UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE: SUNEDISON, INC. SECURITIES LITIGATION This Document Relates To: *Horowitz et al. v. SunEdison, Inc. et al.*, Case No. 1:16-cv-07917-PKC	Civil Action No. 1:16-md-2742-PKC

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

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Max W. Berger
Salvatore J. Graziano
Katherine M. Sinderson
Adam D. Hollander
1251 Avenue of the Americas
New York, New York 10020
Tel: (212) 554-1400
Fax: (212) 554-1444
Email: mwb@blbglaw.com
salvatore@blbglaw.com
katiem@blbglaw.com
adam.hollander@blbglaw.com

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Pursuant to Rule 23(h) of the Federal Rules of Civil Procedure, Court-appointed Lead Counsel Bernstein Litowitz Berger & Grossmann LLP ("Lead Counsel") respectfully submits this memorandum of law in support of its motion for (i) an award of attorneys' fees for Plaintiffs' Counsel in the amount of 21% of the Settlement Fund; (ii) an award of $1,525,355.53 for litigation expenses that were reasonably and necessarily incurred by Plaintiffs' Counsel in prosecuting and resolving the Action; and (iii) awards of $13,598.65 to Lead Plaintiff the Municipal Employees' Retirement System of Michigan ("MERS") and $1,819.50 to Named Plaintiff Arkansas Teacher Retirement System ("ATRS," and together with MERS, "Plaintiffs") for their costs and expenses directly related to their representation of the Class, as authorized by the Private Securities Litigation Reform Act of 1995 (the "PSLRA").[1]

PRELIMINARY STATEMENT

The proposed Settlement, which provides for the payment of $74 million in cash (with a possible additional recovery of up to $2 million) to resolve the Action, represents a very favorable result for the Class. In undertaking this litigation, counsel faced numerous challenges to proving liability, loss causation, and damages that posed the serious risk of no recovery, or a substantially lesser recovery than the Settlement, for the Class. The significant monetary recovery was achieved through the skill, tenacity, and effective advocacy of Lead Counsel, which litigated this Action on a fully contingent basis against highly skilled defense counsel. The Settlement was reached only after more than three years of hard-fought litigation, including substantial discovery, which required an enormous amount of counsel's time and resources.

[1] All capitalized terms that are not otherwise defined have the meanings assigned in the Stipulation and Agreement of Settlement, dated July 11, 2019 (ECF No. 316-1) (the "Stipulation") or in the Declaration of Salvatore J. Graziano in Support of (I) Plaintiffs' Motion for Final Approval of Settlement and Plan of Allocation; and (II) Lead Counsel's Motion for Attorneys' Fees and Litigation Expenses (the "Graziano Declaration"), filed herewith. In this memorandum, citations to "¶ __" refer to paragraphs in the Graziano Declaration and citations to "Ex. __" refer to exhibits to the Graziano Declaration.

As detailed in the accompanying Graziano Declaration,[2] Lead Counsel vigorously pursued this litigation from its outset by, among other things: (i) conducting an extensive investigation into the alleged fraud, including interviews with numerous former employees of SunEdison, consultation with multiple experts, and a thorough review and analysis of the voluminous public information relating to SunEdison's collapse, such as SEC filings, press releases and other public statements, media and news reports, analyst reports, and court filings from the Company's Chapter 11 bankruptcy proceeding and whistleblower actions brought against Defendants; (ii) successfully transferring the litigation to this Court through the Judicial Panel on Multi-District Litigation (the "MDL Panel"); (iii) researching and drafting two extensive amended complaints, including the operative Second Amended Consolidated Securities Class Action Complaint (the "Complaint"); (iv) briefing Plaintiffs' opposition to, and defeating in part, Defendants' motions to dismiss; (v) successfully briefing Plaintiffs' opposition to Defendant Ahmad Chatila's Rule 12(c) motion for judgment on the pleadings; (vi) engaging in substantial nationwide and international discovery efforts, including drafting and serving document requests on Defendants and subpoenas on nearly two dozen nonparties, serving and responding to interrogatories, obtaining and reviewing more than 2,260,000 pages of documents produced by Defendants and third parties, producing close to 40,000 pages of documents to Defendants, deposing 19 fact witnesses, exchanging with Defendants ten expert reports from nine different experts, and litigating numerous discovery disputes against Defendants and third parties; (vii) successfully moving to certify the Class and providing notice of the pendency of the

[2] The Graziano Declaration is an integral part of this submission and, for the sake of brevity, the Court is respectfully referred to it for detailed descriptions of, *inter alia*: the nature of the claims asserted (¶¶ 14-15); the history of the Action (¶¶ 16-223); the negotiations leading to the Settlement (¶¶ 216-23); the risks and uncertainties of continued litigation (¶¶ 7-9, 224-34); and the services Plaintiffs' Counsel provided for the benefit of the Class (¶¶ 4-5, 18-223, 254).

Action to potential Class Members; (viii) undertaking years-long efforts to mediate and settle the Action, including three separate mediations sessions under the auspices of experienced class action mediators; (ix) negotiating the final terms of the Settlement with Defendants; and (x) drafting, finalizing, and filing the Stipulation and related Settlement documents.

The Settlement is a particularly favorable result when considered in light of the substantial litigation risks in this Action, including the risks associated with proving Defendants' liability and establishing loss causation and damages. These risks are detailed in the Graziano Declaration at paragraphs 224 to 234 and are summarized in the memorandum of law supporting the Settlement. These risks posed a real possibility that Plaintiffs and the Class would not be able to recover or would have recovered a much lesser amount if the Action proceeded.

