IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In re U. S. Steel Consolidated Cases	Civil Action No. 17-579 Judge Cathy Bissoon

LEAD COUNSEL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES AND LITIGATION EXPENSES, AND SERVICE AWARDS TO PLAINTIFFS PURSUANT TO 15 U.S.C. §78u-4(a)(4)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Lead Counsel[1] respectfully submits this memorandum of law in support of their Motion for Award of Attorneys' Fees and Litigation Expenses, and Service Awards to Plaintiffs Pursuant to 15 U.S.C. §78u-4(a)(4) for counsel and Plaintiffs' work on behalf of the Settlement Class in achieving the proposed Settlement.

I. OVERVIEW

This $40 million Settlement, which resulted from four arm's-length mediation sessions overseen by several experienced mediators and one settlement conference overseen by the Court, represents an exceptional recovery for the Settlement Class. The Settlement is followed by nearly five years of lengthy and hard-fought litigation. *See* Declaration of Shannon L. Hopkins in Support of: (I) Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation; and (II) Lead Counsel's Motion for Award of Attorneys' Fees and Litigation Expenses, and Service Awards to Plaintiffs Pursuant to 15 U.S.C. §78u-4(a)(4) ("Hopkins Declaration" or "Hopkins Decl."), at ¶¶14-105.

Lead Counsel's request for an award of attorneys' fees and litigation expenses, and Plaintiffs' requests for class representative awards pursuant to 15 U.S.C. §78u-4(a)(4), are reasonable and well within the range approved in similar matters and should be approved. Lead Counsel advanced costs and devoted substantial time on a contingent basis to this complex matter, despite not knowing how long the litigation would last or whether there would ultimately be any recovery. At each stage of the litigation, Lead Counsel faced off against highly sophisticated defense counsel. Since this suit was filed over five years ago, Lead Counsel successfully opposed

[1] Unless otherwise stated or defined, all capitalized terms used herein have the meanings provided in the Stipulation and Agreement of Settlement (the "Stipulation"), dated May 20, 2022 (ECF 329-1). All citations are omitted and emphasis is added unless otherwise indicated. "Ex." refers to exhibits to the Hopkins Declaration.

Defendants' motion to dismiss; obtained class certification and defeated Defendants' Rule 23(f) petition for the Third Circuit Court of Appeals to review this Court's class certification grant; completed fact and expert discovery, including written, documentary, and deposition discovery; and thoroughly briefed Defendants' motion for class decertification. Hopkins Decl., ¶5. Discovery in this case was extensive: Defendants and third parties produced over 2.5 million pages of documents, Lead Counsel deposed 25 fact witnesses and defended 9 depositions, including of Plaintiffs and their confidential witnesses, written discovery was exchanged and responded to, and detailed expert reports were exchanged and 14 expert depositions taken. All this work resulted in the superb result presented here for final approval and supports Lead Counsel's fee and expense request.

Lead Counsel firmly believes that the Settlement is the result of their strenuous, diligent, and creative efforts, as well as their well-earned reputations as attorneys who are unwavering in their dedication to the interests of the Settlement Class and willing to zealously prosecute a meritorious case. Here, in a case asserting claims based on complex legal and factual issues that were opposed by highly skilled and experienced defense counsel, Lead Counsel succeeded in securing an outstanding result for the Settlement Class under difficult and challenging circumstances. Plaintiffs' Counsel dedicated a total of 23,690.37 hours of attorney and other professional staff time to bring the Action to this favorable resolution for Settlement Class Members. Hopkins Decl., ¶142. In class actions like this one, which are prosecuted on a contingent-fee basis, courts often award fees representing a positive "multiplier" of counsel's lodestar (often one to four times the amount of their lodestar) to compensate counsel for taking the risks of non-recovery and other factors. Here, however, Lead Counsel's requested fee is a "negative" lodestar multiplier of 0.81. *Id.*, ¶144. This means that, if awarded, the requested one-

third fee ($13,333,333.33) will result in a discount to Plaintiffs' Counsel's total lodestar ($16,401,823.00), which further supports the reasonableness of the requested fee. Further, the requested fees have been approved by Court-appointed Lead Plaintiff Christakis Vrakas and additional Plaintiff Leeann Reed. *See* Declaration of Christakis Vrakas ("Vrakas Decl."), Ex. 1 at ¶8 and Declaration of Leeann Reed ("Reed Decl."), Ex. 2 at ¶9, submitted herewith. Plaintiffs evaluated the request for fees and expenses and have determined that the requested fees are warranted based on counsel's diligent and aggressive prosecution of the Action. *Id.* As a result, the fee request is entitled to a "presumption of reasonableness." *In re Cendant Corp. Litig*., 243 F. Supp. 2d 166, 171 (D.N.J. 2003), *aff'd sub nom. In re Cendant Corp. Sec. Litig*., 404 F.3d 173 (3d Cir. 2005); *In re ViroPharma Inc. Sec. Litig.*, 2016 U.S. Dist. LEXIS 8626, at *46-*47 (E.D. Pa. Jan. 25, 2016) ("Where the Lead Plaintiff approves the Lead Plaintiff's counsel's request[ed] fee award – as Lead Plaintiff does here – the Court should afford the fee requested a presumption of reasonableness.").

