IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:15-cv-02546-RM-MEH
Consolidated with Civil Action Nos. 15-cv-02547-RM-MEH,
15-cv-02697-RM-MEH, and 16-cv-00459-RM-MEH

SONNY P. MEDINA, *et al.*,

Plaintiffs,

v.

CLOVIS ONCOLOGY, INC., *et al.*,

Defendants.

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 ("Lead Counsel"), respectfully submits this memorandum of law in support of its motion, on behalf of Plaintiffs' Counsel, for an award of attorneys' fees in the amount of 22.5% of the Settlement Fund (net of Litigation Expenses).[1] Lead Counsel also seeks reimbursement of $470,333.68 in Litigation Expenses that were incurred in prosecuting and resolving the Action, and pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §78u-4(a)(4).

I. PRELIMINARY STATEMENT

The proposed Settlement resolves all claims in the Action in exchange for a $142 million payment, consisting of $25 million in cash and $117 million in Clovis common stock valued pursuant to the terms of the Stipulation of Settlement. Under any measure, the Settlement represents an excellent outcome for the Class. It provides truly meaningful compensation while avoiding the risks, delay, and expense of continued litigation, including the risks and hard limits to recovery posed by Clovis' financial condition.

The $142 million Settlement is the second largest securities class action recovery ever obtained in Colorado and is among the four largest in Tenth Circuit history. ¶5. When viewed relative to other securities class action recoveries, the recovery achieved in this case far outpaces the typical result. For example, the median securities class action settlement in the Tenth Circuit between 2007 and 2016 was $8.4 million. Similarly, the median securities class action settlement

[1] Unless otherwise defined herein, all capitalized terms have the meanings set forth in the Stipulation and Agreement of Settlement, dated June 18, 2017 (Dkt. No. 156-1) (the "Stipulation") or in the Declaration of John C. Browne in Support of (I) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation and (II) Lead Counsel's Motion for an Award of Attorney's Fees and Reimbursement of Litigation Expenses (the "Browne Declaration" or "Browne Decl."). Citations to "¶" are to paragraphs in the Browne Declaration and citations to "Ex." in this memorandum refer to exhibits to the Browne Declaration.

nationwide between 1996 (the passage of the PSLRA) and 2015 was $8.3 million. *See* ¶¶6, 112-13.

The benefits the Settlement provides to the Class are particularly noteworthy when considered against the substantial risk that the Class could recover less (or nothing) if the Action were litigated through summary judgment, trial, and any appeals to follow. In particular, there is substantial risk that Clovis – an early stage biopharmaceutical company that has incurred significant net losses in every quarter since its founding and has virtually no free cash – would be unable at the conclusion of protracted litigation to fund a judgment or settlement in excess of the proposed Settlement, and would instead be forced into bankruptcy. *See* ¶¶7, 12, 72(g), 94(a), 96, 122-27. Thus, the Settlement ensures that Class Members recover a substantial sum while Clovis, a Colorado company, will continue to survive and be able to proceed with developing its remaining cancer drug, rucaparib, which treats ovarian cancer.

This favorable Settlement was achieved through Lead Counsel's diligent and skillful prosecution of the case, including the devotion of enormous resources on a fully contingent basis and in the face of very real challenges and risks. It is widely-recognized that "[l]itigating an action under the PSLRA is not a simple undertaking." *In re Crocs, Inc. Sec. Litig.*, No. 07-cv-02351-PAB-KLM, 2014 WL 4670886, at *3 (D. Colo. Sept. 18, 2014); *see also In re Qwest Commc'ns Int'l, Inc. Sec. Litig.*, 625 F. Supp. 2d 1143, 1149 (D. Colo. 2009) ("There are few simple class action cases involving securities law. This area of law may not be novel, but it generally is complex and difficult."). In this case, as confirmed by the extensive discovery Lead Counsel conducted (*see* ¶¶69-99), Lead Plaintiff faced particularly substantial complexities and risks, which make the $142 million settlement achieved here particularly noteworthy.

The many difficulties and challenges present in every securities fraud class action (*see* ¶¶116-21) were magnified here because of the complex nature of the scientific, regulatory, and medical issues in dispute. Establishing the Class' claims required mustering evidence on multiple highly-nuanced – and hotly contested – oncological, statistical, scientific, and regulatory issues concerning the appropriate interpretation of clinical oncology guidelines and multi-faceted cancer drug trial results. The complex and technical nature of the case required Lead Counsel to immerse itself – and indeed master – arcane and difficult subject matter not typically attending securities class action cases. Among other things, Lead Counsel pored over medical and statistical publications concerning endpoint assessment in oncology trials, reviewed regulatory filings and technical presentations issued by dozens of different drug makers relating to "objective response rate," and worked with world-class experts to develop models for statistical analysis of relevant clinical metrics in this Action (including developing bespoke computer programs to analyze relevant clinical parameters in the voluminous raw clinical trial database Clovis produced to Lead Plaintiff). The complexity of issues involved in this case made it acutely challenging, greatly increased the expense and uncertainty of litigation, and further confirms the worth of the Settlement Lead Counsel achieved for the Class. *See* ¶¶9, 52, 128-35.

The Complaint alleges, *inter alia*, that Defendants reported misleading cancer drug trial results, called the "Objective Response Rate" ("ORR"), for Clovis' lung cancer drug rociletinib during the Class Period. ¶¶9, 45-50. Defendants vigorously denied these allegations, arguing that they complied at all times with the relevant clinical trial protocols, and they attempted in good faith to comply with the RECIST guidelines governing the drug trials. Defendants also argued that even if Lead Plaintiff could establish that misleading statements were made, Lead

Plaintiff and the Class would be unable to prove Defendants acted with scienter – *i.e.*, with a fraudulent state of mind – as opposed to mere negligence. *See* ¶¶8, 10, 128-35.

For example, Defendants contended that they repeatedly told the Food and Drug Administration ("FDA") that Clovis was reporting unconfirmed ORR, the FDA had previously accepted unconfirmed ORR results, and that Defendants had no reason to suspect that the FDA would not accept unconfirmed ORR results for rociletinib. ¶¶9, 130-31, 133-34, 140. This was a substantial hurdle to liability because even if a jury believed Defendants acted with gross negligence, it would be insufficient to support Lead Plaintiff's fraud-based claims under the Securities Exchange Act of 1934 ("Exchange Act"). *See* ¶¶8, 128-35.

Despite the many risks in this case and the fully contingent nature of the engagement, Lead Counsel worked extremely hard, devoting substantial resources to investigating and prosecuting this Action against highly competent opposing counsel. As detailed in the accompanying Browne Declaration,[2] Lead Counsel, among other work: (i) performed an extensive investigation into potential claims against Clovis, including a thorough review of scientific and regulatory literature regarding oncology drug studies and FDA guidelines, SEC filings, press releases, and analyst reports; (ii) contacted and interviewed multiple potential witnesses; (iii) drafted a 152-page Consolidated Class Action Complaint; (iv) successfully opposed Defendants' motions to dismiss, which consisted of more than 1,000 pages of briefing and exhibits; (v) successfully briefed and argued a motion to stay a duplicative case filed in California state court; (vi) retained (and paid) gold-plated experts in biostatistics, radiology,

[2] The Browne Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: history of the Action (¶¶21-99); the nature of the claims asserted (¶¶45-50); the negotiations leading to the Settlement (¶¶100-07); the risks and uncertainties of continued litigation (¶¶111-46); and a description of the services Lead Counsel provided for the benefit of the Class (¶¶11-15, 21-107).

medical oncology, investment banking, and financial economics; (vi) reviewed more than 350,000 documents produced by Clovis, the Underwriter Defendants, and the FDA, including over 40 gigabytes of Clovis' internal clinical trial data; and (vi) interviewed four separate senior Clovis executives. *See* ¶¶11-15, 21-99.

