UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

RUSSELL HOFF, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. POPULAR INC., et al., Defendants.	Civil Action No. 3:09-cv-01428-GAG (Consolidated) CLASS ACTION CO-LEAD COUNSEL'S MOTION AND MEMORANDUM OF LAW FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

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TO: THE HONORABLE COURT

NOW COME the Lead Plaintiffs, through their undersigned counsel, and respectfully pray and state:

I. INTRODUCTION

Pursuant to Rule 23(h) of the Federal Rules of Civil Procedure, the Court-appointed co-lead counsel for Lead Plaintiffs and the Settlement Class, Robbins Geller Rudman & Dowd LLP and Bernstein Litowitz Berger & Grossmann LLP ("Co-Lead Counsel"), respectfully submit this motion and memorandum of law in support of their application for an award of attorneys' fees and expenses.[1]

Under the terms of the Stipulation, Co-Lead Counsel have obtained a common fund settlement of $37,500,000 (the "Settlement"). As compensation for their considerable efforts on behalf of the Settlement Class, Co-Lead Counsel seek an award equal to 27% of the Settlement Fund (*i.e.*, the $37,500,000 Settlement Amount plus interest thereon) and expenses in the amount of $435,416.15 with interest thereon, to be paid from the Settlement Fund.[2] Co-Lead Counsel's application is fully supported by the Court-appointed Lead Plaintiffs and is therefore presumed reasonable, and is consistent with recent fee awards in comparable settlements. In light of the risks

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[1] All terms with initial capitalization not otherwise defined herein shall have the meanings ascribed to them in the Stipulation and Agreement of Settlement (the "Stipulation") filed with the Court on June 17, 2011 (Dkt. No. 190-1) and the Joint Declaration of Salvatore J. Graziano and Robert M. Rothman in Support of (1) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation of Settlement Proceeds and Final Certification of the Settlement Class for Settlement Purposes; and (2) Co-Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses ("Joint Decl."), submitted herewith.

[2] This application for attorneys' fees and expenses is submitted on behalf of Co-Lead Counsel and the Court-appointed liaison counsel for Lead Plaintiffs and the Settlement Class, The Law Offices of Andrés W. López, P.S.C. (collectively, "Plaintiffs' Counsel").

undertaken, the work performed, the result obtained, and the favorable response of the Settlement Class to date,[3] Co-Lead Counsel respectfully submit that the requested fees and expenses are fair and reasonable and should be approved by the Court.[4]

II. THE REQUESTED FEE AND EXPENSE AWARD IS FAIR AND REASONABLE

A. The Common Fund Doctrine

For over a century, the Supreme Court has recognized the "common fund" exception to the general rule that a litigant bears his or her own attorneys' fees. *Trustees v. Greenough*, 105 U.S. 527 (1882). The rationale for the common fund principle was explained in *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980), as follows:

> [T]his Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. . . . Jurisdiction over the fund involved in the litigation allows a court to prevent . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

The common fund doctrine both prevents unjust enrichment and encourages counsel to protect the rights of those who have very small claims. The Supreme Court has emphasized that private actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [Securities and Exchange] Commission action.'" *Bateman Eichler, Hill*

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[3] To date, no Class Member has objected to Co-Lead Counsel's request for fees or expenses. The deadline for receipt of objections is October 11, 2011. If any objections are received, they will be addressed in Co-Lead Counsel's reply submission.

[4] As several courts have held, "courts should afford a presumption of reasonableness to fee requests submitted pursuant to an agreement between a properly-selected lead plaintiff and properly-selected lead counsel." *In re Cendant Corp. Litig.*, 264 F.3d 201, 220 (3d Cir. 2001); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 466 (S.D.N.Y. 2004) ("[I]n 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.").

Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)); *accord Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007).

Federal courts have, therefore, long recognized that fee awards in successful cases, such as the instant one, encourage the prosecution of actions on behalf of other individuals with valid claims, and thereby promote private enforcement of, and compliance with, important areas of federal and state law, including the federal securities laws. *See, e.g.*, *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 679, 687 (M.D. Ala. 1988) ("[C]ourts also have acknowledged the economic reality that in order to encourage 'private attorney general' class actions brought to enforce the securities laws on behalf of persons with small individual losses, a financial incentive is necessary to entice capable attorneys, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time-consuming cases for which they may never be paid.").

In complex securities class actions, competent counsel for plaintiffs can be retained only on a contingent basis. Consequently, a large segment of the public would be denied a remedy for violations of the federal securities laws if fees awarded by the courts did not fairly and adequately compensate counsel for the services provided, the serious risks undertaken, and the delay before any compensation is received.