As compensation for their efforts on behalf of the Class and the risks of non-payment they faced in bringing the Action on a contingent basis, Lead Counsel now seeks an attorney-fee award for all Plaintiffs' Counsel of 21% of the Settlement Fund, which will amount to 21% of the current $74 million amount of the Settlement Fund (*i.e.*, $15,540,000, plus accrued interest) plus 21% of any future recovery with respect to the Supplemental Payment of up to $2 million (*i.e.*, up to a maximum additional $420,000, plus accrued interest). The requested fee is well within the range of fees that courts in this Circuit have awarded in securities class actions with comparable recoveries on a percentage basis, and represents a "negative" multiplier of approximately 0.86 on Plaintiffs' Counsel's total lodestar.

Moreover, the fee request is within the terms of the written fee agreement entered into between Lead Counsel and Lead Plaintiff MERS at the outset of the litigation. *See* ¶¶ 12, 253. MERS—a sophisticated institutional investor that actively supervised the Action—has endorsed the fee request and believes that a 21% fee award is reasonable in light of result achieved in the

Action, the quality of the work counsel performed, and the risks of the litigation. *Id*.

In addition, while the deadline set by the Court for Class Members to object to the requested attorneys' fees and expenses has not yet passed, to date, no objections to the requests for fees and expenses have been received. ¶¶ 241, 266, 276. Pursuant to the Preliminary Approval Order, a total of 287,016 Settlement Notices have been mailed to potential Class Members and their nominees through September 19, 2019, and the Summary Settlement Notice was published in the *Wall Street Journal* and transmitted over the *PR Newswire*. *See* Declaration of Richard W. Simmons (Ex. 4) ("Simmons Decl."), at ¶¶ 7-8. The Settlement Notice advised potential Class Members that Lead Counsel would apply for an award of attorneys' fees in amount not to exceed 22% of the Settlement Fund and for payment of litigation expenses (including the reasonable costs and expenses of Plaintiffs) in an amount not to exceed $2,000,000. *See* Simmons Decl. Ex. A, at ¶¶ 5, 55. The fees and expenses sought by Lead Counsel are within the amounts set forth in the Settlement Notice.[3]

Lead Counsel submits that in light of the recovery, the time, effort, and work performed by Plaintiffs' Counsel, the skill and expertise required, and the risks that counsel undertook, the requested fee award is reasonable. In addition, the litigation expenses for which Lead Counsel seeks payment were reasonable and necessary for the successful prosecution of the Action.

ARGUMENT

I. 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

[3] The deadline for submitting objections is October 4, 2019. Lead Counsel will address any objections received in its reply papers, which will be filed on or before October 18, 2019.

attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). Courts recognize that awards of fair 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 therefore "to discourage future misconduct of a similar nature." *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *23 (S.D.N.Y. Nov. 8, 2010) (citation omitted); *see In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *2 (S.D.N.Y. Nov. 7, 2007) (same).

The Supreme Court has emphasized that private securities actions such as this Action are "an essential supplement to criminal prosecutions and civil enforcement actions" by the SEC. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). Compensating plaintiffs' counsel for their risks is crucial, because "[s]uch actions could not be sustained if plaintiffs' counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class." *Hicks v. Morgan Stanley*, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) (citation omitted).

II. THE COURT SHOULD AWARD A REASONABLE PERCENTAGE OF THE COMMON FUND

Lead Counsel respectfully submits that the Court should award a fee based on a percentage of the common fund obtained. The Second Circuit has expressly approved the percentage method, recognizing that "the lodestar method proved vexing" and had resulted in "an inevitable waste of judicial resources." *Goldberger*, 209 F.3d at 48-50 (holding that either the percentage-of-fund or lodestar method may be used to determine appropriate attorneys' fees); *Savoie v. Merchs. Bank*, 166 F.3d 456, 460 (2d Cir. 1999) (stating that the "percentage-of-the-fund method has been deemed a solution to certain problems that may arise when the lodestar method is used in common fund cases"). More recently, the Second Circuit has reiterated its

approval of the percentage method, stating that it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation," and has noted that the "trend in this Circuit is toward the percentage method." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (citations omitted); *see also In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 416 (S.D.N.Y. 2018); *In re Comverse Tech., Inc. Sec. Litig.*, 2010 WL 2653354, at *2 (E.D.N.Y. June 24, 2010).

III. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE UNDER EITHER THE PERCENTAGE-OF-THE-FUND METHOD OR THE LODESTAR METHOD

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

The Supreme Court has recognized that an appropriate court-awarded fee is intended to approximate what counsel would receive if they bargained for the services in the marketplace. *See Missouri v. Jenkins*, 491 U.S. 274, 285-86 (1989). If this were a non-representative action, the customary fee arrangement would be contingent, on a percentage basis, and typically in the range of 30% to 33% of the recovery. *See Blum v. Stenson*, 465 U.S. 886, 903 (1984) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.") (Brennan, J., concurring).

The 21% attorney fee requested by Lead Counsel is well within the range of percentage fees that have been awarded in the Second Circuit in securities class actions and other similar litigation with comparable recoveries. *See, e.g.*, *Freudenberg v. E*Trade Fin. Corp.*, No. 07 Civ. 8538 (JPO) (MHD), slip op. at 6 (S.D.N.Y. Oct. 20, 2012), ECF No. 154 (awarding 28% of $79 million settlement) (Ex. 7); *In re Amaranth Nat. Gas Commodities Litig.*, 2012 WL 2149094, at *2 (S.D.N.Y. June 11, 2012) (awarding 30% of $77.1 million settlement); *Cornwell v. Credit Suisse Grp.*, 2011 WL 13263367, at *1-2 (S.D.N.Y. July 18, 2011) (awarding 27.5% of $70