Moreover, Lead Counsel engaged in months of contentious settlement negotiations with Defendants, which included the exchange of detailed mediation statements and participation in a formal mediation session with retired Judge Layn Phillips. During the mediation process and afterward, Lead Counsel and Lead Plaintiff were given extensive information regarding Clovis' finances and its likely inability to pay a substantial judgment if one were achieved in this case, as well as internal Clovis documents bearing on liability. ¶¶12, 73, 81, 100-07. With the assistance of the mediator and the sophisticated Lead Plaintiff, Lead Counsel's skill and experience in Settlement negotiation enabled the parties to structure a unique Settlement using common stock.

The Settlement negotiated by Lead Counsel provides substantial compensation to the Class in a difficult situation where many firms would have likely viewed available insurance proceeds as the ceiling on recovery. Against this backdrop, Lead Counsel respectfully submits that its request for a fee award of 22.5% of the net Settlement Fund, and reimbursement of Plaintiffs' Counsel's expenses in the amount of $427,133.68, is eminently fair and reasonable. As demonstrated below, the request is well within the range of percentage attorneys' fees awarded in securities class actions in this Circuit – indeed it is on the low end of the range – and is otherwise well supported in the case law and by the facts of this case. *See* Section II.B. below.

The reasonableness of the fee request is confirmed by the fact that it is made pursuant to a written retainer agreement entered into between Lead Plaintiff and Lead Counsel at the outset of the litigation. ¶¶18, 190. The Arkin Group is the quintessential type of sophisticated investor

that, in drafting the PSLRA, Congress suggested should lead securities class actions. The Arkin Group was heavily involved in this case and pushed hard to maximize the recovery. It actively supervised the Action through its litigation and settlement, it observed first-hand the enormous efforts made by Lead Counsel, and it fully endorse the requested fee as fair and reasonable in light of the quality of the result obtained, the work counsel performed, and the risks of the litigation. *See* Declaration of Moshe Arkin, attached as Ex. 2 to the Browne Declaration ("Arkin Decl."), at ¶¶4-5, 7.

Finally, Lead Counsel wishes to highlight three points regarding the Settlement and the Stipulation of Settlement that were raised by the Court during the July 26, 2017 hearing. Dkt. No. 164. As an initial matter, Lead Counsel greatly appreciates the Court's consideration in connection with the July 26, 2017 hearing and particularly appreciates the opportunity the Court afforded the parties to address the Court's questions. As detailed in the Browne Declaration and the accompanying memorandum in support of approval of the Settlement (the "Settlement Memorandum"), in response to the matters raised by the Court in July the parties have entered into an Amendment to the Stipulation of Settlement and otherwise attempted to address every question raised by the Court. *See* ¶¶19, 109-10, 147-71. Only three of the matters raised by the Court potentially bear upon Lead Counsel's fee request and those three matters have been addressed as follows:

- **First**, below and in the Browne Declaration (¶¶149-52), we provide the Court with substantial case law authority making clear that courts routinely grant attorneys' fee awards that consist partly of stock and partly of cash when awarding a fee in settlements, such as here, where the settlement fund is comprised partly of cash and partly of stock. Indeed, in Lead Counsel's view, this is the best practice, as it aligns counsel's interest with the Class. ¶149; Ex. 1.

- **Second**, and similarly, the parties have amended the Stipulation of Settlement so that it expressly aligns the interests of Lead Counsel with

the Class vis-à-vis any decision by Lead Counsel to sell Settlement Shares. *See* ¶¶153-56. Specifically, the Amendment to the Stipulation of Settlement expressly states that Lead Counsel may not sell any shares awarded to itself as part of its attorneys' fees without also simultaneously selling the Settlement shares it holds for the benefit of the Class. In such event, Lead Counsel would collect its percentage share of any Court-awarded fees from the net cash proceeds received from the sale of the ***entire*** lot of shares. This ensures that the interests of Lead Counsel and the Class *qua* liquidation of the Settlement Shares are entirely coterminous, and eliminates any possibility that Lead Counsel could seek to sell its shares at a higher price than that obtained by the Class as a whole. *See id*; Ex. 1.[3]

- **Third**, the parties have also amended the Stipulation of Settlement to make clear that Lead Counsel has a fiduciary duty with respect to the Escrow Account, and the administration and distribution of the Settlement Funds. *See* ¶¶157-58; Ex. 1.

We hope that these additional authorities and amendments to the Stipulation of Settlement adequately address the Court's questions as they relate to Lead Counsel's attorneys' fee request.[4]

For all the reasons set forth below, Lead Counsel respectfully submits that the requested fees and expenses are more than justified in light of Plaintiff Counsel's substantial commitment of effort and resources on a contingency basis to this challenging case, as well as the results achieved in this Action.

II. ARGUMENT

A. Plaintiffs' Counsel Are Entitled to an Award of Attorneys' Fees from the Common Fund

The Supreme Court has emphasized that private securities actions are "an essential supplement to criminal prosecutions and civil enforcement actions brought by the . . . SEC." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *accord Bateman Eichler,*

[3] As Lead Counsel stated at the July 26, 2017 hearing, this was always Lead Counsel's intention, but now, it is an express requirement of the Settlement.

[4] As noted in the Browne Declaration and the Settlement Memorandum, the parties also have addressed other matters raised by the Court on July 26, 2017, but which do not directly relate to attorneys' fees. *See* ¶149-71; s*ee also* Settlement Memorandum at 4-9.

Hill Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985) (private securities actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'") (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).

In addition, the Supreme Court has stated that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). The Tenth Circuit agrees, and has repeatedly held that a court may award attorneys' fees from a common fund in situations where, as here, that fund is the result of the attorneys' successful prosecution of the action. *See, e.g., Law v. NCAA*, No. 99-3353, 2001 U.S. App. LEXIS 3066, at *6-7 (10th Cir. 2001); *Gottlieb v. Barry*, 43 F.3d 474, 482 (10th Cir. 1994); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988); *see also Rosenbaum v. MacAllister*, 64 F.3d 1439, 1444 (10th Cir. 1995) ("The common fund doctrine 'rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense.'") (citation omitted).

Courts in this district regularly award attorneys' fees in securities class actions pursuant to the common fund doctrine. This is because "[f]ederal securities class actions require plaintiffs' counsel to expend substantial time and effort with no guarantee of success" and "[i]n light of these difficulties, 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." *Crocs*, 2014 WL 4670886, at *5. Compensating plaintiffs' counsel for bringing these actions is essential, because "[s]uch actions could not be sustained if plaintiffs' counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class." *Hicks*

v. Morgan Stanley, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005).

