UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

LOUISIANA MUNICIPAL POLICE EMPLOYEES' RETIREMENT SYSTEM, SJUNDE AP-FONDEN, BOARD OF TRUSTEES OF THE CITY OF FORT LAUDERDALE GENERAL EMPLOYEES' RETIREMENT SYSTEM, EMPLOYEES' RETIREMENT SYSTEM OF THE GOVERNMENT OF THE VIRGIN ISLANDS, AND PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI on behalf of themselves and all others similarly situated, Plaintiffs, v. GREEN MOUNTAIN COFFEE ROASTERS, INC., LAWRENCE J. BLANFORD and FRANCES G. RATHKE, Defendants.	No. 2:11-CV-00289-WKS

NOTICE OF CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

TO: All Counsel of Record

PLEASE TAKE NOTICE that pursuant to Federal Rules of Civil Procedure 23(e) and 23(h) and this Court's Order Preliminarily Approving Settlement and Providing for Notice entered July 6, 2018 (ECF No. 339), and upon (i) the Joint Declaration of Matthew L. Mustokoff, John C. Browne, and Mark R. Rosen in Support of: (I) Class Representatives' Motion for Final Approval of Class Action Settlement and Plan of Allocation; and (II) Class Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses; (ii) the Memorandum of Law in Support of Class Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of

Litigation Expenses; and (iii) all other papers and proceedings herein, Class Counsel will and do hereby move this Court, before the Honorable William K. Sessions III, on October 22, 2018 at 10:00 a.m., in Courtroom 110 of the United States District Court for the District of Vermont, 11 Elmwood Avenue, Burlington, VT 05401, or at such other location and time as set by the Court, for entry of an Order awarding attorneys' fees and reimbursement of litigation expenses. A proposed Order granting the requested relief will be submitted with Class Counsel's reply papers after the deadline for objecting to the motion has passed.

Dated: September 17, 2018

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LOUISIANA MUNICIPAL POLICE EMPLOYEES' RETIREMENT SYSTEM, SJUNDE AP-FONDEN, BOARD OF TRUSTEES OF THE CITY OF FORT LAUDERDALE GENERAL EMPLOYEES' RETIREMENT SYSTEM, EMPLOYEES' RETIREMENT SYSTEM OF THE GOVERNMENT OF THE VIRGIN ISLANDS, AND PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI on behalf of themselves and all others similarly situated, Plaintiffs, v. GREEN MOUNTAIN COFFEE ROASTERS, INC., LAWRENCE J. BLANFORD and FRANCES G. RATHKE, Defendants.	No. 2:11-CV-00289-WKS

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Court-appointed Lead Counsel, Kessler Topaz Meltzer & Check, LLP ("KTMC"), Bernstein Litowitz Berger & Grossmann LLP ("BLB&G") and Barrack, Rodos & Bacine ("BR&B") (collectively, "Lead Counsel" or "Class Counsel"), respectfully submit this memorandum of law in support of their motion, on behalf of Plaintiffs' Counsel, for an award of attorneys' fees in the amount of 17% of the Settlement Fund. Class Counsel also seek reimbursement of $2,478,468.65 in Litigation Expenses that Plaintiffs' Counsel reasonably incurred in prosecuting and settling the Action and reimbursement of a total of $94,227.37 in costs incurred by Class Representatives directly related to their representation of the Class.[1]

PRELIMINARY STATEMENT

The proposed Settlement, if approved by the Court, will resolve this case in its entirety in exchange for a payment of $36.5 million in cash. The $36.5 million Settlement, which is based on the Parties' acceptance of a mediator's proposal that the Action be settled for that amount, is a highly favorable result for the Class in light of the significant challenges that Class Representatives faced in proving falsity, scienter, loss causation, and damages. Indeed, in undertaking this litigation, counsel faced numerous challenges that posed a serious risk of no recovery, or a substantially lesser recovery than the Settlement. These risks are illustrated, for example, by the Court's dismissal of the Action in its entirety in December 2013 following Defendants' motions to dismiss. The significant monetary recovery ultimately achieved for the Class was obtained through the skill and tenacity of Class Counsel, and only after the case was litigated on a fully contingent basis against skilled defense counsel for more than six years.

