UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RONALD MONK, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. JOHNSON & JOHNSON, WILLIAM C. WELDON, DOMINIC J. CARUSO, COLLEEN A. GOGGINS and PETER LUTHER, Defendants.	Civil Action No. 10-4841 (FLW) (DEA)

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

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I. PRELIMINARY STATEMENT

In connection with the Court's final approval of the Settlement[1] in the above-captioned action (the "Action"), Court-appointed lead counsel Kessler Topaz Meltzer & Check, LLP ("KTMC" or "Lead Counsel"), with the approval of the Court-appointed lead plaintiff Sjunde AP-Fonden ("Lead Plaintiff" or "AP7"), respectfully submits this memorandum in support of its motion for an award of attorneys' fees and reimbursement of litigation expenses on behalf of Plaintiffs' Counsel.[2] In consideration of Plaintiffs' Counsel's extensive efforts and the substantial monetary recovery obtained for the Class in light of the significant risks discussed herein, Lead Counsel respectfully moves the Court for: (i) an award of attorneys' fees in the amount of 20% of the Settlement Fund, and (ii) reimbursement of expenses reasonably and necessarily incurred by Plaintiffs' Counsel in prosecuting and resolving the Action in the amount of $361,447.44, plus interest earned at the same rate of interest as the Settlement Fund.

As set forth below and in the accompanying Declaration of Matthew L. Mustokoff in Support of Final Approval of Settlement, Plan of Allocation and Application for an Award of Attorneys' Fees and Expenses (the "Mustokoff Dec."), the $22.9 million recovery is an excellent result for the Class, particularly in light of the risks the Class would face had the Action continued. These risks included, among others, surviving Defendants' motion to dismiss in part the Second Amended Complaint which was pending when the Settlement was reached and overcoming significant challenges to establishing Lead Plaintiff's claims under Section 10(b) of

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[1] Capitalized terms not defined herein shall have those meanings ascribed to them in the Stipulation and Agreement of Settlement dated July 15, 2013 (the "Stipulation"). Dkt. Entry 111-2. Pursuant to the Stipulation, the settlement proceeds were deposited into an escrow account on August 14, 2013.

[2] The term "Plaintiffs' Counsel" refers to Lead Counsel, Kessler Topaz Meltzer & Check, LLP, together with Liaison Counsel, Carella, Byrne, Cecchi, Olstein, Brody & Agnello P.C.

the Securities Exchange Act of 1934 (the "Exchange Act"), including scienter, materiality and loss causation, as well as the Class's full amount of damages. The Settlement also avoids the uncertainties regarding the outcome of the Parties' ongoing discovery efforts which had sparked contentious motion practice.

The $22.9 million recovery for the Class would not have been possible without the skill, tenacity and advocacy of Plaintiffs' Counsel, who devoted substantial efforts over the past 2-plus years – and more than 8,900 hours – to the investigation, prosecution and resolution of this Action. These hours equate to a lodestar of $3,959,113.25, meaning that the requested fee, if awarded, would result in an exceedingly modest multiplier of 1.16 to the time spent by Plaintiffs' Counsel. Lead Counsel secured this recovery working on a wholly contingent basis, by among other things: (i) conducting an extensive factual investigation into the alleged fraud, including a thorough review of publicly available information regarding Johnson & Johnson ("J&J" or the "Company") such as the Company's filings with the U.S. Securities and Exchange Commission ("SEC"), press releases, conference calls and other public statements issued by Defendants, as well as securities analyst reports; (ii) conducting extensive and wide ranging investigative interviews with several former employees of J&J and J&J's subsidiary, McNeil-PPC, Inc. ("McNeil"), including personnel who worked at McNeil's Fort Washington, Pennsylvania plant; (iii) preparing and filing two amended complaints detailing Defendants' alleged violations of the federal securities laws; (iv) conducting extensive research of the law applicable to the Class's claims and the defenses thereto; (v) opposing two rounds of motions to dismiss; (vi) filing a motion for reconsideration of the Court's dismissal of Lead Plaintiff's claims against William C. Weldon; (vii) conducting discovery – including the review and analysis of thousands of pages of documents produced by Defendants and third parties, preparing for depositions of fact witnesses

and litigating two motions to compel the production of documents; (viii) consulting with a leading economist and damages expert on issues of loss causation and damages; and (ix) engaging in protracted settlement negotiations with Defendants' Counsel facilitated by an experienced mediator and distinguished former judge, The Honorable Daniel H. Weinstein (Ret.) of JAMS, including two formal full-day mediation sessions, several telephonic conferences and the exchange of lengthy mediation statements. Mustokoff Dec., ¶¶11-26, 37-42.

As compensation for these substantial efforts, Lead Counsel, on behalf of Plaintiffs' Counsel, respectfully requests that the Court award attorneys' fees in the amount of 20% of the Settlement Fund and reimbursement of Plaintiffs' Counsel's litigation expenses in the amount of $361,447.44, with interest on both figures calculated at the same rate earned by the Settlement Fund. As further articulated herein, these requests are fully justified by the facts of this case and the applicable law, and are fair and reasonable.