million settlement); *In re Merrill Lynch & Co. Sec., Derivative & ERISA Litig.*, No. 07-cv-9633 (JSR)(DFE), slip op. at 6 (S.D.N.Y. Aug. 21, 2009), ECF No. 272 (awarding 25% of $75 million settlement) (Ex. 8); *In re Priceline.com, Inc. Sec. Litig.*, 2007 WL 2115592, at *5 (D. Conn. July 20, 2007) (awarding 30% of $80 million settlement); *In re Am. Express Fin. Advisors Sec. Litig.*, 2007 WL 9657979, at *4 (S.D.N.Y. July 18, 2007) (awarding 27% of $100 million settlement); *In re Philip Servs. Corp. Sec. Litig.*, 2007 WL 959299, at *1, *3 (S.D.N.Y. March 28, 2007) (awarding 26% of $79.75 million settlement).[4] The requested fee is also consistent with fee awards in similarly sized securities class actions in other circuits.[5]

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

To ensure the reasonableness of a fee awarded under the percentage-of-the-fund method, district courts may cross-check the proposed award against counsel's lodestar. *See Goldberger*, 209 F.3d at 50.

Here, Plaintiffs' Counsel[6] spent a total of 38,187.10 hours of attorney and other professional-support time prosecuting the Action for the benefit of the Class. ¶ 257. Plaintiffs'

[4] Indeed, percentage fees of this amount and higher have often been awarded in much larger settlements in the Second Circuit. *See, e.g., In re Pfizer Inc. Sec. Litig.,* No. 04-cv-09866 (LTS) (HBP), slip op. at 2 (S.D.N.Y. Dec. 21, 2016), ECF No. 727 (awarding 28% of $486 million settlement) (Ex. 9); *In re Bank of New York Mellon Corp. Forex Transactions Litig.*, 148 F. Supp. 3d 303, 305 (S.D.N.Y. 2015) (awarding 25% of $180 million settlement); *Bd. of Trs. of the AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, 2012 WL 2064907, at *2 (S.D.N.Y. June 7, 2012) (awarding 25% of $150 million settlement); *Comverse*, 2010 WL 2653354, at *6 (awarding 25% of $225 million settlement); *In re Deutsche Telekom AG Sec. Litig.*, 2005 WL 7984326, at *4 (S.D.N.Y. June 9, 2005) (awarding 28% of $120 million settlement); *In re Oxford Health Plans, Inc. Sec. Litig.*, 2003 U.S. Dist. LEXIS 26795, at *13 (S.D.N.Y. June 12, 2003) (awarding 28% of $300 million settlement).

[5] *See, e.g.*, *Minneapolis Firefighters Relief Ass'n v. Medtronic, Inc.*, 2012 WL 12903758, at *1 (D. Minn. Nov. 8, 2012) (awarding 25% of $85 million settlement); *Billitteri v. Secs. Am., Inc.*, 2011 WL 3585983, at *9 (N.D. Tex. Aug. 4, 2011) (awarding 25% of $80 million settlement).

[6] In addition to Lead Counsel, Plaintiffs' Counsel includes (i) Cole Schotz P.C., counsel specializing in bankruptcy litigation that was retained to monitor SunEdison's bankruptcy proceedings and assist Lead Counsel in protecting the interests of class members in light of SunEdison's complex bankruptcy; and (ii) Scott+Scott Attorneys at Law LLP, which acted as counsel for the plaintiffs who filed the initial securities class action related to purchases of SunEdison preferred stock.

Counsel's lodestar, derived by multiplying the hours spent by each attorney and paraprofessional by their current hourly rates, is $18,082,632.00.[7] *See id*. The requested fee of 21% of the $74 million Current Settlement Amount, or $15,540,000 (before interest), therefore represents a "negative" multiplier of approximately 0.86 of the total lodestar, *i.e.*, it is only 86% of Plaintiffs' Counsel's time.[8] This multiplier is significantly below multipliers commonly awarded in securities class actions and other comparable litigation. Indeed, in complex contingent litigation such as this Action, fees representing multiples above the lodestar are regularly awarded to reflect the contingency fee risk and other relevant factors. *See FLAG Telecom*, 2010 WL 4537550, at *26 ("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") (citation omitted); *Comverse*, 2010 WL 2653354, at *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") (citation omitted); *see also Wal-Mart*, 396 F.3d at 123 (upholding multiplier of 3.5 as reasonable on appeal); *Woburn Ret. Sys. v. Salix Pharm., Ltd.,* 2017 WL 3579892, at *6 (S.D.N.Y. Aug. 18, 2017) (awarding fee representing a 3.14 multiplier); *Comverse*, 2010 WL 2653354, at *5 (2.78 multiplier); *Deutsche Telekom*, 2005 WL 7984326, at *4 (3.96 multiplier); *Cornwell*, 2011 WL 13263367, at *2 (4.7 multiplier);

[7] The Supreme Court and courts in this Circuit have approved the use of current hourly rates to calculate the base lodestar figure as a means of compensating for the delay in receiving payment, inflation, and the loss of interest. *See Jenkins*, 491 U.S. at 284; *In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at *15 (S.D.N.Y. Dec. 19, 2014) ("the use of current rates to calculate the lodestar figure has been endorsed repeatedly by the Supreme Court, the Second Circuit and district courts within the Second Circuit as a means of accounting for the delay in payment inherent in class actions and for inflation").

[8] As discussed above, the requested attorneys' fees may include up to an additional $420,000 (before interest) in fees, for a total fee award of $15,960,000 (before interest), depending on the ultimate future recovery on the $2,000,000 Supplemental Payment. Based on a potential total award of $15,960,000, the requested attorneys' fees would still represent a "negative" multiplier of approximately 0.88.

