel is awarded attorneys' fees in the amount of 30% of the settlement amount, *i.e.,* $19,762,500 plus a corresponding share of interest accrued, and litigation expenses in the amount of $516,686.69.

SO ORDERED.

S.D.N.Y.,2007.
In re Bisys Securities Litigation
Not Reported in F.Supp.2d, 2007 WL 2049726 (S.D.N.Y.)

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
The CITY OF PROVIDENCE, Individually and on Behalf of All Others Similarly Situated, Plaintiff,
v.
AEROPOSTALE, INC., Thomas P. Johnson and Marc D. Miller, Defendants.

No. 11 Civ. 7132(CM)(GWG).
Signed May 9, 2014.

MEMORANDUM OPINION AND ORDER GRANTING LEAD PLAINTIFF'S MOTIONS FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, PLAN OF ALLOCATION, AND ATTORNEYS' FEES AND EXPENSES

McMAHON, District Judge.

***1** This Action was commenced on October 11, 2011 by the filing of an initial complaint alleging that Defendants violated the federal securities laws. ECF No. 1. On January 29, 2014, after more than two years of litigation, the Parties signed a settlement Stipulation resolving Lead Plaintiff's and the Class' claims for fifteen million dollars ($15,000,000). Under the terms of the proposed Settlement, these funds will be allocated to all eligible Class Members [FN1] allegedly impacted by Defendants' alleged violations of the federal securities laws.

FN1. On July 17, 2013, the Court entered an order that certified a class consisting of "all persons and entities that purchased or otherwise acquired the publicly traded common stock of Aeropostale from March 11, 2011 through August 18, 2011, inclusive, and who were damaged thereby." ECF No. 40.

The Court concludes that the Settlement should be approved. As set forth in detail in the Declaration of Jonathan Gardner in Support of (A) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation and (B) Lead Counsel's Motion for Attorneys' Fees and Payment of Litigation Expenses, dated April 4, 2014 (the "Gardner Declaration" or "Gardner Decl."), when viewed in light of the risks that Lead Plaintiff would not prevail on Defendants' likely summary judgment motion or at trial, the Settlement is a very favorable result for the Class. In addition, the Settlement also saves the Class the delay posed by continued litigation through summary judgment, trial, and any subsequent appeals.

The Parties reached the Settlement only after aggressively, extensively, and thoroughly litigating this Action. Lead Plaintiff's efforts are detailed in the Gardner Declaration and include, *inter alia:* (i) a detailed pre-filing investigation that included the review and analysis of documents filed publicly by Aeropostale with the SEC as well as other publicly available information about Aeropostale and the retail industry and interviewing 40 former Aeropostale employees-a number of whose accounts were included in the Complaint as confidential witness ("CW") accounts; (ii) responding to and defeating Defendants' motion to dismiss; (iii) fact discovery that involved, among other things, numerous meet and confer sessions to ensure the efficient production of relevant material, the collection and review of over 1 .3 million pages of documents from Defendants and third parties, and five weeks of depositions, including a 30(b)(6) deposition and those of 12 current or former employees of Aeropostale; (iv) negotiation of a stipulation with Defendants regarding class certification after Lead Plaintiff had filed its motion for class certification, Providence and its investment advisors produced over 20,000 pages of documents, and after Defendants took the deposition of Providence as well as two representatives of its investment manager; and (v) a protracted mediation session before Judge Weinstein preceded by the exchange of detailed mediation statements and verbal presentations by counsel that culminated in an arm's-length agreement in principle to settle the claims against Defendants. *See* Gardner Decl. ¶¶ 6–7, 19–75, 93–95.

In short, this case presents a near-ideal set of circumstances that give the court confidence that the Settlement as proposed is fair and reasonable. It is approved.

I. NOTICE TO THE CLASS SATISFIED RULE 23 AND DUE PROCESS

***2** On January 30, 2014, the Court entered its Preliminary Approval Order (ECF No. 55), which directed that a hearing be held on May 9, 2014 to determine the fairness, reasonableness, and adequacy of the Settlement (the "Settlement Hearing"). The Notice provided to the Class satisfied the requirements of Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed.R.Civ.P. 23(c)(2)(B). The Notice also satisfied Rule 23(e)(1), which requires that notice must be provided in a "reasonable manner"-*i.e.,* it must " 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.' " *Wal–Mart Stores, Inc. v. VISA U.S.A. Inc.,* 396 F.3d 96, 114 (2d Cir.2005) (quoting *Weinberger v. Kendrick,* 698 F.2d 61, 70 (2d Cir.1982)).

Pursuant to the Preliminary Approval Order, the Notice was mailed to all known potential Class Members on February 20, 2014 and Summary Notice was published in *Investor's Business Daily* and transmitted over *PR Newswire* on March 6, 2014. *See* Declaration of Adam D. Walter on Behalf of A.B. Data, Ltd. Regarding Mailing of Notice to Potential Class Members and Publication of Summary Notice ("Mailing Declaration" or "Mailing Decl."), Ex. 3 ¶¶ 2–11.[FN2] The Notice contains a detailed description of the nature and procedural history of the Action, as well as the material terms of the Settlement, including, *inter alia:* (i) the total recovery under the Settlement; (ii) the manner in which the Net Settlement Fund will be allocated among eligible Class Members; (iii) a description of the claims that will be released in the Settlement; (iv) the right and mechanism for Class Members to opt out or exclude themselves from the Class; and (v) the right and mechanism for Class Members to object to the Settlement, the Plan of Allocation, or the request for attorneys' fees and expenses.

FN2. All exhibits referenced herein are annexed to the Gardner Declaration. For clarity, citations to exhibits that themselves have attached exhibits are referenced as "Ex.-," which is how Lead Counsel refers to them in the moving brief. The first numerical references refers to the designation of the entire exhibit itself attached to the Gardner Declaration and the second reference refers to the exhibit designation with the exhibit itself.

One objection was received to the sufficiency of notice. It came from an attorney, Forrest S. Turkish, who has apparently filed similar objections in at least 12 other recent class actions. He is, as we say in the trade, a "professional objector." When his objections are overruled, he files a notice of appeal. As far as this court is aware, every one of those appeals has either been dismissed for failure to perfect or voluntarily dismissed. This pattern of litigiousness from a single attorney-objector without more seriously undermines the credibility of the objection in the eyes of this court. I have little time for "professional objectors," who, as one of my colleagues has noted, "undermine the administration of justice by disrupting settlement in the hopes of extorting a greater share of the settlement for themselves and their clients." *In re Initial Public Offering Sec. Litig.,* 728 F.Supp.2d 289, 295 (S.D.N.Y.2010). They are a throwback to the days when this court was practicing law, and when the filing of securities fraud class actions by certain attorneys was chalked up as a "cost of doing business" by corporations-leading to the passage of the Private Securities Litigation Reform Act.

***3** Furthermore, the objection is patently without merit. Indeed, it is patently frivolous. Responding to it has wasted the time of Lead Plaintiff's counsel, and dealing with it has wasted the time of this Court.

Mr. Turkish is hereby ordered to show cause why he should not be sanctioned by this court, in the amount of the costs incurred by Lead Plaintiff in responding to his objection, for filing a patently frivolous objection. An affidavit explaining why that sanction ought not be imposed must be filed with this court by Friday, May 16, 2014.

II. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

A. The Standard for Evaluating Class Action Settlements

Rule 23(e) requires review and approval by the Court for any class action settlement to be effective. A settlement should be approved if the Court finds it "fair, reasonable, and adequate." Fed. R Civ. P. 23(e)(2); *In re Sony Corp SXRD,* 448 Fed. App'x. 85, 86 (2d Cir.2011). This evaluation requires the court to consider "both the settlement's terms and the negotiating process leading to settlement." *Wal–Mart Stores,* 396 F.3d at 116; *Wright v. Stern,* 553 F.Supp.2d 337, 343 (S.D.N.Y.2008); *In re Merrill Lynch & Co. Research Reports Sec. Litig.,* 246 F.R.D. 156, 165 (S.D.N.Y.2007).

While the decision to grant or deny approval of a settlement lies within the broad discretion of the trial court, a general policy favoring settlement exists, especially with respect to class actions. *Wal–Mart,* 396 F.3d at 116 ("We are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.' ") (citation omitted); *see also In re WorldCom, Inc. ERISA Litig.,* No. 02 Civ. 4816(DLC), 2004 WL 2338151, at *5 (S.D.N.Y. Oct. 18,2004).

Recognizing that a settlement represents an exercise of judgment by the negotiating parties, the Second Circuit has cautioned that, while a court should not give "rubber stamp approval" to a proposed settlement, it must "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Detroit v. Grinnell Corp.,* 495 F.2d 448, 462 (2d Cir.1974); *In re Veeco Instruments Inc. Sec. Litig.,* No. 05 MDL 01695(CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007) (McMahon, J).

In addition to a presumption of fairness that attaches to a settlement reached as a result of arm's-length negotiations, the Second Circuit has identified nine factors that courts should consider in deciding whether to approve a proposed settlement of a class action:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

***4** *Grinnell,* 495 F.2d at 463 (citations omitted). "[N]ot every factor must weigh in favor of settlement, rather the court should consider the totality of these factors in light of the particular circumstances." *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 456 (S.D.N.Y.2004); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig,* No. 02 MDL 1484(JFK), 2007 WL 4526593, at *13 (S.D.N.Y. Dec. 20, 2007).

Here, the Settlement satisfies the criteria for approval articulated by the Second Circuit.

B. The Settlement Is Procedurally Fair

A strong initial presumption of fairness attaches to a proposed settlement if it is reached by experienced counsel after arm's-length negotiations. *See Shapiro v. JPMorgan Chase & Co.,* Nos. 11 Civ. 8831(CM)(MHD), 11 Civ. 7961(CM), 2014 WL 1224666, at *7 (S.D.N.Y. Mar. 24, 2014) (McMahon, J.); *In re Luxottica Grp. S.p.A. Sec. Litig,* 233 F.R.D. 306, 315 (E.D.N.Y.2006). A court may find the negotiating process is fair where, as here, "the settlement resulted from 'arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability ... necessary to effective representation of the class's interests.' " *D'Amato v. Deutsche Bank,* 236 F.3d 78, 85 (2d Cir.2001) (quoting *Weinberger,* 698 F.2d at 74); *In re PaineWebber P'ships Litig.,* 171 F.R.D. 104, 125 (S.D.N.Y.1997) ("So long as the integrity of the arm's length negotiation process is preserved ... a strong initial presumption of fairness attaches to the proposed settlement."), *aff'd,* 117 F.3d 721 (2d Cir.1997) (citation omitted).

This initial presumption of fairness and adequacy applies here because the Settlement was reached by experienced, fully-informed counsel after arm's-length negotiations and, ultimately, with the assistance of Judge Daniel Weinstein, one of the nation's premier mediators in complex, multi-party, high stakes litigation, and one in whom this court reposes considerable confidence as a result of past experience. *See In re Flag Telecom Holdings, Ltd. Sec. Litig* No. 02–CV–3400 (CM)(PED), 2010 WL 4537550, at *14 (S.D.N.Y. Nov. 8, 2010) (McMahon, J.) (noting that the "presumption in favor of the negotiated settlement in this case is strengthened by the fact that settlement was reached in an extended mediation supervised by Judge Weinstein"); *In re Wachovia Equity Sec. Litig,* No. 08 Civ. 617(RJS), 2012 WL 2774969, at *3 (S.D.N.Y. June 12, 2012) (noting the procedural fairness of settlement mediated by Judge Weinstein); *see also* *Silverman v. Motorola, Inc.,* No. 07 C 4507, 2012 WL 1597388, at *3 (N.D.Ill. May 7, 2012), *aff'd sub nom.* *Silverman v. Motorola Solutions, Inc.,* 739 F.3d 956 (7th Cir.2013) (approving settlement and describing Judge Weinstein as "a nationally-recognized and highly-respected mediator"); Gardner Decl. ¶ 5.

Moreover, the recommendation of Lead Plaintiff, a sophisticated institutional investor, also supports the fairness of the Settlement. A settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor ... is entitled to an even greater presumption of reasonableness." *Veeco,* 2007 WL 4115809, at *5 (internal citation omitted). " 'Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement.' " *Id.* at *5 (citation omitted). Lead Plaintiff Providence is a sophisticated institutional investor managing approximately $300.8 million in retirement fund assets. *See* Declaration of Jeffrey Padwa, Ex. 2 ¶ 1. Lead Plaintiff took an active role in all aspects of this Action, as envisioned by the PSLRA, including extensive efforts in discovery and participation in settlement negotiations. *Id.* ¶¶ 3–4. Lead Plaintiff approves of the Settlement without reservation. *Id.* ¶ 5.

***5** Lead Counsel, who has extensive experience prosecuting complex securities class actions and is intimately familiar with the facts of this case, believes that the Settlement is not just fair, reasonable, and adequate, but is an excellent result for Lead Plaintiff and the Class. *See* Gardner Decl. ¶ 8. This opinion is entitled to "great weight." *PaineWebber,* 171 F.R.D. at 125 (citation omitted); *see also* *Veeco,* 2007 WL 4115809, at *12.

All of these considerations confirm the reasonableness of the Settlement and that the Settlement is entitled to the presumption of procedural fairness.

C. Application of the *Grinnell* Factors Supports Approval of the Settlement

1. The Complexity, Expense and Likely Duration of the Litigation Support Final Approval of the Settlement

"This factor captures the probable costs, in both time and money, of continued litigation." *Shapiro,* 2014 WL 1224666, at *8. Here, the litigation was complex and likely would have lasted for quite some time in the absence of settlement. Indeed, securities class actions are by their very nature complicated and district courts in this Circuit have "long recognized" that securities class actions are "notably difficult and notoriously uncertain" to litigate. *In re Bear Stearns Cos. Inc. Sec., Derivative & ERISA Litig.,* 909 F.Supp.2d 259, 266 (S.D.N.Y.2012); *In re Sumitomo Copper Litig.,* 189 F.R.D. 274, 281 (S.D.N.Y.1999).

Lead Plaintiff's claims raise numerous complex legal and factual issues concerning the retail industry, inventory account, and loss causation. *See generally* Gardner Decl. ¶¶ 76–92. It would be costly and time-consuming to pursue this litigation all the way through to trial, with no guarantee of success. Even if the Class could recover a judgment at trial, the additional delay through trial, post-trial motions, and the appellate process could prevent the Class from obtaining any recovery for years. *See Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini,* 258 F.Supp.2d 254, 261 (S.D.N.Y.2003) ("[E]ven if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation ... the passage of time would introduce yet more risks ... and would in light of the time value of money, make future recoveries less valuable than this current recovery."). Furthermore, even winning at a trial does not guarantee a recovery to the Class, because there is always a risk that the verdict could be reversed on appeal. *See, e.g., Robbins v. Koger Props., Inc.,* 116 F.3d 1441, 1449 (11th Cir.1997) (reversing $81 million jury verdict and dismissing case with prejudice in securities action). Thus, this factor weighs strongly in favor of approval of the Settlement.

2. The Reaction of the Class to the Settlement Supports Final Approval of the Settlement

The reaction of the Class to the Settlement is a significant factor in assessing its fairness and adequacy, and ' "the absence of objections may itself be taken as evidencing the fairness of a settlement." ' *PaineWebber,* 171 F.R.D. at 126 (citation omitted); *see also Luxottica Grp.,* 233 F.R.D. at 311–12. This Court has previously noted that the reaction of the class to a settlement "is considered perhaps 'the most significant factor to be weighed in considering its adequacy.' " *Veeco,* 2007 WL 4115809, at *7 (citation omitted).

***6** Here, pursuant to the Preliminary Approval Order, a total of 39,429 copies of the Notice have been mailed to potential Class Members and the Summary Notice was published in *Investor's Business Daily* and issued over the *PR Newswire. See* Ex. 3 ¶¶ 10–l. Only two requests for exclusion were received, representing 40.43 shares of Aeropostale's common stock. (*see id.* ¶ 16).

The only objection to the Settlement itself was filed by a Mr. Opp, who takes issue with the start date of the Class Period and the fact that only purchasers of stock during the Class Period are member of the class. (Mr. Opp also objected to the request for attorneys' fees; that will be taken up separately at the end of this opinion). For the reasons set forth at pages 9–10 of the Reply Brief filed by Lead Plaintiff, neither of those objections has the slightest merit, and I reject them.

That almost no Class Member objected to the Settlement or chose to exclude himself from it is indeed the strongest indication that the Settlement is fair and reasonable.

3. The Stage of the Proceedings and Discovery Completed Support Final Approval of the Settlement

In considering this factor, "the question is whether the parties had adequate information about their claims,' such that their counsel can intelligently evaluate the merits of plaintiff s claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement." *Bear Stearns,* 909 F.Supp.2d at 266 (citing *In re IMAX Sec. Litig.,* 283 F.R.D. 178, 190 (S.D.N.Y.2012) (internal citations, quotation marks and alterations omitted)). To satisfy this factor, parties need not have even engaged in formal or extensive discovery. *See Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 363 (S.D.N.Y.2002).

Here, Lead Counsel conducted its own initial investigation without the benefit of any government investigation to formulate its theory of the case and develop sufficient detail to defeat Defendants' motion to dismiss. As set forth in the Gardner Declaration, the investigation included, *inter alia,* reviewing and analyzing publicly available information and data concerning Aeropostale; interviewing numerous former Aeropostale employees and other persons with relevant knowledge after locating over a hundred potential witnesses; and consulting with experts about the retail industry, accounting, valuation, and causation issues. Gardner Decl. ¶¶ 6, 19–20.

In addition, Lead Plaintiff and Lead Counsel have conducted extensive formal discovery, including the review and analysis of over 1.3 million pages of documents from Defendants and various third parties as well as substantially completing fact depositions. *See* Gardner Decl. ¶¶ 36–55, 59–60, 61–64. Lead Counsel has worked extensively with Lead Plaintiff's damages and liability experts, including a retail industry expert and an accounting expert, in order to analyze the strengths and weaknesses of Lead Plaintiff's claims. *Id.* ¶ 74. Indeed, this Action settled only three days before the close of fact discovery and only three weeks before Lead Plaintiff was set to serve its expert reports. *Id.*

***7** Lead Plaintiff also filed its motion for class certification, arguing that the Action was particularly well-suited for class action treatment and that all the requirements of Federal Rule of Civil Procedure 23 were satisfied. *See* ECF No. 31. Accompanying Lead Plaintiff's class certification motion were numerous exhibits supporting that the market for Aeropostale common stock was efficient during the Class Period. Lead Plaintiff also submitted a declaration from Providence demonstrating Lead Plaintiff's adequacy to represent the proposed class in connection with its class certification motion. *See* ECF No. 34. Class discovery was conducted, including the deposition of Lead Plaintiff, after which Defendants ultimately stipulated to class certification. *See* ECF No. 40.

Accordingly, Lead Plaintiff and Lead Counsel have developed a comprehensive understanding of the key legal and factual issues in the litigation and, at the time the Settlement was reached, had "a clear view of the strengths and weaknesses of their case" and of the range of possible outcomes at trial. *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) (quotation omitted). Accordingly, this factor supports approval of the Settlement.

4. The Reasonableness of the Settlement in Relation to the Risk of Establishing Liability Supports Approval of the Settlement

In assessing the Settlement, the Court should balance the benefits afforded to the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell,* 495 F.2d at 463; *Veeco,* 2007 WL 4115809, at * *8–9. Although Lead Plaintiff and Lead Counsel believe that they had a reasonable likelihood of prevailing on the claims at summary judgment and at trial, they also recognize that there were considerable risks involved in pursuing the litigation against Defendants that could have led to a substantially smaller recovery or no recovery at all.

As set forth in detail in the Gardner Declaration (¶¶ 76–92), Lead Plaintiff faced numerous hurdles to establishing liability. In particular, Defendants have raised a number of arguments and defenses (which they would likely raise at summary judgment and trial) involving, *inter alia:* whether there were actionable misstatements and omissions; the ability of Lead Plaintiff to establish that Defendants acted with scienter; whether the market was fully aware during the Class Period of the issues the Company was having with its inventory, before the alleged corrective disclosures; and whether the market reacted to general negative earnings disclosures, not revelations of any allegedly fraudulent statements or omissions. *See id.*

For example, with respect to the falsity of statements, Defendants would have likely argued that, in a March 2011 investor call, well in advance of the first alleged corrective disclosure, Defendants explained to investors that the Company was aggressively clearing through an "overhang" in inventory caused by "women's assortment" issues that would not be recalibrated until its "fall and holiday product." As a result of such warnings, and others, Defendants would likely contend that the market knew, and Defendants did not conceal, the facts and risks that Lead Plaintiff claims were allegedly not disclosed. *Id.* ¶¶ 78–82.

***8** Additionally, Defendants would have continued to challenge Lead Plaintiff's ability to prove that Defendants acted with scienter. In particular, Defendants would likely contend that they lacked any fraudulent motive, illustrated by the lack of insider trading during the Class Period. Additionally, Defendants would argue that Aeropostale repurchased $100 million worth of stock at the beginning of the Class Period, thereby showing that the Company believed that the stock was undervalued. *Id.* ¶¶ 84–86.

Defendants undoubtedly would have also continued to argue that any potential investment losses suffered by Lead Plaintiff and the Class were actually caused by external, independent factors, and not caused by Defendants' alleged conduct. In particular, Defendants would undoubtedly argue that Aeropostale's guidance misses were attributable to market forces and other macroeconomic considerations, including, among others, that during the Class Period (i) Aeropostale's competitors in the teen retail market adopted Aeropostale's "highly promotional" strategy which historically gave it a competitive edge, and (ii) its core customer base had not responded to a slow and bifurcated economic recovery. *Id.* ¶¶ 87–88.

Defendants would also have argued that Lead Plaintiff could not establish liability with respect to Aeropostale's 2Q2011 earnings miss. If successful, this defense would have eliminated two of the four alleged corrective disclosure dates in the case, and would have reduced the Class's maximum damages by $91 million. Among the facts that did not favor Lead Plaintiff in this regard, the Company issued conservative guidance for 2Q2011,[FN3] highlighted the increasingly promotional nature of the Company's competition in public statements to the market, and warned that the Company continued to face margin pressure resulting from a buildup of unsold inventory. *Id.* ¶¶ 8, 81.

FN3. Indeed, the Company issued EPS guidance in 2Q2011 of $0.11 to $0.16, dramatically lower than 2Q2010 results of $0.46, citing margin pressure from the inventory overhang and assortment issues.

> The Company ultimately reported 2Q2011 EPS of $0.04. *Id.* ¶ 81.

The risks of the case being lost or its value diminished on a pre-trial motion or at trial, when weighed against the immediate benefits of settlement, reinforce Lead Plaintiffs judgment that the Settlement is in the best interest of the Class.

5. The Reasonableness of the Settlement in Relation to the Risk of Establishing Damages Supports Final Approval of the Settlement

Even if Lead Plaintiff successfully established liability, it also faced substantial risk in proving damages. Once causation is established, damages remain "a complicated and uncertain process, typically involving conflicting expert opinion about the difference between the purchase price and [share]s true value absent the alleged fraud." *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 459 (S.D.N.Y.2004) (internal quotation omitted). Should Lead Plaintiff have succeeded in proving liability, considerable risk remained with proving damages at trial. The elimination of even one alleged corrective disclosure would have material consequences. As noted above, if, for example, a jury were to find no loss causation or artificial inflation with respect to Aeropostale's 2Q2011 earnings miss, this would have eliminated two of the four alleged corrective disclosure dates and would have drastically reduced the Class's damages. A jury might also have credited Defendants' argument that macroeconomic conditions led to the Company's earnings miss at the end of the Class Period-significantly reducing or eliminating the Class' damages.

***9** Undoubtedly, the Parties' competing expert testimony on damages would inevitably reduce the trial of these issues to a risky "battle of the experts" and the "jury's verdict with respect to damages would depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable." *Flag Telecom,* 2010 WL 4537550, at *18. The complex issues surrounding damages, therefore, support final approval of the Settlement.

6. The Risks of Maintaining the Class Action Through Trial Supports Final Approval of the Settlement

Had the Settlement not been reached, there is no assurance that Class status would be maintained. This is not a significant factor favoring settlement, since it appears to this court unlikely that decertification would have occurred. But the law of class actions is developing at a rapid clip, and it is always possible that some new Supreme Court decision would counsel in favor of decertification.

7. The Ability of Defendant to Withstand a Greater Judgment

Lead Counsel does not dispute the viability of Aeropostale and has no reason to believe that Defendants could not withstand a greater judgment. Courts, however, generally do not find the ability of a defendant to withstand a greater judgment to be an impediment to settlement when the other factors favor the settlement.

The Amount of the Settlement Supports Final Approval

The last two substantive factors courts consider are the range of reasonableness of a settlement in light of (i) the best possible recovery and (ii) litigation risks. *Grinnell,* 495 F.2d at 463. In analyzing these last two factors, the issue for the Court is not whether the settlement represents the best possible recovery, but how the settlement relates to the strengths and weaknesses of the case. The court " 'consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable.' " *Id.* at 462 (citation omitted). Courts agree that the determination of a "reasonable" settlement "is not susceptible of a mathematical equation yielding a particularized sum." *PaineWebber,* 171 F.R.D. at 130 (citation and internal quotation marks omitted). Instead, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir.1972).

The Settlement here provides a recovery well within the range of reasonableness in light of the best possible recovery and all the attendant risks of litigation. According to analyses prepared by Lead Plaintiff's consulting damages expert, using certain assumptions and modeling, the maximum damages recoverable by the Class would be approximately $163 million (assuming 100% recovery for all four alleged corrective disclosure dates), but the most realistic maximum provable damages would likely be as low as $72 million. Gardner Decl. ¶ 8. The $15 million Settlement therefore represents a recovery in the range of approximately 9.2% to 21% of estimated damages. This recovery, particularly in view of the risks and uncertainties discussed above, falls well within the range of possible approval and courts have generally approved other settlements in PSLRA cases that recover a comparable or smaller percentage of estimated damages. *See, e.g., In re Merrill Lynch & Co. Research Reports Sec. Litig.,* No. 02 MDL 1484, 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (approving $40.3 million settlement with a recovery of approximately 6.25% of estimated damages and noting that this is at the "higher end of the range of reasonableness of recovery in class actions securities litigations"); *In re Gilat Satellite Networks, Ltd.,* No. CV 02–1510(CPS), 2007 WL 2743675, at *12 (E.D.N.Y. Sept. 18, 2007) (approving $20 million settlement representing 10% of maximum damages); *see also In re Omnivision Techs., Inc. Sec. Litig.,* 559 F.Supp.2d 1036, 1042 (N.D.Cal.2008) ($13.75 million settlement yielding 6% of potential damages after deducting fees and costs was "higher than the median percentage of investor losses recovered in recent shareholder class action settlements").

***10** Moreover, the $15 million Settlement is well above the $9.1 million median settlement amount of reported securities class action settlements in 2013, and greater than the median reported settlement amounts since the passage of the PSLRA, which have ranged from $3.7 million in 1996 to $9.1 million in 2013 (with a peak of $12.3 million in 2012). *See* Gardner Decl. ¶ 8; Ex. 1 at 28.

Accordingly, the court concludes that the *Grinnell* factors favor approval of the Settlement.

III. THE PLAN OF ALLOCATION IS FAIR AND ADEQUATE

The standard for approval of a plan of allocation is the same as the standard for approving the settlement as a whole: ' "namely, it must be fair and adequate.' " *Maley,* 186 F.Supp.2d at 367 (citation omitted); *In re WorldCom, Inc. Sec. Litig,* 388 F.Supp.2d 319, 343 (S.D.N.Y.2005). "As a general rule, the adequacy of an allocation plan turns on ... whether the proposed apportionment is fair and reasonable' under the particular circumstances of the case." *In re Visa Check/Mastermoney Antitrust Litig.,* 297 F.Supp.2d 503, 518 (E.D.N.Y.2003) (citation omitted), *aff'd sub nom. WalMart Stores, Inc.,* 396 F.3d 96 (2d Cir.2005). A plan of allocation "need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' class counsel." *In re Am. Bank Note Holographies Inc.,* 127 F.Supp.2d 418, 429–30 (S.D.N.Y.2001); *see also WorldCom,* 388 F.Supp.2d at 344 (same).

The Plan of Allocation, which was fully described in the Notice, was prepared with the assistance of Lead Plaintiff's consulting damages expert. It provides for the distribution of the Net Settlement Fund among Authorized Claimants on a *pro rata basis* based upon each Class Member's "Recognized Loss," as calculated by the formulas described in the Notice. These formulas are tied to the amount of alleged artificial inflation in the share prices, as quantified by Lead Plaintiff's expert. Accordingly, the proposed Plan of Allocation is designed to fairly and rationally allocate the proceeds of this Settlement among the Class. *See* Gardner Decl. ¶¶ 103–07.

Notably, no Class Member has objected to this straightforward Plan of Allocation.

IV. THE MOTION FOR ATTORNEYS' FEES IS GRANTED

For its efforts in achieving this result, Lead Counsel seeks a percentage fee of 33% of the Settlement Fund (or $4,950,000), and payment of $455,506.85 in expenses incurred in prosecuting this Action.

Attorneys who achieve a benefit for class members in the form of a "common fund" are entitled to be compensated for their services from that settlement fund. *See Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980) ("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"). *See also Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 47 (2d Cir.2000); *In re Beacon Assocs. Litig.,* No. 09 Civ. 777(CM), 2013 WL 2450960, at *4 (S.D.N.Y. May 9, 2013) (McMahon, J.). 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 0165(CM), 2007 WL 4115808, at *2 (S.D.N.Y. Nov. 7, 2007) (McMahon, J).

***11** Courts have recognized that, in addition to providing just compensation, awards of fair attorneys' fees from a common fund should 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, e.g., Hicks v. Morgan Stanley,* No. 01–cv–10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding."); *Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 369 (S.D.N.Y.2002) (McMahon, J.) ("courts recognize that such awards serve the dual purposes of encouraging representatives to seek redress for injuries caused to public investors and discouraging future misconduct of a similar nature") (citation omitted). Courts in this Circuit have consistently adhered to these teachings. *See, e.g., In re Top Tankers, Inc. Sec. Litig.,* No. 06 Civ. 13761(CM), 2008 WL 2944620, at *12 (S.D.N.Y. July 31, 2008) (McMahon, J.) ("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.' ") (citations omitted).

The Second Circuit has authorized district courts to employ the percentage-of-the-fund method when awarding fees in common fund cases. *See Goldberger,* 209 F.3d at 47 (holding that the percentage-of-the-fund method may be used to determine appropriate attorneys' fees, although the lodestar method may also be used); *Veeco,* 2007 WL 4115808, at *2. In expressly approving the percentage method, the Second Circuit recognized that "the lodestar method proved vexing" and had resulted in "an inevitable waste of judicial resources." *Goldberger,* 209 F.3d at 48, 49; *Savoie v. Merchs. Bank,* 166 F.3d 456, 460 (2d Cir.1999) (stating that "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").

The trend among district courts in the Second Circuit is to award fees using the percentage method. *See, e.g., Beacon,* 2013 WL 2450960, at *5 ("the trend in this Circuit has been toward the use of a percentage of recovery as the preferred method of calculating the award for class counsel in common fund cases, reserving the traditional 'lodestar' calculation as a method of testing the fairness of a proposed settlement"); *In re IMAX Sec. Litig.,* No. 06 Civ. 6128(NRB), 2012 WL 3133476, at *5 (S.D.N.Y. Aug. 1, 2012) (" 'the percentage method continues to be the trend of district courts in th[e Second] Circuit' ") (citation omitted); *see also Veeco,* 2007 WL 4115808, at *3; *Hicks,* 2005 WL 2757792, at *22.

The issue in this case is whether 33%—which is at the high end of the range of other percentage fee awards within the Second Circuit in comparable settlements—is reasonable. Given the advanced stage of the litigation at the time that the settlement was achieved, I hold that it is.

***12** This Court has held, in another case, that "[i]n this Circuit, courts routinely award attorneys' fees that run to 30% and even a little more of the amount of the common fund." *Beacon,* 2013 WL 2450960, at *5. I also recognize that other courts in this District have approved attorneys' fees in the amount requested here. *See Fogarazzo v. Lehman Bros. Inc.,* No. 03 Civ. 5194(SAS), 2011 WL 671745, at *4 (S.D.N.Y. Feb. 23, 2011) (awarding 33.3% of $6.75 million settlement); *In re Giant Interactive Grp., Inc. Sec. Litig .,* 279 F.R.D. 151, 165 (S.D.N.Y.2001) (awarding 33% of $13 million settlement); *In re Van Der Moolen Holding N.V. Sec. Litig.,* No. l:03–CV–8284 (RWS), slip op. at 2 (S.D.N.Y. Dec. 6, 2006) (awarding 331/3% of $8 million settlement) (Ex. 9); *Maley,* 186 F.Supp.2d at 368 (awarding 331/3% of $11.5 million settlement and citing two cases which awarded 331/3% of the settlement amount: *In re Apac Teleservs., Inc. Sec. Litig.,* No. 97 Civ. 9145, at 2 (S.D.N.Y. June 29, 2001), awarding 331/3% of $21 million settlement, and *Newman v. Caribiner Int'l Inc.,* No. 99 Civ. 2271 (S.D.N.Y. Oct. 19, 2001), awarding 331/3% of $15 million settlement); *see also Mohney v. Shelly's Prime*

Steak, Stone Crab & Oyster Bar, No. 06 Civ. 4270(PAC), 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) (collecting cases awarding over 30% and noting that "Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit."); *Khait v. Whirlpool Corp.,* No. 06–6381, 2010 WL 2025106, at *8 (E.D.N.Y. Jan. 20, 2010) (awarding 33% of $9.25 million settlement). The same is true in other districts. *See, e.g., In re Heritage Bond Litig.,* No. No. 02–ML–1475 DT(RCx), 2005 WL 1594403, at *23 (CD. Cal. June 10, 2005) (awarding 331/3% of $27.78 million settlement); *In re Corel Corp. Inc. Sec. Litig,* 293 F.Supp.2d 484, 498 (E.D.Pa.2003) (awarding 331/3% of $7 million settlement); *In re E.W. Blanch Holdings, Inc. Sec. Litig.,* No. 01–258, 2003 WL 23335319, at *3 (D. Minn. June 16, 2003) (awarding 331/3% of $20 million settlement); *In re Green Tree Fin. Corp. Stock Litig/Options Litig,* Nos. 97–2666 and 97–2679, slip op. at 9 (D.Minn. Dec. 18, 2003) (awarding 331/3% of $12.45 million settlement) (Ex. 9).

Nonetheless, in cases where the settlement amount-while reasonable-is not a large fraction of the total amount sought by the class (and this is such a case), this court believes it incumbent to scrutinize the fee request with great care, lest it authorize a fee award that is out of proportion to the amount of work performed by class counsel.

I handily conclude that Lead Counsel have earned the fee they request.

The Second Circuit in *Goldberger* explained that a court should consider the traditional criteria that reflect a reasonable fee in common fund cases, including: (i) the time and labor expended by counsel; (ii) the risks of the litigation; (iii) the magnitude and complexity of the litigation; (iv) the requested fee in relation to the settlement; (v) the quality of representation; and (vi) public policy considerations. *Goldberger,* 209 F.3d at 50. As explained fully above, all the factors are satisfied. Plaintiffs' Counsel have expended substantial time and effort pursuing the Action on behalf of the Class—since its inception, Plaintiffs' Counsel have devoted more than 14,000 hours to this Action with a lodestar value of $7,047,145. *See also* Ex. 7. The Settlement follows two years of litigation, the scope of which was described above. This is not a class action that was settled early on, with only minimal or preliminary discovery. The case involved substantial expenditure of time and effort by Lead Counsel. The case was complicated. And the risks of continuing litigation were substantial.

***13** To ensure the reasonableness of a fee awarded under the percentage method, "the Second Circuit encourages a crosscheck against counsel's lodestar." *Beacon,* 2013 WL 2450960, at *15. "Where the lodestar is 'used as a mere cross-check, the hours document by counsel need not be exhaustively scrutinized by the district court.' " *Veeco,* 2007 WL 4115808, at *8 (quoting *Goldberger,* 209 F.3d at 50).

Under the lodestar method, the court must engage in a two-step 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. *See, e.g., Flag Telecom,* 2010 WL 4537550, at *25–26. Performing the lodestar cross-check here confirms that the fee requested by Lead Counsel is reasonable and should be approved.

Plaintiffs' Counsel have spent, in the aggregate, 14,119 hours in the prosecution of this case. *See* Gardner Decl. ¶¶ 12, 122; Exs. 4–B, 5–B, 6–B, and 7 (summary table of lodestars and expenses). This represents time spent on the Action by partners, of counsel, associates, staff attorneys, paralegals, investigators, and professional analysts. *Id.* The resulting lodestar at Plaintiffs' Counsel's billing rates is $7,047,145. Applying 2013 or 2014 rates to the work done (which has the approval of both the Second Circuit and the Supreme Court), the hourly billing rates of Plaintiffs' Counsel here range from $640 to $875 for partners, $550 to $725 for of counsels, and $335 to $665 for other attorneys. *See* Gardner Decl. ¶ 121. "In determining the propriety of the hourly rates charged by plaintiffs' counsel in class actions, courts have continually held that the standard is the rate charged in the community where the services were performed for the type of services performed by counsel," *Telik,* 576 F.Supp.2d at 589, and the rates charges by Lead Counsel are in line with rates charged by New York firms that *defend* class actions on a regular basis." *Id., See* Gardner Decl. ¶ 121. The fee request is a negative multiplier of 0.70 of Plaintiffs' Counsel's lodestar. Such a multiplier is well below the parameters used throughout district courts in the Second Circuit, which affords additional evidence that the requested fee is reasonable. *See, e.g., In re Bear Stearns Cos. Sec. Derivative & ERISA Litig.,* 909 F.Supp.2d 259, 271 (S.D .N.Y.2012) (approving requested fee with a negative multiplier and noting that the negative multiplier was a "strong indication of the reasonableness of the [requested] fee") (citation omitted of reasonableness and noting that lodestar multiples of over 4 are awarded by this Court).

Furthermore, while the fee is set, the legal work on this Action will not end with the Court's approval of the proposed Settlement. Additional hours and resources necessarily will be expended assisting members of the Class with their Proof of Claim and Release forms, shepherding the claims process, responding to Class Member inquiries, and moving for a distribution order. The time and effort devoted to this case by Plaintiffs' Counsel to obtain this $15 million Settlement confirm that the 33% fee request is reasonable.

A. The Risks of the Litigation

1. The Contingent Nature of Lead Counsel's Representation

***14** The Second Circuit has recognized that the risk associated with a case undertaken on a contingent basis 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); *In re Am. Bank Note Holographies, Inc. Sec. Litig,* 127 F.Supp.2d 418, 433(S.D.N.Y.2001) (concluding it is "appropriate to take this [contingent fee] risk into account in determining the appropriate fee to award") (citation omitted); *In re Prudential Sec. 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.").

Lead Counsel undertook this Action on a wholly contingent-fee basis, investing a substantial amount of time and money to prosecute the Action without a guarantee of compensation or even the recovery of expenses. Unlike counsel for Defendants, who is paid substantial hourly rates and reimbursed for their expenses on a regular basis, Lead Counsel has not been compensated for any time or expenses since this case began, and would have received no compensation or expenses had this case not been successful. 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 the enormous investment of time and money the case would require. In undertaking that responsibility, Lead Counsel was obligated to ensure that sufficient attorney and paraprofessional resources were dedicated to the prosecution of the Action and that funds were available to compensate staff and to pay for the considerable costs which a case such as this entails. Because of the nature of a contingent practice where cases are predominantly complex lasting several years, not only do contingent litigation firms have to pay regular overhead, but they also must advance the expenses of the litigation. Under these circumstances, the financial burden on contingent-fee counsel is far greater than on a firm that is paid on an ongoing basis. *See* Gardner Decl. ¶¶ 12–13.

2. Risks Concerning Liability

"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). Indeed, the "Second Circuit has identified 'the risk of success as perhaps the foremost factor to be considered in determining [a reasonable award of attorneys' fees.]' " *In re Marsh & McLennan Cos., Inc. Sec. Litig.,* No. 04 Civ. 8144(CM), 2009 WL 5178546, at *18 (S.D.N.Y. Dec. 23, 2009) (McMahon, J.) (citing *Goldberger,* 209 F.3d at 54). While Lead Plaintiff remains confident in its ability to prove its claims and to effectively rebut Defendants' defenses, it recognizes that proving liability was far from certain. Although the Court sustained Lead Plaintiff's claims at the motion to dismiss stage, it faced substantial risks if the Action continued. To succeed on its claims, Lead Plaintiff must establish that Defendants made misstatements or omissions of material fact with scienter in connection with the purchase of Aeropostale common stock and that the Class suffered losses as a result of the revelation of truth regarding Defendants' misstatements and omissions.

***15** As set forth in the Gardner Declaration and in the Settlement Brief, Defendants countered the existence of scienter, falsity, materiality, and loss causation, and presented arguments and defenses that required considerable legal skill to rebut. *See* Gardner Decl. ¶¶ 76–92; Settlement Brief § I.C4. For example, since the beginning of the Action, Defendants have argued that Lead Plaintiff has not satisfied its scienter burden and they would continue to argue that Lead Plaintiff would not be able to prove scienter. Specifically, a central theme to the defense was that no one benefited from the alleged fraud; rather, because the Individual Defendants' bonus compensation was tied to achieving the announced projections, they stood to lose hundreds of thousands of dollars by knowingly setting the projections at unattainably high levels. In further support of its position, Defendants argued that Aeropostale had repurchased $100 million of Company stock at the beginning of the Class Period because it believed that the stock was undervalued. *See* Gardner Decl. ¶¶ 84–86.

Defendants would also continue to argue that their Class Period statements were not false and misleading because the market was already aware of the factors that caused the Company's earnings miss, including, *inter alia:* (i) a slow, bifurcated economic recovery had helped more well-off customers but had not yet reached the Company's customer base, therefore, its core customer base was spending less at Aeropostale; (ii) aggressive promotional activity by its competitors harmed Aeropostale's position in the teen retail sector; and (iii) merchandising decisions, including failing to predict what fashion would appeal to a fickle teen customer had negatively affected sales and margins. *Id.* ¶¶ 79–82.

Additionally, Defendants would have also continued to argue that Lead Plaintiff would not be able to prove loss causation, arguing that the stock price drops following announcements of the Company's first and second quarter 2011 results were attributable to market forces and other macroeconomic considerations, not the correction of an alleged misstatement or omission. *Id.* ¶ 87.

Lead Counsel was able to rebut these arguments, and others, in connection with the Defendants' motion to dismiss, however Defendants would never concede their liability and would likely continue to press these defenses and others at summary judgment and trial.

3. Risks Concerning Damages

Whether Lead Plaintiff could prove damages was also unsettled and would continue to require a significant amount of effort on the part of Lead Counsel. “Proof of damages in complex class actions is always complex and difficult and often subject to expert testimony.” *Shapiro v. JPMorgan Chase & Co.,* Nos. 11 Civ. 8831(CM)(MHD), 11 Civ. 7961(CM), 2014 WL 1224666, at *11 (S.D.N.Y. Mar. 24, 2014) (McMahon, J.). Lead Plaintiff's expert estimated that, depending on consideration of different alleged corrective disclosures, aggregate damages ranged between $72 million (if 100% of the two alleged corrective disclosures pertaining only to 1Q2011 are considered) and $163 million (if 100% of the four alleged corrective disclosures pertaining to both 1Q2011 and 2Q2011 are considered). *See* Gardner Decl. ¶ 8. In order for the Class to recover damages at the maximum level estimated by Lead Plaintiff's damages expert, they would need to prevail on each and every one of the claims alleged and establish loss causation related to the four alleged disclosures. The damage assessments of the Parties' trial experts would be sure to vary substantially, and expert discovery and trial would become a “battle of experts” requiring significant work on the part of Lead Counsel. *See, e.g., In re Flag Telecom Holdings Ltd. Sec. Litig.,* No. 02–CV–3400 (CM) (PED), 2010 WL 4537550, at *28 (S.D.N.Y. Nov. 8, 2010) (McMahon, J.) (burden in proving the extent of the class's damages weighed in favor of approving fee request).

B. The Magnitude and Complexity of the Litigation

***16** 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). Indeed, the complex and multifaceted subject matter involved in a securities class action such as this supports the fee request. *See Fogarazzo,* 2011 WL 671745, at *3 ("courts have recognized that, in general, securities actions are highly complex"). As described in greater detail in the Gardner Declaration, this Action involved difficult, complex, hotly disputed, and expert-intensive issues related to the retail industry, inventory accounting, and loss causation. Further, there was no road-map for Lead Counsel to follow in this Action as no governmental agency investigated or brought action against Defendants. *See, e.g., Flag Telecom,* 2010 WL 4537550, at *27 (noting lack of prior governmental action against defendant on which lead counsel could "piggy back" in considering fee request); *In re Med. X–Ray Film Antitrust Litig.,* No. CV–93–5904, 1998 WL 661515, at *8 (E.D.N.Y. Aug. 7, 1998) (noting that "class counsel did not have the benefit of a prior government litigation or investigation" in approving requested fee). Thus, Lead Counsel were left to investigate and develop sufficient facts (without formal discovery) so as to overcome Defendants' motion to dismiss governed by the heightened pleading standards of the PSLRA.

In connection with formal discovery, Lead Counsel undertook to review and analyze over 1.3 million pages of documents, which included complex accounting work papers and intricate and voluminous inventory and sales reports. Counsel prepared for and took 12 fact depositions of executives of the Company. Lead Counsel also prepared an extensive motion for class certification and engaged in class discovery, which resulted in the Defendants stipulating to class certification.

Accordingly, the magnitude and complexity of the Action and the difficulty of the legal and factual issues involved support the requested fee.

The quality of the representation and the standing of Lead Counsel are important factors that support the reasonableness of the requested fee. *See Flag Telecom,* 2010 WL 4537550, at *28.

Lead Counsel is nationally known as a leader in the fields of class actions and complex litigation, and has had substantial experience litigating securities class actions in courts throughout the country with success. *See* Gardner Decl. ¶ 124; Ex. 4–A. As a firm with experienced securities class action litigators, Lead Counsel has not only had to use its knowledge, skill and efficiency from past experiences, but has also developed expertise in the unique issues presented here to overcome significant obstacles in the past two years of this litigation. Gardner Decl. ¶¶ 17–18. This favorable Settlement is attributable to the diligence, determination, hard work, and reputation of Lead Counsel, who developed, litigated, and successfully negotiated the settlement of this Action, an immediate cash recovery in a very challenging case.

***17** The quality of opposing counsel is also important in evaluating the quality of Lead Counsel's work. *See Flag Telecom,* 2010 WL 4537550, at *28; *Teachers Ret. Sys.,* 2004 WL 1087261, at *20. Indeed, Defendants' Counsel, Weil, Gotshal & Manges LLP, is a long-time leader among national litigation firms, with well-noted expertise in corporate litigation practices. The highly skilled attorneys at Weil Gotshal zealously fought Lead Plaintiff's claims at every turn, but notwithstanding this formidable opposition, Lead Counsel was able to develop Lead Plaintiff's case so as to resolve the litigation on terms favorably to the Class.

Finally, the federal securities laws are remedial in nature, and, to effectuate their purpose of protecting investors, the courts must encourage private lawsuits. *See Basic Inc. v. Levinson,* 485 U.S. 224, 230–31 (1988). The Supreme Court has emphasized that private securities actions such as this provide ‘ “a most effective weapon in the enforcement’ of the securities laws and are ‘a necessary supplement to [SEC] action.’ “ *Bateman Eichler, Hill Richards, Inc. v. Berner,* 472 U.S. 299, 310 (1985) (citation omitted); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 319 (2007) (noting that the court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions).

Courts in the Second Circuit have held that “public policy concerns favor the award of reasonable attorneys' fees in class action securities litigation.” *Flag Telecom,* 2010 WL 4537550, at *29. Specifically, “[i]n order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives.” *In re WorldCom, Inc. Sec. Litig.,* 388 F.Supp.2d 319, 359 (S.D.N.Y.2005). The significant expense combined with the high degree of uncertainty of ultimate success means that contingent fees are virtually the only means of recovery in such cases. Indeed, this Court recently noted the importance of “private enforcement actions and the corresponding need to incentivize attorneys to pursue such actions on a contingency fee basis” in *Shapiro:*

> [C]lass actions serve as private enforcement tools when ... regulatory entities fail to adequately protect investors ... plaintiffs' attorneys need to be sufficiently incentivized to commence such actions in order to ensure that defendants who engage in misconduct will suffer serious financial consequences ... awarding counsel a fee that is too low would therefore be detrimental to this system of private enforcement.

2014 WL 1224666, at *24 (citing *In re Initial Pub. Offering Sec. Litig.,* 671 F.Supp.2d 467, 515–16 (S.D.N.Y.2009)); *see also 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.”); *Med. X–Ray Film Antitrust Litig,* 1998 WL 661515, at *23 (E.D.N.Y. Aug. 7, 1998) (“an adequate award furthers the public policy of encouraging private lawsuits”); *Chatelain,* 805 F.Supp. at 216 (“an adequate award furthers the public policy of encouraging private lawsuits in pursuance of the remedial federal securities laws”); *In re Warner Commc'ns Sec. Litig.,* 618 F.Supp. 735, 750–51 (S.D .N.Y.1985) (observing that “[f]air awards in cases such as this encourage and support other prosecutions, and thereby forward the cause of securities law enforcement and compliance”), *aff'd,* 798 F.2d 35 (2d Cir.1986).

***18** Lawsuits such as this one can only be maintained if competent counsel can be retained to prosecute them. This will occur if courts award reasonable and adequate compensation for such services where successful results are achieved. Public policy therefore supports awarding Lead Counsel's reasonable attorneys' fee request.

In accordance with this Court's Preliminary Approval Order, 39,429 copies of the Notice of Pendency of Class Action and Proposed Settlement and Motion for Attorneys' Fees and Expenses (the “Notice”) were sent to potential Members of the Class. *See* Declaration of Adam D. Walter on Behalf of A.B. Data, Ltd. Regarding Mailing of Notice to Potential Class Members and Publication of Summary Notice ¶ 10. The Notice informed Members of the Class that Lead Counsel would make an application up to 33% of the Settlement Fund plus litigation expenses not to exceed $650,000, plus interest on such amounts. The time to object to the fee request expires on April 18, 2014.

Two objections have been filed to the fee request. One came from professional objector Turkish, which does not recommend it to the court. All Mr. Turkish says is that the fee request is too high-indeed, is “presumptively unjustified.” Actually, neither the Second Circuit nor the Supreme Court has established any presumption at all concerning any particular level of fee award that would be unreasonable in a securities fraud class action-nor would such a “presumption” be appropriate, since a fee request must be analyzed in accordance with the particulars of the case at bar, not against some arbitrary one-size-fits-all standard. As for Mr. Turkish's contention that the settlement compensation of $0.50 per share is extremely low in comparison to “damages of as much as $12.34 per share alleged by Plaintiffs,” I can only say that his apparent inability to distinguish between the gross drop in the stock price between the beginning and the end of the class period (which was originally alleged to be, and in fact was, $12.34) and the damages that could be recovered by any given plaintiff suggests that this court would be well advised not to listen to his suggestions. In fact, had this case gone to trial, Plaintiffs' expert would have testified that damages would have ranged between $2.42 and $5.48 per share, while Defendant's expert (who had not yet submitted a report) would undoubtedly have testified that the per share damages were even less. The risk that various corrective disclosures would cut off damages altogether at an early date was far from insubstantial. In short, this court concludes that Mr. Turkish does not know whereof he speaks.

The other objection comes from a Mr. Opp, who suggests that the requested attorneys' fee should be no more than 4.8%—which he calculates is the percentage of eventual recovery after trial that the Settlement provides. Lead Counsel expended over $7 million, using reasonable local billing rates, in prosecuting this hard-fought action over a two year period. 4.8% of the Settlement (assuming, contrary to fact, that 4.8% is the correct figure-Mr. Opp, like Mr. Turkish, simplistically assumed that the proper calculation of damages was simply the difference between the price of the stock at the start and the end of the Class Period) is $720,000. Public policy considerations alone compel the conclusion that an award of that magnitude—representing about 10 cents on the dollar worked-would be inappropriate.

V. PLAINTIFFS' COUNSEL'S EXPENSES WERE REASONABLY INCURRED AND NECESSARY TO THE PROSECUTION OF THIS ACTION

***19** Plaintiffs' Counsel also respectfully request $455,506.85 in expenses incurred in prosecuting this Action. Plaintiffs' Counsel's individual declarations attest to the accuracy of these expenses, which are properly recovered by counsel. *See* Gardner Decl. ¶¶ 129; Exs. 4 through 6; *see also 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). Much of Plaintiffs' Counsel's expenses were for professional services rendered by Lead Plaintiff's experts and consultants, and expenses relating to discovery taken in the case. Gardner Decl. ¶¶ 131–33; Exs. 4 ¶ 8–C, 5 ¶ 8, 6 ¶ 8. The remaining expenses are attributable to such things as travel for depositions and for mediation, the costs of computerized research, duplicating documents, and other incidental expenses. *Id.* ¶ 134. These expenses were critical to Lead Plaintiff's success in achieving the proposed Settlement. *See In re Global Crossing Sec. & ERISA Litig,* 225 F.R.D. 436, 468 (S.D.N.Y.2004) ("The expenses incurred-which include investigative and expert witnesses, filing fees, service of process, travel, legal research and document production and review-are the type for which 'the paying, arms' length market' reimburses attorneys ... [and][F]or this reason, they are properly chargeable to the Settlement fund.") (citation omitted).

Not a single objection to the expense request has been received. Lead Counsel is entitled to payment for these expenses, plus interest earned on such amounts at the same rate as that earned by the Settlement Fund.

VI. THE COURT AWARDS COSTS AND EXPENSES TO LEAD PLAINTIFF

Finally, Lead Counsel seeks an expense award of $11,235.04 for Lead Plaintiff for its lost wages and expenses, pursuant to the Private Securities Litigation Reform Act, 15 U.S.C. § 78u–4(a)(4). The Notice disseminated to the Class stated that Lead Plaintiff may seek reimbursement of up to $15,000 from the Settlement Fund as compensation for the time and expense it incurred. *See* Ex. 3–A at 2. Lead Plaintiff claims to have expended, in wages and expenses for City employees who worked on aspects of this lawsuit, more than the amount requested.

A practice has grown up recently of awarding extra money (that is, money in addition to the fees awarded to the counsel to prosecute the case) to Lead Plaintiffs themselves. Although the PSLRA authorizes (but does not mandate) such awards, this court has always been troubled by the practice-even though I have not rocked the boat and disallowed such awards in prior cases. For the most part, I fail to see why a party who chooses to bring a lawsuit should be compensated for time expended in appearing at a deposition taken in order to insure that he is actually capable of fulfilling his statutory obligations, or responding to document requests, or performing what are essentially duplicative reviews of pleadings and motions that his lawyers are perfectly capable of reviewing for him. Meaning no disrespect to the City Solicitor of the City of Providence, he selected eminent and experienced outside counsel to prosecute this case, who needed no assistance in understanding the issues involved. There are no "lost wages" for the City to recover in this case: as counsel admitted at the final settlement hearing, all the employees of the City of Providence who worked on this case were paid their usual wages every day; they were simply assigned to tasks associated with the lawsuit that they City chose to prosecute, and no concrete evidence has been offered that City operations suffered as a result.

***20** Ironically, in this case, the Lead Plaintiff has probably been more involved in working on this lawsuit than most are-and more competently as well. I have no doubt that the City Solicitor for Providence and his staff have spent more than 150 hours providing various kinds of assistance to Lead Counsel. But what they did involves no more than (1) responding to perfectly legitimate discovery demands, including attending exactly one deposition, (2) commenting on papers prepared and filed by outside counsel, and (3) attending the mediation session. *See* Declaration of Jeffrey M. Padwa, City Solicitor for Providence, attached as Ex. 2 to Gardner Decl. These are activities for which we ordinarily do not "pay" plaintiffs-even prevailing plaintiffs. There has been no adjudication that Aeropostale violated the federal securities laws; there has been a settlement. It is entirely possible that this lawsuit is lacking in merit and that the City of Providence ought not to have bothered the court with it in the first place.

Courts may well "routinely award such costs and expenses to both reimburse named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as provide an incentive for such plaintiffs to remain involved in the litigation and incur such expenses in the first place." *Morgan Stanley,* 2005 WL 2757793, at *10; *see also Varljen v. H.J. Meyers & Co.,* No. 97 CIV 6742(DLC), 2000 WL 1683656, at *4 (S.D.N.Y. Nov. 8, 2000) (reimbursement of such expenses should be allowed because it "encourages participation of plaintiffs in the active supervision of their counsel"). However, I personally believe that this sort of "tip" to the Lead Plaintiff ought not be routine. After much soul searching, and after hearing Lead Counsel extol the assistance he received from the City Solicitor's office, I have decided to authorize the payment of the requested sum to the City of Providence. But this opinion should serve notice that this court, at least, will not routinely decide to "tip" Lead Plaintiffs simply because their names appear in the caption, and will view with some skepticism conclusory arguments that they actually made a meaningful substantive contribution to the lawsuit.

CONCLUSION

For the foregoing reasons, the Court hereby (1) finds that due and adequate notice was directed to persons and entities who are Class Members, advising them of the Plan of Allocation and of their right to object thereto, and a full and fair opportunity was accorded to persons and entities who are Class Members to be heard with respect to the Plan of Allocation.; (2) finds that the formula in the Plan of Allocation for the calculation of the claims of Authorized Claimants that is set forth in the Notice of Pendency of Class Action and Proposed Settlement and Motion for Attorneys' Fees and Expenses (the "Notice") disseminated to Class Members, provides a fair and reasonable basis upon which to allocate the net settlement proceeds among Class Members; (3) finds that the Plan of Allocation set forth in the Notice is, in all respects, fair and reasonable; (4) grants final approval of the Plan of Allocation; (4) authorizes Settlement Class Counsel to make disbursements to Class members; and (5) awarded attorneys' fees in the amount of $4,950,000 plus interest at the same rate earned by the Settlement Fund (or 33% of the Settlement Fund, which includes interest earned thereon) and payment of litigation expenses in the amount of $455,506.85, plus interest at the same rate earned by the Settlement Fund, which sums the Court finds to be fair and reasonable; and (6) authorizes an award of $11,235.04 to Lead Plaintiff. The Clerk of the Court is directed to remove Docket Nos. 57 and 59 from the Court's list of pending motions and to close the file.

S.D.N.Y.,2014.
City of Providence v. Aeropostale, Inc.
Slip Copy, 2014 WL 1883494 (S.D.N.Y.)

END OF DOCUMENT

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
E.D. New York.
In re COMVERSE TECHNOLOGY, INC. SECURITIES LITIGATION.

No. 06–CV–1825 (NGG)(RER).
June 24, 2010.

Christopher Joseph Keller, Labaton Sucharow & Rudoff LLP, Nancy Kaboolian, Abbey Spanier Rodd & Abrams, LLP, New York, NY, for Plaintiffs.

Joseph S. Allerhand, Weil, Gotshal & Manges, LLP, Donald A. Corbett, Dickstein Shapiro Morin & Oshinsky LLP, Edward M. Spiro, Jeremy Hugh Temkin, Morville, Abramowitz, Grand, Iason, David S. Hoffner, Guy Petrillo, Robert W. Topp, Donald Scott Smedley, Dechert LLP, Joel M. Cohen, Clifford Chance U.S. LLP, Solomon N. Klein, Thomas Philip Puccio, Law Office of Solomon N. Klein, Seth T. Taube, Baker Botts, LLP, Yehudis Shalva Lewis, Kramer Levin Naftalis & Frankel LLP, Alex Jason Kaplan, Saima S. Ahmed, Steven Bierman, Sidley Austin LLP, New York, NY, for Defendants.

MEMORANDUM

NICHOLAS G. GARAUFIS, District Judge.

***1** The court issues this Memorandum to explain its award of fees in the Judgment and Order of Dismissal entered in this case on June 23, 2010.

I. BACKGROUND

The court assumes the parties' familiarity with the background of this case, and only recites the facts necessary to address Lead Counsel's motion for an award of attorneys' fees (Docket Entry # 331).

This case arises out of allegedly unlawful stock option awards made to officers of Comverse Technology, Inc. ("Comverse"). Beginning on April 16, 2006, Comverse stockholders filed five putative class actions against Comverse and certain Comverse officers (collectively, "Defendants"), alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78t, and Rule 10b–5, 17 C.F.R. § 240.10b–5, promulgated thereunder. On March 2, 2007, the court consolidated these actions and appointed Menora Mitvachim Pension Funds, Ltd. and Menora Mitvachim Insurance Co. (the "Menora Group") as Lead Plaintiff, in accordance with the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u–4(a)(3)(B)(I). (Docket Entry # 65.) The Menora Group is represented by Pomerantz Haudek Grossman & Gross LLP ("Lead Counsel").

On December 16, 2009, the Menora Group entered into a Stipulation of Settlement with Defendants. (Docket Entry # 323 ("Stipulation").) Under the Stipulation, Comverse agreed to pay a total of $165 million to a class consisting of all purchasers of Comverse common stock during the period April 30, 2001 through January 29, 2008, in exchange for the release and discharge of all claims based upon Comverse's acts during the class period. (*See* Stipulation ¶¶ 1.8, 2.2, 5.2; Declaration of Patrick V. Dahlstrom in Support of Final Approval of Settlement (Docket Entry # 333) ("Dahlstrom Decl.") ¶ 97.) Defendant

Kobi Alexander, a former Comverse officer, agreed to pay $60 million to the class, resulting in a total recovery of $225 million (the "Settlement Amount"). (Stipulation ¶ 2.3.)