These requests are also being made with the approval of the Court-appointed Lead Plaintiff, a sophisticated institutional investor who was directly involved in the prosecution and settlement of this Action, as well as in accordance with an *ex ante* fee agreement.[3] In addition, in accordance with the Court's Preliminary Approval Order, notice of the proposed Settlement, including the maximum amount of attorneys' fees and litigation expenses that would be sought, was mailed to over 2 million potential Class Members and nominees.[4] The deadline to object to

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[3] *See* Declaration of Richard Gröttheim, Chief Executive Officer of Sjunde AP-Fonden, in Support of (I) Lead Plaintiff's Motion for Final Approval of Settlement and Plan of Allocation and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Gröttheim Dec."), ¶¶3-5, 7, submitted herewith.

[4] The Notice advises recipients that Lead Counsel would be requesting an award of attorneys' fees from the Settlement Fund in an amount not to exceed 20% of the Settlement Fund, and reimbursement of Litigation Expenses paid or incurred by Plaintiffs' Counsel in connection with the prosecution and resolution of the Action, in an amount not to exceed

any aspect of the Settlement, including Lead Counsel's fee and expense request, expires on October 24, 2013. To date, not a single objection has been filed challenging the maximum request for attorneys' fees and litigation expenses set forth in the Notice.[5]

II. HISTORY OF THE ACTION

Lead Counsel respectfully refers the Court to the accompanying Mustokoff Declaration for a detailed description of the procedural history of the Action, the nature of the claims asserted, the investigation and discovery undertaken, the Parties' extensive motion practice, the negotiations and formal mediation process resulting in the Settlement, and the risks and uncertainties involved in prosecuting this Action through trial.

III. THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE

A. Plaintiffs' Counsel are Entitled to an Award of Attorneys' Fees from the Common Fund Created by the Settlement

Courts have long held that "a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820 n.39 (3d Cir. 1995); *In re Computron Software, Inc. Sec. Litig.*, 6 F. Supp. 2d 313, 321 (D.N.J. 1998).

Courts have recognized that the award of attorneys' fees from a common fund serves to encourage skilled counsel to represent classes of persons who otherwise may not be able to retain

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$450,000, plus interest earned on this amount at the same rate as the Settlement Fund. *See* Exhibit B to the Declaration of Paul Mulholland, CPA, CVA (the "Mulholland Dec.") submitted herewith on behalf of the Court-authorized claims administrator for the Settlement, Strategic Claims Services ("SCS").

[5] If any objections are received following this submission, Lead Counsel will address them in its reply brief to be filed with the Court on or before November 7, 2013.

counsel to represent them in complex and risky litigation. *See Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000) (goal of percentage fee awards is to "ensur[e] that competent counsel continue to be willing to undertake risky, complex, and novel litigation") (citation omitted). Fee awards in meritorious cases also promote private enforcement of, and compliance with, the federal securities laws which "seek to maintain public confidence in the marketplace. They do so by deterring fraud, in part, through the availability of private securities fraud actions." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 318 (2007); *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (private securities actions provided "a most effective weapon in the enforcement' of the securities laws and are a necessary supplement to [SEC] action") (citation and internal quotations omitted). Here, Lead Counsel's efforts exemplify the importance of such private cases, as no other investigation or proceeding has yielded a monetary recovery for the Class.

B. The Standard for Approval of Attorneys' Fees in the Third Circuit

There are two methods employed by the Third Circuit for determining reasonable attorneys' fees in common fund cases: the percentage-of-recovery method and the lodestar method. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005). Although the individual courts retain discretion over which of the two methods to apply, courts in the Third Circuit have generally favored using the percentage-of-recovery method to determine attorneys' fees in common fund cases. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 330 (3d Cir. 2011) (the percentage of recovery method "is generally favored in common fund cases because it allows court to award fees from the fund 'in a manner that reward counsel for success and penalizes it for failure'") (citation omitted); *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006); *Rite Aid*, 396 F.3d at 300; *Gen. Motors*, 55 F.3d at 821; *In re Prudential Ins. Co. Am. Sales*

Practice Litig. Agent Actions, 148 F.3d 283, 333 (3d Cir. 1998).[6] The percentage-of-recovery method is almost universally preferred for determining attorneys' fees in common fund cases because it most closely aligns the interests of counsel and the class. *See Rite Aid*, 396 F.3d at 300; *Prudential*, 148 F.3d at 333.

The Third Circuit has "several times reaffirmed that the application of a percentage-of-recovery method is appropriate in common-fund cases." *In re Cendant Corp. Prides Litig.*, 243 F.3d 722, 734 (3d Cir. 2001) (citing *Gunter*, 223 F.3d at 195, n.1). Moreover, while the Third Circuit recommends that the percentage award be "cross-checked" against the lodestar method to ensure its reasonableness, *Sullivan*, 667 F.3d at 330, "[t]he lodestar cross-check, while useful, should not displace a district court's primary reliance on the percentage-of-recovery method." *AT&T*, 455 F.3d at 164.

In addition, when reviewing a request for attorneys' fees in a common fund case, the Third Circuit has set forth the following factors for courts to consider:

> (1) the size of the fund created and the number of persons benefited; (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.

