UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DISTRICT

GOVERNMENT OF GUAM RETIREMENT FUND, *et al.*,

Plaintiff,

vs.

INVACARE CORPORATION, *et al.*,

Defendants.

Case No. 1:13CV1165

JUDGE CHRISTOPHER A. BOYKO

Date: November 19, 2015
Time: 2:00 p.m. ET
Courtroom: 15B

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

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I. INTRODUCTION

Lead Counsel Bernstein Litowitz Berger & Grossmann LLP ("Bernstein Litowitz" or "Lead Counsel") and Local Counsel Climaco, Peca, Tarantino & Garofoli Co., L.P.A. ("Climaco" or "Local Counsel") (collectively, "Plaintiffs' Counsel"), with the approval of Lead Plaintiff Government of Guam Retirement Fund ("Guam," "GGRF" or "Lead Plaintiff"), have obtained an $11 million settlement of this complex securities fraud class action. The Settlement was reached after two years of litigation, and after an in-depth mediation and pursuant to a "Mediator's Recommendation." *See* Declaration Of Mediator Jed D. Melnick, Esq. In Support Of Final Approval Of Class Action Settlement ("Mediator Decl." or "Melnick Decl.").[1]

For their extensive efforts, the great risks they faced on a contingency fee basis, and the significant results they achieved, Plaintiffs' Counsel respectfully apply for an award of attorneys' fees in the amount of 25% of the Settlement Amount, plus interest in the amount of 25% of the interest earned by the Settlement Fund as of the date of the award. Plaintiffs' Counsel also seek $156,551.86 in reimbursement of Plaintiffs' Counsel's Litigation Expenses reasonably and necessarily incurred to prosecute the Action, as well as $4,200.00 as reimbursement for the costs and expenses incurred by Lead Plaintiff directly related to its representation of the Settlement Class, as authorized by the Private Securities Litigation Reform Act of 1995 (the "PSLRA").

Throughout the litigation, the stakes have been large, the risks substantial, and the battles hard-fought. The Action was held to a high pleading standard under the PSLRA and thereafter was extremely risky and difficult. The likelihood of succeeding through trial – and then actually recovering years down the road – was highly uncertain. Plaintiffs' Counsel nevertheless undertook this representation on a contingency basis, with no guarantee of success or recovery. They faced

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[1] The Melnick Declaration is submitted herewith as Exhibit 5 to the declaration of Benjamin Galdston ("Galdston Decl."). Lead Plaintiff respectfully refers the Court to the accompanying Galdston Declaration for a detailed description of the case and the Settlement. Unless otherwise stated or defined, all capitalized terms used herein shall have the meanings provided in the Stipulation and Agreement of Settlement dated June 2, 2015 (ECF No. 73, the "Stipulation" or the "Stip.").

substantial risks establishing liability, defeating defenses, and proving damages. Indeed, although Plaintiffs' Counsel successfully overcame two successive attacks on the sufficiency of the operative Complaint – first, in Defendants' motion to dismiss and, second, in Defendants' motion for judgment on the pleadings – the Court expressly reserved certain issues for the trier of fact that posed significant risks. ECF No. 45. And Defendants would have additional opportunities to again contest the issues of scienter, falsity, materiality, loss causation, and damages throughout the life of the litigation and through inevitable appeals.

As detailed in the accompanying Galdston Declaration, Plaintiffs' Counsel vigorously pursued this litigation for over two years. Among other things, Plaintiffs' Counsel: (i) conducted a thorough investigation to prepare the comprehensive Amended Complaint, including review and analysis of publicly available information, information obtained from Lead Plaintiff's Freedom of Information Act requests, interviews of numerous percipient witnesses, and conferring with experts and consultants; (ii) fully briefed and defeated Defendants' motion to dismiss and motion for judgment on the pleadings; (iii) served and responded to discovery requests; (iv) reviewed and analyzed documents obtained; (v) filed a motion for class certification supported by an expert report; and (vi) participated in a mediation and further negotiations before an experienced and nationally-recognized mediator, Jed D. Melnick, Esq. of JAMS.

Given the substantial recovery for the Settlement Class, the complexity and amount of work involved, the skill and expertise required, and the significant risks that counsel undertook, the requested award of 25% of the Settlement Amount is fair and reasonable. As discussed below, federal courts in this District and throughout the nation have awarded the same or greater percentage fees in other similarly complex class action litigation. Indeed, courts in the Sixth Circuit have recognized that "[t]he 'benchmark' percentage for this standard has been 25%.'" *In re Skechers Toning Shoe Prods. Liab. Litig.*, 2012 WL 3312668, at *10 (W.D. Ky. Aug. 13, 2012).

Moreover, a lodestar cross-check confirms that the requested fee, which represents a multiplier of only 1.73, is fair and reasonable. Moreover, the experienced institutional investor Lead Plaintiff, Guam, has reviewed and endorsed the fairness and reasonableness of the requested

fee. *See* Declaration Of The Government Of Guam Retirement Fund In Support Of Final Approval Of Class Action Settlement And Plan Of Allocation And An Award Of Attorneys' Fees And Reimbursement Of Expenses ("Guam Decl."), attached as Exhibit 1 to Galdston Decl.

