UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

In re Innocoll Holdings Public Limited Company Securities Litigation CLASS ACTION This Document Relates To: All Actions	C.A. No. 2:17-cv-00341-GEKP CLASS ACTION

LEAD PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND COMPENSATORY AWARDS TO LEAD PLAINTIFFS

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Lead Plaintiffs Russel Bleiler and Carl Bayney ("Plaintiffs") respectfully submit this memorandum in support of their Motion for an Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Compensatory Awards to Plaintiffs.[1]

I. INTRODUCTION

Lead Counsel have litigated this Action without compensation for five years. They took the case through two motions to dismiss, a year of fact discovery, five depositions, and briefing on a hotly contested motion for class certification that hinged on expert discovery. In all, Lead Counsel devoted 4451.28 hours with a value of $2,423,348 and spent $296,111.74 in cash.

Lead Counsel's tenacity bore fruit. Four and a half years after this case was filed, Plaintiffs and Defendants agreed to settle it for $2.755 million ("Settlement"). Now, for their work in securing this substantial benefit, counsel seek an award of one third of the Settlement, or $918,333.

The Court should grant the award. This was a complicated case with no government investigation, no third-party litigation, no accounting restatement, nor any other external signs that it would prove lucrative. It was also one tenth the size of the median securities class action, limiting the potential attorneys' fees. It was obvious from the nature of the case that counsel would need to work closely with several experts. Thus, it is not surprising that Lead Counsel were the only attorneys who sought appointment.

Though the outlook was inauspicious, the result is excellent. The Settlement recovers 12% of estimated maximum damages for the entire Class Period, which were $22.9 million. But to show

[1] All capitalized terms not otherwise defined herein are defined in the Stipulation of Settlement ("Stipulation") filed on November 24, 2021 (ECF No. 121-2) or the Declaration of Jonathan Horne in Support of the Motions for: (I) Final Approval of Class Action Settlement and Plan of Horne; and (II) an Award of Attorneys' Fees, Reimbursement of Litigation Expenses, and Compensatory Awards to Lead Plaintiffs ("Horne Decl." or "Horne Declaration"), filed concurrently herewith. Unless otherwise noted, all citations are omitted and emphases added.

entitlement to class treatment, Plaintiffs must show that Innocoll securities traded on an efficient market. And as Plaintiffs conceded in their brief in support of class certification, which they filed before reaching the Settlement, the evidence of market efficiency before December 10, 2015, is thin. Damages for the portion of the Class Period with stronger evidence of efficiency are only $10.8 million. At 26%, the recovery for this period significantly exceeds the median result in cases of this size. Indeed, the Settlement Class is satisfied; no Settlement Class Members have either objected to or sought exclusion from the Settlement.

Lead Counsel also seeks reimbursement of $296,111.74 in out-of-pocket litigation expenses incurred in prosecuting the Action. Most of these expenses were to pay for an expert who provided evidence in support of Plaintiffs' critical motion for class certification, among other services. As Lead Counsel would not recover their expenses if it lost, it had no incentive to incur unnecessary expenses. Moreover, Lead Counsel notified the Settlement Class that they would seek up to $325,000 in expenses, and no Settlement Class Member objected.

Finally, the Court should award Plaintiffs $10,000 each, for a total of $20,000 as compensatory awards for the time they dedicated to the Action. Messrs. Bleiler and Bayney have spent 90 and 73 hours, respectively, prosecuting this action. They each sat for their deposition. Though they have received no compensation to date, their efforts helped push this case to its successful resolution.

For these reasons and those set forth below, the Court should award Lead Counsel attorneys' fees of one-third of the Settlement ($918,333), reimbursement of actual out-of-pocket costs of $296,111.74, and Plaintiffs $10,000 each.