Class Counsel had to devote a vast amount of time and resources to the Action before the

[1] Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated June 18, 2018 (ECF No. 336-1) (the "Stipulation") or in the Joint Declaration of Matthew L. Mustokoff, John C. Browne, and Mark R. Rosen in Support of: (I) Class Representatives' Motion for Final Approval of Class Action Settlement and Plan Of Allocation; and (II) Class Counsel's Motion for an Award of Attorneys' Fees And Reimbursement of Litigation Expenses (the "Joint Declaration" or "Joint Decl."), filed herewith. Citations to "¶" in this memorandum refer to paragraphs in the Joint Declaration. "Plaintiffs' Counsel" consist of Class Counsel and local counsel Lynn, Lynn, Blackman & Manitsky, P.C. All internal citations and quotations in case law have been omitted.

Settlement could be obtained. As detailed in the accompanying Joint Declaration, counsel's efforts in pursing the claims on behalf of the Class in the Action included: (i) conducting an extensive investigation into Defendants' alleged misstatements; (ii) drafting a detailed consolidated complaint; (iii) briefing and conducting oral argument on Defendants' motions to dismiss; (iv) obtaining a reversal of the Court's decision granting Defendants' motions to dismiss following an appeal to the Second Circuit; (v) conducting extensive fact and expert discovery, which included depositions of 44 witnesses, reviewing over 1.1 million pages of documents produced to Class Representatives, and litigating various discovery motions; (vi) successfully moving for certification of the Class; (vii) consulting with experts in the areas of sales and operations planning, insider stock trading plans, market efficiency, reliance and damages; (viii) successfully opposing Defendants' motion for partial judgment on the pleadings; (ix) fully briefing Class Representatives' opposition to Defendants' motion for summary judgment and Class Representatives' motions to strike an affidavit from a fact witness and a supplemental expert submitted in connection with summary judgment; and (x) participating in extended settlement negotiations, including two formal mediation sessions and numerous telephonic communications, facilitated by a highly respected and experienced mediator. ¶¶9, 15-42, 75-82.

The Settlement achieved through Class Counsel's efforts is a particularly favorable result when considered in light of the significant risks of proving the Defendants' liability and establishing loss causation and damages, which are set forth in detail in the Joint Declaration at ¶¶43-74. Defendants contend that they did not make any materially false and misleading statements in violation of the federal securities laws and that Class Representatives would not be able to establish that they acted with the requisite intent. Proving the falsity of Defendants' alleged Class Period misstatements and Defendants' scienter would have been challenging here.

Defendants asserted that the statements in question concerning the Company's capacity constraints and customer demand were accurate when made. ¶¶50, 52. And there was no enforcement action by the government, no financial restatement, and no clear "smoking gun" identified in discovery here. ¶¶50, 53. Instead, to prove falsity, Class Representatives would have

to rely on the Company's internal documents, which arguably could be susceptible to multiple interpretations, and overcome testimony from Company employees generally supporting the accuracy of Defendants' alleged misstatements. ¶¶53-58. Proving scienter would also have presented substantial challenges due to, among other reasons, the fact that the Individual Defendants' sales of Green Mountain stock during the Class Period were made pursuant to Rule 10b5-1 stock trading plans. ¶¶62-63.

Class Representatives also faced significant hurdles in bearing their burden to prove loss causation and damages. Defendants asserted that the alleged corrective disclosure on November 9, 2011 did not reveal any new information beyond what the Company had previously disclosed to the market on July 27, 2011, when the market learned that Green Mountain's capacity had caught up to demand, and thus the alleged misrepresentations could not have caused the losses to the Class. Given these substantial risks, Class Counsel respectfully submit that the $36.5 million Settlement is a testament to their hard work and the quality of their representation.

As compensation for their efforts on behalf of the Class and the risks of non-payment they faced in bringing the Action on a contingent basis, Class Counsel seek an award of 17% of the Settlement Fund, which is well within the range of fees that courts in this Circuit have awarded in securities class actions with comparable recoveries on a percentage basis. In addition, the requested fee represents a *negative* multiplier of approximately 0.22 of Plaintiffs' Counsel's total lodestar, which is well ***below*** the range of multipliers typically awarded in class actions with significant contingency risks such as this one.

The Class Representatives, each of whom is a sophisticated institutional investor, have endorsed the requested fee as fair and reasonable based on the quality of the result obtained, the work counsel performed, and the risks of the litigation. *See* Exhibits 1A through 1E to the Joint Declaration. In addition, nearly 150,000 copies of the Notice have been mailed to potential Class Members and their nominees as of September 14, 2018. *See* Declaration of Alexander Villanova Regarding: (A) Mailing of the Notice and Claim Form; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion Received to Date (Joint Decl. Ex. 2) (the "Mailing