In addition, as required by the Court's August 10, 2015 Order Preliminarily Approving Proposed Settlement and Providing for Notice (ECF No. 79, the "Preliminary Approval Order), beginning on August 24, 2015 (the "Notice Date"), copies of the Court-approved Notice have been mailed to at least 21,712 potential Settlement Class Members and their nominees.[2] In addition, the Court-approved Summary Notice was published in *Investor's Business Daily* and over the *PR Newswire*, and the Notice and related Settlement documents are available on the website specifically created for the Settlement, as well as Lead Counsel's website, *id.* ¶¶11, 13. Galdston Decl. ¶69.

The Notice advised potential Settlement Class Members that Plaintiffs' Counsel would "apply to the Court for an award of attorneys' fees on behalf of Plaintiffs' Counsel in an amount not to exceed 25% of the Settlement Amount, plus interest in the amount of 25% of the interest earned by the Settlement Fund as of the date of the award (the remaining 75% of the interest earned shall remain with the Settlement Fund and be distributed to Authorized Claimants as part of the Net Settlement Fund." Keough Decl., at Ex. A ¶¶5, 75. The Notice further advised potential Settlement Class Members that "Plaintiffs' Counsel will apply for reimbursement of Litigation Expenses paid or incurred by Plaintiffs' Counsel in connection with the institution, prosecution and resolution of the claims against the Defendants, in an amount not to exceed $400,000.00," and that "Plaintiffs' Counsel's application for reimbursement of Litigation Expenses may include an

[2] *See* Declaration of Jennifer M. Keough Re Notice Dissemination and Publication ("Keough Decl."), attached as Exhibit 2 to Galdston Decl., ¶¶2-10. The Court-approved Notice that was disseminated to potential Settlement Class Members is attached as Exhibit A to the Keough Declaration, and incorporates the changes requested by the Court at the July 23, 2015 hearing. *See* ECF No. 78-2.

application for reimbursement of the reasonable costs and expenses incurred by Lead Plaintiff directly related to its representation of the Settlement Class." *Id.*

While the October 29, 2015 deadline for Settlement Class Members to object to the requested attorneys' fees and expenses has not yet passed, to date, no one has objected. If any objections are received, they will be addressed in Lead Plaintiff's reply papers to be filed on November 12, 2015.

II. ARGUMENT

A. Plaintiffs' Counsel Are Entitled To An Award Of Attorneys' Fees From The Common Fund

"It is well established that 'a lawyer who recovers a common fund . . . is entitled to a reasonable attorney's fee from the fund as a whole." *New England Health Care Empls. Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 633 (W.D. Ky. 2006) (quoting *Boeing Co. v. Van Germert,* 444 U.S. 472, 478 (1980)). 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 alleged misconduct of a similar nature. Indeed, the Supreme Court has emphasized that private securities actions, such as this one, 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, 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)).

B. The Court Should Award A Reasonable Percentage Of The Common Fund

Most courts, including within this Circuit, have found that the percentage-of-the-fund method, under which counsel is awarded a percentage of the fund that they recovered, is the preferred means to determine a fee because it "eliminates arguments regarding the reasonableness of rates and hours incurred," "conserves judicial resources," and "fully aligns the interests of Class Counsel and the Class." *Shane Group, Inc. v. Blue Cross Blue Shield of Mich.*, 2015 WL 1498888,

at *15 (E.D. Mich. Mar. 31, 2015) (granting request for award of 30% of the common fund, over objections); *see also New England Health Care*, 234 F.R.D. at 633 (recognizing that courts "have indicated their preference for the percentage-of-the-fund method in common fund cases") (quoting *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 532 (E.D. Mich. 2003)).

As explained in *New England Health Care* and in *Cardizem*:

> The lodestar method should arguably be avoided in situations where such a common fund exists because it does not adequately acknowledge (1) the result achieved or (2) the special skill of the attorney(s) in obtaining that result. Courts and commentators have been skeptical of applying the formula in common fund cases . . . . [M]any courts have strayed from using lodestar in common fund cases and moved towards the percentage of the fund method which allows for a more accurate approximation of a reasonable award for fees.

Id. (citation omitted). Additionally, "the lodestar method is too cumbersome and time-consuming of the resources of the Court." *Id.* (quoting *In re F&M Distribs. Inc. Sec. Litig.*, 1999 U.S. Dist. LEXIS 11090, at *8 (E.D. Mich. June 29, 1999) (internal quotes and citations omitted)). As the Supreme Court has made clear, "[a] request for attorneys' fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *see also Blum v. Stenson,* 465 U.S. 886, 900 n.16 (1984) ("under the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class").