II. HISTORY OF THE LITIGATION

In January 2017, Lead Counsel filed this action on behalf of a class of Innocoll investors. The Private Securities Litigation Reform Act ("PSLRA") requires that all putative class members who wish to be appointed lead plaintiffs file a motion within 60 days of publication of notice of the case. Messrs. Bleiler and Bayney (along with others) timely moved to be appointed lead plaintiffs, and sought to have Counsel appointed Lead Counsel, (ECF No. 4). There were no other movants. The Court granted their motion. (ECF No. 18).

Upon appointment, Plaintiffs broadened their pre-filing investigation. Plaintiffs scoured public sources for information about Innocoll, including not only its SEC filings and other public statements, but also hundreds of pages of FDA guidance materials, Innocoll's patents, FDA regulatory information about other Innocoll products, and stock analyst reports. (Horne Decl. ¶5). They also spoke with former Innocoll employees. (*Id.*) They consulted an FDA regulatory expert to make sense of the facts Plaintiffs ultimately filed their amended complaint in May 2017. (ECF No. 19).

Defendants moved to dismiss the amended complaint. (ECF No. 21). The Parties' briefing focused on the complex and exacting standards the PSLRA imposes on securities actions. Plaintiffs had to show they had pled facts that allowed the Court to draw a culpable inference at least as strong as any competing non-culpable inference, before taking any discovery. *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 323 (2007). The parties also briefed Plaintiffs' motion to strike a declaration Defendants had submitted in connection with their briefing. (ECF No. 23). The Court held oral argument and dismissed Plaintiffs' amended complaint, without prejudice. (ECF Nos. 46, 47). The Court found that while "what the plaintiffs have alleged would surely be enough

to survive a motion to dismiss under the normal standard [], the allegations in the complaint do not reach the exacting standard set forth in the PSLRA." (ECF No. 46 at 19).

Undeterred, Plaintiffs resumed their investigation. Plaintiffs sought to address the specific pleading deficiencies identified by the Court. Plaintiffs reviewed all of XaraColl's international patents as well as patents that related to the method through which Innocoll produced the collagen used in XaraColl. To supplement the allegations, Plaintiffs also identified additional FDA guidance applicable to XaraColl. Finally, Plaintiffs further researched the individual defendants Anthony P. Zook and Lesley Russell, thereby identifying facts suggesting they had a motive to make false statements. Plaintiffs filed their second amended complaint ("Complaint"). (ECF No. 48).

The Defendants moved to dismiss the Complaint. (ECF No. 50). The briefing focused on whether the new facts Plaintiffs had alleged sufficed to push the inference of scienter from plausible to cogent and compelling. Following a stay imposed while the parties held a mediation (ECF No. 57), the Court held oral argument (ECF No. 66), after which both sides submitted supplemental briefing (ECF Nos. 67, 68). On March 25, 2020, the Court denied the Defendants' motion to dismiss. (ECF No. 69).

The Parties wasted no time pursuing discovery. Plaintiffs served requests for production on April 21, 2020. (Horne Decl. ¶8). The Parties then spent hours negotiating the parameters of Defendants' production. (*Id.*) They resolved all their many and substantial differences, thereby averting the need to seek the Court's assistance in connection with production of documents. To make sure they understood the universe of documents, Plaintiffs took Innocoll's Rule 30(b)(6) deposition. As a result of what they learned, Plaintiffs served a subpoena on a former Innocoll employee who had retained critical documents. (Horne Decl. ¶9).

