UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE BIOSCRIP, INC. SECURITIES LITIGATION	No. 13-cv-6922-AJN

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 Bernstein Litowitz Berger & Grossmann LLP ("BLB&G" or "Lead Counsel") respectfully requests that the Court grant its motion for an award of attorneys' fees in the amount of 25% of the Settlement Fund,[1] or $2,725,000, plus interest earned at the same rate as the Settlement Fund.[2] Lead Counsel also seeks reimbursement of: (i) $133,565.28 in litigation expenses that Plaintiffs' Counsel reasonably and necessarily incurred in prosecuting and resolving the Action, and (ii) $1,378.61 in costs and expenses incurred by the Court-appointed Lead Plaintiff, Fresno County Employees' Retirement Association ("Lead Plaintiff" or "Fresno"), directly related to its representation of the Settlement Class, as authorized by the Private Securities Litigation Reform Act of 1995 (the "PSLRA").

I. PRELIMINARY STATEMENT

The proposed Settlement, which provides for a payment of $10,900,000 in cash in exchange for the resolution of the Action, represents a very favorable result for the Settlement Class. As discussed in more detail in the Memorandum of Law in Support of Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation, the Settlement Amount represents approximately 17%–28% of the Settlement Class's estimated maximum recoverable damages, and compares favorably with the Government's $15 million settlement with BioScrip in January 2014 based on some of the same alleged misconduct.

The Settlement Amount is particularly favorable when juxtaposed against the significant procedural and substantive hurdles that Lead Plaintiff would have had to overcome to prevail in

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1 Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation and Agreement of Settlement, dated as of December 18, 2015 (the "Stipulation"), between Lead Plaintiff and Defendants. ECF No. 104-5.

2 The Notice informed the Settlement Class that Lead Counsel would apply to the Court for an award of attorneys' fees in an amount not to exceed 25% of the Settlement Fund.

this complex securities-fraud litigation. In undertaking this litigation, Lead Counsel faced numerous challenges to establishing liability, loss causation, and damages. The risk of losing was very real, and it was greatly enhanced by the fact that Lead Counsel would be litigating against a publicly traded corporate defendant, represented by highly skilled defense counsel, under the PSLRA's heightened pleading standards. Moreover, even if Lead Plaintiff had won at trial, BioScrip's weak financial condition meant that there was a serious risk that Defendants would have been unable to pay any judgment. There was, therefore, an exceptionally strong possibility that the case would yield little or no recovery after many years of costly litigation. Despite these risks, Plaintiffs' Counsel collectively worked 3,916.75 hours over the course of more than two years, all on a contingency basis with no guarantee of ever being paid. Indeed, the only guarantees were that the case would be complex and hard-fought, and that Lead Counsel would receive nothing if they lost.

Lead Counsel believe that an attorney's fee award of 25%, together with reimbursement of Litigation Expenses, properly reflects the many significant risks taken by Lead Counsel, as well as the excellent result achieved in a hard-fought and difficult litigation. When examined under either the percentage-of-the-fund or lodestar method for calculating attorneys' fees, the requested fee is reasonable and well within the range of attorneys' fees awarded in similar complex contingency cases. In addition, the costs and expenses requested by Lead Plaintiff and its counsel are likewise reasonable in amount, and they were necessarily incurred in the successful prosecution of the Action. Accordingly, they too should be approved.

II. FACTUAL AND PROCEDURAL HISTORY

The concurrently filed Declaration of Hannah G. Ross in Support of (I) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation, and

(II) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Ross Declaration" or "Ross Decl.") is an integral part of this submission. Mindful of the Court's preference for brevity, we respectfully refer the Court to the Ross Declaration for a detailed description of, *inter alia*, the history of the Action; the nature of the claims asserted by Plaintiffs and sustained by the Court; the negotiations leading to the Settlement; the risks and uncertainties of continued litigation, including the substantial concerns about Defendants' ability to pay; and the services Lead Counsel provided for the benefit of the Settlement Class. *See* U.S. District Judge Alison J. Nathan, Individual Rules of Practice in Civil Cases, Rule 3.B. (S.D.N.Y. Sept. 30, 2014).[3]

ARGUMENT

III. THE COMMON-FUND DOCTRINE APPLIES TO 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 (1980). The Second Circuit, similarly, has confirmed that attorneys who create a "common fund" are entitled to "a reasonable fee – set by the court – to be taken from the fund." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000).

"The rationale for the doctrine is an equitable one: it prevents unjust enrichment of those benefitting from a lawsuit without contributing to its cost." *Goldberger*, 209 F.3d at 47; *see also In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115808, at *2 (S.D.N.Y. Nov. 7, 2007). Courts have also recognized that awards of reasonable "attorneys' fees

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[3] All citations to "¶ __" and "Ex. __" in this memorandum refer, respectively, to paragraphs in, and Exhibits to, the Ross Declaration.

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." *Veeco*, 2007 WL 4115808, at *2; *see also Hicks v. Morgan Stanley & Co.*, 01 Civ. 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.").