Decl."), at ¶8. The Notice advised potential Class Members that Class Counsel would apply for an award of attorneys' fees in amount not to exceed 20% of the Settlement Fund and reimbursement of litigation expenses (including the reasonable costs and expenses of Class Representatives) in an amount not to exceed $3,400,000. *See* Mailing Decl. Ex. A at ¶¶5, 70. The fees and expenses sought by Class Counsel do not exceed the amounts set forth in the Notice. While the deadline set by the Court for Class Members to object has not yet passed, to date, no objections to the fee and expense application have been received. ¶92.[2]

In light of the recovery obtained, time and effort devoted by Class Counsel, work performed, skill and expertise required, and risks that counsel undertook, Class Counsel submit that the requested fee award is reasonable. In addition, the expenses for which Class Counsel seek reimbursement were reasonable and necessary for the successful prosecution of the Action.

ARGUMENT

I. CLASS COUNSEL ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES FROM THE COMMON FUND

The Supreme Court has long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). Courts recognize that awards of fair attorneys' fees from a common fund "serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons," and therefore "to discourage future misconduct of a similar nature." *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *23 (S.D.N.Y. Nov. 8, 2010).

Indeed, the Supreme Court has emphasized that private securities actions, such as the instant Action, are "an essential supplement to criminal prosecutions and civil enforcement actions" brought by the SEC. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313

[2] The deadline for the submission of objections is October 1, 2018. Should any objections be received, Class Counsel will address them in reply papers, which will be filed with the Court on or before October 15, 2018.

(2007); *accord Bateman Eichler, 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.'"). Compensating plaintiffs' counsel for the risks they take in bringing these actions is essential, because "[s]uch actions could not be sustained if plaintiffs' counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class." *Hicks v. Morgan Stanley*, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005).

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

Class Counsel respectfully submit that the Court should award a fee based on a percentage of the common fund obtained. The Second Circuit has expressly approved the percentage method, recognizing that "the lodestar method proved vexing" and had resulted in "an inevitable waste of judicial resources." *Goldberger*, 209 F.3d at 48-50 (either the percentage of fund method or lodestar method may be used to determine appropriate attorneys' fees); *Savoie v. Merchs. Bank*, 166 F.3d 456, 460 (2d Cir. 1999) (the "percentage-of-the-fund method has been deemed a solution to certain problems that may arise when the lodestar method is used in common fund cases"). Indeed, the percentage method "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation," and has noted that the "trend in this Circuit is toward the percentage method." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005); *see In re Comverse Tech., Inc. Sec. Litig.*, 2010 WL 2653354, at *2 (E.D.N.Y. June 24, 2010); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 146 (S.D.N.Y. 2010).

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

Here, the requested fee of 17% of the Settlement Fund, which represents a lodestar multiplier of 0.22 – substantially less than the value of the time devoted by Plaintiffs' Counsel at

their standard hourly rates – is reasonable under either the "percentage" and "lodestar" methods.

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

The 17% fee requested by Class Counsel here with the approval of Class Representatives is well within – indeed on the lower end of – the range of percentage fees typically awarded by Courts in the Second Circuit in securities class actions and other comparable class actions with similar recoveries. *See, e.g., Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 249 (2d Cir. 2007) (affirming award of a 30% fee on a $42.5 million settlement); *Seijas v. Republic of Argentina*, 2017 WL 1511352, at *13 (S.D.N.Y. Apr. 27, 2017) (awarding 30% of approximately $23.1 million settlement); *In re OSG Sec. Litig.*, No. 12-cv-07948-SAS, slip op. at 1 (S.D.N.Y. Dec. 2, 2015), ECF No. 261 (Joint Decl. Ex. 5) (30% of $31.67 million recovery); *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, 2015 WL 6971424, at *11-*12 (S.D.N.Y. Nov. 9, 2015) (33% of $26.5 million settlement); *City of Austin Police Ret. Sys. v. Kinross Gold Corp.*, 2015 WL 13639234, at *4 (S.D.N.Y. Oct. 15, 2015) (30% of $33 million settlement); *In re Celestica Inc. Sec. Litig.*, No. 07-cv-00312-GBD, slip op. at 2 (S.D.N.Y. July 28, 2015), ECF No. 267 (Joint Decl. Ex. 6) (30% of $30 million settlement); *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 (Joint Decl. Ex. 7) (30% of $29 million settlement); *In re Tronox, Inc. Sec. Litig.*, No. 09-CV-06220-SAS, slip op. at 2-3 (S.D.N.Y. Nov. 26, 2012), ECF No. 202 (Joint Decl. Ex. 8) (25% of $37 million settlement); *In re Am. Home Mortg. Sec. Litig.*, No. 07-MD-1898-TCP, slip op. at 2 (E.D.N.Y. Jan. 14, 2010), ECF No. 99 (Joint Decl. Ex. 9) (20% of $37.25 million settlement); *Marsh ERISA*, 265 F.R.D. at 149 (33.3% of $35 million ERISA class action settlement); *In re Salomon Analyst Metromedia Litig.*, No 02-cv-7966-GEL, slip op. at 1 (S.D.N.Y. Feb. 27, 2009), ECF No. 93 (Joint Decl. Ex. 10) (27% fee of $35 million settlement); *In re Sadia S.A. Sec. Litig.*, 2011 WL 6825235, at *3 (S.D.N.Y. Dec.