For all the reasons set forth herein, in the Hopkins Declaration, and in Plaintiffs' Memorandum of Law in Support of Motion for Final Approval of Class Action Settlement and Plan of Allocation ("Settlement Memorandum"), Lead Counsel respectfully submits that the requested attorneys' fees and expenses are fair and reasonable under the applicable legal standards and should be awarded by the Court. Likewise, the awards sought by Plaintiffs are fully justified given their substantial efforts on behalf of the Settlement Class.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

To avoid repetition, Lead Counsel respectfully refers the Court to the accompanying Settlement Memorandum and the Hopkins Declaration for detailed discussions of the factual background and procedural history of the litigation, the extensive efforts undertaken by Lead

Counsel and Plaintiffs during the course of the litigation, the risks of the litigation, and the negotiations leading to the Settlement. *See generally* Hopkins Declaration.

In summary, however, in the near five years that this case was actively litigated, Plaintiffs investigated and drafted a detailed amended complaint, overcame Defendants' pleading motions, successfully moved for class certification, and filed motions concerning discovery disputes; conducted extensive fact and expert discovery; retained experts and exchanged discovery and reports; briefed Defendants' motion for decertification; and engaged in arms'-length settlement negotiations over the course of several years, overseen by three eminently qualified mediators, and the Court. *Id.*

III. THE REQUEST FOR ATTORNEYS' FEES AND EXPENSES SHOULD BE APPROVED

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). The Private Securities Litigation Reform Act of 1995 (the "PSLRA") 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 of any damages and prejudgment interest actually paid to the class." 15 U.S.C. §78u-4(a)(6). The ultimate determination of the proper amount of attorneys' fees rests within the sound discretion of the court based on the facts of the case. *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241 at 256 (3d Cir. 2009).

Here, Lead Counsel requests attorneys' fees of 33 1/3% of the Settlement Fund plus their litigation expenses, and Lead Plaintiff Vrakas and additional Plaintiff Reed seek awards of $70,000 and $10,000, respectively, for a total of $80,000, in connection with their representation of the Settlement Class pursuant to 15 U.S.C. §78u-4(a)(4). These requests are fair and reasonable,

and within the range of fees, expenses, and class representative awards typically granted in similar matters.

The Settlement is an exceptional result for the Settlement Class in the face of significant risks. This case involved substantial outlays of costs and attorney and staff time, with no guarantee of any ultimate recovery. Further, Lead Counsel brought substantial experience to their work on this case, and skillfully overcame defense counsel's determined opposition. For these reasons, and as detailed below, Lead Counsel respectfully request that these attorneys' fees, expenses, and class representative awards be approved.

A. Lead Counsel is Entitled to a Fee from the Common Fund

It is well established that an attorney "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 also, e.g.*, *In re Unisys Corp. Secs. Litig.*, 2001 U.S. Dist. LEXIS 20160, at *8-9 (E.D. Pa. Dec. 6, 2001) (same). Courts have recognized that, in addition to providing just compensation, awards of attorneys' fees from a common fund ensure that "'competent counsel continue to be willing to undertake risky, complex, and novel litigation.'" *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000); *Schuler v. Meds. Co.*, 2016 U.S. Dist. LEXIS 82344, at *25 (D.N.J. June 24, 2016). The Supreme Court has emphasized that private securities actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426 432 (1964)); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).

Courts in this Circuit have consistently adhered to these teachings. *See, e.g.*, *Dartell v. Tibet Pharms., Inc.*, 2017 U.S. Dist. LEXIS 100872, at *19 (D.N.J. June 29, 2017) ("The percentage-of-recovery method provides for attorneys' fees by awarding a reasonable percentage of the common fund") (citing *In re Rite Aid Corp. Sec. Litig*., 396 F.3d 294, 300 (3d Cir. 2005)); *Unisys Corp.*, 2001 U.S. Dist. LEXIS 20160, at *8-9. ("the percentage of recovery method is generally favored in cases involving a common fund").

B. The Court Should Award Attorneys' Fees Using the Percentage of the Common Fund Approach

The Supreme Court recognizes it is appropriate to award counsel a reasonable percentage of a common fund as a fee. *See Boeing*, 444 U.S. at 478-79. Further, the Third Circuit has held that "the PSLRA has made percentage-of recovery the standard for determining whether attorneys' fees are reasonable." *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 188 n.7 (3d Cir. 2005); *Conley v. Cabot Oil and Gas Corp.*, Case No. 17-1391-CB, ECF 59 at ¶14 (Apr. 2, 2019) (Bissoon, J.) (granting fees of 33% of settlement fund as percentage method is "consistent with the standard in this Circuit"). This is because the percentage method aligns counsel's interests with those of the Settlement Class by rewarding counsel for success, penalizing counsel for failure, and ensuring that "'competent counsel continue to be willing to undertake risky, complex, novel litigation.'" *Gunter*, 223 F.3d at 198; *Schuler*, 2016 U.S. Dist. LEXIS 82344, at *25 (same); *see also In re AT&T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006) ("In common fund cases such as this one, the percentage-of-recovery method is generally favored . . . ."); *Yedlowski v. Roka Bioscience, Inc.*, 2016 U.S. Dist. LEXIS 155951, at *54 (D.N.J. Nov. 10, 2016) (same); *Dartell*, 2017 U.S. Dist. LEXIS 100872, at *19 ("The percentage-of recovery method is preferred in common fund cases because it 'rewards counsel for success and penalizes it for failure.'"); *P. Van Hove BVBA v. Universal Travel Grp.*, 2017 U.S. Dist. LEXIS 97909, at *28 (D.N.J. June 26,

2017) (same); *Hall v. Accolade, Inc.*, 2020 U.S. Dist. LEXIS 52632, at *27 (E.D. Pa. Mar. 25, 2020) (same); *In re Orthopedic Bone Screw Prods. Liab. Litig*., 2000 U.S. Dist. LEXIS 15980, at *19 (E.D. Pa. Oct. 23, 2000) (same).

