UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PROTHENA CORPORATION PLC SECURITIES LITIGATION	)	Case No. 1:18-cv-06425-ALC
	)	CLASS ACTION

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

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Court-appointed co-lead counsel, Labaton Sucharow LLP ("Labaton Sucharow") and Levi & Korsinsky LLP ("Levi Korsinsky") (collectively "Co-Lead Counsel"), respectfully submit this memorandum of law in support of their motion, on behalf of themselves and additional counsel Bernstein Litowitz Berger & Grossmann LLP ("Bernstein Litowitz," and with Co-Lead Counsel, "Plaintiffs' Counsel"), pursuant to Fed. R. Civ. P. 23 and 54(d), for an award of attorneys' fees in the amount of 30% of the Settlement Fund, which would calculate to $4,725,000, plus accrued interest.[1] Co-Lead Counsel also seek payment of $112,468.23, plus accrued interest, in litigation expenses that counsel reasonably incurred in prosecuting the Action.[2]

PRELIMINARY STATEMENT

The proposed Settlement, if approved by the Court, will resolve this case in its entirety in exchange for a $15,750,000 cash payment, pursuant to the Stipulation. The Settlement will provide valuable compensation to the Settlement Class while avoiding further delay and the significant risks of continued litigation.

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[1] As set forth in the Notice, Co-Lead Counsel was assisted in this case by Bernstein Litowitz. Co-Lead Counsel have agreed to share the awarded attorneys' fees with Bernstein Litowitz. The allocations of fees amongst Plaintiffs' Counsel will in no way increase the fees that are deducted from the Settlement Fund, and no other attorneys will share the awarded attorneys' fees. Pursuant to the Stipulation and Agreement of Settlement, dated August 26, 2019 (the "Stipulation") (ECF No. 43-1), ¶¶14, attorneys' fees and expenses awarded by the Court are payable immediately after entry of the Order awarding attorneys' fees and expenses and entry of the Judgment.

[2] Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation. Citations to "¶" in this memorandum refer to paragraphs in the Joint Declaration of Carol C. Villegas and Adam M. Apton in Support of (I) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation and (II) Co-Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Litigation Expenses (the "Joint Declaration" or "Joint Decl."), filed herewith.

All exhibits herein are annexed to the Joint Declaration. For clarity, citations to exhibits that themselves have attached exhibits will be referenced as "Ex. ___ - ___." The first numerical reference is to the designation of the entire exhibit attached to the Joint Declaration and the second reference is to the exhibit designation within the exhibit itself.

The benefits of the Settlement are clear when weighed against the risk that the Settlement Class might recover less (or nothing) if litigation continued. The proposed Settlement will provide a meaningful recovery in a case where Defendants had substantial defenses to liability, including challenges to falsity, scienter, and loss causation. In particular, Defendants were expected to advance vigorous challenges to scienter and loss causation in their motion to dismiss. While Lead Plaintiffs believe they had compelling counter arguments, there is a substantial risk that Defendants' motion might result in the elimination of a significant portion—or even all—of the Settlement Class's potential damages. Even if Defendants' motion to dismiss were not successful, Defendants would have continued to press their arguments at summary judgment and beyond. In addition to litigation risks, there were also significant collectability risks in the event the case continued to be litigated. Based on Lead Plaintiffs' analysis, Prothena has little revenue, significant debt, and dwindling cash reserves. The most likely source of funds available to pay any future judgment or settlement is a "wasting" directors-and-officers insurance policy that will be rapidly depleted by rising defense costs related to this Action.

In the face of these risks—as well as the fully contingent nature of the case—Plaintiffs' Counsel devoted substantial resources to prosecuting this Action against highly skilled opposing counsel. As detailed in the Joint Declaration, Plaintiffs' Counsel: conducted a robust investigation and filed a detailed consolidated amended complaint (the "Amended Complaint"), which involved contacting 39 potential witnesses with knowledge of the alleged events and interviews with five former employees of Prothena, analysts, and NEOD001 trial administrators; consulted with an economics expert regarding loss causation and damages, and with an expert in clinical trial design regarding Lead Plaintiffs' claims concerning, among other things, the validity of Company's use of NT-proBNP "best response" as a clinical trial endpoint; reviewed

the voluminous public record; exchanged mediation submissions with Defendants; and participated in a full-day mediation session under the auspices of an experienced and highly respected mediator from the Judicial Mediation and Arbitration Services ("JAMS"), Robert A. Meyer Esq. (the "Mediator").