Maley v. Del Glob. Techs. Corp., 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (awarding fee equal to a 4.65 multiplier, which was "well within the range awarded by courts in this Circuit and courts throughout the country").

In sum, the requested fee award is well within the range of what courts in this Circuit regularly award in class actions such as this one, whether calculated as a percentage of the fund or in relation to Plaintiffs' Counsel's lodestar. Moreover, as discussed below, each of the factors established for the review of attorneys' fee awards by the Second Circuit in *Goldberger* also strongly supports a finding that the requested fee is reasonable.

IV. THE FEE REQUEST IS ENTITLED TO A PRESUMPTION OF REASONABLENESS BECAUSE IT IS BASED ON A FEE AGREEMENT WITH LEAD PLAINTIFF AT THE OUTSET OF THE LITIGATION

The requested fee should be afforded a presumption of reasonableness because it is within the terms of the fee agreement that Lead Counsel entered into with a sophisticated institutional Lead Plaintiff at the outset of the litigation. ¶¶ 12, 253. Even if a formal presumption of reasonableness is not afforded to the fee based on the pre-litigation agreement, the existence of the agreement and the approval of the requested fee by Lead Plaintiff, which was actively involved in the prosecution and settlement of the Action, strongly support approval of the fee.

The PSLRA was intended to encourage institutional investors like MERS 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 *32 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 731. Congress believed that 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.

A number of courts have treated fee arrangements between PSLRA lead plaintiffs and their counsel at the outset of the litigation to be presumptively reasonable in light of Congress's intent to empower lead plaintiffs under the PSLRA to select and supervise attorneys on behalf of the class. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 282 (3d Cir. 2001) (*ex ante* fee agreements in securities class actions enjoy "a presumption of reasonableness"); *In re Marsh & McLennan Cos. Sec. Litig.*, 2009 WL 5178546, at *15 (S.D.N.Y. Dec. 23, 2009) ("Since the passage of the PSLRA, courts have found such an agreement between fully informed lead plaintiffs and their counsel to be presumptively reasonable"). The Second Circuit has indicated that the Court should, at least, give "serious consideration" to such agreements, *see In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133-34 (2d Cir. 2008). For example, the Second Circuit has stated that:

> We expect . . . that district courts will give 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.

Id.; *see also Comverse*, 2010 WL 2653354, at *4 ("an *ex ante* fee agreement is the best indication of the actual market value of counsel's services").

Here, Lead Plaintiff is a classic example of the sophisticated and financially interested investor that Congress envisioned serving as a fiduciary for the class when it enacted the PSLRA. Lead Plaintiff took a very active role in the litigation and closely supervised the work of Lead Counsel. *See* Declaration of Brian LaVictoire (Ex. 2) ("LaVictoire Decl.") at ¶¶ 5-6. Accordingly, the fee should be considered reasonable, and should be approved. *See Veeco*, 2007 WL 4115808, at *8 ("public policy considerations support the award in this case because the Lead Plaintiff . . . —a large public pension fund—conscientiously supervised the work of lead

counsel and has approved the fee request").

V. OTHER FACTORS CONSIDERED BY COURTS IN THE SECOND CIRCUIT CONFIRM THAT THE REQUESTED FEE IS FAIR AND REASONABLE

The Second Circuit has set forth the following criteria that courts should consider when reviewing a request for attorneys' fees in a common fund case:

> (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 quotes and citation omitted). These factors, together with the analyses above, demonstrate that the fee requested by Lead Counsel is reasonable.

A. The Time and Labor Expended Support the Requested Fee

The enormous time and effort expended by Lead Counsel in prosecuting the Action and achieving the Settlement also support the requested fee. The Graziano Declaration details the extraordinary efforts of Lead Counsel in prosecuting Plaintiffs' claims over the course of this multi-year litigation. As set forth in greater detail in the Graziano Declaration, Lead Counsel, among other things:

- conducted an extensive investigation into Defendants' alleged misstatements, which included consultation with multiple experts, interviews with dozens of witnesses, including dozens of former SunEdison employees, and a thorough review and analysis of the Company's SEC filings, press releases, and other public statements, media, news, and analyst reports concerning SunEdison, and court filings from the Company's Chapter 11 bankruptcy proceeding and whistleblowers actions (¶¶ 32-33, 58-59);
- successfully transferred the Action to the Southern District of New York and coordinated the many disparate actions involving SunEdison in this Court through the MDL Panel (¶¶ 34-38);
- researched and drafted two extensive amended complaints based on Lead Counsel's investigation (¶¶ 31-32, 58-59);
- briefed in opposition to, and defeated in part, Defendants' motions to dismiss the Complaint (¶¶ 65-73, 78-79);
- successfully defeated a post-motion to dismiss motion for judgment on the

pleadings filed by Defendant Ahmad Chatila under Rule 12(c) of the Federal Rules of Civil Procedure (¶¶ 89-92);