Plaintiffs reviewed documents as they were produced. As a result, they quickly absorbed and acted on new information. (Horne Decl. ¶10). For example, early in discovery, Defendants produced a document that had been created in 2017 but suggested certain documents that had been created in the 2011/2012 timeframe could be important. (*Id.*) Because Plaintiffs reviewed this document as it came in, they were able to negotiate for a targeted production of documents from that time period without delaying discovery. (*Id.*) Plaintiffs also served interrogatories and requests for admission based on the documents Defendants produced. (*Id.*)

Discovery in this case was necessarily broad. Not only were there tens of millions of dollars at stake, Innocoll had pursued XaraColl's approval since 2009. (Horne Decl. ¶7). During this time, Innocoll had had numerous communications with the FDA and had regularly discussed its XaraColl approval strategy. (*Id.*) Innocoll and the investment fund that acquired it also discussed XaraColl at length. (*Id.*) Plaintiffs reviewed and categorized more than 400,000 pages of documents, devoting further analysis to those that might advance this Action. (Horne Decl. ¶11). Plaintiffs organized these documents to create a timeline that set out in detail the long history of the actions relevant to this case. (*Id.*)

Plaintiffs filed a renewed motion for class certification in March 2021, arguing that a class could be certified because they were entitled to a presumption of reliance. (ECF No. 107). To support their argument, Plaintiffs relied on the opening and reply reports of their financial expert who showed that Innocoll's common stock traded on an efficient market. (ECF Nos. 81-1, 93-11). Defendants hired their own expert who produced opposition and sur-reply reports that claimed Plaintiffs' expert's showing was insufficient. (ECF Nos. 112-2, 112-3). Both experts were deposed, as were Messrs. Bleiler and Bayney. (Horne Decl. ¶22).

The Parties first discussed settlement in 2019 after Defendants' motion to dismiss Plaintiffs' Complaint was fully briefed. (Horne Decl. ¶13). The Parties arranged a mediation before Michelle Yoshida, a nationally-recognized mediator. (ECF No. 56). The mediation took place in August 2019, and took a full day, but was ultimately not successful. (Horne Decl. ¶¶14-15). The Parties continued settlement discussions in the following weeks but could not bridge the gap between their positions. (Horne Decl. ¶15).

Settlement discussions resumed after the Court denied Defendants' motion to dismiss the Complaint. In March/April 2020, and over the summer, the Parties exchanged settlement demands and offers. (Horne Decl. ¶16). Because the gap between the Parties' positions remained significant, in late 2020 and early 2021, Plaintiffs proposed two settlement structures designed to force the Parties to make concessions and ultimately agree to a settlement. (*Id.*) Defendants ultimately did not agree to use these structures, but the Parties continued to exchange offers and demands. (Horne Decl. ¶17). Negotiations accelerated as oral arguments on Plaintiffs' motion for class certification approached. (*Id.*) In late June 2021, the Parties agreed to settle this action for $2.755 million. (*Id.*) The Parties spent the following months negotiating the terms of class settlement. (Horne Decl. ¶18).

Plaintiffs filed their motion for preliminary approval of the Settlement in November 2021. After Plaintiffs provided supplemental information to the Court in written submissions on December 15, 2021 and January 31, 2022, and at the hearing on January 25, the Court granted preliminary approval on March 10. (ECF Nos. 124, 126, 127).

III. THE COURT SHOULD APPROVE THE FEE REQUEST

A. Counsel are Entitled to an Award of Attorneys' Fees From the Common Fund

The Supreme Court and Third Circuit have both recognized that counsel should be compensated from any "common fund" they create for the benefit of a class. *See, e.g.*, *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 205 (3d Cir. 2005) ("[W]e agree with the long line of common fund cases that hold that attorneys 'whose efforts create, discover, increase, or preserve a [common] fund' [] are entitled to compensation."). The common fund doctrine is also designed to prevent unjust enrichment of class members who benefit from a lawsuit without paying for its costs. *See Boeing Co.*, 444 U.S. at 478.

"Congress, the Executive Branch, and [the Supreme] Court, moreover, have recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions[.]" *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 478 (2013). The meritorious private actions the Court referenced are largely class actions; *Amgen*, the case *Amgen* quoted (*Tellabs*),[2] and the two cases *Tellabs* relied upon for the proposition quoted in *Amgen*, were all securities class actions.[3] Thus, for meritorious private actions to continue to function as an "essential supplement" to criminal prosecutions and civil enforcement, counsel who pursue these actions to a successful conclusion must receive sufficient compensation. *In re Worldcom, Inc. Sec. Litig.*, 388 Supp.2d 319, 359 (S.D.N.Y. 2005) ("In order to attract well-qualified plaintiffs' counsel who are able to take a case

[2] *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313 (2007).