B. The First Circuit Has Expressed a Preference for the Percentage-of-the Fund Method in Awarding Fees in Common Fund Cases

The First Circuit favors awarding fees from a common fund based upon the percentage-of-the-fund method. *See Nilsen v. York County*, 400 F. Supp. 2d 266, 270 (D. Me. 2005) ("In the First Circuit, courts have discretion to award fees from a common fund 'either on a percentage of the fund basis or by fashioning a lodestar.'") (citation omitted). "As between the two methods, the First Circuit has noted that the percentage-of-funds method is the prevailing practice, and that it may have

distinct advantages over the lodestar approach." *Id*. at 270-71. *See also In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 78 (D. Mass. 2005).

The First Circuit's most recent pronouncement on the subject is *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig*., 56 F.3d 295, 305 (1st Cir. 1995) ("*Thirteen Appeals*"). There, the district court awarded attorneys' fees of 31% of a $220 million settlement fund – *i.e*., roughly $68 million. On appeal, the First Circuit held that "use of the [percentage of fund] method in common fund cases is the prevailing praxis" based upon the "distinct advantages that the [percentage of fund] method can bring to bear in such cases." *Id.* at 307.[5]

Among the advantages recognized by the court in *Thirteen Appeals* was the fact that the percentage method is less burdensome to administer than the lodestar method, which "forc[es] the judge to review the time records of a multitude of attorneys in order to determine the necessity and reasonableness of every hour expended." 56 F.3d at 307. The court also acknowledged that the "shift in focus lessens the possibility of collateral disputes that might transform the fee proceeding into a second major litigation." *Id*. Moreover, the court recognized another important advantage of the percentage method, namely, that, unlike the lodestar method, it does not create a "'disincentive for the early settlement of cases.'" *Id*. (citation omitted).[6]

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[5] The First Circuit noted that two Courts of Appeals had expressly ***required*** the use of percentage awards in common fund cases. *E.g.*, *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271-72 (D.C. Cir. 1993). The Third Circuit has expressed a similar view. *See* Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 255 (Oct. 8, 1985), cited in *Thirteen Appeals*, 56 F.3d at 306.

[6] The First Circuit in *Thirteen Appeals* noted that the lodestar method, which is linked to time spent in obtaining a result, creates a disincentive for early settlement of cases and rewards unproductive behavior. *Thirteen Appeals*, 56 F.3d at 307, also recognized that the percentage method better reflects the market value of counsel's services

Application of the percentage approach in securities class actions is further supported by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which provides that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." *See* 15 U.S.C. §78u-4(a)(6). Finally, "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." *Global Crossing*, 225 F.R.D. at 466. This presumption of reasonableness "'ensure[s] that the lead plaintiff, not the court, functions as the class's primary agent vis-à-vis its lawyers.'" *Id.* (quoting *Cendant*, 264 F.3d at 282). Thus, Co-Lead Counsel's fee agreements with Lead Plaintiffs, which were negotiated and agreed to in 2011 after the Settlement was achieved, are "'precisely the type of bargaining that the PSLRA anticipated and to which a court reasonably may give substantial deference.'" *Global Crossing*, 225 F.R.D. at 468 n.16 (citation omitted).

> because the [percentage of fund] technique is result-oriented rather than process-oriented, it better approximates the workings of the marketplace. We think that Judge Posner captured the essence of this point when he wrote than "the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character." *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992). In fine, the market pays for the result achieved.

Id. See also In re Sequoia Sys. Sec. Litig., No. 92-11431-WD, 1993 WL 616694, at *2 (D. Mass. Sept. 10, 1993) (percentage fee awards in such cases "ensure that those who are engaged on the plaintiff's side of securities litigation are not unduly discouraged from prompt resolution of these cases and full pursuit of the claims of plaintiffs who, absent such counsel, would be unlikely to have any vindication of the rights that they have in this settling.").

C. The Requested Twenty-Seven Percent Fee Award Is Well Within the Applicable Range of Percentage of Fund Awards

In selecting an appropriate percentage award, both the Supreme Court and the First Circuit have recognized that an appropriate fee is intended to approximate what counsel would receive if they were bargaining for their services in the marketplace. *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989); *Thirteen Appeals*, 56 F.3d at 307. The ordinary contingency fee arrangement is for one-third or more of the settlement fund. *See Furtado v. Bishop*, 635 F.2d 915, 917 (1st Cir. 1980); *accord Blum v. Stenson*, 465 U.S. 886, 903 * (1984) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers.") (Brennan, J., concurring).