B. The Requested Attorneys' Fees Are Reasonable As A Percentage of the Common Fund

As compensation for their efforts and achievements in this Action, Lead Counsel seek a reasonable 22.5 percent of the net common fund (payable in cash and stock at the same ratio as cash and stock is received by the Class and net of expenses). Awarding attorneys' fees as a percentage of a common fund is commonplace in the Tenth Circuit. In *Brown*, the Tenth Circuit affirmed the propriety of awarding attorneys' fees on a percentage basis in a common fund case. 838 F.2d at 454. Similarly, in *Gottlieb v. Barry*, the Tenth Circuit stated that although either the percentage or the "lodestar" method can be used in appropriate cases, "*Uselton* ***implies a preference for the percentage of the fund method***." 43 F.3d 474, 483 (10th Circuit 1994) (emphasis added) (citing *Uselton v. Commercial Lovelace Motor Freight*, 9 F.3d 849, 853 (10th Cir. 1993)); *see also Millsap v. McDonnell Douglas Corp.*, No. 94-CV-633-H(M), 2003 U.S. Dist. LEXIS 26223, at *41 (N.D. Okla. May 28, 2003) ("Attorneys must have an incentive to take undesirable cases in order to assure access to the courts for all people; awarding fees based on a reasonable percentage of the recovered fund provides such an incentive"); *see also Vaszlavik v. Storage Tech. Corp.*, No. 95-cv-2525, 2000 U.S. Dist. LEXIS 21140, at *4 (D. Colo. Mar. 9, 2000) ("the Tenth Circuit has expressed 'a preference for the percentage of the fund method'").[5]

[5] The text of the PSLRA also supports awarding attorneys' fees in securities cases using the percentage method, providing 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 . . . actually paid to the class." 15 U.S.C. §78u-4(a)(6). Other courts have noted that using the percentage method for determining a fee "is less subjective than the lodestar plus multiplier approach," and provides a better incentive to counsel where class counsel "was initially retained on a contingent fee basis." *Gottlieb*, 43 F.3d at 483; *see also In re N.M. Indirect Purchasers Microsoft Corp.*,

Here, the 22.5% fee requested by Lead Counsel pursuant to its retainer agreement with Lead Plaintiff is near the bottom of the range of percentage fees that are regularly awarded in securities class actions and other class actions in this Circuit -- even in cases that do not involve the type of complicated and cutting edge scientific, medical, and regulators issues present here. *See, e.g., Brown*, 838 F.2d at 455 n.2 (recognizing that a typical percentage award in a common fund case is around 33% of the recovery); *In re Molycorp, Inc. Sec. Litig.* 1:12-cv-00292-RM-KMT (J. Moore), slip op. at 1 (D. Colo. June 16, 2017) Dkt. No. 263 (awarding 30% of settlement amount) (Ex. 14); *Crocs*, 2014 WL 4670886, at *5 (awarding 30% of settlement fund); *Vaszlavik*, 2000 U.S. Dist. LEXIS 21140, at *4 ("[C]lass action fee awards are typically 30% of the fund created by the settlement."); *Lucken Family Ltd. P'ship, LLLP v. Ultra Res., Inc.*, No. 09-cv-01543-REB-KMT, 2010 WL 5387559, at *5 (D. Colo. Dec. 22, 2010) ("The customary fee awarded to class counsel in a common fund settlement is approximately one third of the total economic benefit bestowed on the class."); *Anderson v. Merit Energy Co.*, No. 07-CV-00916-LTB-BNB, 2009 U.S. Dist. LEXIS 100681, at *10 (D. Colo. Oct. 20, 2009) (same); *Rasner v. FirstWorld Commc'ns, Inc*., No. 00-cv-1376, slip op. at 2 (D. Colo. Jan. 19, 2005) (awarding 33% of recovery) Dkt. No. 350 (Ex. 15); *Schwartz v. Celestial Seasonings, Inc*., No. 95-cv-1045, slip op. at 6 (D. Colo. Apr. 25, 2000) (awarding 33.3% of recovery) Dkt. No. 183 (Ex. 16); *Queen Uno Ltd. P'ship. v. Coeur D'Alene Mines Corp.*, No. 97-cv-1431-CB, slip op. at 7 (D. Colo. Aug. 11, 1999) (awarding 30% of recovery) Dkt. No. 159 (Ex. 17).

The requested fee is also consistent with fee awards in securities class actions in other circuits, again, even in cases that were far less complex and challenging than here. *See, e.g.*,

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Antitrust Litig., 149 P.3d 976, 993 (N.M. Ct. App. Nov. 15, 2006) ("The percentage method is preferred in some jurisdictions, including the Tenth Circuit, because this method rewards efficient and prompt resolution of class actions.")

NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co., No. 08-cv-10783, 2016 WL 3369534, at *1 (S.D.N.Y. May 2, 2016) (awarding 21% of $272 million settlement); *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.*, No. 09 Civ. 686 (SAS), 2012 WL 2064907, at *3 (S.D.N.Y. June 7, 2012) (awarding 25% of $150 million settlement); *In re Genworth Fin. Inc. Sec. Litig.*, No. 3:14-cv-00682-JRS, 2016 WL 7187290, at *1-2 (E.D. Va. Sept. 26, 2016) (awarding 28% of $219 million settlement); *Schuh v. HCA Holdings Inc.*, No. 3:11-cv-01033, slip op. at 1 (M.D. Tenn. Apr. 14, 2016), Dkt. No. 563 (awarding 30% of $215 million settlement) (Ex. 18); *In re Merck & Co., Inc. Vytorin/Zetia Sec. Litig.*, No. 08-2177 (DMC)(JAD), 2013 WL 5505744, at *3, *46 (D.N.J. Oct. 1, 2013) (awarding a 28% of $215 million settlement); *Alaska Elec. Pension Fund v. Pharmacia Corp.*, No. 03-1519 (AET), slip op. at 2 (D.N.J. Jan. 30, 2013), Dkt. No. 405 (awarding 27.5% of $164 million settlement) (Ex. 19); *In re Apollo Grp. Inc. Sec. Litig.*, No. 04-2147, 2012 WL 1378677, at *9 (D. Ariz. Apr. 20, 2012) (awarding 33.3% of $145 million settlement); *Silverman v. Motorola, Inc.*, No. 07 C 4507, 2012 WL 1597388, at *4 (N.D. Ill. May 7, 2012) (awarding 27.5% of $200 million settlement), *aff'd*, 739 F.3d 956 (7th Cir. 2013); *In re Schering-Plough Corp. Sec. Litig.*, No. 01-829, 2009 WL 5218066, at *5-6 (D.N.J. Dec. 31, 2009) (awarding 23% of $165 million settlement fund).[6]

[6] *See also, e.g., In re CMS Energy Sec. Litig.*, No. 02-cv-72004, 2007 WL 9611274, at *4 (E.D. Mich. Sept. 6, 2007) (awarding 22.5% of $200 million settlement); *Schwartz v. TXU Corp.*, No. 02-2243, 2005 WL 3148350, at *24-34 (N.D. Tex. Nov. 8, 2005) (awarding 22% of $149.75 million settlement); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. Mar. 24, 2005) (awarding 25% of $126.6 million settlement); *In re DaimlerChrysler AG Sec. Litig.*, No. 00-0993 (KAJ), slip op. at 1 (D. Del. Feb. 5, 2004), Dkt. No. 973 (awarding 22.5% of $300 million settlement) (Ex. 20); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 130-35 (D.N.J. 2002) (awarding 21.6% of $194 million settlement); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 736 (E.D. Pa. 2001) (awarding 25% of $193 million settlement).

Thus, Lead Counsel's fee request is consistent with – indeed, it is on the lower end of – the range of attorneys' fees awarded in other class actions. *See, e.g., CompSource Okla v. BNY Mellon, N.A.*, No. CIV-08-469-KEW, 2012 U.S. Dist. LEXIS 185061, at *23 (E.D. Okla. Oct. 25, 2012) ("25% is on the low end of the range of acceptable fee awards in common fund cases which rage between 22% and 37%, and more in some cases").