- engaged in substantial fact discovery efforts, which included drafting and serving discovery requests on Defendants, serving nearly two dozen document subpoenas on nonparties, serving and responding to interrogatories, obtaining and reviewing nearly 2.3 million pages of documents produced by Defendants and third parties, and deposing 19 fact witnesses nationwide (including nine former senior executives or high-ranking employees of SunEdison or related companies TerraForm Power and TerraForm Global, four former directors of SunEdison, and six representatives of the Underwriter Defendants), as well as a deposition of a key whistleblower that required Lead Counsel to travel internationally (¶¶ 94-117);
- produced close to 40,000 pages of documents to Defendants in response to their requests (¶ 164);
- prevailed on at least five separate, heavily-litigated discovery disputes with Defendants, the Company, and other third parties (¶¶ 118-60);
- successfully moved for class certification, which included submitting multiple expert reports from Plaintiffs' market-efficient expert and overcoming several significant arguments raised by Defendants (¶¶ 161-78);
- disseminated notice of the pendency of the Action to potential Class Members (¶¶ 180-82);
- retained and consulted extensively with four separate experts concerning market efficiency, damages, director due diligence, underwriter due diligence, and the Company's cash flows, who in total authored five expert reports on significant merits- and damages-related issues (¶¶ 183-86);
- responded to five reports from Defendants' experts (¶ 193);
- responded to several thorough summary judgment pre-motion letters filed by Defendants, including by submitting over 100 exhibits (¶¶ 197-215);
- prepared to depose Defendants' experts, and defend the depositions of Plaintiffs' experts, which depositions were set to proceed imminently had the Parties not reached the agreement to settle in June 2019 (¶¶ 195-96);
- aggressively engaged in a difficult and multi-year mediation process, including participating in three separate mediation sessions, spanning six days, overseen by experienced class action mediators (¶¶ 51-52, 74-75, 93); and
- negotiated the final terms of the Settlement with Defendants and drafted, finalized, and filed the Stipulation and related Settlement documents (¶¶ 216-21).

As noted above, Plaintiffs' Counsel expended 38,187.10 hours prosecuting this Action with a lodestar value of over $18 million. ¶ 257. Throughout the litigation, Lead Counsel staffed

the matter efficiently and avoided any unnecessary duplication of effort. ¶ 255. The time and effort devoted to this case by Plaintiffs' Counsel was critical in obtaining the favorable result achieved by the Settlement and confirms that the fee request here is reasonable.

B. The Risks of the Litigation Support the Requested Fee

The risk of the litigation is one of the most important *Goldberger* factors. *See Goldberger*, 209 F.3d at 54; *Comverse*, 2010 WL 2653354, at *5. The Second Circuit has recognized that the risks associated with a case undertaken on a contingent fee 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.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 470 (2d Cir. 1974) (citation omitted). "Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *Comverse*, 2010 WL 2653354, at *5 (citation omitted); *see also In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (it is "appropriate to take this [contingent-fee] risk into account in determining the appropriate fee to award") (citation omitted).

While Lead Counsel believes that Plaintiffs' claims are meritorious, Lead Counsel recognized that there were several substantial risks in the litigation from the outset and that Plaintiffs' ability to succeed at trial and obtain a substantial judgment was far from certain.

As discussed in greater detail in the Graziano Declaration and in the memorandum of law in support of the Settlement, there were substantial risks here with respect to liability, loss causation, and damages. ¶¶ 7-9, 224-33. Plaintiffs would have faced substantial challenges in proving that Defendants' statements were materially false and misleading when made. For

example, with respect to the only remaining alleged misstatement under the Exchange Act—Defendant Chatila's September 2, 2015 public statement that SunEdison would "generat[e] cash for a living" by "early 2016"—Chatila consistently and forcefully denied that this challenged statement was false or misleading. ¶¶ 8, 38, 67, 89-90, 199, 225-26. Chatila contended that the late-August 2015 Board of Director's presentation demonstrating that SunEdison did not expect positive total cash flows until the second quarter of 2016 at the earliest also included certain financial metrics that were actually projected to be positive by the first quarter of 2016; that his September 2015 statement referred to those metrics; and that his statement was therefore not false or made with the intent to deceive necessary to prove liability. ¶¶ 225-26. If Chatila prevailed on those arguments, or in establishing that his September 2015 statement was insulated from liability as a "forward looking" projection accompanied by adequate cautionary language, Plaintiffs would have failed to achieve any recovery on behalf of the Exchange Act Subclass.

Plaintiffs also faced significant risks in proving that the statements and omissions underlying the Securities Act claims were materially false and misleading. The claims brought under the Securities Act are based on three alleged misstatements and omissions relating to SunEdison's August 18, 2015 Preferred Offering: (i) Defendants' failure to disclose a margin call (the "Margin Call") that the Company received on an outstanding $410 million margin loan (the "Margin Loan") on August 7, 2015; (ii) Defendants' failure to disclose a $169 million second-lien loan from Goldman Sachs Bank USA (the "Second-Lien Loan") that closed and was funded on August 11, 2015; and (iii) the Company's inaccurate characterization of the Margin Loan as non-recourse debt, when it was in fact recourse to the Company. ¶¶ 203-205, 227-28. Defendants would have likely argued that investors knew or should have known when the Margin Call occurred because SunEdison's prior disclosures provided many, if not all, of the

metrics used in the formula to calculate the triggers for margin calls (such as the amount of collateral posted for the Margin Loan and the loan-to-value ratio the Company was obligated to maintain on the Margin Loan), and investors could have monitored the financial markets to determine exactly when the value of the collateral dropped. ¶¶ 203, 227. Further, Defendants could have succeeded on their argument that the amount of the Margin Call was not material and, therefore, investors were not misled by Defendants' failure to disclose it. *Id*.