28, 2011) (30% of $27 million settlement).[3]

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

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

Here, Plaintiffs' Counsel spent over 60,300 hours of attorney and other professional support time prosecuting the Action. ¶ 95. Plaintiffs' Counsel's lodestar, derived by multiplying the hours spent by each attorney and paraprofessional by their current hourly rates, is $28,543,693.50. The requested fee of 17% of the Settlement Fund, or $6,205,000 (plus interest), therefore represents a "negative" multiplier of approximately 0.22 of counsel's lodestar. Stated differently, Class Counsel are requesting that Plaintiffs' Counsel be paid just 22% of the value of the time devoted to the case based on their standard hourly rates.

In complex class action cases, fees representing multiples ***above*** the lodestar are typically awarded to reflect the contingency fee risk and other relevant factors. *See In re FLAG Telecom*, 2010 WL 4537550, at *26 (S.D.N.Y. Nov. 8, 2010) ("[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[.]"); *Comverse*, 2010 WL 2653354, at *5 ("Where, as here, counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar[.]"). Indeed, in complex contingent litigation, lodestar multipliers between 2 and 5 are commonly awarded. *See, e.g., Wal-Mart*, 396 F.3d at 123 (multiplier of 3.5 was reasonable); *NECA-IBEW Health & Welfare Fund v. Goldman, Sachs & Co.*, 2016 WL 3369534, at *1 (S.D.N.Y. May 2, 2016)

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[3] Indeed, percentage fees of this amount and higher have often been awarded in larger settlements in the Second Circuit. *See*, *e.g.*, *Fresno Cnty. Employees' Ret. Ass'n v. comScore, Inc.*, No. 1:16-cv-01820-JGK, slip op. at 2-3 (S.D.N.Y. June 7, 2018), ECF No. 273 (Joint Decl. Ex. 11) (awarding 20% of $110 million settlement); *Kaplan v. S.A.C. Capital Advisors, L.P.*, No. 12 Civ. 9350, slip op. at 2 (S.D.N.Y. May 12, 2017), ECF No. 388 (Joint Decl. Ex. 12) (20% of $135 million settlement); *In re Salix Pharmaceuticals, Ltd.*, 2017 WL 3579892, at *7-*8 (S.D.N.Y. Aug. 18, 2017) (21.24% of $210 million settlement).

(awarding 21% fee on $272 million settlement; 3.9 multiplier); *In re Deutsche Telekom AG Sec. Litig.*, 2005 WL 7984326, at *4 (S.D.N.Y. June 14, 2005) (awarding 28% of $120 million settlement; 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 as "well within the range awarded by courts in this Circuit").

The fact that the requested percentage fee here represents a substantial discount from Plaintiffs' Counsel's lodestar is strong evidence that the requested fee is reasonable. *See, e.g., In re Bear Stearns Cos. Sec., Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 271 (S.D.N.Y. 2012) (negative multiplier was a "strong indication of the reasonableness of the [requested] fee"); *In re Marsh & McLennan Cos. Sec. Litig.*, 2009 WL 5178546, at *20 (S.D.N.Y. Dec. 23, 2009) (where the multiplier is negative, the lodestar cross-check "unquestionably supports the requested percentage fee award.").

The lodestar is based on Plaintiffs' Counsel's hourly rates as reflected in the community for similar services by attorneys of reasonably comparable skill, experience and reputation and that have been approved in previous class actions or shareholder litigation. Plaintiffs' Counsel's hourly rates range from $575 to $995 for partners and counsel, $375 to $650 for associates, and $85 to $550 for professional support staff, with an overall blended hourly rate for all timekeepers of approximately $473. The rates for the attorneys who primarily conducted document review and analysis ranged from $350 to $395, with a blended hourly rate for those attorneys of approximately $372.