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[6] Additional texts also support application of the percentage-of-recovery method in awarding attorneys' fees in common fund cases. *See* Manual for Complex Litigation (Fourth) § 14.121 at 187 (2004) (commenting that "the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common fund cases"); *see also* Private Securities Litigation Reform Act of 1995 (the "PSLRA"), 15 U.S.C. § 78u-4(a)(6) ("Total 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*.") (emphasis added). Furthermore, the Supreme Court has consistently held that the percentage-of-recovery approach is an appropriate methodology for awarding plaintiffs' counsel's fees in a common fund case. *See, e.g.*, *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").

Gunter, 223 F.3d at 195. The Third Circuit has also suggested three other factors that may be relevant to the Court's inquiry: (1) "the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations;" (2) "the percentage fee that would have been negotiated had the case been subject to a private [non-class] contingent fee agreement at the time counsel was retained;" and (3) any "innovative terms of settlement." *AT&T*, 455 F.3d at 165 (citing *Prudential*, 148 F.3d at 338-40). "These fee award reasonableness factors 'need not be applied in a formulaic way' because each case is different, 'and in certain cases, one factor may outweigh the rest.'" *AT&T*, 455 F.3d at 165 (citing *Rite Aid*, 396 F.3d at 301). "What is important is that the district court evaluate what class counsel actually did and how it benefitted the class." *Id*. at 166 (citing *Prudential*, 148 F.3d at 342).

Lead Counsel respectfully submits that an analysis of the foregoing factors, as well as an analysis under the percentage-of-recovery and lodestar methods, demonstrates that Lead Counsel's fee request is reasonable and appropriate and should be approved by the Court.[7]

C. Analysis Under the Percentage-of-Recovery Method, the Lodestar Method and the *Gunter* and *Prudential* Factors Each Support Lead Counsel's Fee Request

1. Size of the Fund Created and Number of Persons Benefited

The result achieved is one of the primary factors to be considered in assessing the propriety of an attorneys' fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"). Here, through its substantial efforts during the

[7] An analysis using the lodestar method is presented below (in the discussion of the *Gunter* factor – the amount of time devoted to the case by plaintiffs' counsel), at §III(C)(6)(b). An analysis of the percentage-of-recovery method is presented below (in the discussion of the *Gunter* factor – awards in similar cases), at §III(C)(7).

pendency of this Action (*see generally* Mustokoff Dec., ¶¶11-26, 37-42), Lead Counsel obtained a $22.9 million all-cash recovery for the Class. This Settlement confers a substantial and immediate benefit on the Class in contrast to the delays, costs and uncertainty of continued litigation.[8] Mustokoff Dec., ¶54. The Settlement is even more significant given the various risks involved in the Action. Lead Plaintiff, advised by Lead Counsel, carefully considered these risks when negotiating the present Settlement, and that such a result was secured in the face of such risks evinces the significance of the Settlement. *Id*. *See also* Declaration of the Hon. Daniel Weinstein (Ret.) (the "Weinstein Dec."), submitted herewith, ¶11 ("I believe the settlement represents the highest settlement amount and the most favorable terms that the class could have achieved at that time."). Moreover, as of October 9, 2013, over 2 million copies of the Notice have been mailed to potential Class Members and nominees, evidencing that a great number of investors will benefit from the Settlement. *See* Mulholland Dec., ¶9. This factor favors approval of the fee request.

2. The Absence of Objections to the Fee Request to Date

The reaction of the Class to date supports the fee request. As set forth above, over 2 million copies of the Notice have been mailed, advising potential Class Members and nominees

[8] Here, in the view of Lead Plaintiff's damages expert, this recovery represents approximately 12% of the damages number that would be defensible at trial. This damages estimate, however, assumes that a jury would accept every element of the Class's damages theory as being correct and recoverable and does not take into account the many risks Lead Plaintiff faced if the Action proceeded to trial. *See AT&T*, 455 F.3d at 170 ("'[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved' . . . [r]ather, the percentage recovery, 'must represent a material percentage recovery to plaintiff in light of all the risks . . .'") (internal citations omitted); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 2007 U.S. Dist. LEXIS 9450, at *33 (S.D.N.Y. Jan. 31, 2007) (finding settlement representing recovery of approximately 6.25% of estimated damages to be "at the higher end of the range of reasonableness of recovery in class actions securities litigations").

that Lead Counsel would be requesting an award of attorneys' fees from the Settlement Fund in an amount not to exceed 20% of the Settlement Fund, and reimbursement of Litigation Expenses paid or incurred by Plaintiffs' Counsel in connection with the prosecution and resolution of the Action, in an amount not to exceed $450,000, plus interest. Mustokoff Dec., ¶55. In addition, the Summary Notice was published in the national edition of *Investor's Business Daily* and transmitted over *PRNewswire*. *Id.*; *see also* Mulholland Dec., ¶7. While the deadline for filing an objection to Lead Counsel's fee request does not expire until October 24, 2013, to date, there have been no objections to the maximum amount of attorneys' fees and expenses set forth in the Notice. Mustokoff Dec., ¶55.