[3] *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005); *J. I. Case Co. v. Borak*, 377 U.S. 426, 427 (1964).

to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives.”).

B. The Court Should Award Lead Counsel a Percentage of the Settlement Fund

The Supreme Court has held that courts may employ the percentage-of-recovery approach to determine attorneys’ fees in common fund cases. *Blum v. Stenson*, 465 U.S. 886, 900, n.16, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984). The Third Circuit favors the percentage-of-recovery method “because it allows courts to award fees from the fund ‘in a manner that rewards counsel for success and penalizes it for failure.’” *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005), *as amended* (Feb. 25, 2005); *see also Williams v. Aramark Sports, LLC*, No. CIV.A. 10-1044, 2011 WL 4018205, at *10 (E.D. Pa. Sept. 9, 2011) (similar). The percentage of recovery method also comports with the language in the PSLRA 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); *Cendant*, 404 F.3d at 188 (“the PSLRA has made percentage-of-recovery the standard for determining whether attorneys’ fees are reasonable.”).

The alternative lodestar method encourages attorneys to delay settlement and wastes courts’ time by forcing them to review thousands of billing records. *In re Ikon Off. Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 193 (E.D. Pa. 2000). The lodestar method, rather, is appropriate in statutory fee shifting cases and cases involving intangible rights or other benefits that are difficult to quantify. *Hall v. Accolade, Inc.*, No. CV 17-3423, 2020 WL 1477688, at *10 (E.D. Pa. Mar. 25, 2020). Courts should not use the lodestar method in common fund cases with cash settlements like this one. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995).

Thus, this Court should use the percentage method in fixing attorneys’ fees.

C. THE *GUNTER* AND *PRUDENTIAL* FACTORS SUPPORT THE REQUEST FOR A FEE OF ONE-THIRD OF THE SETTLEMENT FUND

The Third Circuit "give[s] [a] great deal of deference to a district court's decision to set fees." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 (3d Cir. 2000). It instructs district courts to consider the *Gunter* and *Prudential* factors when exercising this discretion to award reasonable fees. *In re Diet Drugs*, 582 F.3d 524, 541 (3d Cir. 2009). The *Gunter* factors are:

> (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.

Gunter, 223 F.3d at 195 n.1. The *Prudential* factors are:

> [8] 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; [9] the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and [10] any "innovative" terms of settlement.[4]

In re AT & T Corp., 455 F.3d 160, 165 (3d Cir. 2006). These "factors 'need not be applied in a formulaic way' because each case is different, 'and in certain cases, one factor may outweigh the rest.'" *Id.* at 166. *In re Ocean Power Techs., Inc.*, No. 3:14-CV-3799, 2016 WL 6778218, at *26 (D.N.J. Nov. 15, 2016) ("The Court may give some of these factors less weight in evaluating a fee award."). The *Gunter* and *Prudential* factors support an award of one third of the Settlement Fund.

[4] Plaintiffs have renumbered the *Prudential* factors consecutively to the *Gunter* factors. With a cash fund, *Prudential* Factor 9 duplicates *Gunter* factor 7. There are no innovative terms so Factor 10 "neither weighs in favor nor detracts from a decision to award attorneys' fees." *In re Processed Egg Prod. Antitrust Litig.*, No. 08-MD-2002, 2012 WL 5467530, at *6 (E.D. Pa. Nov. 9, 2012).