On April 2, 2010, the court entered an order preliminarily approving the settlement, certifying a class for settlement purposes, and scheduling a fairness hearing. (Docket Entry # 329 ("Preliminary Approval Order").) The Preliminary Approval Order directed Lead Counsel to provide notice of the settlement and the fairness hearing to potential class members. (Preliminary Approval Order ¶ 9.) Through a claims administrator, Lead Counsel mailed a Notice of Pendency and Settlement of Class Action to more than 204,000 potential class members, and also posted summary notice in the *Wall Street Journal* and in the Israeli financial paper *Globes.* (*See* Pls. Reply Mem. in Opposition to Objections (Docket Entry # 342) ("Pls. Reply Mem.") 1); Affidavit of Michael Rosenbaum (Docket Entry # 336 ("Rosenbaum Aff.").)

The retainer agreement between Lead Counsel and the Menora Group permitted Lead Counsel to request attorneys fees up to 30% of any eventual recovery. (Pls. Mem. in Support of Attorneys' Fees Award (Docket Entry # 334) ("Pls. Fee Mem.") 7.) After the parties reached settlement, the Menora Group and Lead Counsel began "vigorous negations" over the fee award. (Decl. of Assaf David–Margalit (Docket Entry # 335) ¶ 8.) The Menora Group also consulted with independent counsel regarding an appropriate fee award for Lead Counsel. (*Id.*) The Notice of Pendency informed potential class members that Lead Counsel would apply for attorneys' fees not in excess of 27% of the Settlement Amount. (Rosenbaum Aff. Ex. A.) On May 10, 2010, Lead Counsel filed a motion requesting, *inter alia,* an award of attorneys' fees in the amount of 25% of the Settlement Amount. (Docket Entry # 331.)

***2** The court received three objections to the settlement. One of these was withdrawn. Another objection, filed by a repeat pro se litigant, was patently frivolous. (*See* Docket Entry # 330.) The only cognizable objection was filed by the Pennsylvania State Employees' Retirement System ("SERS"). (Docket Entry # 344 ("SERS Ltr.").) SERS argued that Lead Counsel's fee request was too large, and suggested instead that the court "award no more than is absolutely required to provide reasonable compensation to counsel." [FN1] (SERS Ltr. 7.)

FN1. SERS does not object to the proposed settlement of the class action, to the proposed Plan of Allocation, to Lead Counsel's request for an award of unreimbursed expenses, or to Lead Counsel's request for a compensatory award to Lead Plaintiff.

This court held the fairness hearing on June 21, 2010. No parties objected at the hearing.

II. DISCUSSION

A. Calculating Appropriate Fees in Common Fund Cases

Attorneys who recover a common fund for the benefit of a class of injured plaintiffs "are entitled to a reasonable fee—set by the court—to be taken from the fund." *Goldberger v. Integrated Res.,* 209 F.3d 43, 47 (2d Cir.2000). "What constitutes a reasonable fee is properly committed to the sound discretion of the district court, and will not be overturned absent an abuse of discretion, such as a mistake of law or a clearly erroneous factual finding." *Id.* (internal citation omitted). In exercising this discretion,

> [D]istrict courts should continue to be guided by the traditional criteria in determining a reasonable common fund fee, including: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of the representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations."

Id. at 50 (quoting *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.,* 724 F.Supp. 160, 163 (S.D.N.Y.1989)).

Courts use two methods to calculate appropriate fees: the "percentage method" and the "lodestar method." Under the percentage method, the court simply awards counsel a reasonable percentage of the recovery as a fee. The lodestar method requires the court to scrutinize the fee petition to ascertain the number of hours reasonably billed, then multiply that figure by an appropriate hourly rate. *Id.* at 47. "The trend in this Circuit is toward the percentage method, which 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, 122 (2d Cir.2005) (internal citations omitted). The lodestar method, by contrast, "creates an incentive for attorneys to bill as many hours as possible, to do unnecessary work, and for these reasons also can create a disincentive to early settlement." *McDaniel v. County of Schenectady,* 595 F.3d 411, 418 (2d Cir.2010). The Second Circuit therefore encourages district courts to use the lodestar method primarily as a "cross-check" for the percentage method. *Goldberger,* 209 F.3d at 50. Any percentage award, however, must still be assessed for reasonableness using the *Goldberger* criteria.

***3** An additional consideration obtains when the lead counsel and lead plaintiff in a PSLRA class action enter into a fee agreement. In such circumstances, the Second Circuit directs district courts to:

> [G]ive serious consideration to negotiated fees because PSLRA lead plaintiffs often have a significant financial stake in the settlement, providing a powerful incentive to ensure that any fees resulting from that settlement are reasonable. In many cases, the agreed-upon fee will offer the best indication of a market rate,

thus providing a good starting position for a district court's fee analysis. *In re Nortel Networks Corp. Sec. Litig.,* 539 F.3d 129, 133–134 (2d Cir.2008); *see also In re Cendant Corp. Litig.,* 264 F.3d 201, 282 (3d Cir.2001) ("[U]nder the PSLRA, courts should accord a presumption of reasonableness to any fee request submitted pursuant to a retainer agreement that was entered into between a properly-selected lead plaintiff and a properly-selected lead counsel.").

B. Application of the *Goldberger* Factors to Lead Counsel's Fee Application

1. *The Requested Fee in Relation to the Settlement*

When determining whether a fee request is reasonable in relation to a settlement amount, "the court compares the fee application to fees awarded in similar securities class-action settlements of comparable value.” *In re Marsh & McLennan Cos., Inc. Sec. Litig.,* No. 04 Civ. 8144 (McMahon, J.), 2009 U.S. Dist. LEXIS 120953, at *56 (S.D.N.Y.Decl.23, 2009); *see also re* Nortel Networks, 539 F.3d at 134. Lead Counsel's request for 25% of the Settlement Amount is consistent with, or lower than, the fee awards in other “megafund” securities fraud actions in this Circuit. *See In re Initial Pub. Offering Sec. Litig.,* 671 F.Supp.2d 467, 516 (S.D.N.Y.2009) (awarding lead counsel 33.3% of $586 million settlement); *In re Oxford Health Plans, Inc. Sec. Litig.,* MDL Dkt. No. 1222 (Brieant, J.), 2003 U.S. Dist. LEXIS 26795, at *13–14 (S.D.N.Y. June 12, 2003) (28% of $300 million); *Kurzweil v. Philip Morris Cos.,* Nos. 94 Civ. 2373, 94 Civ. 2546 (Mukasey, J.), 1999 U.S. Dist. LEXIS 18378, at *2 (S.D.N.Y. Nov. 30, 1999) (30% of $124 million); *In re Prudential,* 912 F.Supp. 97, 104 (S.D.N.Y.1996) (27% of $ 110 million); *In re Priceline.com,* No. 00 Civ. 1884 (Covello, J.), 2007 U.S. Dist. LEXIS 52538, at *12–13 (D.Conn. July 20, 2007) (30% of $80 million). This suggests, at the very least, that Lead Counsel's request is not unreasonable.

This court is aware that other courts have adopted a “sliding-scale” approach to fee awards in megafund cases in order to prevent “unwarranted windfalls” to class counsel. *See, e.g., In re Indep. Energy Holdings PLC,* No. 00 Civ. 6689 (Scheindlin, J.), 2003 U.S. Dist. LEXIS 17090, at *20 (S.D.N.Y. Sept. 29, 2003) (“The percentage used in calculating any given fee award must follow a sliding-scale and must bear an inverse relationship to the amount of the settlement. Otherwise, those law firms who obtain huge settlements, whether by happenstance or skill, will be over-compensated to the detriment of the class members they represent.”). The logic of this approach is appealing, if not altogether airtight: for example, it ignores the possibility that a sliding scale may actually harm class members by reducing attorneys' incentive to accept greater risk in pursuit of above-average recoveries.

***4** But whatever the merits of the sliding-scale method, its underlying rationale—to avoid awarding unearned or unanticipated benefits to class counsel—is inapplicable in this case. It was clear when Comverse's financial troubles were first announced that the potential recovery in any successful lawsuit against Comverse would be substantial. (*See, e.g.,* Amended Compl. (Docket Entry # 74) ¶¶ 152–60.) Nonetheless, the Menora Group and Lead Counsel contracted at the outset of this litigation for a fee award as high as 30% of the eventual recovery. After the settlement amount had been determined, the Menora Group negotiated a 25% fee request. The fact that this fee request is the product of arm's-length negotiation between Lead Counsel and the lead plaintiff is significant. Whether a court uses the percentage or lodestar method, its primary goal when awarding fees is to approximate the prevailing market rate for counsel's services. *See* Goldberger, 209 F.3d at 52 (“[M]arket rates, where available, are the ideal proxy for [class counsel's] compensation'); *In re Nortel Networks,* 539 F.3d at 133–134; *McDaniel,* 595 F.3d at 420; *cf. Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany,* 522 F.3d 182, 184 (2d Cir.2008) (awards in fee-shifting cases should approximate market rates). Because attorneys and clients ordinarily strike their bargain prior to litigation (*i.e.,* when the risk of loss still exists), an ex ante fee agreement is the best indication of the actual market value of counsel's services. *See In re Synthroid Mktg. Litig.,* 264 F.3d 712, 719 (7th Cir.2001) (opinion of Easterbrook, J.); *In re Nortel Networks,* 539 F.3d at 133–134 ("In many cases, the agreed-upon fee will offer the best indication of a market rate"). Presumably, the Menora Group's decision not to negotiate for a sliding-scale fee award was based on its assessment of the risks of the litigation, Lead Counsel's competence, the rates of settlement in comparable securities actions, and all the other considerations that clients ordinarily take into account when contracting for attorney services on an open market. The court sees no need to impose its own ex post assessment of Lead Counsel's value when the retainer and fee agreements speak for themselves.

Using the lodestar as a cross-check confirms the reasonableness of Lead Counsel's request. Lead Counsel expended 43,573 hours of attorney and support time valued at rates ranging from $125 to $880 per hour, generating a $20,245,585 lodestar figure. (Dahlstrom Decl. Ex. B.) Although high, these rates are not extraordinary for top New York law firms. *See In re Gilat Satellite Networks, Ltd.,* No. 02 Civ. 1510 (Sifton, J.), 2007 U.S. Dist. LEXIS 68964, at *54 (E.D.N.Y. Sept. 18, 2007) (citing cases).FN2 The hours Lead Counsel expended on this action are reasonable given the magnitude and complexity of the case. (*See* Dahlstrom Decl. ¶ 137); *see also Goldberger v. Integrated Res.,* 209 F.3d at 50 (where lodestar method is "used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court.").

FN2. *See also* Nathan Koppel, *Lawyers Gear Up Grand New Fees,* Wall St. J., Aug. 22, 2007, *available at* http:// online.wsj.com/article/SB118775188828405048.html (last visited June 23, 2010).

***5** 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. *Detroit v. Grinnell Corp.,* 495 F.2d 448, 470 (2d Cir.1974). The requested fee in this case represents a lodestar multiplier of 2.78. This multiplier is well within the range awarded in comparable settlements. *See Welch & Forbes, Inc. v. Cendant Corp.,* 243 F.3d 722, 742 (3d Cir.2001) (surveying cases with recoveries over $100 million and finding lodestar multiplier of 1.35 to 2.99 common); *Kurzweil,* 1999 U.S. Dist. LEXIS 18378, at *8 (noting that multipliers between 3 and 4.5 are common in federal securities cases, and awarding 25% attorneys' fee); *In re NASDAQ Market–Makers Antitrust Litig.,* 187 F.R.D. 465, 489 (S.D.N.Y.1998) ("multipliers of between 3 and 4.5 have become common").

2. *The Risk of the Litigation*

The risk of the litigation is often cited as one of the most important *Goldberger* factors. *See, e.g., In re Bristol–Myers Squibb Sec. Litig.,* 361 F.Supp.2d 229, 233 (S.D.N.Y.2005). "Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation. In particular, securities actions have become more difficult from a plaintiff's perspective in the wake of the [Private Securities Litigation Reform Act]." *In re Metlife Demutualization Litig.,* 689 F.Supp.2d 297, 361 (E.D.N.Y.2010) (quotations and citations omitted).

Lead Counsel invested tens of thousands of hours of attorney time and over $1.6 million of its own money to litigate this case. (Dahlstrom Decl. Ex. C.) It did so despite the fact that the Menora Group faced serious challenges with respect to establishing liability and damages. Had the litigation proceeded, the Menora Group would have faced conflicting evidence concerning the materiality of the alleged misstatements regarding backdated options, the *scienter* claims against the Compensation/Audit Committee defendants, and loss causation for the interim partial disclosures. (*See* Dahlstrom Decl. ¶¶ 99–117.) Even if liability was established, there was also a substantial risk that the jury would award damages lower than those calculated by the Menora Group's expert. There was also a risk that Comverse's deteriorating cash condition would make it unable to pay a substantial settlement. (*Id.* ¶¶ 120–25.) In short, a positive outcome was by no means guaranteed.

3. *The Time and Labor Expended By Counsel and the Magnitude and Complexities of the Litigation*

This case, while perhaps not as enormous as some other recent securities class actions, was large, protracted, and bitterly contested. Lead Counsel expended 43,573 hours on the litigation. Among other things, Lead Counsel: reviewed seven million pages of documents, as well as SEC filings, analyst reports, and public filings in nine other securities cases; filed multiple complex pleadings; briefed oppositions to protective-order motions, a motion for class certification, papers in support of the settlement, and six motions to dismiss; successfully appealed a Report and Recommendation; deposed 10 Comverse employees, defended three depositions, and interviewed 30 former Comverse employees throughout the United States and Israel; and prepared and reviewed highly complex accounting and damages analyses with the aid of experts. (Dahlstrom Decl. ¶ 137.) These efforts were hardly makework, given the uncertainty of key issues relating to liability and damages. Lead Counsel also engaged in lengthy, contentious settlement and mediation sessions over the course of a eighteen months. (*Id.* ¶¶ 74–98.) The results of this labor speak for themselves: as of May 2010, this settlement is the second largest securities class action settlement involving options backdating claims. (Pls. Fee Mem. 5.)

4. *The Quality of Lead Counsel's Representation*

***6** To evaluate the quality of representation in common-fund litigations, courts in this Circuit "review the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *Merrill Lynch Tyco Research Sec. Litig.,* 249 F.R.D. 124, 141 (S.D.N.Y.1998). As outlined above, the recovery in this case is one of the highest ever achieved in this type of securities action. Lead Counsel has extensive experience in complex federal civil litigation, including securities fraud class actions. (Dahlstrom Decl. Ex. A.) The court also notes that, throughout this litigation, it has been impressed by Lead Counsel's acumen and diligence. The briefing has been thorough, clear, and convincing, and as far as the court can tell, Lead Counsel has not taken short cuts or relaxed its efforts at any stage of the litigation.

5. *Public Policy Considerations*

Private securities class actions are "a most effective weapon in the enforcement of the securities laws and are a necessary supplement to [SEC] action." *Eichler v. Berner,* 472 U.S. 299, 105 S.Ct. 2622, 86 L.Ed.2d 215 (1985) (internal quotation marks and citation omitted). For these reasons, "public policy supports granting attorneys' fees that are sufficient to encourage plaintiffs' counsel to bring securities class actions that supplement the efforts of the SEC." *Bristol–Myers Squibb,* 361 F.Supp.2d at 236; *see also In re World-Com, Inc. Sec. Litig.,* 388 F.Supp.2d 319, 359 (S.D.N.Y.2005) ("In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives.").

A 25% fee award in a $225 million settlement is certainly sufficient incentive to pursue securities cases of this magnitude. And while it may be that a lower percentage would also be sufficient, this court will not pretend that it has the expertise necessary to divine the ideal percentage or construct an accurate sliding fee scale. This court is particularly unwilling to undertake such an endeavor in a case where the fee award was set on the open market, and where an improperly calibrated fee would provide a disincentive to future counsel to take risks and pursue large class settlements that the SEC cannot.

III. CONCLUSION

For the foregoing reasons, this court finds that Lead Counsel's request for a fees award in the amount of 25% of the Settlement Amount is fair and reasonable under *Goldberger* and the prevailing law in this Circuit.

E.D.N.Y.,2010.
In re Comverse Technology, Inc. Securities Litigation
Not Reported in F.Supp.2d, 2010 WL 2653354 (E.D.N.Y.), Fed. Sec. L. Rep. P 95,781

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Herrero, 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEVIN CORNWELL, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. CREDIT SUISSE GROUP, et al., Defendants.	Civil Action No. 08-cv-03758(VM) **(Consolidated)** CLASS ACTION ORDER AWARDING ATTORNEYS' FEES AND EXPENSES

635891_1

THIS MATTER having come before the Court on July 18, 2011, on the motion of Lead Plaintiffs' counsel for an award of attorneys' fees and expenses incurred in the Action; the Court, having considered all papers filed and proceedings conducted herein, having found the settlement of the Action 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. All of the capitalized terms used herein shall have the same meanings as set forth in the Settlement Agreement dated March 7, 2011.

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

3. Counsel for the Lead Plaintiffs are entitled to a fee paid out of the common fund created for the benefit of the Settlement Class. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (1980). In class action suits where a fund is recovered and fees are awarded therefrom by the court, the Supreme Court has indicated that computing fees as a percentage of the common fund recovered is the proper approach. *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). The Second Circuit recognizes the propriety of the percentage-of-the-fund method when awarding fees. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005).

4. Lead Plaintiffs' counsel have moved for an award of attorneys' fees of 27.5% of the Settlement Fund, plus interest.

5. This Court adopts the percentage-of-recovery method of awarding fees in this case, and concludes that the percentage of the benefit is the proper method for awarding attorneys' fees in this case.

6. The Court hereby awards attorneys' fees of 27.5% of the Settlement Fund, plus interest at the same rate as earned on the Settlement Fund. The Court finds the fee award to be fair and reasonable. The Court further finds that a fee award of 27.5% of the Settlement Fund is consistent with awards made in similar cases.

7. Said fees shall be allocated among plaintiffs' counsel by Co-Lead Counsel in manner which, in their good faith judgment, reflects each counsel's contribution to the institution, prosecution and resolution of the Action.

8. The Court hereby awards expenses in an aggregate amount of $285,072.62, plus interest.

9. In making this award of attorneys' fees and expenses to be paid from the Settlement Fund, the Court has considered each of the applicable factors set fort in *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). In evaluating the *Goldberger* factors, the Court finds that:

(a) Counsel for Lead Plaintiffs expended considerable effort and resources over the course of the Action researching, investigating and prosecuting Lead Plaintiffs' claims. Lead Plaintiffs' counsel have represented that they have reviewed tens of thousands of pages of documents, interviewed witnesses and opposed legally and factually complex motions to dismiss. The parties also engaged in settlement negotiations that lasted several months. The services provided by Lead Plaintiffs' counsel were efficient and highly successful, resulting in an outstanding recovery for the Settlement Class without the substantial expense, risk and delay of continued litigation. Such efficiency and effectiveness supports the requested fee percentage.

(b) Cases brought under the federal securities laws are notably difficult and notoriously uncertain. *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. MDL 1500, 2006 U.S. Dist. LEXIS 17588, at *31 (S.D.N.Y. Apr. 6, 2006). "[S]ecurities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA." *In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000). Despite the novelty and difficulty of the issues raised, and the procedural posture of the case, Lead Plaintiffs' counsel secured an excellent result for the Settlement Class.

(c) The recovery obtained and the backgrounds of the lawyers involved in the lawsuit are the best evidence that the quality of Lead Plaintiffs' counsel's representation of the Settlement Class supports the requested fee. Lead Plaintiffs' counsel demonstrated that notwithstanding the barriers erected by the PSLRA, they would develop evidence to support a convincing case. Based upon Lead Plaintiffs' counsel's diligent efforts on behalf of the Settlement Class, as well as their skill and reputations, Lead Plaintiffs' counsel were able to negotiate a very favorable result for the Settlement Class. Lead Plaintiffs' counsel are among the most experienced and skilled practitioners in the securities litigation field, and have unparalleled experience and capabilities as preeminent class action specialists. Their efforts in efficiently bringing the Action to a successful conclusion against the Defendants are the best indicator of the experience and ability of the attorneys involved. In addition, Defendants were represented by highly experienced lawyers from a prominent firm. The standing of opposing counsel should be weighed in determining the fee, because such standing reflects the challenge faced by plaintiffs' attorneys. The ability of Lead Plaintiffs' counsel to obtain such a favorable settlement for the Settlement Class in the face of such formidable opposition confirms the superior quality of their representation and the reasonableness of the fee request.

(d) The requested fee of 27.5% of the settlement is within the range normally awarded in cases of this nature.

(e) Public policy supports the requested fee, because the private attorney general role is "'vital to the continued enforcement and effectiveness of the Securities Acts.'" *Taft v. Ackermans*, No. 02 Civ. 7951(PKL), 2007 U.S. Dist. LEXIS 9144, at *33 (S.D.N.Y. Jan. 31, 2007) (citation omitted).

(f) Lead Plaintiffs' counsel's total lodestar is $4,049,631.50. A 27.5% fee represents a multiplier of 4.7. Given the public policy and judicial economy interests that support the expeditious settlement of cases, *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 373 (S.D.N.Y. 2002), the requested fee is reasonable.

10. The awarded attorneys' fees and expenses, and interest earned thereon, shall be paid to Co-Lead Counsel from the Settlement Fund immediately after the date this Order is executed subject to the terms, conditions, and obligations of the Settlement Agreement and in particular ¶6.2 thereof, which terms, conditions, and obligations are incorporated herein.

IT IS SO ORDERED.

Dated: New York, NY

18 July, 2011

THE HONORABLE VICTOR MARRERO
UNITED STATES DISTRICT JUDGE

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2011, I submitted the foregoing to orders_and judgments@nysd.uscourts.gov and e-mailed to the e-mail addresses denoted on the Court's Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 11, 2011.

s/ Ellen Gusikoff Stewart
ELLEN GUSIKOFF STEWART

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Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
S.D. New York.
In re FLAG TELECOM HOLDINGS, LTD. SECURITIES LITIGATION.
This Document Relates to: All Actions.

Master File No. 02–CV–3400 (CM)(PED).
Nov. 8, 2010.

DECISION AND ORDER APPROVING THE SETTLEMENT, CERTIFYING THE CLASS FOR SETTLEMENT PURPOSES, APPROVING THE PLAN OF ALLOCATION OF THE SETTLEMENT FUND, AND AWARDING ATTORNEYS' FEES

McMahon, District Judge.

***1** Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiffs and Class Representatives Peter T. Loftin and Joseph Coughlin (collectively, "Lead Plaintiffs" or the "Class Representatives") have moved for an order granting: (1) final approval of the proposed settlement of this action (the "Action") against Citigroup Global Markets, Inc. ("CGMI") and seven former officers and directors (the "Individual Defendants") FN1 of FLAG Telecom Holdings, Limited ("FLAG") FN2 (collectively, with CGMI, "Defendants") for $24.4 million in cash; (2) final approval of the proposed Plan of Allocation of the settlement proceeds; (3) an award of attorneys' fees and reimbursement of counsels' expenses incurred in connection with the prosecution and settlement of the Action; and (4) an award to Lead Plaintiffs for their services in prosecuting the Action. The motion is not opposed by defendants.

> FN1. The seven individual defendants are Andres Bande, Edward McCormack, Edward McQuaid, Philip Seskin, Daniel Petri, Dr. Lim Lek Suan and Larry Bautista.

> FN2. Former Defendant/non-party FLAG filed a Chapter 11 bankruptcy petition on April 12, 2002. FLAG emerged from its Chapter 11 proceeding on October 9, 2002, with FLAG Telecom Group Limited ("FTGL") becoming its successor. In late 2003, FTGL was purchased by Reliance Gateway Net Limited, a subsidiary of Reliance Communications Limited.

I. PRELIMINARY STATEMENT

This Settlement is the culmination of more than eight years of intense, complex and unremitting litigation. The claims and defenses, which center on allegations of materially false statements made by Defendants in a scheme to artificially inflate the value of FLAG'S common stock, were sharply disputed and aggressively litigated by all parties. Despite the long pendency of this case, it would be a mistake to presume that the pace of the litigation was, at any time, "leisurely." A detailed chronology of the case, attached as Exhibit A to the moving Declaration of Brad N. Friedman, demonstrates that significant activity occurred throughout the entire eight year period. The major judicial proceedings which—included two motions to dismiss, a motion for judgment on the pleadings, a motion for partial summary judgment, numerous discovery motions, a petition for a

Writ of Mandamus, class certification and the appeal of class certification to the Second Circuit, as well as significant litigation in the District Court for the District of Columbia and in the High Court of Justice in England—represent just a small fraction of the nearly-constant activity in the case.

Discovery and discovery-related disputes required massive time and effort: Plaintiffs reviewed more than 2.4 million pages of documents produced by Defendants; analyzed privilege logs with more than 9,000 entries; issued document requests by subpoena or Hague Request to over fifty (50) non-parties, including companies in France and England, and received nearly 300,000 pages of documents in response; and conducted sixteen (16) fact depositions, including seven taken in Europe pursuant to Hague Convention requests. Each of three proposed Class Representatives, as well as Plaintiffs' expert, were deposed by the Defendants. Frequent and protracted discovery disputes resulted in hundreds of letters and emails among the parties, and multiple written opinions from multiple jurisdictions in the U.S., and in London.

Settlement negotiations in this case were extraordinarily complicated due, among other reasons, to a Directors and Officers Insurance policy involving twenty-two insurance carriers on eight separate layers of coverage. Negotiations were further complicated by parallel litigation, FN3 which also had to be settled for the Individual Defendants to achieve total peace. The Settlement eventually was achieved with the assistance of the Honorable Daniel Weinstein, a retired California Superior Court Judge, after three full-day mediation sessions that were preceded by extensive written submissions from the parties on both liability and damage issues. Along the way, Plaintiffs also mediated a division of any recovery with the *Rahl* plaintiffs, in a mediation overseen by the Honorable Nicholas H. Politan, a retired Judge from the U.S. District Court for the District of New Jersey. Ultimately, all parties, including the *Rahl* plaintiffs, agreed to Judge Weinstein's “Mediator's Proposal.”

FN3. *Rahl v. Bande,* C.A. No. 04–CV–1019 (CM)(PED) (*“Rahl”*).

***2** Even the drafting of the settlement documents was fiercely contested. From the time the Mediator's Proposal was signed by all parties on November 6, 2009, it took more than seven months, scores of emails, and multiple written submissions to and binding rulings by the mediator, for the parties to agree on the terms of the Stipulation and Agreement of Settlement and other settlement documents.

Members of the Class appear to agree with Lead Counsel's conclusion that the proposed Settlement is fair, reasonable and adequate and that the requested fee is fair and reasonable. Pursuant to the Court's Preliminary Order, as of August 31, 2010, over 43,450 copies of the Notice have been mailed to Class Members or their nominees. (Fishbein Aff., ¶ 8.) In addition, a Summary Notice was published in the national editions of The Wall Street Journal and over the National Circuit of *Business Wire* on July 21, 2010. (Andrejkovics Aff., ¶ 2.) The Notice informed potential Class Members of their right to object or request exclusion from the Class by September 22, 2010. No one has filed an objection to any aspect of the Settlement, including counsel's request for attorneys' fees and reimbursement of expenses, and no member of the Class has requested exclusion from the Class.

II. FACTUAL BACKGROUND%

At all times relevant to this Action, FLAG functioned as a global telecommunications network and services provider, offering a range of products and services to international telecommunications carriers, application service providers and Internet service providers. FLAG offered its shares to the general public in an initial public offering ("IPO") that commenced on February 11, 2000 and closed on February 16, 2000, during which FLAG sold 27,963,980 common shares at $24.00 per share and pre-IPO shareholders sold 8,436,320 shares at that price for total net proceeds to the company of approximately $634.6 million.

FLAG stated in its IPO Prospectus, which was incorporated into the Registration Statement filed with the SEC, that its goal was to become "the leading global carriers' carrier by offering a wide range of cost-effective capacity use options and wholesale products and services across our global network." To further that goal, FLAG was constructing the FLAG Atlantic cable system (the "FA–1 system"), a 50/50 joint venture with GTS TransAtlantic Carrier Services Ltd. ("GTS"), which would connect London and Paris to New York and have a potential capacity of fifteen times the maximum of the most advanced cable system in service on the Atlantic at that time. FLAG'S IPO prospectus stated, among other things, that FLAG intended to finance the construction of the FA–1 system with $600 million in bank financing and presale capacity commitments in excess of $750 million.FN4

FN4. In telecom industry parlance, "presales" are capacity sales made on a system prior to the date the system is put into service.

Plaintiffs allege that, in FLAG's IPO Prospectus and, indeed, throughout the Class Period, the market was misled about the source and nature of FLAG's presales relating to the FA–1 system, the demand for FLAG's telecommunications bandwidth, the value of FLAG's assets, and FLAG's profitability. Plaintiffs claim that FLAG's IPO Prospectus was misleading and omissive because, among other things, a substantial portion of the supposed $750 million in presales were "at cost"—including $200 million to FLAG'S co-venture partner, GTS. Plaintiffs allege that these "at cost" sales were mere financing facilities rather than true presales and, therefore, were not true indicators of profit or demand on the FA–1 system. Plaintiffs also allege that the motivating factor behind the "at cost" presales was to satisfy bank covenants so that FLAG could obtain financing to build the FA–1 system. Plaintiffs claim that, in turn, the motivating factor for FLAG's construction of the FA–1 system was to create a positive story and, therefore, favorable conditions for an IPO of FLAG's common stock, notwithstanding the failure of FLAG's previously existing cable system and FLAG management's substantial doubts about FLAG and FA–1's future prospects.

***3** Plaintiffs also contend that certain Defendants (1) artificially and fraudulently inflated FLAG's reported revenues and EBITDA during fiscal years 2000 and 2001 by causing FLAG to enter into reciprocal "swap" sales with its competitors (such as Qwest and Global Crossing), which did not need the capacity, and then immediately booking the revenue from those sales while amortizing the cost over time; (2) failed to record a substantial impairment of FLAG'S long-lived assets in a timely fashion; and (3) made false and misleading statements about the demand in the marketplace for FLAG'S products and services between April 24, 2001 and November 6, 2001.

Plaintiffs' claims arise under Sections 11, 12(a)(2) and 15 of the Securities Act of 1933 (the "'33 Act claims") and Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b–5 promulgated thereunder (the "'34 Act claims").

Defendants contend that Plaintiffs' allegations are untrue and without any factual support and that Defendants made no false or misleading or omissive statements.

Two years after the IPO, on February 13, 2002, FLAG announced that "approximately 14% of GAAP revenues for the full year 2001 was associated with reciprocal transactions entered into with other telecommunications companies and service providers" and that FLAG anticipated that, if business conditions did not improve, the company would run out of cash sometime in 2003 unless it was able to obtain cash from another source. Following this announcement, the market price of FLAG common stock, which had traded as high as $41 per share during the Class Period, declined by 46% from its February 12, 2002 closing price, to a closing price of $0.36 per share on February 13, 2002, on trading volume more than 10 times its daily average.

III. HISTORY OF THE LITIGATION

A. *Plaintiffs' Investigation, the Initial Complaint, and the Appointment of Lead Counsel*

Beginning in early 2002, Plaintiffs conducted extensive legal and factual investigations into the facts ultimately alleged in the initial complaint. This investigation and research included, *inter alia:* collecting and analyzing FLAG'S financial statements and other public statements; assembling and reviewing a comprehensive collection of analyst reports, SEC filings and major financial news service reports on FLAG and the telecom industry from a variety of sources; consulting with Lead Counsels' in-house forensic accounting experts and analyzing the relevant provisions of GAAP and related commentary; and extensively researching the applicable law.

As a direct result of Plaintiffs' investigatory efforts, the initial complaint on behalf of plaintiff Peter T. Loftin was filed on May 1, 2002. On October 18, 2002, the Honorable William C. Conner consolidated several related actions under the caption above and appointed Mr. Loftin as Lead Plaintiff and Milberg LLP, f/k/a Milberg Weiss Bershad Hynes & Lerach LLP ("Milberg"), as Lead Counsel.

***4** Plaintiffs thereafter began work on a Consolidated Amended Complaint. Lead Counsel's in-house investigative unit, working with outside investigators both in the United States and in England, identified, located and interviewed more than thirty potential witnesses, six of whom became confidential sources who provided information set forth in the Complaint, In addition, Plaintiffs retained and consulted extensively with damages expert Dr. Scott Hakala. Plaintiffs filed a Consolidated Amended Complaint on March 20, 2003.

Lead Plaintiff and eventual Class Representative Peter Loftin played a central role during this period, devoting many days to assisting the research and development of Plaintiffs' claims. Mr. Loftin, who lost more than $24 million on his FLAG investment, was particularly instrumental in shaping Plaintiffs' claims against former defendant Verizon Communications, Inc. ("Verizon") and even contributed draft allegations for the complaint.

On November 19, 2003, J. Andrew Rahl, as Trustee of the Flag Litigation Trust (the "Trustee"), filed the *Rahl* action in State Court in New York against some of the same defendants as this Action, and others. The *Rahl* Defendants removed that action to this Court, where it was assigned to Judge Conner as a related case. Plaintiffs' Lead Counsel and Trustee's counsel in *Rahl* thereafter entered into an informal joint prosecution agreement.

B. *The Amended and Second Amended Complaint and the Motions to Dismiss the Second Amended Complaint*

Plaintiffs filed a 76–page, 226–paragraph Corrected Consolidated Amended Complaint on April 15, 2003, which three different sets of law firms (Shearman & Sterling for the Individual Defendants and former defendant FLAG; Milbank Tweed for CGMI; and Kirkland & Ellis for Verizon) moved and filed separate briefs against. Plaintiffs filed a Second Consolidated Amended Complaint (the "2CAC") that made a technical correction to the name of the defendant FLAG entity (from FTGL to FLAG), on December 1, 2003, and the prior briefing was deemed directed towards that pleading. In their various briefs, the then-defendants argued that (1) the challenged statements in the Registration Statement were neither false nor misleading; (2) Plaintiffs failed to allege facts to establish that the Defendants knew, but failed to disclose, information they had a legal duty to disclose; (3) the challenged statements regarding market demand and bandwidth pricing made during the Class Period were neither false nor misleading; and (4) the allegations of GAAP violations relating to allegedly improper swap transactions and the failure to timely write down assets were inaccurate and/or insufficiently specific and/or vitiated by the fact that the challenged transactions had been reviewed by outside auditors.

In a forty-three page decision issued on February 25, 2004, the Court dismissed the 2CAC without prejudice.[FN5]

FN5. *In re Flag Telecom Holdings, Ltd. Sec. Litig.,* 308 F.Supp.2d 249 (S.D.N.Y.2004).

C. *The Third Amended Complaint and the Motions to Dismiss That Complaint*

***5** Pursuant to the Court's Order, Plaintiffs then filed a 109–page, 299–paragraph Third Consolidated Amended Complaint ("3CAC"), on April 14, 2004. In response to the Court's concerns expressed in its February 25, 2004 decision about standing under Section 12(a) (2) of the '33 Act, in addition to Peter T. Loftin, the 3CAC included as an additional plaintiff Norman H. Hunter, who purchased 200 FLAG shares in FLAG'S IPO. Mr. Hunter sold those shares prior to the end of the Class Period. Joseph Coughlin, who purchased shares traceable to the IPO in February 2000 and additional shares in February 2001, and who held his shares throughout the Class Period, moved to intervene as an additional plaintiff and proposed class representative on February 11, 2005.

The 3CAC contained a plethora of new facts to support Plaintiffs' claims. On June 23, 2004, the Individual Defendants and FLAG moved to dismiss the 3CAC, renewing their claims regarding the inadequacy of Plaintiffs' allegations of misleading statements and omissions and, in addition, asserting that Hunter's claims were time-barred because of his late entry into the case. Verizon and CGMI, separately, moved to dismiss as well.

After extensive briefing, the Court issued a sixty-five page decision on January 12, 2005, denying in part and granting in part the motions to dismiss.FN6 The Court held that Plaintiffs had not pled facts demonstrating that the statements regarding demand in FLAG's prospectus were false as of the time of the IPO; however, the Court held that Plaintiffs *had* “alleged facts sufficient to demonstrate that the Prospectus contained a material misstatement or omission in connection with the Alcatel Sales Agreement,” an agreement by which FLAG had (allegedly) fraudulently inflated the amount of its FA–1 presales.FN7 The Court also held that the 3CAC included allegations sufficient to sustain Plaintiffs' claims regarding: (1) improper accounting related to FLAG's swap transactions; (2) FLAG'S failure to write down the value of its assets in a timely manner; and (3) misstatements concerning demand and the optimistic outlook for FA–1 made by Bande and McCormack between April 1, 2001 and the end of the Class Period. The Court also held that the allegations in the 3CAC raised the requisite strong inference of *scienter* required for the '34 Act claims against Bande, McCormack and Bautista, but not Evans.

FN6. *In re Flag Telecom Holdings, Ltd. Sec. Litig.,* 352 F.Supp.2d 429 (S.D.N.Y.2005).

FN7. *Id.* at 451.

The Court upheld Plaintiffs' claims that FLAG'S financial results issued between June 23, 2000 and February 13, 2002 were materially false or misleading when issued because FLAG had entered into improper swap transactions to artificially inflate its revenues. In this regard, the Court specifically cited supporting statements Lead Counsel had obtained from confidential sources developed during its investigation. The Court further held that Hunter's claims had been tolled by the filing of Plaintiffs' May 2002 complaint and, thus, were timely raised in the 3CAC.

***6** Plaintiffs' '33 Act claims against defendants Bautista and Evans were dismissed because they had not signed the Registration Statement and, despite “a host of new allegations” in the 3CAC regarding Verizon's alleged status as a control person of FLAG and use of FLAG as a corporate piggy bank, the Court again dismissed Plaintiffs' claims against Verizon.FN8 Plaintiffs' claims against FLAG and Evans were dismissed with prejudice and the claims against Verizon were dismissed without prejudice. The motions to dismiss by Bande, McCormack, Rubin, Petri, McQuaid, Seskin, Suan, and Salomon Smith Barney, Inc. n/k/a CGMI, were denied.

FN8. *Id.* at 457.

D. ***Motion for Judgment on the Pleadings***

On June 23, 2005, CGMI moved to dismiss Plaintiffs' Securities Act claims pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, based on an affirmative defense of negative causation. CGMI also asserted that Plaintiffs' claims were barred by the statute of limitations. On January 23, 2006, the Court denied Defendants' motion in its entirety, holding that (1) Defendants had failed to establish “that the decline [in FLAG'S stock price] was not due, at least in part, to the alleged misrepresentations concerning pre-sales in Flag's Prospectus” and (2) that the new allegations in the 3CAC arose from the same conduct charged in the May 2002 complaint and were, therefore, not time-barred. FN9

FN9. *In re Flag Telecom Holdings, Ltd. Sec. Litig.,* 411 F.Supp.2d 377 (S.D.N.Y.2006).

E. *Motion for Class Certification*

On February 11, 2005, Plaintiffs moved to certify a class and also moved to have Joseph Coughlin, who purchased shares traceable to the IPO in February 2000 and additional shares in February 2001, intervene as an additional plaintiff and proposed Class Representative. Defendants aggressively opposed this motion, filing a fifty-page brief and a declaration with more than 1,850 pages of exhibits.

Defendants also challenged the adequacy of the named Plaintiffs to represent the class, claiming that the Plaintiffs were insufficiently engaged in the management of the case and, in particular, were not sufficiently concerned with the then-pending indictment of Lead Counsel and its potential consequences, although Defendants themselves said they did "not [challenge] the competence or adequacy" of Lead Counsel. FN10

FN10. Defendants' Joint Memorandum of Law In Opposition to Plaintiffs' Motion for Class Certification, at 22 n. 65.

Plaintiffs responded with a twenty-page reply brief refuting Defendants' contentions, accompanied by a sworn Declaration from one of Plaintiffs' previously confidential sources (FLAG's former Vice President of Sales for North America); a sworn Declaration from damages expert Dr. Scott Hakala (eighty-five pages with exhibits); and a sworn Declaration of Lead Counsel (491 pages with exhibits). Defendants submitted a 256–page sur-reply (including exhibits). Plaintiffs filed a twenty-five page response to Defendants' sur-reply. On September 4, 2007, the District Court issued a fifty-page decision granting Plaintiffs' motion for class certification. The Court included in-and-out traders in the class because, "in light of Hakala's affidavit ... it is conceivable" that the in-and-out purchasers may be able to prove loss causation based on events prior to the end of the Class Period. FN11 The Court appointed Peter T. Loftin, Norman H. Hunter, and Joseph Coughlin as the Class Representatives, and appointed Milberg as Class Counsel.

FN11. *Id.* at 167.

F. *Discovery and Discovery Disputes*

***7** Discovery in this case was, itself, a multi-front war with battles frequently occurring simultaneously on two continents. Defendants opposed or objected to nearly every discovery request. Productions were often delayed, at least in part because documents, and especially critical accounting documents, were resident on difficult-to-access computer systems owned by overseas non-party FTGL. Disputes over discovery were frequently the subject of letters to the Court, resulting in numerous court appearances, multiple written Court decisions, a petition (by the Individual Defendants) for a Writ of Mandamus to the Court of Appeals, and thousands of pages of briefs and correspondence among the parties.

Plaintiffs have, since 2005, obtained approximately 2,391,600 pages of documents from the Individual Defendants, including approximately 2,381,800 pages of documents from FTGL that were produced by Defendant McCormack pursuant to an unusual court Order. In addition, Plaintiffs ultimately received 39,425 pages of accounting documents generated from FT-GL's accounting system under an agreement with the Individual Defendants pursuant to which a third-party vendor generated reports and Plaintiffs (with the *Rahl* Trustee) paid one-half of the costs. Plaintiffs also obtained 37,725 pages of documents from CGMI and another 268,500 pages of documents from more than fifty (50) non-parties to whom Plaintiffs issued subpoenas and/or the Court issued Hague Convention requests in England and France.

Plaintiffs deposed sixteen witnesses, six of whom were deposed overseas pursuant to Requests for International Judicial Assistance Pursuant to the Hague Convention. At the time of the Settlement, eight additional Hague Convention requests had been issued by the Court and more overseas depositions had been scheduled.

In connection with class certification, the proposed Class Representatives, including Norman Hunter, were deposed and produced over 4,000 pages of documents. Defendants also deposed and obtained documents from Plaintiffs' damages expert, Dr. Scott Hakala.

At the time of the Settlement, Plaintiffs had issued Plaintiffs' Notice of Deposition to CGMI pursuant to Fed.R.Civ.P. 30(b)(6) ; Plaintiffs' Second Set of Supplemental Interrogatories to CGMI and Request for Production of Documents; and Plaintiffs' Corrected First Set of Requests for Admission to CGMI.

The parties to this Action and the *Rahl* litigation entered into a number of stipulations governing the conduct of discovery. While these stipulations greatly enhanced the efficiency of discovery for all parties, and permitted the plaintiffs in the two litigations each to access the discovery obtained by the other, the process of negotiating and drafting the stipulations was complex and extremely time-consuming.

It is totally unnecessary to recount here the massive amount of discovery litigation (and concomitant sanctions litigation) in which the parties engaged once discovery finally commenced (due to the PSLRA stay, discovery did not begin until 2005!). Suffice it to say that the parties are still unable to read each others' descriptions of their many discovery battles without having war break out anew. Nothing between the parties came easily.

***8** Plaintiffs' efforts to obtain discovery from non-parties also required huge investments of time and effort. As mentioned above, Plaintiffs issued subpoenas and/or the Court issued Hague Convention requests to more than fifty (50) non-parties. Several of those parties resisted discovery, necessitating collateral litigation. There was litigation between plaintiffs and the law firm of Gibson, Dunn & Crutcher, which previously represented FLAG in certain matters and which received a subpoena to produce documents in this case. Multiple hearings relating to discovery in this matter were held by the High Court of Justice in London, which required Plaintiffs to retain a Barrister in addition to their Solicitor. There were also interlocutory appeals relating to third party discovery in the Second Circuit.

G. *The Motions for Summary Judgment and the Operative Complaint*

On June 25, 2007, in response to the Individual Defendants' request for permission to file a motion for partial summary judgment dismissing Plaintiffs' '33 Act claims in their entirety, Plaintiffs moved for leave to amend the 3CAC to further detail their '33 Act claims. That motion was granted. Plaintiffs filed the Fourth Consolidated Amended Complaint on October 15, 2007. The final and operative complaint, the Corrected Fourth Consolidated Amended Complaint (the "Complaint"), was filed on January 10, 2008 .FN12

FN12. The Correction removed vestigal references to Verizon as a defendant.

After the completion of further discovery targeted specifically at the more detailed '33 Act allegations, on May 13, 2008, both sets of remaining Defendants (the Individual Defendants and CGMI) filed a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure seeking summary judgment on Plaintiffs' '33 Act claims. Defendants asserted in their motion that the Registration Statement was not false or misleading because:

(i) FLAG had approximately $774 million in FA–1 presales at the time of the IPO and, therefore, the challenged statement at issue—that FLAG had "presales in excess of $750 million"—was true;

(ii) the challenged statement could not have misled potential investors about market demand because the statement was in a section of the Registration Statement dealing with financing, not demand;

(iii) even if a reasonable investor could have understood the challenged statements to be about demand for capacity on the FA–1 system, cautionary language in the Registration Statement about future demand for FLAG'S products was sufficient to make the Registration Statement on the whole not misleading; and

(iv) the specific presales transactions challenged by Plaintiffs were legitimate and the relevant terms of the transactions were disclosed in the Registration Statement.

Collectively, the briefing on this motion included over 175 pages of legal memoranda and over 3,300 pages of declarations and appendices.

On March 23, 2009, the Court issued a twenty-three page opinion denying Defendants' motion in its entirety.FN13

FN13. *In re Flag Telecom Holdings, Ltd. Sec. Litig.,* 618 F.Supp.2d 311 (S.D.N.Y.2009).

H. *The Rule 23(f) Appeal of Class Certification*

***9** On September 19, 2007, Defendants each filed a petition pursuant to Rule 23(f) of the Federal Rules of Civil Procedure seeking interlocutory review of the Court's class certification decision. The Second Circuit granted Defendants' Rule 23(f) petitions on December 12, 2007.

On July 22, 2009, the Second Circuit affirmed virtually all of the Court's class certification Order, rejecting all but one of the Defendants' arguments. However, the Second Circuit agreed with Defendants that "as a matter of law" there was insufficient evidence of loss causation prior to the last day of the Class Period for in-and-out traders to remain in the Class. The Court of Appeals therefore vacated the Court's class certification Order with respect to those Class Members who sold their FLAG common stock prior to February 13, 2002, and ruled that Norman H. Hunter, who sold all of his shares before the end of the Class Period, could not serve as a Class Representative. Unfortunately for Plaintiffs, this decision dramatically reduced the total potential recovery in this case, from more than $360 million to approximately $14.2 million.[FN14]

FN14. Prior to the Second Circuit's decision, Plaintiffs' damage expert, Dr. Scott Hakala, calculated that the potential damages in this case were in the range of $362.3 million to $465.5 million, depending on whether one used the economic loss method or the investment loss method of calculating damages, and whether the date of the first significant corrective disclosure is considered to be April 2, 2001 or June 18, 2001.

On August 5, 2009, Plaintiffs filed a petition pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure seeking rehearing of the appeal and/or rehearing *en banc.* By Order dated October 6, 2009, the Second Circuit Court of Appeals denied Plaintiffs' petition for rehearing and/or rehearing *en banc.*

I. *Judge Conner's Death and the September 2009 Status Conference*

In early July 2009, the parties learned that the Judge who had so ably presided over this matter since its inception, Judge Conner, had died. Shortly thereafter the case was re-assigned, and on August 7, 2009, the parties were advised that the Court would hold a status conference on September 17, 2009. At that status conference, the Court informed the parties that it would not be overly sympathetic to resolving prior to trial yet another defense motion for partial summary judgment, this time on the '34 Act claims, because a trial was already a near certainty in light of the denial of the motion for summary judgment on the '33 Act claims. The Court also informed the parties that it thought the motion for rehearing in the Second Circuit (which was then pending) was unlikely to be granted, and that if it was in fact denied, the Court would not be sympathetic to a renewed motion, based on additional evidence, to certify a class of in-and-out traders. The Court set a schedule to complete discovery and advised the parties that it expected the case to be resolved—whether by settlement or trial—within the year.

IV. HISTORY OF THE SETTLEMENT NEGOTIATIONS

In a case of this complexity and magnitude, one expects to encounter certain obstacles to settlement. In this case, settlement negotiations were exponentially more complicated than usual due to the Byzantine structure of the Directors and Officers ("D & O") Insurance policy covering the Individual Defendants, disputes between the two sets of defendants and among the insurance carriers and the Defendants, and the existence of the parallel *Rahl* action.

***10** The $250 million D & O policy is comprised of one primary and seven excess coverage layers, with multiple carriers sharing each layer. For example, the second excess layer includes five carriers. In all, there are 22 different carriers, with several appearing in more than one layer.[FN15] According to the terms of the policy, the carriers in any particular layer are not obligated to make any payment unless and until all the coverage layers below are exhausted. This coverage structure results in a situation where any carrier that would be required to pay into a possible settlement can effectively veto the settlement even though that veto may expose carriers on higher layers to greatly increased liability;

and, unless the vetoing carrier itself appears on a higher layer, it has no incentive to accept the settlement. Further complicating the situation, certain carriers in the insurance tower, at various times, threatened to and/or did disclaim coverage of the '33 Act claims FN16 and/or coverage of CGMI.

FN15. The first layer is $20 million (two carriers share 50/50); the second layer is $30 million after the first $20 million is exhausted (two carriers share 50/50); the third layer is $50 million after the prior $50 million is exhausted (five carriers have 20% each); the fourth layer is $50 million after the prior $100 million is exhausted (one carrier has 82.16%, plus two others); the fifth layer is $25 million after the prior $150 million is exhausted (one is 40% and three others are 20% each); and the sixth through eighth layers are $25 million each (each is a different single carrier).

FN16. Astoundingly, certain excess insurance policies in the tower did not "follow form."

The parties' long-running dispute over loss causation also posed a very significant obstacle to settlement. In addition to raising the issue in their motions to dismiss, motion for judgment on the pleadings, summary judgment motion, opposition to class certification and in their appeal of the class certification decision, Defendants continually asserted causation as a defense throughout the settlement negotiations, maintaining that damages were only a small fraction of those claimed by Plaintiffs.

A. *Judge Weinstein Presides Over the First Mediation Session Between Plaintiffs and the Individual Defendants*

On October 17, 2007, Plaintiffs' Lead Counsel (with the assistance of Mr. Loftin's personal in-house counsel), counsel for the Individual Defendants (with the assistance of defendant McCormack), and counsel for several of the insurance carriers, conducted a full-day mediation session before retired California Superior Court Judge Daniel Weinstein of JAMS. FN17 Formal written mediation statements were submitted by both sides in advance of the mediation. At the Mediator's request, both sides also submitted a supplemental mediation statement on the issue of loss causation. At the beginning of the mediation counsel for both sides, as well as Mr. McCormack, made oral presentations. At the conclusion of the session Plaintiffs made a settlement demand to which the Individual Defendants did not respond, and the mediation ended without success.

FN17. CGMI and plaintiff's counsel in *Rahl* were not part of the initial mediation efforts.

B. *Periodic Efforts Continue Over the Next Year and a Half*

Although formal mediation did not resume until June 2009, Judge Weinstein periodically kept in contact with both sides, and even occasionally met in person with several of the insurance carriers to discuss this case—including at least once for breakfast in the summer of 2008. However, Lead Counsel refused to attend any further meetings absent a commitment that such a meeting would result in a meaningful response to the outstanding settlement. As the insurance carriers would not make such a commitment, no meeting occurred.

***11** In addition, Lead Counsel exchanged a few telephone calls with counsel for CGMI, to see whether CGMI had any interest in discussing settlement. Counsel for CGMI had no interest at that time in mediation, but was willing to consider a direct negotiation if the parties were in the same financial ballpark. It quickly became clear that the parties were not in the same ballpark, and so no such negotiations occurred.

C. *Judge Weinstein Presides Over the Second Mediation Session Between Plaintiffs and the Individual Defendants*

By Spring 2009, the insurance carriers finally agreed to make a meaningful response to Lead Counsel's outstanding settlement demand, and on June 2, 2009, Plaintiffs' Lead Counsel (again with the assistance of Mr. Loftin's in-house counsel), counsel for the Individual Defendants, and counsel for several of the insurance carriers (including counsel for certain additional insurance carriers who had not attended the prior mediation session), renewed their mediation efforts before Judge Weinstein. By this time, the primary insurance layer was entirely or almost entirely exhausted by defense costs. Once again, however, the mediation was unsuccessful.

D. *Judge Politan Presides Over a Mediation Session Between Plaintiffs and the Plaintiff in Rahl*

Lead Counsel and plaintiff's counsel in *Rahl* agreed that, for a variety of reasons, it would make sense if the plaintiffs in the two competing actions could agree (subject to the later approval by this Court now being sought) upon an allocation between them of any recovery in both cases. Accordingly, on June 24, 2009, Plaintiffs' Lead Counsel and counsel for the Trustee in *Rahl* conducted a full-day mediation session before retired United States District Court Judge Nicholas H. Politan, to see whether these two sets of plaintiffs could agree upon a division between them of any future recovery. This mediation resulted in an agreement that the Class would receive 70% of any recovery from the Individual Defendants, plus 100% of any recovery from CGMI. Certain document production issues were also mediated and resolved as between the Trustee and the Class.

In retrospect, the importance of this agreement cannot be overstated. At the time—June 2009—the Second Circuit had not yet issued its ruling on loss causation. Had Lead Plaintiffs won the loss causation issue in the Circuit (as Lead Counsel reasonably believed they would) the 70–30 split with *Rahl* might well have turned out to be a mildly bad deal, or at least a neutral deal, for the Class. *However,* by “hedging” against the possibility of a bad result in the Circuit, Plaintiffs ultimately were able to achieve *more* than a full recovery in their negotiations with the Defendants. This agreement also removed a significant complication in connection with achieving a global settlement.

E. *Judge Weinstein Presides Over a Third Mediation Session. This Time Among the Plaintiffs in Both Cases, the Individual Defendants, and CGMI*

***12** The mediation before Judge Weinstein finally convened for the third time on October 29, 2009, this time with the addition of counsel for the Trustee, as well as counsel for CGMI, who learned about the planned mediation shortly before-hand and requested (and was granted) permission to attend. The parties did not reach agreement during this session. However, this session did eventually result in a “Mediator's Proposal” that was accepted by all parties on November 6, 2009. As a result of this proposal, and Plaintiffs' earlier agreement with the Trustee, Plaintiffs have agreed to settle this action for 70% of the $34 million in cash being paid on the Individual Defendants' behalf to settle this action and *Rahl,* plus $600,000 in cash being paid by CGMI (all of which is going to the Class in this Action). The total settlement consideration to the Class in this Action is $24.4 million.

F. *"Litigation" Ensues Before Judge Weinstein Over the Terms of the Final Settlement Agreement*

Even the signing of the Mediator's Proposal did not end the legal battle. Over a period of more than seven months after the Mediator's Proposal was signed, the parties exchanged multiple drafts of the Stipulation and Agreement of Settlement, Notice of Pendency and other documents, but were not able to resolve all outstanding issues. Fortunately, however, as part of the Mediator's Proposal to which all parties agreed, Judge Weinstein retained "binding authority" to resolve any disputes in connection with finalizing the settlement papers.

In February and March 2010, numerous issues were submitted to Judge Weinstein for decision pursuant this binding authority, and multiple responses and replies were submitted by Plaintiffs and the Individual Defendants. Additional disputes, as between the insurance carriers and the Individual Defendants, were also submitted to Judge Weinstein for resolution, thereby causing further delay. The Stipulation and Agreement of Settlement was finally executed on June 21, 2010.

V. THE ISSUANCE OF NOTICE AND THE REACTION OF THE CLASS TO THE PROPOSED SETTLEMENT

Subsequent to the Settlement, Lead Plaintiffs retained a claims administrator on behalf of the Class (the "Claims Administrator"). The Claims Administrator was chosen after a competitive bidding process and extensive negotiations thereafter to significantly reduce third party costs, such as broker nominee charges typically incurred during securities class action settlement administrations.

After the parties submitted documentation requesting preliminary approval of the Settlement, this Court entered an Order on June 23, 2010, preliminarily approving the Settlement embodied in the Stipulation (the "Preliminary Approval Order"). The Preliminary Approval Order: (1) approved a form of Notice; (2) approved the form of publication notice; (3) ordered that any Class members wishing to exclude themselves from the Class do so by letters postmarked no later than September 22, 2010; (4) ordered that any Class members wishing to object to the Settlement file their papers by September 22, 2010; and (5) ordered a fairness hearing to take place at 2 p.m. on October 29, 2010. The Court also approved the Claims Administrator in the Preliminary Approval Order.

***13** In accordance with the Preliminary Approval Order, on July 16, 2010, Lead Counsel caused the Notice to be mailed to all Class members who could be identified from FLAG'S stock transfer records and through the efforts of the Claims Administrator. As of August 31, 2010, a total of over 43,450 Notices were sent to potential Class members. (Fishbein Aff., ¶ 8.) Additionally, and also pursuant to the Preliminary Approval Order, on July 21, 2010, a Summary Notice was published in the national editions of The Wall Street Journal and over the National Circuit of *Business Wire.* (Andrejkovics Aff., ¶ 2.)

The Notice provided a detailed description of: (1) the Action; (2) the nature of the claims; (3) the history of the litigation; (4) the potential outcome if this Action were to proceed to trial; (5) the terms of the proposed settlement and the Plan of Allocation, including the manner in which the Settlement Fund would be divided among the Class; (6) the process and deadline for filing objections, requests for exclusion and claim forms; (7) the date, time, and place of the Court's hearing to determine the fairness of the Settlement; (8) the right of Class members to be heard at the hearing; and (9) the claims to be released. The Notice also informed the Class that Lead Plaintiffs would apply for: (1) reimbursement of their expenses in the approximate amount of two million dollars, plus an award of attorneys' fees in the amount of 30% of the remaining balance of the Gross Settlement Fund after reimbursement of these expenses and payment of any PSLRA awards to the Lead Plaintiffs; and (b) awards to the Lead Plaintiffs for their services in prosecuting the Action in the amounts of $100,000 for Lead Plaintiff Peter T. Loftin and $5,000 for Lead Plaintiff Joseph Coughlin.

Both the Notice and Summary Notice are available on the Internet on the websites of Lead Counsel and the Claims Administrator and at the website flagtelecom-securitiessettlement.com. To date, Lead Plaintiffs have paid $66,714.44 out of the Settlement Fund to cover the costs related to Settlement notice and administration.

Pursuant to the terms of the Notice and the Court's preliminary approval Order of June 23, 2010, Class Members have until September 22, 2010 to opt-out of or object to this Settlement pursuant to Fed.R.Civ.P. 23. No Class Members have exercised their right to opt out and no Class Members have objected to the proposed Settlement.

VI. THE COURT GRANTS FINAL APPROVAL TO THE PROPOSED SETTLEMENT

A. *The Standard for Evaluating Class Action Settlements*

The standard for reviewing a proposed class action settlement is whether the settlement is "fair, reasonable and adequate." *In re EVCI Career Colleges Holding Corp. Sec. Litig.,* Nos. 05 Civ. 10240(CM) *et. al.,* 2007 WL 2230177, at *3 (S.D.N.Y. July 27, 2001) (*citing Maywalt v. Parker & Parsley Petroleum Co.,* 67 F.3d 1027, 1079 (2d. Cir.1995)). "A proposed class action settlement enjoys a strong presumption that it is fair, reasonable and adequate if, as is the case here, it was the product of arm's-length negotiations conducted by capable counsel, well-experienced in class action litigation arising under the federal securities laws." *EVCI,* 2007 WL 2230177, at *4 (*citing In re Sumitomo Copper Litis.,* 189 F.R.D. 274, 280 (S.D.N.Y.1999)); *New York & Maryland v. Nintendo of Am.,* 775 F.Supp. 676, 680–81 (S.D.N.Y.1991)); *accord Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 116 (2d Cir.2005), *cert. denied,* 544 U.S. 1044, 125 S.Ct. 2277, 161 L.Ed.2d 1080 (2005). "There is a 'strong judicial policy in favor of settlements, particularly in the class action context.' " *In re Telik, Inc. Sec. Litig.,* 576 F.Supp.2d 570, 575 (S.D.N.Y.2008) (*quoting In re Paine Webber Ltd. P'ships Litig.,* 147 F.3d 132, 138 (2d Cir.1998)). Moreover, " 'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation." *Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 366 (S.D.N.Y.2002) (internal quotation and citation omitted).