C. The Requested Fee Is Presumptively Reasonable Because It Has Been Approved by the Plaintiffs

Lead Plaintiff Vrakas and Plaintiff Reed both support approval of the requested fee. Plaintiffs' endorsement of Lead Counsel's fee request supports its approval, particularly where Lead Plaintiff Vrakas, and Plaintiff Reed through her husband, are experienced investors with decades of investing experience. *See* Ex. 1, Vrakas Decl., ¶3; Ex. 2 at ¶3, Reed Decl.; *e.g., In re Lucent Techs., Inc. Sec. Litig.*, 327 F. Supp. 2d 426, 442 (D.N.J. 2004) (requested fee approved where plaintiffs had "great financial stakes in the outcome of the litigation," and "reviewed and approved Lead Counsel's fees and expenses request."). Indeed, while approval of the fee is left to the sound discretion of the Court, the fact that the requested award has the support of Plaintiffs affords it a "presumption of reasonableness." *See, e.g., Cendant,* 243 F. Supp. 2d at 171; *ViroPharma*, 2016 U.S. Dist. LEXIS 8626, at *46-47.

D. The Requested Fee Is Fair and Reasonable Under the *Gunter/Prudential* Factors

Under Third Circuit law, district courts have considerable discretion on setting an appropriate percentage-based fee award in traditional common fund cases. *See, e.g., Gunter*, 223 F.3d at 195 ("We give [a] great deal of deference to a district court's decision to set fees."). Nonetheless, in exercising that broad discretion, the Third Circuit has also noted that a district court should consider, "among other things," the following factors in determining a fee award:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of

> nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases; (8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations; (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained; and (10) any innovative terms of settlement.

In re Diet Drugs, 582 F.3d 524, 541 (3d Cir. 2009) (*citing Gunter*, 223 F.3d at 195 n.1; *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998) (the "*Gunter/Prudential* factors")). These factors "need not be applied in a formulaic way . . . and in certain cases, one factor may outweigh the rest." *Gunter*, 223 F.3d at 195 n.1; *Schuler*, 2016 U.S. Dist. LEXIS 82344, at *26. Here, each factor supports the requested 33 1/3% fee award or is neutral.

1. The Size of the Common Fund Created and the Number of Persons Benefited by the Settlement

In awarding fees, the "most critical factor is the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983); *ViroPharm*a, 2016 U.S. Dist. LEXIS 8626, at *48 (same). To assess this factor, courts "'consider[] the fee request in comparison to the size of the fund created and the number of class members to be benefitted.'" *Dartell*, 2017 U.S. Dist. LEXIS 100872, at *21 (quoting *Yedlowski*, 2016 U.S. Dist. LEXIS 155951, at *59).

Here, the $40 million Settlement is an outstanding result that provides an immediate cash recovery to a large Class of investors. There were substantial risks to proceeding and proving liability and damages. Hopkins Decl., ¶¶118-131; Settlement Memorandum, § II.B. If this litigation were to continue absent the Settlement, insurance proceeds would continue to be depleted by defense costs, decreasing the likelihood of obtaining a comparable recovery in the future. In light of these and other factors, after multiple rounds of discussions and negotiations, mediator David Murphy recommended that the Settling Parties accept a $40 million settlement

amount, and they ultimately did so. *See* Declaration of David M. Murphy ("Murphy Decl."), Ex. 4 at ¶¶13-14, submitted herewith.

Additionally, the "number of class members to be benefitted" by the Settlement is undoubtedly large. U.S. Steel has over 150 million shares outstanding and the Settlement Class includes "[a]ll persons or entities who purchased or otherwise acquired United States Steel Corporation common stock and options during the period from January 27, 2016 through April 25, 2017, inclusive, and were injured thereby" (excluding those individuals and entities who are excluded by definition or who requested exclusion from the Settlement Class in connection with the Notice of Pendency of Class Action). ECF 329-1 at Section 1.36. Likely thousands of investors who bought U.S. Steel securities during that period will benefit from the Settlement. *See* Settlement Memorandum, § IV (Notice sent 315,783 potential Settlement Class Members). For these reasons, the first *Gunter* factor clearly weighs in favor of approving the negotiated fee.

2. Reaction of Settlement Class Members to the Fee Request

Notice of this Settlement, including the fee request, has been provided to 315,783 potential Settlement Class Members or their nominees. *See* Declaration of Eric Nordskog Regarding Settlement Class Notice and Report on Requests for Exclusion Received, Ex.3, ¶11, submitted herewith. To date, no objections to the fee request have been submitted. Hopkins Decl., ¶132. Thus, the reaction of the Settlement Class weighs in favor of approval of the requested fee. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001) (stating that "[t]he vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement"); *see also High St. Rehab., LLC v. Am. Specialty Health Inc.*, 2019 U.S. Dist. LEXIS 147849, at *11 (E.D. Pa. Aug. 29, 2019) (awarding 33 1/3% in attorneys' fees and finding "[a]

low number of objectors or opt-outs is persuasive evidence of the proposed settlement's fairness and adequacy.").