Against this backdrop, Co-Lead Counsel request a fee of 30% of the Settlement Fund, which would represent a reasonable lodestar "multiplier" of 2.7 on counsel's time in the case, and payment of litigation expenses in the amount of $112,468.23. The requested fee is made with the full support of the Lead Plaintiffs. *See* Exs. 1 and 2. As demonstrated below, the request is well within the range of attorneys' fees typically awarded in securities class actions of this size, and is well supported by both case law and the facts of this case.

For the foregoing reasons, Co-Lead Counsel respectfully submit that the requested fees and expenses should be approved.

ARGUMENT

I. A REASONABLE PERCENTAGE OF THE FUND RECOVERED IS THE APPROPRIATE METHOD FOR AWARDING ATTORNEYS' FEES IN COMMON FUND CASES

Attorneys who achieve a benefit for class members in the form of a "common fund" are entitled to be compensated for their services from that settlement fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole"); *see also Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). The purpose of the common fund doctrine is to fairly and adequately compensate counsel for services rendered and to ensure that all class members contribute equally towards the costs associated with litigation on their behalf. *See Id.* at 47.

Courts have recognized that, in addition to providing just compensation, "awards of fair attorneys' fees from a common fund should also serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future alleged misconduct of a similar nature." *City of Providence v. Aeropostale, Inc*., No. 11-cv-7132 (CM), 2014 WL 1883494, at *11 (S.D.N.Y. May 9, 2014), *aff'd*, *Arbuthnot v. Pierson,* 607 F. App'x. 73 (2d Cir. 2015).

The Second Circuit has authorized district courts to employ the percentage-of-the-fund method when awarding fees in common fund cases. *See Goldberger,* 209 F.3d at 47 (holding that the percentage-of-the-fund method may be used to determine appropriate attorneys' fees, although the lodestar method may also be used). In expressly approving the percentage method, the Second Circuit recognized that "the lodestar method proved vexing" and resulted in "an inevitable waste of judicial resources." *Goldberger,* 209 F.3d at 48, 49; *Savoie v. Merchs. Bank,* 166 F.3d 456, 460 (2d Cir. 1999) (stating that "the percentage-of-the-fund method has been deemed a solution to certain problems that may arise when the lodestar method is used in common fund cases").

Indeed, "[t]he trend in this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 121 (2d Cir. 2005);[3] *see also In re Blech Sec. Litig*., No. 94 Civ. 7696, 2000 WL 661680, at *5 (S.D.N.Y. May 19, 2002) ("This court … continues to find that the percentage of the fund method is more appropriate than the lodestar method for determining attorney's fees in common fund cases."); *In re IMAX Sec. Litig.,* No. 06 Civ. 6128 (NRB), 2012 WL 3133476, at

[3] All internal quotations and citations are omitted unless otherwise stated.

*5 (S.D.N.Y. Aug. 1, 2012) ("'the percentage method continues to be the trend of district courts in the [Second] Circuit'").

In sum, the weight of authority suggests that the Court should use the percentage-of-recovery method in determining a reasonable attorneys' fee here.

II. A FEE OF 30% IS CONSISTENT WITH FEES AWARDED IN COMPARABLE CASES WITHIN THIS DISTRICT

Many courts within the Southern District of New York have previously awarded fees of 30% in comparable complex securities class actions. *See, e.g.*, *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06 Civ. 4270 (PAC), 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) (collecting cases awarding over 30% and noting that "Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit"); *Stefaniak v. HSBC Bank USA, N.A.*, No. 05-720, 2008 WL 7630102, at *3 (W.D.N.Y. June 28, 2008) (awarding 33% of fund, finding it "typical in class action settlements in the Second Circuit"); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 368 (S.D.N.Y. 2002) (awarding 33 1/3% of $11.5 settlement and citing cases that also awarded over 30% including *In re Apac Teleservs., Inc. Sec. Litig*., No. 97-cv-9145 (S.D.N.Y. June 29, 2001), where the court awarded 33 1/3% of $21 million settlement, and *Newman v. Caribiner Int'l Inc*., No. 99-cv-2271 (S.D.N.Y. Oct. 25, 2001), where the court awarded 33 1/3% of $15 million settlement); *Schnall v. Annuity & Life Re (Holdings), Ltd*., No. 02-cv-2133, slip op. at 8-9 (D. Conn. Jan. 21, 2005) (awarding 33-1/3% of $16.5 million fund) (Ex. 10);[4] *In re Giant Interactive Grp., Inc. Sec. Litig*., 279 F.R.D. 151, 165 (S.D.N.Y. 2011) (awarding 33% of $13 million settlement); *Taft v. Ackermans*, No. 02-cv-7951 (PKL), 2007 WL 414493, at *1, 11 (S.D.N.Y. Jan. 31, 2007) (awarding 30% of $15.175 million