Courts in this Circuit frequently award attorneys' fees of approximately thirty percent or more of the settlement fund in securities class actions. *See, e.g., In re First Bancorp Sec. Litig.*, No. 3:05-cv-02148-GAG, slip op. (D.P.R. Nov. 28, 2007) (awarding 27% of settlement proceeds); *Relafen*, 231 F.R.D. at 82 (awarding 33-1/3% of settlement proceeds); *Deckler v. Ionics, Inc., et al.*, No. 03-CV-10393-WGY, slip op. (D. Mass. Apr. 4, 2005) (30% of settlement proceeds); *In re Segue Software, Inc. Sec. Litig.*, No. 99-10891-RGS, slip op. (D. Mass. July 31, 2001) (33% of settlement fund); *Wilensky, et al. v. Digital Equip. Co., et al.*, No. 94-10752-JLT (D. Mass. July 11, 2001) (33-1/3% fee awarded); *Chalverus v. Pegasystems, Inc., et al.*, No. 97-12570-WGY, slip op. (D. Mass. Dec. 19, 2000) (33% awarded).

The request is also consistent with fee percentages that have been awarded across the country in securities class actions with settlements of comparable size or larger. *See, e.g., Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999) (affirming award of one-third of $40 million settlement); *In re BellSouth Corp. Sec. Litig.*, No. 1:02-CV-2142-WSD, 2007 U.S. Dist. LEXIS 98429, at *14 (N.D. Ga. Apr. 9, 2007) (awarding 30% of $34.5 million settlement); *In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 433-35 (E.D. Pa. 2001) (awarding 33.3% of $48 million

settlement). *See also In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 303 (3d Cir. 2005) (recognizing the findings of three studies indicating (i) average fee of 31% in settlements greater than $10 million; (ii) median percentage fee range of 27%-30% for all class actions resolved or settled over a four-year period; and (iii) for class action settlements between $100 million and $200 million, fee awards in 25%-30% range were "fairly standard").

Co-Lead Counsel's request for attorneys' fees of 27% of the Settlement Fund is therefore well within the range of numerous prior percentage awards made by courts in this Circuit (including this Court) and elsewhere.

D. The Relevant Factors Support Co-Lead Counsel's Fee Request

In addition to examining fee awards in similar cases, courts within this Circuit and elsewhere typically examine a variety of factors to determine whether a percentage request is fair and reasonable, including, *inter alia:* the amount of the recovery; the skill and efficiency of counsel; the complexity of the litigation; the risk of non-payment; and the presence or absence of substantial objections by members of the class. *Relafen*, 231 F.R.D. at 84. Each of these factors, and other factors considered by the courts, weigh heavily in support of the 27% fee request in this case.

1. The Amount of the Recovery

It is difficult to dispute that the benefit Co-Lead Counsel conferred on the Settlement Class – $37,500,000 in cash – is an excellent result. This is especially true where, as here, the case was fraught with risks and uncertainties, including the formidable and determined opposition of Defendants, who have consistently denied any wrongdoing. As described in the Joint Declaration and in the accompanying Settlement Brief, there existed the very real possibility that Lead Plaintiffs would be unable to prove their claims, including the risk that Lead Plaintiffs would not have succeeded in convincing a jury that Defendants possessed the requisite scienter or that many of the

statements at issue were materially false and misleading. Joint Decl., ¶¶7, 64-68. In addition, Lead Plaintiffs faced significant hurdles to demonstrating loss causation and damages. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341 (2005); Joint Decl., ¶¶69-70. In light of these obstacles, this Settlement represents an extraordinary result for the Settlement Class.[7]

2. The Skill and Efficiency of Counsel

Plaintiffs' Counsel are prominent and experienced plaintiffs' securities law firms. *See In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, 02-ML-1475-DT(RCx), 2005 U.S. Dist. LEXIS 13627, at *38 (C.D. Cal. June 10, 2005) ("The experience of counsel is also a factor in determining the appropriate fee award.").[8] As the court recognized in *Edmonds v. United States*, 658 F. Supp. 1126, 1137 (D.S.C. 1987), the "prosecution and management of a complex national class action requires unique legal skills and abilities." It is particularly important to reward attorneys with skill and standing for pursuing such cases as "the stated goal in percentage fee-award cases of 'ensuring that competent counsel continue to be willing to undertake risky, complex, and novel litigation.'" *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000) (citation omitted). *See also Tellabs*, 551 U.S. 308.