These are fair and reasonable rates for complex litigations such as this one. *See, e.g., In re Platinum & Palladium Commodities Litig.*, 2015 WL 4560206, at *3-*4 (S.D.N.Y. July 7, 2015) (finding hourly rates ranging from $250 to $950 reasonable); *In re IndyMac Mortg.-Backed Sec. Litig.*, 94 F. Supp. 3d 517, 528 (S.D.N.Y. 2015) (awarding fee that "result[ed] in a blended hourly rate of $514.29"). They also compare favorably with the rates charged by Ropes & Gray, Green Mountain's primary defense counsel in this action, which, as reported in a 2016 bankruptcy filing, ranged from $880 to $1,450 for partners, $605 to $1,425 for counsel, $460 to

$1,050 for associates, and $160 to $415 for paralegals. *See In re Gawker Media LLC*, Case No. 16-11700-SMB, Notice of Debtor's Appl. at 6 (Bankr. S.D.N.Y. June 20, 2016), ECF No. 57 (Joint Decl. Ex. 13).

In sum, Class Counsel's requested fee award is easily within the range of what courts in this Circuit and beyond regularly award in comparable class actions, whether calculated as a percentage of the Settlement Fund or in relation to Plaintiffs' Counsel's lodestar.

IV. ALL FACTORS CONSIDERED BY THE SECOND CIRCUIT SUPPORT THE FINDING THAT THE REQUESTED FEE IS FAIR AND REASONABLE

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

> (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Goldberger, 209 F.3d at 50. All of these factors further support the conclusion that Class Counsel's requested fee is reasonable.

A. <u>The Time and Labor Expended Support the Requested Fee</u>

Class Counsel expended substantial time and labor prosecuting this Action over six years and achieving the Settlement. As set forth in greater detail in the Joint Declaration, Class Counsel, among other things:

- conducted a detailed investigation of the potential claims against Defendants, which included a thorough review of public documents such as SEC filings, analyst reports, and conference call transcripts, and numerous interviews with former Green Mountain employees (including ten who were cited in the Complaint as confidential witnesses) (¶18);
- drafted the detailed consolidated complaint based on their investigation (¶¶17-18);
- researched and drafted briefing in opposition to Defendants' motions to dismiss and participated in oral argument on those motions (¶¶19-20);
- successfully appealed the Court's decision granting Defendants' motions to dismiss to the Second Circuit and obtained a reversal that allowed the Action to continue (¶21);

- following remand from the Court of Appeals, conducted extensive fact discovery, which included (a) obtaining and reviewing over 1.1 million pages of documents produced by Defendants and third parties, (b) defending Rule 30(b)(6) depositions of six witnesses from the Class Representatives and taking fact depositions of 31 other witnesses, including the depositions of the Individual Defendants, virtually all of the senior finance, planning and sales professionals from Green Mountain's primary operating divisions, and multiple relevant third-parties' depositions, and (c) litigating various discovery motions (¶¶23-33, 41-42);

- worked extensively with experts in the areas of sales and operations planning (including business forecasting and supply and demand processes), insider stock trading plans under SEC Rule 10b5-1, market efficiency, reliance and economic damages throughout the litigation (¶34);

- engaged in an extensive expert discovery process, which included (a) assisting in preparation of reports by Class Representatives' experts; (b) defending the depositions of each of Class Representatives' experts, and (c) deposing Defendants' experts (¶34);

- successfully moved for certification of the Class over Defendants' opposition, which included conducting related discovery and submitting an expert report on market efficiency and class-wide damages (¶¶35-36);

- successfully defeated Defendants' motion for partial judgment on the pleadings which sought to shorten the Class Period by contending that Plaintiffs' allegations were unsupported as to any time before the Company's July 27, 2011 earnings release (¶37);

- fully briefed Class Representatives' opposition to Defendants' motion for summary judgment and Class Representatives' motions to strike an affidavit from a fact witness and a supplemental expert report that Defendants had submitted in connection with their summary judgment motion (these motions were pending before the Court when the agreement to settle was reached) (¶¶38-40); and

- engaged in lengthy settlement negotiations with Defendants' Counsel facilitated by Magistrate Judge Edward A. Infante, including two formal mediation sessions and numerous telephonic communications (¶¶75-82).

As noted above, in total Plaintiffs' Counsel expended more than 60,300 hours prosecuting this Action with a lodestar value of over $28 million. ¶95. Counsel staffed the matter efficiently and avoided unnecessary duplication of effort. ¶¶41-42. The extensive time and effort devoted to this case by Plaintiffs' Counsel was critical in obtaining the favorable result achieved by the Settlement, and confirms that the fee request here is reasonable, particularly where, as previously noted, the fee requested is less than the lodestar value of counsel's time.