[4] All unreported "slip opinions" are submitted herewith in a compendium that is Ex. 10 to the Joint Declaration.

fund); *In re LaBranche Sec. Litig*, No. 03-cv-8201, slip op. at 1 (S.D.N.Y. Jan. 22, 2009) (awarding 30% of $13 million fund) (Ex. 10); *In re Ashanti Goldfields Sec. Litig*., No. 00-cv-717, 2005 WL 3050284, at *6 (E.D.N.Y. Nov. 15, 2005)(27.5% fee of $15 million settlement); *City of Providence,* 2014 WL 1883494, at *20 (awarding 33% of $15 million settlement).

The requested fee is also well within the range of percentage fee awards that have been granted in comparable securities class actions in other Circuits. *See, e.g., Public Pension Grp. v. KV Pharm. Co*., No. 08-cv-1859 (CEJ), slip op. at 2 (E.D. Mo. Apr. 23, 2014) (Ex. 10) (awarding 30% of $12.8 million settlement); *Klugmann v. Am. Capital Ltd*., No. 09-cv-00005-PJM, slip op. at 9 (D. Md. June 12, 2012) (Ex. 10) (awarding 33.3% of $18 million settlement); *see also In re Heritage Bond Litig.*, No. No. 02–ML–1475 DT (RCx), 2005 WL 1594403, at *23 (C.D. Cal. June 10, 2005) (awarding 33 1/3% of $27.78 million settlement); *In re E.W. Blanch Holdings, Inc. Sec. Litig*., No. 01-258, 2003 WL 23335319, at *3 (D. Minn. June 16, 2003) (awarding 33 1/3% of $20 million settlement).

Accordingly, the 30% fee requested here is consistent with fees awarded in similar cases in this District and nationwide.

III. THE FACTORS CONSIDERED WITHIN THE SECOND CIRCUIT CONFIRM THAT THE REQUESTED FEE IS REASONABLE

The Second Circuit has set forth the following criteria that courts should consider when reviewing a request for attorneys' fees in a common fund case, whether under the percentage-of-the-fund approach or the lodestar multiplier approach:

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

Goldberger, 209 F.3d at 50. As discussed below, these factors and the analyses herein demonstrate that Co-Lead Counsel's requested fee is reasonable.

A. Plaintiffs' Counsel Have Devoted Substantial Time and Labor to the Action

The time and effort expended by Plaintiffs' Counsel in prosecuting the Action and achieving the Settlement support the requested fee.

As set forth in greater detail in the Joint Declaration, Plaintiffs' Counsel engaged in a thorough factual investigation and analysis of the claims and defenses in the Action that included, among other things, the review and analysis of: (i) press releases, news articles, transcripts, and other public statements issued by or concerning Prothena and the Individual Defendants; (ii) research reports issued by financial analysts concerning Prothena's business; (iii) Prothena's filings with the SEC; (iv) news articles, media reports and other publications concerning the pharmaceutical industry and markets; (v) Prothena's filings with the U.S. Food and Drug Administration and the European Medicines Agency, as well as any documents issued by these agencies concerning the same; and (vi) other publicly available information and data concerning Prothena, its securities, and the markets therefor. Counsel also consulted with an expert in pharmaceutical study design and regulation; contacted 39 potential witnesses with knowledge of the alleged events; conducted interviews with five former employees of Prothena, analysts, and NEOD001 trial administrators; and reviewed a significant amount of medical literature about AL amyloidosis, the condition NEOD001 was designed to address. Co-Lead Counsel also conferred with an expert on the issues of damages and loss causation. Joint Decl. ¶¶ 16-21.

In connection with this work, Plaintiffs' Counsel expended more than 3,064.25 hours with a lodestar value of $1,766,167.75. *See* Ex. 8 (Summary Table of Lodestars and Expenses). At all times, Plaintiffs' Counsel took care to staff the matter efficiently and avoided unnecessary duplication of effort.