The quality and efficiency of the services provided in this case by Plaintiffs' Counsel is evidenced by the substantial recovery obtained for the Settlement Class even though there was

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[7] Indeed, the outstanding nature of the Settlement is confirmed by a recently published report by NERA Economic Consulting, which notes that the average settlement in securities class actions in the first half of 2011 was $23 million, and the median settlement was $6.3 million. Dr. Jordan Milev, Robert Patton, and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation*: *2011 Mid-Year Review*, at 21-23 (NERA 2011).

[8] The experience of Plaintiffs' Counsel is set forth in the Joint Declaration and the firm resumes attached thereto.

significant risk that a trial might have resulted in a finding for Defendants on liability or damages, or resulted in a lower judgment amount.

Plaintiffs' Counsel's skill and efficiency in representing Lead Plaintiffs and the Settlement Class is also exemplified by the quality of the opposition in this case. Sullivan & Cromwell LLP and Pietrantoni Méndez & Alvarez LLP, counsel for Defendants, are skilled and experienced in defending actions such as these. The Settlement clearly reflects Defendants' awareness of Plaintiffs' Counsel's ability and readiness to go to trial if a fair settlement could not be achieved. The ability of Lead Plaintiffs to obtain such an extraordinary settlement for the Settlement Class in the face of such formidable legal opposition further confirms the superior quality of Plaintiffs' Counsel's representation. *See In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003) ("'The quality of representation is best measured by results.'") (citation omitted), *aff'd sub nom. Wal-Mart Stores, Inc. v. VISA U.S.A. Inc.*, 396 F.3d 96 (2d Cir. 2005).

3. The Complexity of the Litigation and the Significant Obstacles to Recovery

The complexity and risk of the litigation also support the requested fee award in this case. As recognized by courts throughout the country, securities class actions, especially following the passage of the PSLRA, are inherently complex. *See, e.g.*, *In re Charter Commc'ns, Inc., Sec. Litig.*, No. MDL 1506, 2005 U.S. Dist. LEXIS 14772, at *47-*48 (E.D. Mo. June 30, 2005) ("Securities fraud class actions are by their nature, complex and difficult to prove."). This Action involved complex accounting, tax, and damages issues that were difficult to prove and explain to a jury. Throughout this litigation, Defendants vigorously contested issues of liability and damages and advanced arguments that, while largely unsuccessful at the motion to dismiss stage, might have persuaded a jury to find in their favor.

In order for Lead Plaintiffs to prove their claims at trial, they would have to prove that the Defendants made material misstatements and, with respect to their claims asserted under §10(b), that they were made with scienter. Scienter, "a mental state embracing intent to deceive, manipulate, or defraud" is an essential element of a §10(b) claim. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). To establish Defendants' scienter in this Circuit, Lead Plaintiffs must prove either that the "'defendants consciously intended to defraud, or that they acted with a high degree of recklessness.'" *Ezra Charitable Trust v. Tyco Int'l, Ltd.*, 466 F.3d 1, 6 (1st Cir. 2006) (citation omitted). Lead Plaintiffs also must prove that the Registration Statement for Popular's Series B preferred stock offering contained material misstatements.

As set forth in more detail in the Joint Declaration, throughout the litigation, Defendants argued that they had absolute defenses to Lead Plaintiffs' claims. Specifically, Defendants argued forcefully that the alleged misstatements were not false or misleading and, if they were false or misleading, they were not material; that any alleged misstatements were not made with scienter; and that the accounting decisions for Popular's deferred tax assets ("DTAs") were fully compliant with Generally Accepted Accounting Principles ("GAAP"). Joint Decl., ¶64. Defendants also argued that they had repeatedly cautioned investors in Popular's SEC filings that it might be necessary to adjust or reassess Popular's valuation allowance determinations. *Id.*, ¶65.