***14** The presumption in favor of the negotiated settlement in this case is strengthened by the fact that settlement was reached in an extended mediation supervised by Judge Weinstein. *See In re Telik,* 576 F.Supp.2d at 576 ("Judge Weinstein's role in the settlement negotiations strongly supports a finding that they were conducted at arm's-length and without collusion."); *In re Elan Sec. Litig.,* 385 F.Supp.2d 363, 369 (S.D.N.Y.2005) ("[T]he Court has no reason to question that the Settlement was the product of extended 'arm's length' negotiations, including, among other things, the two-day settlement conference before Judge Politan."); *In re Interpublic Sec. Litig.,* Nos. 02 Civ. 6527(DLC), 03 Civ. 1194(DLC), 2004 WL 2397190, at *7 (S.D.N.Y. Oct. 26, 2004) (negotiations were arm's-length where, among other things, parties met with magistrate judge and document discovery was complete).

All parties were represented throughout the Settlement negotiations by able counsel experienced in class action and securities litigation: Plaintiffs by Brad N. Friedman of Milberg, LLP; CGMI by Douglas Henkin of Milbank, Tweed, Hadley and McCloy; and the Individual Defendants by Jerome Fortinsky of Shearman & Sterling. The Trustee was represented by Grant & Eisenhofer. *See In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 461 (S.D.N.Y.2004) ("Both sides have been represented well.... Counsel for plaintiffs, the Settling Defendants, and STB possessed the requisite expertise to negotiate a fair settlement."); *In re NASDAQ Market–Makers Antitrust Litig.,* 187 F.R.D. 466, 474 (S.D.N.Y.1998) (approving settlement where "[t]he process by which the parties reached the Proposed Settlements was arm's-length and hard fought by skilled advocates").

In sum, the Settlement was negotiated at arm's-length by sophisticated counsel before an experienced mediator, and after the completion of significant discovery. These facts establish that the process leading to the Settlement was fair to absent Class Members. The Court should therefore accord the strongest presumption of fairness to the Settlement in this case.

B. ***The Settlement Is Fair, Reasonable and Adequate and in the Best Interests of the Class***

Courts in this Circuit evaluate the fairness, adequacy and reasonableness of a class action settlement according to the *"Grinnell* factors:"

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of the litigation.

***15** *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir.1974); *see also County of Suffolk v. Long Island Lighting Co.,* 907 F.2d 1295, 1323–24 (2d Cir.1990); *In re Sumitomo,* 189 F.R.D. at 281. "In finding that a settlement is fair, not every factor must weigh in favor of settlement, 'rather the court should consider the totality of these factors in light of the particular circumstances.' " *In re Global Crossing,* 225 F.R.D. at 456 (*quoting Thompson v.*

Metropolitan Life Ins. Co., 216 F.R.D. 55, 61 (S.D.N.Y.2003)).

i. Continued Litigation Would Be Complex and Consume Substantial Judicial and Private Resources

The complexity, expense and possible duration of this litigation weigh in favor of settlement. "[I]n evaluating the settlement of a securities class action, federal courts, including this Court, 'have long recognized that such litigation is notably difficult and notoriously uncertain.' " *Sumitomo,* 189 F.R.D. at 281 (*quoting In re Michael Milken and Assoc. Sec. Litig.,* 150 F.R.D. 46, 53 (S.D.N.Y.1993)). Indeed, the courts recognize that "[s]ecurities class actions are generally complex and expensive to prosecute." *In re Gilat Satellite Networks, Ltd.,* No. CV–02–1510, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007). Thus, "[c]lass action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In re Luxottica Group S.p .A. Litig.,* 233 F.R.D. 306, 310 (E.D.N.Y.2006) (citations omitted).

Although Plaintiffs have conducted significant fact discovery, the costs and duration of completing fact discovery, conducting expert discovery, additional motion practice, trial preparation, the trial itself, post-trial motions, and any appeals would be substantial. At the time this proposed Settlement was reached, six additional overseas depositions were scheduled. In total, at least twelve additional depositions would have been conducted by Plaintiffs in preparation for trial. Expert discovery would be particularly expensive and time-consuming as both sides would require the services of experts in the telecommunications industry in addition to accounting and damages experts.

Finally, whatever the outcome of any eventual trial, which would likely require several months and involve the introduction of hundreds (if not thousands) of exhibits, vigorously contested motions and significant expenses, it is virtually certain that appeals would be taken from any verdict. All of the foregoing would delay the ability of the Class to recover for years assuming, of course, that Plaintiffs would ultimately be successful in proving their claims. Settlement at this juncture unequivocally results in a substantial and tangible present recovery for the Class, without any attendant risk of delay, or of continued litigation through, for example, summary judgment on the '34 Act claims, a protracted trial, and post-trial proceedings. *See Hicks v. Stanley,* No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *6 (S.D.N.Y. Oct.19, 2005) ("Further litigation would necessarily involve further costs; justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action.").

ii. The Reaction of the Class to the Proposed Settlement Has Been Overwhelmingly Positive

***16** The reaction of the Class to the Settlement is a significant factor—perhaps the most significant factor to be weighed in considering its adequacy. *In re Veeco Instruments Secs. Litig.* (*"Veeco I"*), No. 05 MDL 0165(CM), 2007 WL 4115809, at *7 (S.D.N.Y. Nov.7, 2007); *see also Maley,* 186 F.Supp.2d at 362; *In re American Bank Note Holographics, Inc., Sec. Litig.,* 127 F.Supp.2d 418, 425 (S.D.N.Y.2001).

The Class's reaction to the Settlement in this case is overwhelmingly positive. More than 43,450 Notices were mailed to Class Members or their nominees. To date, no Class Members have exercised their right to opt out and no Class Members have objected to the proposed Settlement. This is an exceptionally strong indication of the fairness of the Settlement. *See Strougo v. Bassini,* 258 F.Supp.2d 254, 258 (S.D.N.Y.2003) (*citing In re SmithKline Beckman Corp. Sec. Litig.,* 751 F.Supp. 525, 530 (E.D.Pa.1990) ("Both the utter absence of objections and the nominal number of shareholders who have exercised their right to opt out ... militate strongly in favor of approval of the settlement."). The absence of objections to the Settlement supports the inference that it is fair, reasonable and adequate. *See Maley,* 186 F.Supp.2d at 374.

iii. Settlement Was Reached at an Advanced Stage of Litigation After Significant Discovery and Extensive Consultation with a Damages Expert

The advanced stage of this litigation and the extensive amount of discovery completed militate in favor of approval of the Settlement. As detailed above, the parties have been vigorously litigating this case for more than eight years, through multiple motions to dismiss, a motion for judgment on the pleadings, discovery and countless discovery motions, a class certification motion, a motion for partial summary judgment, and an interlocutory appeal of the Court's class certification Order. Plaintiffs have reviewed more than 2.5 million pages of documents and taken 16 depositions. Defendants have deposed each of the Class Representatives plus plaintiff Norman Hunter and Plaintiffs' damages expert. The parties conducted multiple full-day mediation sessions before Judge Weinstein (plus Plaintiffs' and the Trustee's mediation before Judge Politan) and exchanged extensive mediation statements on both liability and damages. Throughout all phases of the litigation, Lead Counsel has consulted with and received the advice of Dr. Scott Hakala, a recognized expert on the subject of damages in securities cases.

Thus, the parties reached an agreement to settle the litigation at a point when they had a well-informed understanding of the legal and factual issues surrounding the case. Having sufficient information to properly evaluate the strengths and weaknesses of their case, Lead Counsel were able to settle the litigation on terms highly favorable to the Class without the substantial risk, uncertainty, and delay of continued litigation. *See Veeco I,* 2007 WL 4115809, at *8 ("It is evident that Plaintiffs have a clear view of the strengths and weaknesses of their case and of the adequacy of the Settlement.") (internal quotations omitted) (*citing Meijer, Inc. v. 3M,* Civil Action No. 04–5871, 2006 WL 2382718, at *14 (E.D.Pa. Aug.14, 2006) (Parties had "an adequate appreciation of the merits" of case at time settlement negotiated where Class Counsel, *inter alia,* reviewed hundreds of thousands of pages of documents and depositions and consulted extensively with economic expert; and parties engaged in mediation, including exchange of mediation statements regarding merits of respective positions in order to inform and facilitate negotiations.)).

iv. Establishing Liability, Particularly with Respect to Defendants' *Scienter,* Involves Significant Risks

***17** While Plaintiffs maintain that their claims against Defendants are valid, they would face significant legal challenges if this case were to continue, and there is a real risk that they would ultimately fail to establish liability. "Courts routinely recognize that securities class actions present hurdles to proving liability that are difficult for plaintiffs to clear." *In re Top Tankers, Inc., Sec. Litig.,* No. 06 Civ. 13761(CM), 2008 WL 2944620, at *4 (S.D.N.Y. July 31, 2008); *see In re AOL Time Warner, Inc. Sec. & ERISA Litig.,* No. MDL 1500, 02 Civ. 5575(SWK), 2006 WL 903236, at *4 (S.D.N.Y. Apr. 6, 2006) ("The difficulty of establishing liability is a common risk of securities litigation."); *In re Indep. Energy Holdings PLC Sec. Litig.,* No. 00 Civ. 6689(SAS), 2003 WL 22244676, at *3 (S.D.N.Y. Sept.29, 2003) (noting difficulty of proving *scienter*); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 321–22, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007).

In their various motions, answers to the Complaint, and during the multiple mediation sessions, the Individual Defendants have asserted that:

• the disclosures in FLAG's registration statement regarding presales were accurate and not misleading;

• the Individual Defendants' Class Period statements regarding demand were true and not misleading;

• all of FLAG's accounting for capacity sales during the Class Period was accurate and in accordance with GAAP;

• the allegedly improper "swap" transactions were legitimate business transactions and were properly accounted for;

• FLAG was not required to report an impairment during the Class Period; and

• Plaintiffs could not prove causation and damages.

Defendant CGMI has asserted numerous additional defenses, including negative causation and that it conducted sufficient due diligence. Had this case not settled, Defendants could be expected to gather additional evidence for each of these defenses and to assert them in a motion for summary judgment and/or at trial and, if necessary, on appeal.

The Individual Defendants have also claimed that Plaintiffs face insurmountable hurdles in proving *scienter* against the three remaining Individual Defendants on Plaintiffs' '34 Act claims. Plaintiffs believe they would ultimately prevail on this issue but acknowledge that proving *scienter* in this case would be particularly challenging in light of the following: (1) there is no evidence that any of the '34 Act Defendants exercised options on or sold FLAG stock during the Class Period; (2) the '34 Act Defendants claim to have relied in good faith on the advice of multiple sets of accountants who approved the relevant accounting decisions; and (3) the '34 Act Defendants claim their alleged misstatements were supported by contemporaneous documents and reports that, in and of themselves, negate any inference of *scienter.*

Moreover, at trial, Plaintiffs would face the additional risks posed by conflicting evidence and testimony. Since many witnesses likely would be aligned with Defendants and, as a result, would be hostile to Plaintiffs' case, Plaintiffs would be required to rely primarily on documents and expert witnesses to establish their case. The risk of establishing liability would be exacerbated by the risks inherent in all shareholder litigation, such as the unpredictability of a lengthy and complex jury trial, the risks that witnesses would suddenly become unavailable or jurors could react to the evidence in unforeseen ways, and the risks that the jury would find that Defendants reasonably believed in the propriety of their actions at the time and, consequently, Plaintiffs failed to prove *scienter.*

v. Establishing Recoverable Damages, Particularly with Respect to Loss Causation, Also Involves Significant Risks

***18** Plaintiffs also faced significant risk in proving causation and the amount of damages.

> In order to prove loss causation and damages, Lead Plaintiff would be required to prove that Defendants' alleged false and misleading statements and omissions of material fact inflated the price of [defendant's] common stock during the Class Period, and that upon the Company's disclosure of such misinformation, the price of [defendant's] common stock dropped and damaged Lead Plaintiff and the Class. Lead Plaintiff would also be required to prove the amount of artificial inflation in the price of [defendant's] common stock.

In re Top Tankers, 2008 WL 2944620, at *5. Plaintiffs anticipate that, in the absence of settlement, Defendants would move for summary judgment on the ' 34 Act claims at the close of discovery, renewing the multiple arguments made in their motions to dismiss and for judgment on the pleadings.

The most significant risk to Plaintiffs' claim for damages was actually realized in this case, when the Second Circuit held, as a matter of law, that there was insufficient evidence on which in-and-out traders could establish the element of loss causation. As previously noted, this decision probably caused a very significant reduction in Plaintiffs' recoverable damages, from over $360 million to approximately $14.2 million. Although Plaintiffs initially considered a motion asking that the District Court reformulate the Class to include at least some of the individuals excluded by the Second Circuit's decision, the likelihood of success on such a motion was slim, and the Court so advised the parties during the September 17, 2009 status conference.

With regard to the damages remaining viable in the case, Defendants likely would contend that actual damages, if indeed there were any at all, were far less than even $14.2 million. First, Defendants would claim that any losses suffered by the Class during the Class period were caused not by the acts of the Individual Defendants but, rather, by the general stock market decline and, in particular, the collapse of the telecommunications market. Second, Defendants would argue that the decline in FLAG'S stock price following its announcement on February 13, 2002 resulted primarily from statements indicating that the company might not be able to continue operations in 2003, not from the “corrective disclosures” related to the fraud alleged by Plaintiffs. Finally, even if Plaintiffs prevailed on issues of liability and damage causation, Defendants would likely present an expert to testify that the proper calculation of damages would result in a recovery of only minimal damages at most.

Even in a less challenging case, “[c]alculation of damages is a ‘complicated and uncertain process, typically involving conflicting expert opinion’ about the difference between the purchase price and the stock's ‘true’ value absent the alleged fraud.” *Global Crossing,* 225 F.R.D. at 459 (*quoting Mayley,* 186 F.Supp.2d at 365). Undoubtedly, in this action, establishing the amount of damages at trial would have resulted in a “battle of experts.” The jury's verdict with respect to damages would thus depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable. *See EVCI Career College,* 2007 WL 2230177, at *8 (*citing In re PaineWebber Ltd. P'ships Litig.,* 171 F.R.D. 104, 129 (S.D.N.Y.1997), *aff'd,* 117 F.3d 721 (2d Cir.1997) (noting unpredictability of outcome of battle of damage experts)).

***19** Thus, the very substantial challenges facing Plaintiffs in their attempts to prove liability, loss causation and damages weigh heavily in favor of approval of the proposed Settlement.

vi. The Risk of Maintaining a Class Action Through Trial Also Weighs in Favor of Approval

In addition to the risks of establishing liability and damages, the nature of the Second Circuit's decision was such that there remained a risk of maintaining class status through trial. From the beginning of the case, Defendants strongly contested class certification on various grounds. It is likely that, after the conclusion of expert discovery, Defendants would renew their argument that conflicts among class members relating to liability and damages make class treatment improper or, alternatively, require the certification of subclasses. The Second Circuit, while upholding the certification of a single class including both '33 Act and '34 Act plaintiffs, cautioned:

> [W]e do not suggest that the issue described by Defendants does not deserve the careful and continued attention of the district court, but merely that it does not inevitably lead at the present time to the decertification of the class. As the lower court recognized, if Plaintiffs are able to prove loss causation with respect to both the '33 and '34 Act claims, then it will be necessary for a jury "to determine the extent of harm caused by each [misstatement], and it is here that the interests of class members could diverge." We are confident in the lower court's wisdom and ability to utilize the available case management tools to see that all members of the class are protected, including but not limited to the authority to alter or amend the class certification order pursuant to Rule 23(c)(1)(C), to certify subclasses pursuant to Rule 23(c)(5), and the authority under Rule 23(d) to issue orders ensuring "the fair and efficient conduct of the action."

In re Flag Telecom Holdings, Ltd. Sec. Litig., 574 F.3d 29, 37 (2d Cir.2009) (internal citations omitted) (*citing In re Flag,* 245 F.R.D. at 160). Thus, there remained in this case the very real risk of decertification or modification of the class at a later stage of the proceedings. *See In re NASDAQ Market–Makers Antitrust Litig.,* 187 F.R.D. 466, 476–77 (S.D.N.Y.1998) (decertification can occur if management problems arise during litigation; decertification or reversal of certification would deprive class of any recovery).

vii. The Ability of the Defendants to Withstand a Greater Judgment

If Plaintiffs somehow were successful in undoing the implications of the Second Circuit's loss causation ruling, then the '34 Act Defendants would lack sufficient insurance, and presumably would lack sufficient resources, to pay a judgment in the full amount of the claimed damages. CGMI recently needed a well-publicized infusion of taxpayer dollars just to survive. In any event, "the mere ability to withstand a greater judgment does not suggest the settlement is unfair." *AOL Time Warner,* 2006 WL 903236, at *42, This is particularly true where, as here, the settlement appears to exceed the recoverable damages, in light of the Second Circuit's ruling.

viii. The Settlement is Reasonable When Viewed in Light of the Best Possible Recovery and the Risks of Continued Litigation

***20** The last two substantive factors courts consider are the range of reasonableness of the settlement funds in light of (1) the best possible recovery and (2) litigation risks. In analyzing these last two factors, the issue for the Court is not whether the Settlement represents the "best possible recovery," but how the Settlement relates to the strengths and weaknesses of the case. The Court "consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Grinnell,* 495 F.2d at 462. Courts agree that the determination of a "reasonable" settlement "is not susceptible of a mathematical equation yielding a particularized sum." *PaineWebber,* 171 F.R.D. at 130 (*quoting Milken,* 150 F.R.D. at 66). Instead, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir.1972); *see Indep. Energy,* 2003 WL 22244676, at *4.

Under the proposed Settlement, the Class will receive $24.4 million, well in excess of the $14.2 million estimated by Plaintiffs' expert to be the potential damages in light of the Second Circuit ruling excluding in-and-out traders from the Class. More aggressive methods of calculation could result in damages ranging from approximately $25 million to approximately $120 million . FN18 Even under the most favorable, $120 million scenario, the proposed settlement amounts to over 20% of the potential damages, well within the "range of reasonableness." *See In re Merrill Lynch Research Rep. Sec. Litig.,* Nos. 02 MDL 1484(JFK), 02 Civ. 3176(JFK), 02 Civ. 7854(JFK), 02 Civ. 10021 (JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (settlement representing 6.25% of estimated damages found to be "at the higher end of the range of reasonableness of recovery in class action securities litigations"); *In re PaineWebber,* 171 F.R.D., at 132 (recovery between 7% and 20% is "well within the range of reasonableness"); *see also In re Telik,* 576 F.Supp.2d at 580 (settlement representing 25% of recoverable damages is "well above that in most securities class actions"); *Veeco I,* 2007 WL 4115809, at *11 (settlement representing 23.2% of possible recovery is "squarely within the range of reasonableness") (internal quotations omitted).

FN18. To achieve these results, Class Members (those who held their shares throughout the Class Period) would have to prove loss causation prior to the end of the Class Period notwithstanding the Second Circuit's holding that "as a matter of law" there is insufficient evidence of such loss causation. In addition, to obtain the most favorable damages scenario ($120 million), Plaintiffs would need to argue that the Court should calculate damages based on the "constant percentage inflation" method, not the "constant dollar" method—*i.e.,* that artificial inflation (and, consequently, damages) should be measured by the *percentage* by which FLAG'S stock price dropped when corrective information was revealed to the market, not simply by the *dollar amount* by which FLAG's

> price dropped upon the disclosure of corrective information. While Plaintiffs believe that each of these approaches for calculating legally compensable damages is economically sound, and while valid legal and factual arguments exist in support of each of these approaches, such approaches are not universally accepted and have not been accepted by all courts. *See, e.g., In re Williams Sec. Litig.,* 496 F.Supp.2d 1195, 1270 (N.D.Okla.2007) (rejecting the "constant percentage inflation" method), *aff'd,* 558 F.3d 1144 (10th Cir.2009).

By all measures, the proposed Settlement compares favorably with settlements reached in other securities class actions in recent years. According to objective data recently published by Cornerstone Research, the $24.4 million recovery here is more than three times the median settlement ($7.4 million) in class actions reported during the period 1996 through 2008 and three times the median settlement ($8.0 million) reported for 2009 settlements. The median settlement in class actions securities cases was 2.9% of estimated damages for the period 2002 through 2008 and 2.3% of estimated damages in 2009. In cases with estimated damages of less than $50 million, the median settlement was 11.4% of estimated damages for the period 2002 through 2008 and 12% of estimated damages in 2009. Here, the settlement amount represents 170% of the potential damages (with damages of $14.2 million), and 20% of the maximum potential damages under the most aggressive possible approach (with damages of $120 million).

***21** In light of these circumstances and all of the delay and uncertainty that would be inherent in continued litigation, the Settlement falls well within the range of possible recovery considered fair, reasonable and adequate.

VII. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE

A Plan of Allocation is fair and reasonable as long as it has a "reasonable, rational basis." *Maley,* 186 F.Supp.2d at 367. Courts recognize that "the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information." PaineWebber, 171 F.R.D. at 133. An allocation formula need only have a reasonable and rational basis, particularly if recommended by experienced and competent counsel. Counsel's conclusion here that the Plan of Allocation is fair and reasonable is therefore entitled to great weight. *American Bank Note,* 127 F.Supp.2d at 430 (approving allocation plan and according counsel's opinion "considerable weight" because there were "detailed assessments of the strengths and weaknesses of the claims asserted, the applicable damages, and the likelihood of recovery").

The Plan of Allocation proposed herein has been prepared by Plaintiffs' Lead Counsel utilizing their Damages Expert's report and data concerning causation and damages. The Plan reflects the proposition that the price of FLAG common stock was artificially inflated from the beginning of the '33 Act Class Period on February 11, 2000, and at the beginning of the '34 Act Class Period on March 6, 2000, and through February 12, 2002, but that much of the artificial inflation was suddenly eliminated on February 13, 2002 when FLAG made disclosures that at least partially corrected its prior misstatements, and that any remaining artificial inflation was eliminated by April 11, 2002. The Plan reflects the requirements for establishing damages promulgated by *Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005), and complies with the requirements of the PSLRA.

The Plan of Allocation separately allocates the Net Individual Defendants' Settlement Fund differently than the CGMI Settlement Fund, based on the fact that CGMI was only alleged to be liable under the Securities Act for the IPO, while the Individual Defendants were alleged to be liable under both the Securities Act for the IPO and under Section 10(b) of the Exchange Act for the Class Period.

The Plan provides for the distribution of the Net Individual Defendants' Settlement Fund to all Class Members on a *pro rata* basis based on a formula that takes into account the alleged artificial inflation paid on the shares of FLAG stock purchased during the entire period February 11, 2000 through February 12, 2002, that were still held at the close of trading on February 12, 2002.

The Plan separately provides for the distribution of the Net CGMI Settlement Fund to all IPO Class Members on a *pro rata* basis based on a formula that takes into account the alleged artificial inflation paid on shares of FLAG stock purchased during the IPO period February 11, 2000 through May 10, 2000, that were still held at the close of trading on February 12, 2002.

***22** The Plan's formula subtracts the Asserted Value of the shares on the day of purchase from the purchase price actually paid to calculate the amount of artificial inflation allegedly paid, and either uses that, or a maximum of $5.08 per share, the amount by which the corrective disclosure reduced the alleged inflation, to give the Claimant a "Recognized Claim" from those shares. If the shares were sold after February 12, 2002 for more than their Asserted Value, then the amount received in excess of the Asserted Value can reduce the Recognized Claim. The Net Individual Defendants' Settlement Fund will be distributed *pro rata* to Class Members who submit acceptable Proofs of Claim ("Authorized Claimants") based on their particular Recognized Claim as compared to the total of all Class Members' Recognized Claims. The Net CMGI Settlement Fund will be distributed *pro rata* to Authorized Claimants based on their particular IPO Recognized Claim as compared to the total of all IPO Class Members' Recognized Claims.

The Plan of Allocation is set forth in full in the Settlement Notice, and there have been no objections to the Plan.

Accordingly, the court concludes that the Plan of Allocation provides a fair and reasonable method for allocating the Net Settlement Funds among Class Members based on their relative compensable losses, and should be approved.

VIII. LEAD COUNSEL'S REQUEST FOR FEES AND EXPENSES IS FAIR AND REASONABLE

Lead Counsel, having achieved recovery of $24.4 million in what appears to be a case worth substantially less, seek reimbursement of expenses in the amount of $1,910,420.76, plus an award of attorneys' fees in the amount of 30% of the *remaining* balance of the Settlement Fund *after* reimbursement of these expenses and payment of any PSLRA awards to the Class Representatives; *i.e.,* Lead Counsel seek a fee award that is 30% of the Settlement Fund "net" of expenses and awards to the Class Representatives. On the more traditional "gross" basis, this would amount to an award of only approximately 27.5%. In dollar terms this amount—approximately $6,715,374, plus a *pro rata* share of the accrued interest—is less than 32% of Lead Counsel's approximately $21,000,000 of lodestar in this case.

The $24.4 million Settlement obtained for the benefit of the Class is the result of literally tens of thousands of hours spent by Lead Counsel and the skill and perseverance of Lead Counsel in litigating this Action. It represents a remarkable result for the Class in a complex case that posed a great many obstacles to recovery. Lead Counsel's considerable expenditure of time and resources on a difficult and protracted case, where Lead Counsel ultimately obtained a superior result in light of the size of the Class and the amount of recoverable damages, justifies the requested fee.

Lead Counsel devoted over 45,500 hours to the prosecution of this case over more than eight years. Lead Counsel prosecuted the Action on an entirely contingent-fee basis. The significant outlay of cash and personnel resources by Lead Counsel has been completely at risk. Given the uncertainties inherent in securities class actions generally and the difficulties in this particular case, there was a significant possibility that Lead Counsel would recover nothing for their substantial efforts. They are in any event recovering only a portion of their outlay.

***23** Courts in this District and throughout the nation, recognizing the risks and effort generally expended by counsel to obtain favorable results, have not hesitated to award 30% of the "gross" recovery, or more, in complicated securities fraud cases such as this. Furthermore, the Settlement amount here far exceeds the national medians—in straight dollar terms and as a percentage of the recovery compared to the total alleged damages—for class action securities settlements after the passage of the PSLRA.

The reaction of the Class (or, rather, the lack of reaction of the Class) to the proposed fee award supports Lead Counsel's request. The support of the Class is not surprising, for even after payment of expenses of $1,910,420.76, PSLRA awards to Loftin of $100,000 and to Coughlin of $5,000, and Lead Counsel's requested fee of 30% of the remainder, the net payment to the Class—approximately $15,669,205, plus interest—still would be more than 100% of a $14.2 million damage figure.

A. *Lead Counsel Are Awarded Fees from the Common Fund Created as a Result of the Settlement*

Courts have long recognized that " 'attorneys who create a common fund to be shared by a class are entitled to an award of fees and expenses from that fund as compensation for their work.' " *Veeco I,* 2007 WL 4115809, at *2 (*quoting American Bank Note,* 127 F.Supp.2d at 430); *see Boeing Co. v. Van Gemert,* 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980). The purpose of the common fund doctrine is to fairly and adequately compensate class counsel for services rendered and to prevent the unjust enrichment of persons who benefit from a lawsuit without shouldering its costs. *Mills v. Electric Auto–Lite Co.,* 396 U.S. 375, 392, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970). Moreover, awards of attorneys' fees from a common fund "serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future misconduct of a similar nature." *In re Telik,* 576 F.Supp.2d at 585. Accordingly, Lead Counsel are entitled to an award of attorneys' fees and expenses from the Settlement Fund.

Courts traditionally have used two methods to calculate attorneys' fees in common fund cases: the percentage method, which awards attorneys' fees as a percentage of the common fund created for the benefit of the class; and the lodestar/multiplier or "presumptively reasonable fee" approach, which multiplies the number of hours expended by counsel by the hourly rate normally charged for similar work by attorneys of comparable skill and experience, and enhances the resulting lodestar figure by an appropriate multiplier to reflect litigation risk, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors. *Savoie v. Merchants Bank,* 166 F.3d 456, 460 (2d Cir.1999). The Second Circuit has held that both the percentage and lodestar/multiplier methods are available to district courts in awarding attorneys' fees in common fund cases. *Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 50 (2d Cir.2000). However, as has often and emphatically been noted, the percentage of recovery methodology is considered the "most efficient and logical means" for calculating attorneys' fees. *In re Telik,* 576 F.Supp.2d at 584.

***24** Under either method—percentage or lodestar/multiplier—the fees awarded in common fund cases must be "reasonable" under the circumstances. *Goldberger,* 209 F.3d at 47; *In re Fine Host Corp. Sec. Litig.,* No. MDL 1241, 3:97–CV–2619 JCH, 2000 WL 33116538, at *4 (D.Conn. Nov.8, 2000). The Second Circuit has instructed that, in the exercise of their discretion,

> [D]istrict courts should continue to be guided by the traditional criteria in determining a reasonable common fund fee, including: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation .... (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations."

Goldberger, 209 F.3d at 50 (*quoting In re Union Carbide Corp. Consumer Prod. Bus. Sec. Litig.,* 724 F.Supp. 160, 163 (S.D.N.Y.1989)).

The fee requested in this case—30% of the "net" Settlement Fund (approximately 27.5% of the "gross" Settlement Fund) is reasonable in light of the extensive efforts and risks faced over the course of nearly eight years of litigation and is well within the range of fees awarded (even on "gross" settlements) by courts in this Circuit. *See, e.g., In re Bisys Sec. Litig.,* No. 04 Civ. 3840(JSR), 2007 WL 2049726, at * 2 (S.D.N.Y. July 16, 2007) (30% of $65.87 million settlement); *In re Priceline.com, Inc Sec. Litig.,* No. 3:00–CV–1884(AVC), 2007 WL 2115592, at *4–5 (D.Conn.2007) (30% of $80 million settlement); *Hicks v. Stanley,* No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct.24, 2005) (30% of $10 million settlement); *In re Warnaco Group. Inc. Sec. Litig.,* No. 00 Civ. 6266(LMM), 2004 WL 1574690, at *3 (S.D.N.Y. July 13, 2004) (30% of $12.85 million settlement); *Kurzweil v. Phillip Morris Co., Inc.,* Nos. 94 Civ. 2373(MBM), 94 Civ. 2546(BMB), 1999 WL 1076105, at *1 (S.D.N.Y. Nov. 30, 1999) (30% of $123 million settlement).

Indeed, as this Court wrote in *In re Veeco Instruments* (*"Veeco II"*), there are numerous other common fund cases in this District alone where fees were awarded in the amount of 33 1/3% of the gross settlement fund. *Veeco Instruments Inc. Sec. Litig.,* No. 05 MDL 01695(CM), 2007 WL 4115808, at *4 n. 5 (S.D.N.Y. Nov.7, 2007) (*"Veeco II"*) (collecting cases). FN19

FN19. *See also In re Blech Sec. Litig.,* 2002 WL 31720381, at * 1 (S.D.N.Y. Dec.4, 2002) (33.3%); *In re APAC Teleservice, Inc. Sec. Litig.,* 1999 WL 1052004, at *1 (S.D.N.Y. Nov.19, 1999) (33 1/3% of $21 million settlement); *Becher v. Long Island Lighting Co.,* 64 F.Supp.2d 174, 182 (E.D.N.Y.1999) (one-third fee, plus expenses, is "well within the range accepted by courts in this circuit"); *In re Medical X–Ray Film Antitrust Litig.,* 1998 WL 661515, at *2 (E.D.N.Y. Aug.7, 1998) (awarding 33 1/3% of $39.36 million after concluding such an award is "well within the range accepted by courts in this circuit").

Likewise, courts in other circuits around the country commonly award attorneys' fees equal to or higher than the compensation requested here. "Awards of 30% or more of a settlement fund are not uncommon in § 10(b) common fund cases such as this." *Ressler v. Jacobson,* 149 F.R.D. 651, 655 (M.D.Fla.1992); *see also In re Rite Aid Corp. Sec. Litig.,* 146 F.Supp.2d 706, 735 (E.D.Pa.2001) (noting that in a study of 287 settlements ranging from less than $1 million to $50 million, "the median turns out to be one-third"). As this Court observed in *In re Telik* (awarding attorneys' fees of 25% of the settlement amount):

> ***25** The requested fee is also less than the fee awards in many cases such as this throughout the rest of the country. *See, e.g., In re Ravisent Techs., Inc. Sec. Litig.,* 2005 WL 906361, at *15 (E.D.Pa. Apr.18, 2005) (awarding attorneys' fees of one-third of $7 million settlement); *In re Corel Corp. Inc. Sec. Litig.,* 293 F.Supp.2d 484, 497 (E.D.Pa.2003) ("[T]he 33 1/3% fee request in this complex case is within the reasonable range."); *Faircloth v. Certified Fin. Inc.,* 2001 WL 527489, at *12 (E.D.La. May 16, 2001) (awarding attorneys' fees of 35% of settlement plus interest and reimbursement of expenses).

In re Telik, 576 F.Supp.2d at 587 (additional citations omitted). FN20

FN20. *See also In re Managed Care Litig.,* 2003 WL 22850070, at *2 (S.D.Fla. Oct.24, 2003) (awarding 35.5%).

The Second Circuit "encourages" an analysis of counsel's lodestar "as a 'cross check' on the reasonableness of the requested percentage." *Goldberger,* 209 F.3d at 50; EVCI, 2007 WL 2230177, at * 17. Where the lodestar is used as a cross-check, "the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger, 209 F.3d at 50.*

A lodestar analysis begins with the calculation of the lodestar, which is "comprised of the amount of hours devoted by counsel multiplied by the normal, non-contingent hourly billing rate of counsel." *In re Prudential Sec. Inc. Ltd. Pshps, Litig.,* 985 F.Supp. 410, 414 (S.D.N.Y.1997), Here, Lead Counsel devoted over 45,500 hours to this matter and their lodestar was

$20,955,697.50. (Milberg Decl., ¶ 6 and Exh. A.) FN21 Lead Counsel's efforts are described in detail *supra,* and in the accompanying Friedman Declaration. Lead Counsel is also overseeing all aspects of the settlement process, a responsibility that will continue into the coming months.

FN21. In addition, Finkelstein Thompson devoted 46.9 hours to this matter on a fully contingent basis, and their lodestar was $17,590.00, in connection with Lead Counsels' efforts to compel the production of documents from Gibson, Dunn & Crutcher. (Finkelstein Decl. ¶¶ 2, 5 and Exh. 1.) All other law firms that assisted Lead Counsel were foreign firms that may not legally be paid contingently, or, in one instance, an American bankruptcy firm that would not work contingently, and so these fees and expenses were advanced by Lead Counsel and are being treated by Lead Counsel as an expense to Lead Counsel. (Milberg Decl., Exhs. B and C.)

Lead Counsel are highly experienced in prosecuting complex securities class action cases. (Milberg Decl., Exh. D.) Consequently, Lead Counsel "were presumably able to perform the various tasks necessary to advance Plaintiffs' and the Class's interests in a more efficient manner than would have counsel with a lesser degree of specialization in the field." *In re Telik,* 576 F.Supp.2d at 588–89 (*citing Teachers Ret. Sys. of La. v. A.C.L.N ., Ltd.,* No. 01–CV–11814(MP), 2004 WL 1087261, at *6 (S.D.N.Y. May 14, 2004) (noting that the skill and prior experience of counsel in the specialized field of shareholder securities litigation is relevant in determining fair compensation)).

Finally, in evaluating the reasonableness of the hours expended on this case, it is critical to note that until the Second Circuit decision on July 22, 2009—that is, for more than seven years of the pendency of this case—the estimated amount of damages available to the Class was between $362 million and $465.5 million.

In a lodestar analysis, the appropriate hourly rates are " 'those [rates] prevailing in the community for similar services of lawyers of reasonably comparable skill, experience and reputation.' " *Cruz v. Local Union No. 3 of the IBEW,* 34 F.3d 1148, 1159 (2d Cir.1994) (*quoting Blum v. Stenson,* 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)); *see also Luciano v. Olsten Corp.,* 109 F.3d 111, 115–16 (2d Cir.1997); *Veeco II,* 2007 WL 4115808, at *9. In complex securities class actions in this Circuit and around the country, courts have repeatedly found rates similar to those charged by Lead Counsel here to be reasonable; indeed, the American Lawyer recently reported that the *median* billing rate for partners at many leading law firms exceeds $900/hour. FN22 The median rates for the firms representing defendants in this case were reported to be $950/hour for Shearman & Sterling and $900/hour for Milbank, Tweed, Hadley & McCloy. And, of course, we know that counsel for the Individual Defendants, Shearman & Sterling, who were paid currently and on a risk-free basis, long ago exhausted the entirety of a $20 million primary layer of insurance on defense costs.

FN22. *Bankruptcy Billing,* The American Lawyer, February 2010, at 44–45.

***26** "Under the lodestar method, 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 Marsh & McLennan Cos., Inc. Sec. Litig.,* No. 04 Civ. 8144(CM), 2009 WL 5178546, at *20 (S.D.N.Y. Dec.23, 2009) (*citing Goldberger,* 209 F.3d at 47); *Savoie v. Merchants Bank,* 166 F.3d 456, 460 (2d Cir.1999). "In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts, including this Court." *In re Telik,* 576 F.Supp.2d at 590 (a multiplier of 4 .65 was "well within the range awarded by courts in this Circuit and courts throughout the country") (*citing Maley,* 186 F.Supp.2d at 369). In this case, the percentage fee requested represents a fractional multiplier of less than 0.32 times the lodestar. Thus, even though Lead Counsel here assumed very substantial risk in prosecuting this case and achieved an excellent result considering all the circumstances, they will nevertheless recoup far less than their lodestar.

Lead Counsel's request for a percentage fee representing a significant discount from their lodestar provides additional support for the reasonableness of the fee request. *See In re Initial Pub. Offering Sec. Litig.,* 671 F.Supp.2d 467, 515 (S.D.N.Y.2009) (awarding fees of 33 1/3%, noting that even in a mega-fund case, there is "no real danger of overcompensation" where the award represents a fractional multiplier to the lodestar); *Veeco II,* 2007 WL 4115808, at *10 ("Not only is Plaintiffs' Counsel not receiving a premium on their lodestar to compensate them for the contingent risk factor, their fee request amounts to a deep discount from their lodestar. Thus, the lodestar 'cross-check' unquestionably supports a percentage fee award of 30%."); *In re Blech Sec. Litig.,* Nos. 94 CIV. 7696(RWS), 95 CIV. 6422(RWS), 2000 WL 661680, at *5 (S.D.N.Y. May 19, 2000) (awarding lead counsel 30% of the settlement, and confirming that the award was reasonable because it represented a fractional multiplier of lead counsel's lodestar).

Finally, the Second Circuit has stated that whether the Court uses the percentage method or the lodestar approach, it should continue to consider the following traditional criteria: (1) the time and labor expended by counsel; (2) the risks of the litigation; (3) the magnitude and complexity of the litigation; (4) the requested fee in relation to the settlement; (5) the quality of representation; and (6) public policy considerations. *Goldberger,* 209 F.3d at 50. An analysis of these factors demonstrates that the requested fee is reasonable.

Lead Counsel has devoted over 45,500 hours to the prosecution and settlement of this case. (Milberg Decl., ¶ 6 and Exh. A.) As detailed *supra* and in the accompanying Friedman Declaration, these efforts were reasonable and necessary to the effective prosecution of this Action.

***27** The reasonableness of the requested fee is also supported by an evaluation of the risks undertaken by Lead Counsel in prosecuting this Action. The Second Circuit has recognized that "despite the most vigorous and competent of efforts, success is never guaranteed." *Grinnell,* 495 F.2d at 471. Securities class actions such as this are "notably difficult and notoriously uncertain." *In re Sumitomo,* 189 F.R.D. at 281.

Lead Counsel undertook this Action on a wholly contingent basis, investing substantial amounts of time and money to prosecute this litigation with no guarantee of compensation or even the recovery of out-of-pocket expenses. Unlike counsel for Defendants, who are paid substantial hourly rates and reimbursed for their expenses on a regular basis, Lead Counsel have not been compensated for any time or expenses since this case began more than eight years ago. 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. *See, e.g., American 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,* 985 F.Supp.2d at 417 ("Numerous courts have recognized that the attorney's contingent fee risk is an important factor in determining the fee award.").

Lead Counsel prosecuted this action essentially by itself against teams of defense lawyers from two large and well-funded firms—Shearman & Sterling and Milbank, Tweed, Hadley & McCloy—plus other substantial defense firms who represented earlier defendants (*e.g.,* Kirkland & Ellis on behalf of Verizon) and/or who appeared in connection with discovery disputes (*e.g.,* Gibson Dunn, appearing *pro se*).

Moreover, there was no prior governmental action against FLAG on which Lead Counsel could "piggy back." The burden and the risk here were borne solely by Lead Counsel. As this Court wrote in *Veeco II:*

> Indeed, the risk of non-payment in complex cases, such as this one, is very real. There are numerous class actions in which counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise. There is no guarantee of reaching trial, and even a victory at trial does not guarantee recovery. As the Court stated in *Warner:* "Even a victory at trial is not a guarantee of ultimate success.... An appeal could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself." 618 F.Supp. at 747–48.

2007 WL 4115808, at *6 (*quoting In re Warner Commc'n Sec. Litig.,* 618 F.Supp. 735, 747–48 (S.D.N.Y.1985)).

The risks involved in this case were compounded by the complexity of the issues. Lead Counsel faced enormous obstacles in proving the liability of the Defendants. Assuming these hurdles could be overcome, Lead Counsel still faced the burden of proving both the extent of the Class's damages and that those damages were caused by Defendants' conduct, a "complicated and uncertain" process at best. *Global Crossing,* 225 F.R.D. at 459. Moreover, the risk of this case for Lead Counsel increased as a result of developments in the law during the course of this litigation, especially in the areas of loss causation and class certification.

***28** Much of the risk borne by Lead Counsel here was realized when the Second Circuit held that in-and-out traders should be excluded from the Class, because there was no loss causation prior to the end of the Class Period (thus also arguably limiting the remaining Class's damages). As a result of this decision, the maximum potential damages available to the Class arguably were reduced from more than $362 million to potentially as little as $14.2 million.

Notwithstanding the foregoing significant risks of continued litigation, Lead Counsel zealously represented the Class and secured for them a sizable recovery—indeed, a recovery greater than what may have been the maximum potential recoverable damages. The risks associated with this litigation clearly support the reasonableness of Lead Counsel's fee request.

As discussed above, the proposed fee—30% of the "net" Settlement amount—is well within the range of fees awarded by courts in this Circuit and other circuits in securities class actions. Thus, this factor weighs in favor of the reasonableness of the requested fee.

The quality of the representation and the standing of Lead Counsel are important factors that also support the reasonableness of the requested fee. Lead Counsel have immense experience in complex federal civil litigation, particularly the litigation of securities and other class actions and have received significant recognition for their work. Lead Counsel's experience allowed them to identify the complex issues involved in this case and formulate appropriate and effective litigation strategies. Lead Counsel aggressively prosecuted this Action for roughly eight years and ultimately obtained an extraordinary recovery for the Class.

The skill and sophistication of Lead Counsel's representation in this case enabled Plaintiffs to prevail in battle after battle, critical motion after critical motion, including, most notably, the motions to dismiss, the motion for judgment on the pleadings, countless discovery motions, the motion for class certification (in which Plaintiffs also won every issue on appeal other than loss causation), and the partial summary judgment motion. But nowhere was the skill of Lead Counsel more dramatically displayed than in the mediation and negotiation with the *Rahl* Trustee and the subsequent mediation with the Defendants, which led to the Plaintiffs obtaining FLAG's privileged documents from FTGL, and ultimately to the Plaintiffs receiving 70% of the total recovery from the Individual Defendants in both cases.

Furthermore, the Settlement was obtained in the face of extremely aggressive opposition from the Defendants, represented by the pre-eminent defense firms of Shearman & Sterling and Milbank, Tweed, Hadley & McCloy. The quality of the opposition should be taken into consideration in assessing the quality of Lead Counsel's performance. *See, e.g., Teachers Ret. Sys.,* 2004 WL 1087261, at *20; *Maley.,* 186 F.Supp.2d at 373.

***29** Courts in the Second Circuit have held that "[p]ublic policy concerns favor the award of reasonable attorneys' fees in class action securities litigation." *In re Merrill Lynch Tyco,* 249 F.R.D. 124, 141–42 (S.D.N.Y.2008) (" 'In order to attract well qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives.' ") (*quoting In re Worldcom, Inc. Sec. Litig.,* 388 F.Supp.2d 319, 359 (S.D.N.Y.2005)). Moreover, "public policy supports granting attorneys fees that are sufficient to encourage plaintiffs' counsel to bring securities class actions that supplement the efforts of the SEC." *In re Bristol–Myers,* 361 F.Supp.2d 229, 236 (S.D.N.Y.2005); *see also 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."); *In re Visa Check/Master Money Antitrust Litig.,* 297

F.Supp.2d 503, 524 (E.D.N.Y.2003) ("The fees awarded must be reasonable, but they must also serve as an inducement for lawyers to make similar efforts in the future."), *aff'd sub nom. Wal–Mart Stores, Inc. v. Visa U.S.A. Inc.,* 396 F.3d 96 (2d Cir.2005) .

If this important public policy 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. In this case, Lead Counsel seeks a fee that is significantly less than its accrued lodestar. As such, public policy considerations favor granting the fee request.

Finally, numerous courts have noted that the lack of objection from members of the class is one of the most important factors in determining the reasonableness of a requested fee. *Maley,* 186 F.Supp.2d at 374 ("The reaction by members of the Class is entitled to great weight by the Court."); *Ressler,* 149 F.R.D. at 656 (lack of objections is "strong evidence" of the reasonableness of the fee request); *In re Prudential Sec. Inc. Ltd. P'ships Litig.,* 912 F.Supp. 97, 103 (S.D.N.Y.1996) (court determined that an "isolated expression of opinion" should be considered "in the context of thousands of class members who have not expressed themselves similarly"), *aff'd, Toland v. Prudential Sec. P'ship Litig.,* 107 F.3d 3 (2d Cir.1996).

Over 43,450 Notices have been mailed to potential Class Members and a Summary Notice was also published in *The Wall Street Journal* . (Fishbein Aff., ¶ 8; Andrejkovics Aff., ¶ 2.) The Notice mailed to Class Members stated that Lead Counsel would seek reimbursement of expenses in the approximate amount of $2 million, plus an award of attorneys' fees in the amount of 30% of the remaining balance of the Gross Settlement Fund after reimbursement of these expenses and payment of any PSLRA awards to the Lead Plaintiffs. Notably, not one Class Member has objected to this request. The overwhelmingly positive response to date by the Class attests to the approval of the Class with respect to both the Settlement and the fee and expense application.

IX. THE REQUEST FOR REIMBURSEMENT OF EXPENSES IS REASONABLE AND APPROPRIATE

***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. *See, e.g., Teachers' Ret. Sys.,* 2004 WL 1087261, at *6; *American Bank Note,* 127 F.Supp.2d at 430. " 'Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course.' " *EVCI,* 2007 WL 2230177, at * 18 (*quoting In re McDonnell Douglas Equip. Lease Fee Litig.,* 842 F.Supp. 733, 746 (S.D.N.Y.1994)). Courts have awarded such expenses so long as counsel's documentation of them is "adequate." *NASDAQ Market–Makers,* 187 F.R.D. at 489.

In the Milberg and Finkelstein Declarations, counsel have detailed and documented the $1,910,420.76 in expenses that they incurred in connection with this action.[FN23] These expenses are of the type that law firms typically bill to their clients, including photocopying of documents, mediation fees, court filing fees, deposition transcripts, fees for foreign counsel, online research, creation of a document database, messenger service, postage and next day delivery, long distance and facsimile expenses, transportation, travel, and other expenses directly related to the prosecution of this Action. All of these expenses are customary and necessary expenses for a complex securities action, and were necessary for Lead Counsel to successfully prosecute this case.

FN23. Of the total expenses set forth in text, only a relatively small amount—$1,165.83—were incurred by Finkelstein Thompson.

In addition, Lead Counsel retained accounting, damages and other experts. These experts assisted Lead Counsel in the factual investigation and analysis in connection with the amended complaints and during merits discovery, and also assisted Lead Counsel in preparing their submissions for mediation and a potential trial. This Court and others have reimbursed such expert witness fees where "[t]he expenses incurred were essential to the successful prosecution and resolution of [the] Action." *Veeco II,* 2007 WL 4115808, at *11 (quoting EVCI, 2007 WL 2230177, at *18.)

Finally, the expenses for which reimbursement is sought amount to less than the expense figure of $2 million referred to in the Notice, to which no objection was filed.

Accordingly, Lead Counsel's request for reimbursement of these expenses is granted.

X. LEAD PLAINTIFFS ARE ENTITLED TO AN AWARD PURSUANT TO 15 U.S .C. § 78U–4(A)(4)

Under the PSLRA, the Court may award "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). *See also Hicks,* 2005 WL 2757792, at *10. Lead Plaintiffs devoted substantial amounts of their time to the oversight of, and participation in, the litigation on behalf of the Class. (*See* Loftin Declaration at ¶¶ 6–17; Coughlin Declaration at ¶¶ 5–9.)

As Judge Conner wrote in his decision granting class certification, the Lead Plaintiffs "all received and reviewed the pleadings, consulted with [Lead Counsel] on various issues relevant to the lawsuit, produced documents and participated in depositions. Loftin, for example, is intimately familiar with the claims and was uniquely involved in the drafting of the Complaint, particularly with respect to the decision to initially name Verizon as a defendant.... And Coughlin, during his deposition, cogently explained the underlying basis for the litigation." FN24

FN24. *In re Flag Telecom,* 245 F.R.D. at 160–63.

***31** The Settlement Notice advised Class Members that application "will also be made for reimbursement to the Lead Plaintiffs for an amount not to exceed $100,000 for Lead Plaintiff Peter T. Loftin and for an amount not to exceed $5,000 for Lead Plaintiff Joseph Coughlin." FN25

FN25. Settlement Notice, at 2.

No objections to these requests have been filed. They are granted.

Mr. Loftin, who lost over $24 million in FLAG stock, has been actively involved in this litigation since its inception in 2002. FN26 As set forth in the Loftin Declaration, he reviewed and authorized the various complaints, as well as countless other pleadings, and, incredibly, even assisted in researching and drafting significant parts of the complaint. He consulted regularly with counsel, and insisted on Lead Counsel visiting him at his home in Florida for a full-day in-person briefing. He also traveled from Miami to New York for his deposition, which lasted a full day, as well as a preparation session the day before. He also produced over 4,000 pages of documents from his and his business's files. And, of course, he also sent his in-house counsel to attend several of the mediation sessions in person. In total, Mr. Loftin estimates that he has spent more than four hundred hours on this litigation over the eight years it has been pending. (Loftin Decl., ¶ 17.)

> FN26. Mr. Loftin founded and was, for many years, the Chairman and CEO of a domestic long distance phone company named BTI. Today he owns Casa Casuarina, an upscale South Beach, Florida hotel and event location in the former Versace Mansion. Over the course of the Class Period, especially the summer of 2000, he purchased a total of 1,700,000 FLAG shares at various prices, primarily in the range of $15.50 per share. He sold 297,300 of these shares in early April 2001, at prices ranging from approximately $2.72 to $4.02 per share, and held the remainder until FLAG filed for bankruptcy.

Mr. Coughlin responded to Lead Counsel's statutory lead plaintiff notice at the beginning of the case, but because his loss was much smaller than Mr. Loftin's, he did not seek to intervene as an additional Lead Plaintiff and Class Representative until February 2005, in response to threats from the Defendants that they would challenge Mr. Loftin as a Class Representative in light of his prior work for BTI.[FN27] Because he became involved significantly later in the case, Mr. Coughlin spent much less time on this matter than did Mr. Loftin, but he still spent a meaningful amount of time.

> FN27. Mr. Coughlin served in the Air Force from 1958 to 1962, and then spent six years with the CIA in cryptographic communications, at times posted overseas in classified locations; both positions required a security clearance. He then spent six years as a facilities analyst at IBM. Prior to retiring he spent 20 years as a court reporter. Mr. Coughlin purchased 250 shares traceable to the IPO at prices just under $31.25 per share on February 23, 2000, and purchased an additional 100 shares on July 3, 2001 for $5.17 per share. He held these shares until FLAG filed for bankruptcy.

In addition to reviewing the complaint and other pleadings and communicating with Lead Counsel, Mr. Coughlin collected his documents for production to the Defendants, and travelled from Florida to New York to sit for a half-day deposition, and also spent time preparing for his deposition the night before. In total, Mr. Coughlin estimates that he has spent approximately twenty hours on this litigation, including travel time. Coughlin Decl., ¶ 9.

XI. CONCLUSION

For the reasons set forth above, the Court grants the motion for an order granting: (1) final approval of the proposed Settlement; (2) final approval of the proposed Plan of Allocation for the settlement proceeds; (3) reimbursement of $1,910,420.76 for expenses incurred in connection with the prosecution and settlement of the Action and attorneys' fees in the amount of 30% of the remaining balance of the Settlement Fund after reimbursement of these expenses and payment of any PSLRA awards to the Lead Plaintiffs; and (4) awards to Lead Plaintiffs for their services in prosecuting the Action in the amounts of $100,000 for Lead Plaintiff Peter T. Loftin and $5,000 for Lead Plaintiff Joseph Coughlin.

S.D.N.Y.,2010.
In re Flag Telecom Holdings, Ltd. Securities Litigation
Not Reported in F.Supp.2d, 2010 WL 4537550 (S.D.N.Y.)

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H

United States District Court,
E.D. New York.
In re GILAT SATELLITE NETWORKS, LTD.

No. CV-02-1510 (CPS)(SMG).
Sept. 18, 2007.

Jacob Sabo, The Law Office of Jacob Sabo, Jeffrey Michael Haber, Bernstein, Liebhard & Lifshitz, LLP, Joseph Harry Weiss, Weiss & Lurie, Richard A. Speirs, Zwerling, Schachter & Zwerling, LLP, Steven G. Schulman, Milberg Weiss Bershad & Schulman LLP, Steven J. Toll, Catherine A. Torell, Cohen Milstein Hausfeld & Toll PLLC, Jules Brody, Stull, Stull & Brody, New York, NY, for Plaintiffs.

Joseph P. Cyr, Andrew M. Behrman, Lovells, New York, NY, Thomas Bush, Lovells, Chicago, IL, for Defendants.

MEMORANDUM OPINION AND ORDER

SIFTON, Senior Judge.

***1** On January 17, 2003, eleven class actions alleging violations of federal securities laws by Defendants Gilat Satellite Networks, Ltd. ("Gilat"), Yoel Gat, and Yoav Leibovitch (collectively "Defendants") were consolidated in this Court and Leumi PIA Sector Fund, Leumi PIA World Fund, and Leumi PIA Export Fund were appointed Lead Plaintiffs.FN1 On May 13, 2003, Lead Plaintiffs filed a Consolidated Class Action Complaint (the "Original Consolidated Complaint"), alleging against all Defendants violations of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 promulgated under the Exchange Act, 17 C.F.R. § 240j.10b-5. The complaint also alleges against Gat and Leibovitch a violation of Section 20(a) of the Exchange Act. On April 19, the undersigned certified the settlement class and granted the parties' motions for preliminary approval of a proposed Settlement Agreement, preliminary approval of a Plan of Allocation, and approval of the proposed manner and form of Notice to the settlement class and of the proposed Proof of Claim form. A Fairness Hearing was held on July 19, 2007 to consider final approval of the settlement. Now before the Court are the parties' joint motion for final approval of the proposed Settlement Agreement, Plaintiffs' Co-Lead Counsel's motion for attorney's fees and expenses, and Imanuel Liban's FN2 motion for attorney's fees and expenses, as well as Mr. Liban's August 20, 2007 supplemental filing entitled "Clarification On Behalf of Mr. Imanuel Liban." For the reasons set forth below, the parties' motion for final approval of the Settlement Agreement is granted, Lead Counsel's motion for attorney's fees and expenses is granted in part and denied in part, and Imanuel Liban' motion for attorney's fees and expenses is denied.

FN1. In 2005, while this case was pending, Leumi PIA, which owns and manages the three mutual funds referred to herein, was sold to Harel Insurance Investments Ltd. and is now known as "Harel-PIA Group." The names of the individual funds have also changed. To avoid confusion, the parties continue to refer to Lead Plaintiffs by their prior names, except where noted.

On February 12, 2003, Glancy Binkow & Goldberg LLP, Bernstein Liebhard & Lifshitz, LLP, and Cohen, Milstein, Hausfeld & Toll, P.L.L.C. were appointed co-lead counsel for Lead Plaintiffs.

FN2. Although Mr. Liban describes himself as an objector, he does not in fact object to any part of the settlement or Lead Counsel's fee award.

BACKGROUND

Familiarity with the underlying facts and procedural history of this case, as set forth in prior decisions of this Court, is presumed. Only those facts relevant to the present motion are discussed herein.

Gilat's Business

Gilat is a provider of products and services for satellite-based communications products and services, including Very Small Aperture Terminal ("VSAT") satellite dishes. During the relevant time periods, February 10, 2000 through May 31, 2002, Yoel Gat was Gilat's Chief Executive Officer and Yoav Leibovitch was Gilat's Chief Financial Officer.

In January 2000, Gilat formed a joint venture, StarBand, with Microsoft and EchoStar Communications, to provide internet access via satellite dishes. Customers would purchase a VSAT manufactured by Gilat and then pay a monthly fee to receive internet access. The StarBand service was made available to the public in November 2000.

During the relevant time periods, Gilat common stock was traded on the NASDAQ National Market System ("NASDAQ"). From 1997 to 2000, Gilat reported substantial growth in revenues and its stock rose significantly. On February 28, 2000, Gilat stock closed on the NASDAQ at $160.50 a share.

Claims Against Defendants

***2** According to the Amended Consolidated Complaint, Defendants violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder and defendants Gat and Leibovitch violated Section 20(a) of the Exchange Act. FN3 More specifically, Lead Plaintiffs allege that Defendants artificially inflated Gilat's financial results through deceptive financial statements which overstated Gilat's revenues. Although Defendants purported to follow Generally Accepted Accounting Principles ("GAAP"), FN4 they allegedly inflated reported revenues in press statements and Securities and Exchange Commission ("SEC") filings through premature revenue recognition, recording revenue from sales in excess of actual purchases, recognizing revenue from sales prior to delivering the product to customers, recognizing revenue from sales to uncreditworthy customers, recording goods placed on consignment as sold, and engaged in related-party transactions. Lead Plaintiffs further allege that the defendants misrepresented the performance of StarBand and the market for its services, claiming significant success while there were allegedly serious problems with the service and in signing up new subscribers. The Amended Consolidated Complaint also alleges that Defendants failed to disclose that Echostar Communications had not marketed Starband as promised and that Starband's lenders had withdrawn a $37 million line of credit and that the Defendants falsely stated that Gilat's total financial exposure to Starband would not exceed $75 million. According to Lead Plaintiffs, as a result of these materially false and misleading statements, made between February 10, 2000 and May 31, 2002 (the "Class Period"), FN5 they and other class members suffered damages because they purchased or otherwise acquired Gilat securities at prices which were artificially inflated. The maximum estimated damages alleged by Lead Plaintiffs amount to $187 million.

FN3. For the purposes of this motion, I only discuss those claims in the Complaint which survived Defendants' October 29, 2004 motion to dismiss, which I granted in part and denied in part.

FN4. According to the complaint, "GAAP are those principles recognized by the SEC and the accounting profession as the conventions, rules, and procedures necessary to define proper accounting practice at a particular time." Amended Consolidated Complaint, ¶ 192. 17 C.F.R. § 210.4-01 states that financial statements filed with the SEC that are not in accordance with GAAP are presumed to be misleading or inaccurate.

FN5. As discussed below, the initial alleged fraud is said to have occurred on February 9, 2000 after the close of the markets. Accordingly, the Class Period begins on February 10.

Settlement Negotiations and Preliminary Approval

In June 2006, the parties engaged in two days of mediation before retired California Superior Court Judge Daniel Weinstein.FN6 As a result of that mediation, the parties reached an agreement on the terms of the settlement.

FN6. An earlier attempt at mediation had failed.

On December 1, 2006, the parties moved for (1) certification of a settlement class; (2) preliminary approval of a proposed Settlement Agreement; (3) approval of proposed Plan of Allocation; (4) approval of the proposed manner and form of Notice to the settlement class and of the proposed Proof of Claim form; and (5) scheduling of a date for a Fairness Hearing to consider final approval of the settlement. On January 4, 2007, this Court certified the settlement class, but denied the motions for preliminarily approval of the Settlement Agreement and the Plan of Allocation without prejudice,FN7 and, accordingly, denied the motions for approval of the proposed Notice and for scheduling of a date for a Fairness Hearing.FN8

FN7. Specifically, I held that the Settlement Agreement and Plan of Allocation failed to sufficiently set forth factual bases for presumptions about the timing of alleged disclosures, contained internal inconsistencies regarding dates and recovery amounts, and provided no explanation for the parties' decision to include a $5 minimum claim amount.

FN8. In denying those motions, the Court also alerted the parties to minor typographical errors and aspects of the Notice which required clarification.

The parties then revised the settlement in light of this Court's ruling and moved again for the same relief and on April 19, 2007, I(1) certified an amended settlement class; (2) granted preliminary approval of the Settlement Agreement; (3) granted preliminary approval of the proposed Plan of Allocation; (4) approved the proposed manner and form of Notice and the proposed Proof of Claim form; and (5) scheduled a Fairness Hearing for July 19, 2007. *See In re Gilat Satellite Networks, Ltd.,* 2007 WL 1191048 (E.D.N.Y.2007). I also issued an Order specifying, among other things, the dates by which the parties had to provide notice and the dates by which Class Members had to file objections or requests for exclusion from the Class. FN9 In addition, I set September 3, 2007 as the date by which Proof of Claim forms had to be returned by Class Members. *See In re Gilat Satellite Networks, Ltd.,* 2007 WL 1191137 (E.D.N.Y.2007).