1. The Size of the Fund Created and the Benefit to Class Members Supports the Requested Fee

The first *Gunter* factor "consider[s] the fee request in comparison to the size of the fund created and the number of class members to be benefitted." *Rowe v. E.I. DuPont de Nemours & Co.*, No. CIV. 06-1810 RMB/AMD, 2011 WL 3837106, at *18 (D.N.J. Aug. 26, 2011). Here, ***smaller*** funds that benefit ***fewer*** class members merit ***higher*** awards. *Rowe*, 2011 WL 3837106, at *18. "The rationale for this sliding scale is that, in most cases, the size of the award is more directly related to the size of the class, not the efforts of counsel." *Id.* "[B]ecause of fixed costs and economies of scale, attorneys' fees and costs do not increase dollar-for-dollar with the size of the case." *P. Van Hove BVBA v. Universal Travel Grp., Inc.*, No. CV 11-2164, 2017 WL 2734714, at *11 (D.N.J. June 26, 2017). Thus, "granting counsel a similar percentage of a smaller fund may simply punish counsel for having litigated a smaller case." *Yedlowski v. Roka Bioscience, Inc.*, No. 14-CV-8020-FLW-TJB, 2016 WL 6661336, at *20 (D.N.J. Nov. 10, 2016); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 445 (E.D.N.Y. 2014) ("For example, it is very common to see 33% contingency fees in cases with funds of less than $10 million, and 30% contingency fees in cases with funds between $10 million and $50 million.").

This case is relatively small for a securities class action. In 2021, the median damages in Rule 10b-5 cases was $198 million, or almost ten times the amount at stake in this case. Laarna T. Bulan et al, Securities Class Action Settlements: 2021 Review and Analysis, at 5 (Cornerstone Research 2022) ("Cornerstone Report").[5] While the $2.755 million settlement is "substantial," particularly given the risks, it is "not a mega-fund." *Yedlowski*, 2016 WL 6661336, at *20.

[5] Available at https://securities.stanford.edu/research-reports/1996-2021/Securities-Class-Action-Settlements-2021-Review-and-Analysis.pdf

Thus, the size of the fund and the number of class members benefited support an award of one third of the Settlement Fund.

2. No Class Members Have Objected to The Fee Request

"[I]t is generally assumed that silence constitutes tacit consent to the agreement." *General Motors*, 55 F.3d at 812. Thus, "the absence of substantial objections by class members to the fee requests weigh[s] in favor of approving the fee request." *Rite Aid*, 396 F.3d at 305.

The Notice informed Settlement Class Members that Lead Counsel would apply for an award of attorneys' fees of up to one-third of the Settlement. (ECF Nos. 121-4 at 2, 121-5 at 1, 121-6.) The Notice also advised Settlement Class Members that they could object to the Settlement or any part thereof, including attorneys' fees, and explained the procedure for doing so. (ECF No. 121-4). The deadline to object to the Settlement is June 22, 2022 and the deadline to request exclusion from the Settlement is June 15, 2022. *Id.* To date, no Settlement Class Member has objected to the attorneys' fees or expenses requested or sought exclusion from the Settlement Class. Declaration of Josephine Bravata ("SCS Decl."), attached as Exhibit 1 to the Horne Decl, ¶¶15-16.

3. Lead Counsel Were Skillful and Efficient

The Third Circuit has explained that the goal of the percentage fee award device is to ensure "that competent counsel continue to be willing to undertake risky, complex, and novel litigation." *Gunter*, 223 F.3d at 198. Lead Counsel's skill and efficiency 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*, No. CIV.A. 07-5325 JLL, 2010 WL 4053547, at *19 (D.N.J. Oct. 13, 2010). And "[t]he

single clearest factor reflecting the quality of class counsels' services to the class are the results obtained." *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 149 (E.D. Pa. 2000).

Courts measure quality based on the case counsel litigated rather than in the abstract. *In re Viropharma Inc. Sec. Litig.*, No. CV 12-2714, 2016 WL 312108, at *16 (E.D. Pa. Jan. 25, 2016). In this respect, courts sometimes focus on the percentage recovery compared to the best possible or realistic outcomes. *Id.* (result is excellent because "9-10% recovery of the total estimated maximum losses is a higher than average recovery for cases of this type.").