For the common-fund doctrine to apply, "the applicant's efforts must confer a 'substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread costs proportionately among them,' an award of attorneys' fees must operate to shift the costs of litigation to that group." *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (quoting *Mills*, 396 U.S. at 393–94). All these elements are present here: Plaintiffs' Counsel's efforts have conferred a substantial benefit ($10,900,000 in cash) on an ascertainable class, and a fee award from the common fund will equitably "shift the costs of litigation" to the benefitted group – the Settlement Class Members. Accordingly, the Court should award attorneys' fees from the common fund.

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

In the Second Circuit, courts "may award attorneys' fees in common fund cases under either the 'lodestar' method or the 'percentage of the fund' method." *McDaniel v. Cnty. of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005)). The Supreme Court, however, has suggested that in common-fund cases the attorneys' fee should be determined on a percentage-of-recovery basis. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("[U]nder the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class . . . ."). Similarly, the "trend in this

Circuit is toward the percentage method," rather than the lodestar method. *Wal-Mart*, 396 F.3d at 121.[4] The percentage method also comports with the PSLRA, which states that "[t]otal attorneys fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." 15 U.S.C. § 78u-4(a)(6); *see also In re EVCI Career Coll. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240 CM, 2007 WL 2230177, at *16 (S.D.N.Y. July 27, 2007) ("the PSLRA implicitly supports the use of the percentage of the fund method"); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005) (noting "the PSLRA's express contemplation [of] the percentage method" in "calculat[ing] attorneys' fees in securities fraud class actions").

"Typically, courts utilize the percentage method and then 'cross-check' the adequacy of the resulting fee by applying the lodestar method." *In re Bristol-Myers Squibb Sec. Litig.*, 361 F. Supp. 2d 229, 233 (S.D.N.Y. 2005). Thus, part of the reasonableness inquiry is a comparison of the lodestar to the fees awarded under the percentage-of-the-fund method "[a]s a 'cross-check.'" *Wal–Mart*, 396 F.3d at 123 (quoting *Goldberger,* 209 F.3d at 50). "[W]here [the lodestar method is] used as a mere cross-check, the hours documented by counsel need not be exhaustively

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[4] "There are several reasons that courts prefer the percentage method," including, among others, the fact that it (i) "directly aligns the interests of the class and its counsel because it provides an incentive to attorneys to resolve the case efficiently and to create the largest common fund out of which payments to the class can be made"; (ii) is "closely aligned with market practices because it mimics the compensation system actually used by individual clients to compensate their attorneys"; (iii) "promotes early resolution" because "it provides a powerful incentive for the efficient prosecution and early resolution of litigation"; (iv) "discourages plaintiffs' lawyers from running up their billable hours, one of the most significant downsides of the lodestar method"; and (v) preserves judicial resources because it relieves the court of "the cumbersome, enervating, and often surrealistic process of evaluating fee petitions" *Johnson v. Brennan*, No. 10 Civ. 4712 CM, 2011 WL 4357376, at *14–15 (S.D.N.Y. Sept. 16, 2011) (citations and quotation marks omitted). "In contrast, the lodestar [method] creates an unanticipated disincentive to early settlements, tempts lawyers to run up their hours, and compels district courts to engage in a gimlet-eyed review of line-item fee audits." *Wal-Mart*, 396 F.3d at 121.

scrutinized by the district court. Instead, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case" (*Goldberger,* 209 F.3d at 50), or "[t]he district courts may rely on summaries submitted by the attorneys and need not review actual billing records." *In re Rite Aid Corp. Sec. Litig.,* 396 F.3d 294, 306–07 (3d Cir. 2005); *see also Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172, 184 (W.D.N.Y. 2011); *Johnson*, 2011 WL 4357376, at *14–15.

In sum, the weight of authority suggests that the Court should use the percentage-of-recovery method, with a lodestar cross-check, in determining a reasonable attorneys' fee. *See Hicks*, 2005 WL 2757792, at *10 (utilizing percentage-of-recovery method with a lodestar cross-check in determining reasonable attorneys' fee); *WorldCom*, 388 F. Supp. 2d at 355 ("this Opinion will apply the percentage method, with the lodestar used only as a cross-check of the reasonableness of the percentage of fees requested").

As demonstrated below, the appropriate analysis under this case law demonstrates that the requested fee is fair and reasonable.

V. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE

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

The 25% fee requested by Lead Counsel is well within the range of percentage fees that have been awarded in the Second Circuit in comparable securities class actions. *See Arkansas Teacher Ret. Sys. v. Bankrate, Inc.*, No. 13-cv-07183 (JSR), slip op. at 2 (S.D.N.Y. Nov. 25, 2014), ECF No. 87 (awarding 25% of $18 million settlement fund) (Ex. 8); *In re L.G. Philips LCD Co. Sec. Litig.*, No. 1:07-cv-00909-RJS, slip op. at 1 (S.D.N.Y. Mar. 17, 2011), ECF No. 82 (awarding 30% of $18 million settlement fund) (Ex. 9); *Hicks*, 2005 WL 2757792, at *10 (awarding 30% of $10 million settlement fund); *In re van der Moolen Holding N.V. Sec. Litig.*, No. 03 Civ. 8284,

slip op. at 2 (S.D.N.Y. Dec. 6, 2006), ECF No. 45 (awarding 33–1/3% of $8 million settlement fund) (Ex. 10); *Hayes v. Harmony Gold Mining Co.*, No. 08 Civ. 03653 (BSJ)(MHD), 2011 WL 6019219, at *1 (S.D.N.Y. Dec. 2, 2011) (awarding 33.3% of $9 million settlement fund), *aff'd*, 509 F. App'x 21 (2d Cir. 2013); *Citiline Holdings, Inc. v. iStar Fin., Inc.*, No. 1:08-cv-03612-RJS, slip op. at 1 (S.D.N.Y. Apr. 5, 2013), ECF No. 127 (awarding 30% of $29 million settlement fund) (Ex. 11); *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (awarding 25% of $21 million settlement fund).[5]

Moreover, courts have repeatedly awarded fees of 25% or more where a settlement was reached during the pendency of a motion to dismiss or shortly thereafter, and where no or very limited formal discovery had been obtained as a result of the PSLRA discovery stay. *See In re L.G. Philips LCD Co. Sec. Litig.*, slip op. at 1 (awarding 30% of $18 million settlement fund, where settlement was reached while motion to dismiss was pending) (Ex. 9); *Taft v. Ackermans*, No. 02 Civ. 7951 (PKL), 2007 WL 414493, at *10 (S.D.N.Y. Jan. 31, 2007) (awarding 30% of $15.2 million settlement fund, where settlement was reached while motion to dismiss was pending); *Maley*, 186 F. Supp. 2d at 370 (awarding 33.3% of $11.5 million settlement fund, where settlement was reached while motions to dismiss were pending); *In re Am. Express Fin. Advisors Sec. Litig.*, No. 04 Civ. 1773 (DAB), slip op. at 8 (S.D.N.Y. July 18, 2007), ECF No. 170 (awarding 27% of $100 million settlement fund, where settlement was reached while motion to dismiss was pending)

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[5] *See also In re Tower Group Int'l, Ltd. Sec. Litig.,* No. 13-cv-5852 (AT), slip op. at 2 (S.D.N.Y. Nov. 23, 2015), ECF No. 178 (awarding 25% of $20.5 million settlement) (Ex. 12); *In re Priceline.com, Inc. Sec. Litig.*, No. 00-CV-1884 (AVC), 2007 WL 2115592, at *5 (D. Conn. July 20, 2007) (awarding 30% of $80 million settlement); *In re Acclaim Entm't, Inc. Sec. Litig.*, Master File No. 2:03-CV-1270 (JS) (ETB), slip op. at 9 (E.D.N.Y. Oct. 2, 2007), ECF No. 147 (awarding 30% of $13.65 million) (Ex. 13); *In re Philip Servs. Corp. Sec. Litig.*, No. 98 Civ 835, 2007 WL 959299, at *1, *3 (S.D.N.Y. March 28, 2007) (awarding 26% of $79.75 million settlement).

(Ex. 14); *Bankrate, Inc.*, (Ex. 8) (awarding 25%, where settlement was reached shortly after decision on motion to dismiss).

Indeed, one of the merits of awarding fees on a percentage basis is that it does not penalize attorneys for achieving a prompt resolution of a case, where, as here, Lead Counsel have developed sufficient information concerning the strengths and weaknesses of the case to make an informed decision about the value of the claims. *See Wal-Mart*, 396 F.3d at 121 (the percentage method "provides a powerful incentive for the efficient prosecution and early resolution of litigation") (citation omitted); *Savoie v. Merchants Banks*, 166 F.3d 456, 461 (2d Cir. 1999) (the percentage method "removes disincentives to prompt settlement").

Consequently, Lead Counsel's request for a 25% attorneys' fee is squarely within the range of fees awarded in the Second Circuit for securities class actions comparable to the present action.

B. The Lodestar "Cross-Check" Strongly Supports the Reasonableness of the Requested Fee

As discussed above, the Second Circuit encourages performing a lodestar "cross-check" to test the reasonableness of percentage-based fee awards. *See Goldberger*, 209 F.3d at 50. The "lodestar" is calculated by multiplying the number of hours expended on the litigation by each particular attorney or paralegal by their current reasonable and customary hourly rate, and totaling the amounts for all timekeepers.[6] Additionally, "[u]nder the lodestar method of fee computation, a multiplier is typically applied to the lodestar." *Global Crossing*, 225 F.R.D. at 468. "The multiplier represents the risk of the litigation, the complexity of the issues, the contingent nature