FN9. Objections and requests for exclusion were to be received no later than 20 days before the Fairness Hearing.

Mailing of Notice

***3** The parties submitted an affidavit on July 5, 2007, confirming that Notice was mailed on May 9 to 374 shareholders of record and 2,748 brokerage firms, banks, institutions and others who may serve as nominee owners, as required; that a copy of the Notice was placed on the website of the Claims Administrator, Garden City Group ("GCG"), on May 9, as required; that copies of the Notice were placed on the websites of Plaintiff's Co-Lead Counsel on May 17 and May 18, 1 and 2 days later than was required, though the delay was due to inadvertent error; FN10 that toll-free phone numbers for inquires with English and Hebrew speaking operators were placed into service by GCG by May 14, as required; FN11 that local counsel in Israel placed into service a local phone number for inquires, as required; FN12 and that Summary Notice was published in *Wall Street Journal* on May 23, *Ha'aretz* and the *Jerusalem Post* on May 22, and *Globes* on May 21, as required. Since the original date of the mailings, nominee owners have requested that GCG mail Notice directly to 17,417 potential Class Members and that GCG mail an additional 4,178 copies of the Notice to nominee owners for forwarding to potential Class Members. GCG has responded to these requests as they were made in a timely manner. In addition, the Postal Service has provided updated address information for each of the 374 shareholders of record and Notice has been re-mailed to them. As a result, on July 23, 2007, I ordered that the deadline for requests for exclusion and objections by Class Members who had not received actual Notice prior to July 15, 2007 be extended until September 3, 2007.

FN10. Though this Court's Order required Notice to be placed on the websites within 7 days of mailing of the Notice, this inadvertent error is harmless.

FN11. As of July 5, 108 calls were received by the Claims Administrator and all requests for a return call have been responded to.

FN12. The affidavit does not state when the local number was put into service. However, at the Fairness Hearing, Israeli counsel for the Lead Plaintiff's, Jacob Sabo, confirmed that the number was his office number. No calls were made to that number as of July 5.

No requests for exclusion or objections to the Settlement Agreement have been received by GCG, the parties or this Court as of the date of this Opinion. FN13

FN13. As discussed below, the Liban motion, though titled an "Objection ... to Proposed Settlement/Fees," is, in fact, a request for fees and not an objection to the Settlement Agreement or the awarding of attorneys fees.

Settlement Agreement

I. Members of the Class & Identity of Lead Plaintiffs

According to the Amended Settlement Agreement, the Class consists of "all persons and entities who purchased or otherwise acquired Gilat common stock between February 10, 2000 and May 31, 2002, inclusive." FN14 Amended Stipulation and Agreement of Settlement, ¶ 1(c)) ("Amended Settlement").

FN14. In the Plan of Allocation, the parties note that:

> Common stock (and other securities) may be acquired by means other than purchase on the open market. Examples of other methods of acquisition include acquiring stock through by exercising warrants or stock options, or acquiring stock through an employer stock distribution.
>
> Amended Notice of Proposed Settlement, n. 1 ("Amended Notice").

> Excluded from the Class are Defendants, members of the immediate family of each of Defendants, any person, firm, trust, corporation, officer, director, or other individual or entity in which any Defendant has a controlling interest or which is related to or affiliated with any of the Defendants, and the legal representatives, agents, affiliates, heirs, successors-in-interest or assigns of any such excluded party. "Related to or affiliated with" means all companies, subsidiaries, joint ventures, joint subsidiaries, or other entities controlled by any Defendant, or any entity that is or was under common corporate ownership or control with any Defendant.
>
> *Id.*

Lead Plaintiffs in this case are three mutual funds, managed by Harel-PIA Group, Israel's longest established mutual fund management company, representing more the $3 billion in assets. Harel-PIA Group is owned by Harel Insurance Investments Ltd., a publically traded Israeli insurance company. The three funds who serve as Lead Plaintiffs manage between $7 million and $17.5 million in assets each.

***4** None of these three funds owned Gilat stock at the beginning of the Class Period and they each purchased and sold shares during several of the time periods described in the Plan of Allocation below. FN15 Exhibit A annexed to the Declaration of Michael Civer (filed with the December 2006 motion) reflects that Leumi PIA World Fund purchased 87,950 shares of Gilat stock during periods 1, 3 and 4 and sold stock during periods 1, 3 and 4; the fund sold all its stock before the end of the Class Period. Civer Declaration, ¶ 6, Exhibit A. Leumi PIA Export Fund purchased 11,000 shares of Gilat stock during period 1, sold 4,000 shares during period 1 and held the remainder until after the end of period 5. *Id.* Leumi PIA Sector Fund purchased 6,000 shares during period 1 and sold all of its shares during period 3. *Id.* Lead Plaintiffs will not receive any compensation or recovery under the settlement for acting as Lead Plaintiffs. FN16

FN15. The time periods, detailed below, are (1) February 10, 2000 through March 9, 2001 at 2:40 P.M.; (2) March 9, 2001 after 2:40 P.M. through March 11, 2001; (3)

March 12, 2001 through October 2, 2001; (4) October 3, 2001 through May 31, 2002; and (5) the 90-day period after the end of the Class Period, beginning May 31, 2002 and ending August 28, 2002.

FN16. Lead Plaintiffs' motion for reimbursement of expenses is discussed below.

II. *Released Parties*

Under the terms of the Settlement Agreement, the "Released Parties" are:

any and all of Defendants and their respective present and former affiliates, predecessors, successors, and assigns, and each of their respective family members, heirs, executors, and administrators, and any corporate entity affiliated with any of the Defendants,

including, but not limited to, Gilat, and its presents and former officers, directors, employees, partners, principals, trustees, attorneys, auditors, accountants, investment bankers, consultants, agents, insurers and co-insurers and each of their respective heirs, executors, administrators, predecessors, successors (including, but not limited to, successors inbankruptcy) and assigns.

Amended Settlement, ¶ 1(q).

III. *Claims Administrator*

Lead Plaintiffs' counsel have proposed GCG as their Claims Administrator. FN17 GCG has been in the business of administering class action settlements for twenty years and has administered hundreds of class action settlements, including several well-known securities settlements. First Affidavit of Shandarese Garr, ¶ 2-3 ("Garr First Affidavit") (attached to December 2006 motion). FN18 The firm has experience handling international aspects of class action settlements, and it has in the past provided such services as toll-free numbers and websites which accommodate non-English speakers. *Id.,* ¶ 6. The firm strives to complete all work and provide final reports within six months of the claims-filing deadline and foresees no reason why it could not adhere to that timeline in this case. *Id.,* ¶ 8.

FN17. Pursuant to this Court's April 19 Order, GCG was engaged to send out the Notice and provide related services.

FN18. The securities class action settlements administered by GCG include *Worldcom Securities Litigation and Nortel Networks Corp. Securities Litigation.*

Lead Plaintiffs' counsel selected GCG after reviewing the available options. All three firms have had favorable experiences with GCG in prior securities settlements and have found that "GCG provides professional and high quality work, at competitive rates." Declaration of Daniel Sommers, ¶ 8 ("Sommers Declaration") (attached to December 2006 motion). FN19

FN19. The parties note that while GCG's rates are "not necessarily the lowest among claims administrators," they are reasonable and justified by the quality of the work. GCG has also submitted a document listing "Standard Hourly Billing Rates," though no estimated total cost for their services in this matter has been provided. Garr First Affidavit, Exhibit A.

IV. *Settlement Fund*

***5** Under the Settlement Agreement, Defendants have agreed to pay $20 million to the Class ("Gross Settlement Fund"), FN20 in exchange for release of all claims "arising out of, based upon or related to the purchase of Gilat common stock during the Class Period and that facts, transactions, events, occurrences, acts, disclosures, statements, omissions or failures to act that were alleged in Action ." Amended Settlement, ¶ 1(r)), 5(a), 5(b). After accounting for (1) taxes on the income from the Settlement Fund, (ii) the notice and administrative costs of settlement, (iii) attorneys' fees and expenses awarded by this Court, and (iv) additional administrative expenses, the "Net Settlement Fund" will be distributed according to the Plan of Allocation among Class members who do not opt-out of the settlement and who submit valid proofs of claim. *Id.,* ¶ 7, 13-16.

FN20. As of the date of the Fairness Hearing, the Gross Settlement Fund had accrued $320,688 in interest.

Under the Settlement Agreement, Lead Plaintiffs' counsel may expend, without further approval from the Court, up to $300,000 from the Gross Settlement Fund to pay the reasonable costs and expenses associated with identifying Class members, publishing, printing and mailing notice and the administrative fees charged by the Claims Administrator in connection with providing notice and processing submitted claims. *Id.,* ¶ 8. The Amended Settlement also provides that Lead Counsel will apply to the Court for an award of attorneys fees of up to 30% of the Gross Settlement Amount and reimbursement of expenses, also payable from the Gross Settlement Amount; these fees and expenses are to be allocated among counsel in proportion to their respective contributions to the prosecution and resolution of this suit. *Id.,* ¶ 9.

V. Amended Plan of Allocation

The Amended Plan of Allocation proposed by the Lead Plaintiffs is set out in the Amended Notice of Proposed Settlement and was prepared with the assistance of a damages consultant, Michael Marek, CFA. *See* Declaration of Michael Marek. The Plan of Allocation "reflects the Lead Plaintiffs' allegations that the price of Gilat's common stock was inflated artificially during the Class Period." Amended Notice, ¶ 38. According to Lead Plaintiffs, the artificial inflation began on or before February 10, 2000 and Gilat's stock remained inflated throughout the Class Period, until May 31, 2002. *Id.* However, at certain times during the Class Period, Gilat made disclosures which partially revealed the alleged fraud and caused the stock price to fall, thereby reducing the amount of artificial inflation caused by earlier allegedly false and misleading statements. Accordingly, the Plan of Allocation identifies five different time periods and allocates damages on the basis of the amount of artificial inflation remaining in the stock price during each of these periods. "Each Authorized Claimant shall be allocated a pro rata share of the Net Settlement Fund based on his, her or its Recognized Claim as compared to the total Recognized Claims of all Authorized Claimants." *Id.,* ¶ 41.

1) Time Period 1: February 10, 2000-March 9, 2001 at 2:40 PM

***6** According to the Amended Consolidated Complaint, after the close of the markets on February 9, 2000, Bloomberg reported on comments made by Gat at a conference regarding StarBand's business prospects which were "materially false and misleading." Amended Consolidated Complaint, ¶¶ 66-67; see also Marek Declaration, ¶ 5. Accordingly, the relevant Class Period begins on February 10, the first trading day after the allegedly false statements.

"The first alleged partial disclosure of fraud occurred on March 9, 2001, when Defendants revealed that a previously announced initial public offering of StarBand stock would not proceed." Amended Notice, ¶ 38. According to the parties' damages consultant, the disclosure was made at 2:40 P.M. EST. Marek Declaration, ¶ 7. For stock purchased before 2:40 P.M. on March 9, 2001 the damages consultant concluded that the price of Gilat stock was inflated by $16.62 per share. Therefore

> for common stock purchased prior to 2:40 p.m. EST on March 9, 2001 and held through the end of the Class Period, the Plan of Allocation provides for a maximum Recognized Loss of $16.62. FN21 For stock sold earlier than the end of the Class Period, and thus before the full amount of alleged inflation had gone out of the stock, the Recognized Loss will be lower than the maximum.

> FN21. The Recognized Loss is "a calculation of a particular Authorized Claimant's losses that are recognized as compensable in some measure under the Settlement." Notice, ¶ 37.

Amended Notice, ¶ 38. Since some Class Members will be unable to prove the time at which they purchased their Gilat stock on that day, the stock price of $32.875 will be used as a proxy under the Plan, since $32.875 was the price per share of the last trade prior to the 2:40 PM disclosure. Trades at or above $32.875 will be deemed to have occurred prior to 2:40 PM and trades below that amount will be deemed to have occurred after 2:40 PM. *Id.,* n. 6.FN22

> FN22. According to the damages consultant, 99% of trades above $32.875 were made prior to 2:40 PM. Marek Declaration, ¶ 10.

2) Time Period 2: March 9, 2001 after 2:40 P.M.-March 11, 2001 FN23

> FN23. There was no trading on March 10 or March 11.

Gilat's stock price fell on March 9 after the disclosure at 2:40 P.M. and, according to the damages consultant, $1.19 of the decline was attributable to the StarBand announcement of March 9, leaving $15.43 of artificial inflation in the stock. Amended Notice, ¶ 38.

> Accordingly, for purchases after 2:40 p.m. EST on March 9, 2001 but prior to March 12, 2001, and held through the end of the Class Period, the Plan of Allocation provides for a maximum Recognized Loss of $15.43. For stock sold earlier than the end of the Class Period, and thus before the full amount of alleged inflation had gone out of the stock, the Recognized Loss will be lower than the maximum.

Id.

3) Time Period 3: March 12, 2001-October 2, 2001

According to Lead Plaintiffs, the alleged fraud was further partially revealed on March 12, 2001, prior to the opening of the market, FN24 "when Defendants announced downwardly-revised earnings guidelines for Gilat," leading to a further decline in Gilat's stock price, $13.10 of which was attributable to that disclosure;

as a result, Gilat's stock price after the disclosure was inflated by $2.33. *Id.*

FN24. The press release disclosing this information was at 8:57 A.M. EST. Marek Declaration, ¶ 12.

***7** Accordingly, for purchases on or after March 12, 2001 but before October 3, 2001 and held through the end of the Class Period, the Plan of Allocation provides for a maximum Recognized Loss of $2.33. For stock sold earlier than the end of the Class Period, and thus before the full amount of alleged inflation had gone out of the stock, the Recognized Loss will be lower than the maximum.
Id.

4) Time Period 4: October 3, 2001-May 31, 2002

According to Lead Plaintiffs, Defendants made additional disclosures on October 2, 2001, after the close of the markets, FN25 announcing that Gilat would take "tens of millions of dollars in charges and make an additional bad debt reserve of $10 million." *Id.* After this disclosure, the remaining $2.33 in inflation was removed from the stock. However, the disclosure allegedly contained an additional misstatement which caused a new inflation of $0.30. *Id.*

FN25. The press release disclosing this information was at 5:53 P.M. EST. Marek Declaration, ¶ 15.

Accordingly, for common stock purchased on or after October 3, 2001 but on or before May 31, 2002, and held through the end of the Class Period, the Plan of Allocation provides for a maximum Recognized Loss of $0.30. For stock sold earlier than the end of the Class Period, and thus before the full amount of alleged inflation had gone out of the stock, the Recognized Loss will be lower than the maximum.
Id.

5) Time Period 5: May 31, 2002-August 28, 2002

According to Lead Plaintiffs, the final disclosure occurred on May 31, 2002, when Defendants filed a Form 20F with the S.E.C. which announced "increased reserves for uncollectible accounts receivables." *Id.*FN26 Accordingly, "no purchases after this date are recognized under the Plan of Allocation." *Id.* In addition, the Plan of Allocation reflects a limitation on damages in securities cases imposed under the Private Securities Litigation Reform Act ("PSLRA"), limiting recovery for Class Members who sold after the close of the Class Period, namely May 31, 2002. FN27 See 15 U.S.C. § 78u-4. Under the Plan, recovery on stock sold between May 31, 2002 and August 28, 2002 may be no greater than the purchase price of the stock minus the average trading price of the stock between May 31, 2002 and the date of sale. Recovery for stock sold after August 28, 2002 may be not exceed the purchase price of the stock minus the 90-day mean trading price of $0.95. *Id.,* n. 8.

FN26. The time of the filing is not available, but since such filings are normally submitted after the close of business and the price decline on Gilat stock did not occur until the next trading day, the damages consultant concluded that the disclosure occurred after the close of trading on May 31. *Id.,* ¶ 19.

FN27. Under the PSLRA, plaintiff's damages are limited in securities class actions by the mean stock

> trading price for the 90-day period (the 'lookback' period) subsequent to the corrective disclosure-recovery cannot be greater than the purchase price minus the mean trading price during the lookback period. Similarly, if a party sold the stock during that same 90-day period, the damages may not exceed the difference between the purchase price and the mean trading price of the security from the date of disclosure until the date of sale.

The Plan of Allocation also provides that transactions resulting in recognized gains will be excluded from the calculation of the net Recognized Claim; the costs/proceeds associated with securities purchased or sold by reason of having exercised an option or warrant shall be incorporated into the price accordingly; shares originally sold short shall have a Recognized Claim of $0; and no payments will be made on a claim where the potential distribution is less than $5.00.[FN28] Amended Notice, ¶ 40.

> FN28. As set out in the Opinion on preliminary approval, this Court's understanding of this clause is that claims which, under the optimal distribution scenario, are worth less than $5 will not be paid out. However, claims which are potentially worth more than $5 but, after the allocations have been determined are worth less in practice, will be paid out.

In summary, the Plan of Allocation establishes the following claim calculations. For authorized claimants who purchased stock between February 10, 2000 and March 9, 2001 at 2:40 P.M., inclusive, claims will be calculated as follows:

***8** (1) for stock retained until the end of trading on August 28, 2002, the Recognized Loss shall be the lesser of (a) $16.62 per share or (b) the difference between the purchase price per share and $0.95;

(2) for stock sold between February 10, 2000 and 2:40 P.M. on March 9, 2001, inclusive, there shall be no Recognized Loss;

(3) for stock sold after March 9, 2001 at 2:40 P.M. but prior to March 12, 2001, the Recognized Loss shall be the lesser of (a) $1.19 per share or (b) the difference between the purchase price per share and the sales price per share;

(4) for stock sold between March 12, 2001 and October 2, 2001, inclusive, the Recognized Loss shall be the lesser of (a) $14.29 per share or (b) the difference between the purchase price per share and the sales price per share;

(5) for stock sold between October 3, 2001 and May 31, 2002, inclusive, the Recognized Loss shall be the lesser of (a) $16.32 per share or (b) the difference between the purchase price per share and the sales price per share;

(6) for stock sold between June 1, 2002 and August 28, 2002, inclusive, the Recognized Loss shall be the lesser or (a) $16.62 per share, (b) the difference between the purchase price per share and the sales price per share or (c) the difference between the purchase price per share and the mean closing price of Gilat common stock between May 31, 2002 and the date of sale. Amended Notice, ¶ 39(a).

For authorized claimants who purchased stock on after 2:40 P.M. on March 9, 2001 but before March 12, 2001, claims will be calculated as follows:

(1) for stock retained until the end of trading on August 28, 2002, the Recognized Loss shall be the lesser of (a) $15.43 per share or (b) the difference between the purchase price per share and $0.95;

(2) for stock sold on March 9, 2001, there shall be no Recognized Loss;

(3) for stock sold between March 12, 2001 and October 2, 2001, inclusive, the Recognized Loss shall be the lesser of (a) $13.10 per share or (b) the difference between the purchase price per share and the sales price per share;

(4) for stock sold between October 3, 2001 and May 31, 2002, inclusive, the Recognized Loss shall be the lesser of (a) $15.13 per share or (b) the difference between the purchase price per share and the sales price per share;

(5) for stock sold between June 1, 2002 and August 28, 2002, inclusive, the Recognized Loss shall be the lesser or (a) $15.43 per share, (b) the difference between the purchase price per share and the sales price per share or (c) the difference between the purchase price per share and the mean closing price of Gilat common stock between May 31, 2002 and the date of sale. Amended Notice, ¶ 39(b).

For authorized claimants who purchased stock between March 12, 2001 and October 2, 2001, inclusive, claims will be calculated as follows:

(1) for stock retained until the end of trading on August 28, 2002, the Recognized Loss shall be the lesser of (a) $2.33 per share or (b) the difference between the purchase price per share and $0.95;

***9** (2) for stock sold between March 12, 2001 and October 2, 2001, inclusive, there shall be no Recognized Loss;

(3) for stock sold between October 3, 2001 and May 31, 2002, inclusive, the Recognized Loss shall be the lesser of (a) $2.03 per share or (b) the difference between the purchase price per share and the sales price per share;

(4) for stock sold between June 1, 2002 and August 28, 2002, inclusive, the Recognized Loss shall be the lesser or (a) $2.33 per share, (b) the difference between the purchase price per share and the sales price per share or (c) the difference between the purchase price per share and the mean closing price of Gilat common stock between May 31, 2002 and the date of sale. Amended Notice, ¶ 39(c)).

For authorized claimants who purchased stock between October 3, 2001 and May 31, 2002, inclusive, claims will be calculated as follows:

(1) for stock retained until the end of trading on August 28, 2002, the Recognized Loss shall be the lesser of (a) $0.30 per share or (b) the difference between the purchase price per share and $0.95;

(2) for stock sold between October 3, 2001 and May 31, 2002, inclusive, there shall be no Recognized Loss;

(3) for stock sold between June 1, 2002 and August 28, 2002, inclusive, the Recognized Loss shall be the lesser or (a) $0.30 per share, (b) the difference between the purchase price per share and the sales price per share or (c) the difference between the purchase price per share and the mean closing price of Gilat common stock between May 31, 2002 and the date of sale. Amended Notice, ¶ 39(d).

DISCUSSION

I. Final Approval of Settlement and Plan of Allocation

Under Rule 23(e) of the Federal Rules of Civil Procedure, class actions "shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Fed.R.Civ.P. 23(e).

"The central question raised by [a] proposed settlement of a class action is whether the compromise is fair, reasonable, and adequate." *Weinberger v. Kendrick,* 698 F.2d 61, 73 (2d Cir.1982). To determine whether this standard has been met, the court must "compare the terms of the compromise with the likely rewards of litigation." *In re Warner Communications Securities Litigation,* 618 F.Supp. 735, 741 (S.D.N.Y.1985) (citations omitted). In evaluating the substantive fairness of a proposed settlement, the Court is guided by the nine factors initially enumerated in *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir.1974):

> (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation[.]

***10** *D'Amato v. Deutsche Bank,* 236 F.3d 78, 86 (2d Cir.2001) (citations omitted). The court must also examine the negotiating process that gave rise to the settlement to determine if it was achieved through arms-length negotiations by counsel with the experience and ability to effectively represent the class's interests. *See In re Warner Communications Securities Litigation,* 618 F.Supp. at 741; *see also D'Amato,* 236 F.3d at 85 ("The District Court determines a settlement's fairness by examining the negotiating process leading up to the settlement as well as the settlement's substantive terms.").

1) Complexity, Expense and Likely Duration of the Litigation

Securities class action litigation " 'is notably difficult and notoriously uncertain.' " *In re Sumitomo Copper Litigation,* 189 F.R.D. 274, 281 (S.D.N.Y.1999) (quoting *In re Michael Milken and Associates Securities Litigation,* 150 F.R.D. 46, 53 (S.D.N.Y.1993)). In this case, the costs of litigating are anticipated to be significant, since extensive discovery remains to be completed and since both Gilat and the companies with which Gilat did business under the allegedly fraudulent scheme are located overseas,[FN29] which will increase the cost and complexity of discovery. *See Schwartz v. Novo Industri A/S,* 119 F.R.D. 359, 363 (S.D.N.Y.1988) (weighing the complications of discovery with a foreign defendant in favor of settlement). In addition, the parties state that if the case were litigated and Plaintiffs prevailed, Defendants would appeal the verdict, adding further delay and expense. *See In re Am. Bank Note Holographics, Inc.,* 127 F.Supp.2d 418, 425 (S.D.N.Y.2001) ("Add on time for a trial and appeals, and the class would have seen no recovery for years. Class counsel properly considered this factor as well").

FN29. Sales related to the alleged fraud were made to companies around the world, including Zimbabwe, Brazil, China, Indonesia, and Kazakhstan.

2) Reaction of the Class

No objections or requests for exclusion have been filed in this case, indicating general approval of the Settlement by Class Members. *See In re Mexico Money Transfer Litigation (Western Union and Orlandi Valuta),* 164 F.Supp.2d 1002, 1021 (N.D.Ill.2000) (99.9% of class members having neither opted out nor filed objections indicated strong circumstantial evidence in favor of settlement.).

3) Stage of the Proceedings

The stage of the proceedings and the amount of discovery the parties have conducted is "relevant to the parties' knowledge of the strengths and weaknesses of the various claims in the case, and consequently affects the determination of the settlement's fairness." *In re Painewebber Ltd. Partnerships Litigation,* 171 F.R.D. 104, 126 (S.D.N.Y., 1997). The parties have spent significant time over the last four years investigating the legal and factual issues in this case and appear to be well informed as to the operative facts. Although little formal discovery has been completed, Lead Counsel has interviewed several former employees of Gilat and obtained a number of internal documents, FN30 and all parties have conducted extensive research in connection with their submissions in connection with Defendants' motion to dismiss and in preparation for mediation.

FN30. Discovery is discussed in more detail below, in regard to attorneys fees.

4 & 5) Risks of Establishing Liability & Damages

***11** "In assessing the adequacy of a settlement, a court must balance the benefits of a certain and immediate [relief] against the inherent risks of litigation." *In re Medical X-Ray Antitrust Litigation,* 1998 WL 661515, at *4 (E.D.N.Y.1998). In this case, the risks of establishing liability and damages are considerable. "To prevail on its federal securities fraud claims, [Plaintiffs] must demonstrate that its injuries were caused by defendants' omission of material information," *Emergent Capital Investment Management, LLC v. Stonepath Group, Inc.,* 343 F.3d 189, 196 (2d Cir.2003), and must also prove that Defendants acted with scienter. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). Establishing scienter is "a difficult burden to meet," *Adair v. Bristol Technology Systems, Inc.,* 1999 WL 1037878, at *2 (S.D.N.Y.1999), and proving it will be especially challenging in this case where, apparently, neither the individual defendants nor any other Gilat executive profited from their Gilat investments. In addition, at trial Defendants would likely introduce experts to contest Lead Plaintiffs' allegations as to the causes of the stock price declines, leading to a "battle of the experts," the outcome of which is uncertain. Specifically, while Lead Plaintiffs allege that the most significant stock decline, which occurred on March 12, 2001, was related to Gilat's financial announcement of that day, Defendants dispute this and argue instead that the stock decline was related to prior announcements and, moreover, that the announcement of March 12 did not reveal any fraud. Accordingly, it is uncertain whether Lead Plaintiffs will be able to demonstrate loss causation related to the March 12 announcement, which would reduce alleged damages from $187 million to

$27 million.

6) Risks of Maintaining the Class Action through the Trial

The parties contend that Defendants, should settlement not be approved, may challenge the certification of the Class before trial (and appeal any adverse ruling) on the grounds that there was no predominance of common issues among the Class Members, as required under Fed.R.Civ.P. 23. However, having previously approved the Class and found that the claims of Class Members all resulted from the alleged fraud which caused the inflated stock price, I find there to be little risk that the Class would not be maintained through trial.

7) Ability of Defendants to Withstand Greater Judgement

It remains an open question whether Defendants could withstand a greater judgment. The parties have represented that Gilat was forced to restructure $350 million of debt in 2002, that its stock price is in the single digits, and that Gilat's insurance would not cover an award of Lead Plaintiff's total estimated damages.FN31 However, the parties have not provided this Court with any specific information as to the value of Gilat's assets or the impact that higher judgement amounts would have on Gilat's ability to continue as a functioning entity. Accordingly, this factor weighs neither in favor nor against settlement.

FN31. Gilat has filed insurance coverage information under seal.

8 & 9) Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery & Range of Reasonableness of the Settlement Fund to a Possible Recovery in Light of all the Attendant Risks of Litigation

***12** As this court has observed, "the adequacy of the amount offered must be judged not in comparison with the best possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of the plaintiffs' case." *In re Medical X-Ray Antitrust Litigation,* 1998 WL 661515 at *5 (internal quotations and citations omitted). As stated above, Defendants have agreed to contribute $20 million to the Gross Settlement Fund.FN32 $20 million represents 10.6% of the maximum amount which Plaintiffs believe could be recovered at trial, and is within the range of settlements that have been awarded in securities class actions. *See Kurzweil v. Philip Morris Companies, Inc.,* 1999 WL 1076105, at *2 (S.D.N.Y.1999) ("[I]ndependent research discloses that recoveries in securities class actions tend to fall in the 7% to 15% range."); Cornerstone Research, *Post Reform Act Securities Settlements, 2005 Review and Analysis* (submitted as Exhibit B) (Finding a median settlement amount of $7.5 million, an average settlement amount of $28.5 million, FN33 and a median settlement amount as a percentage of estimated damages of 3.1% in 2005); PriceWaterhouseCoopers, *2005 Securities Litigation Study* (submitted as Exhibit A) (Finding a median settlement amount of $9.5 million and an average settlement amount of $71.1 million in 2005 FN34). Given the risks involved in proving liability and damages, were this case to proceed to trial there is a significant possibility that the Class would recover much less or even nothing, while incurring additional costs in the process.

FN32. After attorney's fees and other costs associated with this action, the Net Settlement Fund will likely be in the range of $13 million to $14 million.

FN33. These figures exclude two settlements of over a billion dollars.

FN34. These figures exclude three settlements of over a billion dollars.

In addition, as I set out in my Opinion on preliminary approval, the parties have established a reasonable formula for allocating recovery to Class Members on the basis of each Class Member's injury and the date and time of various disclosures by Defendants.

10) Arms Length Negotiations

In my Opinion on preliminary approval, I concluded that the Settlement Agreement was procedurally fair as well. The parties mediated the case before a retired state court judge who has attested to the thoroughness, reasonableness and 'arms-length' nature of the negotiations. *See In re Independent Energy Holdings PLC,* 2003 WL 22244676, at *4 (S.D.N.Y.2003) ("the fact that the Settlement was reached after exhaustive arm's-length negotiations, with the assistance of a private 'mediator experienced in complex litigation, is further proof that it is fair and reasonable."). Further, there is no unduly preferential treatment to class representatives, who will receive no additional compensation from the settlement for their role as Lead Plaintiffs. Therefore, there appears to be no collusion and I conclude that the negotiations were conducted at 'arms-length.'

Balancing all these factors, which weigh substantially in favor of settlement, I find the Settlement and Plan of Allocation to be fair, reasonable and adequate.

II. Co-Lead Counsel's Fee and Expense Request

***13** Plaintiff's Co-Lead Counsel move for an award of 30% (equivalent to $6 million) of the Gross Settlement Fund as payment for fees and for an additional reimbursement of $588,810.43 for expenses incurred in connection with this action. I will first discuss the fee award and then deal with the request for expenses.

Method of Determining Amount of Recovery

"[Where] an attorney succeeds in creating a common fund from which members of a class are compensated for a common injury inflicted on the class .... the attorneys whose efforts created the fund are entitled to a reasonable fee-set by the court-to be taken from the fund." *Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43, 47 (2d Cir.2000) (internal citations omitted). To determine the amount of the fee award, courts use two approaches: the "lodestar" method (number of hours reasonably billed multiplied by an appropriate hourly rate) and the "simpler" method of setting "some percentage of the recovery as a fee." *Id.* In either case, "the fees awarded in common fund cases may not exceed what is 'reasonable' under the circumstances," which is committed to the sound discretion of the trial court. *Id.*

In the present case, counsel requests a fee based on a percentage of recovery. "The trend in this Circuit is toward the percentage method, ... which 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) (internal citations and quotations omitted). "Use of the percentage method also comports with the statutory language of the Private Securities Litigation Reform Act ("PSLRA"), which specifies that '[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.' " *In re NTL Inc. Securities Litigation,* 2007 WL 1294377, at *4 (S.D.N.Y.2007) (quoting 15 U.S.C. § 78u-4(a)(6)). Accordingly, the percentage method requested by counsel is an appropriate method to calculate the fees award.

That said, "even when the percentage of the fund method is used, 'the lodestar remains useful as a baseline even if the percentage method is eventually chosen. Indeed [the Second Circuit] encourage[s] the practice of requiring documentation of hours as a 'cross check' on the reasonableness of the requested percentage.' " *Id.* (quoting *Goldberger,* 209 F.3d at 50).

Reasonableness of Counsel's Request

To evaluate the reasonableness of fee requests, courts apply the *Goldberger* factors: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger,* 209 F.3d at 50 (internal citations and quotations omitted).

(1) Time and Labor

***14** Over the last four years, Plaintiffs' Counsel has spent 9,958 hours prosecuting this action.[FN35] Counsel expended significant effort analyzing Gilat's SEC filings and financial statements; reviewing analyst and news service reports on Gilat; researching the applicable law regarding claims and potential defenses; interviewing former employees with knowledge related to the action; drafting a Consolidated Complaint and an Amended Consolidated Complaint; and engaging in motion practice, including a motion to dismiss. The parties also began formal discovery, developing a plan of discovery and exchanging Rule 26 materials. Pursuant to the discovery plan, Defendants also produced several thousand documents in an initial disclosure, while Plaintiffs' Counsel subpoenaed documents from third-party stock analysts.[FN36] Further, Plaintiffs' Counsel consulted a forensic accountant and also engaged an economic consultant to evaluate defendants' loss causation theories and to calculate class damages and develop the Plan of Allocation.[FN37] Finally, counsel engaged in two separate mediation sessions and, as a result of the second of these sessions, prepared the settlement agreement and supporting documentation. While formal discovery was limited and counsel did not engage significantly in "the major attorney time user[s] .... namely depositions, trial or appeal," the extensive investigation, analysis, motion practice and settlement negotiations which have taken place over the last four years demonstrate that counsel has expended significant time and effort in furtherance of this litigation. *In re Sterling Foster & Co., Inc.,* 2006 WL 3193744, at *8 (E.D.N.Y.2006); *cf. In re AremisSoft Corp. Securities Litigation,* 210 F.R.D. 109, 133 (D.N.J.2002) ("Informal discovery leading to an early settlement that avoids such costs favors approval of the fee application.").

FN35. Glancy Binkow expended approximately 2,887 hours, Bernstein Liebhard expended approximately 3,381 hours, Cohen, Milstein expended approximately 2,430 hours and the Law Office of Jacob Sabo, who acted as Israeli counsel, expended approximately 1,259 hours.

FN36. The parties also discussed the manner in which third-party discovery would be served on Gilat's customers and the scope of documentation requested, as well as the scope of Plaintiffs' subpoena of Gilat's auditors in Israel. Due to the fact that the parties were able to reach a settlement relatively early in the process of litigation, the parties ultimately did not engage in extensive formal discovery.

FN37. As discussed below, the consulting fees are included in the requested expense reimbursement.

(2) Magnitude and Complexity of Litigation

As noted above, securities class action litigation is difficult and uncertain. With regards to this factor, courts evaluate whether the action was particularly large or complex, relative to other securities class actions. *See In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation,* 2007 WL 313474, at *15 (S.D.N.Y.2007) ("The magnitude and complexity of a case, however, also should be evaluated in comparison with other securities class litigations."); *In re Bristol-Myers Squibb Securities Litigation,* 361 F.Supp.2d 229, 234 (S.D.N.Y.2005) ("Certainly, managing the large class of plaintiffs and reaching a $300 million settlement was not a simple task for Lead Counsel, but, in the realm of securities class actions, prosecution of this action was less complex than most. All of the alleged misstatements were easily found in the public record. The public expressions of optimism uttered by the Company and its officers provided the bases for the Erbitux claims and the financials laid bare the channel-stuffing claims.... Neither the facts nor the legal and accounting theories were complicated. Among securities class actions, this case as a whole was neither unique nor complex.").

***15** Plaintiffs' Counsel argues that this case, had it gone to trial, would have required voluminous document and deposition discovery. Plaintiffs would have had to demonstrate that Gilat recorded revenue in violation of GAAP, which would have been complicated by the fact that the transactions occurred 6 to 8 years ago and involved companies located around the world. Further, as noted above, Plaintiffs would have had to demonstrate that Defendants perpetrated a fraud and that the fraud caused Plaintiffs' losses, and would also have needed to establish the amount of loss which resulted. According to Plaintiffs' Counsel, since Gilat never actually restated its financial results, proof of accounting fraud would require circumstantial evidence which is primarily within Defendants' control.

While litigation in this case is undoubtedly complicated and would have taken a significant amount of time and effort to investigate,[FN38] Plaintiffs' claims are not particularly "novel," nor does proof of these claims appear to be so complex so as to "weigh[ ] significantly in favor of the award of generous attorneys' fees." *In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation,* 2007 WL 313474, at *15-16 (S.D.N.Y.2007); *see In re Elan Securities Litigation,* 385 F.Supp.2d 363, 374 (S.D.N.Y.2005) ("[A]lthough this case was 'large and complex' involving a great many separate finance and accounting issues, the factual and legal issues were not exceptionally 'novel.' "); *cf. In re VisaCheck/ Mastermoney Litigation,* 297 F.Supp.2d 503, 523 (E.D.N.Y.2003) (finding magnitude and complexities of case "enormous" where the "case involved almost every U.S. bank and more than five million U.S. merchants"); *In re Sumitomo Copper Litigation,* 74 F.Supp.2d at 395 (case involved "almost overwhelming magnitude and complexity"); *In re NASDAQ Market-Makers Antitrust Litigation,* 187 F.R.D. 465, 474, 488 (S.D.N.Y.1998) (finding that "liability in this case requires proof of an unusually complex conspiracy involving 37 Defendants and a 'checkerboard' of fact situations and disparate periods for each of 1,659 different securities" and that "the issues were novel and difficult requiring a challenge to a long-standing industry practice and the exercise of skill and imagination").

FN38. I note that, unlike in some other cases, there was no public investigation being made by a government or regulatory body which would could have assisted Plaintiffs. *See, e.g., In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation,* 2007 WL 313474 at *17 ("Actions stemmed from the highly publicized NYAG's investigation into the alleged undisclosed conflict of interest.").

(3) Risks of Litigation

"Courts of this Circuit have recognized the risk of litigation to be 'perhaps the foremost factor to be considered in determining' the award of appropriate attorneys' fees." *In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation,* 2007 WL 313474 at *16 (quoting *In re Elan Securities Litigation,* 385 F.Supp.2d 363, 374 (S.D.N.Y.2005) (internal quotations and citation omitted). "It is well-established that litigation risk must be measured as of when the case is filed." *Goldberger,* 209 F.3d at 55.

"There is generally only a very small risk of non-recovery in securities class litigation." *In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation,* 2007 WL 313474 at *16 (citing *In re Dreyfus Aggressive Growth Mutual Fund Litigation,* 2001 WL 709262, at *4 (S.D.N.Y.2001) ("What empirical data does exist indicates that all but a small percentage of class actions settle, thereby guaranteeing counsel payment of fees and minimizing the risks associated with contingency fee litigation."). That said, Plaintiffs' Counsel, in undertaking this case on a contingency basis, "did take some risk in undertaking the representation." *In re Sterling Foster & Co., Inc.,* 2006 WL 3193744 at *7. As noted, Plaintiffs would have to demonstrate that Defendants caused its injuries by their fraud and that Defendants acted with scienter, and it is far from certain that Plaintiffs would have prevailed or, to the degree they did prevail, that a jury would agree as to the amount of damages alleged. FN39 Accordingly, while the odds of *some* recovery were not low, counsel did assume a significant litigation risk by taking the case on contingency. *But see In re NTL Inc. Securities Litigation,* 2007 WL 1294377 at *7 ("The chance of some sort of settlement was fairly high even at the beginning of the lawsuit, before Judge Kaplan sustained several of class plaintiffs' claims in denying defendants' motion to dismiss. Accordingly, the Court finds that the risk of non-recovery here was low and does not militate in favor of an 'enhanced' award of attorneys' fees."); *In re Bristol-Myers Squibb Securities Litigation,* 361 F.Supp.2d at 234 ("[T]he circumstances preceding the filing of the Complaint, ... particularly the Company's restatement of its financials, support a finding that this case falls along the low end of the continuum of risk.").

FN39. Plaintiffs' Counsel also states that there was a risk that a class would not be certified. However, as indicated above and in my Opinion on preliminary approval, it does not appear that there was much risk that a court would not find that the central question which survived the motion to dismiss, namely whether Defendants engaged in fraudulent representations which artificially inflated the price of Gilat stock, predominated over the individual claims of each class member.

(4) Quality of Representation

***16** "To determine the 'quality of the representation,' courts review, among other things, the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *Taft v. Ackermans,* 2007 WL 414493, at *10 (S.D.N.Y.2007).

As I have previously noted, Plaintiffs' Counsel in this case are qualified and experienced in this type of litigation and their preparation and advocacy have been praised by the mediator. As for the recovery amount, the $20 million Gross Settlement Fund equals 10 .6% of Plaintiffs' highest damages estimate (and a much higher percentage of more conservative damages estimates). Given the risk involved in proving liability and establishing the amount of damages, such a recovery, while perhaps not as "excellent" as counsel claims, is within the range of settlements that are common in securities class actions.

(5) Relationship of Fee to Settlement

Plaintiffs' Counsel proposes a fee of 30%, or $6 million leaving the settlement fund with $14 million before deducting other expenses.

Although counsel has cited other cases in which courts have granted a fee award of 30%,[FN40] "reference to awards in other cases is of limited usefulness," *In re KeySpan Corp. Securities Litigation,* 2005 WL 3093399 at *13 (E.D.N.Y.2005), because "fee awards should be assessed based on the unique circumstances of each case." *In re Bristol-Myers Squibb Securities Litigation,* 361 F .Supp.2d at 236. Moreover, "[s]ince *Goldberger,* courts in the Second Circuit have tended to award attorneys' fees in amounts considerably less than 30% of common funds in securities actions, even where there is a substantial contingency risk." *In re KeySpan Corp. Securities Litigation,* 2005 WL 3093399 at *12 (internal quotations omitted) (citing cases); *see In re Twinlab Corp. Securities Litigation,* 187 F.Supp.2d 80, 88 (E.D.N.Y.2003) (Awarding a 12% fee after finding "that a 25% fee ... would be excessive considering that the parties did not engage in extensive discovery, motion practice, trial or appeals and that the action was settled shortly after the motions to dismiss were decided."). In the present case, although the case was complicated and required counsel to encounter some risk, a 30% fee, which is at the high range of what courts award, is not mandated by the nature of the claims and the process of the litigation.[FN41]

FN40. *See Taft,* 2007 WL 414493 (30% fee awarded on $15 million settlement, where lodestar was $3.2 million); *Hicks v. Stanley,* 2005 WL 2757792 (S.D.N.Y.2005) (30% fee awarded on $10 million settlement, where lodestar was $1.6 million); *Schnall v. Annuity and Life Re (Holdings), Ltd., et al,* 02-CV-2133 (January 21, 2005) (Awardeing a fee of 33 1/3% on $16.5 million settlement, where loadstar was $1.8 million). However, two cases cited by counsel are distinguishable since the fee awarded under the percentage method was less than the lodestar amount. *See In re Blech Securities Litigation,* 2002 U.S. Dist. LEXIS 23170 (S.D.N.Y.2002); *Baffa v. Donaldson Lufkin & Jenrette Securities Corp.,* 2002 U.S. Dist. LEXIS 10732 (S.D.N.Y.2002). Another case cited by plaintiffs, *In re ESC Medical Systems Ltd. Securities Litigation,* 98-CV-7530 (April 1, 2002) contains no explanation of the reason the fee was awarded or what the loadstar would have been. The remaining cases cited by plaintiff were decided pre-Goldberger. *See In re Medical X-Ray Film Antitrust Litigation,* 1998 WL 661515 (E.D.N.Y.1998); *In re Warner Communications Securities Litigation,* 618 F.Supp. 735 (S.D.N.Y.1985).

FN41. Given the modest size of the total settlement, I am not concerned that a 30% fee would constitute a windfall for counsel. *See In re Indep. Energy Holdings PLC,* 2003 WL 22244676, at *6 (S.D.N.Y.2003) ("[T]he percentage used in calculating any given fee award must follow a sliding-scale and must bear an inverse relationship to the amount of the settlement. Otherwise, those law firms who obtain huge settlements, whether by happenstance or skill, will be over-compensated to the detriment of the class members they represent.").

(6) Public Policy

"Public policy concerns favor the award of reasonable attorneys' fees in class action securities litigation." *In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation,* 2007 WL 313474 at *21; *see also In re WorldCom, Inc. Securities Litigation,* 388 F.Supp.2d 319, 359 (S.D.N.Y.2005) ("In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives."); *In re VisaCheck/ Mastermoney Litigation,* 297 F.Supp.2d at 524 ("The fees awarded must be reasonable, but they must also serve as an inducement for lawyers to make similar efforts in the future."). However, "[a]n award of fees in excess of that required to encourage class litigation ... does not necessarily serve public policy." *In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation,* 2007 WL 313474 at *21 (finding the public policy did not require an award of 28% of the settlement fund, which would be an "exceedingly high rate of compensation."); *but see In re Sterling Foster & Co., Inc.,* 2006 WL 3193744 at *8 ("The 25% contingent fee is a fair and reasonable fee and follows the emerging trend within the Second Circuit in securities class actions ."). In the present case, while public policy does favor a significant fee award to Plaintiffs' Counsel, to compensate them both for their time and their risk, a fee award of 30% is not necessary to accomplish that goal.

Cross-Check

***17** As noted above, the Second Circuit encourages courts applying the percentage method to "cross-check" against the lodestar amount to establish a baseline for reasonableness. "Of course, where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court. Instead, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case (as well as encouraged by the strictures of Rule 11).” *Goldberger,* 209 F.3d at 50.

In the present case, Plaintiffs' Counsel has worked approximately 9,958 hours on this action which, applying their normally hourly rates, yields a lodestar amount of $4,641,785.95.FN42 Billing records show a range of rates charged by Plaintiffs' Counsel, starting at $325 for associates FN43 and up to $725 for certain partners. While these fees are high, they are not out of line with the rates of major law firms engaged in this type of litigation. FN44 *See In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation,* 2007 WL 313474 at *22 (Hourly rates of $515/hour for associates and up to $850/hour for partners, “though high, are not inordinate for top-caliber New York law firms .”); *In re NTL Inc. Securities Litigation,* 2007 WL 1294377 at *8 (approving rates up to $695 for partners); *but see In re KeySpan Corp. Securities Litigation,* 2005 WL 3093399 at *15 (Finding that, in 2005, a firm which charged from $350/hour for associates and up to $675/hour for partners was on the higher end for securities class action suits and that $550/hour for senior associates was “beyond [the] prevailing rate.”). Though partners in these firms, who bill at the highest rates, did spend significant time on these cases, it does not appear that the firms relied primarily or inappropriately on partners to do work more properly performed by more junior members of the firm.FN45FN46

FN42. “Current ‘market rates' are proper because such rates more adequately compensate for inflation and loss of use of funds.” *Stanley,* 2005 WL 2757792, at *10 (citing *Missouri v. Jenkins,* 491 U.S. 274, 283-84, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989)).

FN43. A single “of counsel” attorney who worked for less than 13 hours on the case for Bernstein Liebhard was billed at a rate of $185/hour.

FN44. Bernstein Liebhard, and Cohen, Milstein are based in New York City, while Glancy Binkow is based in Los Angeles. At Bernstein Liebhard, partners involved in the case charge up to $725/hour and associates charge up to $525/hour. At Cohen, Milstein partners involved in the case charge up to $675/hour and associates charge up to $325/hour. At Glancy Binkow partners involved in the case charge up to $625/hour and associates charge up to $525/hour. The Law Office of Jacob Sabo charged a rate of $395/hour for the work of Mr. Sabo, which he states is his normal billing rate.

FN45. At Bernstein Liebhard, 30% of the time was spent by one associate, at a rate of $495/hour, and partners account for less than 50% of the time. At Cohen, Milstein, partners account for approximately 50% of the total hours spent by attorneys and paralegals. At Glancy Binkow, partners (and “of-counsel” billing at partner rates) account for just under 50% of the total hours spent by attorneys and paralegals. The exception is that Mr. Sabo, who is a solo practitioner, personally performed all the work at his firm.

FN46. That said, the paralegal rates at Bernstein Liebhard, which were routinely above $200/hour and reach $250/hour, and Glancy Binkow, which start at $255/hour and reach $275, do appear to be above prevailing market norms. *See In re KeySpan Corp. Securities Litigation,* 2005 WL 3093399 at *15 (Paralegal rate of $215/hour and ‘law clerk’ rate of $275/hour are “excessive.”). However, the total lodestar for paralegal work at these two firms was, based on this Court's best estimate from the data provided, approximately $188,000, or just 4% of the total lodestar, and so, to the degree the rates were excessive, their impact on the lodestar is minimal.

It was not immediately clear from the submissions of Bernstein Liebhard which employees who worked on this case were attorneys and which employees were paralegals or law clerks. However, by looking at the firm's internet site, I was able to identify the names of attorneys at the firm and, by process of elimination, determine which listed employees were paralegals or law clerks. *See* http://www.bernlieb.com/ (last visited on July 20, 2007).

“Under the lodestar method of fee computation, a multiplier is typically applied to the lodestar. The multiplier represents 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 Merrill Lynch & Co., Inc. Research Reports Securities Litigation,* 2007 WL 313474 at *22. The $6 million fee requested here represents a multiplier of just under 1.3. “In this Circuit, contingency fees of 1.85 times the lodestar and greater have been deemed reasonable by the courts.” *Hicks v. Stanley,* 2005 WL 2757792, at *10 (S.D.N.Y.2005); *see In re Interpublic Securities,* 2004 WL 2397190, at *12 (S.D.N.Y.2004) (approving 12% fee representing multiplier of 3.96 times lodestar) (internal citation and quotation omitted); *In re Arakis Energy Corp. Securities Litigation,* 2001 WL 1590512, at *15 (E.D.N.Y.2001) (Multiplier of 1.2 would not “deviate materially from post-*Goldberger* decisions of courts within the Second Circuit.”). Though greater and lesser multipliers have been applied, a 1.3 multiplier is not out of line with other cases recently decided in this circuit.

***18** Finally, in performing this cross-check, the Court typically “confirm that the percentage amount does not award counsel an exorbitant hourly rate.” *In re Bristol-Meyers Squibb Securities Litigation,* 361 F.Supp.2d at 233. In the present case, the average hourly rate, based on the hours work and the $6 million fee, would be $602/hour for all personnel. While that amount is significant, it does not appear to be exorbitant. See *In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation,* 2007 WL 313474 at *22 (Finding effective rate of $1,193.51/hour to be “exorbitant.”).

Balancing all these factors, and accounting for the lodestar calculation, it appears to the undersigned that this case does not merit an award at the very high-end of fees given out by courts in this circuit, but does merit a significant award of 25% ($5 million), which adequately compensates Plaintiffs' Counsel for their time, effort and risk.FN47

FN47. I am not concerned that this represents a multiplier of less than 1.1 since the hourly rates charged by these firms, which establish the lodestar baseline, are at the very top-end of rates charged by similar firms and, accordingly, compensate counsel for their risk. *See, e.g., In re KeySpan Corp. Securities Litigation,* 2005 WL 3093399, at *16 (E.D.N.Y.2005) ("[T]he use of rates which are higher than reasonable serves to meet the concerns of Class Counsel that they will be properly compensated for value lost due to the contingent nature of the fee arrangement and for the risk associated with this litigation, and alleviates the necessity of the application of a heightened multiplier.") (internal quotations omitted).

B. Expenses

Plaintiffs' Counsel also requests reimbursement for out-of-pocket expenses totaling $588,810.43, below the $600,000 estimate in the Amended Notice. These expenses include both standard office expenses, travel and the expenses incurred in consulting fees for Plaintiffs' experts and investigators. The expenses are broken down as follows: Bernstein Liebhard spent $54,523.56, Cohen, Milstein spent $98,852.67, Glancy Binkow spent $337,770.20, and the Law Office of Jacob Sabo spent $87,664. Lead Plaintiffs also incurred expenses of $10,000.

"Courts routinely grant the expense requests of class counsel." *In re KeySpan Corp. Securities Litigation,* 2005 WL 3093399 at *18; *see In re Arakis Energy Corp. Securities Litigation,* 2001 WL 1590512 at *17 n. 12 ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course."). However, while "nit-picking" is not required, it is still the responsibility of the district court to review the expenses and address any concerns. *In re KeySpan Corp. Securities Litigation,* 2005 WL 3093399 at *18.

Plaintiffs' Counsels' Expenses

At the request of the undersigned, counsel has provided some additional detail under seal as to the cost of consultants and experts, which account for approximately $285,000 of the total expenses.

After reviewing the information submitted by counsel, the rates for experts and consultants appear reasonable given the expertise involved, as does the total amount spent on these services. *See In re Ashanti Goldfields Securities Litigation,* 2005 WL 3050284, at *5 (E.D.N.Y.2005) ("By far the largest expense, totaling over $500,000, was for the services of expert witnesses .... This is not unusual in securities litigation actions.") (internal citations omitted). In addition, the remaining office, travel and research expenses also appear fair and reasonable and, accordingly, the motion for Plaintiffs' Counsels' expenses is granted.

Lead Plaintiffs' Expenses

***19** At the request of the undersigned, counsel has submitted a translated copy of Lead Plaintiffs' description of their $10,000 in expenses. Lead Plaintiffs spent 25 hours, at a rate of $300/hour, managing the case; 10 hours, at a rate of $100/hour, performing economic analysis; 20 hours, at a rate of $50/hour, providing audit services; and also spent another $500 in computer expenses. Lead Plaintiffs also filed, under seal, an affidavit which lists the tasks performed by Lead Plaintiffs and the basis for the hourly rates listed. "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." *Hicks,* 2005 WL 2757792, at *10.[FN48] Since the tasks undertaken by employees of Lead Plaintiffs reduced the amount of time those employees would have spent on other work and these tasks and rates appear reasonable to the furtherance of the litigation, the motion for $10,000 in expenses for Lead Plaintiffs is granted.[FN49]

FN48. Under the PSLRA, the share of any final judgment "awarded to a [class] representative ... shall be equal, on a per share basis, to" the amount awarded to all other members of the class but "[n]othing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly related to the representation of the class to any representative party." 15 U.S.C. § 78u-4(a)(4).

FN49. The "computer expenses" are presumably out-of-pocket costs which are also reimbursable.

While Plaintiffs' Counsel disclosed their intent to move for fees and expenses in the Notice, Lead Plaintiffs first made their request for reimbursement along with motion for fees and expenses filed by Plaintiffs' Counsel. Since Class Members had no prior notice of Lead Plaintiffs' intention to make such a request, I entertained objections to such expenses until September 3, 2007, the date for filing of Proof of Claim forms. No such objections have been filed.

II. Liban Fee Request [FN50]

FN50. Although Mr. Liban's papers are labeled as an "objection," Mr. Liban does not object to the settlement itself or to the awarding of the requested fees to Lead Counsel. Rather, he only seeks an additional award of fees for his efforts.

In a brief submitted July 3, 2007, Imanuel Liban filed an "objection to the fee component" of the Settlement Agreement.[FN51] According to Mr. Liban, he is a Class Member under the terms of the Settlement Agreement, and on April 15, 2002, filed a suit against defendants [FN52] in the District Court of Tel Aviv, as well as an application to recognize his suit as a class action, specifying as the class all those who purchased Gilat shares between May 16, 2000 and October 2, 2001.[FN53] According to Mr. Liban, the Tel Aviv suit "concerns the false and misleading nature of the quarterly financial statement publications of Gilat for the year 2000 and for the first two quarters of the year 2001" which resulted in Gilat shares being traded at an "exaggerated artificial price." Following the filing of Mr. Liban's claim, defendants applied for a stay of proceedings [FN54] and on October 10, 2002, the Tel Aviv District Court ordered the proceedings stayed until "the granting of a judgment or other operative rulings from the appropriate Court in the USA."[FN55]

FN51. Mr. Liban also served notice that his attorneys would appear at the Fairness Hearing. However, no one appeared on that date. Mr. Liban and his lawyers later apologized for their absence, stating the absence was due to personal reasons of Mr. Liban's lawyers. Clarification on Behalf of Mr. Liban, filed August 20, 2007, ¶ 1.

FN52. Mr. Liban's suit also named Gilat's auditors, Kost, Fuhrer and Gabai-Ernst Young, but the claims against them have been "deleted" according to Mr. Liban.

FN53. A copy of the filing papers have not been provided to this Court. This litigation was originally filed in this district on March 11, 2002, a week before Mr. Liban's attorneys began working on the case on March 18, 2002and a month before Mr. Liban actually filed his suit in Israel.

FN54. Mr. Liban states that he submitted a reply to that application, in which he apparently objected to the stay.

FN55. *Gilat Satellite Networks Ltd. v. Emanuel Liban,* No. A 1456/02, slip op. at 6 (Dist. Ct. of Tel Aviv, Oct. 10, 2002). Although Mr. Liban did not provide a copy of the Tel Aviv court's decision, Lead Counsel has provided me with a certified translation (attached as Exhibit 2 to Lead Plaintiffs' Response to the Clarification on Behalf of Mr. Imanuel Liban, Docket # 136).

Mr. Liban now argues that his attorneys should be awarded fees and he should be reimbursed for the expenses he incurred in filing the suit in Tel Aviv since his claim materially advanced the settlement of the matter.FN56 According to Mr. Liban, while American law requires proof of scienter to establish liability for this type of securities fraud, a plaintiff need only demonstrate negligence before an Israeli court and, accordingly, even if an American court found that there was no scienter, the case could have been revived in Tel Aviv under the more plaintiff-friendly Israeli law.FN57 Mr. Liban argues that it is "self-evident" that Defendants took this factor into account and that it played an important part in motivating Defendants to settle the action.

FN56. Mr. Liban request attorneys fees of $110,302.50 and reimbursement of$15,000 in expenses. According to the documents provided by Mr. Liban, his attorneys spent 382 hours preparing the claim and preparing a reply to the application for a stay. No documentation has been provided for Mr. Liban's expenses, which he says are for translation of documents, accounting and financial consultation, photocopying and binding.

FN57. Though Mr. Liban provided no proof that Israeli law requires only a finding of negligence, Mr. Sabo confirmed that to be the case.

***20** A district court is authorized to provide "compensation for attorneys' fees and expenses where a proper showing has been made that the settlement was improved as a result of [applicant's] efforts." FN58 *White v. Auerbach,* 500 F.2d 822, 828 (2d Cir.1974). In this case, Mr. Liban's application revolves around his claim that Defendants were motivated to settle at least in part by the possibility of an Israeli court applying the more plaintiff-friendly Israeli law. However, in its decision staying the proceedings, the Tel Aviv court found that "the relevant law for the action ... is American law" since the contract was signed in New York and because the securities were purchased "based on expectations and reliance on the American Securities Laws." FN59 Given this determination as to choice of law, Defendants had little to be concerned about the possible application of Israeli law, and, accordingly, the filing of Mr. Liban's suit cannot be said to have materially advanced the settlement.FN60 Moreover, while Mr. Liban claims that it is "self-evident" that his suit induced the settlement, there is nothing in the record which indicates that Defendants took the Israeli action into account at any point. In fact, Mr. Liban did not participate in the settlement discussions nor did he apply to be a Lead Plaintiff. Though Mr. Liban filed a "Clarification On Behalf of Mr. Imanuel Liban" (the "Clarification"), on August 20, 2007, the Clarification contains nothing more than the rehashing of Mr. Liban's conclusory claims that the Israeli proceedings "acted as a catalyst, encouraging the defendants in the United States" to settle. FN61 A conclusory allegation unsupported by the record is an insufficient basis on which to award fees which would reduce the settlement fund available to the Class.

FN58. While the Court in *White* was specifically discussing fees for objectors, I see no material difference between objectors and others whose efforts in the period prior to the appointment of lead counsel improved the settlement. *See In re Auction Houses Antitrust Litig.,* 2001 WL 210697, at *4 (S.D.N.Y.2001) (denying fee application where attorneys "jumped on the band wagon" and filed complaints, since "the mere filing of complaints did not benefit the class."); *In re Cendant Corp. Securities Litigation,* 404 F.3d 173,195 (3d Cir.2005) ("If an attorney creates a substantial benefit for the class [in the period prior to the appointment of lead counsel]-by, for example, discovering wrongdoing through his or her own investigation, or by developing legal theories that are ultimately used by lead counsel in prosecuting the class action-then he or she will be entitled to compensation whether or not chosen as lead counsel.").

FN59. *Gilat Satellite Networks, Ltd. v. Emanuel Liban,* No. A 1456/02, slip op. at 4 (Dist. Ct. Of Tel-Aviv, Oct. 10, 2002); *see also* Declaration of Jacob Sabo, ¶ 4. Even if the court in Tel Aviv was merely indicating how it was likely to rule on choice of law, rather than actually making a ruling, it is clear that Defendants had little to be concerned about regarding the application of the more lenient Israeli law.

FN60. At the Fairness Hearing, Defendants' counsel confirmed that they were aware of the Israeli action but that such knowledge did not factor into their determination as to the amount of the settlement.

FN61. Clarification, ¶ 12.

While it was unclear from Mr. Liban's initial filing whether he also implicitly requested exclusion from the Class,FN62 Mr. Liban states in his Clarification that, ***"he does not intend to withdraw from the class"*** (emphasis in original). I find that Mr. Liban has not requested exclusion from the Class, nor is he entitled to attorneys fees or expenses.

FN62. At the Fairness Hearing, I directed counsel for the parties to

> contact Mr. Liban and instruct him to inform me whether he was indeed seeking exclusion, which they did by hand-delivered letter to Mr. Liban's attorneys on July 26, 2007. The Clarification was sent in response.