C. The *Johnson* Factors Support the Fee Requested Here

The Tenth Circuit has stated that in determining the appropriate percentage of attorneys' fees in common fund cases, the Court should consider the factors set forth in the Fifth Circuit's decision in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). *See Gottlieb*, 43 F.3d at 483 ("the court must consider the twelve *Johnson* factors" to determine the reasonableness of a common fund fee award); *see also Brown*, 838 F.2d at 454-55; *Uselton*, 9 F.3d at 853; *Lane v. Page*, 862 F. Supp. 2d 1182, 1251 (D.N.M. 2012) (the Tenth Circuit "has adopted" the Fifth Circuit Test in *Johnson*). The *Johnson* factors consist of the following:

> (1) The time and labor required. . . . (2) The novelty and difficulty of the questions. . . . (3) The skill requisite to perform the legal services properly. . . . (4) The preclusion of other employment. . . . (5) The customary fee. . . . (6) Whether the fee is fixed or contingent. . . . (7) Time limitations imposed by the client or the circumstances. . . . (8) The amount involved and results obtained. . . . (9) The experience, reputation, and ability of the attorneys. . . . (10) The "undesirability" of the case. . . . (11) The nature and length of the professional relationship with the client. . . . [and] (12) Awards in similar cases.

488 F.2d at 717-19. The Tenth Circuit also has recognized that "rarely are all of the *Johnson* factors applicable" in a common fund case. *Brown*, 838 F.2d at 456; *see also Uselton*, 9 F.3d at 853. Recognizing that the relevance of each of the *Johnson* factors will vary in any particular case, the Tenth Circuit has left it to the lower courts' discretion to apply the factors in view of the

circumstances of the case. *Brown*, 838 F.2d at 456. As set forth below, application of the relevant *Johnson* factors supports Lead Counsel's fee request.[7]

1. The Amount Involved and Results Obtained

The result achieved for the class (*Johnson* factor 5) is often cited as the most important factor when assessing an appropriate fee award. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"); *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 630 (D. Colo. 1976) ("the amount of the recovery, and end result achieved are of primary importance, for these are the true benefit to the client").

There can be no question that in this case the result obtained for the Class is outstanding. As noted above, this Settlement is the second largest securities class action recovery ever obtained in Colorado and is among the four largest in Tenth Circuit history. ¶5. It far exceeds the Tenth Circuit and national medians for securities class action settlements – by more than ***seventeen*** times. ¶¶6, 114. The size of this recovery is particularly noteworthy in the context of this case where there have been no admissions of wrongdoing by the Company, no restatements of prior financial filings, and no criminal charges against any Defendant.

Another noteworthy fact about this recovery is that it far exceeds available insurance coverage. Given Clovis' financial condition, the highly complex nature of the subject matter, and the many risks inherent in the case, the $142 million recovery is truly exceptional. Put simply, many firms would have viewed insurance limits as the ceiling on recovery in this case,

[7] The customary fee (*Johnson* factor 5) and awards in similar cases (*Johnson* factor 12) are two factors that are often assessed in tandem (*see Crocs*, 2014 WL 4670886, at *3) and are addressed *supra* in §II.B. In addition, the following *Johnson* factors are not relevant to this Action, and, therefore, are not addressed herein: preclusion of other employment (*Johnson* factor 4), time limitations imposed by the client or the circumstances (*Johnson* factor 7), and the nature and length of the professional relationship with the client (*Johnson* factor 11).

and it is a testament to Lead Counsel's skill, diligence, and devotion of resources that the Settlement exceeds insurance policy limits by a substantial $117 million.

Furthermore, the $142 million Settlement Amount represents as much as thirty-seven percent of the Class' likely recoverable damages. ¶¶112-15. This, again, far exceeds the median securities class action settlement, which between 2007 and 2016 recovered 2.1% of estimated damages (while settlements in the Tenth Circuit over the same time period recovered 1.6% of estimated damages). *Id.* at ¶¶112-15. The substantial percentage of damages recovered in this case further supports Lead Counsel's fee request. *See, e.g., Thorpe v. Walter Inv. Mgmt. Corp.*, No. 1:14-cv-20880-UU, 2016 U.S. Dist. LEXIS 144133, at *9 (S.D. Fla. Oct. 17, 2016) (approving settlement representing 5.5% of the maximum damages and noting that the settlement is "an excellent recovery, returning more than triple the average settlement in cases of this size"); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02 MDL 1484, 2007 U.S. Dist. LEXIS 9450, at *33 (S.D.N.Y. Feb. 1, 2007) ("The [$40.3 million] settlement . . . represents a recovery of approximately 6.25% of estimated damages. This is at the higher end of the range of reasonableness of recovery in class action securities litigations."); *Hicks v. Morgan Stanley*, No. 01 Civ. 10071(RJH), 2005 U.S. Dist. LEXIS 24890, at *19 (S.D.N.Y. Oct. 24, 2005) (finding settlement representing 3.8% of plaintiffs' estimated damages to be within range of reasonableness); *In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895 (DAB), 2011 WL 1899715, at *5 (S.D.N.Y. May 13, 2011) (finding that settlements in the range of 3% to 7% of estimated losses in securities cases are common and reasonable).

Finally, as detailed in the Browne Declaration, Lead Counsel overcame significant challenges to obtain this result, both as to ability to pay and underlying liability. ¶¶11, 122-46. In the face of these risks, Lead Counsel obtained this Settlement without unnecessary delay,

thereby providing the Class with a real benefit without having to wait untold additional years with no assurances of recovering as much or anything at all, particularly in light of the risks and hard limits to recovery posed by Clovis' financial condition. ¶¶7, 12, 72(g), 94(a), 96, 122-27. In short, the result achieved by the Settlement – $25 million in cash plus shares of Clovis common stock valued at $117 million – is an excellent result favoring the requested fees.

2. The Novelty and Difficulty of Questions Raised by the Litigation

The novelty and difficulty of the issues in a case (*Johnson* factor 2) is a significant factor in determining a fee award. As noted above, securities class actions are inherently difficult. *See, e.g., Crocs*, 2014 WL 4670886, at *3 ("[l]itigating an action under the PSLRA is not a simple undertaking"); *Qwest Commc'ns*, 625 F. Supp. 2d at 1149 ("There are few simple class action cases involving securities law. This area of law may not be novel, but it generally is complex and difficult"); *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999) ("'[C]lass action suits' in general 'have a well-deserved reputation as being most complex.'… [F]ederal courts, including this Court, 'have long recognized that [securities class actions are] notably difficult and notoriously uncertain.'") (internal citations omitted); *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 263 (E.D. Va. 2009) ("The very nature of a securities fraud case demands a difficult level of proof to establish liability. Elements such as scienter, reliance, and materiality of misrepresentation are notoriously difficult to establish."); *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA").

In addition to the complexities present in all securities class actions generally, this Action involved a set of unique challenges and risks elevating it beyond the typical case. For example, this Action involved incredibly complex and technical oncological, statistical, scientific, and regulatory issues relating to the appropriate interpretation of clinical oncology guidelines and

multifaceted cancer drug trial results. Therefore, in order to prevail on its allegations, Lead Plaintiff needed to obtain and develop evidence – including expert evidence – on a multitude of complex medical, statistical, regulatory, financial, and other issues. As discussed in the Browne Declaration and the Settlement Memorandum, these complexities made it far from certain that any recovery, let alone an outstanding recovery of $142 million, would ultimately be achieved.