District courts in this Circuit have virtually uniformly shifted to the percentage method in awarding fees in common fund cases, particularly securities cases. *See Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d 521, 528 (E.D. Ky. 2010), *aff'd sub nom. Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d 235 (6th Cir. 2011); *La. Mun. Police Empls. Ret. Sys. v. KPMG, LLP*, 10-cv-1461-BYP (N.D. Ohio 2014); *In re Advanced Lighting Techs., Inc. Sec. Litig.*, 99CV836 (N.D. Ohio Jan. 17, 2013); *Fruit of the Loom*, 234 F.R.D. at 633; *In re Telectronics Pacing Sys. Inc.*, 186 F.R.D. 459, 483 (S.D. Ohio 1999) ("the preferred method in common fund cases has been to award a reasonable percentage of the fund to Class Counsel as

attorneys' fees"), *rev'd on other grounds*, 221 F.3d 870 (6th Cir. 2000); *see also In re Southeastern Milk Antitrust Litig.*, 2013 WL 2155387, at *2 (E.D. Tenn. May 17, 2013) ("[T]he clear trend in the Sixth Circuit" is to use the percentage-of-the-fund method, combined with a lodestar cross-check, which "accounts for both the amount of the work done and reflects the results achieved by class counsel.") (citing, among other sources, Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7; J. Empirical Legal Stud. 811, 832 (Dec. 2010)). All federal Courts of Appeal to consider the matter, including the Sixth Circuit, have approved of the percentage method, with two circuits ***requiring*** its use in common-fund cases.[3]

The PSLRA also supports use of the percentage-of-the-fund method, as it provides that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a *reasonable percentage* of the amount" recovered for the class. 15 U.S.C. § 78u-1(a)(6) (emphasis added). Several courts have concluded that Congress, in using this language, expressed a preference for the percentage method when determining attorneys' fees in securities class actions.[4]

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[3] *See In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305-07 (1st Cir. 1995); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006); *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 642-43 (5th Cir. 2012); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 515-17 (6th Cir. 1993); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Gottlieb v. Barry*, 43 F.3d 474, 483 (10th Cir. 1994); *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269-71 (D.C. Cir. 1993). The Eleventh and District of Columbia Circuits have required the use of the percentage method in common-fund cases. *See Camden*, 946 F.2d at 774; *Swedish Hosp.*, 1 F.3d at 1271.

[4] *See, e.g., In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 586 (S.D.N.Y. 2008); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002).

C. The Requested Attorneys' Fees Are Reasonable Under The Percentage-Of-The Fund Method

Plaintiffs' Counsel's fee request of 25% of the Settlement Amount falls well within the range of fees awarded in the Sixth Circuit on a percentage basis in complex common fund case. *See, e.g., Southeastern Milk*, 2013 WL 2155387, at *3 (finding that 33% "is certainly within the range of fees often awarded in common fund cases, both nationwide and in the Sixth Circuit") (citing *Bessey v. Packerland Plainwell, Inc.*, 2007 WL 3173972, at *4 (W.D. Mich. Oct. 26, 2007) (awarding 33%, and noting that "[e]mpirical studies show that . . . fee awards in class actions average around one-third of recovery") (quoting *Shaw v. Toshiba America Inf. Sys., Inc.,* 91 F. Supp. 2d 942, 972 (E.D. Tex. 2000)); *Worthington v. CDW Corp.*, 2006 U.S. Dist. LEXIS 32100, at *22 (S.D. Ohio May 22, 2006) ("[C]ounsel's requested percentage of 38 and one-third of the total gross settlement is solidly within the typical 20 to 50 percent range"); MCL § 14.121 ("[a]ttorney fees awarded under the percentage method are often between 25% and 30% of the fund."); Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?* 158 U. Pa. L. Rev. 2043, 2063 (2010) ("although the mean and median fee awards in federal court are 25%, there are many awards at the 33% level . . ."); *see also Fruit of the Loom*, 234 F.R.D. at 633 ("Fee awards in common fund cases typically range "from 20 to 50 percent of the common fund created.") (citing, among others, *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 910 (S.D. Ohio 2001)).

At 25% – what some courts consider "the 'benchmark' percentage"[5] – the requested fee is equal to, or less than, the percentage fee awards granted in many other complex class actions within the Sixth Circuit. *See, e.g., Southeastern Milk*, *supra* (granting award of 33% of $158.6 million settlement fund); *In re Polyurethane Foam Antitrust Litig.*, 2015 WL 1639269 (N.D. Ohio Feb. 26, 2015) (granting award of 30% of $147.8 million settlement fund); *In re Advanced Lighting Techs., Inc. Sec. Litig.*, 99CV836 (N.D. Ohio Jan. 17, 2003) (granting award of 30% of $8.84 million settlement); *In re Direct Gen. Corp. Sec. Litig.*, 3:05-0077 (M.D. Tenn. July 20, 2007) (awarding 30% of $14.94 million settlement); *In re Sirrom Capital Corp. Sec. Litig.*,

[5] *Skechers*, 2012 WL 3312668, at *10.