3. The Skill and Efficiency of Counsel

The third *Gunter* factor – the skill and efficiency of the attorneys involved – "is 'measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel.'" *Dartell* 2017 U.S. Dist. LEXIS 100872, at *23 (citing cases). Here, each of these considerations demonstrates the skill and efficiency of Lead Counsel and supports the requested fee.

Among other things, Lead Counsel investigated Defendants' conduct; drafted a detailed Amended Complaint; successfully opposed two motions to dismiss, obtained over 2.5 million pages of documents from Defendants and third parties; litigated discovery disputes; propounded and responded to written discovery; conducted 25 fact depositions (including a seven-part 30(b)(6) deposition of U. S. Steel) and defended 9 fact depositions; successfully moved for class certification and defeated Defendants' Rule 23(f) petition; served expert reports on topics relevant to class certification, liability and damages; and defended their experts' depositions and deposed Defendants' experts. Lead Counsel also fully briefed Defendants' motion for class decertification. Finally, Lead Counsel engaged in contentious, arm's-length settlement negotiations with experienced mediators, including four separate mediation sessions and one Court settlement conference. *See generally* Hopkins Decl., ¶¶98-105. *See also* Murphy Decl., Ex. 4.

By any measure, Lead Counsel's efforts have resulted in a highly favorable outcome for the benefit of the Settlement Class. The substantial and certain recovery obtained for the Settlement Class is the direct result of the significant efforts of highly skilled and specialized

attorneys who possess substantial experience in the prosecution of complex securities class actions. Lead Counsel's well-earned reputations as attorneys who will zealously litigate meritorious cases, as well as their demonstrated ability to vigorously develop the evidence in this Action, enabled them to negotiate the outstanding Settlement for the benefit of the Settlement Class.

The quality and vigor of opposing counsel is also relevant in evaluating the quality Lead Counsel's work. *See, e.g.*, *Dartell*, 2017 U.S. Dist. LEXIS 100872, at *23 ("'The quality and vigor of opposing counsel' is relevant when evaluating the quality of services rendered by Lead Counsel.") (quoting *Yedlowski*, 2016 U.S. Dist. LEXIS 155951, at *63). Defendants were represented by attorneys from Jones Day, a prominent law firm with widely recognized experience and skill. Lead Counsel's ability to obtain such a favorable settlement for the Settlement Class in the face of such formidable opposition further confirms the superior quality of the representation.

4. The Complexity and Duration of the Litigation

As detailed in the Hopkins Declaration and the Settlement Memorandum, this Action spanned nearly five years of active litigation and involved massive document discovery; dozens of depositions; full briefing on Defendants' motions to dismiss; discovery and extensive briefing regarding Plaintiffs' motion for class certification and Defendants' motion to decertify the class; and detailed expert reports and depositions at the class certification and merits stages. Each of these stages of litigation presented obstacles that Lead Counsel skillfully overcame.

In order to secure this recovery, Lead Counsel analyzed a large quantity of complex, technical documents concerning the steel industry and manufacturing of steel, generally, as well as U.S. Steel's maintenance practices in particular, the state of the steel market and steel prices

prior to and over the Settlement Class Period; and Defendants' insider selling and the timing and approvals received under Defendants' 10b5-1 trading plans. Lead Counsel used the fact and expert discovery record to assemble a narrative supporting Plaintiffs' claims that Defendants' alleged misstatements were materially false and misleading when made. Further, Lead Counsel had to establish that the corrective disclosure, in fact, revealed corrective information to the market, and marshalled expert opinions that the stock price decline on the relevant date was not caused by other market-wide, industry-specific, or U.S. Steel-specific factors. In addition, Lead Counsel had to defend against Defendant's decertification motion that argued pursuant to the-then recent decision in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System,* 141 S. Ct. 1951 (2021) that there was no impact on U. S. Steel's stock price from the alleged misstatements. Maintaining class certification was by no means guaranteed and there were very few judicial decisions analyzing the *Goldman* decision.

Plaintiffs' and Defendants' experts differed as to the proper measure of damages as an economic matter, with Defendants maintaining (supported by expert opinion) that even if liability were established, the alleged corrective disclosure did not correct any of the prior alleged misstatements and, thus, the Plaintiffs' allegations did not give rise to any cognizable damages. These and multiple other complex issues arose in the course of this Action. In light of the complexity and duration of this case, this factor favors approval of the requested attorneys' fees. *See Dartell*, 2017 U.S. Dist. LEXIS 100872, at *24 (the "complexity and nature of securities litigation" supports fourth *Gunter* factor").

5. The Risk of Non-Payment

Lead Counsel prosecuted this case on a contingency fee basis. Thus, without a settlement or a trial victory, they would go unpaid. This created an incentive to litigate the case aggressively

and seek the best recovery possible. Unlike defense counsel, who are paid on an hourly rate and paid for their expenses on a regular basis, Lead Counsel has not been compensated for any time or expense since this case began in May 2017. Since that time, Plaintiffs' Counsel has expended 23,690.37 hours prosecuting this Action and incurred $2,711,338.12 in litigation expenses. "'Courts routinely recognize that the risk created by undertaking an action on a contingency fee basis militates in favor of approval.'" *High St. Rehab.*, 2019 U.S. Dist. LEXIS 147849, at **35-36; *see also In re Schering-Plough Corp. Enhance ERISA Litig.*, 2012 U.S. Dist. LEXIS 75213, at *19 (D.N.J. May 31, 2012) ("*Schering Plough I*") (approving 33.3% fee; noting that "the risk created by undertaking an action on a contingency fee basis militates in favor of approval").