Moreover, as discussed further below and in the Browne Declaration, Lead Counsel's successful litigation of this case in light of the complexities of the questions and issues attending it required enormous skill and diligence. For instance, while the Complaint alleged that Clovis' internal clinical trial data showed rociletinib's confirmed ORR was, throughout the Class Period, materially lower than the unconfirmed ORR Clovis publicly reported, the Company's confirmed ORR data were unavailable to Lead Counsel at the time the Complaint was drafted. To overcome this obstacle, Lead Counsel developed statistical models and reconstructed Clovis' confirmation process based the details of the Company's clinical trial protocols in order to approximate what its data showed during the Class Period.

Lead Plaintiff and the Class also face significant risks in establishing Defendants' liability, including challenges in establishing that Defendants' statements were false and in establishing scienter. With respect to the falsity of Defendants' statements, among other defenses, Defendants had a credible argument that their statements reporting unconfirmed ORR were not misleading because they reasonably believed that the FDA would rely on unconfirmed responses in determining whether to approve, and how to label, rociletinib. ¶¶129-46.

Defendants also put forth strong arguments regarding scienter that could have barred any recovery in this Action. For example, Defendants would have argued, among other things, that Clovis acted at all times in good faith and held a genuine belief that the FDA would accept

unconfirmed ORR resultsm truly expected that rociletinib was performing well in its clinical trials, and that they were accurately reporting those results to the public. Further, Defendants would have continued to claim that the FDA repeatedly accepted unconfirmed results, and not until the very end of the Class Period did the FDA indicate that it would rely only on "confirmed" ORR results. ¶¶128-38.

Finally, this case involved significant "ability to pay" issues that injected an additional level of uncertainty into the Class' ability to recover on its claims. As discussed in the Browne Declaration, Clovis is a fledgling biopharmaceutical company that has reported significant net losses in every quarter since its founding. While the Company recently launched its first and only revenue-generating product, rucaparib, that product's current revenues do not even cover Clovis' operating costs, and the Company has continued to post net operating losses. Thus, there was a very substantial risk that even if the Class prevailed at trial, the Company might declare bankruptcy, making any recovery against the Company difficult and delaying any such recovery for years.

In sum, the risk that Lead Counsel would invest additional substantial financial resources and receive nothing from this complex and risky litigation weighs in favor of the fee request.

3. The Skill Required to Perform the Legal Services Properly and the Experience, Reputation, and Ability of the Attorneys

Two other *Johnson* factors – the skill required to properly perform the legal services (*Johnson* factor 3) and the experience, reputation, and ability of counsel (*Johnson* factor 9) – also support the requested fee award. *Qwest Commc'ns Int'l, Inc. Sec. Litig.*, No. 01-1451-REB-CBS, 2006 U.S. Dist. LEXIS 71267, at *18-19 (D. Colo. Sept. 29, 2006) ("Particularly in a case as complex as this [securities class action]. . .[t]his factor carries significant weight because the plaintiff class likely would not have obtained any relief without the assistance of counsel with a

high level of skill and expertise."). Lead Counsel have extensive experience prosecuting securities class actions and other complex litigation. ¶195; *see also* firm resume of Lead Counsel attached as Ex. C to Ex. 6A of the Browne Decl. That experience and skill was demonstrated during the prosecution and resolution of this Litigation. *See In re Checking Account*, 830 F. Supp. 2d 1330, 1359 (S.D. Fla. 2011) ("Class Counsel took on a great deal of risk in bringing this case, and turned a potentially empty well into a significant judgment. That kind of ***initiative and skill must be adequately compensated*** to insure that counsel of this caliber is available to undertake these kinds of risky but important cases in the future.").

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 Qwest*, 2006 U.S. Dist. LEXIS 71267, at *18 (finding that counsel for defendants were also "represented by lawyers of similar expertise and experience"); *see also In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115808, at *7 (S.D.N.Y. Nov. 7, 2007) (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. 8 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, the Clovis Defendants were represented by Willkie Farr & Gallagher LLP, one of the country's most prestigious and experienced defense firms, which vigorously represented its clients. The Underwriter Defendants were represented by Sullivan & Cromwell LLP, yet

another of the country's top corporate defense firms, who vigorously defended the Action as to the Underwriter Defendants. Notwithstanding this capable opposition, Lead Counsel's thorough investigation, ability to present a strong case, successful opposition of Defendants' motion to dismiss, and demonstrated willingness to vigorously prosecute the Action through a lengthy and highly contested discovery process, enabled it to achieve the favorable Settlement.

Moreover, the complex and technical nature of this Action required Lead Counsel to immerse itself in – and, indeed, master – arcane and difficult subject matter not typically attending securities class action cases, such as statistics, oncology (including endpoint selection in clinical trials of oncologic products), radiology, clinical trial conduct, and regulatory procedure. For instance, Lead Counsel, after obtaining and carefully reviewing Clovis' clinical trial protocols and recognizing the central importance of the RECIST clinical trial standards to this Action, engaged in a comprehensive review of scholarly commentary on RECIST, texts on the conduct of clinical trials, manuals on clinical oncology outcome assessments, and presentations and publications from dozens of drug manufacturers presenting ORR data in connection with oncology drugs. In addition, Lead Counsel reviewed reams of FDA and international regulatory guidance, including NDA submissions, data plans, and labels for dozens of different cancer drugs. Lead Counsel also worked with its experts to develop statistical models for approximating Clovis' internal clinical trial data when those data were unavailable to Lead Counsel; when those data were finally produced to Lead Plaintiff, Lead Counsel worked diligently to decipher Clovis' complex database, wrote computer code to sift through it, and developed algorithms to analyze rociletinib's ORR at all relevant time points.

4. The Contingent Nature of the Fee

A determination of a fair fee must include consideration of the contingent nature of the fee (*Johnson* factor 6). *See Vaszlavik*, 2000 U.S. Dist. LEXIS 21140, at *9-10; *see also Tuten v.*

United Airlines, Inc., 41 F. Supp. 3d 1003, 1009 (D. Colo. 2014) ("Class Counsel took the case on a contingent basis, which permits a higher recovery to compensate for the risk of recovering nothing for their work."); *Qwest*, 2006 U.S. Dist. LEXIS 71267, at *22 (a contingent fee "is designed to reward counsel for taking the risk of prosecuting a case without payment during the litigation, and the risk that the litigation may be unsuccessful").

Lead Counsel prosecuted this Action on a wholly contingent basis and bore all risks of litigating the case through trial and appeals. From the outset of this case, Lead Counsel understood that they were embarking on a complex, risky, and potentially lengthy litigation, which could (and did) require the expenditure of many thousands of hours of attorney time and the investment of hundreds of thousands of dollars in litigation expenses, with no guarantee of ever being compensated for their investment of time or resources.

The risks of contingent litigation are particularly stark in the context of securities class actions. Recent data show that securities class actions are dismissed at the pleadings stage approximately 54% of the time. ¶116. Other securities class actions are increasingly dismissed at the class certification stage, in connection with *Daubert* motions, or at summary judgment, after counsel have sometimes expended millions of dollars out-of-pocket and spent thousands of attorney hours working on the case. ¶¶116-21; *see also In re Barclays Bank PLC Sec. Litig.*, No. 09-01989, (S.D.N.Y.) (summary judgment granted on September 13, 2017 after eight years of litigation); *Omnicom Grp., Inc. Sec. Litig.*, 541 F. Supp. 2d 546, 554-55 (S.D.N.Y. 2008), *aff'd* 597 F.3d 501 (2d Cir. 2010) (summary judgment granted after 6 years of litigation and millions of dollars spent by plaintiffs' counsel).