[6] Counsel have calculated their lodestar here using their 2015 hourly rates. The Supreme Court and courts in this Circuit have both approved the use of current rates in the lodestar calculation to "compensate for the delay in receiving compensation, inflationary losses, and the loss of interest." *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989); *see also Missouri v. Jenkins*, 491 U.S. 274, 284 (1989).

of the engagement, the skill of the attorneys, and other factors." *Id.* (citing *Goldberger*, 209 F.3d at 47); *see also Savoie*, 166 F.3d at 460.[7]

Here, Plaintiffs' Counsel's (including attorneys, paralegals, investigators, and professional support staff) collectively devoted a total of 3,916.75 hours to the prosecution of this Action, resulting in a lodestar of $1,965,256.25. ¶90. Based on a 25% fee (which would equate to roughly $2,725,000), Lead Counsel's lodestar of $1,965,256.25 would yield a multiplier of 1.39. *Id.* This multiplier is at the lower end of multipliers commonly awarded in securities class actions and other complex litigation. *See Wal-Mart*, 396 F.3d at 123 (upholding multiplier of 3.5 as reasonable on appeal); *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 347, 353 (S.D.N.Y. 2014) (awarding 25% of $45.9 million settlement, equating to multiplier of 5.2); *Maley*, 186 F. Supp. 2d at 369 (awarding 33.3% fee, equating to a 4.65 multiplier, which was "well within the range awarded by courts in this Circuit and courts throughout the country"); *In re Bisys Sec. Litig.*, No. 04 Civ. 3840 (JSR), 2007 WL 2049726, at *3 (S.D.N.Y. July 16, 2007) (awarding 30% fee, equating to a 2.99 multiplier and finding that the multiplier "falls well within the parameters set in this district and elsewhere"); *Davis*, 827 F. Supp. 2d at 185 (awarding fee equating to a multiplier of 5.3, which was "not atypical" in similar cases); *In re L.G. Philips LCD Co. Sec. Litig.*, slip op.

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[7] *See also In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-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").

at 1, memo. at 16-17 (S.D.N.Y. Mar. 17, 2011), ECF Nos. 82 and 69 (awarding 30% fee, equating to 3.17 multiplier) (Ex. 9).[8]

In sum, Lead Counsel's requested fee award is plainly within the range of what courts in this Circuit regularly award in class actions like 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 by the Second Circuit in *Goldberger* for reviewing attorneys' fee awards strongly supports a finding that the requested fee is reasonable.

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

The Second Circuit has established 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 quotation marks and citation omitted). Consideration of these factors, together with the analyses above, demonstrates that the fee requested by Lead Counsel is reasonable.

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[8] *See also Cornwell v. Credit Suisse Grp.*, No. 08-cv-03758 (VM), slip op. at 4 (S.D.N.Y. July 18, 2011), ECF No. 117 (awarding fee representing a 4.7 multiplier) (Ex. 15); *Comverse*, 2010 WL 2653354, at *5 (awarding fee representing a 2.8 multiplier); *In re Telik, Inc. Sec. Litig.,* 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008) ("In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts"); *In re Deutsche Telekom AG Sec. Litig.*, No. 00-CV-9475 (SHS), 2005 WL 7984326 at *4 (S.D.N.Y., June 14, 2005) (awarding fee representing a 3.96 multiplier); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 135 (D.N.J. 2002) (finding that a 4.3 multiplier was appropriate in light of the contingency risk and the quality of the result achieved); *Bd. of Trustees of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, No. 09 Civ. 686 (SAS), 2012 WL 2064907, at *3 (S.D.N.Y. June 7, 2012) (awarding fee representing a 2.86 multiplier).

A. The Time and Labor Expended Support the Requested Fee

The substantial time and effort expended by Lead Counsel in prosecuting the Action and achieving the Settlement support the requested fee. As discussed in greater detail in the Ross Declaration, Plaintiffs' Counsel's work on this matter included, among other things:

- conducting an extensive investigation of the claims asserted in the Action, which included a detailed review of SEC filings, press releases, analyst reports, news reports and other public information, 72 interviews with former BioScrip employees and employees of companies that did business with BioScrip, and consultation with a damages expert and a pharmacy-benefits-management industry expert (¶¶4, 19);
- researching and drafting the highly detailed 110-page Consolidated Class Action Complaint ("Complaint") based on Counsel's investigation (¶¶4, 20);
- researching and drafting briefs in opposition to comprehensive motions to dismiss the Complaint filed by two sets of Defendants, including letter briefs concerning relevant decisions issued by the Supreme Court and the Second Circuit while the motions were pending (¶¶23-33) (*see also In re BioScrip, Inc. Sec. Litig.*, 95 F. Supp. 3d 711 (S.D.N.Y. 2015));
- opposing Defendants' partial motion for reconsideration of the denial of their motion to dismiss (¶37) (*see also In re Bioscrip, Inc. Sec. Litig.,* No. 13-CV-6922 AJN, 2015 WL 3540736 (S.D.N.Y. June 5, 2015);
- engaging in discovery, including negotiating a confidentiality order, exchanging initial disclosures, preparing requests for the production of documents, serving responses and objections to Defendants' first request for production of documents, participating in multiple meet-and-confer conferences and writing numerous discovery letters on topics such as search terms and the scope of production, assisting the Lead and Additional Plaintiffs with their document search in response to Defendants' document requests, and reviewing and analyzing approximately 800,000 pages of documents produced by Defendants (¶41);
- consulting extensively with experts on damages and loss causation in connection with preparing for class-certification discovery and settlement negotiations (¶¶44-45);
- engaging in a mediation process overseen by former United States District Judge Layn Phillips, which involved exchanging written submissions concerning liability and damages, preparing a response to numerous confidential written questions from Judge Phillips, making a presentation on loss causation and damages, participating in a full-day formal mediation session, further consulting with Lead Plaintiff's damages expert, and participating in many weeks of follow-up negotiations (¶¶44-46);