While not all of Plaintiffs' allegations survived the pleading stage, Plaintiffs also continued to face hurdles in prevailing on Defendants' motion to decertify the class and forthcoming motion for summary judgment, and later, at trial. As set forth in more detail in the Settlement Memorandum and the Hopkins Declaration, Defendants have argued that Plaintiffs' evidence does not support jury findings that any alleged misstatements regarding RCM and the benefits of RCM were false or misleading because U. S. Steel purportedly achieved over $70 million in benefits from RCM during the Settlement Class Period and employed many people with titles containing "RCM" that purportedly performed RCM-related work. Defendants further argued that any issues regarding capacity to meet demand were limited to three specific unplanned outages in early 2016 for which there was purportedly no related corrective disclosure. Defendants also argued that Plaintiffs could not establish the element of scienter and their insider sales were made pursuant to 10b5-1 trading plans and not suspicious.

Further, Defendants continued to argue, including in their most recent motion to decertify, that there is no evidence to support loss causation or damages. Hopkins Decl., ¶¶91-97, 124-31.

In a "battle of the experts," the Court or jury could side with Defendants' experts and find no damages or only a fraction of the damages Plaintiffs claimed. *In re Daimlerchysler AG Secs. Litig*, 2004 U. S. Dist. LEXIS 31774, *36 (D. Del. Jan. 28, 2004). The risk of no recovery for the class and counsel in complex cases of this type is very real. There are scores of hard-fought lawsuits where, because of the discovery of facts unknown when the case was commenced, or changes in the law during the pendency of the case, or a decision of a judge or jury following a trial on the merits, extensive professional efforts of members of the plaintiffs' bar produced no fee for counsel. *See, e.g., In re Oracle Corp. Sec. Litig.*, 2009 U.S. Dist. LEXIS 50995 (N.D. Cal. June 16, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010) (summary judgment granted and affirmed in favor of defendants after eight years of litigation,). Even the most promising cases can be eviscerated by a sudden change in the law after years of litigation. *See, e.g., In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d 469, 471-73 (S.D.N.Y. 2010) (after completing significant foreign discovery, 95% of plaintiffs' damages were eliminated by the Supreme Court's reversal of some 40 years of unbroken circuit court precedents in *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010)); *see also In re Allergan PLC Sec. Litig.*, 2022 U.S. Dist. LEXIS 223638 (S.D.N.Y. Dec. 12, 2022) (granting summary judgment after full discovery and class certification). Because the fee in this matter was entirely contingent, the only certainty was that there would be no fee without a successful result and that such a result would be realized only after considerable effort. This factor strongly favors approval of the requested fee.

6. The Significant Time Devoted to This Case

The significant time that counsel devoted to this case favors approval of the requested attorneys' fees. Plaintiffs' Counsel invested 23,690.37 hours of attorney and support staff time over the course of nearly five years and incurred $2,711,338.12 in expenses prosecuting this case

for the benefit of the Settlement Class, without promise of payment of attorney's fees or expenses if Plaintiffs did not prevail on their claims. *See* Hopkins Decl., ¶142, 148; *see also* Declaration of Liaison Counsel Vincent Coppola ("Liaison Counsel Fee and Expense Decl."), ¶5.

As discussed above and in the Hopkins Declaration, this Action was actively litigated and vigorously defended for nearly five years at the time the Settling Parties agreed to the Settlement and has been pending for nearly six years. Defendants fought Plaintiffs at every step of the Action. The successful resolution of this Action required Lead Counsel to commit a significant amount of time and expense to the case.

7. The Range of Fees Typically Awarded

"While there is no benchmark for the percentage of fees to be awarded in common fund cases, the Third Circuit has noted that reasonable fee awards in percentage-of-recovery cases generally range from nineteen to forty-five percent of the common fund." *Whiteley v. Zynerba Pharms., Inc.*, 2021 U.S. Dist. LEXIS 176101, at *36 (E.D. Pa. Sept. 16, 2021) (holding that this factor weighs in favor of approval where 33% fee request, which "falls in the middle" of the range of fees granted in comparable securities class actions in the Third Circuit); *Chludzinski v. NWPA Pizza, Inc., et al.*, Case No. 1:20-cv-163 (W.D. Pa.) (Bissoon, J.) at Dkt. No. 43 (approving one-third of settlement fund in attorneys' fees and noting "[t]his is the standard amount awarded in district courts within the Third Circuit"); *Conley*, Case No. 2:17-cv-01391 (Bissoon, J.) at Dkt. No. 59 (granting fees of 33% of settlement fund); *Dartell*, 2017 U.S. Dist. LEXIS 100872, at * 21 ("[a]n analysis of [the Gunter] factors supports the requested one-third fee award"); *P. Van Hove BVBA*, 2017 U.S. Dist. LEXIS 97909, at *28 (awarding 33% fee); *Bell v. Fore Sys.*, 2003 U.S. Dist. LEXIS 26676, at *11 (W.D. Pa. Dec. 22, 2003) (awarding one-third fee as fair and reasonable); *Unisys Corp.*, 2001 U.S. Dist. LEXIS 20160, at *11-12 (awarding 33% fee). Courts