Even when securities class action plaintiffs are successful in getting a class certified, prevail at summary judgment, overcome *Daubert* motions, and go to trial, there remain very real

risks that there will be no recovery or substantially less recovery for class members. For example, in *In re BankAtlantic Bancorp, Inc.*, a jury rendered a verdict in plaintiffs' favor on liability in 2010. In 2011, the district court granted defendants' motion for judgment as a matter of law and entered judgment in favor of the defendants on all claims. 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011). In 2012, the eleventh Circuit affirmed the district court's ruling, finding that there was insufficient evidence to support a finding of loss causation. *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012).

There is also the increasing risk that an intervening change in the law can result in the dismissal of a case after significant effort has been expended. The Supreme Court has heard several securities cases in recent years, often announcing holdings that dramatically changed the law in the midst of long-running cases. *See Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015); *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014); *Comcast Corp. v Behrend*, 133 S. Ct. 1426 (2013); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010). As a result, many cases have been lost after thousands of hours have been invested in briefing and discovery. For example, in *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 524, 533 (S.D.N.Y. 2011), after a verdict for class plaintiffs finding Vivendi acted reckless with respect to 57 statements, the district court granted judgment for defendants following a change in the law announced in *Morrison*.

In each of these cases, the underlying lawsuits were perceived as strong and the actions were litigated for several years with the investment of significant resources, but investors (and their attorneys) ultimately recovered nothing.

Thus, the risk that Lead Counsel would invest significant financial resources and receive nothing due to the contingent nature of the fee weighs in favor of the fee request.

5. The Time and Labor Expended by Plaintiffs' Counsel

The Tenth Circuit has found this *Johnson* factor to be of less importance in a common fund case. *Brown*, 838 F. 3d at 456. Nonetheless, this factor strongly favors the requested fee here. The enormous amount of work performed by Plaintiffs' Counsel throughout the litigation of this case is exhaustively detailed in the Browne Declaration. *See, e.g.*, ¶¶11-15, 21-99. This work, which was all done on a contingent basis, required a total of 23,521.90 hours of attorney and other professional support time. ¶193. Plaintiffs' Counsel's lodestar, derived by multiplying the hours spent by each attorney and professional support staff by their current hourly rates, is $10,654,683.25. *See id.* The requested fee of $22.5% of the net Settlement Fund (*i.e.*, approximately $31.844 million plus interest) therefore represents a multiplier of 2.99 of the total lodestar.

The requested 2.99 multiplier and lodestar cross-check in this Action is well within the range of multipliers commonly awarded in securities class actions and other comparable litigation. In cases of this nature, fees representing multiples above the lodestar are regularly awarded to reflect the contingency fee risk and other relevant factors. *See., e.g., Qwest*, 2006 U.S. Dist. LEXIS 71267, at *21 ("[L]ead counsel who create a common fund for the benefit of a class are rewarded with fees that often are at least two times the reasonable lodestar figure, ***and in some cases reach as high as five to ten times the lodestar figure***."); *Vaszlavik*, 2000 U.S. Dist. LEXIS 21140, at *7-8 (noting that "[c]ourts in common fund cases regularly award multipliers of two to three times the lodestar or more to compensate for risk and to reflect the quality of the work performed"); *Markus v. The North Face, Inc.*, C.A. No. 99-cv-47 (D. Colo. May 1, 2001) (awarding fee equal to a 2.9 multiplier in a case that settled before motions to dismiss were decided); *In re Samsonite Corp. Sec. Litig.*, C.A. No. 98-cv-1878 (D. Colo. July 25, 2000) (awarding fee equal to a 3.45 multiplier in a case that settled before motions to dismiss

were decided); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (upholding multiplier of 3.5 as reasonable on appeal); *NECA-IBEW*, 2016 WL 3369534, at *1 (awarding fee on $272 million settlement representing a 3.9 multiplier).[8]

D. Matters Raised By The Court At The July 26, 2017 Hearing

As noted above, during the hearing on July 26, 2017, the Court raised three matters that potentially impacted on Lead Counsel's fee request: (1) whether it is appropriate to award attorneys' fees in part stock and part cash; (2) whether certain provisions of the Stipulation of Settlement that allowed Lead Counsel to sell any portion of its stock awarded as attorneys' fees while choosing not to sell the stock awarded to the Class were fair; and (3) Lead Counsel's fiduciary duties with respect to the escrow fund. We believe each of these have been addressed, including by the parties' agreement to make certain amendments to the Stipulation of Settlement.

First, the Court asked whether Plaintiffs' Counsel could receive a fee comprised of stock in a company it was suing. *See* Tr. at 5:14-22. Lead Counsel respectfully submits that this is a well-recognized practice and has been expressly endorsed by multiple Courts. *See Montgomery v. Aetna Plywood, Inc., et al.*, 231 F.3d 399, 409 (7th Cir. 2000) ("Stock, like cash, is simply a form of compensation secured on the class's behalf. There is no reason it should be treated differently than cash. In fact, treating it differently creates perverse incentives for attorneys by encouraging them to seek all cash recoveries even when a cash and stock recovery would be in their clients' best interest or would otherwise be more appropriate.")

[8] *See also In re Deutsche Telekom AG Sec. Litig.*, No. 00-CV-9475 (NRB), 2005 WL 7984326, at *4 (S.D.N.Y. June 9, 2005) (awarding 25% of $120 million settlement representing a 3.96 multiplier). *Maley v. Del Global 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"); *Kurzweil v. Philip Morris Cos.*, Nos. 94 civ. 2373, 94 civ. 2546, 1999 U.S. Dist. LEXIS 18378, at *7-8 (S.D.N.Y. Nov. 24, 1999) (recognizing that when cross checking the common fund approach with the lodestar method, multipliers of between 3 and 4.5 are common in federal securities cases).

Consistent with this principle, there have been multiple securities class action settlements in Colorado and around the nation in which some portion of the settlement fund was comprised of the settling corporate defendant's securities. In each of these cases, class counsel's fee was paid at least in part in the securities issued to the settlement class. For example, in *Rosenfeld v. Laser Tech. Inc., et al.*, No. 99-cv-266 (D. Colo. Oct. 19, 2000), Dkt. No. 87 (Ex. 8), the Court approved a settlement of $850,000 in cash and 475,000 shares of stock and awarded attorneys' fees of 30% of each. *See also Rasner v. Vari-L Co., Inc., et al.*, No. 00-cv-1181 (D. Colo. March 28, 2003), Dkt. No. 102 (docket indicates that court approved settlement of $644,000 in cash and 2 million shares of stock and awarding attorneys' fees of 25% of settlement fund not attributable to disgorgement) (Ex. 9); *Anderton v. ClearOne Commn'cs., Inc., et al.*, No. 2:03-CV-0062-PCG, slip op. at 2 (D. Utah March 16, 2004), Dkt. Nos. 79, 92 (Ex. 10) (approved settlement of $5 million in cash and 1.2 million shares of stock and awarding attorneys' fees of 19%).[9]

Similarly, in *In re Lumber Liquidators Holdings, Inc. Sec. Litig.*, No. 13-00157, slip op. at 2 (E.D. Va. Nov. 17, 2016), Dkt. No. 206 (Ex. 11), the court recently awarded "attorneys' fees in the amount of 23.75% of the Settlement Cash . . . and 23.75% of the Settlement Stock."). *See also In re Ocean Power Techs. Inc. Sec. Litig.*, No. 14-03799, 2016 U.S. Dist. LEXIS 158222, at *93-94 (D.N.J. Nov. 15, 2016) (Lead Counsel "awarded $900,000 and 114,000 shares of OPT common stock"); *In re Heckmann Corp. Sec. Litig.*, No. 10-00378, slip op. at 2 (D. Del. June 26, 2014) Dkt. No. 308 (Ex. 12) (awarding "attorneys' fees in the amount of 33 1/3% of the Cash Settlement Amount (totaling $4,500,000) and 33 1/3% of the Settlement Shares (totaling 282,663 shares)"); *Crystal v. Medbox, Inc.*, No. 15-00426, slip op. at 33 (C.D. Cal. Nov. 14, 2016), Dkt.