This case was plainly difficult. There was no government investigation nor third-party lawsuit. This case centers on the FDA's regulatory scheme, so it would require testimony from an FDA expert in addition to the standard financial and damages expert. The relatively poor showing on the factors that have made class certification a challenge was apparent at inception. Thus, it is no surprise that no other firms sought appointment as lead counsel. Indeed, as evidence that this case was difficult, the Court need look no further than its own order dismissing the first amended complaint without prejudice. (ECF Nos. 46, 47).

Lead Counsel persevered through five years of litigation. It redoubled its efforts after the Court dismissed the first amended complaint. It briefed Defendants' motion to dismiss the Complaint. When it survived Defendants' motion to dismiss, it spent the time and money needed to take the case through a year's worth of fact and class certification discovery.

The median recovery in cases with less than $25 million in damages in the period of 2012-2020 was 18.2%. Cornerstone Report, at 6. The $2.755 million Settlement recovers 12% of all damages and 26% of the damages in Plaintiffs' more defensible Class Period. While 12% is slightly less than 18.2%, the comparison hinges on the fact that the $22.9 million in damages places this case just short of the $25-74 million category. Had damages been $25.9 million instead, the

settlement would have recovered 8.8% of damages, or less than the Settlement, but would have exceeded the median for settlements of that size of 7.3%.

A roughly median recovery in a case this difficult is an excellent result and supports a fee of one third of the Settlement.

Lead Counsel's skill, professionalism, and standing also support the fee award. Lead Counsel have substantial experience in securities class actions. *See* Rosen's resume attached as Exhibit 2 to the Horne Decl. Courts in the Third Circuit and elsewhere have recognized that Rosen's skill, experience, and reputation allow it to deliver excellent results. *See e.g., Whiteley v. Zynerba Pharms., Inc.*, No. CV 19-4959, 2021 WL 4206696, at *12 (E.D. Pa. Sept. 16, 2021) (in a biotech case, recognizing that Rosen has "substantial experience prosecuting large-scale class actions, including securities class actions like the case *sub judice*. This experience undoubtedly contributed to the favorable outcome negotiated with equally experienced opposing counsel."); *Yedlowski*, 2016 WL 6661336, at *21 ("[Rosen] is highly experienced in the complex field of securities fraud class action litigation"); *Vinh Nguyen v. Radient Pharms. Corp.*, No. SACV 11-00406 DOC, 2014 WL 1802293, at *9 (C.D. Cal. May 6, 2014) (in a biotech case, Rosen "took on significant risk in this case, working thoroughly and enthusiastically through extensive litigation."). *Christine Asia Co. v. Yun Ma*, No. 115MD02631CMSDA, 2019 WL 5257534, at *19 (S.D.N.Y. Oct. 16, 2019)(considering Rosen's achievement of $250 million settlement and finding that "[t]he quality of representation by both Plaintiffs' and Defendants' counsel was high in this case and supports the requested fee."). Counsel applied themselves to position this case for the best possible result and leveraged their reputation to negotiate the Settlement.

Additionally, "[t]he quality and vigor of opposing counsel is also relevant in evaluating the quality of the services rendered by [Plaintiffs'] Counsel." *Yedlowski*, 2016 WL 6661336, at *21;

see also Universal Travel, 2017 WL 2734714, at *11 (same). Here, Defendants hired Dentons US LLP, the U.S. arm of the world's largest law firm. Three of its partners and four associates entered appearances. The lead partner, Kenneth Pfaehler, is ranked by Legal 500 nationally as a leading lawyer for securities litigation defense. Defendants' legal team zealously opposed Plaintiffs' efforts and worked with experts to develop and defend their theory of the case.

That Lead Counsel achieved an excellent result despite Defendants' counsel's skillful opposition supports the requested one third fee.