Accordingly, it is respectfully submitted that the time and labor dedicated to the litigation support the fee request.

B. The Magnitude and Complexity of the Action Support the Requested Fee

The magnitude and complexity of the Action also support the requested fee. Courts routinely recognize that securities class action litigation is "notably difficult and notoriously uncertain." *City of Providence,* 2014 WL 1883494, at *5; *In re FLAG Telecom Holdings, Ltd.* No. 02-cv 3400, 2010 WL 4537550, at *27 (S.D.N.Y. Nov. 8, 2010) (same). This case was no different.

As discussed in the Joint Declaration, this Action involved difficult, complex, hotly disputed, and expert-intensive issues related to drug development, clinical trials, and loss causation. Prosecuting the Settlement Class's claims required skill and dedication, including extensive expert analysis. Accordingly, the magnitude and complexity of the Action supports the conclusion that the requested fee is fair and reasonable. *See City of Providence*, 2014 WL 1883494, at *16 ("[T]he complex and multifaceted subject matter involved in a securities class action such as this supports the fee request.").

C. The Risks of the Litigation Support the Requested Fee

"Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01-CV-11814 (MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004). "Courts have repeatedly recognized that 'the risk of litigation' is a pivotal factor in assessing the appropriate attorneys' fees to award plaintiffs' counsel in class actions." *In re Telik, Inc. Sec. Litig.* 576 F. Supp. 2d 570, 592 (S.D.N.Y. 2008). For this reason, the Second Circuit has said that "[t]he level of risk associated with litigation . . . is 'perhaps the foremost factor' to be considered in assessing the propriety of

the multiplier." *McDaniel v. Cty. of Schenectady*, 595 F.3d 411, 424 (2d Cir. 2010) (quoting *Goldberger*, 209 F.3d at 54).

While Lead Plaintiffs remain confident in their ability to prove their claims and to effectively rebut Defendants' defenses, they recognize that proving liability and recovering their damages was far from certain. The likelihood of a recovery was further complicated by the Company's precarious financial situation. The primary risks are discussed below. For a more detailed discussion, the Court is respectfully referred to the Joint Declaration, Section III and the Memorandum of Law in Support of Lead Plaintiffs' Motion for Final Approval of Settlement and Approval of Plan of Allocation, Sections I.D.4 - I.D.6.

1. Risks Concerning Liability

Defendants were expected, in their motion to dismiss and beyond, to strongly dispute the existence of falsity and scienter, particularly throughout the course of the Class Period, which required considerable legal skill to rebut. *See* Joint Decl. ¶¶24-27. Absent the Settlement, there was a significant risk that the Court might have granted Defendants' motion to dismiss in part or in whole on any of several grounds.

In particular, Defendants would likely have advanced several arguments to challenge that the alleged misstatements were false. For instance, Defendants were expected to argue that: (i) their statements concerning the use of NT-proBNP "best response" endpoint were novel yet accurate and well supported in the scientific literature; (ii) Lead Plaintiffs' position as to the validity of NT-proBNP "best response" as a surrogate efficacy endpoint in the NEOD001 clinical trials was nothing more than a well-publicized scientific disagreement; and (iii) they disclosed all available information concerning the validity and NT-proBNP "best response" as a surrogate efficacy endpoint and that, therefore, many of the challenged statements about NT-

proBNP "best response" were technically accurate when taken in the context of Defendants' more fulsome disclosures. Joint Decl. ¶25.

Additionally, Lead Plaintiffs would have faced obstacles to pleading and proving that Defendants acted with the required intent to defraud or severe recklessness necessary to establish Defendants' scienter. Specifically, Defendants likely would have argued, among other things, that: (i) Defendants reasonably believed that NEOD001's clinical data and studies would produce data supporting its efficacy; (ii) the clinical trial data for NEOD001 was blinded and Lead Plaintiffs have not adequately alleged, and could not prove, that Defendants knew their statements were false; (iii) Defendants had no incentive to continue or to accelerate NEOD001's clinical trials, or invest limited cash reserves in building a commercial organization for possible regulatory approval to market NEOD001, if they knew the drug was going to fail; (iv) raising capital for general business operations does not contribute to a strong inference of scienter; and (v) Defendants Dr. Kinney and Mr. Nguyen could have, but did not, exercise the vast majority of their vested stock options with significant in-the-money value during the Class Period. Joint Decl. ¶26.