[9] To the extent that the Court was concerned about Lead Counsel holding the common stock of Clovis while opt out or other litigations are proceeding (Tr. at 5:18-22), there are no issues there because none of the plaintiff attorneys involved in this case have any role in other ongoing litigation against Clovis.

No. 114 (Ex. 13); ("the Court awards to Lead Counsel attorneys' fees in the amount of twenty-five per cent of the $1,850,000.00 cash portion of the Settlement Fund and twenty-five per cent of the shares of Medbox stock contributed by Defendants to the Settlement Fund.").[10]

Second, the parties have amended the Stipulation of Settlement so that it expressly aligns the interests of Lead Counsel with the Class vis-à-vis any decision by Lead Counsel to sell Settlement Shares. Specifically, the Amendment to the Stipulation of Settlement expressly states that Lead Counsel may not sell any shares awarded to itself as part of its attorneys' fees without also simultaneously selling the Settlement Shares it holds for the benefit of the Class. This ensures that the interests of Lead Counsel and the Class are entirely coterminous, and eliminates any possibility that Lead Counsel could seek to sell its shares at a higher price than that obtained by the Class as a whole. *See* ¶¶153-156; Ex. 1.

Third, the parties have also amended the Stipulation of Settlement to make clear that Lead Counsel has a fiduciary duty with respect to the Escrow Account, and the administration and distribution of the Settlement Funds. *See* ¶¶157-158; Ex. 1.

[10] *See also Adams v. Amplidyne, Inc.*, No. 99-4468 (MLC), 2001 U.S. Dist. LEXIS 14464, at * 12 (D.N.J. Aug. 14, 2001) ("Plaintiffs' Counsel … awarded 33% of the Cash Settlement Amount (including interest), and one-third of the Settlement Shares, as and for their attorneys' fees, which amounts the Court finds to be fair and reasonable"); *In re Cell Pathways, Inc. Sec. Litig. II*, No. 01-CV-1189, 2002 WL 31528573, at *15 (E.D. Pa. Sept. 23, 2002) ("Plaintiffs' Counsel … awarded 30% of the Settlement Fund as and for their attorneys' fees, which sum the Court finds to be fair and reasonable, and which percentage shall be payable from both the Settlement Stock and the Settlement Cash in the Settlement Fund."); *In re Genta Sec. Litig.*, No. 04-2123 (JAG), 2008 WL 2229843, at *11, 13 (D.N.J. May 28, 2008) (awarding attorneys' fees of 25% of each of the settlement cash and settlement stock in the settlement fund); *In re Tripath Tech., Inc. Sec. Litig.*, No. C 04 4681 SBA, 2006 U.S. Dist. LEXIS 34465, at *12 (N.D. Cal. Apr. 18, 2006) (awarding 25% of the settlement shares as attorneys' fees).

E. The Fee Request is Entitled to a Presumption of Reasonableness Because it is Based on a Fee Agreement Entered into with Lead Plaintiff at the Outset of the Litigation

In addition to the *Johnson* factors discussed above, another factor favoring the reasonableness of Lead Counsel's fee application under the percentage-of-the-fund method is that the fee is based on an agreement Lead Counsel entered into with a sophisticated Lead Plaintiff at the outset of the litigation, and, therefore, should be afforded a presumption of reasonableness.

The PSLRA was intended to encourage sophisticated investors like the Arkin Group 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. Accordingly, fees negotiated between a properly selected PSLRA Lead Plaintiff and their counsel should be accorded a presumption of reasonableness. *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.*, No. 04 Civ. 8144 (CM), 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"); *City of St. Clair Shores Gen. Emps.' Ret. Sys. v. Lender Processing Servs., Inc.*, No. 3:10–cv–01073–TJC–JBT, 2014 WL 12621611, at *2 (M.D. Fla. Mar. 4, 2014) *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 261 (E.D. Va. 2009) ("in a PSLRA case . . . a fee request that has been approved and endorsed by properly-appointed lead plaintiffs .

. . enjoys a presumption of reasonableness"). This presumption helps "ensure that the lead plaintiff, not the court, functions as the class's primary agent vis-a-vis its lawyers." *Cendant*, 264 F.3d at 282.

Here, Lead Plaintiff is precisely the type of sophisticated and financially interested investor that Congress envisioned serving as a fiduciary for the Class when it enacted the PSLRA. The Arkin Group negotiated the fee request pursuant to its retainer agreement with Lead Counsel that was entered into at the beginning of the litigation. *See* Arkin Decl. at ¶7. After the agreement to settle the Action was reached, Lead Plaintiff has approved the proposed fee as consistent with the written retainer agreement and believes it is fair and reasonable in light of the quality of the result obtained, the work counsel performed, and the risks of the litigation.[11] *Id*. Accordingly, the endorsement of the fee as reasonable by Lead Plaintiff supports approval of the fee.[12]

F. 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 20, 2017, the Claims Administrator has disseminated 53,629 copies of the Notice to potential Class Members and nominees informing them, among other things, that Lead Counsel intends to apply to the Court for an award of attorneys' fees in an amount not to exceed 22.5% of the Settlement Fund and up to $900,000 in Litigation Expenses. *See* Thurin Decl. ¶8 and Ex. A thereto. While the time to object to the Fee and Expense Application does not expire until October 5, 2017, to

[11] There is one aspect where the fee request is slightly different than the retainer. Lead Plaintiff and Lead Counsel have now agreed that Lead Counsel would seek fees off of the "net" Settlement Fund (after first subtracting any Court-awarded expenses), rather than the entire Settlement Fund as contemplated by the retainer. *See* Arkin Decl. at ¶7. Thus, Lead Counsel has agreed to take a lower fee than originally provided in the retainer.

[12] Named plaintiff St. Petersburg also believes the fee request is fair and reasonable. *See* Declaration of Jane Wallace (the "Wallace Decl."), attached as Ex. 3 to the Browne Decl., at ¶7.

date, no objections have been received. ¶¶177, 203. Should any objections be received, Lead Counsel will address them in its reply papers.