B. <u>The Risks of the Litigation Support the Requested Fee</u>

The risks associated with this contingency fee case also support the requested fee. "Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *Comverse*, 2010 WL 2653354, at *5; *see also In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (it is "appropriate to take [contingent-fee] risk into account in determining the appropriate fee.").

While Class Counsel believe that the Class's claims in this Action are meritorious, substantial risks in the litigation could have compromised Plaintiffs' ability to succeed at trial and obtain any recovery for the Class (and any compensation for their efforts in the case). Indeed, substantial risks were present in the Action from the outset, as illustrated by the Court's December 2013 dismissal of the Action for failure to adequately allege a misstatement or to raise a compelling inference of scienter. ECF No. 113. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004) (for purposes of evaluating attorneys' fees, "[l]itigation risk must be measured as of when the case is filed.") (quoting *Goldberger*, 209 F.3d at 55).

Even following the reversal by the Court of Appeal and Plaintiffs' successful motion for class certification, substantial risks existed here with respect to Class Representatives' ability to prove falsity, scienter, loss causation and to establish damages, as well as significant trial-related risks, as discussed in detail in the Joint Declaration. ¶¶43-74.

With respect to the risks of establishing liability, this was not a case that involved a financial restatement, or enforcement action by the government. In order to prove that Defendants' Class Period statements concerning capacity constraints, customer demand and inventory shortages were false and misleading, Class Representatives would have had to rely principally on Green Mountain's internal documents relating to inventory and supply chain issues which were arguably ambiguous or subject to different interpretations (the extensive document discovery had not uncovered any "smoking gun" document) and their own experts' analysis and could expect little help from the trial testimony of Green Mountain's current and former employees, who generally remained loyal to the Company. ¶¶52-58.

For example, Defendants would be able to produce multiple witnesses who would testify that the Company was, in fact, capacity constrained in 2011, that demand was growing, and the Company was striving to meet demand through best practices and policies applied in good faith – in short, that Defendants' statements at issue were true or believed to be true when made. ¶¶54-58. Moreover, a jury might find that the allegations that Defendants promoted a false "growth story" were undercut by the fact that the Company's sales actually grew by 91%, year over year in the quarter when those statements were allegedly revealed to be misleading. ¶51.

Even assuming that the falsity of Defendants' statements could be established, Plaintiffs would have faced further hurdles at both summary judgment and at any trial in proving that the Defendants acted recklessly or with intent to deceive in making the statements. No witness directly corroborated Class Representatives' theories concerning falsity, and the documents they would rely on to establish falsity are, in many instances, arguably susceptible to more than one interpretation. ¶¶59-61. The Individual Defendants and other senior Company managers insisted in testimony that, contrary to Class Representatives' claims, the Company was, in fact, racing to keep up with demand at the time the statements were made, and important customers were complaining about a lack of supply. ¶61. Moreover, although the Individual Defendants sold $49 million of Green Mountain stock during the Class Period, Defendant contended that the sales were made pursuant to Rule 10b5-1 trading plans that established fixed timing and pricing terms, and had passed through the review and approval of investment professionals and securities attorneys before being executed, and that, even after those sales were made, the Individual Defendants still continued to hold the vast majority of their Green Mountain shares. ¶¶62-63. This evidence, if accepted at summary judgment or trial, would tend to rebut any argument that the Individual Defendants entered into the trading plans with fraudulent intent. ¶63.

Class Counsel also faced substantial challenges in establishing loss causation and damages. Defendants and their damages expert, Dr. Gompers, asserted that the alleged corrective disclosure on November 9, 2011 did not relate to the alleged fraud because the fact that the Company no longer faced material capacity constraints had previously been disclosed to the

market. ¶¶69-70. Specifically, Defendants and Dr. Gompers pointed to statements on a July 2011 earnings call that, they contended, told the market that the Company's coffee product sales were no longer being held back by the capacity constraints that had existed earlier in 2011, as well as investment analyst reports discussing the call. ¶70. Class Representatives disagree with the interpretation of these matters put forward by Defendants and Dr. Gompers, but if the Court or the jury had accepted this view, Class Representatives might not have been able to establish that the stock price decline following the November 9 disclosure resulted from the alleged fraud.

Class Counsel undertook this case on a wholly contingent basis, knowing that the litigation would require the devotion of a substantial amount of time and expense with no guarantee of compensation. ¶¶106-108. Class Counsel's assumption of this contingency fee risk strongly supports the reasonableness of the requested fee. *See FLAG Telecom*, 2010 WL 4537550, at *27 ("Courts in the Second Circuit have recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award."); *Marsh ERISA*, 265 F.R.D. at 148 ("There was significant risk of non-payment in this case, and Plaintiffs' Counsel should be rewarded for having borne and successfully overcome that risk.").