nationwide award fee percentages similar to the requested fee of 33 1/3% in this case. *See, e.g., id.*; *see also Hosp. Auth. of Metro. Gov't v. Momenta Pharms., Inc.*, 2020 U.S. Dist. LEXIS 99546, *6 (M.D. Tenn. May 29, 2020) (awarded one-third of $120 million settlement, plus expenses); *Landmen Partners Inc. v. Blackstone Grp.*, 2013 U.S. Dist. LEXIS 190908, **9-10 (S.D.N.Y. Dec. 18, 2013) (awarded fees of one-third of $85 million settlement, plus expenses). Because the requested fee is reasonable in relation to fees typically awarded in similar cases, this factor favors approval of the requested fee award.

8. The Value of Benefits Attributable to the Efforts of Class Counsel Relative to Others

Class Counsel were the only ones investigating the claims at issue in this case. There were no SEC or other governmental investigations. As discussed above and in Plaintiffs' Settlement Memorandum, Class Counsel actively litigated this federal action through merits and expert discovery and a pending motion for class decertification. *See* Hopkins Decl., ¶¶15-105.

Because Class Counsel were the only attorneys pursuing the claims at issue in this case, this factor weighs in favor of approving the requested fee award. *Whiteley*, 2021 U.S. Dist. LEXIS 176101, at *36-37; *Kanefsky v. Honeywell Int'l Inc.*, 2022 U.S. Dist. LEXIS 80328, *28 (D.N.J. May 3, 2022) (fee request granted where claims were "independent of any investigative reports or enforcement actions by any governmental entity").

9. The Percentage Fee that Would Have Been Negotiated in A Private Contingent Arrangement

Class Counsel agreed to litigate this case on a contingency fee basis and successfully negotiated a settlement. Were this case brought on behalf of an individual, the customary contingency fee would likely range between thirty and forty percent of the recovery. *Whiteley*, 2021 U.S. Dist. LEXIS 176101, at *37 (*citing Wallace v. Powell*, 288 F.R.D. 347, 375 (M.D. Pa.

2012) ("In private contingency fee cases, attorneys routinely negotiate agreements for between thirty percent (30%) and forty percent (40%) of the recovery")); *In re Ikon Ofc. Sols., Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("[I]n private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery.")).

Here, Class Counsel's requested percentage is commensurate with customary percentages in private contingency fee agreements. Thus, this factor supports approval. *Whiteley*, 2021 U.S. Dist. LEXIS 176101, at *37.

10. Innovative Settlement Terms

The Settlement Agreement does not contain any innovative terms. This factor is neutral as it neither weighs in favor of, nor against, approval. *Id.*

E. The Requested Fee Is Reasonable Under a Lodestar Crosscheck

Courts in the Third Circuit may also use a "lodestar cross-check" to confirm the reasonableness of a percentage fee. *See Moore v. GMAC Mortg.*, 2014 U.S. Dist. LEXIS 181432, at *5 (E.D. Pa. Sept. 19, 2014) (stating that the "lodestar cross-check is 'suggested,' but not mandatory"). If used, the lodestar cross-check "should not displace a district court's primary reliance on the percentage-of-recovery method." *AT&T*, 455 F.3d at 164. In evaluating attorneys' fee requests, courts in the Third Circuit have also considered factors such as whether the fee award "reflects commonly negotiated fees in the private marketplace," and any benefit received from the efforts of government agencies, or any innovative terms of settlement. *In re Merck & Co., Inc. Vytorin ERISA Litig.*, 2010 U.S. Dist. LEXIS 12344, at **41-42 (D.N.J. Feb. 9, 2010). These additional factors also favor approval of the requested fee here, as the advancement of this case was based upon the efforts of counsel, not government agencies, and a 33% fee is well within the

range commonly negotiated in contingent fees. *See id.*, at *42 (noting that contingent fees in the private marketplace are commonly 30% to 40%).

The Third Circuit has recognized that when used, the lodestar cross-check "need entail neither mathematical precision nor bean-counting," and "district courts may rely on summaries submitted by the attorneys and need not review actual billing records*." Rite Aid Corp.*, 396 F.3d at 306-07. The lodestar cross-check involves simply comparing counsel's "lodestar" – i.e., timekeepers' hourly rates multiplied by the number of hours spent on the case – to the fee resulting from the requested percentage award, and assessing the reasonableness of the resulting multiplier. The appropriate multiplier varies based on the specifics of each case and "'need not fall within any pre-defined range, provided that the [d]istrict [c]ourt's analysis justifies the award.'" *Schuler*, 2016 U.S. Dist. LEXIS 82344, at *30 (quoting *Rite-Aid*, 396 F.3d at 307). The Third Circuit has recognized that percentage awards that result in positive multipliers "'ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.'" *In re Veritas Software Corp. Sec. Litig.*, 396 F. App'x 815, 819 (3d Cir. 2010); *see also Stevens v. SEI Invs. Co.*, 2020 U.S. Dist. LEXIS 35471, at *39-*40 (E.D. Pa. Feb. 26, 2020) (approving one-third fee equating to multiplier of 6.16; noting that "multiples ranging from 1 to 8 are often used in common fund cases" to "compensate counsel for the risk of assuming the representation on a contingency fee basis."); *Bodnar v. Bank of America, N.A.*, Case No. 14-3224, slip op. at 10 (E.D. Pa. Aug. 4, 2016) (ECF 90) (a 4.69 multiplier was "appropriate and reasonable").