Conclusion

For the reasons set forth above, the parties' motion for final approval of the Settlement Agreement is granted, Lead Counsel's motion for attorney's fees and expenses is granted in part and denied in part, and Imanuel Liban's motion for attorney's fees and expenses is denied. The Clerk is directed to transmit a copy of the within to all parties and to Chief Magistrate Judge Gold.

SO ORDERED.

E.D.N.Y.,2007.
In re Gilat Satellite Networks, Ltd.
Not Reported in F.Supp.2d, 2007 WL 2743675 (E.D.N.Y.), Fed. Sec. L. Rep. P 94,385

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DATE FILED: 4/1/14

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- x
In re:

LEHMAN BROTHERS SECURITIES AND ERISA LITIGATION

09 MD 2017 (LAK)

This document applies to:

In re Lehman Brothers Equity/Debt Securities Litigation, 08 Civ. 5523 (LAK)
- x

PRETRIAL ORDER NO. 80
(Motion for Attorneys' Fees and Expenses - Structured Products)

LEWIS A. KAPLAN, *District Judge.*

The motion of Structured Plaintiffs' Counsel for an award of attorneys' fees and reimbursement of expenses [09 MD 2017 – DI 1320] is granted to the extent that the attorneys' fees and expenses listed on the following schedule are awarded.

SO ORDERED.

Dated: April 1, 2014

____
Lewis A. Kaplan
United States District Judge

Schedule

Firm	Fees Awarded	Expenses Approved
Gerard Gibbs LLP	$11,500,000	$399,825.92
Zwerling, Schachter & Zwerling	4,146,372	44,552.48
Bernstein Litowitz Berger & Grossmann LLP	1,586,242	0.00
Kessler Topaz Meltzer & Check, LLP	916,310	0.00
Law Offices of James V. Bashian	581,767	246.85
Tiffany & Bosco	262,603	3,368.17
Bonnett Fairbourn Friedman & Baling	237,886	1,220.98
Total	$19,231,180	$449,214.40

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- x
In re:

LEHMAN BROTHERS SECURITIES AND
ERISA LITIGATION

This document applies to: 09 MD 2017 (LAK)

In re Lehman Brothers Equity/Debt Securities Litigation, 08 Civ. 5523 (LAK)
- x

PRETRIAL ORDER NO. 35
(Attorneys' Fees and Expenses)

LEWIS A. KAPLAN, *District Judge.*

This securities class action was settled for an aggregate of $516,218,000 of which $90 million will be paid on behalf of the director and officer defendants and the balance on behalf of underwriter defendants. Lead Counsel apply for attorneys' fees of 16 percent of the recovery, which is $82,594,880, plus reimbursement of expenses. The proposed fees would be approximately 2.18 times the lodestar (the product of the hours expended and hourly rates) of $37,819,510, which reflects 91,876 hours devoted to the litigation.

In passing on this application, the Court applies the factors referred to in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 42 (2d Cir. 2000). It notes that plaintiffs seek an award in terms of a percentage of the recovery. But use of that methodology, while certainly permissible, is not mandatory, the lodestar approach being appropriate also. *McDaniel v. County of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010). So there is no need for any academic debate on the relative merits of these approaches, both in light of *McDaniel* and because the result would be the same here whichever were applied. Thus, the fact that the Court opts to express its rationale principally in terms of the lodestar approach ultimately is not material.

Some of the *Golberger* factors warrant only minimal discussion. First, this was a big and complicated action. Second, the Court respects the performance of plaintiffs accomplished counsel. They did a great deal of work.[1] Third, despite the facts that virtually all securities class

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1 Although one might wonder whether all of the 91,876 hours used in computing the lodestar all were efficiently and usefully devoted to the matter, the Court assumes for present purposes that they were. This is supported by the fact that the bankruptcy examiner, whose work is discussed below, devoted 111,000 hours to his investigation. Transcript, Apr. 12, 2012 ("Tr."), at 47-48. While his mission and that of plaintiffs' counsel were different, and

actions that survive motions to dismiss are settled and that the lawyers who bring those cases are paid fees, there often is a risk of dismissal on the pleadings, and that was so here during the early stages of the case. Finally, it bears note that class counsel usually are compensated only many months or years after much of the work is done and overhead costs borne. On the other hand, there are some factors that cut in favor of an award lower than the nearly $83 million requested – which would amount to an average of almost $900 per hour for each of the 91,876 hours claimed.

First, plaintiffs' counsel here had the benefit of the quite extraordinary report of the examiner appointed by the Bankruptcy Court in the Lehman bankruptcy. It was that report that revealed the facts regarding Lehman's use of and accounting for Repo 105s, which became the most important part of plaintiffs' case.[2] Indeed, the second amended complaint, which antedated the examiner's report, did not even mention that subject while the third amended complaint ("TAC") relied heavily upon it – as did the Court in denying in significant respects defendants' motions to dismiss the TAC.[3] Thus, plaintiffs took great and good advantage of the examiner's report, which became a roadmap for the most significant part of their case.[4] They were right to do so. But the fact remains that this very significant factor in the denial of much of the motions to dismiss and, doubtless, in the price defendants eventually paid to settle was the product of the examiner's efforts. And just to be quite clear, this implies no criticism of plaintiffs' counsel, who lacked the examiner's access to the evidence. But it does bear on the amount of compensation appropriately paid to plaintiffs' counsel, particularly any amount above the lodestar.

Second, while the Court acknowledges that plaintiffs' counsel faced risks in this case, those should not be overstated.

Third, the objective in compensating common fund counsel is subject to the overriding requirement of reasonableness. Lead Counsel here claim that the settlement represents recovery of 13 percent of the theoretical maximum allowable statutory damages of $3.3 billion and a significantly larger percentage of reasonably recoverable damages.[5] But there is no contention that the class members as a result of these settlements will recover even a third of their reasonably

while he had access to far more evidence than did plaintiffs' counsel, the comparison tends to corroborate the order of magnitude of the plaintiffs' effort and therefore of the Court's assumption.

2 *See In re Lehman Bros. Secur. and ERISA Litig.*, 799 F. Supp.2d 258 (S.D.N.Y. 2011).

3 *See id.*

4 Lead Counsel candidly acknowledged that the examiner's report provided plaintiffs with important information they had not had earlier, particular with respect to Repo 105s. *See* Tr., Apr. 12, 2012, at 6-7.

5 *Id.* at 9-10.

recoverable damages. Yet counsel seek to recovery 2.18 times the reasonable value of their services measured by their hourly rates and the number of hours devoted to the task. Moreover, even acknowledging that class counsel, under existing law, almost always receive a greater proportion of their lodestar fee measures than the class members receive of their losses, the Court in good conscience is bound to question a legal fee of over $80 million, which would compensate the attorneys at a rate of more than $900 per hour. We live in hard times. A fee in excess of $82 million, reflecting about 2.18 times the notional reasonable value of the services rendered, even granting that some premium over the lodestar is appropriate, simply seems too much.

All of this said, the Court is frank to say that there is no magic to setting a fee in this case. There is no figure that is right or wrong. But it seems to the undersigned that a lodestar multiplier of 1.5 is appropriate in light of all of the circumstances, given the legal standards that govern this determination. The expenses sought are appropriate.

Accordingly, the motion for attorneys fees and expenses [09 MD 2017 DI 805, 08 Civ. 5523 DI 341] is granted to the extent that the Court awards attorneys' fees in the aggregate amount of $56,729,265[6] plus expenses in the amount of $1,619,669.27, to be paid *pro rata* out of the two separate settlement funds.

SO ORDERED.

Dated: June 29, 2012

Lewis A. Kaplan
United States District Judge

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6 For those keeping score in terms of the percentage of the recovery, this represents 10.99 percent of the aggregate amount of the settlements.

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
In re MARSH & McLENNAN COMPANIES, INC. SECURITIES LITIGATION.

No. 04 Civ. 8144(CM).
Dec. 23, 2009.

West KeySummary**Compromise and Settlement 89 65**

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k65 k. Securities Law Actions.
Most Cited Cases

Proposed settlement of class action, wherein proposed class members alleged that they were injured by corporation's fraudulent scheme to artificially inflate corporate securities prices by making false and misleading statements about its contingent commission practices, was fair, reasonable, and adequate. The litigation involved complex issues of securities law and insurance industry practice, making it extremely complicated to bring to trial and with significant costs, so considering that class certification was still pending, the proposed settlement was procedurally fair. Moreover, the majority of the proposed class approved of the proposed settlement.

DECISION AND ORDER APPROVING THE SETTLEMENT, CERTIFYING THE CLASS FOR SETTLEMENT PURPOSES, APPROVING THE PLAN OF ALLOCATION OF THE SETTLEMENT FUND, AWARDING ATTORNEYS' FEES, AND REJECTING THE OBJECTIONS

McMAHON, District Judge.

INTRODUCTION

***1** Lead Plaintiffs the Public Employees Retirement System of Ohio, the State Teachers Retirement System of Ohio and the Ohio Bureau of Workers' Compensation (collectively, the “Ohio Plaintiffs”), and the State of New Jersey, Department of the Treasury, Division of Investment, on behalf of itself and the Common Pension Fund A, the DCP Equity Fund and the Supplemental Annuity Collective Trust Fund (collectively, the “New Jersey Plaintiffs” and, together with the Ohio Plaintiffs, “Lead Plaintiffs”), on behalf of themselves and the Class (as defined herein), move for final approval of a proposed settlement of $400 million (the “Settlement”) with Defendants Marsh & McLennan Companies, Inc. (“MMC”), Marsh, Inc. (“Marsh”), Jeffrey Greenberg (“Greenberg”) and Roger Egan (“Egan”) (collectively, “Defendants”). The Court preliminarily approved the Settlement in its Preliminary Approval Order of November 10, 2009 (Docket No. 301.) Only a handful of Class members have offered any objection to the Settlement. Not one potential Class member has objected to the amount of the Settlement, or to any of the substantive terms of the Settlement. For the reasons stated below, the Court approves the Settlement, concluding that it is fair, reasonable and adequate.

With the approval of Lead Plaintiffs, the law firms of Grant & Eisenhofer, P.A. and Bernstein Liebhard LLP (together, “Lead Counsel”), move for (1) an award of attorneys' fees in the amount of 13.5% of the Settlement amount (the “Fee Application”); (2) reimbursement of $7,848,411.84

of expenses incurred by Lead Counsel in litigating this action; and (3) reimbursement of $214,657.14 of expenses incurred by Lead Plaintiffs ($70,000 for the Ohio Plaintiffs and $144,657.14 for the New Jersey Plaintiffs) in representing the Class (the "PSLRA Award Request").[FN1] For the reasons stated below, the Court grants all three requests.

FN1. In their brief submitted in support of their request for fees and expenses, Lead Counsel first request an award of $320,000 for Lead Plaintiffs. (Mem. in Supp. of Lead Counsel's App. for an Award of Attorneys' Fees, Reimbursement of Expenses for Lead Counsel, and an Award of Expenses to Lead Pls., Dec. 18, 2009 ("Fees Br."), at 1.) However, Lead Counsel then state: "Pursuant to the PSLRA, Ohio Plaintiffs and the New Jersey Plaintiffs request an award totaling $214,657.14 to compensate them for their reasonable costs and expenses incurred in managing this litigation and representing the Class," and "request[ ] that the Court award the Ohio Plaintiffs $70,000 and the New Jersey Plaintiffs $ 144,657.14." (*Id.* at 23–25.) Thus, the Court construes the PSLRA Award Request as a request for $214,657.14.

BACKGROUND

I. Lead Plaintiffs' Allegations and Claims

Lead Plaintiffs allege that Defendants engaged in a systematic plan to increase insurance placement revenues through improper bid manipulation and illicit client steering, all designed to generate a critical source of income known as "contingent commissions." Lead Plaintiffs further allege that Defendants violated federal securities laws by making materially false and misleading statements about their contingent commission practices, which caused the price of MMC stock to be artificially inflated during the Class Period (as defined herein), and to drop precipitously when the truth about the scheme was finally revealed, causing massive losses to investors.

Lead Plaintiffs brought claims against all Defendants under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. Lead Plaintiffs also brought a claim against MMC under Section 11 of the Securities Act of 1933. Specifically, Lead Plaintiffs' Second Amended Consolidated Class Action Complaint (the "Amended Complaint") alleges, inter alia, that Defendants lied to the investing public by misrepresenting that: (1) contingent commission payments played no role in Marsh's recommendations to its clients about which carrier to choose for insurance coverage; (2) contingent commissions were paid in exchange for "services" provided by Marsh to the insurance carriers; and (3) Marsh fully disclosed contingent commissions to its clients. Lead Plaintiffs further allege that when the scheme ultimately was revealed in late 2004, following a suit brought by the New York Attorney General ("NYAG"), and the truth about Defendants' misstatements began to come out, MMC's stock price collapsed and investors suffered billions of dollars in damages.

II. Procedural Background

***2** This Settlement comes about after more than five years of hard-fought litigation. The litigation began on October 15, 2004, when the first of several class-action complaints was filed in the Southern District of New York against MMC, its subsidiary, Marsh, and others, including Greenberg, the former CEO of MMC, and Egan, the former President of Marsh. The complaints were assigned to the late Judge Kram for consolidated pretrial proceedings and the action was styled *In re Marsh & McLennan Companies, Inc. Securities Litigation,* No. 04 Civ. 8144. By Order dated January 26, 2005, Judge Kram appointed the Ohio Plaintiffs and the New Jersey Plaintiffs as Lead Plaintiffs, and Grant & Eisenhofer and Bernstein Liebhard as Lead Counsel.

Lead Plaintiffs filed their Consolidated Class Action Complaint on April 19, 2005. All Defendants moved to dismiss all claims asserted against them. On July 19, 2006, Judge Kram granted in part and denied in part the motions to dismiss. Judge Kram's decision substantially narrowed the claims and allegations asserted against Defendants and dismissed all of the state-law claims. *See In re Marsh & McLennan Cos., Inc. Sec. Litig.,* No. 04 Civ. 8144, 2006 WL 2057194 (S.D.N.Y. July 19, 2006). Lead Plaintiffs filed the Amended Complaint on October 13, 2006, asserting only the claims and allegations that Judge Kram had not dismissed. Defendants answered the Amended Complaint on December 12, 2006.

With the discovery stay lifted, the parties proceeded to conduct extensive and vigorously contested fact discovery. Given the intensity of discovery, Judge Kram appointed a Special Master, L. Peter Parcher, to hear and rule on disputed discovery issues. Lead Plaintiffs brought twenty such motions to the Special Master and Defendants brought five, on which the Special Master issued twenty opinions. (Fees Br. at 6.)

Lead Plaintiffs and Defendants each retained an expert to address Lead Plaintiffs' motion for class certification, with each side filing detailed initial and rebuttal expert witness submissions. As discovery continued, Lead Plaintiffs retained six experts to address liability, damages and causation issues, and Defendants retained two experts. The parties exchanged lengthy, detailed initial reports from all of the experts, and rebuttal reports from four experts. By the time the parties had agreed in principle to settle, both Lead Plaintiffs and Defendants had already deposed one of the other side's expert witnesses. Both sides were preparing their other expert witnesses for depositions, which were set to continue the same week the parties reached their agreement to settle.

Lead Plaintiffs moved for certification of a class of purchasers of MMC securities from October 14, 1999 through October 13, 2004. Defendants opposed that motion. The class certification issues were hotly contested, and numerous briefs were filed on the certification question. At the time the parties agreed to settle, the Court had not yet ruled on Lead Plaintiffs' class certification motion. On November 10, 2009, at the request of Lead Plaintiffs and Defendants, the Court certified the Class for settlement purposes only in the Preliminary Approval Order.

***3** At all times, the parties sharply disputed the merits of the case, class certification and damages. Defendants denied, and still deny, each claim alleged against them. Defendants asserted, and still assert, that they made no material misrepresentations or omissions and that, even if they did, they did so without intent such that they are not liable under the federal securities laws. Further, Defendants maintain that, even if they were found liable, the amount of the damages suffered by the Class is negligible or nonexistent.

Through an experienced mediator, the Honorable Daniel Weinstein (the "Mediator")—a retired Judge of the Superior Court of California—Lead Counsel engaged in intensive, arm's-length negotiations with Defendants over a one-and-a-half year period, with the aim of settling the issues in dispute and achieving the best relief possible consistent with the interests of the Class. Formal mediation sessions were held on April 7, 2008, February 4, 2009 and October 14–15, 2009. The mediation sessions involved sophisticated demonstrative aides and written and oral presentations to Judge Weinstein, as well as separate sessions with an independent damages expert retained for the sole purpose of advising the Mediator. On November 10, 2009, a settlement was reached.

III. Summary of the Settlement

The Settlement is the result of several rounds of mediation between Lead Plaintiffs and Defendants, conducted before the Mediator. Judge Weinstein has submitted a declaration attesting to his belief that the Settlement is a fair and reasonable resolution of this matter, taking into account the complexities of the issues involved, the strengths and weaknesses of each side's position and the uncertainty of continued litigation. (*See* Decl. of Judge Weinstein, Dec. 18, 2009, ¶ 14.)

The Settlement provides for the payment of $400 million for the benefit of Lead Plaintiffs and the Class into a settlement fund (the "Settlement Fund"). Additionally, the Stipulation and Agreement of Settlement, dated November 10, 2009 (Docket No. 300) (the "Stipulation") allows Lead Counsel to request an attorneys' fee of up to 13.5% of the Settlement Fund and reimbursement of expenses of up to $13 million, as well as to request reimbursement for class representative expenses incurred by Lead Plaintiffs.

IV. Notice of Settlement

Pursuant to the Preliminary Approval Order, Lead Plaintiffs provided notice of the Settlement to Class members in several significant ways: (1) Lead Plaintiffs, through their claims agent, caused the Court-approved Notice of Proposed Settlement (the "Notice") to be mailed by first-class mail, postage prepaid, to all reasonably identifiable Class members and their nominees (Joint Decl. of Keith M. Fleischman & Stanley D. Bernstein, Dec. 18, 2009 ("Joint Decl."), ¶ 96; Aff. of Charlene Young, Dec. 18, 2009 ("Young Aff"), ¶ 11); (2) Lead Plaintiffs caused a copy of the Summary Notice of Proposed Settlement (the "Summary Notice") to be published in the national edition of *The Wall Street Journal* (Joint Decl. ¶ 97; Young Aff. ¶ 6); (3) Lead Plaintiffs caused a copy of the Notice to be transmitted over *Business Wire* (Joint Decl. ¶ 98; Young Aff. ¶ 6); and (4) Lead Plaintiffs established the website www.MMCSecuritiesLitigation.com, on which was published the Notice, the Proof of Claim and Release Form (the "Proof of Claim"), various Court documents and additional information regarding the Settlement (Joint Decl. ¶ 99; Young Aff. ¶ 7). The Notice described the terms of the Settlement; explained the claims and defenses in the lawsuit; provided instructions for Class members to exclude themselves from the Settlement or to object to any part of the Settlement; provided detailed information about the final Settlement fairness hearing on December 23, 2009 (the "Settlement Fairness Hearing"); and provided contact information for the claims agent and Lead Plaintiffs' counsel, among other things.

V. Objections Received

***4** Lead Plaintiffs have received only seven objections from potential Class members. (Joint Decl. ¶ 115.) In addition, twenty potential Class members have asked to be excluded from the Settlement. (*Id.* ¶ 113; Young Aff. ¶ 14.)

DISCUSSION

I. The Settlement Is Fair, Reasonable and Adequate

There is a "strong judicial policy in favor of settlements, particularly in the class action context." *In re PaineWebber Ltd. P'ships Litig.,* 147 F.3d 132, 138 (2d Cir.1998). "Settlement approval is within the Court's discretion, which should be exercised in light of the general judicial policy favoring settlement." *In re Sumitomo Copper Litig.,* 189 F.R.D. 274, 280 (S.D.N.Y.1999) (internal quotations omitted). In a class-action settlement, there is a presumption of fairness, reasonableness and adequacy when the settlement is the product of "arms-length negotiations between experienced, capable counsel after meaningful discovery." *Id.* at 280 (*citing Manual for Complex Litigation* (Third) § 30.42 (1995)).

A. Standards for Approval of a Class–Action Settlement

In evaluating a proposed settlement under Federal Rule of Civil Procedure 23, the Court must determine whether the settlement, taken as a whole, is fair, reasonable and adequate. *Maywalt v. Parker & Parsley Petroleum Co.,* 67 F.3d 1072, 1079 (2d Cir.1995); *see In re WorldCom, Inc. Sec. Litig.,* No. 02 Civ. 3288, 2004 WL 2591402, at *10 (S.D.N.Y. Nov. 12, 2004). It is well-established that courts in this Circuit examine the fairness, adequacy and reasonableness of a class-action settlement according to the *"Grinnell* factors":

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund in light of all the attendant risks of litigation.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir.1974) (citations omitted). "In finding that a settlement is fair, not every factor must weigh in favor of settlement, 'rather the court should consider the totality of these factors in light of the particular circumstances.' " *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 456 (S.D.N.Y.2004) (quoting *Thompson v. Metro. Life Ins. Co.,* 216 F.R.D. 55, 61 (S.D.N.Y.2003)). In deciding whether to approve a settlement, a court "should not attempt to approximate a litigated determination of the merits of the case lest the process of determining whether to approve a settlement simply substitute one complex, time consuming and expensive litigation for another." *White v. First Am. Registry, Inc.,* No. 04 Civ. 1611, 2007 WL 703926, at *2 (S.D.N.Y. Mar. 7, 2007).

B. Application of the *Grinnell* Factors Supports Approval of the Settlement

1. The Complexity, Expense and Likely Duration of the Litigation

***5** "[I]n evaluating the settlement of a *securities* class action, federal courts, including this Court, have long recognized that such litigation is notably difficult and notoriously uncertain." *In re Sumitomo,* 189 F.R.D. at 281 (emphasis in original) (internal quotations omitted). This is certainly true with respect to the claims in this case.

This litigation involved not only complex issues of securities law, but also specific issues involving the highly regulated insurance industry and its use and understanding of contingent commissions. These industry-specific issues were complex enough to require Lead Plaintiffs to hire two industry experts, at significant expense, to assist Lead Counsel during most of the five years of the litigation. (*See* Joint Decl. ¶ 74.)

This case would have been extremely complicated to bring to trial, with the prospects for Lead Plaintiffs and the Class being highly uncertain. Even the most optimistic estimates did not have trial commencing until early 2011, with the Class not receiving any recovery until at least 2013. There would have been significant additional resources and costs expended to litigate the case through trial and through the inevitable appeals of any judgment that might have been entered against Marsh. The Settlement, by contrast, provides certain and substantial recompense to Class members now, and avoids their having to await the uncertain outcome of what would have been a lengthy trial and appeals process.

Thus, the complexity, expense and uncertainty of the litigation supports approval of the Settlement.

2. The Reaction of the Class to the Settlement

The Class's reaction to the Settlement also supports approval. Lead Counsel provided Notice by mail and by publication to all ascertainable Class members, and a website was established to handle inquiries. As the Court remarked at the preliminary approval hearing on November 10, 2009, the quality of the Notice provided by Lead Counsel is exceptionally high. Lead Counsel have received only seven purported objections and twenty requests for exclusion. This is an extremely strong indication of the fairness of the Settlement.[FN2]

FN2. Counsel disagree over whether the requests for exclusion (which come from a group of entities represented by the same lawyer) were great enough to trigger Marsh's right to walk away from the Settlement. But in exchange for an opportunity to convince these opt-outs of the error of their ways, Marsh has decided not to exercise any right it might have to walk away, and has asked the Court to approve the Settlement. The Court has today signed an order giving these twenty opt-outs additional time to rethink their position.

3. The Stage of the Proceedings and the Amount of Discovery Completed

At the time of the Settlement, the parties had just completed merits discovery and were in the process of conducting expert depositions. (Joint Decl. ¶ 76.) The parties had already exchanged expert reports and rebuttal reports. (*Id.* ¶ 74.) By this time, Lead Plaintiffs had, inter alia, (1) inspected, reviewed and analyzed over thirty-four million pages of documents produced by Defendants; (2) subpoenaed 100 non-parties and inspected, reviewed and analyzed over two million pages produced by non-parties; (3) taken and defended over 100 depositions; and (4) researched the applicable law concerning Lead Plaintiffs' claims and potential defenses thereto, as well as numerous pretrial issues.

***6** The advanced stage of the litigation and extensive amount of discovery completed weigh heavily in favor of approval. The parties' counsel were clearly in a position to realistically evaluate the strengths and weaknesses of the claims, and to evaluate the fairness of the proposed Settlement. *See In re Lloyd's Am. Trust Fund. Litig.,* No. 96 Civ. 1262, 2002 WL 31663577, at *15 (S.D.N.Y. Nov. 26, 2002); *see also In re Sumitomo,* 189 F.R.D. at 281–82 (finding that the stage of the proceedings "strongly" favored approval of settlement reached after "[p]laintiffs had conducted extensive discovery, investigation and analyses, and the proceedings were in the advanced stage of pointing or preparing for trial"). This is not a case where the parties engaged only in "settlement discovery." Thus, this *Grinnell* factor strongly supports approval.

4. The Risks of Establishing Liability

There is some risk that Lead Plaintiffs ultimately might have failed to establish Defendants' liability. Courts have acknowledged that "the legal requirements for recovery under the securities laws present considerable challenges, particularly with respect to loss causation and the calculation of damages." *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.,* No. 02 Civ. 5575, 2006 WL 903236, at *9 (S.D.N.Y. Apr. 6, 2006) (citations omitted). For example, with respect to the Rule 10b–5 claims, Lead Plaintiffs may have had difficulty proving that Defendants acted with scienter, or that the alleged decline in MMC's stock price was due entirely to the conduct alleged in the Amended Complaint and not to other unrelated factors.

5. The Risks of Establishing Damages

If there is anything in the world that is uncertain when a case like this one is taken to trial, it is what the jury will come up with as a number for damages. On damages, this case would have ended up as a classic "battle of the experts." There is the undeniable risk that a "jury could be swayed by experts for the Defendants, who [c]ould minimize the amount of Plaintiffs' losses." *Maley v. Del Global Tech. Corp.,* 186 F.Supp.2d 358, 365 (S.D.N.Y.2002); *see Strougo v. Bassini,* 258 F.Supp.2d 254, 259 (S.D.N.Y.2003); *In re Lloyd's,* 2002 WL 31663577, at *21. The risk that Lead Plaintiffs would be unable to establish damages exceeding the $400 million that the Settlement provides to the Class supports approval of the Settlement. Even if Lead Plaintiffs were successful in establishing liability, they have avoided substantial risks in proving damages by virtue of this proposed Class Settlement.

6. The Risk of Maintaining the Class Action Through Trial

There is also the risk that the Court might have denied Lead Plaintiffs' motion for class certification, and thereby precluded any recovery for the Class whatsoever. At the time of the Settlement, the class certification motion was pending before the Court. Defendants had vigorously contested class certification, arguing, inter alia, that Lead Plaintiffs are not entitled to the "fraud-on-the-market" presumption. The briefing was voluminous, intense and complex. Had the Court rejected Lead Plaintiff's motion, no class action could have been maintained. Although Defendants have stipulated to certification of the

Class for purposes of the Settlement, there would have been no such stipulation had Lead Plaintiffs brought this case to trial. Thus, the uncertainty surrounding class certification supports approval of the Settlement. *See In re AOL,* 2006 WL 903236, at *12 (finding that risk of plaintiffs' not succeeding in certifying class supported approval of settlement); *In re Global Crossing,* 225 F.R.D. at 460 (same).

7. The Ability of Defendants to Withstand a Greater Judgment

***7** It is undeniable that the current economic climate is not strong. Marsh's financial condition undoubtedly has been adversely affected by the economic turmoil of the past year. Moreover, the value of MMC stock has not recovered since the alleged wrongdoing giving rise to this litigation. In October 2004, during the five days following the announcement of the NYAG's lawsuit, the value of MMC stock dropped from $46.01 per share to $24.10. (Am.Compl.¶ 10.) MMC stock is currently trading even lower, at approximately $22 per share. There exists the legitimate concern that Defendants might not be able to pay an award higher than the Settlement, even if Lead Plaintiffs were to prevail at trial. Accordingly, this factor supports approval of the Settlement.

8. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and All the Attendant Risks of Litigation

The determination of a "reasonable" settlement "is not susceptible of a mathematical equation yielding a particularized sum ." *In re Michael Milken & Assocs. Sec. Litis.,* 150 F.R.D. 57, 66 (S.D.N.Y.1993); *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litis.,* 718 F.Supp. 1099, 1103 (S.D.N.Y.1989). Rather, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir.1972) "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell,* 495 F.2d at 455 & n. 2 ("In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.")

The Settlement is well within the range of reasonableness in light of the best possible recovery and all the attendant risks of litigation. A recovery totaling $400 million is an excellent result when success on the claims asserted is uncertain, class certification is being vigorously challenged, and the condition of the economy and of MMC in particular is questionable. Accordingly, the eighth and ninth *Grinnell* factors support approval of the Settlement.

C. The Proposed Settlement Is Procedurally Fair

"In addition to ensuring the substantive fairness of the settlement through full consideration of the *Grinnell* factors, the Court must also 'ensure that the settlement is not the product of collusion.' " *In re Global Crossing,* 225 F.R.D. at 461 (*quoting In re NASDAQ Market–Makers Antitrust Litig.,* 187 F.R.D. 465, 474 (S.D.N.Y.1998)). However, "As long as the integrity of the negotiating process is ensured by the Court, it is assumed that the forces of self-interest and vigorous advocacy will of their own accord produce the best possible result for all sides." *Banyai v. Mazur,* No. 00 Civ. 9806, 2007 WL 927583, at *12 (S.D.N.Y. Mar.27, 2007) (approving settlement reached after months of good-faith, arm's-length negotiations) (*quoting In re PaineWebber Ltd. P'Ships Litig.,* 171 F.R.D. 104, 132 (S.D.N.Y.1997)).

***8** Where, as here, "the settlement is the result of arm's length negotiations conducted by experienced counsel after adequate discovery and the settlement provokes only minimal objections, then it is entitled to '[a] strong initial presumption of fairness.' " *In re Global Crossing,* 225 F.R.D. at 461 (citation omitted). As set forth in Lead Counsel's Joint Declaration, Lead Counsel entered into this Settlement after conducting extensive discovery and arm's-length negotiations, based on their good-faith belief that the Settlement is in the best interests of the Class. The Settlement was the result of protracted, difficult negotiations that stretched out over a year and a half. Moreover, those negotiations were conducted with the assistance of Judge Weinstein, a highly regarded mediator with extensive experience in securities litigation, who has submitted a declaration in support of the Settlement. There is no reason to doubt that the Settlement is procedurally fair.

II. Certification of a Settlement Class Is Appropriate Under Rule 23

The Preliminary Approval Order certified the Class pursuant to Rules 23(a) and (b)(3) on behalf of all persons who purchased or otherwise acquired MMC securities between October 14, 1999 and October 13, 2004 (the "Class Period"), and that claim to have suffered losses as a result of such purchase or acquisition. The Class excludes the following: (1) MMC, Marsh and their officers, directors, employees, affiliates, parents, subsidiaries, representatives, predecessors and assigns; (2) Greenberg and Egan and their immediate families, employees, affiliates, representatives, heirs, predecessors, successors and assigns, as well as any entity in which either Greenberg or Egan has a controlling interest; and (3) those persons that would otherwise be members of the Class but that submit valid and timely requests for exclusion in accordance with the Preliminary Approval Order. The Court also certified Lead Plaintiffs as Class Representatives and Lead Counsel as Class Counsel, for purposes of Settlement only, pursuant to Rule 23.

The Second Circuit has long acknowledged the propriety of certifying a class solely for purposes of a class-action settlement. *See Weinberger v. Kendrick,* 698 F.2d 61, 73 (2d Cir.1982). Classes certified for settlement purposes, like all other classes, must meet the requirements of Rule 23(a) and at least one of three requirements set forth in Rule 23(b). *See In re Prudential Sec. Inc. Ltd. P'ships Litis.,* 163 F.R.D. 200, 205–10 (S.D.N.Y.1995).

A. The Requirements of Rule 23(a) Are Satisfied

Certification under Rule 23(a) is proper if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the class representatives are typical of the claims or defenses of the class; and (4) the class representatives will fairly and adequately protect the interests of the class.

1. The Settlement Class Is Sufficiently Numerous

***9** Rule 23(a)(1) requires a showing that the Class is so numerous that joinder of all members is impracticable. Numerosity is generally presumed when a class consists of forty or more members. *See Consol. Rail Corp. v. Town of Hyde Park,* 47 F.3d 473, 483 (2d Cir.1995). "In securities fraud class actions relating to publicly owned and nationally listed corporations, the numerosity requirement may be satisfied by a showing that a large number of shares were outstanding and traded during the relevant period." *In re Vivendi Universal, S.A. Sec. Litig.,* 242 F.R.D. 76, 84 (S.D.N.Y.2007) (*quoting Teachers Ret. Sys. v. ACLN Ltd.,* No. 01 Civ. 11814, 2004 WL 2997957, at *3 (S.D.N.Y. Dec.27, 2004)).

At the time of the Amended Complaint, MMC was the largest insurance broker in the United States, and one of the largest in the world, with approximately $11 billion in annual revenues. (Am.Compl.¶ 43.) MMC has traded on the NYSE during all relevant times, and undoubtedly has had millions of shares outstanding at any given time. Further, Lead Plaintiffs have caused the Notice to be mailed to thousands of potential Class members or nominees, and there have been over 7,000 viewers at the Settlement website. (Young Aff. ¶ 8.) In short, the numerosity of the Class cannot seriously be disputed.

2. There Are Questions of Law or Fact Common to the Class

Rule 23(a)(2) requires a showing that common issues of fact or law affect all Class members. "The commonality requirement, particularly in securities fraud litigation, is generally considered a low hurdle easily surmounted. Commonality does not demand that every question of law or fact be common to every class member, but instead merely requires that the claims arise from a common nucleus of operative facts. *In re Omnicom Group, Inc. Sec. Litig.,* No. 02 Civ. 4483, 2007 WL 1300781, at *3 (S.D.N.Y. Apr. 30, 2007) (internal quotations and citations omitted); *In re Vivendi,* 242 F.R.D. at 84 (stating that commonality requirement is applied "permissively" in securities litigation). In fact, a single common question may be sufficient to satisfy the commonality requirement. *See, e.g., German v. Fed. Home Mortgage Loan Corp.,* 885 F.Supp. 537, 553 (S.D.N.Y.1995). Where, as here, plaintiffs allege that class members have been injured by the same fraudulent scheme, the commonality requirement is satisfied. *See, e.g., Berwecky v. Bear, Stearns & Co.,* 197 F.R.D. 65, 68–69 (S.D.N.Y.2000); *In re Towers Fin. Corp. Noteholders Litis.,* 177 F.R.D. 167, 170 (S.D.N.Y.1997).

Here, Lead Plaintiffs allege that they and all Class members were injured by a fraudulent scheme to artificially inflate and maintain the price of MMC securities, and that Defendants engaged in manipulative and deceptive acts in furtherance of that scheme by, among other things, making false and misleading statements about the nature of their contingent commission practices and revenues. Common questions include (1) whether Defendants engaged in a fraudulent scheme; (2) whether Defendants acted with scienter; (3) whether Defendants' acts affected the market for MMC securities; and (4) whether Defendants' conduct had the effect of concealing the circumstances that bore on the ultimate loss. There are clearly sufficient common questions to satisfy Rule 23(a)(2).

3. Lead Plaintiffs' Claims Are Typical of Those of the Class

***10** Rule 23(a)(3) requires that Lead Plaintiffs' claims be "typical" of those of the Class, Lead plaintiffs' claims are typical where, as here, they "arise from the same practice or course of conduct that gives rise to the claims of the proposed class members." *In re Vivendi,* 242 F.R.D. at 85 (*quoting Marisol A. v. Giuliani,* 929

F.Supp. 662. 691 (S.D.N.Y.1996)). Typicality thus embraces the principle that class representatives "have the incentive to prove all the elements of the cause of action which would be presented by the individual members of the class were they initiating individual actions." *In re NASDAQ,* 172 F.R.D. at 126 (internal quotations and citation omitted).

"Typical" does not mean "identical." *See In re Omnicom,* 2007 WL 1300781, at *4; *Trief v. Dun & Bradstreet Corp.,* 144 F.R.D. 193, 200 (S.D.N.Y.1992). Accordingly, the "typicality requirement is not defeated by minor variations in the fact patterns of individual class member[s'] claims." *Abdul–Malik v. Coombe,* No. 96 Civ. 1021, 1996 WL 706914, at *3 (S.D.N.Y. Dec.6, 1996). Factual differences involving the date of acquisition, type of securities purchased and manner by which the investor acquired the securities will not destroy typicality if each class member was the victim of the same material misstatements and the same fraudulent course of conduct. *See, e.g., In re Baldwin–United Corp. Litig.,* 122 F.R.D. 424, 428 (S.D.N.Y.1986); *Dura–Bilt Corp. v. Chase Manhattan Corp.,* 89 F.R.D. 87, 99 (S.D.N.Y.1981).

Lead Plaintiffs' claims are typical of those of the Class because their claims arise out of the same course of conduct—Defendants' alleged participation in the fraudulent scheme to artificially inflate and maintain the price of MMC securities. Lead Plaintiffs, like the members of the Class they represent, purchased MMC securities during the Class Period and suffered significant losses as a result of the violations of the federal securities laws alleged in the Amended Complaint. Lead Plaintiffs stand in the same position as other investors who purchased MMC securities during the Class Period, having suffered the same type of injury (purchasing MMC securities at artificially inflated prices and suffering losses when the fraud was revealed) as a result of Defendants' conduct. Such a showing is sufficient to meet the typicality requirement of Rule 23(a)(3).

4. Lead Plaintiffs Have Fairly and Adequately Protected the Interests of the Class

Rule 23(a)(4) is satisfied if "the representative parties will fairly and adequately protect the interests of the class." Courts consider two factors in measuring adequacy of representation: (1) whether the claims of the lead plaintiffs conflict with those of the class; and (2) whether the lead plaintiffs' counsel is qualified, experienced and generally able to conduct the litigation. *See In re Drexel Burnham Lambert Group, Inc.,* 960 F.2d 285, 291 (2d Cir.1992); *In re Oxford Health Plans,* 191 F.R.D. 369, 376 (S.D.N.Y.2000). As many courts have observed, "the issues of typicality and adequacy tend to merge because they 'serve as guideposts for determining whether ... the named plaintiff's claim and the class claims are so inter-related that the interests of the class members will be fairly and adequately protected in their absence.' " *In re Vivendi,* 242 F.R.D. at 85 (*quoting Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)).

***11** As discussed above, Lead Plaintiffs and the members of the Class they represent were injured by the same wrongful course of conduct. Accordingly, it is in Lead Plaintiffs' interest to vigorously prosecute this action on behalf of the Class. Lead Counsel are experienced securities class action law firms and they have more than adequately represented the interests of the Class. Accordingly, Lead Plaintiffs and Lead Counsel meet the requirements of Rule 23(a)(4).

B. The Requirements of Rule 23(b)(3) Are Satisfied

Rule 23(b)(3) authorizes class certification if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Both requirements are satisfied here.

1. Common Questions of Law or Fact Predominate

"Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Moore v. Paine Webber, Inc.,* 306 F.3d 1247, 1252 (2d Cir.2002). "Courts generally focus on the liability issue in deciding whether the predominance requirement is met, and if the liability issue is common to the class, common questions are held to predominate over individual questions." *In re Prudential,* 163 F.R.D. at 206 (*quoting Dura–Bilt,* 89 F.R.D. at 93). Accordingly, as the Supreme Court has noted, "Predominance is a test readily met in certain cases alleging ... securities fraud." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 625, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

Here, the critical issues for establishing Defendants' liability include whether the Defendants (1) made misstatements or omissions of material fact; (2) with scienter; (3) in connection with the purchase or sale of securities; (4) upon which plaintiffs relied; and (5) that plaintiffs' reliance was the proximate cause of their injury. Each of these issues is susceptible of generalized proof and, accordingly, the predominance requirement of Rule 23(b)(3) is satisfied. *See, e.g., In re Salomon Analyst Metromedia,* 236 F.R.D. 208, 218 (S.D.N.Y.2006).

2. A Class Action Is the Superior Method of Adjudication

The last prong of Rule 23(b)(3) requires a court to consider whether a class action is superior to other methods of adjudication. A class action is particularly appropriate for addressing the claims at issue in this case. Lead Plaintiffs represent a Class consisting of a large number of investors in MMC securities whose individual damages are likely small enough to render individual litigation prohibitively expensive. Superiority is readily found where, as here, "the alternatives [to a class action] are either no recourse for thousands of stockholders ... or a multiplicity and scattering of suits with the inefficient administration of litigation which follows in its wake." *Green v. Wolf Corp.,* 406 F.2d 291, 301 (2d Cir.1968).

***12** Rule 23(b)(3) specifies four factors that a court should consider in determining whether a class action is superior to other methods of adjudication: (1) the class members' interests in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action. Each of these factors weighs in favor of certification of the Settlement Class.

Class members have limited interest in individually controlling the prosecution or defense of separate actions given the prohibitive cost of instituting individual actions for securities fraud. Accordingly, the courts recognize that a class action is uniquely suited to resolving securities claims. *See In re Vivendi,* 242 F.R.D. at 91; *see also Green,* 406 F.2d at 296. This point is underscored by the fact that, to date, only a small number of Class members have opted out of this class action. Further, concentrating litigation in a single forum plainly has a number of benefits, including eliminating the risk of inconsistent adjudications and promoting the fair and efficient use of the judicial system, and "the Southern District of New York is well known to have expertise in securities law." *Albert Fadem Trust v. Duke Energy Corp.,* 214 F.Supp.2d 341, 344 (S.D.N.Y.2002). Finally, in determining whether a class action is a superior method of adjudication, a court must also consider "the management difficulties likely to be encountered if the action is continued as a class suit, such as the burden of complying with Rule 23's notice requirements." *In re Vivendi,* 242 F.R.D. at 107. Securities class actions are routinely certified and raise no unusual manageability issues. Indeed, as shown below, the streamlined and timely manner by which Lead Plaintiffs identified and notified Class members of the Settlement demonstrates that class treatment here is manageable and efficient.

III. Transmission of the Notice to the Class Satisfied Both the Preliminary Approval Order and Applicable Law

Rule 23(c) (2)(B) requires that notice of class certification must be served on all class members who can be identified through reasonable efforts. Further, Rule 23(e)(1) instructs courts to "direct notice in a reasonable manner to all class members who would be bound by the proposal." Such notice to class members need only be reasonably calculated under the circumstances to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections. *See Thompson v. Metro. Life Ins. Co.,* 216 F.R.D. 55, 67 (S.D.N.Y.2003) ("Although no rigid standards govern the contents of notice to class members, the notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings." (internal quotations and citations omitted)).

***13** As with the notice approved by the court in *Thompson,* the Notice provided to Class members here provided, "in language easily understandable to a layperson, the essential terms of the settlement, including the claims asserted; who would be covered by the settlement; how to participate in or opt-out of the settlement; the settlement benefits; the contact information of the lawyers representing the class members and the amount sought for named Class members; how to object to the settlement and the time and place of the Court's scheduled fairness hearing if an objector or his counsel wished to appear; and who to contact if further information is sought." *Id.* at 68 (citations omitted). Indeed, as the Court stated at the preliminary approval hearing, the Notice provided by Lead Counsel was among the best the Court has encountered.

The Preliminary Approval Order authorized Lead Plaintiffs to retain Rust Consulting, Inc. as the Claims Administrator, and directed the Claims Administrator to (1) cause the Notice and Proof of Claim to be mailed, by first-class mail, postage prepaid, by November 13, 2009, to all reasonably identifiable Class members; and (2) cause the Summary Notice to be published in the *Wall Street Journal* and transmitted over *Business Wire.* In addition, the Preliminary Approval Order directed Lead Counsel to file proof of the publication of the Summary Notice and mailing of the Notice with the Court at least three days before the Settlement Fairness Hearing. Lead Plaintiffs have fully complied with these requirements. (Joint Decl. ¶¶ 96–98; Young Aff. ¶¶ 6, 7, 11.) This is sufficient to satisfy Rule 23. Accordingly, the form and manner of Notice provided to Class members satisfies both the Preliminary Approval Order and Rule 23.

IV. The Plan of Allocation Is Reasonable, Fair and Equitable

"When formulated by competent and experienced class counsel, an allocation plan need have only a 'reasonable, rational basis.' " *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 462 (S.D.N.Y.2004) (*quoting In re Am. Bank Note Holographics, Inc. Sec. Litig.,* 127 F.Supp.2d 418, 429–30 (S.D.N.Y.2001)). In determining whether a plan of allocation is fair, courts look largely to the opinion of counsel. *See In re Painewebber Ltd. P'shps. Litig.,* 171 F.R.D. 104, 133 (S.D.N.Y.1997).

The Plan of Allocation (the "Plan") in this case meets these standards of rationality and reasonableness. As set forth in the Joint Declaration, the Plan is the product of Lead Counsel's investigation, discovery and consultation with their damages expert. In developing the Plan, Lead Counsel and their experts considered numerous factors, including (1) the volume of publicly traded MMC securities purchased, acquired or sold during the Class Period; (2) the time period in which an MMC security was purchased or acquired, or an MMC put option was sold; (3) whether the security was held until after the end of the Class Period or whether it was sold during the Class Period, and if so, when it was sold and at what price; (4) the artificial inflation in the price of MMC securities (or "artificial deflation" for put options) allegedly attributable to Defendants' misstatements; and (5) the type of security involved. The Court concludes that the Plan is rational and reasonable.

V. Attorneys' Fees

***14** Lead Counsel (1) submit their Fee Application for an award of attorneys' fees in the amount of 13.5% of the Settlement Fund; (2) petition for reimbursement of litigation expenses in the amount of $7,848,411.84; and (3) make, on behalf of Lead Plaintiffs, a PSLRA Award Request for reimbursement of class representative expenses totaling $214,657.14–$70,000 for the Ohio Plaintiffs and $144,657.14 for the New Jersey Plaintiffs. For the reasons stated below, the Court grants these requests.

A. Lead Counsel Are Entitled to an Award of Attorneys' Fees and Reimbursement of Expenses from the Settlement Fund

Pursuant to the "equitable" or "common fund" doctrine, established more than a century ago in *Trustees v. Greenough,* 105 U.S. 527, 532–33, 26 L.Ed. 1157 (1881), attorneys who create a common fund to be shared by a class are entitled to an award of fees and expenses from that fund as compensation for their work. *In re Telik, Inc. Sec. Litig.,* 576

F.Supp.2d 570, 584–85 (S.D.N.Y.2008). The Supreme Court has recognized that a lawyer who recovers a common fund for the benefit of persons other than 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, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980). Fees and expenses are paid from the common fund so that all class members contribute equally toward the costs associated with litigation pursued on their behalf. *See Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 47 (2d Cir.2000).

Courts traditionally have used two methods to calculate reasonable attorneys' fees in common fund cases: the "percentage method" and the "lodestar method." *Id.* The percentage method is the simpler method of the two and involves awarding counsel a percentage of the recovery as a fee. *Id.* The lodestar method requires the court to scrutinize the fee petition to ascertain the number of hours reasonably billed, then multiply that figure by an appropriate hourly rate. *Id.*

Although district courts may use both methods when approving an award of attorneys' fees, the Second Circuit encourages using the lodestar method only as a cross-check for the percentage method. *Id.* at 50; *see Strougo v. Bassini,* 258 F.Supp.2d 254, 263 (S.D.N.Y.2003). Indeed, the percentage method continues to be the trend of district courts in this Circuit and has been expressly adopted in the vast majority of circuits, *See In re Telik,* 576 F.Supp.2d at 586 & n. 6 (collecting cases). Further, the percentage method comports with the PSLRA, which provides that "attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable *percentage* of the amount of any damages and prejudgment interest actually paid to the class." *See* 15 U.S.C. § 78u–4(a)(6) (emphasis added).

Whether determined by lodestar or percentage, the fees awarded in common fund cases must be "reasonable" under the circumstances. *Goldberger,* 209 F.3d at 47. "What constitutes a reasonable fee is properly committed to the sound discretion of the district court, and will not be overturned absent an abuse of discretion." *Id.* (internal citation omitted). The Second Circuit has instructed that, in exercising their discretion:

> ***15** [D]istrict courts should continue to be guided by the traditional criteria in determining a reasonable common fund fee, including: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of the representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations."

Id. at 50 (*quoting In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.,* 724 F.Supp. 160, 163 (S.D.N.Y.1989)). In applying these criteria, "a Court essentially makes no more than a qualitative assessment of a fair legal fee under all the circumstances of the case." *See In re Union Carbide,* 724 F.Supp. at 166. In this case, the fee requested by Lead Counsel is warranted under either the percentage or lodestar method.

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

The requested fee of 13.5% of the Settlement Fund is reasonable. Lead Counsel vigorously pursued this litigation over the course of five years. The requested fee represents only 0.44% of the total value of Lead Counsel's lodestar. When considering percentage fee awards in securities class actions settled in the $100–$600 million range, Lead Counsel's request for 13.5% of the $400 million Settlement Fund is at the low end of the spectrum in this Circuit and elsewhere. *See, e.g., In re Initial Pub. Offering Sec. Litig.,* Master File No. 21 MC 92, 2009 WL 3397238 (S.D.N.Y. Oct. 5, 2009) ($586 million; 33.33%); *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.,* No. 03 MDL 1529, 2006 U.S. Dist. LEXIS 84621 (S.D.N.Y. Nov. 16, 2006) ($455 million; 21.4%); *In re Qwest Commc'ns Int'l. Inc. Sec. Litig.,* No. 01 Civ. 01451, 2006 U.S. Dist. LEXIS 71267 (D.Colo. Sept.28, 2006) ($400 million; 15%); *In re Lucent Techs., Inc. Sec. Litis.,* 327 F.Supp.2d 426 (D.N.J.2004) ($517 million; 17%); *In re BankAmerica Corp. Sec. Litis.,* 228 F.Supp.2d 1061 (E.D.Mo.2002) ($490 million; 18%); *In re Prison Realty Sec. Litis.,* No. 3:99–0458, 2001 U.S. Dist. LEXIS 21942 (M.D.Tenn. Feb. 9, 2001) ($104 million; 30%); *In re Ikon Office Solutions, Inc. Sec. Litis.,* 194 F.R.D. 166 (E.D.Pa.2000) ($111 million; 30%); *Kurzweil v. Philip Morris Cos., Inc.,* Nos. 94 Civ. 2373, 2546, 1999 WL 1076105 (S.D.N.Y. Nov.30, 1999) ($124 million; 30%); *In re Prudential Sec. Inc. Ltd. P'ships Litig. .,* 912 F.Supp. 97 (S.D.N.Y.1996) ($110 million; 27%).

Further, Lead Counsel have based their fee request on the percentage method because Lead Plaintiffs chose the percentage method for determining the fees that Lead Counsel could seek. (Decl. of Carol G. Jacobson, Dec. 18, 2009, ¶ 22; Decl. of Dennis P. Smith, Dec. 18, 2009, ¶ 16.) Since the passage of the PSLRA, courts have found such an agreement between fully informed lead plaintiffs and their counsel to be presumptively reasonable. *See In re Cendant Corp. Litig.,* 264 F.3d 201, 282 (3d Cir.2001); *In re Lucent,* 327 F.Supp.2d at 433–34; *In re Global Crossing Sec. & ERISA Litis.,* 225 F.R.D. 436, 466 (S.D.N.Y.2004) (citing *In re Cendant* for proposition that "in class action cases under the PSLRA, courts presume fee requests submitted pursuant to a retainer agreement negotiated at arm's length between lead plaintiff and lead counsel are reasonable").

***16** Indeed, public policy considerations support fee awards where, as here, large public pension funds, serving as lead plaintiffs, conscientiously supervised the work of lead counsel, and gave their endorsement to lead counsel's fee request. *See In re WorldCom. Inc. Sec. Litis.,* 388 F.Supp.2d 319, 356 (S.D.N.Y.2005) (finding that when "class counsel in a securities lawsuit have negotiated an arm's length agreement with a sophisticated lead plaintiff possessing a large stake in the litigation, and when that lead plaintiff endorses the application following close supervision of the litigation, the court should give the terms of that agreement great weight").

Moreover, the requested fee award is plainly warranted and reasonable in light of the six *Goldberger* criteria.

C. The Fee Application Is Reasonable Under the *Goldberger* Factors

1. Lead Counsel's Time, Labor and Lodestar Are Reasonable

The first *Goldberger* factor for determining a fee's reasonableness is "the time and labor expended by counsel." 209 F.3d at 50. Similarly, the first step of the lodestar analysis is to multiply the number of hours reasonably expended in the litigation by each attorney by the appropriate hourly rate for that attorney. *Strougo,* 258 F.Supp.2d at 263. Lead Counsel have unquestionably expended an enormous amount of time over the course of five years to bring this case to a resolution. As set forth in the Joint Declaration, through November 2009, Lead Counsel have collectively spent 309,537.80 hours of attorney and litigation support time valued at $119,556,484.25, and have advanced or incurred $7,848,411.84 in expenses to litigate this case. The requested 13.5% fee represents a multiplier of 0.44—in other words, a negative multiplier—that is amply justified by application of the relevant factors.

(a) Lead Counsel's Hours Are Reasonable

Where the lodestar is used as a cross-check, "the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger,* 209 F.3d at 50. The Court concludes that the hours Lead Counsel expended in litigating this action are plainly reasonable given the magnitude and complexity of the case, the fierce defenses mounted and the relatively late stage at which the Settlement was reached.

The extensive history of this litigation, the nature of the services performed, and the time expended by each attorney or other professional, are set forth in depth in the Joint Declaration and other papers submitted by Lead Counsel. All of merits discovery has been completed, including the production, review and analysis of over thirty-six million pages produced by Defendants and third parties, as well as the taking of ninety and defending of twenty depositions. Numerous procedural and substantive motions were fully briefed and argued. A substantial portion of complex expert discovery has been completed. (Joint Decl. ¶¶ 44, 68, 70, 73–76 .) Lead Counsel supervised and managed every aspect of this litigation. (*Id.* ¶ 131.) They in turn were supervised closely by Lead Plaintiffs—in effect, by the Attorneys General of Ohio and New Jersey—who exercised their oversight responsibilities zealously and with an eye to keeping fees as low as possible, given the nature and duration of this action.

***17** Given the five years over which this case has been pending, Lead Counsel's zealous prosecution of the litigation, Lead Counsel's success in overcoming Defendants' motions to dismiss, the briefing and affidavits submitted regarding class certification, and the expansive nature of discovery, with the corresponding intense and lengthy disputes that arose and required resolution by the Court-appointed Special Master, the Court concludes that the total hours billed by Lead Counsel are reasonable.

(b) Lead Counsel's Hourly Rates Are Reasonable

In a lodestar analysis, the appropriate hourly rates are those rates that are normally charged in the community where counsel practices—that is, the market rate. *Luciano v. Olsten Corp.,* 109 F.3d 111, 115–16 (2d. Cir.1997) ("The 'lodestar' figure should be 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.' " (*quoting* *Blum v. Stenson,* 465 U.S. 886, 896 n. 11, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984))). Thus, awards in comparable cases are an appropriate measure of the market value of counsel's time. Courts in this Circuit and around the country have repeatedly found rates similar to those charged by Lead Counsel to be reasonable in other securities class actions. In short, a market check and substantial precedent demonstrates that the rates used by Lead Counsel in calculating their lodestars are reasonable.

2. The Magnitude and Complexity of the Litigation Support the Requested Fee

The second *Goldberger* factor—the magnitude and complexity of the case—also supports the requested fee award. A securities fraud class action's magnitude and complexity must be evaluated in comparison to similarly complex cases. *See In re Bristol–Myers Squibb Sec. Litig.,* 361 F.Supp.2d 229, 234 (S.D.N.Y.2005). Shareholder class actions are notoriously complex and difficult to prove.

This action is an example of large-scale, highly complex litigation. At $400 million, the Settlement is one of the top twenty-five recoveries for shareholders in lawsuits of this nature in American history. Complex, fact-intensive pleadings were prepared and filed; multiple motions to dismiss were filed and opposed; Lead Counsel reviewed more than thirty-six million pages in electronic and paper discovery produced by Defendants; over 100 third parties were subpoenaed; 110 depositions were taken and defended; and Lead Counsel pursued class certification and engaged in attendant fact and expert discovery, which included reports and testimony from multiple experts concerning complex damage and loss causation theories and analyses. (Joint Decl. 31–34, 44, 70.)

In addition, throughout the course of the litigation, many disputes among the parties have required judicial interaction and resolution. Numerous hearings were conducted before the Special Master, either in person or telephonically. The negotiations relating to this Settlement spanned one and a half years, and included three sessions with the Mediator and countless phone conferences and meetings. In sum, considering the magnitude and complexity of this case, the 13.5% Fee Application is reasonable.

3. The Risks of the Litigation Support the Requested Fee

***18** The Second Circuit has identified "the risk of success as perhaps the foremost factor to be considered in determining [a reasonable award of attorneys' fees]." *See Goldberger,* 209 F.3d at 54 (internal quotations omitted). While risk is measured as of when the case is filed, *id.* at 55, changes in the law during the course of litigation can increase those risks considerably. During the course of this litigation, significant changes occurred in the well-established standards governing the critical issue of class certification. *See, e. g., Miles v. Merrill Lynch & Co.,* 471 F.3d 24 (2d Cir.2006).

Courts in this Circuit have long recognized that the risk associated with a case bears heavily upon the determination of an appropriate fee award. *See In re Am. Bank Note Holographies, Inc. Sec. Litig.,* 127 F.Supp.2d 418, 432–33 (S.D.N.Y.2001) ("[It is] appropriate to take this [contingent fee] risk into account in determining the appropriate fee to award."); *In re Warner Commc'ns Sec. Litig.,* 618 F.Supp. 735, 747 (S.D.N.Y.1985), *aff'd,* 798 F.2d 35 (2d Cir.1986) ("Numerous cases have recognized that the attorneys' contingent fee risk is an important factor in determining the fee award.").

Enormous risk is inherent in massive and highly complex cases like this one. As noted above, there is great uncertainty in taking a case such as this to a jury trial in what would have been a battle of the experts.

(a) Risk of Non–Payment

Lead Counsel pursued this case for five years on an entirely contingent basis, without receiving any reimbursement and with the ever-present and substantial risk of non-payment. In numerous class actions, including complex securities cases, plaintiffs' counsel have expended thousands of hours and advanced significant out-of-pocket expenses and received no remuneration whatsoever. *See, e.g., State Univs. Ret. Sys. of Ill, v. AstraZeneca PLC,* No. 08 Civ. 3185, 2009 U.S.App. LEXIS 13674 (2d Cir. June 25, 2009) (affirming district court's dismissal of securities class action); *Freedman v. Value Health, Inc.,* 34 F. App'x 408 (2d Cir.2002) (affirming district court's grant of summary judgment in favor of defendants in securities class action); *Steinberg v. Ericsson LM Tel. Co.,* No. 07 Civ. 9615, 2008 WL 5170640 (S.D.N.Y. Dec. 10, 2008) (dismissing securities class action). Here, Lead Counsel worked for five years on this large, complex case on a wholly contingent fee basis, facing the real and heightened risk that they would receive nothing for their efforts. Accordingly, the Court finds that the risk of non-payment weighs in favor of granting Lead Counsel's Fee Application.

(b) Risks of Establishing Liability and Maintaining the Class Action Through Trial

In assessing the risk of establishing liability, the Court must balance the benefits afforded to the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. Courts have recognized the considerable risks of failing to recover anything in securities class actions. *See In re AOL Time Warner, Inc.,* No. 02 Civ. 5575, 2006 WL 903236, at *11–12 (S.D.N.Y. Apr. 6, 2006).

***19** Throughout the course of this litigation, Lead Counsel encountered the risks of developing law in the areas of loss causation, pleading requirements and class certification jurisprudence. *See, e.g., Dura Pharms., Inc. v. Broudo,* 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005); *Miles,* 471 F.3d 24. The risks of this case for Lead Counsel increased with those legal developments.

In sum, the risks associated with this litigation support the reasonableness of Lead Counsel's Fee Applicartion.

4. The Quality of Lead Counsel's Representation of the Class Supports the Fee Application

The fourth *Goldberger* factor is the “quality of representation” delivered in the litigation. 209 F.3d at 50. To evaluate the quality of representation, courts in the Second Circuit “review the recovery obtained and the backgrounds of the lawyers involved in the lawsuit.” *In re Merrill Lynch Tyco Research Sec. Litis.,* 249 F.R.D. 124, 141 (S.D.N.Y.2008).

There is no doubt that Lead Counsel has immense experience in complex federal civil litigation, particularly the litigation of securities and other class actions. Both Grant & Eisenhofer and Bernstein Liebhard have received significant recognition for their work in these areas.

Another consideration for assessing the quality of services rendered by Lead Counsel is the quality of opposing counsel. Here, all Defendants were represented by first-rate attorneys who vigorously contested Lead Plaintiffs' claims and allegations. Accordingly, the Court concludes that the quality of Lead Counsel's representation of the Class supports the Fee Application.