Even if Lead Plaintiffs prevailed on Defendants' motion to dismiss, Defendants would likely move for summary judgment following discovery, arguing, among other things, that there was no evidence that there was anything fraudulent about the way Defendants presented the NT-proBNP "best response" endpoint. In particular, Defendants would have argued that Lead Plaintiffs would not be able to prove that anyone in 2015 or 2016 believed that subsequent clinical trials would fail. Joint Decl. ¶27.

Many of these same arguments could have been continued at summary judgment, trial, or on appeal, and, in the absence of any settlement, presumably would have been. Thus, there were

very significant risks in prevailing, had the case not settled, and no guarantee that Defendants' liability could be established. *See In re Bayer AG Sec. Litig.*, No. 03-cv-1546, 2008 WL 5336691, at *5 (S.D.N.Y. Dec. 15, 2008) (noting the "difficulty of establishing loss causation [] and the difficulty in proving that Defendants acted with scienter, militate in favor of fee awards.").

2. Risks Concerning Loss Causation and Damages

Whether Lead Plaintiffs could demonstrate loss causation and damages was also vigorously challenged by Defendants and would continue to require a significant amount of effort on the part of Lead Counsel. "Proof of damages in complex class actions is always complex and difficult and often subject to expert testimony." *Shapiro v. JPMorgan Chase & Co.*, Nos. 11 Civ. 8831(CM)(MHD), 11 Civ. 7961(CM), 2014 WL 1224666, at *11 (S.D.N.Y. Mar. 24, 2014).

Lead Plaintiffs anticipate that Defendants would have strenuously challenged, in the motion to dismiss and thereafter, each of the three alleged corrective disclosures. In general, they would likely have argued that the release of an analyst report on November 8, 2017 criticizing the Company's use of NT-proBNP best response was not "new" information and therefore did not constitute a corrective disclosure, that the resignation of Defendant Noonberg as Prothena's Chief Medical Officer on February 2, 2018 was unrelated to the ongoing NEOD001 trials and the alleged fraud, and that the cancellation on April 23, 2018 of the NEOD001 clinical trials was not anticipated and therefore could not have been disclosed until the then-recently completed review of the PRONTO trial data. Joint Decl. ¶29.

Additionally, Defendants would have also likely argued that the negative analyst report issued on November 8, 2017 did not contain "new" information sufficient to correct Defendants' alleged misstatements, and that the resignation of Defendant Noonberg as Chief Medical Officer

on February 2, 2018 was unrelated to the ongoing NEOD001 trials and the alleged fraud. *Id*. ¶¶30-31.

In order for the Settlement Class to recover damages at the maximum level estimated by Lead Plaintiffs' damages expert, it would need to prevail on each and every one of the claims alleged and establish loss causation related to all of the alleged disclosures. The damage assessments of the Parties' trial experts would be sure to vary substantially, and expert discovery and trial would become a "battle of experts" requiring significant work on the part of Lead Counsel. *See, e.g., In re Flag Telecom Holdings Ltd. Sec. Litig.*, 2010 WL 4537550, at *28 (burden in proving the extent of the class's damages weighed in favor of approving fee request).

3. Risks Related to Defendants' Ability to Pay

Lead Plaintiffs' ability to recover was also negatively impacted by the Company's financial state during the pendency of the litigation. Based on Co-Lead Counsel's analysis, Prothena operates at a net loss, has yet to commercialize any of its investigational drugs, and depends on its limited cash reverses to fund operations. As of December 31, 2018, the Company's SEC filings report that it had an accumulated deficit of $598.0 million and cash and cash equivalents of $427.7 million. Joint Decl. ¶37.

Thus, in the event of protracted litigation—with defense costs draining millions from available insurance policies—there was no guarantee that the Defendants' insurance and wasting cash reserves would be sufficient to satisfy a judgment greater than the Settlement Amount. *See* Joint Decl. §III.C. Had the litigation continued, there would have been significant barriers to recovering even what the Parties have agreed to in the Settlement, much less anything more, given the wasting insurance policy.