- drafting and negotiating the final terms of the Stipulation and related settlement documents (¶47);
- drafting the preliminary approval motion papers (*id.*); and
- working with Lead Plaintiff's damages expert to prepare the proposed Plan of Allocation (¶77).

Moreover, Lead Counsel's legal work on this case will not end with the Court's approval of the proposed Settlement. Additional hours and resources will necessarily be expended assisting Settlement Class Members with their Proof of Claim forms, responding to Settlement Class Members' inquiries, shepherding the claims process to conclusion, and filing a distribution motion. No additional compensation will be sought or received for this work. *See In re Facebook, Inc. IPO Sec. & Derivative Litig.,* No. MDL 12-2389, 2015 WL 6971424, at *10 (S.D.N.Y. Nov. 9, 2015) ("Considering that the work in this matter is not yet concluded for Plaintiffs' counsel who will necessarily need to oversee the claims process, respond to inquiries, and assist Class Members in submitting their Proof of Claims, the time and labor expended by counsel in this matter support a conclusion that a 33% fee award in this matter is reasonable.").

The tremendous time and effort devoted to this case by Plaintiffs' Counsel to obtain the $10.9 million settlement confirms that the fee request is reasonable.

B. The Risks of the Litigation Support the Requested Fee

"[T]he risk of success [is] 'perhaps the foremost' factor to be considered in determining" a reasonable award of attorneys' fees. *Goldberger*, 209 F.3d at 54; *see also Shapiro v. JP Morgan Chase & Co.,* No. 11-Civ-8331 (CM), 2014 WL 1224666, at *21 (S.D.N.Y. 2014) ("The Second Circuit long ago recognized that courts should consider the risks associated with lawyers undertaking a case on a contingent fee basis."). This is because "[n]o 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). In applying this factor, "'litigation risk must be measured as of when the case is filed,' rather than with the hindsight benefit of subsequent events." *In re Global Crossing Sec.,* 225 F.R.D. at 467 (quoting *Goldberger*, 209 F.3d at 55). Courts have also repeatedly recognized that "class actions confront even more substantial risks than other forms of litigation" (*Comverse*, 2010 WL 2653354, at *5 (citation omitted)) and that "[s]ecurities class actions such as this are 'notably difficult and notoriously uncertain.'" *Flag Telecom*, 2010 WL 4537550, at *27 (citations omitted). This case was no different.

From the outset of this Action, Lead Counsel understood they were embarking on a complex, expensive, and likely lengthy litigation with no guarantee of ever being compensated for the substantial investment of time and money the case would require. In undertaking that responsibility, Counsel were obligated to ensure that sufficient resources were dedicated to the prosecution of the Action, and that funds were available to compensate staff and to cover the considerable costs that a case like this requires. With an average lag time of several years for cases of this type to conclude, the financial burden on contingent-fee counsel is far greater than on a firm that is paid on an ongoing basis, as Defense counsel were. *See Flag Telecom*, 2010 WL 4537550, at *27. Indeed, Plaintiffs' Counsel received no compensation during more than two years of litigation and advanced or incurred more than $133,565 in expenses in prosecuting this Action for the benefit of the Settlement Class. ¶104.

While all litigation entails some risks, here, there was a very real possibility that Lead Plaintiff would recover nothing, as evidenced by the Court's partial dismissal of the Action. *See*

BioScrip, 95 F. Supp. 3d at 719; *see also In re Xcel Energy, Inc. Sec. Litig.*, 364 F. Supp. 2d 980, 1003 (D. Minn. 2005) ("The court needs to look no further than its own order dismissing the . . . litigation to assess the risks involved."). Even if they succeeded in obtaining a recovery for the class, Lead Counsel also bore the risk that they would not be fully compensated for their time and efforts. Furthermore, even after Lead Plaintiff partly prevailed at the motion-to-dismiss stage, substantial risks remained. As explained below, and as discussed in the Ross Declaration (¶¶49-60), there were significant obstacles to establishing material misstatements or omissions, scienter, loss causation, and damages. There were also major concerns about Defendants' ability to pay any judgment, as well as other risks. ¶¶61-66.