5. The Fee Request Is Fair and Reasonable in Relation to the Settlement Amount

In determining whether the Fee Application is reasonable in relation to the settlement amount, the Court compares the Fee Application to fees awarded in similar securities class-action settlements of comparable value. As demonstrated above, when compared with fee requests in securities class-action settlements ranging from $100–$600 million, Lead Counsel's requested fee of 13.5% of the $400 million Settlement Fund is at the low end of the spectrum. *See supra* Discussion V.B.; *In re Ikon,* 194 F.R.D. at 194 ("Percentages awarded have varied considerably, but most fees appear to fall in the range of nineteen to forty-five percent."). Thus, the Court finds that Lead Counsel's fee request is fair and reasonable in relation to the $400 million Settlement.

6. Public Policy Considerations Support the Requested Fee

Public policy is the sixth factor a court considers in determining the reasonableness of a fee request. *Goldberger,* 209 F.3d at 50. "Public policy concerns favor the award of reasonable attorneys' fees in class action securities litigation." *In re Merrill Lynch,* 249 F.R.D. at 141–42; *see In re WorldCom,* 388 F.Supp.2d at 359 ("In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives.") Moreover, "public policy supports granting attorneys fees that are sufficient to encourage plaintiffs' counsel to bring securities class actions that supplement the efforts of the SEC." *In re Bristol–Myers,* 361 F.Supp.2d at 236.

***20** Here, Lead Counsel's willingness to assume the risks of this litigation resulted in a substantial benefit to a large Class of purchasers of MMC securities, and Lead Counsel must be adequately compensated for their efforts. Further, Lead Counsel seek a fee that is substantially less than their accrued lodestar. Public policy considerations favor granting the Fee Application,

D. A "Cross–Check" of Lead Counsel's Lodestar Demonstrates the Reasonableness of the Requested Fee

In *Goldberger.* the Second Circuit held that even in cases in which the percentage method is chosen, "documentation of hours" remains "a [useful] 'cross-check' on the reasonableness of the requested percentage." 209 F.3d at 50. However, "where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court .... Instead, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case ...." *Id.* (internal citation omitted).

Under the lodestar method, 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. *See id.* at 47; *Savoie v. Merchs. Bank,* 166 F.3d 456, 460 (2d Cir.1999). In this case, the cumulative lodestar reported by Lead Counsel is $119,556,484.25. (Fees Br. at 22.) The percentage fee requested represents a negative multiplier of 0.44 to the lodestar. Thus, not only are Lead Counsel not receiving a premium on their lodestar, their fee request amounts to a deep discount from their lodestar. The lodestar "cross-check" therefore unquestionably supports the requested percentage fee award of 13.5%.

E. The Expenses Incurred by Lead Counsel Were Reasonable and Necessary to the Effective Prosecution of this Action

Counsel who create a common fund are entitled to the reimbursement of expenses that they advance to a class. Lead Counsel requests reimbursement of $7,848,411.84 in expenses advanced or incurred by Lead Counsel while litigating this action. Those expenses relate principally to electronic document hosting, retention of a battery of highly regarded and experienced experts, legal research and photocopying services, deposition expenses, as well as travel expenses related to extensive discovery, settlement negotiations and mediations, court appearances and depositions. (*See* Decl. of Stanley D. Bernstein, Dec. 18, 2009 (summarizing and categorizing Lead Counsel's expenses); Decl. of Keith M. Fleischman, Dec. 18, 2009 (same).)

After reviewing the requested expenses, the Court finds that they were necessary litigation expenses that were reasonably incurred, reasonably related to the interests of the members of the Class, and adequately documented. The fact that Lead Plaintiffs, who have reviewed the requested expenses, believe that this payment represents fair and reasonable compensation to Lead Counsel, further supports the reasonableness of Lead Counsel's request for reimbursement. Accordingly, the Court grants Lead Counsel's petition for reimbursement of expenses in the amount of $7,848,411.84.

F. Lead Plaintiffs Are Entitled to an Award of Reasonable Costs and Expenses

***21** The PSLRA states that "Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class," 15 U.S.C. § 78u–4(a)(4); *see Hicks v. Stanley,* No. 01 Civ. 10071, 2005 WL 2757792, at *10 (S.D.N.Y. Oct. 24, 2005) ("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.").

Here, the Ohio Plaintiffs and the New Jersey Plaintiffs have been actively involved in this action since its inception. Pursuant to the PSLRA, the Ohio Plaintiffs and the New Jersey Plaintiffs request an award totaling $214,657.14–$70,000 for the Ohio Plaintiffs and $144,657.14 for the New Jersey Plaintiffs—to compensate them for their reasonable costs and expenses incurred in managing this litigation and representing the Class. (Fees Br. at 23–25.)

Lead Plaintiffs have pursued their claims against Defendants for five years. These large institutional investors have actively and effectively fulfilled their obligations as representatives of the Class. As set forth in the Joint Declaration and in the other papers submitted by Lead Plaintiffs, they (1) reviewed and approved the complaints and other pleadings filed in this action; (2) had extensive and regular telephonic, email, and in-person communications with Lead Counsel regarding strategy and developments in the case; (3) reviewed and commented on Lead Counsel's submissions to the Court, the Special Master and the Mediator; (4) oversaw and assisted their own personnel in responding to discovery requests, including requests for production of documents and interrogatories; (5) reviewed and approved responses and objections to discovery requests drafted by Lead Counsel; (6) proffered several representatives to give deposition testimony; (7) reviewed and approved the retention of experts and consultants; and (8) fully participated in all mediation sessions and settlement discussions on behalf of the Class. These are precisely the types of activities that support awarding reimbursement of expenses to class representatives.

The Notice provided to Class members stated that Lead Plaintiffs would apply to the Court for approval of their PSLRA Award Request. To date, only one objection to this request has been received. (Fees Br. at 25) The Court thus awards the Ohio Plaintiffs $70,000 and the New Jersey Plaintiffs $144,657.14 as compensation for their reasonable costs and expenses incurred in representing the Class.

VI. Objections Received

Pursuant to the Preliminary Approval Order, Rust Consulting, Inc., the Claims Administrator, implemented an extensive notice program to potential Class members. The Claims Administrator mailed a total of 596,517 copies of the Notice and Proof of Claim (together, the "Notice Packet") to potential Class Members. (Young Aff. ¶ 11.) The Claims Administrator also had the Summary Notice published in the national edition of *The Wall Street Journal* and had a copy of the Summary Notice transmitted over *Business Wire*. (*Id.* Ex. B.)

***22** Through these efforts, the Claims Administrator reached hundreds of thousands of Class members, fully informing them of the Settlement terms and their rights, including the right to object to the Settlement or any part of it (including the Plan of Allocation, Lead Counsel's application for attorneys' fees and reimbursement of expenses, and reimbursement of costs and expenses for Lead Plaintiffs). Only *seven* potential Class members have objected. (Lead Pls.' Mem. in Resp. to Objections, Dec. 18, 2009, at 1.) These seven objections represent a mere 0.0012% of the Notices mailed to potential Class members.

Of these seven objectors, only one complied with the Notice's clearly stated procedures for filing a proper objection. That single objection was filed by Edward F. Siegel, Esq. ("Siegel") on behalf of purported Class member Hermine Union ("Ms. Union" or "Objector Union"). (Objection of Hermine Union, Dec. 14, 2009 ("Union Objection") (Docket No. 303).) That objection has been withdrawn. (Docket No. 330.)

A. Any Suggestion That the Requested Fee Award Is "Unreasonable" and "Excessive" Is Meritless

One objector, James M. McCague, asserts that the requested fee award is unreasonable. (*See* Decl. of Brian S. Cohen, Dec. 18, 2009 ("Cohen Decl."), Ex. 10 (McCague objection).) That is simply not so. The law in this Circuit is clear: a district court must consider several specific factors in determining the reasonableness of a fee award for class counsel. *See Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 50 (2d Cir.2000). After considering those factors, the Court has little trouble rejecting McCague's objection. *Cf. In re Lorazepam & Clorazepate Antitrust Litig.,* 205 F.R.D. 369, 378 (D.D.C.2002) (rejecting broad, unsupported objections because "[they] are of little aid to the Court in determining whether these settlements are fair, adequate, and reasonable."

The Court-approved Notice clearly describes the massive efforts engaged in by Lead Counsel in litigating the action. The Notice explains, inter alia, the extensive and vigorously contested fact discovery (including the review of over thirty-six million pages of documents), the huge number of depositions taken and defended, the intensive class certification motion practice, and the thorough expert witness work.

Mr. McCague acknowledges these efforts, but complains that he does not understand why counsel needed to take all the actions listed. (*Id.*) The Court easily concludes that Lead Counsel's efforts were necessary for the zealous and effective prosecution of this action on behalf of the Class.

That only two objections to the fee request were received, and just one continues to be pressed, is powerful evidence that the requested fee is fair and reasonable. *See In re Prudential Sec. Inc. Ltd. P'ships Litig.,* 912 F.Supp. 97, 103 (S.D.N.Y.1996) (concluding that a single "isolated expression of opinion" should be considered "in the context of thousands of class members who have not expressed themselves similarly"); *In re Crazy Eddie Sec. Litig.,* 824 F.Supp. 320, 327 (E.D.N.Y.1993) (finding fact that "only one person has opposed the fee" to support its reasonableness). The reaction by members of the Class is entitled to great weight by the Court. The Notice was sent to hundreds of thousands of prospective Class members. Only two objections relating to the Fee Application were submitted. That strongly supports a finding that the request is fair and reasonable.

B. The Remaining Objections to the Notice Program Are Meritless

***23** Six people challenge the Notice on the ground that it was not "timely received." None of these individuals filed proper objections. Both the Notice and Summary Notice informed the Class that any objection to the Settlement must be filed with the Court and served on Lead Counsel no later than December 14, 2009. The Notice states that an objector must "include ... proof of the number of MMC securities ... purchased and sold during the Class Period." (Notice at 19.) Objectors William N. Weld ("Weld"), John F. Mencer ("Mencer"), Robert G. Coplin ("Coplin"), McCague, Thomas and Carolynn Kane ("the Kanes"), and an unidentified individual claiming via email that he/she did not receive the Notice until December 14, 2009 ("Anonymous"), failed to include this information. (*See* Cohen Decl. Exs. 7–12 (copies of objections of Weld, Mencer, Coplin, McCague, the Kanes, and Anonymous).)

Even if their objections had been proper, however, they are meritless. As the Court recognized in the Preliminary Approval Order, the Notice plan satisfied due process. Notice was first mailed on November 13, 2009. Objections were due thirty days later on December 14, 2009. Courts have repeatedly found such a time period to constitute sufficient notice. *See, e.g., Miller v. Republic Nat'l Life Ins. Co.,* 559 F.2d 426, 429–30 (5th Cir.1977) (concluding, in securities fraud class action, that a period of "almost four weeks between the mailing of the notices and the settlement hearing" was adequate time, particularly when only one class member objected to the timing); *In re BankAmerica Corp. Sec. Litig.,* 210 F.R.D. 694, 707–08 (E.D.Mo.2002) (finding that timing of notice comported with due process where “[t]here were three to four weeks between the mailing of class notice and the last date to object”) (*citing Grunin v. Int'l House of Pancakes,* 513 F.2d 114, 120–21 (8th Cir.1975) (finding nineteen-day notice period sufficient, particularly when case had been ongoing for two years)); *see also Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1374–75 (9th Cir.1993) (holding that initial notice sent thirty-one days before deadline for written objections was adequate); *In re AOL Time Warner S'holder Derivative Litig.,* No. 02 Civ. 6302, 2006 WL 2572114 (S.D.N.Y. Sept. 6, 2006) (finding distribution of notice thirty-four days before the deadline for objections was adequate).

It is well-established class-action jurisprudence in this Circuit that courts focus the due process lens on the notice efforts made by counsel, not whether class members actually received notice. *See In re “Agent Orange” Prod. Liab. Litis.,* 818 F.2d 145, 168 (2d Cir.1987) (determining that class notice was adequate and rejecting the proposition that actual notice had to be given to each and every class member); *see also Buxbaum v. Deutsche Bank AG,* 216 F.R.D. 72, 80 (S.D.N.Y.2003) (“It is widely recognized that for the due process standard to be met it is not necessary that every class member receive actual notice, so long as class counsel acted reasonably in selecting means likely to inform persons affected.”) (internal quotations and citation omitted). As the Second Circuit recently held:

> ***24** Because notice of the settlement was reasonably provided through individually mailed notice to all known and reasonably identifiable class members, publication in several major newspapers, and entered on the district court's docket sheet, actual notice was not necessary and the notice provided here was sufficient. It is clear that for due process to be satisfied, not every class member need receive actual notice, as long as class counsel “acted reasonably in selecting means likely to inform persons affected.”

In re Adelphia Commc'ns Corp. Sec. & Derivative Litis., 271 F. App'x 41, 44 (2d Cir.2008) (*quoting Weigner v. City of N.Y.,* 852 F.2d 646, 649 (2d Cir.1988)).

In this case, a total of 596, 517 Notice Packets were mailed to potential Class members. (Young Aff. ¶¶ 5, 9–10.) In addition, Summary Notice was transmitted over *Business Wire* on November 16, 2009, and a copy of the Summary Notice was published in the national edition of *The Wall Street Journal* the next day. (*Id* . ¶ 6.) The Court easily concludes that the Class as a whole had adequate notice.

It must be noted that certain objectors received Notice later than others because they held their shares in “street name”—i.e., in the name of a nominee/brokerage house. Pursuant to the Preliminary Approval Order, the Claims Administrator used “reasonable efforts to give notice to nominee purchasers such as brokerage firms and other Persons that purchased or otherwise acquired MMC securities during the Class Period as record owners but not as beneficial owners.” (Preliminary Approval Order at 4; *see* Young Aff. ¶¶ 3–4, 10.) In addition, the Preliminary Approval Order provides that “Such nominee purchasers are directed within seven (7) days of their receipt of the Notice to forward copies of the Notice and Proof of

Claim to their beneficiaries that are Members of the Class." (Preliminary Approval Order at 4–5.)

That certain objectors' brokers failed to comply with the Preliminary Approval Order and forward their clients the necessary paperwork in a timely fashion is no fault of Lead Counsel. That is the risk a shareholder takes in registering his or her securities in street name. Moreover, "notice provided to the class members' nominees—i.e., the brokerage houses—has been deemed sufficient even if brokerage houses failed to timely forward the notice to the beneficial owners." *Fidel v. Farley,* 534 F.3d 508, 514 (6th Cir.2008) (*citing DeJulius v. New England Health Care Employees Pension Fund,* 429 F.3d 935, 936, 945–47 (10th Cir.2005) (finding notice sufficient where two beneficial owners received notice of class settlement two weeks after deadline for filing objections and on the same day as the final fairness hearing); *Silber v. Mabon,* 18 F.3d 1449, 1453–54 (9th Cir.1994) (finding notice adequate where 1,000 beneficial owners received notice after the opt-out deadline as a result of late response of brokerage house); *Torrisi,* 8 F.3d at 1374–75 (concluding notice was sufficient where notice was mailed to some beneficial owners after deadline for filing objections had passed).

***25** Accordingly, the Court rejects the remaining objections to the timeliness of the Notice program.

C. The Single Objection to the Format of the Claim Form Is Meritless

Only one objector challenges the Proof of Claim form, arguing that it is unreasonably burdensome and complex, and should be filled out by the lawyers and not the potential Class members. (*See* Cohen Decl. Ex. 11 (objection of the Kanes).) The Proof of Claim form simply asks Class members to list purchases, sales and holdings of MMC stock within the Class Period. Without that necessary information, the Claims Administrator could not calculate claimants' distributions. The single objector's claim that the lawyers should fill out the Proof of Claim form and that potential Class members should simply verify the information does not comport with the long-approved procedures for the efficient management of class-action settlement distributions. *See In re WorldCom. Inc. Sec. Litig.,* No. 02 Civ. 3288, 2004 WL 2591402, at *12 (S.D.N.Y. Nov. 12, 2004) (holding that "[t]he [one] objection to the length and complexity of the proof of claim form is ... meritless," as "the information that claimants are required to submit is necessary in order for a fair distribution of the settlement proceeds").

D. The Single Objection to the Exclusion of Former Employees Is Meritless

One objector claims that it is "unfair" to exclude former employees from the Settlement Class. (*See* Cohen Decl. Ex. 7 (Weld objection).) Yet Lead Plaintiffs have always asserted—in the Amended Complaint, Lead Plaintiffs' class certification motion and the Stipulation of Settlement—that the wrongful conduct underlying their claims against Defendants were engaged in on a company-wide basis and ingrained in Marsh's business model. Accordingly, the Class definition has always excluded MMC and Marsh employees, and the sole objection to the definition's exclusion of former employees is rejected.

CONCLUSION

For the reasons stated above, the Court (1) approves the Settlement; (2) grants Lead Counsel's Fee Application of 13.5% of the Settlement Fund; (3) grants Lead

Counsel's request for reimbursement of expenses in the amount of $7,848,411.84; and (4) grants Lead Plaintiffs' PSLRA Award Request for expenses totaling $214,657.14 ($70,000 for the Ohio Plaintiffs and $144,657.14 for the New Jersey Plaintiffs).

S.D.N.Y.,2009.
In re Marsh & McLennan Companies, Inc. Securities Litigation
Not Reported in F.Supp.2d, 2009 WL 5178546 (S.D.N.Y.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: SATYAM COMPUTER SERVICES LTD. SECURITIES LITIGATION

No.: 09-MD-2027-BSJ

ORDER AWARDING ATTORNEYS' FEES AND EXPENSES

This matter came on for hearing on September 8, 2011 (the "Settlement Hearing") on the motion of Lead Counsel to determine, among other things, whether and in what amount to award Lead Counsel in the above-captioned consolidated securities class action (the "Action") fees and reimbursement of expenses.

The Court having considered all matters submitted to it at the Settlement Hearing and otherwise; and it appearing that notices of the Settlement Hearing substantially in the form approved by the Court were mailed to all Class Members who or which could be identified with reasonable effort, except those persons or entities excluded from the definition of the Class, and that summary notices of the hearing substantially in the form approved by the Court were published in *The Wall Street Journal*, *Investor's Business Daily* and *The Financial Times* and transmitted over *Business Wire* pursuant to the specifications of the Court; and the Court having considered and determined the fairness and reasonableness of the award of attorneys' fees and expenses requested.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. This Order Awarding Attorneys' Fees and Expenses incorporates by reference the definitions in the Stipulations and Agreements of Settlement (the "Settlement Stipulations") and all

terms used herein shall, with respect to the respective Settlement Stipulations, have the same meanings as set forth in the applicable Settlement Stipulations.[1]

2. The Court has jurisdiction to enter this Order Awarding Attorneys' Fees and Expenses, and over the subject matter of the Action and all parties to the Action, including all Class Members.

3. Notice of Lead Counsel's application for attorneys' fees and reimbursement of expenses was given to all Class Members who could be identified with reasonable effort. The form and method of notifying the Class of the motion for attorneys' fees and expenses constituted due, adequate, and sufficient notice to all persons or entities entitled to receive notice of the motion and satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), the Private Securities Litigation Reform Act of 1995 (15 U.S.C. § 78u-4, et seq.) (the "PSLRA"), and all other applicable law and rules.

4. Lead Counsel are hereby awarded attorneys' fees in the amount of 17% of the total Settlement Funds, as well as 17% of any additional Settlement Funds recovered by Satyam from the PwC Entities, net of any taxes withheld from the Initial Escrow Accounts and ultimately paid pursuant to Indian tax law, and $1,027,076.94 in reimbursement of litigation expenses advanced or incurred by Lead Counsel collectively while prosecuting this Action (which expenses shall be paid from the Settlement Funds) with interest on such fees and expenses at the same rate as earned by the Settlement Funds from the dates the Settlement Funds were funded to the date of payment, which sums the Court finds to be fair and reasonable. The foregoing award of Attorneys' Fees and

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[1] The Settlement Stipulations are: the Stipulation and Agreement of Settlement with Defendant Satyam Computer Services Ltd., dated February 16, 2011 (the "Satyam Stipulation") and the Stipulation and Agreement of Settlement between Lead Plaintiffs and the PwC Entities, dated April 27, 2011 (the "PwC Entities Stipulation") entered into by and among Lead Plaintiffs and the Settling Defendants (together, the "Settlement Stipulations").

Expenses shall be payable immediately in accordance with the terms set forth in ¶¶ 19 and 16, respectively of the Satyam Stipulation and the PwC Entities Stipulation. The award of attorneys' fees shall be allocated among Plaintiffs' Counsel in a manner which, in the opinion of Lead Counsel, fairly compensates Plaintiffs' Counsel for their respective contributions in the prosecution and settlement of the Action.

5. Also in accordance with the terms set forth in ¶¶ 20 and 17, respectively of the Satyam Stipulation and the PwC Entities Stipulation, Lead Counsel who seek to be paid their share of the attorney fee and expense award prior to the Effective Date shall be jointly and severally obligated to make appropriate refunds or repayments of attorneys' fees and expenses and any interest thereon paid to Lead Counsel to the Settlement Funds or to the Settling Defendants who contributed the Settlement Funds in direct proportion to their contributions to the Settlement Funds, as applicable, plus accrued interest at the same net rate as is earned by the Settlement Funds, if the Settlements are terminated pursuant to the terms of the Stipulations or if, as a result of any appeal or further proceedings on remand, or successful collateral attack, the award of attorneys' fees and/or litigation expenses is reduced or reversed by final non-appealable court order.

6. Class Representative the Public Employees' Retirement System of Mississippi is awarded $14,400 as reimbursement for its costs and expenses directly relating to its services in representing the Class.

7. Class Representative Mineworkers' Pension Scheme is awarded $98,711 as reimbursement for its costs and expenses directly relating to its services in representing the Class.

8. Class Representative SKAGEN AS is awarded $59,000 as reimbursement for its costs and expenses directly relating to its services in representing the Class.

9. Class Representative Sampension KP Livsforsikring A/S is awarded $21,000 as reimbursement for its costs and expenses directly relating to its services in representing the Class.

10. Subclass Representative Brian F. Adams is awarded $2,000 as reimbursement for his costs and expenses directly relating to his services in representing the Class and Subclass.

11. A litigation fund in the amount of $1,000,000 from the Satyam Settlement Fund shall be established to fund the continued prosecution of the Action against the Non-Settling Defendants.

12. In making this award of attorneys' fees, and reimbursement of expenses to be paid from the Settlement Funds, the Court has considered and found that:

(a) The Settlements have created a total settlement amount of $150.5 million in cash that is already on deposit and has been earning interest, and that numerous Class Members who submit acceptable Proofs of Claim will benefit from the Settlements created by the efforts of Lead Counsel;

(b) The fee sought by Lead Counsel has been reviewed and approved as fair and reasonable by the Court-appointed Lead Plaintiffs, sophisticated institutional investors that were substantially involved in all aspects of the prosecution and resolution of the Action;

(c) To date, over 208,000 copies of the Notices were disseminated to putative Class Members stating that Lead Counsel were moving for attorneys' fees not to exceed 17% of proposed Settlements and reimbursement of expenses incurred in connection with the prosecution of this Action. Only one objection to the terms of the Settlement and the fees and expenses requested by Lead Counsel contained in the Notice was received, although it was untimely and not filed with the Court as required by the Preliminary Approval Orders. The objector has not proven that he is a member of the Class, nor does he have standing; even if he did, his objection has been considered and overruled;

(d) Lead Counsel have conducted the litigation and achieved the Settlements with skill, perseverance and diligent advocacy;

(e) The Action involves complex factual and legal issues and, in the absence of settlement, would involve lengthy proceedings with uncertain resolution of the complex factual and legal issues;

(f) Had the Settlements not been achieved, there would remain a significant risk that Lead Plaintiffs and the other members of the Class may have recovered less or nothing from the Settling Defendants; and

(g) The amount of attorneys' fees awarded and expenses reimbursed from the Settlement Funds are fair and reasonable and consistent with awards in similar cases.

13. Any appeal or any challenge affecting this Court's approval regarding any attorneys' fees and expense application shall in no way disturb or affect the finality of the Judgments entered with respect to the Settlements.

14. Continuing jurisdiction is hereby retained over the parties and the Class Members for all matters relating to this Action, including the administration, interpretation, effectuation or enforcement of the Settlement Stipulations and this Order, including any further application for fees and expenses incurred in connection with administering and distributing the settlement proceeds to the members of the Class.

15. In the event that any of the Settlements are terminated or do not become Final or the Effective Date does not occur in accordance with the terms of the applicable Settlement Stipulation(s), this Order, except for ¶ 5 above, shall be rendered null and void to the extent provided by the applicable Settlement Stipulation(s) and shall be vacated in accordance with the terms of the applicable Settlement Stipulation(s).

16. There is no just reason for delay in the entry of this Order, and immediate entry by the Clerk of the Court is expressly directed.

Dated: New York, New York
September 13, 2011

Barbara S. Jones

Honorable Barbara S. Jones
UNITED STATES DISTRICT JUDGE

Slip Copy, 2014 WL 1224666 (S.D.N.Y.)
(Cite as: 2014 WL 1224666 (S.D.N.Y.))

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
Paul SHAPIRO, on behalf of himself as an individual, and on behalf of all others similarly situated, Plaintiff,
v.
JPMORGAN CHASE & CO., JPMorgan Chase Bank, N.A., J.P. Morgan Securities LLC, and J.P. Morgan Securities, Ltd., Defendants.
Stephen and Leyla Hill, on behalf of themselves as individuals, and on behalf of all others similarly situated, Plaintiffs,
v.
JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., J.P. Morgan Securities LLC, and J.P. Morgan Securities, Ltd., Defendants.

Nos. 11 Civ. 8331(CM)(MHD), 11 Civ. 7961(CM).
Signed March 24, 2014.

AMENDED MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFFS' MOTIONS FOR FINAL CLASS ACTION SETTLEMENT APPROVAL AND ATTORNEYS' FEES

McMAHON, District Judge.

***1** On January 10, 2014, this Court preliminarily approved a settlement agreement [FN1] between plaintiffs Paul Shapiro, Stephen Hill and Leyla Hill, individually, and on behalf of a putative class (the "Plaintiffs"), Intervenor Irving H. Picard, Trustee of the SIPA liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS") and the estate of Bernard L. Madoff (the "SIPA Trustee") and defendants JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., J.P. Morgan Securities LLC, and J.P. Morgan Securities Ltd. (collectively, "JPMorgan"). [FN2] The settlement of this class action is an integral piece of a global resolution of Madoff-related litigation against JPMorgan involving three simultaneous, separately negotiated settlements totaling $2,243,000,000 consisting of: (i) this class action settlement in the amount of $218 million (the "Settlement"); (ii) the SIPA Trustee's Avoidance Action settlement in the amount of $325 million; [FN3] and (iii) a civil forfeiture in the amount of $1.7 billion in connection with a resolution of U.S. government claims against JPMorgan concerning Madoff-related matters. The entire $2,243,000,000 will flow to victims of Madoff's Ponzi scheme.

FN1. A copy of the settlement agreement is attached as Exhibit 2 to the accompanying Joint Declaration of Andrew J. Entwistle and Reed Kathrein in Support of Plaintiffs' Motion for Final Approval of Proposed Settlement with Defendants (the "Joint Final Approval Declaration")

FN2. *See* January 10, 2014 Order Preliminarily Approving Proposed Settlement and Providing for Notice [ECF No. 52] ("Preliminary Approval Order"), a copy of which is attached as Exhibit 1 to the Joint Final Approval Declaration.

FN3. *See* Exhibit 2 to January 7, 2014 Declaration of Andrew J. Entwistle in Support of Plaintiffs' Motion for Preliminary Approval of Proposed Settlement with Defendants [ECF No. 51–7] ("Trustee's Motion for Entry of Order Pursuant to Section 105(a) of the Bankruptcy Code and Rules 2002 and 9010 of the Federal Rules of Bankruptcy Procedure Approving Settlement of Common Law Claims by and Between the Trustee and the Class Representatives and JPMorgan") for a discussion and description of the Trustee's settlement.

Since the Preliminary Approval Order, Plaintiffs have provided direct notice of the Settlement to what is reasonably believed to be every member of the settlement class, and published notice in accordance with the Preliminary Approval Order. As further described herein, the notices were also available on numerous websites. The deadline by which settlement class members may opt-out of the class or object to the settlement was Friday, February 28, 2014; there was only one objection—though a group of former Madoff "investors" who are not encompassed within the definition of the preliminarily certified Settlement Class filed a notice of intent to "opt out" of a settlement to which they are not parties.

For all of the reasons set forth in the Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Approval of Settlement with Defendants [Docket No. 50] ("Preliminary Approval Memorandum"), and as further discussed herein, the court finds that the Settlement easily meets the standards for final approval in this Circuit and merits the approval of this Court.

BACKGROUND

Subject to the Court's final approval, Plaintiffs have agreed to settle their claims against JPMorgan in exchange for a $218 million cash payment. JPMorgan has also agreed to make a separate payment, in addition to the settlement amount, of up to $18 million for attorneys' fees and expenses to Co–Lead Counsel in connection with the Settlement.

The proposed Settlement, which will resolve all of the Plaintiffs' claims against JPMorgan arising from JPMorgan's conduct as one of Bernard L. Madoff's primary banks, provides a significant benefit to the Settlement Class. The Settlement provides substantial and immediate benefits to the Settlement Class, providing millions of dollars to injured Class members, while avoiding the need for extensive, complex and uncertain litigation against one of the largest banks in the world, represented by highly sophisticated and experienced counsel.

***2** Co–Lead Counsel, who have extensive experience in prosecuting complex class actions, strongly believe the Settlement is in the best interests of the Class, an opinion which is entitled to "great weight." [FN4] Further, on February 5, 2014, Bankruptcy Judge Bernstein, who is overseeing the SIPA Liquidation of BLMIS, on motion of the SIPA Trustee, approved and authorized the Settlement pursuant to Rules 2002 and 9019 of the Federal Rules of Bankruptcy Procedure.[FN5] Judge Bernstein's intimate familiarity with the Madoff matter causes this court to view his conclusions with particular deference.

FN4. *In re NASDAQ Mkt.-Makers Antitrust Litig.,* 187 F.R.D. 465 at 474 (Courts have consistently given " 'great weight' ... to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation."). *See also In re Paine Webber P'ships. Litig.,* 171 F.R.D. 104, 125 (S.D.N.Y.1997), *aff'd* 117 F.3d 721 (2d Cir.1992) (class counsel's opinion that the settlement is in the best interest of the class is entitled to "great weight"); *Armstrong v. Bd. of Sch. Dirs.,* 616 F.2d 305, 325 (7th Cir.1980) ("the court is entitled to rely heavily on the opinion of competent counsel").

FN5. *See* Exhibit 4 to the Joint Final Approval Declaration.

I. Factual Background

A. Class Plaintiffs' Allegations Concerning JPMorgan's Role in Madoff

In the Class Complaint, the Class Plaintiffs alleged that JPMorgan played a central role in the Ponzi scheme perpetrated by Bernard L. Madoff and BLMIS. The Class Plaintiffs allege that JPMorgan had actual knowledge of the scheme, was in a position to stop it, but did nothing. From approximately 1986 on, Madoff's primary account through which most, if not all, of the funds of BLMIS flowed, was a depository account at JPMorgan referred to as the "703 Account." FN6 By 2006, and between 2006 and 2008, the 703 Account had billions of dollars in cash deposits. FN7 Every customer opening an account with Madoff received an account number, and was instructed to either wire funds or send funds to the 703 Account. FN8 As the financial markets began a sharp decline in 2008, the balance in the 703 Account began to drop precipitously and dropped to nearly zero on several occasions. FN9 Although the 703 Account was the primary account used by BLMIS, Class Plaintiffs allege that none of the money in the 703 Account was ever used to purchase a single security—a fact that should have been obvious to JPMorgan. FN10 Instead, the funds in the account merely flowed back and forth between Madoff customers in furtherance of the Ponzi scheme. FN11

FN6. Class Complaint, ¶ 4. The "Class Complaint" refers to the January 20, 2012 Consolidated Amended Class Action Complaint. *See* Docket No. 18. The following is only a summary of certain of the Class Plaintiffs' allegations made in the Class Complaint. Class Plaintiffs respectfully refer the Court to the Class Complaint for a more comprehensive presentation of the allegations made against the defendants.

FN7. *Id.,* ¶¶ 5, 8.

FN8. *Id.,* ¶ 6.

FN9. *Id.,* ¶ 8.

FN10. *Id.,* ¶ 9.

FN11. *Id.*

In this regard, Class Plaintiffs' investigations focused on, among other transactions, numerous round trip transactions involving Madoff friend and insider Norman Levy, internal documents that commented on these questionable transactions very early in the relevant period, and the fees received by JPMorgan in connection with Madoff, including those related to the 703 Account.

In addition to the knowledge that Class Plaintiffs allege JPMorgan had by virtue of the 703 Account, Class Plaintiffs allege that JPMorgan acquired knowledge of the Ponzi scheme in connection with transactions in which JPMorgan was involved during the relevant time period. For example, in 2005 and 2006, JPMorgan was involved in various lending activities with Madoff. In 2006 and 2007, JPMorgan began considering the structuring and issuing of certain financial products that would be based on feeder funds tied to Madoff. FN12 In connection with those transactions, JPMorgan performed due diligence on the feeder funds, and since these funds were invested with Madoff, attempted unsuccessfully to perform due diligence on BLMIS itself.

FN12. *Id.,* ¶ 93.

***3** We now know that, in the process of conducting due diligence, JPMorgan even spoke directly to Madoff, and Madoff stated he would not permit due diligence on his operations.[FN13] In addition, JPMorgan's due diligence raised questions about BLMIS' auditor, noting, among other things, that the auditor was not registered with the Public Company Accounting Oversight Board, or subject to peer reviews from the American Institute of Certified Public Accountants.[FN14] Finally, the feeder funds themselves often did not permit access to the agreements they had with Madoff, preventing JPMorgan from understanding the relationship between such funds and Madoff.[FN15] Internally, at JPMorgan, during the due diligence with regard to these investments, certain JPMorgan employees unsuccessfully attempted to recreate Madoff results, and raised various other concerns at Underwriting Committee Meetings and in various other contexts and "health checks," with one employee even going so far as to state that there "is a well-known cloud over the head of Madoff and that his returns are speculated to be part of a Ponzi scheme." [FN16] Notwithstanding these obvious red flags, JPMorgan allowed the scheme to continue without any reporting to U.S. authorities, despite the fact that it filed a SAR report in the UK, and, despite its AML obligations, failed to follow up and take appropriate action in connection with warnings from other banks related to Madoff, and failed to follow through on internal "alerts" or to otherwise heed "triggers" that related to the 703 Account and other Madoff-related activities.

FN13. *Id.,* ¶ 107.

FN14. *Id.,* ¶ 98.

FN15. *Id.,* ¶ 95.

FN16. *Id.,* ¶ 121.

Despite the above and without any reporting to U.S. regulators, JPMorgan redeemed over a quarter billion dollars of its own interests in BMIS feeder funds—managing to redeem all but $80 million in Madoff-related investments before Madoff's December 2008 arrest. BLMIS customers, on the other hand, lost their investment capital of approximately $19 billion.

B. Factual and Procedural Background

As is now well documented, in December 2008, it was revealed that Madoff and BLMIS, perpetrated the largest Ponzi scheme in history. Shortly following this revelation, the Securities Investor Corporation ("SIPC") filed an application in the United States District Court for the Southern District of New York under § 78eee (a)(3) of the Securities Investor Protection Act of 1970 ("SIPA") alleging, *inter alia,* that BLMIS was not able to meet its obligations to securities customers as they came due and, accordingly, its customers needed the protections afforded by SIPA.[FN17] On December 15, 2008, the District Court granted the SIPC application and entered an order under SIPA, which, in pertinent part, appointed Irving H. Picard as Trustee for the liquidation of the business of BLMIS under the SIPA, and removed the case to the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") under section 78eee(b)(4) of SIPA, where it is currently pending as *SIPC v. BLMIS,* No. 08–01789(BRL) (the "SIPA proceeding"). Bernard Madoff's Chapter 7 case was later substantively consolidated into the SIPA proceeding.

FN17. *Securities Investor Protection Corporation v. Bernard L. Madoff Investment Securities, LLC,* 08–CV–10791 (S.D.N.Y.).

***4** On December 2, 2010, the Trustee filed a complaint commencing an adversary proceeding captioned *Picard v. JPMorgan Chase & Co, et al.,* No. 10–4932(BRL) (the "JPMorgan Adversary Proceeding") against JPMorgan seeking to avoid and recover under 11 U.S.C. §§ 544(b), 547, 548 and 550 and the

New York Uniform Fraudulent Conveyance Act (New York Debtor and Creditor Law §§ 270 – 281) (collectively, the "Avoidance Claims") approximately $425 million of transfers or other payments (the "Transfers") received by JPMorgan prior to the collapse of BLMIS. The Trustee also asserted common law claims (the "Common Law Claims") against JPMorgan, including aiding and abetting fraud, aiding and abetting breach of fiduciary duty, conversion, unjust enrichment, and contribution. On February 8, 2011, JPMorgan moved to withdraw the reference from the Bankruptcy Court, which was granted by this Court on May 23, 2011.

On June 24, 2011, the Trustee filed an amended complaint (the "Trustee Amended Complaint"). On August 1, 2011, JPMorgan moved to dismiss the Common Law Claims and certain of the Avoidance Claims in the Trustee Amended Complaint. On November 1, 2011, the District Court granted JPMorgan's motion to dismiss the Trustee's Common Law Claims and returned all the Avoidance Claims to the Bankruptcy Court for further proceedings. *Picard v. JPMorgan Chase & Co.,* 460 B.R. 84 (S.D.N.Y.2011). That decision was subsequently affirmed by the Second Circuit.

Shortly after the District Court dismissed the Trustee's Common Law Claims, two class action complaints were filed in the District Court against JPMorgan in the names of the Class Plaintiffs, Stephen and Leyla Hill, captioned *Hill v. JPMorgan Chase & Co.,* 11 Civ. 7961(CM); and Paul Shapiro, *Shapiro v. JPMorgan Chase & Co.,* 11 Civ. 8331(CM), based upon their ongoing investigation and that of the Trustee. These complaints asserted various claims against JPMorgan on behalf of BLMIS customers who directly had capital invested with BLMIS as of December 2008, *i.e.,* BLMIS customers who were Net Losers (as defined below). Specifically, the complaints contained several common law causes of action based on alleged breaches of fiduciary duties, embezzlement, conversion, unjust enrichment, and gross negligence.

On December 5, 2011, the District Court consolidated these two actions into the Consolidated Class Action. On January 20, 2012, the Class Plaintiffs filed their Consolidated Amended Class Action Complaint ("Class Complaint") against JPMorgan, again asserting on behalf of the proposed class various claims against JPMorgan arising out of its relationship to Madoff (the claims set forth in the Class Complaint together with the dismissed Common Law Claims are collectively referred to hereafter as the "Class Claims").

On March 9, 2012, JPMorgan filed a motion to dismiss the Class Complaint. One of JPMorgan's primary arguments in support of their motion to dismiss was that the Class Claims (which were common law claims), were all precluded under the Securities Litigation Uniform Standards Act ("SLUSA"). In support of their SLUSA arguments, JPMorgan cited numerous Madoff-related cases from this District, including cases from this Court, which dismissed Madoff claims under SLUSA. FN18 JPMorgan also moved to dismiss on the basis that the Class Complaint failed to state a claim for relief, contending, among other things, that the complaint does not show JPMorgan's actual knowledge of or participation in Madoff's fraud. The Class Plaintiffs opposed the motion to dismiss and continued their ongoing investigation of the facts and circumstances related to Madoff generally and JPMorgan's involvement in Madoff specifically.

FN18. *See, e.g., In re Jeanneret Assocs., Inc.,* 769 F.Supp.2d 340 (S.D.N.Y.2011) (McMahon, J.). *See also, In re Herald,* 730 F.3d 112, 118 (2d Cir.2013), decided while JPMorgan's motion to dismiss was *sub judice.*

***5** In addition to JPMorgan's motion to dismiss the Class Complaint, the Trustee filed a motion seeking limited intervention pursuant to Fed.R.Civ.P. 24(a)(2) in the Consolidated Class Action, which was granted by this Court on October 16, 2012. On September 26, 2013, this Court placed the Consolidated Class Action on the suspense calendar pending a decision from the United States Supreme Court in *Roland v. Green,* 675 F.3d 503 (5th Cir.2012), *cert. granted sub nom. Chadbourne & Parke LLP v. Troice,* ––– U.S. ––––, 133 S.Ct. 977, 184 L.Ed.2d 757 (U.S. Jan. 18, 2013) (No. 12–79), eases concerning the fraud perpetrated by Allan Stanford and which raised certain issues concerning the interpretation of SLUSA. The parties submitted various letter briefs regarding *Chadbourne* and related issues with the result that the matter remains on the suspense calendar. Throughout that period, counsel for the Class Plaintiffs, Representatives continued to investigate the claims here and to prosecute other Madoff-related litigations.

II. Reasons for the Settlement

The Settlement represents the culmination of extensive investigations by the Class Plaintiffs and the Trustee into JPMorgan's potential liability to BLMIS and the customers.

Settlement Class Counsel conducted an independent and exhaustive investigation of the relationship between BLMIS and JPMorgan, including JPMorgan's activities as BLMIS's bank; reviewed and analyzed document productions by JPMorgan and the Trustee totaling more than a million pages; reviewed and analyzed Bankruptcy Rule 2004 examination, trial and other Madoff related testimony; reviewed numerous related Madoff documents, including materials developed in related investigations by regulators and others; developed expert testimony on related issues and conducted their own interviews of numerous JPMorgan senior executive witnesses. Settlement Class counsel and their consultants also independently analyzed the Class' potential claims and damages against JPMorgan.

The Trustee's professionals also conducted an exhaustive review of JPMorgan's documents, interviewed numerous JPMorgan witnesses, deposed several former and current employees of JPMorgan, and reviewed related BLMIS documents which were shared with Class Counsel during the period after the motions to dismiss were filed as part of Lead Counsel's ongoing investigation and effort to maximize recoveries on behalf of Madoff victims.

JPMorgan voluntarily cooperated with both the Trustee and counsel for the Class Plaintiffs during the course of these investigations.

The Trustee and Class Plaintiffs believe the Settlement represents an excellent resolution to what would otherwise be a costly and protracted legal battle, the outcome of which is uncertain. While the various potential claims against JPMorgan may be colorable, the independent and collaborative investigations by the Trustee and Class Plaintiffs—including discussions with JPMorgan's skilled counsel—have caused counsel to conclude that the Trustee and Class Plaintiffs face substantial challenges in litigation of common law damages claims against JPMorgan and that JPMorgan has substantial defenses. Most notable, is the fact that Class Plaintiffs faced a substantial risk of their claims being adversely impacted by developing law interpreting SLUSA.

***6** In contrast to the difficulty and cost of protracted litigation of the potential claims against JPMorgan, the Settlement will provide timely increased recovery to customers and certainty to the Madoff estate, and permit the Trustee to make substantial progress toward completion of the SIPA Liquidation of Madoff.

The Class Claims *i.e.* the common law damages claims asserted on behalf of the class of net-loser Madoff customers—are being settled for $218 million. The combined settlement of the Class Claims and the Trustee's Avoidance claims is $543 million. The Class and Trustee settlements, combined with the contemporaneous Government resolution, will result in a total recovery of $2.243 billion for Madoff victims.

III. The Terms of the Class Action Settlement

The key terms of the Settlement of the Class Claims are as follows:

(a) In connection with the Class Claims, within 14 days following orders by this Court preliminarily approving the Settlement and by the Bankruptcy Court approving the Settlement (in connection with the Trustee's settlement of his Common Law Claims), JPMorgan has agreed to pay $218 million into an escrow account managed by City National Bank ("Class Settlement Funds"). As further described below, in exchange for these settlement payments, members of the Settlement Class will release JPMorgan from all claims related to Madoff or BLMIS or that were alleged in the Class Complaint.

(b) In addition to the $218 million settlement amount, within 14 days following the Court's ruling on Class Plaintiffs' application for attorneys' fees and expenses, JPMorgan has agreed to pay up to $18 million to Plaintiffs' Counsel as attorneys' fees and expenses.

The Settlement Agreement provides that the Class Settlement Funds will be distributed to members of the Settlement Class following the Effective Date of the Settlement Agreement.[FN19] Settlement Class members will be able to make a claim on the Class Settlement Funds regardless of whether they have submitted a claim in the SIPA proceeding. For purposes of distributions from the Class Settlement Fund, a claim filed with the Trustee in the SIPA proceeding will be deemed a claim against the Class Settlement Fund.[FN20] If a Settlement Class member did not file a claim in the SIPA proceeding, that Class member will need to file a claim against the Class Settlement Fund.[FN21] Members of the Settlement Class, including those Net Losers that are defendants in avoidance actions by the Trustee, shall receive their *pro rata* shares of the Class Settlement Fund based on their Net Losses as of December 11, 2008.[FN22]

FN19. Settlement Agreement, ¶ 9.

FN20. *Id.*

FN21. *Id.*

FN22. *Id.*

DISCUSSION

I. THE STANDARDS FOR ASSESSING WHETHER THE CLASS SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE.

Federal courts have long expressed a preference for the negotiated resolution of litigation.[FN23] While the decision to grant or deny approval of a settlement lies within the broad discretion of the trial court, there is a general policy favoring settlement, especially with respect to class actions.[FN24]

FN23. *See, e.g., Williams v. First Nat'l Bank,* 216 U.S. 582, 595, 30 S.Ct. 441, 54 L.Ed. 625 (1910) ("Compromises of disputed claims are favored by the courts.").

FN24. *See, e.g., Wal–Mart Stores, Inc. v. Visa USA, Inc.,* 396 F.3d 96, 116 (2d Cir.2005) ("We are mindful of the 'strong judicial policy in favor of' settlements, particularly in the class action context.") (citation omitted); *Weinber-*

ger v. Kendrick, 698 F.2d 61, 73 (2d Cir.1982) ("There are weighty justifications, such as reduction of litigation and related expenses, for the general policy favoring the settlement of litigation.") (citing 3 Newberg, *Class Actions* § 5570c, at 479–80 (1977)): *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir.1974); *In re Sumitomo Copper Litig.,* 189 F.R.D. 274, 280 (S.D.N.Y.1999) ("Indeed, there is a 'general policy favoring the settlement of litigation.'... This is particularly true of class actions.") (quoting *Weinberger,* 698 F.2d 61 at 73).

***7** The standard for reviewing the proposed settlement of a class action in the Second Circuit, as in other circuits, is whether the proposed settlement is "fair, reasonable, and adequate." FN25 In assessing a settlement, the Court should neither substitute its judgment for that of the parties who negotiated the settlement, nor conduct a mini-trial on the merits of the action. FN26 Recognizing that a settlement represents an exercise of judgment by the negotiating parties, the Second Circuit has cautioned that, while a court should not give "rubber stamp approval" to a settlement, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." FN27 In any case, "there is a range of reasonableness with respect to a settlement." FN28

FN25. *In re Luxottica Group S.p.A. Sec. Litig.,* 233 F.R.D. 306, 310 (E.D.N.Y.2006); *In re Indep. Energy Holdings PLC Sec. Litig.,* No. 00 Civ. 6689, 2003 U.S. Dist. LEXIS 17090, at *9, 2003 WL 22244676 (S.D.N.Y. Sept. 29, 2003); *In re Currency Conversion Fee Antitrust Litig. ("CCF"),* 263 F.R.D. 110, 122 (S.D.N.Y.2009).

FN26. *Weinberger,* 698 F.2d at 74; *In re Michael Milken & Assocs. Sec. Litig.,* 150 F.R.D. 46, 53 (S.D.N.Y.1993).

FN27. *Grinnell,* 495 F.2d at 462.

FN28. *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir.1972).

Where, as here, a $218 million settlement was agreed to by experienced counsel, who are most closely acquainted with the facts of the underlying litigation, after extensive arm's-length negotiations, a strong initial presumption of fairness attaches to the proposed settlement. FN29

FN29. *Luxottica,* 233 F.R.D. at 315; *see also In re Alloy, Inc. Sec. Litig.,* 03 Civ. 1597, 2004 U.S. Dist. LEXIS 24129, at *5, 2004 WL 2750089 (S.D .N.Y. Dec. 2, 2004); *In re Automotive Refinishing Paint Antitrust Litig.,* No. 1426, 2007 WL 4570918, at *3 (E.D.Pa. Dec.28, 2007).

In addition to the presumption of fairness, the Second Circuit in *Grinnell* has identified nine factors to be utilized in assessing a proposed class action settlement:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. FN30

FN30. *Grinnell,* 495 F.2d at 463; *see also D'Amato v. Deutsche Bank,* 236 F.3d 78, 86 (2d Cir.2001); *In re AMF Bowling Sec. Litig.,* 334 F.Supp.2d 462, 464 (S.D.N.Y.2004).

All of the *Grinnell* factors need not be satisfied.[FN31] Instead, the Court should look at the totality of these factors in light of the circumstances.[FN32]

FN31. *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 456 (S.D.N.Y.2004) (citation omitted).

FN32. *See CCF,* 263 F.R.D. at 123; *Thompson v. Metro. Life Ins. Co.,* 216 F.R.D. 55, 61 (S.D.N.Y.2003).

II. THE SETTLEMENT IS ENTITLED TO A PRESUMPTION OF FAIRNESS BECAUSE IT IS THE RESULT OF EXTENSIVE ARM'S–LENGTH NEGOTIATIONS CONDUCTED BY HIGHLY EXPERIENCED COUNSEL.

A class action settlement is entitled to a presumption of fairness when it is the product of extensive arm's-length negotiations.[FN33] "So long as the integrity of the arm's length negotiation process is preserved ... a strong initial presumption of fairness attaches to the proposed settlement."[FN34] The Court may presume that a settlement negotiated at arm's-length by experienced counsel is fair and reasonable.[FN35]

FN33. *See* 4 Alba Conte, Herbert B. Newberg, *Newberg on Class Actions* § 11.41 (4th ed.2002).

FN34. *NASDAQ,* 187 F.R.D. at 474 (S.D.N.Y.1998). *See also Wal–Mart Stores,* 396 F.3d at 116; *Teachers' Ret. Sys. of La. v. A.C.N.U., Ltd.,* No. 01–CV–11814, 2004 WL 1087261, at *1 (S.D.N.Y. May 14, 2004) ("A proposed class action settlement enjoys a strong presumption that it is fair, reasonable and adequate if ... it was the product of arm's length negotiations conducted by capable counsel experienced in class action litigation ... and if it occurred after meaningful discovery.").

FN35. *See In re IMAX Secs. Litig.,* 283 F.R.D. 178 at 189; *In re Veeco Instruments Inc. Sec. Litig.,* No. 05 MDL 01695, 2007 WL 4115809, at *5 (S.D.N.Y. Nov.7, 2007) ("A proposed class action settlement enjoys a strong presumption that it is fair, reasonable and adequate if, as is the case here, it was the product of arm's-length negotiations conducted by capable counsel, well-experienced in class action litigation arising under the federal securities laws.") (citation omitted).

Here, highly experienced counsel on both sides, all with a strong understanding of the strengths and weaknesses of each party's respective potential claims and defenses, vigorously negotiated the Settlement at arm's-length. The settlement process was initiated by Plaintiffs' Co–Lead Counsel who negotiated the Settlement following significant investigation and informal discovery and analysis in this matter, as well as extensive efforts in connection with the investigation and prosecution of other Madoff-related litigation, and helped to facilitate these global resolutions. The hard-fought arm's-length settlement negotiations took place over the course of almost one year, amid a myriad of complicated issues, including the simultaneous settlements of the Trustee's avoidance claims and the civil forfeiture with the United States government, and included numerous in-person and telephonic meetings.[FN36] During the course of the negotiations, the parties debated the merits of their respective potential claims and defenses. Plaintiffs' Co–Lead Counsel zealously and knowledgeably advanced the Settlement Class' positions and were fully prepared to pursue litigation against JPMorgan rather than accept a settlement that was not in the best interest of the Settlement Class.

FN36. *See* Joint Final Approval Declaration at ¶¶ 33–39 for a detailed discussion of the settlement negotiations.

***8** By the time of the Settlement, Plaintiffs' Co–Lead Counsel were well-positioned, following an extensive investigation, to critically evaluate the propriety of settlement.[FN37] And while counsel were undoubtedly interested in their compensation, the separate $18 million payment of attorneys' fees and expenses by JPMorgan was negotiated with JPMorgan only *after* the parties had structured and agreed to the terms of the Settlement.

FN37. *See In re Elec. Carbon Prods. Antitrust Litig.,* 447 F.Supp.2d 389, 400 (D.N.J.2006) ("Where this negotiation process follows meaningful discovery, the maturity and correctness of the settlement become all the more apparent.") (citing *In re Linerboard Antitrust Litig.,* 292 F.Supp.2d 631, 640 (E.D.Pa.2003)).

The hard-fought and arduous settlement negotiations demonstrate that the Settlement is the result of fair and honest negotiations. Further, Plaintiffs' Co–Lead Counsel, who have extensive experience in the prosecution of complex class action litigation, with particular expertise in complex commercial and financial litigation, have made a considered judgment that the Settlement is not only fair, reasonable and adequate, but an excellent result for the Settlement Class.[FN38]

FN38. *See D'Amato,* 236 F.3d at 85 ("the settlement resulted from arm's-length negotiations and [ ] plaintiffs' counsel have possessed the experience and ability ... necessary to [the] effective representation of the class's interest").

As a result, the court gives the Settlement a strong presumption of fairness.

III. THE *GRINNELL* FACTORS CONFIRM THAT THE CLASS SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE.

A presumption is, of course, only a presumption—it can be rebutted. Here, however, independent analysis of the terms of the settlement, using the Grinnell factors, confirms the propriety of the presumption.

A. Complexity, Expense and Likely Duration of the Litigation Support Approval of the Settlement.

This factor captures the probable costs, in both time and money, of continued litigation.[FN39] "Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation."[FN40]

FN39. *See In re Bears Stearns Cos., Inc. Secs., Derivative, and ERISA Litig.,* 909 F.Supp.2d 259, 265 (S.D.N.Y.2012); *CCF,* 263 F.R.D. at 123.

FN40. *Luxottica,* 233 F.R.D. at 310 (citations omitted).

Absent this Settlement, JPMorgan would likely litigate against Class Plaintiffs for years to come, consuming thousands of hours of professional time and substantial expense, assuming plaintiff's claims were able to survive a dispositive motion. Given the lengthy time period at issue in this case, this litigation would also likely involve massive discovery—far more than the discovery already taken in aid of the settlement negotiations—millions of pages of documents, and scores of depositions. In addition, any litigation here would involve extensive and contested motion practice, and, assuming the success of the Class Plaintiffs at each of these stages, a complex and costly trial, followed by likely appeals. FN41 Throughout this process, the Class Plaintiffs would face numerous hurdles to establishing JPMorgan's liability. Moreover, even if the Plaintiffs were to prevail at all stages of such litigation, any potential recovery (in the absence of a settlement) would occur years from now, substantially delaying payment and other relief to the Settlement Class.

FN41. *See New York v. Nintendo, Inc.,* 775 F.Supp. 676, 681 (S.D.N.Y.1991) (approving settlement in complex litigation where court held: "If the litigation proceeds to trial, it no doubt will be complex, protracted and costly. Even if [plaintiffs] ultimately prevail, it could be years before consumers received any meaningful restitution."); *Hicks v. Morgan Stanley,* 01 Civ. 10071, 2005 WL 2757792, at *6 ("Further litigation would necessarily involve further costs; justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action.").

In contrast, the Settlement, if approved, would provide for an immediate cash payment of $218 million to the Settlement Class. In addition, in connection with the Class Settlement, JPMorgan has agreed to pay $325 million to the Trustee in connection with the Trustee's avoidance claims against JPMorgan. Finally, JPMorgan has also agreed to a civil forfeiture of $1.7 billion to the United States Department of Justice. In total, therefore, JPMorgan has agreed to make a payment of $2,243,000,000—all of which will be distributed to Madoff victims. The proposed distributions represent an immediate and substantial benefit to the Settlement Class, free of the risk of many years of complex litigation.

B. Reaction of the Class Supports Approval of the Settlement.

***9** A favorable reception by the Settlement Class constitutes "strong evidence" of the fairness of a proposed settlement and supports judicial approval. FN42 A small number of objections are convincing evidence of strong support by class members. FN43 Indeed, "In litigation involving a large class it would be 'extremely unusual' not to encounter objections.' " FN44 In *Stoetzner v. U.S. Steel Corp.,* FN45 the Third Circuit held that the fact that "only" 29 members of a 281 member class (*i.e.,* 10% of the class) had objected "strongly favors settlement." Likewise, in *Boyd v. Bechtel Corp.,* FN46 the fact that only 16% of the class objected was deemed "persuasive" of the adequacy of the settlement.

FN42. *Grinnell,* 495 F.2d at 462; *see also Wal–Mart,* 396 F.3d at 119 ("the favorable reaction of the overwhelming majority of class members to the Settlement is perhaps the most significant factor in our *Grinnell* inquiry").

FN43. *Id.* ("Any claim by appellants that the settlement offer is grossly and unreasonably inadequate is belied by the fact that ... [o]nly ***twenty*** objectors appeared from the group of 14,156 claimants.") (emphasis added).

FN44. *NASDAQ,* 187 F.R.D. at 478 (citation omitted).

FN45. 897 F.2d 115, 118–19 (3d Cir.1990).

FN46. 485 F.Supp. 610, 624 (N.D.Cal.1979).

The Settlement has received overwhelming support. Nearly 2,800 notices were mailed to Class members.[FN47] Only ten opt-out requests were filed.[FN48] One of those was filed by attorney Helen Davis Chaitman, Esq. on behalf of a group of so-called "net winner" BLMIS customers (the "Net Winner Customer Group").[FN49] The "net winners," in brief, are Madoff investors who were deemed ineligible for SIPA recovery or recovery in the Bankruptcy Court because, over time, they withdrew more money from their Madoff Investment Accounts than they invested with BLMIS, which meant that they had not really lost any money. Their theory—that they should have been allowed to recover some or all of the money they thought they had earned from their BMLIS investments—was not adopted by the Trustee or the Bankruptcy Court, which decision was affirmed by the United States Court of Appeals for the Second Circuit.[FN50] As a result, a decision was made not to include them in the definition of the Settlement Class. There is nothing for them to "opt out" of, because any claims they might have against JPMorgan are by definition not compromised by the settlement. I can and do, therefore, treat the Chaitman "opt out" as a nullity.[FN51] In addition to the Chaitman "opt out," AlixPartners received opt-out requests from five other "Net Winner" accounts, as determined by the Trustee, which are also excluded from the definition of the Settlement Class, and which, for this court's purposes, are of no interest.

FN47. *See* Declaration of Vineet Sehgal of Alix Partners, LLP [ECF No. 64].

FN48. The SIPA Trustee entered a default judgment against the main opt-out, in a far greater sum than the value of its claim against the settlement fund. *See* Account 1 of Exhibit G to the Declaration of Vineet Sehgal of Alix Partners, LLP [ECF No. 64]. The main opt-out is a foreign entity that may not wish to subject itself to the jurisdiction of this Court.

FN49. *See Notice of Intention to Opt Out of the Proposed Settlement Agreement Among the Trustee, The Class Action Plaintiffs and JPMorgan Chase,* ECF No. 19 (Case No. 11–cv–07961), ECF No. 55 (Case No. 11–cv–08331), Exhibit A.

FN50. *See In re Bernard L. Madoff Inv. Sec. LLC,* 654 F.3d 229, 242 (2d Cir.2011).

FN51. The parties to the settlement argued that such group opt-outs are not permitted. *See* NEWBERG on Class Actions § 9:49 (5th ed.) ("The right to opt out in a Rule 23(b)(3) class action is considered an individual right.... [A] plaintiff ... may not also opt out a group en masse without the express consent of each individual."); *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1024 (9th Cir.1998). From this I erroneously concluded that Attorney Chaitman was part of the group that was purporting to opt out. I now appreciate that Attorney Chaitman was appearing on behalf of a group of 193 of her clients. I am filing an amended decision to correct the record. The fact remains that Attorney Chaitman's clients are not members of the Settlement Class, so there is no basis on which they could "opt out" of the settlement.

In sum, there appear to be nine valid opt outs from a Settlement Class of nearly 2,800 members. Support for the settlement is indeed overwhelming.

The only objection to the Settlement was filed by Philip ‘loop, Elizabeth Scott and the Elizabeth F. Scott Family GST Exempt Trust UA (collectively referred to as the “Loop Objection”).FN52 It will be discussed below.

> FN52. This objection, focused predominately on the business judgment of the SIPA Trustee, should have more appropriately been filed in the Bankruptcy Court in which the SIPA liquidation of BLMIS is pending. However, the time to file objections in the Bankruptcy Court to the Trustee's settlements with JPMorgan Chase expired on January 28, 2014 and no objections were filed in that proceeding. Moreover, the Bankruptcy Court approved the Trustee's settlements with JPMorgan on February 5, 2014 and the time for appeal has since passed. As such, the arguments in the Toop Objection are misplaced and untimely, and should not be considered by this Court.