4. The Contingent Nature of Counsel's Representation

Despite the uncertainties concerning the outcome of the case, Co-Lead Counsel undertook this Action on an entirely contingent fee basis, assuming the substantial risk that the litigation would yield no or potentially little recovery and leave them uncompensated for their investment of time and expenses. Courts within the Second Circuit have consistently recognized that this risk is an important factor favoring an award of attorneys' fees. *See, e.g.*, *In re Am. Bank Note Holographics, Inc. Sec. Litig*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (concluding it is "appropriate to take this [contingent fee] risk into account in determining the appropriate fee to award").

Unlike counsel for defendants, who are paid substantial hourly rates and reimbursed for their expenses on a regular basis, Plaintiffs' Counsel have not been compensated for any time or expenses and would have received no compensation or expenses had this case not achieved a recovery for the Settlement Class. From the outset, Plaintiffs' Counsel understood that they were embarking on a complex, expensive, and lengthy endeavor with no guarantee of ever being compensated. In undertaking that responsibility, Co-Lead Counsel were obligated to ensure that sufficient attorney and professional resources were dedicated to the prosecution of the Action and that funds were available to compensate staff and to pay for the costs entailed. Indeed, there have been many class actions in which plaintiffs' counsel took on the risk of pursuing claims on a contingent basis, expended thousands of hours and millions of dollars in expenses and time and received nothing for their efforts.[5] This case could have been dismissed like so many others on

[5] *See, e.g.*, *Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (reversal of jury verdict of $81 million against accounting firm after a 19-day trial); *Bentley v. Legent Corp.*, 849 F. Supp. 429 (E.D. Va. 1994), *aff'd*, *Herman v. Legent Corp.*, 50 F.3d 6 (4th Cir. 1995) (directed verdict after plaintiffs' presentation of its case to the jury); *Landy v. Amsterdam*, 815 F.2d 925 (3d Cir. 1987) (directed verdict for defendants after five years of litigation); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir.

Defendants' motion to dismiss or on summary judgment, leading to absolutely no recovery for the Settlement Class or Plaintiffs' Counsel. Accordingly, the contingency risk in this case supports the requested attorneys' fee.

D. The Quality of Plaintiffs' Counsel's Representation

The quality of the representation by Plaintiffs' Counsel is another important factor that supports the reasonableness of the requested fee.

Since the passage of the PSLRA, Labaton Sucharow, Levi & Korsinsky, and Bernstein Litowitz have been approved by courts to serve as lead counsel in numerous notable securities class actions throughout the United States. *See* Joint Decl. ¶¶71-74; Ex. 5-D, 6-C, and 7-C. Here, the firms have devoted considerable time and effort to this case, thereby bringing to bear many years of collective experience.

The quality of opposing counsel is also important in evaluating the quality of Plaintiffs' Counsel's work. *See Flag Telecom*, 2010 WL 4537550, at *28; *Teachers Ret. Sys*., 2004 WL 1087261, at *20. Indeed, Defendants' Counsel are long-time leaders among national litigation firms, with well-noted expertise in corporate litigation practices. Notwithstanding this formidable opposition, Plaintiffs' Counsel were able to develop Lead Plaintiffs' case so as to resolve the litigation on terms favorable to the Settlement Class. *See, e.g.*, *In re Adelphia Commc'ns Corp. Sec. and Derivative Litig.*, MDL No. 03-1529, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006) ("The fact that the settlements were obtained from defendants

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1996) (overturning plaintiffs' verdict following two decades of litigation); *In re Apple Comput. Sec. Litig*., No. C-84-20148, 1991 WL 238298, at *1-2 (N.D. Cal. Sept. 6, 1991) ($100 million jury verdict vacated on post-trial motions); *In re BankAtlantic Bancorp, Inc.,* No. 07-cv-61542 (S.D. Fla. 2010) (in case tried by Labaton Sucharow, after plaintiffs' jury verdict, court granted defendants' motion for judgment as a matter of law on loss causation grounds), *aff'd,* 688 F. 3d 713 (11th Cir. 2012) (trial court erred, but defendants entitled to judgment as matter of law on lack of loss causation).

represented by 'formidable opposing counsel from some of the best defense firms in the country' also evidences the high quality of lead counsels' work."), *aff'd*, 272 F. App'x. 9 (2d Cir. 2008).