3-98-0643 (M.D. Tenn. Feb. 4, 2000) (awarding 33 1/3% of a $15 million settlement); *Fruit of the Loom*, 234 F.R.D. 627 (25% award); *Blitz v. AgFeed Industries, Inc.* 11-cv-992, Order and Final Judgment dated December 8, 2014 (M.D. Tenn. 2014) (30% award); *Chesapeake Appalachia*, 695 F. Supp. 2d 521 (30% award); *Miracle v. Bullitt Cnty.*, 2008 WL 4974799 (W.D. Ky. Nov. 19, 2008) (30% award); *New England Health Care*, 234 F.R.D. at 634 (25% award); *Kogan v. AIMCO Fox Chase*, 193 F.R.D. 496 (E.D. Mich. 2000) (30% award); *In re Cincinnati Microwave, Inc. Sec. Litig.*, 95-cv-00905, Order and Final Judgment (S.D. Ohio Mar. 21, 1997) (30% award); *In re Structural Dynamics Research Corp. Sec. Litig.*, 94-cv-00630, Final Judgment and Order (S.D. Ohio Mar. 22, 1996) (30% award); *cf. Robinson v. Connections Health Wellness Advocacy,* 09-cv-2436 (N.D. Ohio July 23, 2010) (Boyko, J.) (approving stipulated payment by defendants of attorneys' fees in FLSA case equaling 33% of settlement amount).

Courts have repeatedly awarded fees of 25% or more where a settlement was reached during the pendency of a motion to dismiss or shortly after, and where no or very limited formal discovery had been obtained as a result of the PSLRA discovery stay.[6] Indeed, courts recognize that one of the merits of awarding fees on a percentage basis is that it does not penalize attorneys for achieving a prompt resolution of a case, where, as here, sufficient information about the value of the claims could be determined through investigation and careful analysis of the legal and factual issues, thus avoiding the need for costly and lengthy formal discovery. *See Southeastern Milk*, 2013 WL 2155387, at *2 (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96,

[6] *See, e.g., In re L.G. Philips LCD Co. Sec. Litig.*, slip op. at 1 (awarding 30% of $18 million settlement fund, representing a multiplier of 3.17, where settlement was reached while motion to dismiss was pending); *Taft v. Ackermans*, 2007 WL 414493, at *10 (S.D.N.Y. Jan. 31, 2007) (awarding 30% of $15.2 million settlement fund, representing a 1.44 multiplier, where settlement was reached while motion to dismiss was pending); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) (awarding 33.3% of $11.5 million settlement fund, representing a 4.65 multiplier, where settlement was reached while motions to dismiss were pending); *In re Am. Express Fin. Advisors Sec. Litig.*, No. 04 Civ. 1773 (DAB), slip op. at 8 (S.D.N.Y. July 18, 2007), ECF No. 170 (awarding 27% of $100 million settlement fund, representing a 2.8 multiplier, where settlement was reached while motion to dismiss was pending).

121 (2d Cir. 2005) (recognizing that one of the merits of the percentage method is that it "provides a powerful incentive for the efficient prosecution and early resolution of litigation"); *see also* Manual for Complex Litigation (4th) § 14.121.

D. A Review Of The Sixth Circuit Factors Confirms That The Requested 25% Fee Is Fair And Reasonable

Plaintiffs' Counsel's requested fee is fair and reasonable compensation for their efforts in light of the following factors considered by the Sixth Circuit:

> (1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides.

Bowling v. Pfizer, Inc., 102 F.3d 777, 780 (6th Cir. 1996).

1. The Value Of The Benefit Rendered To The Settlement Class Supports The Requested Fee

Plaintiffs' Counsel have secured a settlement that provides a substantial and certain cash payment of $11 million. Courts have consistently recognized that the result achieved is a major factor to be considered in making a fee award. *Hensley,* 461 U.S. at 436 ("most critical factor is the degree of success obtained"); *see also In re Delphi Corp. Sec., Derivative & ERISA Litig.*, 248 F.R.D. 483, 503 (E.D. Mich. 2008). Respectfully, this outstanding settlement was achieved as a direct result of the skill, effort and tenacity of Plaintiffs' Counsel in prosecuting this action on behalf of the Settlement Class. There is no question that Plaintiffs' Counsel overcame numerous obstacles, zealously sought to move the case forward, and took significant risks in obtaining this highly favorable result for the Settlement Class.

While Lead Plaintiff and its counsel believe that the claims have merit, if litigation were to proceed, there is a significant risk that the Settlement Class would recover substantially less than the amount of the Settlement – or nothing. Throughout the litigation, Defendants have consistently

maintained that Lead Plaintiff could not establish liability or damages and challenged virtually every factual and legal issue in the litigation in an effort to defeat Lead Plaintiff's claims. For example, in their motion to dismiss, Defendants argued, among other things, that: (i) the Complaint failed to plead an actionable misstatement regarding legal compliance; (ii) the information alleged to have been omitted by Invacare was immaterial as a matter of law; (iii) the Complaint failed to satisfy the rigorous standards for scienter; and (iv) the Complaint failed to plead loss causation. ECF No. 36-1.

After Lead Plaintiff defeated Defendants' motion to dismiss, Defendants filed a Motion for Judgment on the Pleadings or in the Alternative, Motion for Reconsideration of the Court's Order denying Defendants' motion to dismiss. Defendants argued that the Sixth Circuit's newly issued decision in *In re Omnicare, Inc. Securities Litigation*, 769 F.3d 455 (6th Cir. Oct. 10, 2014), changed the pleading standard for scienter allegations relying on "soft information" to requiring allegations of "actual knowledge." ECF No. 55. Defendants further argued that the Court's prior order denying Defendants' motion to dismiss relied on the earlier standard that the Sixth Circuit overruled in that new opinion, and that using the new standard required dismissal. *Id*.