G. Lead Counsel's Expenses Are Reasonable And Were Necessarily Incurred To Achieve The Benefit Obtained

Lead Counsel are also applying for reimbursement of Plaintiffs' Counsel's Litigation Expenses, which were reasonably incurred and necessary to the prosecution and settlement of the Action. *See* ¶¶205-17; *see also* Ex. 7 to the Browne Decl. These expenses are properly recovered by counsel. *Vaszlavik*, 2000 U.S. Dist. LEXIS 21140, at *11 ("As with attorneys' fees, an attorney who creates or preserves a common fund for the benefit of a class is entitled to receive reimbursement of all reasonable costs incurred."). As set forth in detail in the Browne Declaration, Plaintiffs' Counsel incurred $427,133.68 in Litigation Expenses in the prosecution of the Action. ¶205. Reimbursement of these expenses is fair and reasonable.

The expenses for which reimbursement are sought are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the hour. *See Bratcher v. Bray-Doyle Indep. Sch. Dis.*, 8 F.3d 722, 725-26 (10th Cir. 1993) (holding that expenses reimbursable if such charges would normally be billed to client) (citing *Bee v. Greaves*, 910 F.2d 686, 690 (10th Cir. 1990)); *Kelley v. City of Albuquerque*, No. Civ. 03-507 JBACT, 2005 WL 3663515, at *17-18 (D.N.M. Oct. 24, 2005) (awarding reasonable expenses that would normally be billed to paying client.). These expenses include, among others, expert fees, online research, mediation fees, court reporting and transcripts, photocopying, travel costs, and postage expenses. The largest expense is for retention of Lead Plaintiff's experts, in the amount of $245,343.23, or approximately 57% of the total Litigation Expenses. ¶208. Another significant expense is charges for electronic discovery/document management, which includes costs for an electronic discovery vendor in managing the enormous database of documents received, totaling

$66,486.17, or approximately 16% of the total amount of expenses. ¶212. The combined costs for online legal and factual research, in the amount of $50,733.16, represent approximately 12% of the total amount of expenses. ¶210. A complete breakdown by category of the expenses incurred by Plaintiffs' Counsel is set forth in Ex. 7 to the Browne Declaration. These expense items are billed separately by Plaintiffs' Counsel, and such charges are not duplicated in the firms' hourly billing rates.

The Notice informed potential Class Members that Lead Counsel would apply for reimbursement of Litigation Expenses in an amount not to exceed $900,000, 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 $470,333.68, which includes $427,133.68 in reimbursement of total expenses incurred by Plaintiffs' Counsel and $43,200.00 in reimbursement of total costs and expenses incurred by Plaintiffs, an amount well below the amount listed in the Notice. To date, there has been no objection to the request for expenses.

H. Plaintiffs Should Be Awarded Their Reasonable Costs And Expenses Under 15 U.S.C. §78u-4(a)(4)

In connection with its request for reimbursement of Litigation Expenses, Lead Counsel also seeks reimbursement of the costs and expenses incurred directly by (i) the Court-appointed Lead Plaintiff, the Arkin Group, and (ii) additional named plaintiff St. Petersburg. 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, the Arkin Group and St. Petersburg seek awards of $33,300.00 and $9,900.00, respectively, for time dedicated by their personnel to furthering and supervising the Action. *See*

Arkin Decl. ¶¶9-12; Wallace Decl. ¶¶9-11. The Arkin Group took an extremely active role throughout the entire litigation, demonstrating a unique degree of involvement in the prosecution and settlement of the Action. Principals and employees of the Arkin Group devoted significant time to, among other things, participating in discussions with Lead Counsel concerning the litigation, including case strategy; reviewing and commenting on all significant pleadings and briefs filed in the Action; consulting with Lead Counsel regarding the retention of experts and consultants; monitoring the progress of settlement negotiations; conducting settlement negotiations directly in Israel with Clovis CEO Patrick Mahaffy; and otherwise consulting with Lead Counsel concerning the settlement negotiations as they progressed; and evaluating and approving the Settlement. *See* Arkin Decl. at ¶¶ 4-5.

As set forth in the Arkin Declaration, the Arkin Group personnel devoted a total of 111 hours to assisting in the prosecution of this Action. *Id.* at ¶12. The time that Arkin Group personnel spent on these activities was time that they otherwise would have expected to spend on other work for the Arkin Group and, thus, represented a cost to the Arkin Group. *Id.* As set forth in the Arkin Declaration, the Arkin Group has valued the time of its personnel at $300 per hour, which is the approximate blended average billing rates of Lead Counsel's paralegals who billed time to this Action. Accordingly, the Arkin Group seeks reimbursement of $33,300.00. *Id*.

Similarly, St. Petersburg has also been actively involved in the prosecution of the Action through, among other things, regular communications with its counsel, Saxena White; review of significant pleadings and briefs filed in the Action; consulting with Saxena White regarding the settlement negotiations; and evaluating and approving the proposed Settlement. *See* Wallace Decl., at ¶5. As with the Arkin Group, the time that St. Petersburg personnel spent on these

activities was time that they otherwise would have expected to spend on other work for St. Petersburg and, thus, represented a cost to St. Petersburg. *Id.* at ¶11. As set forth in the Wallace Decl., St. Petersburg has devoted a total of 33 hours to this litigation and, like the Arkin Group, has valued the time of its personnel at $300 per hour. Accordingly, St. Petersburg seeks reimbursement of $9,900. *Id.*

Numerous courts have approved reasonable awards to compensate lead plaintiffs for the time and effort they spent on behalf of a class. In *Marsh & McLennan*, the court awarded $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." 2009 WL 5178546, at *21. As the court noted, their efforts in, among other things, communicating with lead counsel, reviewing submissions to the court, and participating in settlement discussions were "precisely the types of activities that support awarding reimbursement of expenses to class representatives." *Id.*; *see also In re NU Skin Enters., Inc. Sec. Litig.*, No. 2:14-cv-00033-JNP-BCW, 2016 WL 6916486, at *1 (D. Utah Oct. 13, 2016) (awarding $9,800.00 to lead plaintiff to "reimburse it for the time it dedicated to the prosecution of the Action on behalf of the Settlement Class"); *In re Bank of Am. Corp. Sec., Derivative, & Emp. Ret. Income Sec. Act (ERISA) Litig.*, 772 F.3d 125, 133 (2d Cir. 2014) (affirming award of over $450,000 to representative plaintiffs for time spent by their employees on the action); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-3400 (CM) (PED), 2010 WL 4537550, at *31 (S.D.N.Y. Nov. 8, 2010) (approving award of $100,000 to Lead Plaintiff for time spent on the litigation); *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").

The awards sought by Plaintiffs are reasonable and fully justified under the PSLRA based on the involvement of Plaintiffs in the Action, and should be granted.

III. CONCLUSION

For the reasons discussed above and in the Browne Declaration, Lead Counsel respectfully request that the Court award attorneys' fees in the amount of 22.5% of the net Settlement Fund, or approximately $31.844 million plus interest accrued at the same rate as earned by the Settlement Fund; award $427,133.68 in reimbursement of the reasonable Litigation Expenses that Plaintiffs' Counsel incurred in prosecuting the Action; and award $33,300.00 in reimbursement of the total costs and expenses incurred by the Arkin Group and St. Petersburg directly relating to their representation of the Class.

Dated: September 21, 2017

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CERTIFICATE OF SERVICE

I, Abraham Alexander, an attorney, hereby certify that on this 21st day of September, 2017, I caused a true and correct copy of the foregoing **MEMORANDUM OF LAW IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES** to be filed with the Clerk of the Court using the CM/ECF system which will send a Notice of Electronic Filing to all counsel of record.

I certify under perjury that the foregoing is true and correct.

/s/ Abe Alexander

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