As an initial matter, Lead Plaintiff would have faced major hurdles in proving to the ultimate finder of fact that the statements made by Defendants were materially false and misleading and that Defendants acted with scienter. Defendants strenuously argued on the motions to dismiss that their alleged misstatements were not materially misleading and that even if they made materially misleading statements, they did not do so intentionally or recklessly. Even though the Court partly sustained the Complaint, it found that several of the alleged misstatements were not actionable and that Lead Plaintiff had failed to adequately allege scienter with respect to some statements – indeed, the Court dismissed most of Lead Plaintiff's claims concerning the PBM Scheme. *See BioScrip*, 95 F. Supp. 3d at 740. Had the litigation continued, there is simply no guarantee that Lead Plaintiff would have been able to establish falsity and scienter with respect to the remaining statements.

Lead Plaintiff would also have confronted considerable challenges in establishing loss causation and damages. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345–46 (2005) (holding that plaintiffs bear the burden of proving "that the defendant's misrepresentations 'caused the loss

for which the plaintiff seeks to recover'"). While Lead Plaintiff would have argued that the declines in BioScrip's stock price were attributable to corrections of the alleged misstatements and omissions concerning the Exjade and PBM Schemes, Defendants would have asserted that the declines were due to other negative news, and that even if some portion of the declines in BioScrip's stock price was caused by corrective disclosures, damages were minimal. Simply put, the parties held extremely disparate views with respect to damages. Had Defendants' arguments been accepted in whole or part, they could have eliminated or, at a minimum, dramatically limited any potential recovery. Thus, even if Lead Plaintiff prevailed in establishing liability, there existed significant additional risks to establishing damages. *See In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012) ("When the success of a party's case turns on winning a so-called 'battle of experts,' victory is by no means assured."); *In re Cendant Corp. Sec. Litig.*, 264 F.3d 201, 239 (3d Cir. 2001) ("[E]stablishing damages at trial would lead to a 'battle of experts' with each side presenting its figures to the jury and with no guarantee whom the jury would believe.").

Moreover, the fact that Lead Plaintiff had prevailed, in part, against Defendants' motions to dismiss did not guarantee victory. Lead Plaintiff still faced the substantial burdens of class-certification, summary-judgment, Daubert motions, trial, and likely appeals – a process that could possibly extend for years and might lead to a smaller recovery, or no recovery at all. Indeed, even prevailing at trial would not have guaranteed a recovery larger than the $10.9 million Settlement. *See Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408 (7th Cir. 2015), *reh'g denied* (July 1, 2015) (reversing jury verdict awarding investors $2.46 billion and ordering new trial); *In re BankAtlantic Bancorp, Inc.*, No. 07-61542-CIV, 2011 WL 1585605, at *20–22 (S.D. Fla. Apr. 25, 2011) (following jury verdict in plaintiffs' favor on liability, district court granted defendants'

motion for judgment as a matter of law because there was insufficient evidence of loss causation), *aff'd*, 688 F.3d 713 (11th Cir. 2012).[9]

Finally, as detailed in the Memorandum in Support of Final Approval and the Ross Declaration, this case presented very real ability-to-pay issues. Any recovery would likely have been funded out of BioScrip's limited officers' and directors' insurance, which had already been partly used for defense costs in this and other litigation and would have continued wasting if this case had not been settled. ¶¶61-65. This not only limited the upside of this case for the Settlement Class, but it also created more contingency-fee risk for Lead Counsel.

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 assurance of compensation. ¶¶95-97, 101. Lead Counsel's assumption of this contingency-fee risk 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.").

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[9] *See also Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1446 (11th Cir. 1997) (reversing jury verdict of $81 million for plaintiffs against an accounting firm on loss causation grounds and ordering judgment for defendant); *Anixter v. Home-Stake Prods. Co.*, 77 F.3d 1215, 1235 (10th Cir. 1996) (overturning securities-fraud class-action jury verdict for plaintiffs in case filed in 1973 and tried in 1988 on the basis of 1994 Supreme Court opinion); *Backman v. Polaroid Corp.*, 910 F.2d 10, 18 (1st Cir. 1990) (*en banc*) (dismissing plaintiffs' claims after 11 years of litigation, jury verdict for plaintiffs, and affirmance by a First Circuit panel).

In sum, the risks posed by litigation were substantial, and they were present at every step of the litigation. Accordingly, this factor weighs heavily in favor of the requested fee award.

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

Courts have repeatedly recognized the "notorious complexity" of securities class-action litigation. *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. 02 Civ. 5575, 2006 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006); *Taft*, 2007 WL 414493 at *10; *La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*, 2009 WL 4730185, at *8 (D.N.J. Dec. 4, 2009) ("securities class actions are inherently complex"). Courts have also recognized that "securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA" and other changes in the law. *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000); *see also AOL Time Warner*, 2006 WL 903236, at *9 ("[T]he legal requirements for recovery under the securities laws present considerable challenges, particularly with respect to loss causation and the calculation of damages."). Such was the case here.