Although Lead Plaintiff successfully defeated both motions at the pleading stage, Defendants would continue to argue that many of the alleged misstatements are only general, aspiration statements concerning Invacare's legal compliance that are contained in general risk disclosures, including statements regarding Invacare's belief that it was compliant. Defendants would continue to argue that other misstatements are in the realm of soft information and puffery, for example, that regulatory compliance was a "high priority" and that Invacare was "currently addressing" the FDA's concerns. Likewise, Defendants would continue to argue that the alleged misstatements were not material – an argument that the Court expressly reserved for the trier of fact. ECF No. 45.

Defendants would also continue to argue, and attempt to convince a jury, that they honestly believed they were addressing the FDA's concerns, and thus the element of scienter is lacking. Defendants would contend that many of the alleged misstatements constitute inactionable

statements of Defendants' opinions and beliefs, including statements that Invacare "has established numerous policies and procedures that the company believes are sufficient to ensure" compliance with FDA regulations, as well as statements that Invacare "was working with the FDA" to address the agency's concerns, "had a good, active dialogue with the FDA," and was "happy with our progress" on compliance. It may be difficult for Lead Plaintiff to prove at trial, or produce sufficient evidence at the summary judgment phase, that Invacare did not implement the corrective actions Defendants said they did and that Defendants did not honestly believe they were "working with" the FDA and "addressing" the FDA's concerns based on the information that was provided to them. Defendants would likely emphasize that, as alleged in the Complaint, Invacare hired outside compliance experts and incurred $6 million in regulatory and compliance costs, in support of their purported scienter defense.

Even assuming that Lead Plaintiff prevailed at trial in establishing material untrue statements and omissions that were made with scienter, Defendants would continue to argue that loss causation was not established. During the course of the litigation, Defendants contended that the alleged revelations were simply confirmatory of information that was already known to investors, and thus, not actionable, and that the FDA's decision to issue a Warning Letter and to sue for an injunction against Invacare constituted an independent, intervening cause of any alleged loss.

Despite the significant risks of continued litigation, Plaintiffs' Counsel were able to achieve a result of significant value to the Settlement Class. The Settlement, which represents approximately 10% of the estimated maximum recoverable damages of, at most, $118 million, assuming Lead Plaintiff prevailed on all claims as to each and every alleged misstatement against

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all Defendants and before taking into account Defendants' causation arguments and other defenses, far exceeds the median recovery as a percentage of estimated damages.[7]

2. The Value Of The Services On An Hourly Basis, And A Lodestar Cross-Check, Supports The Requested Fee

A considerable effort on the part of Plaintiffs' Counsel was required to obtain this outstanding Settlement. As set forth in greater detail in the Galdston Declaration, Lead Counsel extensively developed the record by, among other things:

- Performing an in-depth review and analysis of (i) Invacare's public filings with the SEC; (ii) publicly available filings and reports by government law enforcement and regulatory agencies relating to investigations and legal actions concerning Invacare, including in the action captioned *United States v. Invacare Corp*., No. 1:12-cv-03086 (DAP) (N.D. Ohio); (iii) documents and information disclosed in other litigation naming Invacare and/or its directors as defendants or nominal defendants; (iv) research reports by securities and financial analysts regarding Invacare; (v) transcripts of Invacare investor conference calls; (vi) press releases and media reports; (vii) economic analyses of the historical movement, pricing and trading data for publicly traded Invacare common stock; (viii) consultation with relevant experts; and (ix) other publicly available material and data, *see* Galdston Decl. Section II.F.1;

- Conducting a thorough investigation identifying and interviewing potential percipient witnesses, including the nine witnesses with direct knowledge as alleged in the Complaint, as well as other corroborating witnesses, *id.*;

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[7] However, damages may be reduced or eliminated if the jury accepted any of Defendants' arguments, including finding that a portion or all of the losses are attributable to causes other than the alleged misstatements or omissions, or that certain statements are not actionable, or that other elements are not met. If Defendants prevailed on loss causation arguments, for example, the recoverable damages could be reduced to under $6 million, or eliminated altogether. *See* Galdston Decl. ¶66. Even before accounting for Defendants' causation arguments and other defenses, the recovery of approximately 10% of the maximum recoverable damages is significantly higher than the 2.2% median settlement recovery as a percentage of estimated damages in securities class actions in 2014, as recently reported by Cornerstone Research. *See* Cornerstone Research, "Securities Class Action Settlements: 2014 Review and Analysis," at p. 8, Figure 7, *available at* www. cornerstone.com/GetAttachment/701f936e-ab1d-425b-8304-8a3e063abae8/Securities-Class-Action-Settlements-2014-Review-and-Analysis.pdf; *see also* NERA, "Recent Trends in Securities Class Action Litigation: 2014 Full-Year Review, at p. 32, Figure 27 (reporting a 0.7% median settlement value as a percentage of investor losses in 2014), *available at* www.nera.com/content/dam/nera/publications/2015/PUB_2014_Trends_0115.pdf.