Here, the lodestar cross-check further demonstrates the reasonableness of the requested fee percentage because the fee request is substantially below Plaintiffs' Counsel's total lodestar. As detailed in the Hopkins Declaration, Plaintiffs' Counsel spent 23,690.37 hours of attorney and other professional time prosecuting the Action for the benefit of the Settlement Class through

May 20, 2022 (the date the Stipulation was executed). Hopkins Decl., ¶142. Plaintiffs' Counsel's lodestar, derived by multiplying the hours spent on the litigation by each attorney or other professional by his or her current hourly rate, is $16,401,823.00. The Supreme Court has approved the use of current hourly rates to calculate the base lodestar figure as a means of compensating for the delay in receiving payment, inflation, and the loss of interest. *See Missouri v. Jenkins*, 491 U.S. 274, 284 (1989); *Dartell*, 2017 U.S. Dist. LEXIS 100872, at *27 ("the Court recognizes that it is based upon a reasonable hourly rate for such services given the geographical area, the nature of the services provided, and the experience of each attorney"); *Yedlowski*, 2016 U.S. Dist. LEXIS 155951, at *55 (finding hourly rate reasonable "for such services in the given geographical area") (citing *Gunter*, 223 F.3d at 195 n.1).[2] Thus, the requested fee of 33 1/3% of the Settlement Fund, or $13,333,333.33 million, represents a negative multiplier of 0.81 on counsel's lodestar. In other words, counsel for Plaintiffs will recover just 81% of the value of the time they dedicated to the Action. The fact that the requested fee is less than the lodestar strongly supports its reasonableness. *See In re Lithium Ion Batteries Antitrust Litig.*, 2019 WL 3856413, at *53 (N.D. Cal. Aug. 16, 2019) (finding requested fee "particularly appropriate where the lodestar cross-check results in a negative multiplier"), *vacated in part*, 2020 U.S. App. LEXIS 2987(9th Cir. 2020), aff'd, 853 F. App'x 56 (9th Cir. 2021); *In re Bear Stearns Cos., Inc. Sec., Derivative, &*

[2] The current rates charged by Lead Counsel are consistent with those approved as reasonable by other courts in this Circuit. *See, e.g.*, *Whiteley*, 2021 U.S. Dist. LEXIS 176101, at *36; *Id.*, ECF 47-2 (approving rate of $975 per hour for partner with 18 years' experience, $770 per hour for partner with 11 years' experience, $700 per hour for associate with nine years' experience and $600 per hour for associate with five years' experience); *In re Novo Nordisk Sec. Litig.*, Case No. 17-209-BRM-LHG (D.N.J. July 17, 2022), ECFs 351-14, 351-11, 351-15 (LK rates) and 361 (approving similar, or higher rates, including those of Levi & Korsinsky); *Robb v. Education Management Corp. et.al.*, Case No. 2:14-1287 (W.D. Pa. Feb. 19, 2016), ECFs 48-51, 53 (accepting lead counsel's current market rates to calculate lodestar used to analyze the reasonableness of the fee request).

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").

F. Reasonably Incurred Litigation Expenses Should Be Awarded

Lead Counsel also request payment of expenses incurred in connection with the prosecution of this litigation in the aggregate amount of $2,711,338.12. "Counsel in common fund cases is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case." *Dartell*, 2017 U.S. Dist. LEXIS 100872, at *28 (*quoting In re Cendant Corp.*, 232 F. Supp. 2d 327, 343 (D.N.J. 2002)); *Schering Plough I*, 2012 U.S. Dist. LEXIS 75213, at *22 (approving litigation expenses and noting that "[t]his type of reimbursement has been expressly approved by the Third Circuit").

The expenses borne by Plaintiffs' Counsel are documented in the accompanying Exhibit 8 to the Hopkins Declaration. These expenses consist of typical costs, such as experts, travel, document hosting and production, depositions, research costs, mediation fees, filing fees, postage, copying, and delivery. *See* Hopkins Decl., ¶148. These expenses were reasonable and necessary to Plaintiffs' prosecution of the claims and achieving the Settlement and are of the same type routinely approved in securities class actions. *See, e.g.*, *Dartell*, 2017 U.S. Dist. LEXIS 100872, at *28-29 (approving costs and expenses for, among other things, experts, fees for service of process and online legal research); *Unisys Corp.*, 2001 U.S. Dist. LEXIS 20160, at *12-13 (approving reimbursement for expenses related to expert fees, document hosting, legal research, photocopying and service fees, among others); *Whiteley*, 2021 U.S. Dist. LEXIS 176101, at *42 (approving reimbursement of expenses for investigator, experts, legal and factual research, among others); *Yedlowski*, 2016 U.S. Dist. LEXIS 155951, at *70 (approving costs and expenses for

experts, investigation, mediation, publishing notice, and online legal research, and noting that "[c]ourts have held that all of these items are properly charged to the [c]lass").