C. <u>The Magnitude and Complexity of the Action Support the Requested Fee</u>

The magnitude and complexity of the Action also support the requested fee. Courts recognize that securities class action litigation is "notably difficult and notoriously uncertain." *Semon v. Swenson*, 2013 WL 1182224, at * 6 (D. Vt. Mar. 21, 2013) (quoting *FLAG Telecom*, 2010 WL 4537550, at *27). This case was no exception.

The litigation raised complex questions concerning liability and loss causation that would have required extensive efforts by Class Counsel and consultation with experts to resolve. To build the case, Class Counsel dedicated substantial time to conducting extensive factual and expert discovery. Accordingly, the magnitude and complexity of the Action support the conclusion that the requested fee is fair and reasonable.

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

The quality of the representation by Class Counsel is another important factor that supports the reasonableness of the requested fee. Class Counsel submit that the quality of their representation is best evidenced by the quality of the result achieved. *See, e.g.*, *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *7 (S.D.N.Y. Nov. 7, 2007); *Global Crossing*, 225 F.R.D. at 467. Class Counsel's success in obtaining a reversal of this Court's decision granting Defendants' motions to dismiss was solely responsible for there being any recovery for the Class in this Action. Moreover, as discussed in the Joint Declaration, the $36.5 million Settlement is very favorable in light of the numerous substantial risks presented in the litigation.

Moreover, Class Counsel faced talented adversaries in this Action. Courts recognize that the quality of opposing counsel should be considered in assessing the quality of class counsel's performance. *See, e.g., Seijas,* 2017 WL 1511352, at *13 ("The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work"); *Marsh ERISA*, 265 F.R.D. at 148 ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement."). Throughout this action, Defendants were vigorously represented by able counsel from Ropes & Gray and Gravel & Shea. ¶ 104. Notwithstanding this capable opposition, which had initially succeeded in obtaining a dismissal of the Action, Class Counsel's successful appeal and their demonstrated willingness to vigorously prosecute the Action through a lengthy and highly contested discovery process ultimately enabled Class Representatives to achieve the favorable Settlement.

E. **<u>The Requested Fee in Relation to the Settlement</u>**

Courts interpret this factor as requiring the review of the fee requested in terms of the percentage it represents of the total recovery. "When determining whether a fee request is reasonable in relation to a settlement amount, 'the court compares the fee application to fees awarded in similar securities class-action settlements of comparable value.'" *Comverse*, 2010 WL 2653354, at *3. As discussed in detail in Section III.A, *supra*, the requested fee is well within the range of percentage fees that this Court and other courts have awarded in comparable

cases and, accordingly, the fee requested is reasonable in relation to the Settlement.

F. Public Policy Considerations Support the Requested Fee

Strong public policy favors rewarding firms for bringing successful securities litigation. *See FLAG Telecom*, 2010 WL 4537550, at *29 (if the "important public policy [of enforcing the securities laws] is to be carried out, the courts should award fees which will adequately compensate Lead Counsel for the value of their efforts, taking into account the enormous risks they undertook"); *Maley*, 186 F. Supp. 2d at 373 ("In considering an award of attorney's fees, the public policy of vigorously enforcing the federal securities laws must be considered."); *Hicks*, 2005 WL 2757792, at *9 ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding."). Strong public policy concerns favor granting Class Counsel's fee and expense application here.

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

The reaction of the Class to date also supports the requested fee. As of September 14, 2018, the Claims Administrator has mailed the Notice to nearly 150,000 potential Class Members and nominees informing them, among other things, that Class Counsel intended to apply to the Court for an award of attorneys' fees in an amount not to exceed 20% of the Settlement Fund and up to $3,400,000 in expenses. *See* Mailing Decl. ¶ 8 and Ex. A, ¶¶5, 70. While the time to object to the Fee and Expense Application does not expire until October 1, 2018, to date, no objections have been received. ¶94. Class Counsel will address any objections in their reply papers. ¶92.

V. THE FEE REQUEST IS SUPPORTED BY CLASS REPRESENTATIVES

Each of the Class Representatives is an institutional investor – precisely the type of sophisticated and financially interested plaintiffs that Congress sought to encourage to play an active role in securities litigation by enacting the PSLRA. Moreover, all of the Class Representatives have endorsed the requested fee based on the result achieved in the Action, the efforts of counsel and the risks of the litigation. *See* Joint Decl. Exs. 1A to 1E. This fact further supports approval of the fee request. *See Marsh,* 2009 WL 5178546, at *16 ("[P]ublic 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[.]").