3. The Skill and Efficiency of the Attorneys Involved

An analysis of the skill and efficiency of the attorneys involved also supports Lead Counsel's fee request. The skill and efficiency of counsel 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 the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." *Hall v. AT&T Mobility LLC*, 2010 WL 4053547, at *19 (D.N.J. Oct. 13, 2010) (internal citation omitted). This factor is particularly important as the Third Circuit recognizes "the stated goal in percentage fee-award cases of ensuring that competent counsel continue to be willing to undertake risky, complex and novel litigation." *Gunter*, 223 F.3d at 198 (internal quotation omitted).[9]

[9] *See generally In re Rio Hair Naturalizer Prods. Liab. Litig.*, 1996 WL 780512, at *17 (E.D. Mich. Dec. 20, 1996) ("As the Supreme Court has recognized, without a class action, small claimants individually lack the economic resources to vigorously litigate their rights. Thus, attorneys who take on class action matters enabling litigants to pool their claims provide a huge service to the judicial process.") (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161

Lead Counsel is highly experienced in prosecuting securities class actions and has successfully litigated these types of cases on behalf of major institutional investors throughout the country. Mustokoff Dec., ¶56. *See In re Genta Sec. Litig.*, 2008 WL 2229843, at *10 (D.N.J. May 28, 2008) ("the attorneys' expertise in securities litigation favors approving the requested award for attorneys' fees"). Liaison Counsel, Carella, Byrne, Cecchi, Olstein, Brody & Agnello, P.C., is also highly experienced in complex litigation.[10] Plaintiffs' Counsel worked diligently and efficiently in prosecuting the Action as well as in bringing the Action to a successful conclusion for the Class. Indeed, Lead Counsel engaged in a thorough analysis of the best possible recovery for the Class in light of Defendants' pending motion to dismiss and the risks of further litigation.

"'The quality of opposing counsel is also important in evaluating the quality of counsel's work." *Hall*, 2010 WL 4053547, at *19 (citation omitted); *In re Aetna Inc. Sec. Litig.*, 2001 WL 20928, at *15 (E.D. Pa. Jan. 4, 2001) (recognizing quality of opposing counsel to be an important factor in evaluating plaintiff' counsel's performance). Defendants in this case were represented by the nationally prominent law firm of Covington & Burling LLP, who zealously represented the interests of its clients, spared no effort in the defense of their claims, and were fully prepared to take this case to trial. The ability of Lead Counsel to obtain such a favorable Settlement for

(1974)); *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985) (effectiveness of securities laws depends "in large measure" on class actions).

[10] *See* firm resumes for Lead Counsel and Liaison Counsel attached as Exhibit 3 to the Declaration of David Kessler in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses Filed on Behalf of Kessler Topaz Meltzer & Check, LLP (the "Kessler Dec.") and as Exhibit 3 to the Declaration of James E. Cecchi in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses Filed on Behalf of Carella, Byrne, Cecchi, Olstein, Brody & Agnello (the "Cecchi Dec."), respectively, submitted herewith.

the Class "in the face of formidable legal opposition further evidences the quality of their work." *In re Corel Corp. Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 496 (E.D. Pa. 2003).

4. The Complexity and Duration of the Litigation

As recognized by courts in this jurisdiction, securities class actions are inherently complex. *See, e.g., AT&T*, 455 F.3d at 170 (finding that the difficulty and substantial risks plaintiffs faced in establishing liability, particularly scienter, and damages in securities actions supported approval of attorneys' fee award); *Smith v. Dominion Bridge Corp.*, 2007 WL 1101272, at *8 (E.D. Pa. Apr. 11, 2007) (noting that securities fraud cases are difficult to litigate successfully).

As detailed in the accompanying Mustokoff Declaration and Settlement Memorandum, the claims advanced in this Action involve complex legal issues and many questions remained regarding the extent of Defendants' liability and the true measure of the Class's damages. The issues would have undoubtedly required extensive additional discovery, including numerous depositions, as well as expert reports and testimony. Mustokoff Dec., ¶58; Settlement Memorandum, §III(B)(1). *See Smith*, 2007 WL 1101272, at *4 ("There is no doubt that the issues in this case are complex in that the alleged misrepresentations relate to securities fraud which would have required a significant amount of expert testimony and would involve educating a jury about financial accounting and federal securities law."). But for the Settlement, this Action would have continued for additional years, through discovery, summary judgment, trial and appeals. *See also Muse v. Dymacol, Inc.*, 2003 WL 22794698, at *2 (E.D. Pa. Nov. 7, 2003) ("[s]ettlement . . . will avoid delay in realizing benefit for the affected class members, and will avoid unnecessary litigation costs").

5. The Risk of Nonpayment

Courts in the Third Circuit have consistently recognized that the attorneys' contingent fee risk is an important factor in determining a fee award. *See In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 516 (W.D. Pa. 2003) (finding investment of time, personnel and resources supported awarding requested fee). *See, e.g.*, *In re Schering-Plough Corp. Enhance ERISA Litig.*, 2012 WL 1964451, at *6 (D.N.J. May 31, 2012) ("Courts routinely recognize that the risk created by undertaking an action on a contingency fee basis militates in favor of approval."); *In re Merck & Co., Inc. Vytorin ERISA Litig.*, 2010 WL 547613, at *11 (D.N.J. Feb. 9, 2010) (finding "[t]he risk of little or no recovery weighs in favor of an award of attorneys' fees" where counsel accepted the action on a contingent-fee basis); *In re Suprema Specialties, Inc. Sec. Litig.*, 2008 WL 906254, at *11 (D.N.J. Mar. 31, 2008) (same). Here, Plaintiffs' Counsel undertook this Action on an entirely contingent fee basis, assuming a substantial risk that the litigation would yield no recovery.