The requested expense amount is lower than the expenses approved in many other securities class actions. *See, e.g., AT&T*, 455 F.3d at 169 (approving expenses of nearly $5.5 million); *In re Merck & Co.*, 2016 U.S. Dist. LEXIS 150769, at *81-*82 (D.N.J. June 28, 2016) (approving award of $9.5 million in expenses); *Ikon*, 194 F.R.D. at 197 (approving award of over $3.5 million in expenses); *In re Lucent Techs., Inc. Sec. Litig.*, Case No. 2:00-cv-621, slip op. at 1 (D.N.J. July 23, 2004) (ECF 236) (approving award of $3.5 million in expenses). Further, the requested amount is materially less than the expense figure of up to $3.3 million set out in the Notice; to date, there have been no objections to that proposed figure. For all these reasons, the requested expense award should be approved.

G. Lead Plaintiffs Are Entitled to Awards Pursuant to 15 U.S.C. §78u-4(a)(4)

The Third Circuit has "favor[ed] encouraging class representatives, by appropriate means, to create common funds and to enforce laws." *Yedlowski*, 2016 U.S. Dist. LEXIS 155951, at *70. The PSLRA makes clear that it does not "limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class." 15 U.S.C. §78u-4(a)(4). In enacting this provision, Congress explicitly acknowledged the importance of awarding appropriate reimbursement to class representatives. *Yedlowski*, 2016 U.S. Dist. LEXIS 155951, at *70 (citing H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 35 (1995)); *see also Whiteley*, 2021 U.S. Dist. LEXIS 176101, at *42 (purpose of these payments is to "compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation" and to "reward the public service of contributing to the enforcement of mandatory laws.") (*citing Bredbenner v. Liberty*

Travel, Inc., 2011 U.S. Dist. LEXIS 38663 (D.N.J. Apr. 8, 2011)). Thus, courts provide awards under 15 U.S.C. §78u-4(a)(4) to compensate class representatives for their time and effort in representing the class. Lead Plaintiff Vrakas and Plaintiff Reed seek awards of $70,000 and $10,000, respectively, for a total of $80,000, for the time of Plaintiffs devoted to supervising counsel and participating in the litigation. *See* Vrakas Decl., Ex. 1 at ¶11; Reed Decl., Ex. 2 at ¶12.

The declarations describe Plaintiffs' activities directly related to representing the Settlement Class, including: (a) consulting with counsel regarding the litigation and the Court's orders; (b) reviewing and commenting upon pleadings, motions, and briefs; (c) reviewing correspondence and status reports from counsel; (d) responding to discovery requests and collecting documents for production; (e) preparing for and participating in depositions; (f) conferring with counsel concerning litigation strategy; and (g) monitoring settlement negotiations and, for Lead Plaintiff Vrakas, attending four mediations and one Court settlement conference. *Id.* The requested class representative awards are reasonable and consistent with those awarded in similar cases under similar circumstances. *See, e.g.*, *McDermid v. Inovio Pharms, Inc.*, 2023 U.S. Dist. LEXIS 8200, **39-40 (E.D. Pa. Jan. 18, 2023) (approving award to plaintiff Zenoff, who spent 168.25 hours, of $75,712.50 and to plaintiff Williams, who spent 221.2 hours, of $77,450.00); *In re CIGNA Corp. Sec. Litig.*, Case No. 02-8088, slip op. at 1-2 (E.D. Pa. July 13, 2007) (ECF 288) (approving awards to four lead plaintiffs totaling more than $130,000); *In re Schering-Plough Corp.*, 2013 U.S. Dist. LEXIS 147981, at *111 (D.N.J. Aug. 27, 2013) ("*Schering-Plough II*") (approving awards to four lead plaintiffs totaling more than $102,000); *id.*, at *56-*57 (in related matter, approving awards to four separate lead plaintiffs totaling more than $109,000).

Accordingly, Plaintiffs respectfully request that the proposed awards be approved.

IV. CONCLUSION

For all the reasons stated above and in the accompanying declarations, Lead Counsel respectfully request that the Court: (i) award Plaintiffs' Counsel attorneys' fees of $13,333,333.33 million, or 33 1/3% of the Settlement Fund; (ii) award Plaintiffs' Counsel payment of litigation expenses of $2,711,338.12; and (iii) award Plaintiffs a total of $80,000, in connection with their representation of the Settlement Class pursuant to 15 U.S.C. §78u-4(a)(4).

DATED: February 6, 2023

LEVI & KORSINSKY, LLP

By: */s/ Shannon L. Hopkins*
Shannon L. Hopkins

Gregory M. Potrepka
1111 Summer Street, Suite 304
Stamford, CT 06901
Telephone: (203) 992-4523
Email: shopkins@zlk.com
gpotrepka@zlk.com

Joseph E. Levi
LEVI & KORSINSKY, LLP
55 Broadway, 10th Floor
New York, NY 10006
Telephone: (212) 363-7500
Email: jlevi@zlk.com

Lead Counsel for Plaintiffs Christakis Vrakas and Leeann Reed and Lead Counsel for the Settlement Class

-and-

Vincent Coppola, Esquire
Penn. Attorney #50181
513 Court Place
Pittsburgh, PA 15219

Liaison Counsel for Plaintiffs and the Class

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2023, I served a copy of the foregoing document on all appearing counsel through the Court's ECF system.

/s/ Shannon L. Hopkins
Shannon L. Hopkins