C. The Stage of the Proceedings and the Extent of the Investigation Support Approval of the Class Settlement.

In determining whether a class action settlement is fair, reasonable and adequate, courts consider the stage of the proceedings and the amount of discovery completed to ensure that plaintiffs had access to sufficient information to evaluate their case properly and to assess the adequacy of any settlement proposal.FN53 Here, Plaintiffs and their counsel had ample information to evaluate the strengths and weaknesses of their claims and the defenses that could be asserted by JPMorgan, as well as the propriety of settlement.

> FN53. *See* *Weinberger,* 698 F.2d at 74; *Chatelain v. Prudential–Bache Sec.,* 805 F.Supp. 209, 213–14 (S.D.N.Y.1992).

***10** By the time the Settlement was reached. Plaintiffs' Co–Lead Counsel had thoroughly analyzed the possible legal claims against JPMorgan and the substantial legal and factual defenses raised by JPMorgan. In addition, as further described at ¶¶ 34–36 of the Joint Final Approval Declaration, Plaintiffs' Co–Lead Counsel reviewed and analyzed over a million pages of documents produced by JPMorgan and interviewed numerous JPMorgan senior executives, in order to fully understand and evaluate the relationship between JPMorgan and Madoff, and the quantum of evidence that exists concerning JPMorgan's alleged role in Madoff's Ponzi scheme. Co–Lead Counsel also had the benefit of the discovery record generated in the Trustee's proceeding related to Madoff, and held detailed collaborative discussions with the Trustee's professionals who had conducted their own exhaustive investigation of potential claims against JPMorgan. Furthermore, Co–Lead Counsel, themselves, conducted detailed interviews with numerous important JPMorgan senior executives who had not previously been examined by the Trustee. As a result, the court is satisfied that plaintiffs have a full understanding of the strengths and weaknesses of possible claims against JPMorgan and the difficulties they would encounter in this litigation.

D. The Risks of Establishing Liability Support Approval of the Settlement.

It has long been recognized that complex class actions are difficult to litigate.FN54 “The legal and factual issues involved are always numerous and uncertain in outcome.” FN55 Thus, in assessing this factor, the Court is not required to “decide the merits of the case or resolve unsettled legal questions,” FN56 or to “foresee with absolute certainty the outcome of the case.” FN57 “[R]ather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement.” FN58 This litigation is no exception; as this Court has already opined, Madoff investor cases against third parties like JPMorgan would involve numerous complex and novel issues of fact and law.FN59

FN54. *See CCF,* 263 F.R.D. at 123 ("The complexity of Plaintiffs claims *ipso facto* creates uncertainty.") (citations omitted); *In re Art Materials Antitrust Litig.,* 100 F.R.D. 367, 372 (N.D.Ohio 1983).

FN55. *In re Motorsports Merch. Antitrust Litig.,* 112 F.Supp.2d 1329, 1337 (N.D.Ga.2000).

FN56. *Carson v. Am. Brands. Inc.,* 450 U.S. 79, 88 n. 14, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981).

FN57. *In re Austrian & German Dank Holocaust Litig.,* 80 F.Supp.2d 164, 177 (S.D.N.Y.2000).

FN58. *Global Crossing,* 225 F.R.D. at 459.

FN59. *See, e.g., Picard v. JPMorgan Chase & Co.,* 460 B.R. 84, 92 (S.D.N.Y.2011), *aff'd sub nom. In re Bernard L. Madoff Inv. Sec. LLC.,* 721 F.3d 54 (2d Cir.2013); *Picard v. HSBC Bank PLC,* 454 B.R. 25 (S.D.N.Y.2011), *amended sub nom. In re Bernard L. Madoff Inv. Sec. LLC,* ADV. 08–1789 BRL, 2011 WL 3477177 (S.D.N.Y. Aug.8, 2011), *aff'd sub nom. In re Bernard L. Madoff Inv. Sec. LLC.,* 721 F.3d 54 (2d Cir.2013).

For example, Class Plaintiffs faced a substantial risk of their claims being adversely impacted by developing law interpreting SLUSA. In addition, Class Plaintiffs' aiding and abetting theories require proof of *substantial knowledge* and participation in the primary wrongdoing. Although JPMorgan has elected to settle, including with the Government, for a substantial payment, it continues to maintain that its employees did nothing wrong, and there is no "smoking gun" in the evidence reviewed during Plaintiffs' investigation. Finally, substantial legal questions exist concerning discovery into, and JPMorgan's liability with respect to, key submissions JPMorgan made to regulators concerning Madoff. While Plaintiffs' Co–Lead Counsel believe that Class Plaintiffs can bring a strong case against JPMorgan, they recognize that a favorable verdict is never assured—especially where, as here, the issues are novel and the theories are untested.

E. The Risks of Proving Damages Support Approval of the Class Settlement.

***11** Should Class Plaintiffs in a case against JPMorgan overcome any dispositive motions and ultimately prove JPMorgan's liability, they would still face the risks of proving damages. Proof of damages in complex class actions is always complex and difficult and often subject to expert testimony.FN60

FN60. *See Am. Booksellers Ass'n v. Barnes & Noble, Inc.,* 135 F.Supp.2d 1031, 1042 (N.D.Cal.2001) ("Plaintiffs cannot prove causation of actual [antitrust] injury without ... expert testimony, because only expert testimony can demonstrate that any injury to plaintiffs was caused by defendants' unlawful conduct, and not because of lawful competition or other factors.").

F. The Risks of Maintaining the Class Action Through Trial Support Approval of the Class Settlement.

"This factor allows the Court to weigh the possibility that, if a class were certified for trial in this case, it would be decertified prior to trial." FN61 Settlement permits the parties to ensure that class status will not be lost. Courts may always exercise their discretion to re-evaluate the appropriateness of class certification at any time, and no one can deny that developments in class action law, including multiple decisions from the United States Supreme Court, have altered the landscape in which class status is determined.FN62 The possibility of decertification thus favors settlement.

FN61. *Meijer. Inc. v. 3M,* No. 04–5871, 2006 U.S. Dist. LEXIS 56744, at *50, 2006 WL 2382718 (E.D.Pa.2006).

FN62. *See Chatelain,* 805 F.Supp. at 214 ("Even if certified, the class would face the risk of decertification."); *see also, e.g., Comcast Corp. v. Behrend,* 133 S. Cl. 1426 (2013); *Wal–Mart Stores, Inc. v. Dukes,* ––– U.S. ––––, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011).

G. The Reasonableness of the Class Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation Supports Approval.

The reasonableness of the Settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." FN63 The issue for the Court is not whether the Settlement represents the "best possible recovery," but how it relates to the strengths and weakness of plaintiffs' claims and the risks of continued litigation. In making this determination, the Court should recognize that "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.' " FN64

FN63. *In re "Agent Orange" Prod Liab. Litig.,* 597 F.Supp. 740, 762 (E.D.N.Y.1984).

FN64. *Officers for Justice v. Civil Serv. Comm'n,* 688 F.2d 615, 624 (9th Cir.1982) (citations omitted).

As discussed above, approval of the $218 million Settlement will result in an immediate distribution to the Settlement Class, rather than a speculative payment many years down the road.FN65 All told, the Settlement, along with JPMorgan's $325 million payment to the Trustee, and $1.7 billion forfeiture to the United States, will ultimately enable Madoff victims to receive over $2 billion from JPMorgan, to the benefit of the Settlement Class. The Settlement represents a substantial recovery for the Settlement Class, and, as such, may well be the best possible recovery in light of the circumstances of a possible lawsuit against JPMorgan.FN66

FN65. *See In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.,* MDL No. 1500, 2006 U.S. Dist. LEXIS 17588, at *44, 2006 WL 903236 (S.D.N.Y. Apr. 6, 2006) (where settlement amount has been paid, "the benefit of the Settlement will ... be realized far earlier than a hypothetical post-trial recovery").

FN66. *See Indep. Energy,* 2003 U.S. Dist. LEXIS 17090, at *13, 2003 WL 22244676 (noting few cases tried before a jury result in the full amount of damages claimed).

H. The Ability of JPMorgan to Withstand a Greater Judgment.

JPMorgan can withstand a judgment greater than that secured by the Settlement. "But a defendant is not required to 'empty its coffers' before a settlement can be found adequate." FN67 JP Morgan's financial circumstances do not ameliorate the force of the other *Grinnell* factors, which lead to the conclusion that the settlement is fair, reasonable and adequate.

FN67. *In re Sony SXRD Rear Projection Television Class Action Litig.,* No. 06 Civ. 5173, 2008 U.S. Dist. LEXIS 36093, at *23, 2008 WL 1956267 (S.D

.N.Y. May 1, 2008) (*quoting* McBean v. City of New York, 233 F.R.D. 377, 388 (S.D.N.Y.2006)); *see also* IMAX, 283 F.R.D. at 189 (same).

I. The Toop Objection Does Not Counsel Against the Result Suggested by the Grinnell Factors.

The Toop Objection acknowledges that "any test of reasonableness must weigh the benefits of the settlement ... against the consequences of not settling at this time for this amount." Nonetheless, it argues that reasonableness should not require them to "defer to the judgments of the Lead Plaintiffs and the S1PA Trustee." FN68 However, courts have long recognized that complex class actions, such as the present case, are notoriously difficult to litigate. FN69 Thus, the Court is not required to "decide the merits of the case or resolve unsettled legal questions." FN70 "[R]ather, the Court need only assess the risks of litigation against the certainty of recovery under the settlement." FN71

FN68. Toop Objection ¶ 2.2.1.

FN69. *See In re Currency Conversion Fee Antitrust Litig.,* 263 F.R.D. 110, 123 (S.D.N.Y.2009) ("The complexity of Plaintiff's claims *ipso facto* creates uncertainty"), *aff'd sub nom. Priceline.com, Inc. v. Silberman,* 405 F. App'x 532 (2d Cir.2010); *In re Art Mat. Antitrust Litig.,* 100 F.R.D. 367, 372 (N.D.Ohio 1983).

FN70. *Carson v. Am. Brands, Inc.,* 450 U.S. 79, 88 n. 14, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981).

FN71. *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 459 (S.D.N.Y.2004).

***12** The Toop Objection contends that the Settlement is unreasonable because it does not consider the continued litigation costs stemming from separate actions brought by the SIPA Trustee against other financial institutions. It is wrong. In determining reasonableness under *Grinned,* courts have consistently looked to the continued litigation of the case at issue, not of separate actions. FN72 The issue for the Court is how the Settlement relates to the strengths and weaknesses of Plaintiffs' claims in this particular action and the risks of continued litigation. In making this determination, the Court should recognize that "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.' " FN73 Approval of the $218 million Settlement will result in an immediate distribution to the Settlement Class, rather than a speculative payment many years down the road. Consequently, the Settlement represents a substantial recovery for the Settlement Class, and, as such, may well be the best possible recovery in light of the circumstances of a possible lawsuit against JPMorgan.

FN72. *See In re Pfizer Inc. S'holder Derivative Litig.,* 780 F.Supp.2d 336, 342 (S.D.N.Y.2011) ("Given the daunting legal standard ... plaintiffs would have faced very substantial risks in continuing to prosecute *this action."*) (emphasis added); *Odom v. Hazen Transp., Inc.,* 275 F.R.D. 400, 412 (W.D.N.Y.2011) ("The Settlement Agreement ... represents ... a reasonable compromise that accounts for the risks and rewards posed by this litigation.").

FN73. *Officers for Justice v. Civil Serv. Comm'n,* 688 F.2d 615, 624 (9th Cir.1982).

The Toop Objection contends that the $218 million Settlement is unreasonable because it "ignores the consequences of JPMorgan's deferred prosecution agreement" with the United

States Government and "falls outside the bounds of any likely finding of damage given the scale of the losses sustained by customers...." FN74 This contention is misguided. First, the Settlement is an integral part of a global resolution of Madoff-related litigation against JPMorgan involving three simultaneous, separately negotiated settlements, totaling over $2 billion from JPMorgan, all of which will flow to victims of Madoff's Ponzi scheme.

FN74. Toop Objection ¶ 2.2.2, Reason 2.

Second, the reasonableness of the Settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of *plaintiffs' case.*" FN75 Despite the loop Objection's contention that the Settlement ignores information gleaned from JPMorgan's deferred prosecution agreement with the U.S. Government, Co–Lead Counsel reviewed and analyzed the deferred prosecution agreement before finalizing the Settlement, with the express purpose of ensuring there was no materially new information beyond the facts previously reviewed by Co–Lead Counsel through extensive and informal discovery provided by JPMorgan. In any event, Plaintiffs face several significant obstacles in surviving dispositive motions. While Co–Lead Counsel believes Plaintiffs' claims against JPMorgan are strong, a favorable verdict is never assured, especially where, as here, JPMorgan has valid defenses that could absolve it of liability. FN76

FN75. *In re "Agent Orange" Prod. Liab. Litig.,* 597 F.Supp. 740, 762 (E.D.N.Y.1984), *aff'd,* 818 F.2d 145 (2d Cir.1987).

FN76. *Taft v. Ackermans,* No. 02 Civ. 7951(PKL), 2007 WL 414493, at *6 (S.D.N.Y. Jan.31, 2007) ("... [T]he Court's inquiry is into whether the plaintiffs have sufficient information to evaluate the adequacy of the proposed settlement, not whether they have availed themselves of all possible information.' ")

IV. THE PROPOSED PLAN OF ALLOCATION IS APPROVED.

The proposed Plan of Allocation is set forth in the Notice at pages 13–14 [ECF No. 57, pp. 20–21]. FN77 It is fair and adequate, and should be approved.

FN77. A copy of the Notice is Exhibit A to the Alix Partners Declaration, Exhibit 5 to the Joint Final Approval Declaration.

***13** "To warrant approval, the plan of allocation must also meet the standards by which the settlement was scrutinized—namely, it must be fair and adequate.... An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." FN78

FN78. *Bear Stearns,* 909 F.Supp.2d at 270 (quoting *In re WorldCom, Inc. Sec. Litig.,* 388 F.Supp.2d 319, 344 (S.D.N.Y.2005) (internal citations and quotation marks omitted); *see also In re Am. Int'l. Grp., Inc. Secs. Litig.,* No. 04 Civ. 8141, 2013 WL 1499412, at *6 (S.D.N.Y. April 11, 2013).

As noted above, JPMorgan will pay $218 million to settle the claims advanced in the Action. The Notice, including the Plan of Allocation at pp. 13–14, was mailed to all class members. Alix Partners Declaration. ¶ 10. The $218 million settlement amount, less any costs in connection with the administration of the Settlement by the Claims Administrator, will be distributed to all members of the Settlement Class who file a timely Proof of Claim

("POC"), on a *pro rata* basis, based on a Settlement Class Member's "Net Losses" as of December 11, 2008.FN79 If a Settlement Class Member has already filed a POC in connection with the S1PA Proceeding, that Class Member will not be required to file another POC. and their POC filed in the SIPA proceeding will be used in this proceeding.FN80 A Class Member's Net Losses are calculated by taking the amount of money a Class Member deposited into their Madoff account, and subtracting any withdrawals.FN81 This calculation of Net losses is intended to be coextensive with the Trustee's "net investment method," the method of loss calculation that has been upheld by the Second Circuit.FN82

FN79. *See* pages 13–14 of the Notice, ¶ 9 and Section D, "Plan of Allocation." [ECF 57, pp. 20–21]

FN80. *Id.*

FN81. *Id.*

FN82. *See generally In re Bernard L. Madoff Inv. Sec., LLC,* 654 F.3d 229 (2d Cir.2011).

The Plan of Allocation is designed to fairly allocate funds to members of the Settlement Class. It is approved.

V. CERTIFICATION OF A SETTLEMENT CLASS IS APPROPRIATE.

The Court hereby certifies the Settlement Class for purposes of the Settlement under Rule 23(b)(3) of the Federal Rules of Civil Procedure.

The proposed Settlement Class here is defined as all BLMIS customers or their successors, transferees or assignees, who directly had capital invested with BLMIS as of December 11, 2008.FN83 This class definition is intended to include only "Net Losers." The Settlement Class does not include: (i) BLMIS insiders and their families; (ii) defendants in any criminal Madoff-related proceeding; (iii) BLMIS accountholders whose claims against the BLMIS estate were extinguished by virtue of three separate settlements with the Trustee, the estate of Jeffry Picower, *Picard v. Picower,* 09–1197(BRL) (Bankr.S.D.N.Y.) (ECF No. 43), the Carl Shapiro Family, *SIPC v. BLMIS,* 08–1789 (Bankr.S.D.N.Y.) (LCF No. 3551), and Jeanne Levy–Church and Francis N. Levy, *SIPC v. BLMIS,* 08–1789 (Bankr.S.D.N.Y.) (ECF No.1964); or (iv) any persons or entities that exclude themselves from the Selllemenl Class by filing a request for exclusion that is accepted by the Court. FN84

FN83. Settlement Agreement [ECF No. 51–1], ¶ 6.

FN84. *Id.*

Pursuant to the Settlement Agreement, the parties agreed, for settlement purposes only, to request certification under Federal Rules of Civil Procedure Rules 23(a) and (b)(3) of the Plaintiffs' claims against JPMorgan, and that the Judgment would provide for the releases of JPMorgan and any parents, subsidiaries, affiliates and employees.FN85

FN85. *See* Settlement Agreement [ECF No. 51–1], ¶ 13.

***14** The Second Circuit recognizes the propriety of certifying a class solely for purposes of a class action settlement.FN86 I hereby conclude that the proposed Settlement Class satisfies Rule 23(a) and Rule 23(b), certify the Settlement Class, appoint the Plaintiffs to lead the Settlement Class, and appoint Entwistle and Cappucci and Hagens Berman Sobol Shapiro as Settlement Class Counsel.

FN86. *See In re Am. Int'l Grp. Inc. Sec. Litig.,* 689 F.3d 229, 238–39 (2d

Cir.2012).

A. The Settlement Class Satisfies the Requirements of Rule 23(a).

Certification is appropriate because the proposed Settlement Class readily meets each of the four requirements of Rule 23(a).

1. The Settlement Class Members Are Too Numerous to Be Joined.

Plaintiffs meet the first requirement of Rule 23(a) because the proposed Class is so numerous that joinder of all members is impracticable.FN87 To satisfy the numerosity requirement, "a plaintiff need not show that joinder is impossible. Nor need the plaintiff know the exact number of class members." FN88 Rather, while "[t]here is no strict numerical test for determining impracticability of joinder[,] .... [w]hen class size reaches substantial proportions ... the impracticability requirement is usually satisfied by the numbers alone." FN89 Judicial consensus is that a class with as few as 40 members satisfies the requirement. FN90 Here, the Settlement Class consists of over 2,000 individuals and entities throughout the world. The number of potential Settlement Class members, coupled with their widely-dispersed locations in the United States and around the world, makes joinder impracticable and class treatment appropriate.

FN87. *See* Fed.R.Civ.P. 23(a)(1).

FN88. *Saddle Rock Partners Ltd. v. Hiatt,* No. 96 Civ. 9474, 2000 WL 1182793, at *2 (S.D.N.Y. Aug.21, 2000) (citations omitted).

FN89. *In re Am. Med. Sys., Inc.,* 75 F.3d 1069, 1079 (6th Cir.1996) (citations omitted).

FN90. *See, e.g., Consul. Rail Corp. v. Town of Hyde Park,* 47 F.3d 473, 483 (2d Cir.1995); *In re NTL, Inc. Sec. Litig.,* No. 02 Civ. 3013, 2006 WL 330113, at *5 (S.D.N.Y. Feb.14, 2006).

2. There Are Common Questions of Law and Fact.

Rule 23(a)(2) requires that there must be questions of law or fact common to the class. The commonality requirement of Rule 23(a) is met if the claims involve questions of law or fact that are common to the class.FN91 The commonality requirement is satisfied if the named plaintiffs share at least one question of fact or law in common with the purported class.FN92

FN91. *See Robinson v. Metro–North Commuter R.R.,* 267 F.3d 147, 155 (2d Cir.2001).

FN92. *See Marisol A. by Forbes v. Giuliani,* 126 F.3d 372, 376 (2d Cir.1997)
.

The Plaintiffs and members of the proposed Class have numerous issues of law and fact in common, including:

(a) Whether JPMorgan violated duties owed to Plaintiffs and members of the Class;

(b) Whether JPMorgan aided and abetted BLMIS' theft from Plaintiffs and members of the Class; and

(c) The extent to which Plaintiffs have suffered damages and the measure of such damages.

These common issues are more than sufficient to satisfy Rule 23(a) (2).

3. The Class Representatives' Claims Are Typical.

Rule 23(a)(3) requires that "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." FN93 Like the test for commonality, "[t]he typicality requirement is 'not demanding.' " FN94 The typicality requirement is readily met where "the claims of the named plaintiffs arise from the same practice or course of conduct that gives rise to the claims of the proposed class members." FN95 There is no requirement, however, that the claims of all members of a proposed class be identical.FN96

FN93. Fed.R.Civ.P. 23(a)(3).

FN94. *In re Initial Pub. Offering Sec. Litig. (IPO II),* 227 F.R.D. 65, 87 (S.D.N.Y.2004) vacated on other grounds. 471 F.3d 24 (2d Cir.2006) (citations omitted).

FN95. *In re Vivendi Universal S. A.,* 242 F.R.D. 76, 85 (S.D.N.Y.2007) (internal quotation and citation omitted).

FN96. *In re Marsh & McLennan Cos., Inc. Sec. Litig.,* No. 04 Civ. 8144, 2009 WL 5178546, at *10, (S.D.N.Y. Dec. 23, 2009).

***15** The Plaintiffs' claims are typical of the claims of other members of the Settlement Class because their losses all derive from the same course of JPMorgan's conduct. The facts necessary to advance Plaintiffs' potential claims are the same as those necessary for absent Class members to establish theirs; thus, typicality is established.

4. The Class Representatives Fairly and Adequately Protect the Interests of the Settlement Class.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interest of the class." This requirement is met if it appears that: (1) the named plaintiffs' interests are not antagonistic to the class' interests; and (2) the plaintiffs' attorneys are qualified, experienced, and generally able to conduct the litigation.FN97

FN97. *See In re Drexel Burnham Lambert Grp.,* 960 F.2d 285, 291 (2d Cir.1992); *In re Marsh,* 2009 WL 5178546, at *10.

Here, Plaintiffs and members of the Class are similarly situated because they share the same claims and have the same interest in maximizing the recovery from JPMorgan. FN98 The Plaintiffs have thus far protected the interests of the proposed Settlement Class vigorously and without conflict, and they will continue to do so throughout the litigation. Plaintiffs are individuals who, as customers of Bernard L. Madoff Investment Securities LLC ("BLMIS"), deposited funds with BLMIS and are "Net Losers." Each has the same interest as members of the Class in establishing that JPMorgan's conduct caused or contributed to their damages; therefore, their incentives align perfectly.

FN98. *See Drexel,* 960 F.2d at 291; *In re Polaroid ERISA Litig.,* 240 F.R.D. 65, 77 (S.D.N.Y.2006) (no conflict of interest between class representatives and absent class members where they share the common goal of maximizing recovery).

Co–Lead Counsel—Entwistle & Cappucci and Hagens Berman Sobol Shapiro—have extensive experience and expertise in complex litigation and class action proceedings throughout the United States, and are uniquely qualified to conduct this litigation by virtue of their extensive experience in successfully prosecuting other Madoff-related litigation against third parties and by virtue of their experience in working with SIPA trustees and in prosecuting similar litigation against JPMorgan. Thus, the requirements of Rule 23(a)(4) are satisfied.

B. The Predominance Requirement of Rule

23(b)(3) is Satisfied .

Rule 23(b)(3) requires that the common questions of law or fact predominate over any questions affecting only individual class members and that a class action is superior to other available methods of adjudication. Both of these requirements are met.

1. Common Questions Predominate.

Rule 23(b)(3) does not require a complete absence of any individual issues. FN99 Rather, it requires predominance, which entails that "some of the legal or factual questions" can be resolved through "generalized proof" and that "these particular issues are more substantial than the issues subject only to individualized proof." FN100 The Supreme Court has defined this inquiry as establishing "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." FN101 This inquiry is "similar" to Rule 23(a)(3)*s typicality requirement. FN102 The Court added that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." FN103

FN99. *See Dura–Bilt Corp. v. Chase Manhattan Corp.,* 89 F.R.D. 87, 99 (S.D.N.Y.1981) ("To be sure, individual issues will likely arise in this as in all class action cases.").

FN100. *Moore v. PaineWebber, Inc.,* 306 F.3d 1247, 1252 (2d Cir.2002).

FN101. *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

FN102. *Id.* at 623 n. 18.

FN103. *Id.* at 625.

***16** This case involves the type of "common nucleus of operative facts and issues 'with which the predominance inquiry is concerned.' " FN104 The proof of any liability on the part of JPMorgan in this case, if such claims were to be brought by Plaintiffs, would be common to the Class as a whole, and because such class-wide proof will be the overriding focus of any trial of this case, Rule 23(b) (3)'s predominance requirement is thus satisfied, and the proposed Class should be certified.

FN104. *In re Nassau Cnty. Strip Search Cases,* 461 F.3d 219, 228 (2d Cir.2006) .

2. A Class Action Is the Superior Method of Adjudication.

Rule 23(b)(3) also sets forth the following non-exhaustive factors to be considered in making a determination of whether class certification is the superior method of litigation: "(A) the class members' interests in individually controlling the prosecution ... of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by ... class members ... and (D) the likely difficulties in managing a class action." FN105 Considering these factors, proceeding by means of a class action is clearly "superior to other available methods for fairly and efficiently adjudicating" the potential claims against JPMorgan.

FN105. Fed.R.Civ.P. 23(b)(3).

a. Any Individual Interest in Controlling the Prosecution of Separate Actions Is Limited.

The scope and complexity of Class Plaintiffs' potential claims against JPMorgan, together with the high cost of individualized litigation, make it unlikely that the vast majority of the Settlement Class members would be able to pursue their own potential claims and obtain relief without class certification. Separate actions would also "risk disparate results among those seeking redress, ... exponentially increase the costs of litigation for all, and [ ] be a particularly inefficient use of judicial resources ." FN106

FN106. *Cromer Fin. Ltd. v. Berger,* 205 F.R.D. 113, 133 (S.D.N.Y.2001) (footnote omitted).

b. Settlement–Only Class Certification Moots Manageability.

The final factor asks the Court to consider "the difficulties likely to be encountered in the management of a class action." FN107 Although management of this case as a class action would not render individual actions a better alternative, the factor is moot because when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems for the proposal is that there be no trial." FN108 Accordingly, the requirements of Rule 23(b)(3) are satisfied.

FN107. Fed.R.Civ.P. 23(b)(3)(D).

FN108. *Amchem,* 521 U.S. at 620; *In re Am. Int'l Group Secs. Litig.,* 689 F.3d at 239–40 (2d Cir.2012) (internal citation omitted).

C. The Proposed Method of Class Notice Is Appropriate and Satisfies Due Process.

Rule 23(e)(1) requires that a "court must direct notice in a reasonable manner to all class members who would be bound by the proposal" to settle a class action. "Due Process requires that the notice to class members 'fairly apprise the ... members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.' " FN109 The Second Circuit has held that the adequacy of a class action settlement notice is "measured by reasonableness" and that "[t]here are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings. Notice is adequate if it may be understood by the average class member." FN110 "For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." FN111

FN109. *Consol. Edison, Inc. v. Northeast Utils.,* 332 F.Supp.2d 639, 652 (S.D.N.Y.2004) (citation omitted); *see also Weinberger* 698 F.2d 61 at 70.

FN110. *Masters v. Wilhelmina Model Agency, Inc.,* 473 F.3d 423, 438 (2d Cir.2007).

FN111. Fed.R.Civ.P. Rule 23(c)(2)(B).

***17** Where, as here, "the parties seek simultaneously to certify a settlement class and to settle a class action, the elements of Rule 23(c) notice (for class certification) are combined with the elements of Rule 23(e) notice (for settlement or dismissal)." FN112 Rule 23(c)(2) requires the "best practicable notice," while Rule 23(e) requires notice that is "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections." FN113 Neither Rule 23 nor due process requires actual notice to each possible class member, FN114 although here, Plaintiffs reasonably believe that actual notice has been provided to each and every potential member of the class.

FN112. *Global Crossing,* 225 F.R.D. at 448 (S.D.N.Y.2004).

FN113. *In re Prudential Ins. Co. of Am.*

Sales Practices Litig., 962 F.Supp. 450, 527 (D.N.J.1997), *affd,* 148 F.3d 283 (3d Cir.1998).

FN114. *See In re Marsh,* 2009 WF 5178546, at *23–24; *Buxbaum v. Deutsche Bank AG,* 216 F.R.D. 72, 80–81 (S.D.N.Y.2003).

Pursuant to the Court's Preliminary Approval Order, two types of notice were provided to potential members of the class: (1) a notice of the settlement which was sent by first-class mail to all identifiable members of the class, along with a proof of claim form ("Mailed Notice"); and (2) a summary notice was published ("Summary Notice"). The Mailed Notice was mailed to all identifiable Settlement Class members who filed claims in the S1PA Proceeding, and the Mailed Notice also informed Settlement Class members that if they previously filed a claim in the SIPA proceeding, they need not file another proof of claim and will automatically participate in the settlement, unless they elect to opt-out of the Settlement Class. These notices were mailed to the address Settlement Class members provided in their S1PA claim form and, where appropriate, to the transferee of any such claim.FN115 The Summary Notice was published in four separate locations: (1) *Bloomberg;*FN116 (2) the website of the S1PA Trustee; FN117 and (3) the two websites of each of the two Co–Lead Counsel.FN118 In addition, the Claims Administrator established and maintains a website—www.shapiro-hillclasssettlement.com—on which anyone can obtain a copy of the Mailed Notice, or other pleadings and documents related to the case.FN119

FN115. *See* ¶¶ 9–10 of the February 12, 2014 Declaration of John Franks of Alix Partners LLP (ECF No. 57) ("Alix Partners Declaration"), a copy of which is attached as Exhibit 5 to the Joint Final Approval Declaration.

FN116. Alix Partners Declaration, ¶ 15.

FN117. http://www.madofftrustee.com/class–action–09.html.

FN118. *See* Joint Final Approval Declaration, ¶ 72 (attesting to posting of Summary Notice on http://www.entwistle-law.com/index and www.hbsslaw.com).

FN119. Alix Partners Declaration, ¶ 17.

These Notices, consistent with Rule 23(c)(2), Rule 23(e) and Rule 23(h), as well as paragraph 8 of the Preliminary Approval Order, included the following information: (1) a description of the class action; (2) a definition of the Settlement Class; (3) notification that the Court will exclude a class member upon request by a certain date; (4) notification that the judgment will include all members of the class who do not request exclusion; (5) notification that any class member who does not request exclusion may enter an appearance through counsel; (6) a description of the potential claims and defenses as well as the issues on which the parties disagree; (7) the general terms of the Class Settlement; (8) a clear explanation of the binding nature of the Class Settlement; (9) the Plan of Allocation pursuant to which the settlement proceeds would be allocated; (10) notification that complete information is available from the court files; (11) notification that any class member may appear and be heard at the Fairness Hearing; and (12) notice of the application for fees and expenses.

***18** The content of the Mailed Notice and the Summary Notice, as well as the method of notification, each satisfy the requirements under Rules 23(c), 23(e) and 23(h) as those rules have been interpreted in this District.

VI. CO–LEAD COUNSEL'S MOTION FOR ATTORNEYS' FEES AND EXPENSES IS GRANTED.

A. Co–Lead Counsel Is Entitled To An Award Of Attorneys' Fees And Expenses In Connection With The Settlement.

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, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980); *see also Goldberger,* 209 F.3d at 47; *Savoie v. Merchants Bank,* 166 F.3d 456, 460 (2d Cir.1999).[FN120] The purpose of the common fund doctrine is to fairly and adequately compensate 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). Moreover, the Second Circuit Court of Appeals has confirmed that fees in common fund cases may be awarded under either the lodestar or percentage of the fund methods, but that "the trend in this Circuit is toward the percentage method." *Wal–Mart Stores Inc. v. Visa U.S.A.,* 396 F.3d 96, 121 (2d Cir.2005).

> FN120. Although the fee in this action was separately negotiated with JPMorgan, the common fund principles are applicable in that counsel here is entitled to a reasonable fee for the substantial benefit achieved on behalf of the Class.

In addition, courts have recognized that awards of reasonable attorneys' fees from a common fund should 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, e.g., Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 369 (S.D.N.Y.2002).

Here, the proposed Attorneys' Fees Payment is not derived from the $218 million Class Settlement Fund, and it will not reduce the award to the Settlement Class in any way. Rather, JPMorgan has agreed to pay a separate Attorneys' Fees Payment to Co–Lead Counsel, as a result of arms-length negotiations, conducted separate from and subsequent to the Class Settlement Amount agreement. The structure of the Attorneys' Fees Payment was designed intentionally by the Parties "to preserve as much of the settlement as possible for the Settlement Class." Settlement at ¶ P. *Cf., Thompson,* 216 F.R.D. at 67 ("[U]nlike common fund cases, where attorneys' fees can erase a considerable portion of the funds allocated for settlement, the fees were negotiated separately and after the settlement amount had been decided, thus considerably removing the danger that attorneys' fees would unfairly swallow the proceeds that should go to class members.")

B. The Percentage–Of–The–Fund Method

The Supreme Court has consistently held that it is appropriate for a fee to be analyzed as a percentage of the fund recovered. *See Blum v. Stenson,* 465 U.S. 886, 900 n. 16, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) ("under the 'common fund doctrine.' ... a reasonable fee is based on a percentage of the fund bestowed on the class"); *see also Trustees v. Greenough,* 105 U.S. 527, 532, 26 L.Ed. 1157 (1881); *Central R.R. & Banking Co. of Ga. v. Pettus,* 113 U.S. 116, 124–25, 5 S.Ct. 387, 28 L.Ed. 915 (1885); *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161, 165–66, 59 S.Ct. 777, 83 L.Ed. 1184 (1939). The percentage-of-the-fund method is preferred, in part, because of its "ease of administration, permitting the judge to focus on 'a showing that the fund conferring a benefit on the class resulted from the lawyers' efforts' .... rather than collateral disputes over billing." *In re NASDAQ Market–Makers Antitrust Litig.,* 187 F.R.D. 465, 485 (S.D.N.Y.1998) (citation omitted).

***19** The Second Circuit authorizes district courts to employ the "percentage-of-the-fund method" when awarding fees in common fund cases. *See Goldberger,* 209 F.3d at 47 (holding that the percentage-of-the-fund method may be used to determine appropriate attorneys' fees, although the lodestar method may also be used). Indeed, in *Wal–Mart,* 396 F.3d at 121, the Second Circuit recognized that the trend in determining the amount of a common fund fee in this Circuit is toward the percentage-of-the-fund method.FN121

FN121. *See also Clark v. Ecolab Inc.,* No. 07 Civ. 8623(PAC), 2010 WL 1948198, at *8 (S.D.N.Y. May 11, 2010) ("In this Circuit, the 'percentage-of-recovery' method is the 'trend.' ") (citation omitted); *Hicks v. Morgan Stanley,* No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *8 (S.D.N.Y. Oct.24, 2005) ("The trend in the Second Circuit recently has been to use the percentage method."); *In re WorldCom, Inc. Sec. Litig.,* No. 02 CIV 3288(DLC), 2004 WL 2591402, at *21 (S.D.N.Y. Nov.12, 2004); *In re Visa Check/Mastermoney Antitrust Litig.,* 297 F.Supp.2d 503, 520 (E.D.N.Y.2003).

Here, the requested Attorneys' Fee Payment is not being paid from the Class Settlement Fund. *Cf., Thompson,* 216 F.R.D. at 67. *See also, McBean v. City of New York,* 233 F.R.D. 377, 392 (S.D.N.Y.2006) ("If, however, money paid to the attorneys is entirely independent of money awarded to the class, the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between attorneys and class members .").

But even if, *arguendo,* the Class Settlement Amount were to be constructively "pooled" together with the requested Attorneys' Fee Payment (for a total of $236 million), the Attorneys' Fee Payment would only represent approximately 7.6% of the total. By way of example, a review of district court decisions in this Circuit applying the *Goldberger* factors place a reasonable percentage-of-the-fund range between 10% and 30%. *See Farinella v. Paypal, Inc.,* 611 F.Supp.2d 250, 272–73 (L.D.N.Y.2009) (finding that a survey of 2008 district court decisions in this Circuit cases applying the *Goldherger* factors shows a percentage-of-the-fund range between 10% and 25% to be reasonable); *see also In re Excess Value Ins. Coverage Litig.,* 598 F.Supp.2d 380, 385–387, 391 (S.D.N.Y.2005) (approving a fee of 30% of the constructive value of the "total fund"). An Attorneys' Fee Payment of approximately 7.6% falls well within the standard of reasonableness articulated in this Circuit.

C. The Requested Attorneys' Fee Payment Is Fair And Reasonable Based On All Six *Goldberger* Factors.

In *Goldberger,* the Second Circuit held that:

> [N]o matter which method is chosen, district courts should continue to be guided by the traditional criteria in determining a reasonable common fund fee, including: '(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.'

Goldberger, 209 F.3d at 50 (citation omitted).

As set forth below, the $18 million fee award sought by Co–Lead Counsel is fair and reasonable based on all six *Goldberger* factors.

1. The Time and Labor Expended by Counsel

The first factor for determining whether a fee is reasonable is " 'the time and labor expended by counsel.' " *Id.* As of February 8, 2014, Co–Lead Counsel and their staffs have spent more than 9,964 hours of professional time representing the interests of the Class, at a time value of $5,853,767 plus expenses of $52,812, for a total of $5,906,579.

Firm	Hours	Lodestar
Entwistle & Cappucci LLP	7,397.9	4,015,276.00
Hagens Berman Sobol Shapiro LLP	2,566.3	$ 1,848,491.75
Total	**9,964.2**	$ 5,863,767.75

***20** *See* Joint Attorneys' Fee Declaration, ¶¶ 7–10.

The work performed by counsel to date has been complex and wide ranging. Settlement ¶ L–M. Co–Lead Counsel conducted an independent and exhaustive investigation of the relationship between BLMIS and JPMorgan, including JPMorgan's activities as BLMIS's bank; reviewed and analyzed document productions by JPMorgan and the SIPA Trustee totaling more than a million pages; reviewed and analyzed Bankruptcy Rule 2004 examinations, trial and other Madoff related testimony; reviewed numerous related Madoff documents, including materials developed in related investigations by regulators and others; developed expert testimony on related issues and conducted their own interviews of numerous JPMorgan senior executive witnesses.

Accordingly, the time and effort devoted by Co–Lead Counsel to obtain $218 million on behalf of the Settlement Class well justifies the requested Attorneys' Fee Payment.

2. The Magnitude and Complexities of the Litigation

The Attorneys' Fee Payment is reasonable in light of the magnitude and complexity of the Class Action. As is now well documented, in December 2008, it was revealed that Madoff and BLMIS perpetrated the largest Ponzi scheme in history. Plaintiffs allege that JPMorgan played a central role in the Ponzi scheme perpetrated by Bernard L. Madoff and BLMIS. Plaintiffs contend that JPMorgan had actual knowledge of the scheme, was in a position to stop it, but did nothing. From approximately 1986 on, Madoff's primary account through which most, if not all, of the funds of BLMIS flowed, was a depository account at JPMorgan referred to as the "703 Account." In addition, Plaintiffs allege that JPMorgan acquired knowledge of the Ponzi scheme in connection with the structuring and issuing of certain financial products that would be based on feeder funds tied to Madoff. In connection with those transactions, JPMorgan performed due diligence on the feeder funds, and since these funds were invested with Madoff, attempted unsuccessfully to perform due diligence on BLMIS itself.

Plaintiffs' investigations into JPMorgan's involvement with Madoff focused on, *inter alia,* numerous round trip transactions involving Madoff's friend and insider Norman Levy, structured products very early in the relevant period, and the fees received by JPMorgan in connection with Madoff, including those related to the 703 Account.

On March 9, 2012, JPMorgan moved to dismiss the Class Complaint. One of JPMorgan's primary arguments in support of their motion to dismiss was that the Class Claims (which were common law claims), were all precluded under the Securities Litigation Uniform Standards Act ("SLUSA"). In support of their SLUSA arguments, JPMorgan cited numerous Madoff-related cases from this District, including from this very Court, which dismissed Madoff-related common law claims under SLUSA.[FN122] JPMorgan also moved to dismiss on the basis that the Class Complaint failed to state a claim for relief, contending, among other things, that the complaint does not show JPMorgan's actual knowledge of or participation in Madoff's fraud. Co–Lead Counsel opposed the motion to dismiss and continued their ongoing investigation of the facts and circumstances related to Madoff generally and JPMorgan's involvement in Madoff specifically.

FN122. *See, e.g., In re J.P. Jeanneret Assocs., Inc.,* 769 F.Supp.2d 340 (S.D.N.Y.2011) (McMahon, J.); *See also, In re Herald,* 730 F.3d 112, 118 (2d Cir.2013), decided while JPMorgan's motion to dismiss was *sub judice.*

***21** As a threshold matter, the issues in the case are novel and complex given that the case involves the largest Ponzi scheme in U.S. history. Co–Lead Counsel has researched and evaluated novel and complex claims and areas of law arising from the unprecedented fraud. In sum, through the combined efforts of Co–Lead Counsel and the S1PA Trustee, Customer Class members who have waited over 5 years to recover their losses will be able to partake in the $218 million dollar settlement.

3. The Risks of Litigation

The Second Circuit has identified "the risk of success as 'perhaps the foremost' factor to be considered in determining" a reasonable fee award. *Goldberger,* 209 L.3d at 54 (citation omitted).

a. Risks of Establishing Liability

It is well settled that class actions are notoriously complex and difficult to litigate. *See, e.g., 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) ("Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation"). "The legal and factual issues involved are always numerous and uncertain in outcome." *In re Motorsports Merch. Antitrust Litig.,* 112 F.Supp.2d 1329, 1337 (N.D.Ga.2000).

This litigation is no exception. It involves numerous complex and novel issues of fact and law, and JPMorgan asserted numerous factual and legal defenses to any potential liability.

Moreover, even if JPMorgan was ultimately found liable—a matter JPMorgan vigorously disputes and which is subject to significant uncertainty both factually and legally—additional substantial distributions to Net Losers would be delayed for a number of years.

Assuming the potential claims that Plaintiffs may have brought against JPMorgan would have survived dispositive motion practice, Co–Lead Counsel could not be certain that they would ultimately succeed in achieving a determination of liability against JPMorgan.

b. Risks of Establishing Damages

Even if Plaintiffs were able to defeat dispositive motions and to overcome the risks in proving liability, they would still face the risks of proving damages. Proof of damages in complex class actions is always complex and difficult and often subject to expert testimony. FN123 Here, even if Co–Lead Counsel could prove liability, JPMorgan has asserted substantial arguments in defense that any alleged shortfall was not legally or factually attributable to its conduct and that the shortfall should properly be made up in whole or part through recoveries from other parties.

FN123. *See Am. Booksellers Ass'n v. Barnes & Noble, Inc.,* 135 F.Supp.2d 1031, 1041–43 (N.D.Cal.2001) (“Plaintiffs cannot prove causation of actual [antitrust] injury without ... expert testimony, because only expert testimony can demonstrate that any injury to plaintiffs was caused by defendants' unlawful conduct, and not because of lawful competition or other factors.”).

c. Risks to Counsel

The Second Circuit long ago recognized that courts should consider the risks associated with lawyers undertaking a case on a contingent fee basis. *See City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 470 (2d Cir.1974), abrogated on other grounds by *Goldberger,* 209 F.3d at 39. Districts courts within this circuit have also recognized this risk.FN124

FN124. *See, e.g., Teachers' Ret. Sys.,* 2004 WL 1087261, at *3; *In re Am. Bank Note Holographics, Inc.,* 127 F.Supp.2d 418. 433 (S.D.N.Y.2001) (concluding it is “appropriate to take this [contingent fee] risk into account in determining the appropriate fee to award”) (emphasis omitted); *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.”).

***22** Here, Co–Lead Counsel undertook to represent Plaintiffs and the Customer-victims on a wholly contingent-fee basis. For years, Co–Lead Counsel have invested thousands of hours of time without any guarantee of compensation or even a recovery of out-of-pocket expenses. As this Court stated:

> Indeed, the risk of non-payment in complex cases, such as this one, is very real. There are numerous class actions in which counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise. There is no guarantee of reaching trial, and even a victory at trial does not guarantee recovery.

In re Flag Telecom Holdings, Ltd. See. Litig., No. 02–CV–3400 (CM)(PED), 2010 WL 4537550, at *27 (S.D.N.Y. Nov. 8, 2010) (quotation omitted).

In undertaking to represent Plaintiffs and Customers, Co–Lead Counsel knew that the litigation and related Liquidation Proceedings would be lengthy, complex and labor intensive with no guarantee of compensation for the enormous investment of time and money. To date, counsel has spent 9,964.2 hours representing Customers at a total lodestar of $5,853,767. *See* Joint Attorneys' Fee Declaration, ¶ 7–10. Additionally, Co–Lead Counsel's total out-of-pocket expenses are $52,812. *Id.* Clearly, Co–Lead Counsel undertook enormous financial risks in representing Customers on a contingency basis.

4. The Quality of Representation

The fourth factor cited by the Second Circuit is the “quality of representation” delivered by counsel. *Goldberger,* 209 F.3d at 50. To evaluate this factor, courts in the Second Circuit “review the recovery obtained and the background of the lawyers involved in the lawsuit.” *In re Merrill Lynch Tyco Research Sec. Litig.,* 249 F.R.D. 124, 141 (S.D.N.Y.2008).

FN125

FN125. Moreover, an "indication of the quality of the result achieved is the fact that the Settlement will provide compensation to the [victims] expeditiously." *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 467 (S.D.N.Y.2004).

a. Entwistle & Cappucci LLPFN126

FN126. *See* Joint Attorneys' Fee Declaration, ¶¶ 14–15.

Kntwistlc & Cappucci possesses extensive experience in complex litigation, including class actions, having successfully prosecuted some of the largest and highest-profile class actions in history. As sole or co-lead counsel in class actions, Entwistle & Cappucci has obtained billions of dollars in recoveries on behalf of defrauded class members. *See, e.g., In re Royal Ahold, N.V. Sec. & ERISA Litig.,* No. 03–md–01539–CCB (D. Md. June 16, 2006) (order re-formatted on June 21, 2006) (served as sole lead counsel and obtained a $1.1 billion recovery for the Class); *In re BankAmerica Sec. Litig.,* No. 99–md–1264–CEJ (E.D.Mo. Oct. 18, 2002) ($490 million recovery); *In re DaimlerChiysler AG Sec. Litig.,* No. 00–CV–00993–LPS (D.Del. Feb. 5, 2004) ($300 million recovery).

In addition to its extensive experience leading complex national class actions, Entwistle & Cappucci possesses extensive experience in cases with a liquidation or bankruptcy component. For example, acting as one of the lead counsel in the Tremont Fund Litigation (arising out of the Madoff Ponzi scheme), Entwistle & Cappucci has recovered more than $100 million from third parties, preserved the customers' rights to certain fidelity bond proceeds, and worked with defendants and the SIPA Trustee to negotiate a resolution of certain SIPC claims and related litigation which will result in customers recovering in excess of a billion dollars on those claims. Additionally, Entwistle & Cappucci acted as Special Litigation Counsel to the estate of Global Crossing, Ltd. in prosecuting claims of the estate for the benefit of unsatisfied creditors and was appointed to act as Special Counsel for the Receiver in "clawback" actions on behalf of victims in the Ponzi scheme of Edward T. Stein.

b. Hagens Berman Sobol Shapiro LLP FN127

FN127. *See* Joint Attorneys' Fee Declaration, ¶¶ 17–18.

***23** Hagens Berman is one of the premier law firms in the United States dedicated to the representation of plaintiffs in complex litigation. Hagens Berman collectively possesses hundreds of years of experience in complex litigation of all sorts, including class actions, having successfully prosecuted some of the largest and highest-profile class actions in history. As sole or co-lead counsel in class actions, Hagens Berman has obtained billions of dollars in recoveries on behalf of defrauded class members. *See, e.g., In re Toyota Motor Corp. Unintended Acceleration Mktg. Sales Practices, & Prods. Liab. Litig.,* No. 8:10–ML–2151 JVS (FMOx) (C.D.Cal.) (co-lead counsel; $1.6 billion recovered); *In re Elec. Books Antitrust Litig.,* No. 11–MD–2293 (S.D.N.Y.) (co-lead counsel; litigation still pending; over $100 million recovered to date); *In re Charles Schwab Sec. Litig.,* No. 08–CV–1510 (N.D.Cal.) (sole lead counsel; $235 million recovered); *In re Enron Corp. Sec. Derivative & "ERISA" Litig.,* MDL No. 1446 (S.D.Tex.) (co-lead counsel; over $250 million recovered); *In re Visa Check/ MasterCard Antitrust Litig.,* 96–CV–5238 (E.D.N.Y.) (co-lead counsel; $3.25 billion recovered).

In addition to its extensive experience leading complex national class actions. Hagens Berman possesses extensive experience in cases with a liquidation or bankruptcy component. For example, along with co-lead counsel in this case (Entwistle & Cappucci) acting as one of the lead counsel in the Tremont Fund Litigation (arising out of the Madoff Ponzi scheme), Hagens Berman has recovered more than $100 million from third parties, preserved the customers' rights to certain fidelity bond proceeds, and worked with defendants and the SIPA Trustee to negotiate a resolution of certain SIPC claims and related litigation which will result in customers recovering in excess of a billion dollars on those claims.

5. The Requested Fee in Relation to the Settlement

As discussed above, Co–Lead Counsel has expended many thousands of hours representing the interests of the Class and, in conjunction with the SIPA Trustee, has achieved the Settlement that will result in a total $218 million cash payment to the Class. Accordingly, the requested Attorneys' Fee Payment, which comprises only approximately 7.6% of the total combined payments by JPMorgan, is well within the range of reasonableness compared to similar settlements in this district.[FN128]

FN128. *See, e.g., Fogarazzo v. Lehman Bros., Inc.,* No. 03 Civ. 5194(SAS), 2011 WL 671745, at *4 (S.D.N.Y. Feb.23, 2011) (one-third of $2.25 million settlement); *Flag Telecom,* 2010 WL 4537550, at *31 (30% of $24.4 million settlement, less expenses); *In re Bisys Sec. Litig.,* No. 04 Civ. 3840(JSR), 2007 WL 2049726, at *2–3 (S.D.N.Y. July 16, 2007) (30% of $65.87 million settlement); *In re Priceline.com, Inc. Sec. Litig.,* No. 3:00–CV–1884(AVC), 2007 WL 2115592, at *4–5 (D.Conn. July 20, 2007) (30% of $80 million settlement); *Hicks,* 2005 WL 2757792, at *9 (30% of $10 million settlement); *In re Warnaco Grp., Inc., Sec. Litig.,* No. 00 Civ. 6266(LMM), 2004 WL 1574690, at *3 (S.D.N.Y. July 13, 2004) (30% of $12.85 million settlement); *In re Blech Sec. Litig.,* No. 94 Civ. 7696(RWS), 2002 WL 31720381, at *1 (S.D.N.Y. Dec.4, 2002) (33.3% of settlement); *Kurzweil v. Philip Morris Cos., Inc.,* No. 94 Civ. 2373(MBM), 1999 WL 1076105, at *1 (S.D.N.Y. Nov.30, 1999) (30% of $123.82 million settlement); *Becher v. Long Island Lighting Co.,* 64 F.Supp.2d 174, 182 (E.D.N.Y.1999) (one-third fee, plus expenses, is "well within the range accepted by courts in this circuit"); *In re Med. X–Ray Film Antitrust Litig.,* No. CV–93–5904, 1998 WL 661515, at *7 (E.D.N.Y. Aug.7, 1998) (awarding 33.3% of $39.36 million after concluding such an award is "well within the range accepted by courts in this circuit").

6. Public Policy Considerations

Congress viewed private lawsuits as "critical to protecting the public and fundamental to maintaining the credibility of the futures market." *Cange v. Slotler & Co.,* 826 F.2d 581, 594–595 (7th Cir.1987) *citing* to H.R.Rep. No. 97–565(II), pt. 1, at 56–7 (1982) , *reprinted* in 1982 U.S.C.C.A.N. 4022, 1982 WL 25140.

In *In re Initial Public Offering Securities Litigation,* 671 F.Supp.2d 467, 515–16 (S.D.N.Y.2009), this Court recognized the importance of private enforcement actions and the corresponding need to incentivize attorneys to pursue such actions on a contingency fee basis:

***24** [C]lass actions serve as private enforce-

> ment tools when ... regulatory entities fail to adequately protect investors ... plaintiffs' attorneys need to be sufficiently incentivized to commence such actions in order to ensure that defendants who engage in misconduct will suffer serious financial consequences ... awarding counsel a fee that is too low would therefore be detrimental to this system of private enforcement.

See also *Maley,* 186 F.Supp.2d at 374 ("Private attorneys should be encouraged to take the risks required to represent those who would not otherwise be protected from socially undesirable activities").

Public policy considerations here strongly support the requested Attorneys' Fee Payment. Skilled counsel must be incentivized to pursue complex and risky claims such as those at issue here.

D. The Requested Attorneys' Fees Are Also Reasonable Under The Lodestar Cross–Check With A Reasonable Multiplier.

The Second Circuit has approved district courts' use of counsel's lodestar as a "cross check" to ensure the reasonableness of a fee awarded under the percentage-of-the-fund method. *See Goldberger,* 209 F.3d at 50. Where counsel's lodestar is used as a cross-check, "the hours documented by counsel need not be exhaustively scrutinized by the district court." *Id.* Instead, "the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case." *Id.*

A lodestar analysis begins with the calculation of the lodestar, which is "comprised of the amount of hours devoted by counsel multiplied by the normal, non-contingent hourly billing rate of counsel." *Prudential,* 985 F.Supp. at 414.

Additionally, "[u]nder the lodestar method, 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 Marsh & McLennan Cos., Inc. Sec. Litig.,* No. 04 Civ. 8144(CM), 2009 WL 5178546, at *20 (S.D.N.Y. Dec.23, 2009) (citing *Goldberger,* 209 F.3d at 47); *Savoie,* 166 F.3d at 460.

"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." *In re Comverse Tech., Inc. Sec. Litig.,* No. 06 CV 1825(NGG), 2010 WL 2653354, at *5 (E.D.N.Y. June 24, 2010) (multiplier of 2.78 was "well within the range awarded in comparable settlements.").

"Lodestar multipliers of nearly 5 have been deemed 'common' by courts in this District." *In re EVCI Career Colls. Holding Corp. Sec. Litig.,* No. 05 Civ. 10240(CM), 2007 WL 2230177, at *56 n. 7 (S.D.N.Y. July 27, 2007); *accord* *Wal–Mart,* 396 F.3d at 123 (finding as reasonable a lodestar multiplier of 3.5) (citing *NASDAQ,* 187 F.R.D. at 489 (holding that " 'multipliers of between 3 and 4.5 have become common' ")); *see also,* *In re Worldcom, Inc. Sec. Litig.,* 388 F.Supp.2d 319, 354–59 (S.D.N.Y.2005) (approving $194.6 million fee, for a lodestar multiplier of 4.0). Under these circumstances, a lodestar multiplier of approximately 3.05 is reasonable and appropriate.

E. The Requested Attorneys' Fees Are Reasonable Under Either The Percentage–Of–The–Fund Method Or Lodestar Analysis.

***25** Under either analysis—percentage-of-the-fund or lodestar—the fees awarded in common fund cases must be "reasonable" under the circumstances. *Goldberger,* 209 F.3d at 47. The Attorneys' Fee Payment requested is well within the range of fees awarded by courts in this Circuit, whether considered as a percentage-of-the-fund or as a reasonable multiple of counsel's lodestar.

F. Courts Favorably View Fees Negotiated By Settling Parties.

Although the fee in this action was separately negotiated by JPMorgan subsequent to the Settlement, common fund principles are applicable. Co–Lead Counsel are entitled to a reasonable fee for the substantial benefit achieved on behalf of the Class. That the Attorneys' Fee Payment was later separately negotiated weighs in favor of its reasonableness. *See, e.g., Dupler v. Costco Wholesale Corp.,* 705 F.Supp.2d 231, 244 (E.D.N.Y.2010) ("the fact that the parties did not negotiate the issue of attorneys' fees until after deciding on the benefit to the class weighs in favor of the reasonableness of the fees") (internal citation omitted); *In re Sony SXRD Rear Projection Television Class Action Litig.,* No. 06 Civ. 5173(RPP), 2008 WL 1956267, at *15 (S.D.N.Y. May 1, 2008) ("[T]he fee was negotiated only *after* agreement had been reached on the substantive terms of the Settlement benefitting the class. This tends to eliminate any danger of the amount of attorneys' fees affecting the amount of the class recovery.") (internal citation omitted).

G. Co–Lead Counsel's Expenses Were Reasonable And Necessary.

"Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course." *In re Arakis Energy Corp. Sec. Litig.,* No. 95–CV–3431(ARR), 2001 WL 1590512, at *17 n. 12 (E.D.N.Y. Oct.31, 2001).

Here, the expenses of Co–Lead Counsel totaled a relatively modest $52,812. No separate payment is requested for such expenses, which are included in the requested Attorneys' Fee Payment.

CONCLUSION

For the foregoing reasons, the Court hereby: (1) certifies the proposed Class for purposes of this Settlement; (2) finds that the Class notice was fair, adequate and reasonable and in compliance with due process, Rule 23 and the Court's prior orders; (3) appoints Entwistle and Cappucci and Hagens Berman Sobol Shapiro as Settlement Class Counsel; (4) grants final approval of the Settlement Agreement and Plan of Allocation; (5) authorizes Settlement Class Counsel to make disbursements to Class members; and (6) awards attorneys' fees and expenses in the amount of $18,000,000. The Clerk of the Court is directed to remove Docket Nos. 58 and 61 in Case No. 11–cv–8331 and Docket Nos. 22 and 25 in Case No. 11–cv–7961 from the Court's list of pending motions and to close the files.

S.D.N.Y.,2014.
Shapiro v. JPMorgan Chase & Co.
Slip Copy, 2014 WL 1224666 (S.D.N.Y.)

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
TEACHERS' RETIREMENT SYSTEM OF LOUISIANA, individually and on behalf of itself and all others similarly situated, Plaintiff,
v.
A.C.L.N., LIMITED, Joseph J.H. Bisschops, Aldo Labiad a/k/a Abderrazak Labiadh, Alex De Ridder, Christian L. Payne, Michael S. Doherty, Earl Gould, Charles L. Brock, Marina Savva, Yiannakis Economides, BDO International, BDO International Accountants & Consultants (Cyprus), BDO Seidman, LLP, and BDO International B.V., Defendants.

No. 01–CV–11814(MP).
May 14, 2004.

Partial Settlement Pursuant to Rule 23(e)
POLLACK, Senior J.
DECISION

***1** On January 23, 2004, Lead Plaintiff, acting on behalf of itself and the Class, entered into a Stipulation and Agreement of Settlement (the “Settlement Stipulation”) with A.C.L.N., Limited (“ACLN” or the “Company”), and certain of ACLN's officers and directors, namely Aldo Labiad a/k/a Abderrazak Labaidh, Christian L. Payne, Michael S. Doherty, Earl Gould and Charles L. Brock (collectively the “Settling Defendants”). The claims against defendants Joseph J.H. Bisschops (ACLN's chairman and managing director), Alex de Ridder (ACLN's Chief Operating Officer and Chief Financial Officer), and directors Marina Savva and Yiannakis Economides will be released. Not covered by the Settlement are defendants BDO International, BDO International Accountants & Consultants (Cyprus) (“BDO–Cyprus”), BDO Seidman, LLP (“Seidman”), and BDO International B.V. (“BDO B.V.”). Plaintiffs' Counsel are continuing to prosecute the Action against these latter defendants, collectively referred to herein as the “BDO Entities.”

The Settlement Stipulation is now before the Court pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, after reasonable notice to all members of the Class, for a determination, after a hearing, that the Settlement is fair, reasonable, and adequate, and incident thereto, for the allowance of counsel fees and expenses and the establishment of a litigation fund to pay additional costs incurred in the continuing prosecution of the Action against the BDO Entities not part of the Settlement.

The Settlement provides for the payment of $5.5 million in cash plus accrued interest thereon, less certain amounts. The $5.5 million is being maintained in an escrow account (the “Escrow Account”) and is earning interest for the benefit of the Class. The money comes from ACLN's $10 million Directors and Officers (“D & O”) insurance policy.

Additional consideration for the Settlement is the agreement of the Settling Defendants to cooperate with Lead Counsel in the continuing prosecution of the Action against the BDO Entities. Finally, in conjunction with the settlement negotiations, Lead Counsel has agreed with the SEC to jointly develop a plan of allocation for the Net Settlement Fund in the Action and any recovery the SEC may obtain in its action against ACLN. The plan provides for a joint distribution of the funds through one claims administrator.

I. *The Settlement*

The standards governing approval of class action settlements are well-established in this Circuit. In evaluating a proposed settlement under Fed R. Civ. P. 23(e), the Court must determine whether the settlement, taken as a whole, is fair, reasonable, and adequate. *Maywell v. Parker & Parsley Petroleum Co.,* 67 F.3d 1072, 1079 (2d Cir.1995). A proposed class action settlement enjoys a strong presumption that it is fair, reasonable, and adequate if, as here, it was the product of arm's length negotiations conducted by capable counsel experienced in class action litigation arising under the federal securities laws, and if it occurred after meaningful discovery. *See, e.g., In re PaineWebber Ltd. P'ships Litig.,* 171 F.R.D. 104, 124 (S.D.N.Y.1997), *aff'd,* 117 F.3d 721 (2d Cir.1997); *New York & Maryland v. Nintendo of Am ., Inc.,* 775 F.Supp. 676, 680–81 (S.D.N.Y.1991); *see also Manual for Complex Litigation, Fourth* § 21.612 (2004) ("Extended litigation between or among adversaries might bolster confidence that the settlement negotiations were at arm's length.")