From the outset, Plaintiffs' Counsel understood that they were embarking on a complex and expensive litigation with no guarantee of compensation for the investment of time, money and effort that the case would require. Plaintiffs' Counsel also understood that Defendants would (and, in fact, did) retain a large, highly experienced corporate defense firm to mount a strong defense. In undertaking this risk, Plaintiffs' Counsel were obligated to ensure that sufficient resources were dedicated to the prosecution of the Action, and that funds were available to compensate staff and to cover the considerable costs that a case such as this entails. With an average lag time of several years for these cases to conclude, the financial burden on contingent-fee counsel is far greater than on a firm that is paid on an ongoing basis. Indeed, Plaintiffs' Counsel have received no compensation for their efforts during the course of this Action. Mustokoff Dec., ¶59.

Plaintiffs' Counsel also bore the risk that no recovery would be achieved (or that a judgment could not be collected, in whole or in part). Even with the most vigorous and competent of efforts, success in contingent-fee litigation, such as this, is never assured. In fact, there have been many hard-fought lawsuits where, because of: (i) the discovery of facts unknown when the case was commenced; (ii) changes in the law while the case was pending; or (iii) decisions on summary judgment or following a trial on the merits, that excellent professional efforts produced no fee for counsel.[11] This Action presented a number of risks and uncertainties which could have prevented any recovery whatsoever. *See* Mustokoff Dec., ¶60. Thus, any fee award has always been at risk, and completely contingent on the result achieved and on this Court's discretion in awarding fees and expenses. Accordingly, the contingent risk in this case strongly supports the requested attorneys' fee.

6. The Amount of Time Devoted to the Action

a. The Time and Labor Devoted by Plaintiffs' Counsel Supports the Fee Request

As set forth above and in the Mustokoff Declaration, Plaintiffs' Counsel marshaled considerable resources and time in the research, investigation, prosecution and ultimate resolution

[11] *See, e.g.*, *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011) (granting defendants' judgment as a matter of law following plaintiff verdict); *Robbins v. Koger Props. Inc.*, 116 F.3d 1441 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against an accounting firm reversed on appeal); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning securities class action jury verdict for plaintiffs' case filed in 1973 and tried in 1988); *Bentley v. Legent Corp.*, 849 F. Supp. 429 (E.D. Va. 1994), *aff'd*, 50 F.3d 6 (4th Cir. 1995) (directed verdict after plaintiffs' presentation of its case to the jury); *In re Apple Computer Sec. Litig.*, 1991 WL 238298 (N.D. Cal. Sept. 6, 1991) (after jury rendered a verdict for plaintiffs following an extended trial, the court overturned the verdict); *Landy v. Amsterdam*, 815 F.2d 925 (3d Cir. 1987) (directed verdict for defendants after five years of litigation). Indeed, even judgments initially affirmed on appeal by an appellate panel are no assurance of a recovery. *See, e.g.*, *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (after 11 years of litigation, and following a jury verdict for plaintiffs and an affirmance by a First Circuit panel, plaintiffs' claims were dismissed by an *en banc* decision and plaintiffs recovered nothing).

of the Action. These efforts included, *inter alia*, conducting a comprehensive investigation into the Class's claims; preparing two amended complaints; opposing two rounds of motions to dismiss by defendants; filing a motion for partial reconsideration; conducting discovery, including the review of thousands of pages of documents produced by Defendants and third parties and preparation for depositions; consulting with a damages expert to present a damages model at mediation; and engaging in arm's-length settlement negotiations with Defendants over the course of six months, including two in-person, formal mediations, and additional months of negotiating the terms of the Stipulation and drafting the related settlement documents. Mustokoff Dec., ¶¶11-26, 37-42.[12]

b. The Lodestar Analysis Supports the Fee Request

The Third Circuit recommends that district courts use counsel's lodestar as a "cross-check" to determine whether the fee that would be awarded under the percentage-of-recovery method is reasonable. *See Sullivan*, 667 F.3d at 330; *AT&T*, 455 F.3d at 164. In applying the lodestar method, a court multiplies the number of hours each timekeeper spent on the case by a reasonable hourly rate, then adjusts that lodestar figure by applying a multiplier to reflect such factors as the risk and contingency nature of the litigation, the result obtained and the quality of the attorneys' work. *See Rite Aid*, 396 F.3d at 305-06 (multiplier is intended to "account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work"). In applying the lodestar cross-check, however, the Third Circuit has emphasized that the calculation is "not a full-blown lodestar inquiry" and need not entail "mathematical precision" or

[12] Should the Court approve the Settlement, Lead Counsel will continue to perform legal work on behalf of the Class, without seeking any additional compensation. Additional resources will be expended assisting Class Members with their Proofs of Claim and related inquiries and working with the claims administrator, SCS, to ensure the smooth progression of claims processing.