4. Counsel Pursued this Case Diligently

"[S]ecurities fraud class actions are notably complex, lengthy, and expensive cases to litigate." *In re Par Pharm. Sec. Litig.*, No. CIV.A. 06-3226 ES, 2013 WL 3930091, at *10 (D.N.J. July 29, 2013); *Yedlowski*, 2016 WL 6661336, at *21 ("securities class actions are by nature particularly expensive to prosecute, usually requiring expert testimony on, at least questions of damages and loss causation."). This case was no exception.

Over the five years in which they litigated this case, Lead Counsel expended 4,451.28 hours, worth $2,423,348.25, and incurred $296,111.74 in expenses. (Horne Decl. ¶¶24, 27). Lead Counsel's time was well and efficiently spent. Plaintiffs drafted three complaints, opposed two motions to dismiss, took or defended three fact and two expert depositions, drafted opening and reply papers in support of class certification, litigated this case through a year's worth of fact and expert discovery, negotiated a settlement, and drafted and filed preliminary and final approval papers. (Horne Decl. ¶22). Counsel devoted enough time to these tasks to ensure they were done well.

The time and money Lead Counsel spent on this case with no guarantee of recovery support an award of one-third of the Settlement Fund.

5. The Risk of Nonpayment Supports an Award of One-Third of the Settlement Fund

"[T]he risk created by undertaking an action on a contingency fee basis militates in favor of approval." *Zynerba Pharms.*, 2021 WL 4206696, at *12. The "risk of no recovery is especially high in securities class actions, as they are notably difficult and notoriously uncertain." *Universal Travel*, 2017 WL 2734714, at *12. Further, "[l]egal precedents are continually making it more difficult to plead securities class actions." *Yedlowski*, 2016 WL 6661336, at *21.

Lead Counsel undertook this complex securities class action entirely on contingency and prosecuted the claims with no guarantee it would receive compensation or even recover its out-of-pocket expenses. Taking a securities class action on contingency is a heavy responsibility that imposes substantial risk. Lead Counsel committed to providing enough attorneys and money to properly litigate this Action and followed through on their commitment.

The five-year delay between filing and final approval also supports the fee Lead Counsel request. *Viropharma*, 2016 WL 312108, at *17 ("In litigating this case for nearly four years now, without pay, shouldering all expenses, Plaintiff's Counsel took on significant risk of non-payment. Given the length and complexity of this case, this factor weighs in favor of the award of attorneys' fees."). Lead Counsel has not received any compensation for their services, or reimbursement for the substantial necessary out-of-pocket litigation expenses they have paid since filing the Action in January 2017.

D. Similar Awards and Negotiated Contingency Agreements Support the Fee Request

To determine whether awards in similar cases support the fee Lead Counsel requests, "the court must (1) compare the award requested with other awards in comparable settlements; and (2) ensure that the award is consistent with what the attorney would have received had the fee been

negotiated on the open market." *Hall*, 2010 WL 4053547, at *21. An award of one-third of the Settlement Funds meets both subparts.