E. The Requested Fee in Relation to the Settlement

"In determining whether the Fee Application is reasonable in relation to the settlement amount, the Court compares the Fee Application to fees awarded in similar securities class-action settlements of comparable value." *In re Marsh & McLennan*, *Co. Sec. Litig*. No. 04-8144, 2009 WL 5178546, at *19 (S.D.N.Y. Dec. 23, 2009); *see also In re Veeco Instruments Inc. Sec. Litig,* No. 05-1695, 2007 WL 4115808, at *4 (S.D.N.Y. Nov. 7, 2007) (noting that the fee awarded is "consistent with fees awarded in a similar class actions settlements of comparable value"). As discussed above, the attorneys' fees requested here are well within the range of percentage fee awards in comparable securities class action cases within this District. *See* §II., *supra*.

F. Public Policy Considerations Support the Requested Fee

The federal securities laws are remedial in nature and, to effectuate their purpose of protecting investors, it is respectfully submitted that courts should encourage meritorious private lawsuits such as this one. *See Basic Inc. v. Levinson*, 485 U.S. 224, 230-31 (1988). 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); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (noting that the court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions).

Courts within the Second Circuit have reasoned that if the "important public policy [of enforcing the securities laws] is to be carried out, the courts should award fees which will

adequately compensate Lead Counsel for the value of their efforts, taking into account the enormous risks they undertook." *Flag Telecom*, 2010 WL 4537550, at *29. Specifically, "[i]n order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives." (quoting, *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005)); *see also Hicks v. Stanley*, No. 01-10071, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding.")

It is respectfully submitted that lawsuits such as this one can only be maintained if competent counsel can be retained to prosecute them. This will occur if courts award reasonable and adequate compensation for such services where successful results are achieved. Public policy therefore supports awarding Co-Lead Counsel's attorneys' fee request.

G. The Requested Attorneys' Fees Are Reasonable Under the Lodestar Cross-Check

To ensure the reasonableness of a fee awarded under the percentage method, the Second Circuit encourages a "crosscheck" against counsel's lodestar. *Goldberger*, 209 F.3d at 50. Under the lodestar method, a court must engage in a two-step analysis: first, to determine the lodestar, the court multiplies the number of hours each timekeeper spent on the case by each person's reasonable hourly rate; and second, the court adjusts that lodestar figure (by applying a multiplier) to reflect such factors as the risk and contingent nature of the litigation, the result obtained, and the quality of the attorney's work. *See, e.g., Flag Telecom*, 2010 WL 4537550, at *26 ("Under the lodestar method, a positive multiplier is typically applied to the lodestar in recognition of the risk of litigation, the complexity of the issues, the contingent nature of the

engagements, the skill of the attorneys, and other factors"). Performing the lodestar cross-check here confirms that the fee requested by Co-Lead Counsel is reasonable and should be approved.

Plaintiffs' Counsel have collectively expended more than 3,064.25 hours in the prosecution of this case. *See* Joint Decl. ¶70; Exs. 5-A, 6-A, 7-A, and Ex. 8. The resulting lodestar at their current rates is $1,766,167.75. *Id*.; Ex. 8. "[T]he use of current rates to calculate the lodestar figure has been endorsed repeatedly by the Supreme Court, the Second Circuit and district courts within the Second Circuit as a means of accounting for the delay in payment inherent in class actions and for inflation." *In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12–cv–8557 (CM), 2014 WL 7323417, at *15 (S.D.N.Y. Dec. 19, 2014) (citing *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989)); *see also Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir. 1998) (similar); *Telik,* 576 F. Supp. 2d at 589 n.10 (similar).

The hourly rates of Plaintiffs' Counsel here range from $765 to $1,300[6] for partners, $600 to $775 for of-counsels and senior counsel, and $335 to $600 for associates and staff attorneys. *See* Joint Decl. ¶69. "In determining the propriety of the hourly rates charged by plaintiffs' counsel in class actions, courts have continually held that the standard is the rate charged in the community where the services were performed for the type of services performed by counsel." *Telik,* 576 F. Supp. 2d at 589. In fact, "perhaps the best indicator of the 'market rate' in the New York area for plaintiffs' counsel in securities class actions is to examine the rates charged by New York firms that *defend* class actions on a regular basis." *Id*. Defense firm rates gathered and analyzed by Labaton Sucharow from bankruptcy court filings nationwide in 2018, in many cases, exceeded these rates. *See* Joint Decl. ¶69; Ex. 9.

[6] This is the rate of a named-partner at Bernstein Litowitz and was applied to only 16.25 hours.