"bean counting." *AT&T*, 455 F.3d at 169, n.6 (quoting *Rite Aid*, 396 F.3d at 306). Further, "the district court may rely on summaries submitted by the attorneys and need not review actual billing records." *Rite Aid*, 396 F.3d at 306-307.

Here, Plaintiffs' Counsel have devoted over 8,900 hours to the prosecution of the Class's claims against Defendants in this Action, resulting in a total lodestar of $3,959,113.25.[13] *See* Kessler and Cecchi Declarations.[14] Thus, the requested fee award results in the application of an extremely modest 1.16 multiplier to the lodestar.[15]

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[13] This figure reflects Plaintiffs' Counsel's current hourly rates, as permitted by the United States Supreme Court and the other courts, to help compensate for inflation and the loss of use of funds. *See Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989); *Rent-Way*, 305 F. Supp. 2d at 517 n.10; *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D 166, 195 (E.D. Pa. 2000).

[14] In addition to the lodestar summaries contained in the Kessler and Cecchi Declarations, Exhibit 1 to the accompanying Mustokoff Declaration provides a breakdown of Plaintiffs' Counsel's time for each of the following stages of the litigation: (1) Investigation of claims, witness interviews and preparation of initial Complaint and First Amended Complaint; (2) Preparation of Lead Plaintiff's Opposition to Defendants' Motion to Dismiss the Complaint and Motion for Partial Reconsideration of the Court's Order on the Motion to Dismiss; (3) Preparation (including research and drafting) of Second Amended Complaint, witness interviews and Motion to Amend Complaint; (4) Preparation (including research and drafting) of Lead Plaintiff's Opposition to Motion to Dismiss the Second Amended Complaint and Preparation for Oral Argument; (5) Negotiation and preparation of joint discovery plan; meet and confer sessions with defendants regarding discovery disputes and related correspondence; preparation of motions to compel discovery; preparation for/attendance at discovery hearings and conferences before Magistrate Judge; (6) Preparation of document requests, interrogatories and initial disclosures; review and analysis of documents produced by defendants and third parties; responding to defendants' document requests; post-complaint witness interviews; (7) Preparation for depositions (including document analysis and preparation of deposition outlines); (8) Preparation of court submissions for settlement approval; (9) Preparation of mediation submissions and participation in mediation sessions and calls with mediator; (10) Analysis of loss causation/damages issues and consultation with damages expert; (11) Preparation of subpoenas on third parties; negotiations with third parties regarding subpoenas; (12) Client communications, meetings, client document-related discovery and client related issues; and (13) Miscellaneous time incurred in prosecuting the Action.

[15] Plaintiffs' Counsel are cognizant of Judge Derman's report and recommendation regarding the fee request in *Johnson & Johnson Deriv. Litig.*, Civil Action No. 10-2033(FLW)(DEA). Notwithstanding the obvious differences between that litigation (which

This modest multiplier falls on the lower end of multipliers awarded by courts in the Third Circuit and is additional evidence that the requested attorneys' fee is reasonable. Multipliers of one to four are often used in common fund cases. *See, e.g.*, *Aetna*, 2001 WL 20928, at *15 (awarding 30% of settlement fund, equating with 3.6 multiplier and noting that multipliers ranging from one to four are frequently awarded in common fund cases when lodestar method is applied) (internal quotations omitted); *see also*; *AT&T*, 455 F.3d at 172 (approving a 1.28 multiplier and noting the Third Circuit's prior "approv[al] of a lodestar multiplier of 2.99 in … a case [that] 'was neither legally nor factually complex.'") (citation omitted); *Genta*, 2008 WL 2229843, at *11 (approving 3.72 multiplier and noting that multiplier "falls within the range approved for reasonable attorneys' fee awards"); *In re ATI Techs., Inc. Sec. Litig.*, 2003 WL 1962400, at *3 (E.D. Pa. Apr. 28, 2003) (approving 2.35 multiplier); *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 103 (D.N.J. Sept. 27, 2001) (approving 2.81 multiplier).

Lead Counsel respectfully submits that this factor weighs strongly in favor of the requested fee.

7. The Fee Requested Is Well Within the Range of Fees Awarded in Similar Cases

Lead Counsel's request for 20% of the Settlement Fund is reasonable under the percentage-of-recovery method and is within the range of fees awarded by courts in similar cases. While there is no general rule, the Third Circuit has observed that fee awards generally range from 19% to 45% of the settlement fund. *See Gen. Motors*, 55 F.3d at 822; *see also Ikon*, 194 F.R.D. at 194 ("Percentages awarded have varied considerably, but most fees appear to fall

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yielded no calculable monetary recovery) and the instant case (which yielded a $22.9 million common fund), even applying the hourly rates recommended by Judge Derman in that very different case would generate a lodestar multiplier no higher than 1.45 ($4,580,000 / $3,168,164) – a figure well within the bounds of reasonableness.

in the range of nineteen to forty-five percent."); *cf. La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp*., 2009 WL 4730185, at *8 (D.N.J. Dec. 4, 2009) (noting that "'[c]ourts within the Third Circuit often award fees of 25% to 33⅓% of the recovery'") (citation omitted); *Safety Components*, 166 F. Supp. 2d at 101-02 (reviewing Third Circuit case law and stating that while the median fee award in class actions is approximately twenty-five percent, awards of more are not uncommon in securities class actions) (internal citations omitted).