With respect to Lead Plaintiffs' scienter allegations, Defendants argued that the subjective judgment involved in the valuation allowance determination under SFAS No. 109 would be incommensurate with establishing their intent to commit fraud. Joint Decl., ¶66. Defendants also argued that PricewaterhouseCoopers LLP ("PwC"), Popular's auditor, had reviewed and concurred with each of Popular's valuation allowance determinations. *Id.*

Lead Plaintiffs also faced significant hurdles in establishing loss causation. Defendants argued that the alleged corrective disclosures, *i.e.*, Popular's January 22, 2009 announcement that it would record a full valuation allowance against its U.S. DTAs, and its February 19, 2009 announcement that Popular would cut its dividend by 75%, did not cause the Settlement Class's alleged damages. Joint Decl., ¶¶69-70. Defendants asserted that the price of Popular's Series B preferred stock did not decline materially in response to either announcement, and that, in any event, other negative news about Popular, including disclosure of losses in all of its U.S. operating segments, an increase in its allowance for loan losses, a weakening credit environment, decreased net interest income earnings, and further restructuring of certain subsidiaries, caused Popular's common stock price to fall. *Id.*, ¶70. If Defendants successfully countered Lead Plaintiffs' loss causation arguments at summary judgment or at trial, the Settlement Class's recoverable damages would likely have been significantly reduced.

4. The Risk of Non-Payment

Unlike defense counsel who are paid substantial hourly rates and reimbursed for their expenses on a regular basis, Plaintiffs' Counsel have not been compensated for any time or expenses since this case began, and would have received no compensation or even reimbursement of expenses had this case not been successful.[9]

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[9] The risk of no recovery in complex cases of this type is real. There are numerous class actions in which plaintiffs' counsel expended thousands of hours and yet received no remuneration despite their diligence and expertise. *See, e.g.*, *In re BankAtlanic Bancorp, Inc.*, No. 07-61542-CIV, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011) (court granted defendants' motion for a judgment as a matter of law following jury verdict mostly in plaintiffs' favor); *In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486 CW (EDL), 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) (jury verdict for defendants); *Robbins v. Koger Props.*, 116 F.3d 1441 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against an accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (Tenth

From the outset, Lead Plaintiffs and their counsel understood that they were 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, Plaintiffs' Counsel were obligated to assure that sufficient attorney and para-professional resources were dedicated to the prosecution of the Action and that funds were available to compensate staff and to pay for the considerable out-of-pocket costs which a case such as this entails. Because of the nature of a contingent practice where cases are predominantly "big cases" 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. Here, Plaintiffs' Counsel made sure that the Settlement Class received the best possible representation and dedicated whatever resources were needed to properly litigate this complex case.

In addition to advancing litigation expenses and paying overhead, Plaintiffs' Counsel faced the possibility that they would receive no attorneys' fees. The factor labeled by the courts as "the risks of litigation" is not an empty phrase. There are numerous cases where plaintiffs' counsel in contingent cases such as this, after the expenditure of thousands of hours, have received no compensation. It is only because defendants and their counsel know that the leading members of the plaintiffs' securities bar are prepared to, and will, force a resolution on the merits and go to trial, or pursue appeals if necessary, that meaningful settlements in actions such as this can occur.

Circuit overturned securities fraud class action jury verdict for plaintiffs in case filed in 1973 and tried in 1988 on basis of 1994 Supreme Court opinion).

5. Public Policy Favors the Requested Fee

The requested fee award would also be consistent with public policy and judicial economy interests that support the expeditious settlement of cases. As noted in *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358 (S.D.N.Y. 2002):

> [E]fficient prosecution of plaintiffs' claims weighs in favor of a finding of the quality of Plaintiffs' Class Counsel's representation here . . . . "[A] prompt and efficient attorney who achieves a fair settlement without litigation serves both his client and the interests of justice." In the context of a complex class action, early settlement has far reaching benefits in the judicial system.

Id. at 373 (quoting *McKenzie Constr., Inc. v. Maynard*, 758 F.2d 97, 101-02 (3d Cir. 1985)). *Accord In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 133 (D.N.J. 2002) ("[I]nformal discovery leading to an early settlement that avoids such costs [of formal discovery] favors approval of the fee application.").

Judge David S. Doty of the District of Minnesota observed, in *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 992 (D. Minn. 2005), that early settlements are consistent with the purposes of the Federal Rules of Civil Procedure, which "'shall be construed and administered to ensure the ***just, speedy, and inexpensive determination*** of every action.'" (quoting Fed. R. Civ. P. 1) (emphasis in original). "Under Rule 1, as officers of the court, attorneys share the responsibility with the court of ensuring that cases are 'resolved not only fairly, but without undue cost or delay.'" *Id.* (citing Fed. R. Civ. P. 1 Advisory Committee Notes, 1993 Amendments). Co-Lead Counsel have likewise litigated this case efficiently, and, for their efforts, seek approval of a 27% fee.