- Drafting the detailed Complaint, including 132 pages of allegations plus 144 pages of supporting exhibits, based on Lead Counsel's extensive factual investigation and legal research into the applicable claims, *id.* Sections II.C and II.F.1;

- Preparing extensive briefing in response to Defendants' motion to dismiss, *id.* Section II.C;

- Preparing additional extensive briefing in response to Defendants' motion for judgment on the pleadings, *id.* Section II.D;

- Serving and responding to discovery, filing a motion to compel discovery, and obtaining and reviewing a substantial amount of documents, *id.* Section II.F.2;

- Drafting Lead Plaintiff's motion for class certification, supported by an expert report, *id.* Section II.G; and

- Drafting Lead Plaintiff's mediation statement, preparing for and participating in the mediation process, including a full-day mediation session held before an experienced mediator. *Id.* Section III.A.

As a result of that effort, a substantial, immediate, and certain recovery of $11 million has been obtained after the pleading stage and prior to the completion of full discovery without the substantial expense, additional delay, risk and uncertainty of continued litigation.

The requested fee is fair and reasonable not only under the percentage approach, but a lodestar cross-check – demonstrating the value of Plaintiffs' Counsel's services on an hourly basis – confirms the reasonableness of the fee. As set forth in their declarations, Plaintiffs' Counsel have spent more than 3,000 hours with a resulting lodestar of $1,593,005.00. *See* Galdston Decl. ¶88, and Exhibits 4A-1 and 4B-1 thereto.[8] Thus, the requested fee of 25%, or $2.75 million, represents a multiplier on Plaintiffs' Counsel's lodestar of less than 1.73. Courts within the Sixth

[8] As is customary in seeking a percentage-of-the-fund award in common fund cases and submitting data for a lodestar cross-check, included with each Plaintiffs' Counsel's declaration is a schedule identifying the lodestar of each firm (by individual, position, billing rate, and time billed). *See Southeastern Milk*, 2013 WL 2155387, at n.3 ("Counsel have provided to the Court summary schedules indicating the number of hours spent by the attorneys involved in this litigation and the lodestar calculation based on historical billing rates."). "Unlike the situation when the Court employs the lodestar method in full, 'the hours documented by counsel need not be exhaustively scrutinized by the district court' where a lodestar cross-check is used." *Id*. (quoting *WorldCom*, 388 F. Supp. 2d at 355 (citing *Goldberger*, 209 F.3d at 50)).

Circuit have awarded fees with much higher multipliers. *See, e.g., In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) (6 multiplier); *Bailey v. AK Steel Corp.*, 2008 U.S. Dist. LEXIS 18838, at *8 (S.D. Ohio Feb. 28, 2008) (3.08 multiplier); *Manners v. Am. Gen. Life Ins. Co.*, 1999 WL 33581944, at *31 (M.D. Tenn. Aug. 11, 1999) (3.8 multiplier).

3. The Contingent Nature Of The Representation And Society's Stake In Rewarding Attorneys Who Produce Such Benefits To Maintain An Incentive To Others Supports The Requested Fee

The federal securities laws are remedial in nature, and, to effectuate their purpose of protecting investors, the courts must encourage private lawsuits. *See Basic Inc. v. Levinson,* 485 U.S. 224, 230-31 (1988). The Supreme Court has emphasized that private securities actions such as this provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'" *Bateman*, 472 U.S. at 310 (citation omitted); *Tellabs,* 551 U.S. at 313. The percentage-of-the-fund method is prevalent in complex securities class action litigation because plaintiffs' counsel are invariably retained on a contingent basis, largely due to the huge commitment of time and expense required. Unlike counsel for Defendants, who are paid an hourly rate and paid for their expenses on a regular basis, Plaintiffs' Counsel have not been compensated for any time or expenses since this case began in May 2013.

Adequate compensation to encourage attorneys to assume the risk of litigation is in the public interest. Indeed, without adequate compensation, it would be difficult to retain the caliber of lawyers necessary, willing, and able to properly prosecute to a favorable conclusion complex, risky, and expensive class actions such as this one. Thus, courts have long recognized that an important factor is "society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others." *Ramey v. The Cincinnati Enquirer, Inc.,* 508 F.2d 1188, 1196 (6th Cir. 1974).

While securities cases have always been complex and difficult to prosecute, the PSLRA has only increased the difficulty in successfully prosecuting a securities class action. Plaintiffs' Counsel addressed numerous difficult issues in opposing Defendants' motion to dismiss and motion for judgment on the pleadings. As discussed above and detailed in the Galdston

Declaration, even after the Court's denial of Defendants' motions at the pleading stage, Lead Plaintiff still faced the substantial burden of proving, among other things, that Defendants made false statements or omissions, that were material, that caused damages, and that Defendants acted with scienter. *See In re Comshare, Inc. Sec. Litig.*, 183 F.3d 542, 548 (6th Cir. 1999). Because the fee in this matter (at least on the plaintiff side) was entirely contingent, the only certainties were that there would be no fee without a successful result and that such a result would be realized only after considerable and difficult effort. The contingent nature of counsel's representation strongly favors approval of the requested fee.