Ultimately, ample precedent exists in the Third Circuit for granting fees to counsel that are equal to or greater than the fees requested herein which confirms the reasonableness of the requested fee. *See, e.g.*, *In re Sterling Fin. Corp. Sec. Class Action*, 2009 WL 2914363, at *2 (E.D. Pa. Sept. 10, 2009) (awarding 30% of common fund); *In re Am. Bus. Fin Servs. Inc. Noteholders Litig.*, 2008 WL 4974782, at *24 (E.D. Pa. Nov. 21, 2008) (awarding 25% of common fund); *Genta*, 2008 WL 2229843, at *11 (awarding 25% of common fund); *In re Vicuron Pharms., Inc. Sec. Litig.*, 512 F. Supp. 2d 279, 287 (E.D. Pa. 2007) (awarding 25% of common fund); *In re AT&T Corp. Sec. Litig.*, 2005 WL 6716404, at *6 (D.N.J. Apr. 25, 2005) (awarding 21.25% of common fund); *In re Ravisent Techs., Inc. Sec. Litig.*, 2005 WL 906361, at *11 (E.D. Pa. Apr. 18, 2005) (awarding 33⅓% of common fund and acknowledging that attorney fees of 30-35% were commonly granted); *Rent-Way*, 305 F. Supp. 2d 491 (awarding 25% of common fund); *ATI Techs.*, 2003 WL 1962400, at *5 (awarding 30% of common fund); *Cendant*, 243 F. Supp. 2d at 173 (awarding 30% of common fund); *In re Cell Pathways, Inc. Sec. Litig. II*, 2002 WL 31528573, at *15 (E.D. Pa. Sept. 23, 2002) (awarding 30% of common fund). Lead Counsel's present fee request is therefore consistent with, and in many cases lower than, fee award percentages granted in this Circuit.

8. Impact of Governmental Investigations

The Third Circuit has advised district courts to examine whether class counsel benefited from a governmental investigation or enforcement action concerning the alleged wrongdoing, because this can indicate whether or not counsel should be given full credit for obtaining the value of the settlement fund for the class.

While there were governmental investigations into the quality control issues at McNeil, as well as a permanent injunction filed by the U.S. Department of Justice, none of these investigations or proceedings concerned alleged misrepresentations in J&J's filings with the SEC or other public statements regarding the quality control issues at McNeil. For example, there was no investigation brought by the SEC. Through the effort of no one but their own, Plaintiffs' Counsel, in addition to the claims in the First Amended Complaint alleging Defendants' false and misleading SEC filings and conference call statements, developed a claim that defendant Caruso misled the public during a May 11, 2010 analyst conference regarding the true revenue impact of the McNeil OTC recall and Fort Washington, Pennsylvania plant shutdown. This claim, which was based on Plaintiffs' Counsel's review of documents produced by J&J in discovery, was one of the primary bases for Plaintiffs' Counsel's filing of the Second Amended Complaint in August 2012.

Moreover, none of the government investigations or proceedings resulted in any recovery for J&J shareholders. Indeed, the Supreme Court has emphasized that private securities actions, such as the instant Action, are "an essential supplement to criminal prosecutions and civil enforcement actions." *Tellabs*, 551 U.S. 308 at 313. Thus, the value of the Settlement achieved is directly attributable to the efforts undertaken by Plaintiffs' Counsel in the Action, and this factor supports the reasonableness of the requested fee award.

9. The Requested Fee Is Significantly Lower than Contingent Fee Arrangements Negotiated in Non-Class Litigation

The Third Circuit has also suggested that the requested fee be compared to "the percentage fee that would have been negotiated had the case been subjected to a private [non-class] contingent fee agreement." *AT&T*, 455 F.3d at 165. The requested fee is much lower than what would have been negotiated in the private marketplace.[16]

If this Action were a non-representative litigation, the customary arrangement likely would be contingent, on a percentage basis, and in the range of 30%-33% of the recovery – a significantly higher percentage that the 20% requested in this Action. *See Blum*, 465 U.S. at 904 ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery."); *Ikon*, 194 F.R.D. at 194 ("In private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery.").

The requested fee award of 20% is thus reasonable when compared with such privately agreed upon contingent fee arrangements.

10. Innovative Terms

The terms of the Settlement, while providing a benefit to the Class, are otherwise standard for a securities class action settlement. Therefore, this factor neither supports nor

[16] *See IBEW Local 697 Pension Fund v. Int'l Game Tech., Inc.*, 2012 WL 5199742, at *4 (D. Nev. Oct. 19, 2012) ("Plaintiffs' counsel shouldered the risk of non-payment by taking the class action suit on a contingency fee basis. 'It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases.'").

detracts from Lead Counsel's fee request.[17]

11. Lead Plaintiff Supports Lead Counsel's Fee Request

Lead Counsel is submitting its fee request with the prior approval of the Lead Plaintiff and this application is, in all respects, in accordance with the retainer agreement entered into by Lead Plaintiff and Lead Counsel at the outset of the Action. Gröttheim Dec., ¶7. Under the retainer agreement, Lead Counsel agreed to undertake the litigation on an entirely contingent basis, meaning that Lead Counsel would not be compensated at all, or reimbursed for any expenses incurred on behalf of the Class, unless it obtained a recovery for the Class. The retainer agreement also provided that, if Lead Counsel was successful at obtaining a recovery for the Class, it could seek up to 25% of the recovery as attorneys' fees. *Id.* Given the protections "embedded [for the class] in the PSLRA[,]…courts 'should accord a presumption of reasonableness to any fee request submitted pursuant to a retainer agreement that was entered into between a properly-selected lead plaintiff and properly-selected lead counsel.'" *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 758 (S.D. Ohio 2007).