Regarding the Second-Lien Loan, Defendants argued that the $169 million amount of the loan was not material, and that the terms of the Second-Lien Loan (including the interest rate and fees that Goldman Sachs charged) would not have been material to investors. ¶¶ 204, 228. During the litigation, Defendants developed evidence to support this position, including testimony and documents suggesting that the Second-Lien Loan's interest rate as disclosed in a November 2015 filing was actually incorrect and overstated, and that the fees disclosed at that time were also incorrect and were substantially inflated by legal fees for unrelated work. ¶ 228. If a jury found that the interest rate and fees for the Second-Lien Loan were lower than Plaintiffs contended, and therefore did not indicate any underlying difficulty by the Company accessing the capital markets or other financial problems at SunEdison, Plaintiffs may not have been able to establish Defendants' liability. Further, regarding the recourse nature of the Margin Loan, there was a real risk that Defendants would establish that the amount of the loan was not material, and that, given other disclosures prior to the Preferred Offering that did accurately describe the Margin Loan, investors were not misled. *Id.*

Further, Plaintiffs faced the risk that the Underwriter Defendants and/or Director Defendants would prevail on summary judgment or at trial in proving their defense that they conducted adequate due diligence and thus cannot be liable. The Underwriter Defendants could

have proven that, among other things, they conducted due diligence through their retention of experienced counsel in connection with the Preferred Offering, as well as based on previous diligence conducted for SunEdison in connection with other offerings and at various points leading up to the Preferred Offering. ¶¶ 206, 230. Similarly, the Director Defendants could have prevailed on such a defense because the Audit Committee of the SunEdison Board reviewed the Company's quarterly and annual filings incorporated into the Prospectus Supplement for the Preferred Offering, those filings were also reviewed by counsel and the Company's outside auditors, and because, they would contend, they were not aware of any "red flags" prior to the Preferred Offering that triggered any additional or heightened due-diligence obligations. *Id.*

Plaintiffs also faced significant hurdles in establishing "loss causation"—that the alleged misstatements were the cause of investors' losses—and in proving damages. With respect to the remaining Exchange Act claim, Plaintiffs would need to establish that Chatila's alleged September 2015 misstatement was the cause of investors' losses in SunEdison common stock. However, Chatila would likely argue that many of the alleged corrective disclosures do not relate to his alleged false statement concerning the timing of the Company's cash flows, especially in light of a subsequent statement on November 10, 2015 indicating that SunEdison would not generate positive cash flows until mid-2016. If Chatila prevailed on his loss-causation arguments, recoverable damages for the Exchange Act Subclass would have been dramatically reduced. ¶ 226.

With respect to the claims brought under the Securities Act, Plaintiffs also faced the significant risk that Defendants could prevail on "negative causation" arguments by establishing that declines in the price of SunEdison preferred stock after November 9, 2015 were due to reasons other than the alleged misstatements and omissions. Defendants would argue that

SunEdison fully disclosed and corrected the three items underlying the Securities Act claims (the Margin Call, the Second-Lien Loan, and the recourse nature of the Margin Loan) by the time that the Company's Form 10-Q was filed on November 9, 2015, and, therefore, the subsequent declines in SunEdison preferred stock were caused by unrelated market forces. If Defendants proved negative causation for declines in the value of SunEdison preferred stock after November 9, 2015, the amount of recoverable damages would have been substantially less. ¶¶ 229, 233.

Finally, the proposed Settlement is noteworthy because of the very substantial risk that certain of the Defendants would be unable to satisfy a significant judgment after trial, assuming Plaintiffs were successful in overcoming Defendants' credible challenges to liability and loss causation described above. Based on the Court's ruling on the motion to dismiss, Chatila is the only remaining Exchange Act Defendant in the Action, but he lacks any significant personal assets to contribute to any settlement or post-trial judgment, including because he held his SunEdison stock until it completely declined in value. ¶¶ 7, 232. Moreover, SunEdison, as a bankrupt, liquidating entity, is not a Defendant in this Action, and any recovery on Plaintiffs' Section 10(b) claim would be paid solely from the Company's available insurance proceeds. *Id.* Plaintiffs have been pursuing their claims for over three years and the insurance available to fund a settlement or post-trial judgment has been severely depleted, as it has been used both to defend against and resolve several governmental investigations and private actions. This Court has recognized the risk that this wasting asset presents on multiple occasions. *See, e.g., In re SunEdison, Inc. Sec. Litig.*, Civil Action No. 1:16-md-2742-PKC, Apr. 17, 2018 Tr. at 31:17-20, ECF No. 356 (Ex. 10) (Court expressed concern "that there will not be sufficient assets to satisfy anything close to a judgment. There may not even be assets or insurance proceeds available to

have any kind of a meaningful settlement."); *Id.*, Jan. 31, 2018 Tr. at 12:8-19, ECF No. 299 (Ex. 11) ("[defendants] Chatila and Wuebbels have dwindling personal resources and a limited pool of insurance coverage. … The diminishing insurance coverage is a factor in considering the reasonableness of the settlement, and so the settlement certainly was negotiated not only with the difficulty and risks of establishing liability and damages as a major concern, but also the defendants' ability to withstand a greater judgment.").

In the face of the many uncertainties regarding the outcome of the case, Lead Counsel undertook this case on a wholly contingent basis, knowing that the litigation could last for years and would require the devotion of a substantial amount of time and a significant expenditure of litigation expenses with no guarantee of compensation. ¶¶ 261-63.

Lead Counsel's assumption of this contingency fee risk strongly supports the reasonableness of the requested fee. *See FLAG Telecom*, 2010 WL 4537550, at *27 ("Courts in the Second Circuit have recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award."); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("There was significant risk of non-payment in this case, and Plaintiffs' Counsel should be rewarded for having borne and successfully overcome that risk.").

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

The magnitude and complexity of the Action also support the requested fee. Courts have recognized that securities class action litigation is "notably difficult and notoriously uncertain." *FLAG Telecom*, 2010 WL 4537550, at *27. This case was no exception. As noted above and in the Graziano Declaration, the litigation raised several complex questions concerning Defendants' liability, loss causation, and damages that would have required extensive efforts by Lead Counsel and consultation with Plaintiffs' experts to bring to resolution. Proving the claims in the

Action would have turned on complicated issues such as director and underwriter due diligence, company cash flows, market efficiency, and damages. To build the case, Lead Counsel had to dedicate a substantial amount of time to understanding these complex matters, conducting an extensive factual investigation, obtaining discovery, and working extensively with experts to analyze the claims and the evidence obtained.