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

Class Counsel's fee application includes a request for reimbursement of Plaintiffs' Counsel's Litigation Expenses, which were reasonably incurred and necessary to prosecute the Action. ¶¶111-119. These expenses are properly recoverable by counsel. *See In re China Sunergy Sec. Litig.,* 2011 WL 1899715, at *6 (S.D.N.Y. May 13, 2011) (in a class action, attorneys should be compensated "for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were 'incidental and necessary to the representation'").

As set forth in detail in the Joint Declaration, Plaintiffs' Counsel incurred $2,478,468.65 in Litigation Expenses in connection with the Action. ¶111. These include expert fees, online research, court reporting and transcripts, photocopying, travel costs, and postage expenses. ¶114. The largest expense was for the retention of experts, in the amount of $1,601,242.60, or approximately 65% of the total Litigation Expenses. ¶115. Another large component of expenses related to document production, including the retention of an outside vendor to host and maintain a database that allowed Class Counsel to review the documents produced, which came to $304,918.19 or approximately 12% of the total expense request. ¶116. The combined costs for online legal and factual research, in the amount of $130,870.77, represented approximately 5% of the total amount of expenses. ¶117. A complete breakdown by category of the expenses incurred by Plaintiffs' Counsel is set forth in Exhibit 4 to the Joint Declaration.

The Notice informed potential Class Members that Class Counsel would apply for reimbursement of Litigation Expenses in an amount not to exceed $3,400,000 including the costs

and expenses of Class Representatives directly related to their representation of the Class. The total amount of expenses requested is $2,572,696.02, which includes $2,478,468.65 in reimbursement of Litigation Expenses incurred by Plaintiffs' Counsel and $94,227.37 in reimbursement of costs and expenses incurred by Class Representatives, an amount well below the amount listed in the Notice. To date, there has been no objection to the request for expenses.

VII. CLASS REPRESENTATIVES SHOULD BE AWARDED THEIR REASONABLE COSTS AND EXPENSES UNDER 15 U.S.C. §78u-4(a)(4)

Class Counsel also seek reimbursement of $94,227.37 in costs and expenses incurred by Class Representatives. ¶¶120-122. 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, Class Representatives each took active roles in the litigation and have been fully committed to pursuing the Class's claims since they became involved in the litigation. These efforts, which included communicating with counsel, assisting in responding to discovery requests and sitting for deposition, required employees of Class Representatives to dedicate time they otherwise would have devoted to their regular duties. The requested reimbursement amounts are based on the number of hours that Class Representatives' employees committed to these activities. The amounts requested, $5,715.80 for LAMPERS, $21,650.00 for AP7, $3,862.87 for Fort Lauderdale, $24,823.70 for Virgin Islands, and $38,175.00 for Mississippi PERS, are reasonable. *See In re Bank of Am. Corp. Sec., Deriv., & ERISA Litig.*, 772 F.3d 125, 134 (2d Cir. 2014) (affirming over $450,000 award to lead plaintiffs for time spent by their employees); *FLAG Telecom*, 2010 WL 4537550, at *31 (award of $100,000 to Lead Plaintiff for time spent on the litigation).

CONCLUSION

For the foregoing reasons, Class Counsel respectfully request that the Court award attorneys' fees in the amount of 17% of the Settlement Fund; $2,478,468.65 in reimbursement of

Litigation Expenses incurred by Plaintiffs' Counsel; and $94,227.37 in reimbursement of Class Representatives' costs.[4]

Dated: September 17, 2018

Respectfully submitted,

/s/ Matthew L. Mustokoff

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[4] Plaintiffs' Counsel recognize that this brief is slightly over the 15-page limit for non-dispositive motions, however we respectfully submit that given the information required by the rules, the additional space was necessary. Given the volume of filings associated with these motions, Plaintiffs' Counsel believed that proceeding this way was most efficient, however, should the Court require Plaintiffs' Counsel to file a formal motion to expand the page limits, Plaintiffs' Counsel will do so promptly.

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2018, I electronically filed the Notice Of Class Counsel's Motion For An Award Of Attorneys' Fees And Reimbursement Of Litigation Expenses and the Memorandum Of Law In Support, and it is available for viewing and downloading from the ECF system. A copy of the foregoing document was also emailed to all counsel of record.

/s/ Matthew L. Mustokoff
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