As set forth in the Gröttheim Declaration, Lead Plaintiff actively monitored the Action and consulted with counsel during the course of the Parties' settlement negotiations. Gröttheim Dec., ¶¶3-5. As a sophisticated institutional investor, Lead Plaintiff's oversight in the conduct of litigation and settlement negotiations is the precise result Congress intended in enacting the PSLRA. Congress enacted the PSLRA in large part to encourage institutional investors, like AP7, to assume control of securities class actions and "increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of

[17] *See Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 340 (E.D. Pa. 2007) (where settlement did not contain any particularly innovative terms, this did not adversely affect counsel's fee request).

shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel." H.R. Conf. Rep. No. 104-369, at 32 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 731. Congress believed that institutions and other investors with a significant financial stake in the outcome of a securities class action would be in the best position to monitor the ongoing prosecution of the litigation, select counsel, and to assess the reasonableness of counsel's fee request. Here, Lead Plaintiff's approval of the present fee request (and the existence of its *ex ante* fee agreement with Lead Counsel) lends additional support to Lead Counsel's request and is a fact that should be given considerable weight in the Court's determination of a reasonable fee in this case.

IV. PLAINTIFFS' COUNSEL ARE ENTITLED TO REIMBURSEMENT FOR THEIR REASONABLE LITIGATION EXPENSES

Lead Counsel also requests reimbursement of expenses in the amount of $361,447.44, incurred by Plaintiffs' Counsel in connection with the investigation, prosecution and resolution of the Action on behalf of the Class, plus interest on this amount at the same rate as earned by the Settlement Fund. Mustokoff Decl., ¶65. Courts in the Third Circuit recognize that attorneys who create a common fund for the benefit of a class are also entitled to reimbursement of reasonable litigation expenses and costs from the fund. *See Ikon*, 194 F.R.D. at 192 (internal citations omitted). *See also In re Datatec Sys., Inc. Sec. Litig.*, 2007 WL 4225828, at *9 (D.N.J. Nov. 28, 2007) (approving litigation expenses reflecting "costs associated with experts, consultants, investigators, legal research, mediation, meals, hotels, transportation, word processing, court fees, mailing postage, telephone…"); *Safety Components*, 166 F. Supp. 2d at 91 (finding counsel to be entitled to reimbursement of expenses "that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action").

From the outset of this Action, Plaintiffs' Counsel were aware that they might not recover any of their expenses, and, at the very least, would not recover any of their out-of-pocket expenses until the Action was successfully resolved. Thus, Plaintiffs' Counsel were motivated to, and did, take significant steps to minimize expenses whenever practicable without jeopardizing the vigorous and efficient prosecution of the case. Mustokoff Dec., ¶66.

The expenses incurred by Plaintiffs' Counsel are set forth in the Kessler and Cecchi Declarations, respectively, and include the following categories of expenses, among others: on-line legal and factual research,[18] experts' fees, mediation, travel, postage, messenger services, filing fees and other incidental expenses directly related to the prosecution of this Action. *See* Exhibits 2 to the Kessler and Cecchi Declarations, respectively. A large portion of Plaintiff's Counsels' expenses was used to fund Lead Plaintiff's investigation, to pay for experts, and to pay for the costs of formal mediation with Judge Weinstein. These expenses were critical to the prosecution and resolution of this Action and are of the type "routinely billed by attorneys to paying clients in similar cases" and should therefore be reimbursed from the Settlement Fund. *Schering-Plough*, 2012 WL 1964451, at *7. To date, no objections have been received regarding the maximum expense number set forth in the Notice. Accordingly, Lead Counsel respectfully requests reimbursement of Plaintiffs' Counsel's expenses in the amount of $361,447.44, plus interest.

[18] This reflects charges for computerized factual and legal research services such as *LexisNexis* and *Westlaw*. It is standard practice for attorneys to use *LexisNexis* and *Westlaw* 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.

V. CONCLUSION

With no assurance of success and in the face of substantial risks, Lead Plaintiff and its counsel pursued the Action and have successfully obtained a $22.9 million cash recovery for the benefit of the Class. For the reasons set forth herein, Lead Counsel respectfully requests that the Court award: (i) attorneys' fees of 20% of the Settlement Fund; and (ii) reimbursement of $361,447.44 in Litigation Expenses incurred by Plaintiffs' Counsel in connection with the prosecution and resolution of this Action, plus interest.

Dated: October 10, 2013

CARELLA, BYRNE, CECCHI, OLSTEIN, BRODY & AGNELLO P.C.

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