Moreover, the SunEdison bankruptcy added an additional level of complexity to the prosecution of this case. For example, when SunEdison filed for bankruptcy protection, the Eastern District of Missouri (the jurisdiction of the original filing) *sua sponte* stayed the entire case—including as to the non-bankrupt Defendants. ¶¶ 23-25. At the same time, SunEdison's bankruptcy filing led to numerous additional related cases in California and New York which Defendants began to litigate individually in those separate jurisdictions, and which were competing for the same D&O insurance available to settle the Exchange Act claims. ¶ 34. In reaction to these developments, Lead Counsel took the initiative to file a motion before the MDL Panel to organize all the competing actions arising out of the collapse of SunEdison, and to transfer them to the Southern District of New York. ¶¶ 35-38. Ultimately, Lead Counsel was successful in coordinating the related actions in this Court, which was vital to the preservation of the available D&O insurance and the ultimate successful resolution of this Action.

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

The quality of the representation by Lead Counsel is another important factor that supports the reasonableness of the requested fee. Lead Counsel submits that the quality of its representation is best evidenced by the quality of the result achieved. *See, e.g.*, *Veeco*, 2007 WL 4115808, at *7; *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004). Here, as discussed above and in the Graziano Declaration, the Settlement provides a very favorable result for the Class considering the serious risks of continued litigation. *See* ¶¶ 224-33.

In order to achieve this result, Lead Counsel demanded an aggressive litigation schedule from the outset of the case and continually pursued additional discovery—while repeatedly urging Defendants and the Mediators to focus on a resolution of the Action before the available D&O insurance was fully exhausted. As a result of Lead Counsel's efforts, Plaintiffs: (i) successfully (in part) litigated motions to dismiss filed by the Individual Defendants and the Underwriter Defendants, and defeated Defendant Chatila's post-motion-to-dismiss motion for judgment on the pleadings; (ii) prevailed on five separate, heavily litigated discovery disputes that allowed Plaintiffs to develop a compelling factual record evidencing Defendants' liability, preserve the ability of common-stock purchasers to participate in the recovery, and recover for losses suffered post-November 2015; (iii) successfully moved for class certification, including defeating several novel arguments raised by Defendants, which, if accepted, would have substantially curtailed Class membership and damages; and (iv) aggressively engaged in a difficult, multi-year mediation process, including sessions with parties to this Action and to several other related actions. Furthermore, in order to ensure that Plaintiffs have maximized the recovery to common-stock investors, Lead Counsel secured Defendants' agreement to fund the Supplemental Payment of up to $2 million. Lead Counsel respectfully submits that the quality of its efforts in the Action, together with its substantial experience in securities class actions and its commitment to this litigation, provided it with the leverage necessary to negotiate the Settlement and secure a large as recovery as possible for the Class.

Furthermore, Lead Counsel faced talented adversaries in this Action. Courts have repeatedly recognized that the quality of the opposition faced by plaintiffs' counsel should also be taken into consideration in assessing the quality of the counsel's performance. *See, e.g.*, *Veeco*, 2007 WL 4115808, at *7 (among factors supporting 30% award of attorneys' fees was

that defendants were represented by "one of the country's largest law firms"); *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, 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") (citation omitted), *aff'd*, 272 F. App'x 9 (2d Cir. 2008). Here, Defendants were represented by able counsel from Sidley Austin LLP, Wilmer Cutler Pickering Hale and Dorr LLP, Shearman & Sterling LLP, and Paul, Weiss, Rifkind, Wharton & Garrison LLP, who zealously represented their clients throughout this Action. *See* ¶ 260. Notwithstanding this capable opposition, Lead Counsel's extraordinary litigation efforts and demonstrated willingness to vigorously prosecute the Action enabled it to achieve the favorable Settlement.

E. The Requested Fee in Relation to the Settlement

Courts have interpreted this factor as requiring the review of the fee requested in terms of the percentage it represents of the total recovery. "When determining whether a fee request is reasonable in relation to a settlement amount, 'the court compares the fee application to fees awarded in similar securities class-action settlements of comparable value.'" *Comverse*, 2010 WL 2653354, at *3 (citation omitted). As discussed in detail in Part III above, the requested fee is well within the range of percentage fees that courts in the Second Circuit have awarded in comparable cases.

F. Public Policy Considerations Support the Requested Fee

A strong public policy concern exists for rewarding firms for bringing successful securities litigation. *See FLAG Telecom*, 2010 WL 4537550, at *29 (if the "important public policy [of enforcing the securities laws] is to be carried out, the courts should award fees which will adequately compensate Lead Counsel for the value of their efforts, taking into account the enormous risks they undertook"); *Maley*, 186 F. Supp. 2d at 373 ("In considering an award of

attorney's fees, the public policy of vigorously enforcing the federal securities laws must be considered."); *Hicks*, 2005 WL 2757792, at *9 ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding.") (citation omitted). Accordingly, public policy favors granting Lead Counsel's fee and expense application here.

G. The Reaction of the Class to Date Supports the Requested Fee

The reaction of the Class to date also supports the requested fee. Through September 19, 2019, 287,016 copies of the Settlement Notice have been mailed to potential Class Members and nominees informing them, among other things, that Lead Counsel intended to apply to the Court for an award of attorneys' fees in an amount not to exceed 22% of the Settlement Fund and up to $2,000,000 in expenses. *See* Simmons Decl. ¶ 7 and Ex. A thereto. While the time to object to the Fee and Expense Application does not expire until October 4, 2019, to date, no objections have been received. ¶¶ 241, 266, 276. Should any objections be received, Lead Counsel will address them in its reply papers.