E. The Reaction of the Settlement Class Favors the Requested Fee

Finally, the favorable reaction of the Class Members also supports the reasonableness of the fee request. The Notice advised potential Class Members that Co-Lead Counsel would apply to the Court for a fee not to exceed 27% of the Settlement Fund and expenses not to exceed $1,000,000

(plus interest). To date, although the deadline for objections is not until October 11, 2011, no Class Member of has objected to the fee or expense request. Consequently, the favorable reaction of the Settlement Class further supports the requested fee award. *See, e.g.*, *Sequoia Sys.*, 1993 WL 616694, at *1; *Ressler v. Jacobson*, 149 F.R.D. 651, 656 (M.D. Fla. 1992) (a lack of objections is "strong evidence of the propriety and acceptability" of the fee request).

F. The Fee Request Is Also Fully Justified Under the Lodestar/Multiplier Method

The First Circuit does not require a court to cross check the percentage of fund against the lodestar in its determination of the reasonableness of the requested fee. *Relafen*, 231 F.R.D. at 81. Nevertheless, the requested fee is also reasonable under the lodestar method of analysis. As reflected in the accompanying Joint Declaration, Plaintiffs' Counsel have devoted over 6,200 hours and $3,231,951.25 in time charges, at current hourly rates, to the prosecution and settlement of this complex litigation.[10] The requested fee amounts to a reasonable multiple of counsel's lodestar.

The 3.13 multiplier reflected here falls within the range of multipliers found reasonable for cross-check purposes by courts throughout the country, and is fully justified here given the effort required, the risks faced, and the results achieved. *See, e.g.*, *Cornwell v. Credit Suisse Group, et al.*, No. 08 CV 03758(VM), slip op. (S.D.N.Y. July 20, 2011) (4.7 multiplier on $70 million settlement); *In re Veritas Software Corp. Sec. Litig.*, No. C-03-0283 MMC, 2005 WL 3096079, at *19 (N.D. Cal. Nov. 15, 2005) (applying 4.0 multiplier where motion to dismiss was pending and no formal discovery pending); *Maley*, 186 F. Supp. 2d at 371 ("it clearly appears that the modest multiplier of 4.65 is fair and reasonable"). *See also* 1 Alba Conte, *Attorney Fee Awards*, §2.06, at 39 (2d ed.

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[10] The Supreme Court has held that the use of current rates is proper because those rates more adequately compensate for inflation and loss of use of funds. *Jenkins*, 491 U.S. 274.

1993) ("When a large common fund has been recovered and the hours are relatively small, some courts reach a reasonable fee determination based on large multiples of 5 or 10 times the lodestar.").

As the court noted in *In re Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 131 (N.D. Ill. 1990): "There should be no arbitrary ceiling on multipliers." This is especially true when a lodestar/multiplier is used merely as a cross-check on reasonableness. To find otherwise undermines the principles supporting the percentage approach and encourages needless lodestar building litigation. *See also In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 196 (E.D. Pa. 2000) ("The court will not reduce the requested award simply for the sake of doing so when every other factor ordinarily considered weighs in favor of approving class counsel's request of thirty percent."). Indeed, the multiplier here is amply supported by the substantial nature of the recovery and the tremendous amount of work performed by Co-Lead Counsel in order to obtain it.

G. The Expenses Incurred by Plaintiffs' Counsel Were Reasonable

As demonstrated in the Joint Declaration submitted herewith, Plaintiffs' Counsel have incurred expenses of $435,416.15 in successfully prosecuting this Action. These expenses included costs for, among other things, filing fees, service of process, travel, legal research, copying, and consultants. The expenses for which reimbursement is sought herein are the type of expenses for which "the paying, arms' length market" reimburses attorneys, and they are properly chargeable to the Settlement Fund. *See, e.g.*, *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 570 (7th Cir. 1992). They are reasonable and necessary within the parameters set by this Circuit. *See In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999) (class counsel creating a common fund is entitled to recover "expenses, reasonable in amount, that were necessary to bring the action to a climax").

As noted above, to date, no Class Member has objected to the amount of expenses being sought by Co-Lead Counsel. The positive reaction of the Settlement Class further supports the requested expense award. *See, e.g.*, *Sequoia Sys.*, 1993 WL 616694, at *1.

III. CONCLUSION

For all of the foregoing reasons, Co-Lead Counsel respectfully request that the Court award: (i) attorneys' fees of 27% of the Settlement Fund; and (ii) expenses in the amount of $435,416.15 (plus interest).

RESPECTFULLY SUBMITTED,

In San Juan, Puerto Rico, this
4th day of October, 2011

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