As noted above and in the Ross Declaration, this litigation raised a number of complex questions concerning liability and loss causation that would have required extensive efforts by Lead Counsel and consultation with experts to bring to resolution. To build the case, Lead Counsel had to conduct an extensive factual investigation, which included interviews with numerous confidential witnesses, significant time consulting with a loss-causation and damages expert and an industry expert, and a broad review of publicly available information. Following the Court's partial denial of the motion to dismiss, Lead Counsel reviewed and analyzed approximately 800,000 pages of documents produced by Defendants, many of which were technical and complicated. If the Action had not been settled, there would have been copious amounts of additional litigated discovery, depositions of fact and expert witnesses, additional motion practice, a trial, post-trial motion practice, and mostly likely appeals.

In terms of the magnitude of the action, the litigation was hard-fought for over two years and required considerable skill and commitment of resources to litigate. Accordingly, the magnitude and complexity of the Action support the conclusion that the requested fee is fair and reasonable. *See City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 CM GWG, 2014 WL 1883494, at *16 (S.D.N.Y. May 9, 2014) ("the complex and multifaceted subject matter involved in a securities class action such as this supports the fee request"), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015).

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 respectfully submits that the quality of its representation is best evidenced by the quality of the result achieved. *See Veeco*, 2007 WL 4115808, at *7; *In re Global Crossing* 225 F.R.D. at 467. Here, the $10.9 million settlement provides a very favorable result for the Settlement Class in light of the serious risks of continued litigation, and represents approximately 17%–28% of the Settlement Class's estimated maximum recoverable damages.[10] *See* ¶¶60, 67-68. Lead Counsel respectfully submits that the quality of its efforts in the litigation to date, 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. *See* Exhibit 3 to Ex. 5A (BLB&G firm resume); *see also Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co.*, 277 F.R.D. 97, 110 (S.D.N.Y. 2011) ("It is also beyond serious dispute

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[10] For comparison purposed, this recovery is far higher than the median settlements of 1.8%-2.9% of estimated damages in all securities class actions from 2006 to 2015, as well as the median settlement of 11.4% of estimated damages in securities class actions during those years with estimated damages less than $50 million. *See* Cornerstone Research, "Securities Class Action Settlements – 2015 Review and Analysis," at 8–9 (Ex. 1).

that class counsel – Bernstein Litowitz Berger & Grossmann LLP – is qualified and capable of prosecuting this action.”).

Courts have also repeatedly recognized that the quality of the opposition faced by plaintiffs' counsel should 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.*, 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") (citation omitted), *aff'd*, 272 F. App'x 9 (2d Cir. 2008). Here, Defendants were vigorously represented by two of the country's most capable and renowned law firms: Kirkland & Ellis LLP (counsel for the BioScrip Defendants) and O'Melveny & Myers LLP (counsel for the Underwriter Defendants). *See* ¶93. Notwithstanding this formidable opposition, Lead Counsel's thorough investigation, ability to present a strong case, successful opposition to Defendants' motions to dismiss and for reconsideration, and demonstrated willingness to vigorously prosecute the Action enabled it to achieve the favorable Settlement. Consequently, this factor militates in favor of the requested fee.

E. The Requested Fee's Relation to the Settlement Supports the Requested Fee

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.'" *Converse*, 2010 WL 2653354, at *3 (citation omitted). As discussed in detail in Part V.A. above, the requested 25% fee

is well within the range of percentage fees that courts in the Second Circuit have awarded in comparable cases. Accordingly, the fee requested is reasonable in relation to the Settlement.

F. Public-Policy Considerations Support the Requested Fee

"In considering an award of attorney's fees, the public policy of vigorously enforcing the federal securities laws must be considered." *Maley*, 186 F. Supp. 2d at 373. This is because private actions like this one further the objective of the federal securities laws to protect investors. "[The Supreme] 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 brought, respectively, by the Department of Justice and the Securities and Exchange Commission." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). 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." *Flag Telecom*, 2010 WL 4537550, at *29. Indeed, "[a]s a practical matter, 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." *City of Providence*, 2014 WL 1883494, at *18; *see also Hicks*, 2005 WL 2757792, at *9. Accordingly, public-policy considerations favor Lead Counsel's attorneys' fee request. *See In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895 DAB, 2011 WL 1899715, at *6 (S.D.N.Y. May 13, 2011) ("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.").

G. The Approval of Lead Plaintiff and the Reaction of the Settlement Class to Date Support the Requested Fee

Another factor favoring the reasonableness of Lead Counsel's 25% fee application under the percentage-of-the-fund method is that this fee was approved by Lead Plaintiff, an institutional investor charged by the Court and the PSLRA with responsibility for monitoring Lead Counsel. Indeed, efforts such as this by a lead plaintiff to restrain and monitor attorney fees are exactly what Congress intended in passing the lead-plaintiff provisions of the PSLRA:

> We leave open the question of how much weight should be given to fees agreed upon by PSLRA Lead Plaintiffs. We expect, however, 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.