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

Lead Counsel's fee application includes a request for payment of the litigation expenses that Plaintiffs' Counsel paid or incurred, which were reasonable in amount and necessary to the prosecution of the Action. *See* ¶¶ 267-74. These expenses are properly recovered by counsel. *See Facebook IPO*, 343 F. Supp. 3d at 418 (in a class action, attorneys should be compensated "for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were incidental and necessary to the representation"); *In re China Sunergy Sec. Litig.*, 2011 WL 1899715, at *6 (S.D.N.Y. May 13, 2011) (same); *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"). As set forth in detail in the Graziano Declaration, Plaintiffs' Counsel incurred $1,525,355.53 in litigation expenses in connection with the prosecution of the Action. ¶ 270.

The expenses for which payment are sought are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the hour. These expenses include, among others, expert fees, document management costs, on-line research, mediation fees, court reporting and transcripts, photocopying, travel costs, and telephone and postage expenses. The largest expense is for retention of Plaintiffs' experts, in the amount of $724,157.56, or approximately 47% of the total litigation expenses. ¶ 271. Another significant category of expenses was for document management and discovery support, which included the cost of retaining the electronic discovery vendor which managed the database of documents received, which came to $201,809.68, or approximately 13% of the total amount of expenses. ¶ 272. The combined costs for on-line legal and factual research, in the amount of $200,084.00, also represent approximately 13% of the total amount of expenses. ¶ 273. A complete breakdown by category of the expenses incurred by Plaintiffs' Counsel is set forth in Exhibit 6 to the Graziano Declaration.

The Settlement Notice informed potential Class Members that Lead Counsel would apply for payment of litigation expenses in an amount not to exceed $2,000,000 which might include the reasonable costs and expenses of Plaintiffs directly related to their representation of the Class. The total amount of expenses requested by Lead Counsel is $1,540,773.68, which includes $1,525,355.53 for litigation expenses incurred by Plaintiffs' Counsel and a combined $15,418.15 for the costs and expenses directly incurred by Plaintiffs, an amount well below the amount listed in the Settlement Notice. To date, there has been no objection to the request for expenses.

VII. PLAINTIFFS SHOULD BE AWARDED THEIR REASONABLE COSTS AND EXPENSES UNDER THE PSLRA

In connection with its request for an award of Litigation Expenses, Lead Counsel also seeks an award of a combined $15,418.15 in costs and expenses incurred by Plaintiffs MERS and ATRS directly related to their representation of the 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 made to "any representative party serving on behalf of a class." 15 U.S.C. § 78u-4(a)(4). Here, Plaintiffs seek awards based on the time dedicated by their employees in furthering and supervising the Action. Specifically, the MERS seek an award of $13,598.65 and ATRS seeks an award of $1,819.50. *See* LaVictoire Decl. at ¶¶ 10-12; Declaration of Rod Graves (Ex. 3) (the "Graves Decl.") at ¶¶ 12-14.

Each of the Plaintiffs took an active role in the litigation and has been fully committed to pursuing the claims on behalf of the Class since they became involved in the litigation. During the course of the litigation, Plaintiffs communicated regularly with Lead Counsel regarding case strategy and developments, reviewed pleadings and briefs filed in the Action, assisted in responding to discovery requests, consulted with Lead Counsel regarding settlement negotiations, and evaluated and approved the Settlement. *See* LaVictoire Decl. ¶¶ 5-6; Graves Decl. ¶¶ 7-8. In addition, representatives of each of the Plaintiffs prepared for, traveled to, and testified at depositions in connection with the class certification motion. *See* LaVictoire Decl. ¶ 6; Graves Decl. ¶ 8. These efforts required employees of Plaintiffs to dedicate considerable time and resources to the Action that they would have otherwise devoted to their regular duties.

Numerous courts—including this Court—have approved reasonable awards to compensate lead plaintiffs for the time their employees have spent supervising and participating in the litigation on behalf of the class. In the *In re Bank of America Corp. Securities Litigation*,

this Court awarded over $450,000 to public pension plans and other institutional investors as reimbursement for the time spent by their employees on that action. 2013 WL 12091355, at *1-*2 (S.D.N.Y. April 8, 2013) (Castel, J.), *aff'd*, 772 F.3d 125, 133 (2d Cir. 2014); *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"); *FLAG Telecom*, 2010 WL 4537550, at *31 (approving award of $100,000 to Lead Plaintiff for time spent on the litigation); *Veeco*, 2007 WL 4115808, at *12 (awarding institutional lead plaintiff $15,900 for time spent supervising litigation, and characterizing such awards as "routine" in this Circuit); *In re Gilat Satellite Networks, Ltd.,* 2007 WL 2743675, at *19 (E.D.N.Y. Sept. 18, 2007) (granting PSLRA awards where, as here, "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 awards sought by Plaintiffs are reasonable and justified under the PSLRA.

CONCLUSION

For the foregoing reasons, Lead Counsel respectfully requests that the Court award attorneys' fees in the amount of 21% of the Settlement Fund; award $1,525,355.53 for the reasonable litigation expenses that Plaintiffs' Counsel incurred in connection with the prosecution of the Action; and award a combined $15,418.15 for Plaintiffs' costs and expenses related to their representation of the Class.

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Respectfully submitted,

/s/ *Salvatore J. Graziano*

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Max W. Berger
Salvatore J. Graziano
Katherine M. Sinderson
Adam D. Hollander
1251 Avenue of the Americas
New York, New York 10020
Tel: (212) 554-1400
Fax: (212) 554-1444
Email: mwb@blbglaw.com
salvatore@blbglaw.com
katiem@blbglaw.com
adam.hollander@blbglaw.com

Lead Counsel for Lead Plaintiff and the Class

#1320075