Thus, the amount of attorneys' fees requested by Co-Lead Counsel ($4,750,000) represents a reasonable multiplier of 2.7 of Plaintiffs' Counsel's lodestar. Such a multiplier is within the parameters used throughout district courts in the Second Circuit and is additional evidence that the requested fee is reasonable. *See, e.g., Wal-Mart Stores, Inc. v. Visa USA, Inc.*, 396 F. 3d 96, 123 (2d Cir. 2005) (upholding a multiplier of 3.5 as reasonable on appeal); *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-1825, 2010 WL 2653354, at *5 (S.D.N.Y. June 24, 2010) (approving a 2.78 multiplier in case involving a $165 million settlement); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 359 (E.D.N.Y. 2010) ("[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied."); *In re Deutsche Telekom AG Sec. Litig.,* No. 00-CV-9475 (NRB), 2005 WL 7984326, at *4 (S.D.N.Y. June 9, 2005) (awarding 25% of $120 million settlement representing a 3.96 multiplier); *Maley,* 186 F. Supp. 2d at 369 (awarding fee equal to a 4.65 multiplier, which was "well within the range awarded by courts in this Circuit and courts throughout the country").

Accordingly, it is respectfully submitted that the requested fee would be reasonable, whether calculated as a percentage-of-the-fund or in relation to Plaintiffs' Counsel's lodestar.

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

Co-Lead Counsel's fee application includes a request for payment of $112,468.23 in litigation expenses, which were reasonably incurred and necessary to prosecute the Action. *See* Ex. 8. These expenses are set forth in Plaintiffs' Counsel's individual fee and expense declarations submitted concurrently herewith. *See* Exs. 5-B, 6-B, and 7-B. This amount is well-below the $175,000 cap that the Notice informed potential Settlement Class Members that Co-Lead Counsel may apply for, and which—to date—there has been no objection to.

Much of Plaintiffs' Counsel's expenses were for professional services rendered by Lead

Plaintiffs' experts and consultants ($72,671.25 or 65% of total expenses). As set forth in the Joint Declaration, Lead Plaintiffs' consulting clinical trial expert provided valuable assistance with respect to clinical trial design and the validity of Company's use of NT-proBNP "best response" as a clinical trial endpoint. *See*, *e.g.*, Joint Decl. ¶18. Likewise, Lead Plaintiffs' consulting damages expert reviewed statistically significant price movements to assist Co-Lead Counsel with identifying stock declines to include in the amended complaint, among other things. *Id*. ¶21. The consulting damages expert also developed the proposed Plan of Allocation. *Id*. ¶57.

Additionally, Plaintiffs' counsel incurred expenses related to, among other things, the mediation, electronic research, travel, court reporting and fees, and duplicating. A complete breakdown by category of the expenses incurred is set forth in Plaintiffs' Counsel's respective declarations. These expenses are properly recoverable by counsel. *See In re China Sunergy Sec. Litig.*, No. 07-cv-7895, 2011 WL 1899715, at *6 (S.D.N.Y. May 13, 2011) (in a class action, attorneys should be compensated "for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were 'incidental and necessary to the representation…'").

V. THE REACTION OF THE SETTLEMENT CLASS TO DATE SUPPORTS THE REQUESTED FEE

The reaction of the Settlement Class to date also supports the fee request. Through October 25, 2019, the Claims Administrator has mailed 28,397 copies of the Notice to potential Settlement Class Members and nominees informing them of, among other things, Co-Lead Counsel's intention to apply to the Court for an award of attorneys' fees in an amount not to exceed 30% of the Settlement Fund and up to $175,000 in expenses. *See* Ex. 4 at ¶¶2-8 and Ex. A thereto. While the time to object to the Fee and Expense Application does not expire until

November 11, 2019, to date no objections have been received. Co-Lead Counsel will address any that are submitted in their reply papers, which will be filed on or before November 25, 2019.

CONCLUSION

For the foregoing reasons, Co-Lead Counsel respectfully request, on behalf of all Plaintiffs' Counsel, that the Court award attorneys' fees in the amount of 30% of the Settlement Fund, which includes accrued interest, and $112,468.23 in litigation expenses, plus accrued interest. A proposed order will be submitted with Co-Lead Counsel's reply papers, after the deadline for objecting has passed.

DATED: October 28, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2019, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all registered ECF participants.

/s/ *Carol C. Villegas*
CAROL C. VILLEGAS