4. The Complexity Of The Litigation Supports The Requested Fee

The complexity of the issues is a significant factor to be considered in making a fee award. Courts have long recognized that securities class actions are "notably difficult and notoriously uncertain." *In re FLAG Telecom Holdings, Ltd. Sec. Litig*., 2010 WL 4537550, at *27 (S.D.N.Y. Nov. 8, 2010) (quoting *In re Sumitomo Copper Litig*., 189 F.R.D. 274, 281 (S.D.N.Y. 1999)).

This case was no exception. Litigation of the claims in this case raised many complex issues, as is evidenced by the 132-page Complaint (plus exhibits); the voluminous briefing and exhibits dedicated to addressing Defendants' motion to dismiss, with additional briefing on Defendants' motion for judgment on the pleadings; and the Court's 17-page Opinion And Order denying Defendants' motion to dismiss and additional 8-page Opinion and Order denying Defendants' Motion for Judgment on the Pleadings.

The litigation also raised a number of complex questions that required substantial efforts by Plaintiffs' Counsel, often through analysis of the factual record and consultation with experts. Lead Counsel's consultation with experts was necessarily extensive given the complex nature of the subject matter underlying the claims. Plaintiffs' Counsel undertook to create a compelling record addressing these and other complicated issues. Accordingly, the complexity of the litigation supports the conclusion that the requested fee is fair and reasonable.

5. The Professional Skill And Standing Of Counsel Supports The Requested Fee

Plaintiff's Counsel include locally and nationally known leaders in the fields of securities class actions and complex litigation. *See* Firm Biographies, attached to Galdston Decl. as Exhibits 4A-5 and 4B-3; *see also* www.blbglaw.com and www.climacolaw.com. The quality of the representation is best demonstrated by the substantial benefit achieved for the Settlement Class and the effective and efficient prosecution and resolution of the Action under difficult and challenging circumstances. The substantial recovery obtained for the Settlement Class is the direct result of the efforts of highly skilled and specialized attorneys who possess significant experience in the prosecution of complex securities class actions. From the outset of the Action, Plaintiffs' Counsel engaged in a concerted effort to obtain the maximum recovery for the Settlement Class and committed considerable resources and time in the research, investigation, and prosecution of the case. Based upon Plaintiffs' Counsel's diligent efforts and their skill and reputation, they were able to negotiate a highly favorable result under difficult and challenging circumstances. Such quality, efficiency, and dedication support the requested fee.

The quality of the work performed by counsel in attaining the Settlement should also be evaluated in light of the quality of opposing counsel. Plaintiffs' Counsel were opposed in this case by a skilled defense firm who spared no effort in the defense of their clients. In the face of this defense, Plaintiffs' Counsel were nonetheless able to develop a case that was sufficiently strong to persuade Defendants to settle on terms that represent a fair, reasonable and adequate recovery to the Settlement Class. The ability of Plaintiffs' Counsel to obtain a favorable result for the Settlement Class in the face of such opposition further evidences the quality of Plaintiffs' Counsel's work. *See Delphi,* 248 F.R.D. at 504 ("The ability of Co-Lead Counsel to negotiate a favorable settlement in the face of formidable legal opposition further evidences the reasonableness of the fee requested.").

For the reasons set forth above, Plaintiffs' Counsel respectfully request that the Court grant their request for an attorneys' fee award in the amount of 25% of the Settlement Amount, plus interest in the amount of 25% of the interest accrued thereon.

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

Plaintiffs' Counsel also request payment of expenses incurred by them in connection with the prosecution of this Action in the amount of $156,551.86. *See* Plaintiffs' Counsel Declarations, attached to the Galdston Declaration as Exhibits 4A-2 and 4B-2. "Under the common fund doctrine, 'class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and settlement, including expenses incurred in connection with document production, consulting with experts and consultants, travel and other litigation-related expenses.'" *New England Health*, 234 F.R.D. at 634-35 (quoting *Cardizem*, 218 F.R.D. at 535); *see Southeastern Milk*, 2013 WL 2155387, at *7 ("Expense awards are customary when litigants have created a common settlement fund for the benefit of a class.") (citing *In re F & M Distribs., Inc*., 19 U.S. Dist. LEXIS 11090, at *19 (E.D. Mich. June 29, 1999)).

In determining which expenses are reasonable and compensable the question is whether such costs are of the variety typically billed by attorneys to paying clients in similar litigation. *New England Health,* 234 F.R.D. at 634-35. Here, the categories of expenses for which Plaintiffs' Counsel seek reimbursement here are the type of expenses routinely charged to hourly clients. They are detailed in Plaintiffs' Counsel's declarations, setting forth the specific category of expenses incurred and the amount. *See* Exhibits 4A-2 and 4B-2.[9]

A large component of Plaintiffs' Counsel's expenses, over 62%, is for the costs of experts and consultants, including the retention of experts with significant experience opining on damages, loss causation, and market efficiency in securities class actions. In prosecuting the claims, Lead Counsel worked extensively with experts and consultants. Consultants were utilized to prepare

[9] *See Southeastern Milk*, 2013 WL 2155387, at *8 ("Although the declarations submitted by class counsel are not itemizations of all of the expenses incurred but rather an aggregate listing of the expenses for each category, the Court finds the declarations submitted sufficiently detailed and the Court is persuaded that the expenses are legitimate and are reasonable in the case and will approve payment to class counsel from the common settlement fund in the amount of $798,237.66 as reimbursement for their out-of-pocket expenses.").

the complaints, support class certification, prepare the mediation briefs, review Defendants' affirmative defenses, and prepare for negotiations. Galdston Decl. ¶¶45, 105.