In re Nortel Networks Corp. Sec. Litig., 539 F.3d 129, 133–34 (2d Cir. 2008).

Fresno is a paradigmatic example of the type of sophisticated and financially interested investor that Congress envisioned serving as a fiduciary for the class when it enacted the PSLRA. The PSLRA was intended to encourage institutional investors like Fresno 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 to assess the reasonableness of counsel's fee request.

After the Court appointed Fresno as Lead Plaintiff in this case, Fresno took an active role in the litigation and closely supervised the work of Lead Counsel. *See* Ex. 4, Declaration of Donald C. Kendig, CPA, submitted on behalf of Fresno (the "Kendig Decl."), ¶4. Accordingly, the

endorsement of the fee as reasonable by Lead Plaintiff supports approval of the fee. *See In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *16 (S.D.N.Y. Dec. 23, 2009) ("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"); *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").

The reaction of the class to date also supports the requested fee. Through May 5, 2016, the Claims Administrator, A.B. Data, Ltd. ("A.B. Data"), has disseminated the Notice to 31,155 potential Settlement 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 25% of the Settlement Fund and up to $250,000 in expenses. *See* Ex. 3, Declaration of Eric Schachter, submitted on behalf of A.B. Data (the "Schachter Decl."), ¶8. While the time to object to the Fee and Expense Application does not expire until May 23, 2016, to date, not a single objection has been received. ¶75. Should any objections be received, Lead Counsel will address them in their reply papers.

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

Lead Counsel also requests reimbursement of $133,565.28 in expenses incurred while prosecuting the Action. Plaintiffs' Counsel have submitted separate declarations attesting to the accuracy of these expenses, which are properly recovered by counsel. *See Flag Telecom*, 2010 WL 4537550, at *30 ("It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class"); *In re Indep. Energy Holdings PLC Sec.*

Litig., 302 F. Supp. 2d 180, 183 n.3 (S.D.N.Y. 2003) (court may compensate class counsel for reasonable out-of-pocket expenses necessary to the representation of the class). A significant portion of the expenses were incurred for professional services rendered by Lead Plaintiff's experts and the mediator, and the remaining expenses are attributable to the costs of copying documents, and other incidental expenses incurred in the course of the litigation. *See* ¶¶104-107, and Ex. 6 (breakdown of expenses by category). These expenses were critical to Lead Plaintiffs' 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. For this reason, they are properly chargeable to the Settlement fund.") (citation omitted). Not a single objection to the expense request has been received, and the amount requested is below the $250,000 limit disclosed in the Notice. *See* Schachter Decl., Ex. A at ¶¶5, 65. Accordingly, Lead Counsel respectfully request payment for these expenses.

VIII. LEAD PLAINTIFF FRESNO SHOULD BE AWARDED ITS 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 $1,378.61 in costs and expenses incurred directly by Lead Plaintiff Fresno. ¶110. 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, Lead Plaintiff Fresno seeks an award of $1,378.61 for time dedicated by its employees to furthering and supervising the Action. *See* Kendig Decl., ¶¶9-11. Employees of Fresno took an active role in the litigation, including reviewing significant pleadings and briefs in the Action, communicating

regularly with Lead Counsel regarding developments in the Action, searching for and gathering their internal documents for production in response to Defendants' document requests, authorizing settlement discussions, monitoring the progress of settlement negotiations, and approving of the Settlement. *Id*. ¶4.

Numerous courts have approved reasonable awards to compensate lead plaintiffs for the time and effort they spent on behalf of a class. *See In re Tower Group Int'l, Ltd. Sec. Litig.*, No. 13-cv-5852 (AT), slip op. at 2-3 (S.D.N.Y. Nov. 23, 2015) (awarding lead plaintiffs costs and expenses in the amount of $2,922 and $7,000, respectively, under the PSLRA) (Ex. 12); *In re Monster Worldwide, Inc. Sec. Litig.,* No. 07-cv-02237 (JSR), 2008 WL 9019514, at *2 (S.D.N.Y. Nov. 25, 2008) (awarding lead plaintiff $7,303 for reasonable costs and expenses directly relating to the representation of the class); *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.,* No. CV-02-1510 (CPS)(SMG), 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").

Accordingly, Lead Plaintiff Fresno respectfully requests that the Court grant its request for reimbursement of $1,378.61 in costs and expenses. This amount is reasonable, was incurred in the course of representing the Settlement Class, and should be approved.

CONCLUSION

For the foregoing reasons, Lead Counsel respectfully requests that the Court award attorneys' fees in the amount of 25% of the Settlement Fund, plus interest earned at the same rate as the Settlement Fund; $133,565.28 in reimbursement of the reasonable litigation expenses that

Lead Counsel incurred in connection with the prosecution of the Action; and $1,378.61 in reimbursement of the costs and expenses incurred by Lead Plaintiff Fresno.

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Respectfully submitted,

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