***2** In *City of Detroit v. Grinnell Corp.,* 495 F.2d 448 (2d Cir.1974) (*"Grinnell"*), the Second Circuit provided a nonexhaustive list of factors to consider in reviewing a settlement proposal:

> (1) the complexity, expense and likely duration of the litigation ...; (2) the reaction of the class to the settlement ....; (3) the stage of the proceedings and the amount of discovery completed ...; (4) the risks of establishing liability ...; (5) the risks of establishing damages ...; (6) the risks of maintaining the class action through the trial ...; (7) the ability of the defendants to withstand a greater judgment ...; (8) the range of reasonableness of the settlement fund in light of the best possible recovery ...; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation....

495 F.2d at 463 (citations omitted); *See also In re Sumitomo Copper Litig.,* 189 F.R.D. 274, 281–84 (S.D.N.Y.1999) (following and applying *Grinell* factors).

The proposed Settlement is fair, reasonable, and adequate when measured under the foregoing criteria.

A. *The Complexity, Expense and Likely Duration of the Litigation*

Many of the defendants, witnesses and documents are beyond the subpoena power of the Court and many relevant documents have been seized by foreign government authorities and may not be available. The number of defendants with divergent interests is also a factor. Because of the Private Security Litigation Reform Act of 1995 ("PSLRA")'s provision for proportional fault, even as to the Settling Defendants, it was expected that they would present their own "unique" defenses and experts in support thereof.

While the Action proceeds against the BDO Entities, there would, absent the proposed Settlement, be significant additional resources needed to prosecute the claims against the Settling Defendants throughout the completion of expert discovery, summary judgment motions, the completion of pretrial and trial proceedings, and the post-trial motions and appeals they might file. Moreover, any appeals would substantially delay any payment to Class Members, even if Lead Plaintiff were to prevail.

B. *The Reaction of the Class to the Settlement*

Pursuant to this Court's Order,[FN1] a printed Notice of Pendency of Class Action, Hearing on Partial Settlement and Attorneys' Fee Petition and Right to Share in Settlement Fund (the "Notice"), in form approved by the Court, was mailed to more than 15,000 potential Class Members beginning on March 15, 2004, and a Summary Notice of Pendency of Class Action, Proposed Partial Settlement and Settlement Hearing (the "Publication Notice"), in form approved by the Court, was published in the national edition of *The Wall Street Journal* on March 25, 2004. The Notice contained a detailed description of the nature and procedural history of the Action, the terms of the Settlement, the average recovery per share and the claims that will be released in the Settlement, and Lead Counsel's fee and expense application. The Notice also advised Class Members of their right to object to the Settlement, and/or the fee and expense application, or to opt out of the Class by no later than April 30, 2004.

> FN1. On February 18, 2004, the Court preliminarily approved the Settlement, set a hearing on May 14, 2004 to determine the fairness, reasonableness and adequacy of the Settlement (the "Settlement Hearing") and directed that notice of the proposed Settlement and the Settlement Hearing be given to the Class.

***3** No Class Member has filed an objection to the proposed Settlement and only eleven persons have requested to be and are opted out of the Class. These persons are as follows: Mary Arena; Richard W. Burg; David Freeman; the Freeman Family Partnership, A Texas Limited Partnership composed of David R. Freeman and Margaret Freeman; William Massatis; Thomas S. Pratt; Christopher Scott; Cordia V. Scott; Douglas P. Scott; Jo Ann W. Scott; and Morris Smith.

The overwhelmingly positive reaction of the Class to the proposed Settlement supports its approval by the Court. *See Grinnell,* 495 F.2d at 462 (approving settlement where only 20 objectors appeared from group of 14,156 claimants).

C. *The Stage of the Proceedings and the Amount of Discovery Completed*

To approve a proposed settlement "the Court need not find that the parties have engaged in extensive discovery." *In re Austrian & German Bank Holocaust Litig.,* 80 F.Supp.2d 164, 176 (S.D.N.Y.2000) (citing *Plummer v. Chem. Bank,* 608 F.2d 654 (2d Cir.1982)). "Instead, it is enough for the parties to have engaged in sufficient investigation of the facts to enable the Court to 'intelligently make ... an appraisal' of the Settlement." *Holocaust Litig., Id.*

This threshold was easily met here. Prior to executing the Stipulation, Lead Counsel investigated the events and transactions alleged in the Action, reviewed and analyzed enormous numbers of documents produced by the Settling Defendants and others, and retained and consulted with expert witnesses in damages and forensic accounting. *See* Berger Decl. ¶¶ 9, 25, 29, 36–38, 42–44. Lead Plaintiff had a wealth of information at its disposal gleaned from more than two years of investigation and litigation before entering into the Settlement Stipulation. Lead Plaintiff and Lead Counsel engaged in sufficient document discovery and sufficient discussions about the merits of the Action to fully evaluate the merits of the claims and the obstacles to success. Thus the parties "have a clear view of the strengths and weaknesses of their cases." *In re Warner Communications Sec. Litig.,* 618 F.Supp. 735, 745 (S.D.N.Y.1985) *aff'd,* 798 F.2d 35 (2d Cir.1986).

D. *The Risks of Establishing Liability, Damages, and in Maintaining the Class Action Through the Trial*

Grinnell holds that in assessing the fairness, reasonableness, and adequacy of a settlement, courts should consider such factors as the "risks of establishing liability," "the risks of establishing damages," and "the risks of maintaining the class action throughout the trial." *Grinnell,* 495 F.2d at 463 (citations omitted). Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation.

The risks to establishing the Settling Defendants' liability were augmented by the fact that ACLN is a foreign company; many of the Company's records which were located abroad had been seized by various government and regulatory agencies and thus availability was doubtful. Moreover, virtually all potential witnesses with knowledge as to ACLN's operations, as well as many of the named ACLN Defendants, are foreigners and are beyond the subpoena power of the Court. While the Settling Defendants would have been able to call live witnesses in support of their position, Plaintiffs would have been forced to rely primarily on videotaped deposition testimony of defendants and third parties to prove their case.

***4** In addition to the risks unique to the Action, Lead Plaintiff also faced significant risks in establishing damages. Experts could be expected on each side to present sophisticated analyses and methods for calculating damages, and it is impossible to predict with certainty which testimony or method might be accepted by a jury. *PaineWebber Ltd. P'ships Litig.,* 171 F.R.D. at 129 ("[D]amages are a matter for the jury, whose determinations can never be predicted with certainty"). There was thus considerable risk that a jury might disagree with Lead Plaintiff's analysis.

E. *Collectability and the Ability of the Defendants to Withstand a Greater Judgment*

The proposed Settlement is for an amount significantly less than the damages Lead Plaintiff and Lead Counsel believe would be attributable to the Settling Defendants. Berger Decl. Exhibit A, Reeves Decl. ¶ 14. Nevertheless, the Settlement is an excellent result under the circumstances.

The overriding consideration driving the settlement negotiations was the inability of the Settling Defendants to contribute in any meaningful way to a recovery by the Class. The Company was defunct and the individual settling defendants did not have any meaningful resources to satisfy a judgment.

To the extent that ACLN may have had any remaining assets, they had been seized by various authorities and there was no assurance that the judgment here could be enforced abroad. Moreover, even if the judgment were recognized, the Class might be vying with other claimants for the same funds. Based on the Settling Defendants' representations, which it was made clear were subject to confirmation, the only practical available source of recovery for the Class was the D & O insurance policy. Given that the insurance policy was a "wasting" asset that would be used to pay the defense costs of the four firms representing the Settling Defendants, it was clear that even if Plaintiffs were able to establish Settling Defendants' liability at trial and even if the jury accepted Plaintiffs' damage analyses, by that point the only meaningful source of recovery, the insurance policy, would in all likelihood have been substantially reduced or exhausted.

The risks to collectability were further compounded by the risk that the insurer would disclaim. This was not a theoretical or remote risk given that early in the settlement negotiations, the insurer took steps to rescind the policy based on ACLN's alleged fraud in the inducement; specifically ACLN's alleged misrepresentations in its SEC-filed financial report for the year ending December 31, 1999.

The proposed Settlement was contingent upon Lead Counsel's receipt of sufficient documentation to support Settling Defendants' representations that they lacked any meaningful resources from which plaintiffs could recover. Lead Counsel received statements under oath regarding the Settling Defendants' net worth and other documentation including tax returns, statements of accounts, insurance policies and certified lists of transactions in ACLN securities during the Class Period. The information was reviewed and analyzed by Lead Counsel who determined that the information supplied confirmed that the individual defendants did not have any meaningful assets that could be used to satisfy a judgment the Class might obtain.

F. *The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and in Light of All the Attendant Risks of Litigation*

***5** In order to calculate the "best possible" recovery, the Court must assume complete victory on both liability and damages as to all class members on every claim asserted against each defendant in the Action. Courts agree that "[r]easonableness is not a standard susceptible to a mathematical equation yielding a sum certain." *In re Union Carbide Corp. Consumer Products Bus. Sec. Litig,* 718 F.Supp. 1099, 1103 (S.D.N.Y.1989); *In re Paine Webber Ltd. P'ships Litig.,* 171 F.R.D. at 130. Rather, there is "a range of reasonableness with respect to a settlement." *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir.1972). "That a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell,* 495 F.2d at 455. "There is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Id.* at 455 n. 2.

While Lead Counsel believes that, despite the obstacles facing Lead Plaintiff on the issues of liability and damages, it would be able to prove its claims and obtain a verdict for substantial damages for the members of the Class, a successful proof might result in a victory in form only. The costs of Defense Counsel's services and the significant additional costs of separate liability and damages experts might have consumed in its entirety the proceeds of the insurance policy, the only meaningful source of recovery.

Above all, the proposed Settlement provides for payment to Class members now, not some speculative payment of a hypothetically larger amount years down the road. "[M]uch of the value of a settlement lies in the ability to make funds available promptly." *In re "Agent Orange" Prod. Liab. Litig.,* 611 F.Supp. 1396, 1405 (E.D.N.Y.1985), *modified on other grounds,* 818 F.2d 179 (2d Cir.1987). Given the obstacles and uncertainties attendant to this complex litigation, the proposed Settlement is within the range of reasonableness, and is unquestionably better than the other likely possibility – little or no recovery.

II. *Expenses, Litigation Fund, and Fees*

Lead Counsel, on behalf of Plaintiffs' Counsel, is applying for an award of attorneys' fees in the amount of 20% of the Settlement Amount plus accrued interest thereon, for reimbursement of out-of-pocket expenses incurred in connection with the prosecution of the Action up through February 29, 2004 in the amount of $464,444 .78, and for the establishment of a litigation fund in the amount of $250,000 to defray the ongoing costs incurred in connection with the continuing prosecution of the Action against the BDO Entities. Lead Counsel also suggests reserving $100,000 to pay the estimated costs and expenses associated with the administration of the Settlement and the provision of notice to the Class.

A. *Expenses Already Incurred*

***6** Reimbursement of expenses incurred on behalf of the Class in common fund cases is appropriate. *See In re Arakis Energy Corp ., Sec. Litig.,* No. 95 CV 3431, 201 WL 1590512, at *17 n. 12 (E.D.N.Y. Oct. 31, 2001); *In re McDonnell Douglas Equip. Leasing Sec. Litig.,* 842 F.Supp. 733, 746 (S.D.N.Y.1994). The Berger Declaration and Exhibits D and E thereto demonstrate that $464,444.78 in expenses have been incurred on behalf of the Class, and that amount is deductible from the gross recovery of $5.5 million. The amount is less than the estimated expenses of $500,000 contained in the Notice, and is reasonable given, among other things, the complexity of the litigation, the stage of the proceedings, the amount of discovery completed, the out of town travel required, service of process through the Hague Convention, and the use of forensic accounting and damages experts.

B. *The $250,000 Litigation Fund*

Lead Counsel requests that $250,000 of the Settlement Amount be set aside to fund the continued prosecution of the Action against the BDO Entities. The Application for reimbursement of expenses only covers expenses incurred through February 29, 2004. Since that time, Plaintiffs' Counsel have already incurred and expect to incur significant additional expenses on behalf of the remaining claims. For example, four depositions have been taken in March and April 2004 and an additional eight are scheduled. In conjunction with each of these depositions there will be the cost of the court reporter and possibly a videographer. Also, expert discovery is scheduled. Lead Plaintiff, an institutional investor with a significant financial stake in the outcome of the litigation, has approved the establishment of such a fund. *See* Berger Decl. Exhibit A, Reeves Decl. ¶¶ 20–22. It is so Ordered and said sum may be deducted from the recovery.

C. *Administering the Settlement and Providing Notice to the Class*

Costs and expenses associated with the final administration of the Settlement and notices to the Class are estimated by Lead Counsel to involve approximately $100,000. The Court is prepared to rely upon the estimates of Plaintiffs' Counsel, and such sum may be deducted from the recovery.

D. *The Fees*

In assessing fees payable to counsel, the Second Circuit has held that "district courts should continue to be guided by the traditional criteria" set forth in *Grinnell.*

Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 47 (2d Cir.2000) ("Goldberger"). Those factors include:

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

Goldberger, 209 F.3d at 50.

11,801.66 hours were spent by the plaintiffs' firms on this case and attest to their extensive efforts.

Here, through the many proceedings before this Court, the Court has witnessed first hand the quality of services rendered by Lead Counsel in prosecuting this Action. The skill and prior experience of Plaintiffs' Counsel are also relevant in determining fair compensation. *In re Union Carbide Corp.,* 724 F.Supp. 160, 165 (S.D.N.Y.1989). Exhibit F of the Berger Declaration includes descriptions of the background and experiences of each of the plaintiffs' counsel which assisted Lead Counsel in prosecuting this action. As these submissions demonstrate, Plaintiffs' Counsel have expertise in the specialized field of shareholder securities litigation.

***7** The quality of opposing counsel is also relevant in evaluating the quality of services rendered by Plaintiffs' Counsel. *See, e.g., Warner Communications Sec. Litig.,* 618 F.Supp. at 749. Settling Defendants are represented by four nationally prominent firms of undeniable experience and skill.

In order to determine a reasonable fee for the services of counsel, it is necessary to understand what counsel has actually accomplished for their clients, the class members. This can only be done when the expenses paid by the class are deducted from the gross settlement. The amount that remains, the adjusted gross settlement, represents what counsel has been able to achieve for the benefit of the class. *Cf.* 15 U.S.C. § 77z–1(a)(6) (*"Total attorneys' fees and expenses* awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.") (emphasis added).

In this case the amount actually distributable to the Class is prospectively as follows: $5.5 million in cash plus interest thereon less: (1) $464,444.78 for reimbursable expenses incurred through February 29, 2004; (2) $250,000 for the Litigation Fund; (3) $100,000 for the estimated cost of administration of the Settlement and notice thereof to the Class, and (4) attorneys' fees. In other words, a distribution of $4,685,555.30 is available to the class, less attorneys' fees. Given the totality of the circumstances in this case, reasonable fees are fixed and shall be payable at 20% of the adjusted gross settlement of $4,685,555.30, or $937,111.06. That leaves the Class with $3,748,444.30, or approximately 63.2% of the recovery from the Settling Defendants.

III. *Additional Findings*

The Second Consolidated and Amended Class Action Complaint dated December 19, 2002, which was further amended on June 13, 2003 and August 8, 2003, which the Court finds, as to the claims asserted against the Settling Defendants, was filed in accordance with Fed.R.Civ.P. 11, is hereby dismissed in its entirety as to the Settling Defendants, with prejudice, and without costs to any party.

Upon the Effective Date, by operation of this Decision and the Final Judgment to be entered hereon, each Class Member, whether or not such Class Member executes and delivers a Proof of Claim and Release, other than those who have filed timely requests to be excluded from the Class, shall have fully, finally, and forever released, relinquished and discharged all Settled ACLN Claims against the Released Defendant Parties.

Upon the Effective Date, by operation of this Decision and the Final Judgment to be entered hereon, all members of the Class should be and are forever barred and enjoined from prosecuting the Settled ACLN Claims against any of the Released Defendant Parties.

Upon the Effective Date, by operation of this Decision and the Final Judgment to be entered hereon, each Released Defendant Party, shall have fully, finally, and forever released, relinquished and discharged all Settled ACLN Defendants' Claims and should be and are barred and enjoined from prosecuting any of the Settled ACLN Defendants' Claims.

***8** This Decision and the Final Judgment to be entered thereon, and the Settlement Stipulation, and all papers related thereto are not, and shall not be construed to be, an admission by any of the Settling Defendants of any liability or wrongdoing whatsoever, and shall not be offered as evidence of any such liability or wrongdoing in this or any other proceeding.

The administration of the Settlement, and the decision of all disputed questions of law and fact with respect to the validity of any claim or right of any Person to participate in the distribution of the Settlement Fund should and shall remain under the authority of this Court.

Any Non–Settling Defendant should be and is barred from asserting any Claim arising out of or relating to the Complaints, (including, without limitation, claims for contribution and equitable indemnity) by which any Non–Settling Defendant attempts to recover from the Settling Defendants losses arising as a result of claims made by the Plaintiffs on behalf of themselves or any portion of the Class against any Non–Settling Defendant. Notwithstanding the dismissal of the Settling Defendants provided for hereafter, if there is a final verdict or judgment against any or all Non–Settling Defendants in this action, the total amount of such verdict(s) or judgment(s) shall be reduced by the greater of (a) an amount that corresponds to the percentage of responsibility of the Settling Defendants; or (b) the amount paid to plaintiffs by the Settling Defendants.

The Settling Defendants should be and are barred from asserting any Claim arising out of the Complaints, (including, without limitation, claims for contribution and equitable indemnity) by which the Settling Defendants attempt to recover from any Non–Settling Defendant monies paid to settle the Action.

CONCLUSIONS

A. The Settlement of the Action with the Settling Defendants on the terms and conditions set forth in the Settlement Stipulation is, after hearing, determined in all respects to be fair, reasonable and adequate and is hereby approved pursuant to Rule 23(e) of the Federal Rules of Civil Procedure.

B. Eleven persons have requested to be

and are opted out of the Class. These persons are as follows: Mary Arena; Richard W. Burg; David Freeman, the Freeman Family Partnership, A Texas Limited Partnership composed of David R. Freeman and Margaret Freeman; William Massatis; Thomas S. Pratt, Christopher Scott; Cordia V. Scott, Douglas P. Scott, Jo Ann W. Scott, and Morris Smith.

C. Expenses of $464,444.78 incurred by Plaintiffs' Counsel on behalf of the Class shall be reimbursed from the Escrow Account, and this reimbursement shall be allocated among Plaintiffs' Counsel by Lead Counsel in a fashion which fairly compensates each Plaintiffs' Counsel in view of their respective contributions to the prosecution and settlement of the Action.

D. A fund of $100,000 is to be set aside from the Escrow Account to cover the costs and expenses associated with the administration of the Settlement and notices to the Class.

***9** E. A litigation fund in the amount of $250,000 (the "Litigation Fund") shall be established out of the Escrow Account. The Litigation Fund shall be used to fund the continued prosecution of the Action on behalf of the Class against the remaining defendants, the BDO Entities. Lead Counsel is permitted to draw against the Litigation Fund without further order of the Court to pay costs of the continued prosecution of the Action against the BDO Entities.

F. Attorneys' fees of $937,111.06 shall be paid from the Escrow Account in accordance with Paragraph 14 of the Settlement Stipulation. Attorneys' fees shall be allocated among Plaintiffs' Counsel by Lead Counsel in a fashion which fairly compensates each Plaintiffs' Counsel in view of their respective contributions to the prosecution and settlement of the Action.

G. Upon the Effective Date, by operation of said Decision and the Final Judgment thereon, each Class Member, whether or not such Class Member executes and delivers a Proof of Claim and Release, other than those who have filed timely requests to be excluded from the Class, shall have fully, finally, and forever released, relinquished and discharged all Settled ACLN Claims against the Released Defendant Parties.

H. Upon the Effective Date, by operation of said Decision and the Final Judgment thereon, all members of the Class are forever barred and enjoined from prosecuting the Settled ACLN Claims against any of the Released Defendant Parties.

I. Upon the Effective Date, by operation of said Decision and the Final Judgment thereon, each Released Defendant Party, shall have fully, finally, and forever released, relinquished and discharged all Settled ACLN Defendants' Claims and shall forever be barred and enjoined from prosecuting any of the Settled ACLN Defendants' Claims.

J. Said Decision and the Final Judgment thereon, and the Settlement Stipulation, and all papers related thereto are not, and shall not be construed to be, an admission by any of the Settling Defendants of any liability or wrongdoing whatsoever, and shall not be offered as evidence of any such liability or wrongdoing in this or any other proceeding.

K. The administration of the Settlement, and the decision of all disputed questions of law and fact with respect to the validity of any claim or right of any Person to participate in the distribution of the Settlement Fund shall remain under the authority of this Court.

L. Any Non–Settling Defendant is barred from asserting any Claim arising out of or relating to the Complaints, (including, without limitation, claims for contribution and equitable indemnity) by which any Non–Settling Defendant attempts to recover from the Settling Defendants losses arising as a result of claims made by the Plaintiffs on behalf of themselves or any portion of the Class against any Non–Settling Defendant. Notwithstanding the dismissal of the Settling Defendants provided for hereafter, if there is a final verdict or judgment against any or all Non–Settling Defendants in this action, the total amount of such verdict(s) or judgment(s) shall be reduced by the greater of (a) an amount that corresponds to the percentage of responsibility of the Settling Defendants; or (b) the amount paid to plaintiffs by the Settling Defendants.

***10** M. The Settling Defendants are barred from asserting any Claim arising out of the Complaints, (including, without limitation, claims for contribution and equitable indemnity) by which the Settling Defendants attempt to recover from any Non–Settling Defendant monies paid to settle the Action.

N. A judgment accordingly shall be entered pursuant to Fed.R.Civ.P. 58 in accordance with the foregoing findings of fact and conclusions of law which constitute the grounds of the Court's action.

O. Pursuant to Fed.R.Civ.P. 54(b), the Court expressly determines that there is no just reason for delay of entry of a final judgment in accordance with the foregoing decision set out herein.

P. Without affecting the finality of the judgment in any way, this Court hereby retains continuing jurisdiction over (a) implementation of this Settlement and any award or distribution of the Settlement Fund, including interest earned thereon; (b) disposition of the Settlement Fund; (c) hearing and determining applications for attorneys' fees, costs, interest and reimbursement of expenses in the Action; and (d) all parties hereto for the purpose of construing, enforcing and administering the Settlement Stipulation.

Q. The Court retains exclusive jurisdiction over the Action with respect to the ongoing prosecution against the BDO Entities and nothing herein shall be deemed to limit or otherwise affect the prosecution thereof. Nothing herein shall limit the ability of any Non–Settling Defendant to make any argument or advance any position concerning the admissibility or inadmissibility at trial of the settlement.

SO ORDERED.

S.D.N.Y.,2004.
Teachers' Retirement System of Louisiana v. A.C.L.N., Ltd.
Not Reported in F.Supp.2d, 2004 WL 1087261 (S.D.N.Y.)

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
In re VEECO INSTRUMENTS INC. SECURITIES LITIGATION.
This Document Relates to All Actions.

No. 05 MDL 0165(CM).
Nov. 7, 2007.

ORDER GIVING FINAL APPROVAL TO THE SETTLEMENT AND PLAN OF ALLOCATION

McMAHON, District Judge.

I. INTRODUCTION

***1** This settlement resolves a securities fraud class action brought by the purchasers of Veeco securities between April 26, 2004 and February 10, 2005, inclusive (the "Class Period"). The Action was brought against Veeco Instruments Inc. ("Veeco"), and Individual Defendants Edward H. Braun, John F. Rein, Jr., John P. Kiernan, and R. Michael Weiss (collectively, the "Defendants"). The complaint alleged that Defendants artificially inflated the market price of Veeco securities during the Class Period by issuing false and misleading financial statements in the first, second, and third quarters of 2004, which the Company was forced to restate shortly after the Class Period, which the Company attributed to accounting improprieties at its newly-acquired TurboDisc division, and which the Company admitted had concealed the unprofitability of TurboDisc from investors. The Class was certified on March 21, 2006. Pursuant to Fed.R.Civ.P. 23, class members were given notice of the pendency of the Action and trial date, and were given an opportunity to opt-out of the Action. Only two shareholders have opted out.

This Action has been actively litigated for almost two years, with extensive motion practice and discovery, and completed preparations for trial, including a full-day pre-trial hearing before this Court on June 28, 2007, with trial scheduled to begin on July 9, 2007.

On July 5, 2007, the parties entered into a Memorandum of Understanding ("MOU") agreeing in principle to settle the case for $5.5 million in cash. The proposed settlement was achieved following negotiations between the parties, with the assistance of retired Judge the Honorable Nicholas H. Politan, who had served as a mediator throughout the litigation, including a two-day mediation in October 2006. The Settlement, which was crafted at arm's length by very experienced counsel on both sides, provides guaranteed immediate relief for the Class, while eliminating all of the many risks and delays associated with the continued litigation of this Action, including the risk of no recovery at all.

Most important, the Settlement has the implicit approval of an overwhelming number of Class members. By Order dated August 23, 2007, the Court preliminarily approved the Settlement and directed that a hearing be held on November 2, 2007 to determine the fairness, reasonableness and adequacy of the proposed Settlement. Pursuant to this Order, 15,528 copies of the Notice of the Proposed Settlement, Motion for Attorneys' Fees and Settlement Fairness Hearing and Proof of Claim and Release were mailed to potential Class members or their nominees beginning on September 12, 2007. (Sincavage Aff. at ¶ 10.) A summary notice was also published in *The Wall Street Journal on* September 19, 2007. (Sincavage Aff. at ¶ 11.) The Notice and the Proof of Claim and Release contained a detailed description of the history of the Action and the terms of the proposed Settlement, a statement of the attorneys' fees and expenses sought, a description of the claims to be released, the deadline for filing objections, proof of claim forms and the time and place of the fairness hearing, and advised Class members of their right to object to the Settlement or to request exclusion from the Class by October 19, 2007. As of October 24, 2007, there were no objections to the settlement, and only one request for exclusion, from a shareholder-Mr. Harold P. Houser who was one of the two class members who had previously requested to be excluded from the Class in response to the Notice of Pendency mailed to the Class in June 2007, before the Settlement was reached. (Sincavage Aff. at ¶ 12.)

II. BACKGROUND

A. History Of The Litigation

***2** The Action was commenced on February 15, 2005 by the filing of a complaint captioned *L.I.S.T., Inc. v. Veeco Instruments Inc.,* Edward H. Braun, and John F. Rein, Jr., No. 7:05-2189, and alleged claims under sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5. Additional complaints were filed thereafter in both the Eastern District of New York and the Southern District of New York. On May 15, 2005, all of the cases then filed in the Eastern District of New York were transferred to the Southern District of New York and assigned to this Court for coordinated or consolidated pretrial proceedings with the cases then filed in the Southern District of New York. By Order dated October 12, 2005, the Court appointed Steelworkers Pension Trust ("Steelworkers") as Lead Plaintiff, and Berger & Montague, P.C. as Lead Counsel for the Class and sole counsel.

On November 7, 2005, Steelworkers filed a Consolidated Amended Class Action Complaint (the "Complaint"), which superseded all prior complaints filed in the Action, and named additional Defendants John P. Kiernan and R. Michael Weiss.

The Complaint alleged, *inter alia,* that the Defendants issued false and misleading statements in their financial statements, reports and related press releases, and during analyst conference calls for the first, second, and third quarters of 2004, which, as Defendants admitted after the Class Period, overstated Veeco's pre-tax earnings by $10.2 million, causing the Company to restate its financial statements for those quarters. The Complaint also alleged that certain of the Individual Defendants also issued false and misleading certificates of compliance with the Sarbanes-Oxley Act; that Veeco's financial statements during the Class Period concealed the unprofitability and true profit margins and accounting improprieties of Veeco's TurboDisc division; that TurboDisc had deficient or absent financial controls; and that Veeco's financial statements could not be relied on by the investing public. The Complaint alleged that these facts were concealed by Defendants during the Class Period, and that the problems were first disclosed to the public on the morning of February 11, 2005, before the market opened, when Veeco announced it would postpone the release of its audited results for the 2004 fourth quarter and full year, pending completion of an internal investigation of improper accounting transactions at TurboDisc. In the announcement, Veeco explained that the investigation focused principally on the value of inventory, accounts payable, liabilities, and revenue transactions, and that the investigation would likely lead to adjustments requiring the restatement of its financial statements for the first three quarters of 2004. The Complaint alleged that this announcement of the previously undisclosed material information resulted in more than a 10% drop in the price of Veeco stock, thereby causing damages to Lead Plaintiff and the other members of the Class.

***3** By Order dated March 21, 2006. this Court denied Defendants' Motion to Dismiss the Complaint, and, pursuant to Fed.R.Civ.P. 23, also certified a Class consisting of all persons who purchased the securities of Veeco Instruments Inc. between April 26, 2004 and February 10, 2005 (inclusive) and were damaged as a result thereof. The Court appointed Lead Plaintiff Steelworkers as class representative and Berger & Montague, P.C. as sole class counsel.

On April 10, 2006, Defendants answered the Consolidated Amended Class Action Complaint, denying all allegations of liability therein and asserting affirmative defenses thereto. On October 11 and 12, 2006, the parlies attempted to mediate the case under the supervision of Judge Nicholas H. Politan as mediator. However, the mediation was unsuccessful and the parties resumed document and deposition discovery, with a trial date set for July 9, 2007.

In preparation for trial, the parties prepared extensive pre-trial submissions and filed numerous motions *in limine.* On June 28, 2007, the Court held a final pre-trial conference, during which the Court ruled, *inter alia,* on the admissibility of the parties' proposed evidence and on the motions *in limine.* Among the Court's rulings on the motions *in limine,* the Court ruled that members of the Class who purchased Veeco stock during the Class Period and who either sold those shares at a profit after the Class Period, or who retained those shares past the point when the price of Veeco stock first recovered to the price at which those shares were purchased, were not damaged by Defendants' alleged wrongful conduct.

Soon thereafter, the parties engaged in settlement discussions, with the assistance of mediator Politan. On July 5, 2007, the parties entered into a Memorandum of Understanding (the “MOU”) to settle the Action for $5.5 million in cash. On August 16, 2007, the Parties signed a Stipulation and Agreement of Settlement (the “Stipulation”). The Court approved the Stipulation on August 23, 2007, preliminarily approving the proposed Settlement.

B. Extensive Discovery Was Conducted

Following the denial of the motion to dismiss in March 2006, extensive fact and expert discovery began. Lead Plaintiff reviewed approximately 225,000 pages of documents produced by Defendants in response to Lead Plaintiff's document requests, including documents produced as a result of Lead Plaintiff's motion to compel Defendants' production of documents on backup tapes. Lead Plaintiff also subpoenaed documents from twenty-six third parties-including Veeco's outside auditor Ernst & Young, Veeco customers and suppliers, and analysts who covered Veeco during the Class period-and received and reviewed approximately ten thousand pages of documents from Ernst & Young alone, and hundreds of pages more from the other third parties.

Lead Plaintiff took and defended many

depositions in this case, beginning with Lead Plaintiff's defense of the depositions of Lead Plaintiff/class representative Steelworkers and its asset manager, Fox Asset Management, in connection with Lead Plaintiff's motion for class certification. During fact discovery, Lead Plaintiff conducted ten days of depositions, including the depositions of Individual Defendants Braun, Rein and Kiernan, three Ernest & Young partners involved in Veeco's audit before and during the Class Period, former TurboDisc controller Bruce Huff (to whom the Company attributed the improprieties leading to the restatement), and Veeco's internal auditors during the Class Period, Gary Reifert and Herman Birnbaum. The parties also engaged in other fact discovery, including serving interrogatories and requests for admission upon Defendants. Following merits discovery, the parties conducted expert discovery, exchanging the reports of their respective accounting and damages experts, and took and defended expert depositions.

***4** The parties completed substantial preparation for trial, including preparation of all the exhibits to the pre-trial order, which were submitted to the Court on June 6, 2007. The parties also filed and responded to numerous motions *in limine,* served trial witnesses subpoenas, attended a pretrial conference on June 28, 2007, and were prepared to begin jury selection on July 9, 2007.

In sum, the parties had conducted almost all of the fact and expert discovery necessary for trial. There is no question the parties were fully informed of the strengths and weaknesses of the their respective positions.

C. Extensive Motion Practice Was Conducted

In addition to the motion to dismiss and the motion for class certification, the parties engaged in extensive motion practice, including a number of hard-fought discovery motions in this case before Magistrate Judge George A. Yanthis. These motions included Plaintiff's motion to compel Defendants to produce documents concerning the internal investigation of TurboDisc by Veeco and Jefferson Wells (as well as oral argument on that motion), and a motion to obtain documents on backup tapes from Defendants. In addition, each party filed a number of motions *in limine* before this Court on June 6, 2007, and responses thereto followed.

D. Class Certification Was Granted And A Notice of Pendency Of The Action Was Sent To The Class

On November 7, 2005, Lead Plaintiff moved for certification of the Class under Fed.R.Civ.P. 23. In connection with the motion, Lead Plaintiff produced documents in response to Defendants' requests, and defended the depositions of the proposed Class Representative, Lead Plaintiff Steelworkers, and its asset manager. This Court, by Order dated March 21, 2006, certified the Class, appointed the Steelworkers as Class Representative and Berger & Montague as Class Counsel, and ruled that the Class Period would begin on April 26, 2004 (rather than November 3, 2003).

Pursuant to this Court's Order of May 15, 2007, Lead Plaintiff caused a Notice of Pendency of Class Action (the “Initial Notice”) to be sent to putative class members. Beginning on June 1, 2007, Heffler, Radetich & Saitta LLP (“HRS”), the notice administrator retained by Plaintiffs, mailed out more than 11,390 notices of the action and caused the summary notice of the Action to be published in *The Wall Street*

Journal on June 8, 2007. The Initial Notice provided class members with an opportunity to opt-out by July 6, 2007. As of that date, only two class members opted out. Defendants and the Court were advised of the very small number of opt-outs.[FN1] The Notice of Settlement, which was mailed to the Class on September 12, 2007, provided a second opportunity to opt-out, resulting in only one opt-out and no objections by the October 19, 2007 deadline.

FN1. One of the opt-outs, Mr. Harold P. Houser, asserted that he bought Veeco stock on June 7, 2004 at a cost of $2,603.00, and sold on April 27, 2006 for $2,230.73, for a loss of $372.27, without indicating the number of shares bought or sold on those dates. The other opt-out reported a purchase of 100 shares of Veeco on December 10, 2004, without providing any further information. On September 20, 2007, Mr. Houser again opted out following receipt of the Notice of Settlement, but still gave no further information.

E. Terms of the Proposed Settlement

As set forth in the Stipulation dated August 16, 2007, the central terms of the Settlement are as follows: The Settlement provides for the creation of a fund in the amount of $5.5 million in cash, plus interest ("Gross Settlement Fund"). The Gross Settlement Fund less all taxes, approved costs, fees, and expenses is the "Net Settlement Fund." The Net Settlement Fund is to be distributed to those Class Members who submit timely and valid Proofs of Claim to the Claims Administrator (the "Authorized Claimants"). Based on this Court's June 28, 2007 decision on the proper calculation of damages, Plaintiffs estimate that there were approximately 6.3 million damaged shares of Veeco common stock traded during the Class Period. Plaintiffs estimate that the average recovery per damaged share of Veeco common stock under the settlement is $.87 per damaged share before deduction of Court-awarded attorneys' fees and expenses, and notice and claims administration costs.

***5** The Plan of Allocation was prepared according to the analysis of Plaintiffs' damage expert, Steven P. Feinstein, Ph.D., CFA, with the assistance of Plaintiffs' Counsel, and in accordance with this Court's June 28, 2007 decision on Defendants' motion *in limine* regarding damages. The Plan takes into account that (I) Class Members were not damaged if they purchased Veeco stock during the Class Period and either sold it at a profit or retained it past the point after the Class Period when the price of Veeco stock recovered to the price paid by them; (ii) the price varied at which Veeco stock declined following the Company's corrective disclosure on February 11, 2005; and (iii) any Class Member who sold before the corrective disclosure was not damaged. Thus, an Authorized Claimants' recognized loss ("Recognized Loss") is primarily determined by the date the Authorized Claimant purchased or sold any of Veeco's securities, as set forth in detail in the Notice.

III. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

There is a "strong judicial policy in favor of settlements, particularly in the class action context." *In re PaineWebber Ltd. P'ships Litig.,* 147 F.3d 132, 138 (2d Cir.1998). "Settlement approval is within the Court's discretion, which 'should be exercised in light of the general judicial policy favoring settlement.' " *In re EVCI Career Colleges Holding Corp. Sec. Litig.,* 2007 U.S. Dist. LEXIS 57918, at *10, 2007 WL 2230177 (S.D.N.Y. July 27, 2007) (McMahon, J.) (citing *In re Sumitomo Copper Litig.,* 189 F.R.D. 274, 280 (S.D.N.Y.1999); *accord Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 361 (S.D.N.Y.2002) (McMahon,J.); *In re American Bank Note Holographies,* 127 F.Supp.2d 418, 423 (S.D.N.Y.2001) (McMahon, J.). As this Court has stated: "In its exercise of that discretion, the Court must engage in a careful balancing act: 'The Court must eschew any rubber stamp approval in favor of an independent evaluation, yet, at the same time, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case.' " *American Bank Note,* 127 F.Supp.2d at 424 (citing *Detroit v. Grinnell Corp.,* 495 F.2d 448, 462 (2d Cir.1974)). "In evaluating a proposed settlement under Rule 23(e) of the Federal Rules of Civil Procedure, the Court must determine whether the settlement, taken as a whole, is fair, reasonable and adequate." *EVCI,* 2007 U.S. Dist. LEXIS 57918, 2007 WL 2230177, at k10.

"A proposed class action settlement enjoys a strong presumption that it is fair, reasonable and adequate if, as is the case here, it was the product of arm's-length negotiations conducted by capable counsel, well-experienced in class action litigation arising under the federal securities laws." *Id.* at *11 (citation omitted). Moreover, under the PSLRA, a settlement reached-as this one was under the supervision and with the endorsement of a sophisticated institutional investor (here, the Steelworkers Pension Trust) is "entitled to an even greater presumption of reasonableness.... Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement." *Id.* at *12.

***6** The factors that the Court should consider in reviewing the settlement are well established in the Second Circuit. *See Grinnell,* 495 F.2d at 463. They are the following:

(1) the complexity, expense and likely duration of the litigation;

(2) the reaction of the class to the Settlement;

(3) the stage of the proceeding and the amount of discovery completed;

(4) the risks of establishing liability:

(5) the risks of establishing damages;

(6) the risks of maintaining the class action through trial;

(7) the ability of Defendants to withstand a greater judgment;

(8) the range of reasonableness of the settlement in view of the best possible recovery; and

(9) the range of reasonableness of the settlement to a possible recovery in view of all the attendant risks of litigation.

Grinnell 495 F.2d at 463; *Strougo v. Bassini,* 258 F.Supp.2d 254, 258 (S.D.N.Y.2003) (and cases cited therein). As set forth below, under these criteria, the proposed Settlement is fair, reasonable and adequate.

1. The Complexity, Expense and Likely Duration of the Litigation

This Action, like most securities fraud cases, presented complex factual and legal issues. Plaintiffs encountered (and would have continued to encounter at trial, absent the Settlement) significant litigation risks, including proving all of the necessary elements to establish that Defendants' dissemination of materially false and misleading statements regarding Veeco violated Sections 10(b) and 20(a) of the Exchange Act of 1934, and Rule 10b-5 promulgated thereunder.

Plaintiffs were successful in withstanding the motion to dismiss and obtaining certification of the Class. Subsequently, Plaintiffs obtained critical evidence to support their claims during merits and expert discovery. However, it was far from certain whether a jury would find that any or all of the Defendants were liable or that the jury would find that their level of culpability rose to the level of scienter, where there was no alleged insider trading by any Defendants and neither the SEC nor any other governmental agency had charged the Company with wrongdoing. Defendants were represented by highly experienced counsel who presented Plaintiffs with a number of serious obstacles, including requiring Plaintiffs to file motions to obtain critical evidence. These included Plaintiffs' motion to compel Defendants' production of documents relating to Veeco's internal investigation of the TurboDisc accounting issues that led to the Restatement, and for production of documents on backup tapes. Defendants filed numerous substantial motions including the motion *in limine* to preclude Plaintiffs' damages expert from including certain damages in his calculations. Thus, Plaintiffs' Counsel recognized that continued litigation would be costly with no assurance of success, and, even if Plaintiffs won a judgment at trial, there was no assurance they would obtain damages beyond the amount of the Settlement.

***7** The proposed $5.5 million Settlement provides a substantial and tangible present recovery, without the attendant further expenses, uncertainties, and risk of *no* recovery that Plaintiffs would encounter in a lengthy, complex trial and likely appeals. This case involved complex issues of accounting and internal financial controls which could be difficult to present and prove to a jury, and, even if Defendants' liability was proven, the Court had already reduced the number of Class members who could claim damages, thus reducing the total amount of damages that a jury could award. As this Court has repeatedly stated:

> Settlement at this juncture results in a substantial and tangible present recovery. without the attendant risk and delay of trial. These factors weigh in favor of the proposed Settlement. As the court in *Slomovics v. All for a Dollar, Inc.,* 906 F.Supp. 146, 149 (E.D.N.Y.1995), concluded: “The potential for this litigation to result in great expense and to continue for a long time suggest that settlement is in the best interests of the Class.” *Id.* (citation omitted). The same reasoning applies here. Delay, not just at the trial stage but through post-trial motions and the appellate process, would cause Class Members to wait years for any recovery, further reducing its value.

EVCI, 2007 U.S. Dist. LEXIS 57918, at * 16-17, 2007 WL 2230177 (citing *Maley,* 186 F.Supp.2d at 361-62) (citation omitted).

2. The Reaction of the Class to the Settlement

It is “well-settled” that the reaction of the class to a settlement is considered perhaps “the most significant factor to be weighed in considering its adequacy.” *Maley,* 186 F.Supp.2d at 362-63; *American*

Bank Note, 127 F.Supp.2d at 425; *EVCI,* 2007 U.S. Dist. LEXIS 57918 at * 17, 2007 WL 2230177. The lack of objections provides effective evidence of the fairness of the Settlement. *American Bank Note,* 127 F.Supp.2d at 425; *In re PaineWebber,* 171 F.R.D. 104, 126 (S.D.N.Y.1997).

Here, 15,528 copies of the Notice of the Settlement were sent to potential class members or their nominees. (Sincavage Aff. at ¶ 10.) Not a single objection has been received, and the deadline for objections has passed. Moreover, there has been only one request for exclusion, from Mr. Harold P. Houser. (*Id.* at ¶ 12.) Mr. Houser had previously opted-out from the Class in response to the Notice of Pendency of the action, before settlement was ever reached.

Therefore, those affected by the Settlement have overwhelmingly endorsed it. *See Strougo,* 258 F.Supp.2d at 259. The strong favorable reaction of the class is overwhelming evidence that the Settlement is fair, reasonable and adequate.

3. The Stage of Proceedings and The Amount of Discovery Completed

The stage of the proceedings is another factor that should be considered in evaluating a proposed settlement, although the parties need not have engaged in full discovery for a settlement to be approved as fair. *See American Bank Note,* 127 F.Supp.2d at 425-26. This case was litigated to the very eve of trial, after completion of merits and expert discovery during which Plaintiff received and analyzed the expert reports of Defendants' accounting and damages experts, deposed Defendants' damages expert, and proffered Plaintiffs' own accounting expert, Robert W. Berliner, CPA, CFE, to opine on issues of liability, and its own damages expert, Steven P. Feinstein, Ph.D., CFA, to opine on issues of loss causation and damages. The parties had completed almost all pre-trial preparations, including attendance at the final pre-trial hearing at which the Court considered and ruled on the admissibility of key evidence. In addition to the completion of merits and expert discovery, the parties learned the strength and weaknesses of their respective cases during a two-day mediation. In written submissions to the mediator and oral presentations during the mediation, both sides presented their best arguments in support of their respective positions.

***8** Accordingly, the parties' knowledge of the strength and weakness of their claims was more extensive than the norm in securities cases which are resolved at an earlier stage. It is evident that Plaintiffs “have a clear view of the strengths and weaknesses of their case[ ]” and of the adequacy of the Settlement. *American Bank Note,* 127 F.Supp.2d at 426 (citation omitted); *Maley,* 186 F.Supp.2d at 363-64; *see also Meijer, Inc. v. 3M,* 2006 U.S. Dist. LEXIS 56744, at **46-47, 2006 WL 2382718 (E.D.Pa. Aug. 14, 2006) (parties had “an adequate appreciation of the merits” of case at time settlement negotiated where: Class Counsel, *inter alia,* reviewed hundreds of thousands of pages of documents and depositions and consulted extensively with economic expert; and parties engaged in mediation, including exchange of mediation statements regarding merits of respective positions in order to inform and facilitate negotiations); *Goldsmith v. Tech. Solutions Co.,* 1995 U.S. Dist. LEXIS 15093, at *15, 1995 WL 17009594 (N.D.Ill. Oct. 10, 1995) (plaintiffs' counsel's endorsement of the settlement “bears particularly significant weight” where counsel reviewed thousands of pages of documents, took several depositions, and worked closely with accounting and damages experts in evaluating the claims and estimating the potential recovery).

4. The Risks of Establishing Liability

In assessing this factor, the Court is not required to "decide the merits of the case or resolve unsettled legal questions," *Carson v. American Brands, Inc.,* 450 U.S. 79, 88 n. 14, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981), or to "foresee with absolute certainty the outcome of the case." *In re Austrian & German Bank Holocaust Litig.,* 80 F.Supp.2d 164, 177 (S.D.N.Y.2000). "[R]ather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 459 (S.D.N.Y.2004).

The claims in this case under section 10b-5 of the Exchange Act focus on: whether Defendants issued false and misleading financial statements with scienter during the Class Period in Veeco's quarterly reports filed with the SEC for the first, second, and third quarters of 2004, and in other statements concerning the Company's financial performance in press releases and analyst conference calls during the Class Period; whether certain of the Individual Defendants issued false and misleading certificates of compliance with the Sarbanes-Oxley Act in those Forms 10-Q; whether the price of Veeco securities was inflated during the Class Period; and whether Defendants' disclosure of the truth before the market opened on the morning of February 11, 2005 caused the price of Veeco stock to fall, thereby damaging Plaintiff and the other Class Members. Defendants have sharply contested the merits of these claims, asserting that Plaintiffs could not prove that any Defendant is liable because the Company's restatement of the first three quarters of 2004 was caused solely by the accounting errors of the TurboDisc controller, and that the Company look corrective action as soon as the errors were discovered, including firing the controller and launching an independent investigation. Thus, Defendants would continue to assert that even if Veeco's financial statements were restated for three quarters because of accounting errors at TurboDisc, Plaintiffs would be unable to prove that the statements were materially false and misleading, and that even if they could prove the falsity of any statements, Plaintiffs would be unable to prove that any of the Defendants acted with scienter.

***9** Plaintiffs recognize that scienter would be hard to prove since there were no allegations that any of the Individual Defendants had any financial motive to commit fraud, none of the Defendants engaged in insider trading during the Class Period, and neither the SEC nor any other governmental agency pursued a case against the company. Defendants would also claim that any flaws in their accounting were the result of reasonable reliance on their auditor, Ernst & Young LLP. Plaintiffs would have to prove scienter by circumstantial evidence of Defendants' conscious or reckless behavior, and it is difficult to predict whether a jury would find the circumstantial evidence convincing to prove scienter. Indeed, a jury might have concluded that Defendants were liable for simple mismanagement-by failing to fire an incompetent employee and failing to adequately supervise its TurboDisc division-which is not actionable under the securities laws, thereby resulting in judgment for Defendants. *See In re Blech Sec. Litig.,* 2002 U.S. Dist. LEXIS 23170, at *4-5, 2002 WL 31720381 (S.D.N.Y. Dec. 4, 2002) ("Plaintiffs recognize that establishing scienter, necessary for a showing of liability under Section 10(b), posed a substantial risk to their claims”).

Plaintiffs' Counsel assert that ample evidence exists to support their claims. Nevertheless, they recognize that ultimately a court or a jury may agree with Defendants' arguments and find that the Defendants did not violate the federal securities laws. Shareholder class action litigation is notably unpredictable.

Moreover, in attempting to prove to a jury the elements of liability, materiality, causation, and scienter including the issues of the role of specific Individual Defendants in the alleged fraud, whether the actions violated GAAP and/or the Sarbanes-Oxley Act, and whether the decline in Veeco's stock price at the end of the Class Period was caused by disclosure of the alleged fraud-Plaintiffs likely would need to rely heavily on the testimony of their accounting and damages experts, who would be challenged by Defendants. Thus, a very lengthy and complex battle of the parties' experts likely would have ensued at trial, with unpredictable results. These risks as to liability strongly militate in favor of the Settlement. *Maley,* 186 F.Supp.2d at 364 (noting the many obstacles to plaintiffs' ability to prevail on the merits in a 10b-5 case).

5. The Risks of Establishing Damages

Had this Action gone to trial, Defendants would not only have asserted strong defenses as to liability, but would also have raised strong defenses to Plaintiffs' claims of damages. First, the Defendants would likely have asserted that little or no damages existed and that any decline in the price of Veeco securities was attributable to market or other non-fraud factors. Indeed, the damage assessments of experts retained by the parties vary substantially, and the assessment of this crucial element of Plaintiffs' case in particular would be reduced at trial to an argument between experts having conflicting analyses of highly complex economic data. *See, e.g., In re Lloyd's Am. Trust Fund Litig.,* 2002 U.S. Dist. LEXIS 22663, at *61, 2002 WL 31663577 (S.D.N.Y. Nov. 26, 2002) (“The reaction of a jury to such complex expert testimony is highly unpredictable.”). A jury could be swayed by Defendants' expert seeking to establish that damages were caused by factors other than Defendants' wrongdoing, or, alternatively, trying to minimize the amount of losses suffered by the class. *American Bank Note,* 127 F.Supp.2d at 427.

***10** Even in a less challenging case, “[c]alculation of damages is a ‘complicated and uncertain process, typically involving conflicting expert opinion’ about the difference between the purchase price and the stock's ‘true’ value absent the alleged fraud.” *Global Crossing,* 225 F.R.D. at 459 (citations and internal quotations omitted). The jury's verdict with respect to damages would depend on its reaction to the complex testimony of experts, a reaction which at best is uncertain.

> Undoubtedly, expert testimony would be needed to fix not only the amount, but the existence, of actual damages .... In this “battle of experts.” It is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad non-actionable factors such as general market conditions.

American Bank Note, 127 F.Supp.2d at 427 (quoting *Warner Communications Sec.*

Litig., 618 F.Supp. 735, 744-745 (S.D.N.Y.1985)); *see also Blech,* 2002 U.S. Dist. LEXIS 23170, at *5, 2002 WL 31720381 ("Establishing damages from the drop in the relevant stock price, would, Plaintiffs claim, have degenerated into a 'battle of the experts' and thus posed a risk to Plaintiffs.").

Most important, Plaintiffs' Counsel recognized that even if they could overcome all the obstacles and could prove that one or more of the Defendants was liable and had acted with scienter, Plaintiffs were constrained in their ability to prove that certain Class members had been damaged, in light of this Court's June 28, 2007 ruling on one of Defendants' motion *in limine,* which held that Plaintiffs' damages calculations could not include Class Members who purchased Veeco stock during the Class Period and either sold it at a profit, or retained it past the point after the Class Period when the stock price first recovered to the price at which the shares were purchased. This is because such Class Members can prove no economic loss that is attributable to any of the Defendants' alleged misrepresentations. This ruling diminished the number of damaged class members and, thus, the amount of the calculated damages.

Consequently, while Plaintiffs believe that their claims were meritorious, and that the Class suffered real and substantial damages, there were no guarantees that Plaintiffs could recover their estimated damages, let alone recover any damages at all. By virtue of the proposed $5.5 million Settlement, Plaintiffs have avoided substantial risks in proving damages. The fairness and reasonableness of the proposed Settlement, in light of the risks, are manifest.

6. The Risks of Maintaining the Class Action Through Trial

There is no issue here. The Court certified a class early in this litigation (March 2006). Only two Class Members opted out after the Initial Notice of pendency in June 2007. The Defendants did not seek decertification. This factor had no bearing on settlement negotiations.

7. Defendants' Ability to Withstand a Greater Judgment

***11** This factor had little bearing on settlement negotiations. Although the Individual Defendants had limited resources and limited insurance, Veeco does have substantial net worth. However, this factor alone does not prevent the Court from approving the Settlement where the other *Grinnell* factors are satisfied. *See Meijer,* 2006 U.S. Dist. LEXIS 56744, at *51, 2006 WL 2382718 ("this determination in itself does not carry much weight in evaluating the fairness of the Settlement"); *D'Amato v. Deutsche Bank,* 236 F.3d 78, 86 (2d Cir.2001) (upholding approval of settlement despite defendants' ability to withstand greater judgment, where other *Grinnell* factors were met).

8. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery, and in Light of Litigation Risks

In evaluating the proposed Settlement, the Court is not required to engage in a trial on the merits to determine the prospects of success. *Strougo,* 258 F.Supp.2d at 260 (citing *In re Michael Milken & Assocs. Sec. Litig.,* 150 F.R.D. 46, 54 (S.D.N.Y.1993)). Similarly, the Court is not to compare the terms of the Settlement with a hypothetical or speculative measure of a recovery that might be achieved by prosecution of the litigation to a successful conclusion. *Repub-*

lic Nat'l Life Ins. Co. v. Beasley, 73 F.R.D. 658, 668 (S.D.N.Y.1977). In view of the risks of proving liability and of recovering damages, discussed above, this Settlement provides a substantial recovery.

In *Grinnell,* the Second Circuit noted that "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell,* 495 F.2d at 455. The Court further noted: "[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Id.* at 455 n. 2. *Maley,* 186 F.Supp.2d at 366 (same). *See also* *Weinberger v. Kendrick,* 698 F.2d 61, 65 (2d Cir.1983) (settlement which amounted to only a negligible percentage of the losses suffered by the class was affirmed); *In re Gulf Oil/Cities Serv. Tender Offer Litig.,* 142 F.R.D. 588, 596 (S.D.N.Y.1992) (court approved settlement after determining that the settlement would provide "slightly more than 48 cents [per share]" out of the potential recovery of approximately $30 per share).

The $5.5 million all-cash recovery in this Action is significant, and-in light of the risks facing Plaintiffs, the unpredictability of a lengthy and complex trial, the inevitable appellate process that would follow, the risk of reversal, and the limits on damages posed by the Court's opinion-the $5.5 million Settlement falls squarely within the "range of reasonableness." *In re PaineWebber,* 171 F.R.D. at 130-31 (citations and internal quotations omitted); *American Bank Note,* 127 F.Supp.2d at 428 .

***12** Moreover, published data on securities fraud settlements further confirms the quality of the proposed Settlement. The $5.5 million settlement results in an estimated average recovery of $.87 per share for the approximately 6.3 million shares which suffered damages in accordance with the Court's June 28, 2007 opinion, or 23.2% of the estimated maximum $3.75 per share suffered by any Class Member. The 23.2% possible recovery of estimated damages exceeds the median percentage reported by Cornerstone Research for settlements overall, which was 3.6% through year-end 2005 and 2.4% for 2006; for settlements where the estimated damages were less then $50 million (similar to this case) the percentage was 10.5% through year-end 2005 and 8.8% in 2006. [FN2] In view of the risk that the jury could have found that Plaintiffs were entitled to *no* recovery, the proposed settlement that represents a recovery of up to 23.2% of the possible damages supports approval of the settlement. *See* *Maley,* 186 F.Supp.2d at 366.

> FN2. *See* Laura E. Simmons & Ellen M. Ryan, *Cornerstone Research, Securities Class Action Settlements: 2006 Review and Analysis* (Cornerstone Research 2007), at 6, available at http://www.cornerstone.com (the "Cornerstone Report").

9. The Settlement Negotiations

In assessing whether a settlement is fair, reasonable and adequate, courts often focus on the "negotiating process by which the settlement was reached." *American Bank Note,* 127 F.Supp.2d at 428 (citation omitted). Courts look to this process in order to ensure that the settlement resulted from "arm's-length negotiations" between counsel with the "experience and ability necessary to effective representation of the class's interests." *Id.; Grinnell,* 495 F.2d at 463-66. In this context, courts consider the opinion of experienced counsel with respect to the value of the settlement. *PaineWebber,* 171 F.R.D. at 125 (" 'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation") (citation omitted). In this case, qualified and experienced counsel for both sides, who litigated the case vigorously for many months up to the very eve of trial, recommend final approval of the Settlement.

The negotiations for the Settlement were conducted with an experienced mediator and, like every step of the litigation, at arm's length between experienced and skilled attorneys who knew the strengths and weaknesses of their respective cases and were ready for trial to begin on July 9, 2007. Moreover, in the course of litigation, both sides had exchanged mediation statements which revealed the respective strengths and weaknesses of the claims and defenses. The mediation that finally resulted in this settlement occurred after the end of merits and expert discovery and preparation for trial. "So long as the integrity of the arm's length negotiation process is preserved ... a strong initial presumption of fairness attaches to the proposed settlement." *American Bank Note,* 127 F.Supp.2d at 428 (citing *PaineWebber,* 171 F.R.D. at 125). That presumption applies here.

THE PROPOSED PLAN OF ALLOCATION IS APPROVED AS FAIR AND REASONABLE

***13** A plan of allocation is fair, reasonable and adequate as long as it has a "reasonable, rational basis." *Maley,* 186 F.Supp.2d at 367. Because it is virtually impossible in a large class to calculate each member's claim with mathematical precision, courts recognize that "the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information." *In re PaineWebber,* 171 F.R.D. at 133.

Lead Counsel, together with its damages expert, Steven P. Feinstein, Ph.D., CFA, determined the appropriate allocation of damages. The Plan reflects an assessment of an individual Class Member's damages based on when the Class Member bought or sold Veeco stock. The plan of allocation follows the Supreme Court's decision in *Dura Pharmaceuticals,* and requires that the claimant must have purchased the security during the Class Period and held it on the day of corrective disclosure, recognizing that Class Members suffered an economic loss only if they bought shares during the Class Period and sold them after the Class Period ended on February 10, 2005. *See, e.g., Dura Pharm., Inc. v. Broudo,* 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005). The plan of allocation also recognizes that, in accordance with this Court's June 28, 2007 decision, Class Members' shares sold after the corrective disclosure at a price higher than or equal to the initial purchase price-and any shares of Class Members who chose to retain their shares past the point when the stock price first recovered to the price at which the shares were purchased-can prove no economic loss. In practical terms, this means that under the Plan, any shares held at the close of trading on May 8, 2006, have no recognized loss, because on May 9, 2006, Veeco's stock traded at a price equal or greater than any price at which Veeco traded during the Class Period. (*See* Notice at p. 9.)

Incorporating these principles, the Plan of Allocation provides for the distribution of the Net Settlement Fund on a proportionate basis, using a formula based on the decline in the price of Veeco stock following the disclosure-before the market opened on February 11, 2005-that the Company expected to restate its financials for the first three quarters of 2004. (*See* Notice at p. 9.) “Allocation formulas, including certain discounts for certain securities, are recognized as an appropriate means to reflect the comparative strengths and values of different categories of the claim.” *American Bank Note,* 127 F.Supp.2d at 429. “[T]here is no rule that settlements benefit all class members equally....” *Holmes v. Continental Can Co.,* 706 F.2d 1144, 1148 (11th Cir.1983). Instead, the general rule is that an allocation formula need only have a reasonable and rational basis, particularly if recommended by experienced and competent class counsel. *American Bank Note,* 127 F.Supp.2d at 429-30. Plaintiffs' Counsel's conclusion that the Plan of Allocation is fair and reasonable is therefore entitled to great weight. *Id.* at 430 (approving allocation plan and according counsel's opinion “considerable weight” because there were “detailed assessments of the strengths and weaknesses of the claims asserted, the applicable damages, and the likelihood of recovery”).

***14** Under the Plan of Allocation, an independent claims administrator, Heffler, Radetich & Saitta LLP, will calculate each claimant's “recognized loss” based on the class member's proof of claim. Each valid claim will then be calculated so that each authorized claimant will receive, on a proportionate basis, the share of the net settlement fund that the claimant's recognized loss bears to the total recognized loss of all authorized claimants.

The Plan of Allocation fairly, equitably, and adequately allocate the proceeds of the settlement among the class members who submit valid claims, with a minimum of complication, ensuring efficiency in claims administration. Finally, not one class member has objected to the Plan of Allocation which was fully explained in the Notice of Settlement sent to all Class Members. This favorable reaction of the Class supports approval of the Plan of Allocation. *Maley,* 186 F.Supp.2d at 367.

S.D.N.Y.,2007.
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