The expenses also include the costs of online research. These are the charges for computerized factual and legal research services such as *LexisNexis, Westlaw*, and PACER. It is standard practice for attorneys to use these resources to assist them in researching legal and factual issues, and, indeed, courts recognize that these tools create efficiencies in litigation and, ultimately, save clients and the class money. *Id.* ¶106.

In addition, Lead Counsel were required to travel in connection with prosecuting and settling the Action, and thus incurred the related costs of transportation (coach only), meals and lodging, as well as mediation fees. *Id.* ¶107.

The Notice informed potential Settlement Class Members that Plaintiffs' Counsel would apply for reimbursement of their Litigation Expenses in an amount not to exceed $400,000.00. *See* Keough Decl., Exhibit A ¶¶5, 75. The amount of expenses for which reimbursement is now sought, $156,551.86, is less than one-half of the maximum amount stated in the Notice. To date, no Settlement Class Member has objected.

F. Lead Plaintiff Guam Should Be Awarded Its Reasonable Costs Under The PSLRA

Plaintiffs' Counsel also seek approval for $4,200.00 in costs incurred by Lead Plaintiff Guam directly related to its representation of the Settlement Class. *See* Guam Decl., attached as Exhibit 1 to Galdston Decl., ¶¶9-12. 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). Courts have approved such awards under the PSLRA to compensate class representatives for the time and effort they spent on behalf of the class. *See, e.g., In re Bank of America Corp. Sec., Derivative, and ERISA Litig.* ("*BofA*"), 772 F.3d 125, 133 (2d Cir. 2014) (affirming district court's award of costs totaling over $453,000 to representative plaintiffs).

As set forth in the Guam Declaration (Exhibit 1 to the Galdston Decl.), Lead Plaintiff devoted substantial time in connection with its role and responsibilities as the Lead Plaintiff. For example, the Chairman Agustin, along with Director Paula Blas, of the Government of Guam Retirement Fund, reviewed and authorized the filing of the Amended Complaint; received and evaluated regular status reports from Lead Counsel regarding the litigation; reviewed and considered pleadings, briefs and Court orders in the Action; received and reviewed communications for Lead Counsel regarding significant developments in the Action; participated in telephonic and email communications with Lead Counsel regarding case strategy and related matters; and consulted with Lead Counsel during the course of the litigation regarding efforts to mediate and negotiate the Settlement, including by participating in correspondences concerning appropriate amounts to settle the claims asserted in the Action and by conveying appropriate settlement authority to Lead Counsel. Guam Decl. ¶5. These are the types of activities that courts have found to support awards to class representatives.[10]

The Notice sufficiently informed potential Settlement Class Members that such expenses would be sought. *See BofA*, 772 F.3d at 132-33 (affirming district court's holding of sufficient notice, finding that comparable notice "unequivocally conveys the relevant information to the respective class members"). The request by Lead Plaintiff Guam is supported by a sworn declaration including an accounting of the hours dedicated to the litigation and explanation of the time incurred. The request is reasonable and fully justifiable under the PSLRA and should be granted.

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[10] *See, e.g., BofA*, 77 F.3d at 133; *In re Am. Int'l Grp., Inc. Sec. Litig.*, No. 04 Civ. 8141 (DAB), 2010 WL 5060697, at *3 (S.D.N.Y. Dec. 2, 2010) (granting PSLRA award of $30,000 to institutional lead plaintiffs "to compensate them for the time and effort they devoted on behalf of a class"); *FLAG Telecom*, 2010 WL 4537550, at *31 (approving award of $100,000 to Lead Plaintiff for time spent on the litigation); *In re Veeco Inc. Sec. Litig.*, 2007 WL 4115808, at *12 (S.D.N.Y. Nov. 7, 2007) (characterizing such awards as "routine" in this Circuit); *see also Xcel*, 364 F. Supp. 2d at 1000 (awarding $100,000 collectively to lead plaintiffs who "fully discharged their PSLRA obligations and have been actively involved throughout the litigation [including] . . . communicat[ing] with counsel . . . [and] review[ing] counsels' submissions").

III. CONCLUSION

Plaintiffs' Counsel respectfully request that the Court award them attorneys' fees in the amount of 25% of the Settlement Amount, plus 25% of the interest accrued; $156,551.86 in Plaintiffs' Counsel's Litigation Expenses; and $4,200.00 as reimbursement to Lead Plaintiff Guam, as authorized by the PSLRA.

Dated: October 15, 2015

Respectfully submitted,

/s/ Benjamin Galdston
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