First, Plaintiffs who bring cases subject to the PSLRA face uniquely high pleading burdens. There is no "small case" exception to these burdens. Thus, to comply with the PSLRA, Plaintiffs must spend tens or hundreds of hours and tens of thousands of dollars investigating and pleading a case, and more time and money opposing the motion to dismiss. Lead Counsel must bear these costs whether they seek to recover $20 million or $2 billion in damages. Thus, and as set out above, "[f]or smaller securities fraud class actions, 'courts within [the Third] Circuit have typically awarded attorneys' fees of 30% to 35% of the recovery, plus expenses.'" *Dartell v. Tibet Pharms., Inc.*, No. CV 14-3620, 2017 WL 2815073, at *10 (D.N.J. June 29, 2017) (*quoting Yedlowski*, 2016 WL 6661336, at *22); *see also Universal Travel*, 2017 WL 2734714, at *12 (awarding fees of one-third of $4.075 million settlement fund reached before a decision on a motion to dismiss); *Schuler v. Medicines Co.*, No. CV 14-1149 (CCC), 2016 WL 3457218, at *9 (D.N.J. June 24, 2016) (awarding one-third of $4.25 million settlement reached before a decision on motion to dismiss); *In re Gen. Instrument Sec. Litig*., 209 F. Supp. 2d 423, 431, 433-34 (E.D. Pa. 2001) (awarding one third of the settlement fund where plaintiffs recovered 11% of the high-end range of damages); *Shapiro v. All. MMA, Inc.*, No. 117CV02583RBKAMD, 2018 WL 10050181, at *1 (D.N.J. Oct. 15, 2018) (awarding one-third of $1.55 million settlement reached before decision on motion to dismiss) (proposed order entered by the court).

Second, "[t]he requested fee of one-third is also consistent with a privately negotiated contingent fee in the marketplace." *Hall*, 2010 WL 4053547, at *21. "In individual cases, the customary contingent fee would likely range between 30 and 40 percent of the recovery." *Dartell*,

2017 WL 2815073, at *11 (awarding one third of the Settlement Fund). The requested fee of one third of the Settlement thus falls squarely within the customary fee for non-class actions.

Thus, both subparts of this final *Gunter* factor support Lead Counsel's request for an award of one third of the Settlement Fund.

E. The Settlement Results From Plaintiffs' and Lead Counsel's Efforts Alone

When counsel file claims in the wake of governmental investigations, they benefit from admissions, findings, or a government-approved roadmap to the litigation. But "[t]his is not a case where counsel can be cast as jackals to the government's lion," *Oklahoma Firefighters Pension & Ret. Sys. v. Lexmark Int'l, Inc.*, No. 17CV5543, 2021 WL 76328, at *5 (S.D.N.Y. Jan. 7, 2021), because there was no government or even third-party action or investigation. Counsel cleared their own way. That the Settlement results entirely from Lead Counsel's efforts weighs in favor of an award of one third of the settlement. *See In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 749 (E.D. Pa. 2013).

F. A Lodestar Cross-Check Confirms An Award of One Third of the Settlement Fund Is Reasonable

While it need not, the Court may "cross-check the percentage award at which [it] arrive[s] against the 'lodestar' award method[.]" *Gunter*, 223 F.3d at 195 n.1. "The lodestar cross-check serves the purpose of alerting the trial judge that when the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method." *Rite Aid*, 396 F.3d at 306.

A lodestar cross-check is "not a full-blown lodestar inquiry" and need not entail "mathematical precision" or "bean-counting." *AT&T*, 455 F.3d at 169 n.6. "The lodestar cross-check, while useful, should not displace a district court's primary reliance on the percentage-of-recovery method." *Id.* at 164. So "the district court may rely on summaries submitted by counsel and need not review billing records." *Rite Aid*, 396 F.3d at 306-07. A fractional multiplier

"provides strong additional support for approving the attorneys' fee request[.]" *Stagi v. Nat'l R.R. Passenger Corp.*, 880 F. Supp. 2d 564, 572 (E.D. Pa. 2012); *Hall*, 2010 WL 4053547, at *22 ("A multiplier of less than one, as is the case here, is therefore quite reasonable for a lodestar.").

Here, Lead Counsel calculate their lodestar using current rates. "An appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise—is within the contemplation of" statutory language that provides for an award of "reasonable attorneys' fees" similar to the PSLRA's. *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 284 (1989); *see also Lochren v. Cnty. of Suffolk*, 344 F. App'x 706, 710 (2d Cir. 2009) (reversible error not to use current rates). "[T]he current market rate for lodestar purposes is the rate <u>at the time of the fee petition</u>." *Wade v. State Trooper Michael Colaner*, No. CV 06-3715 (FLW), 2011 WL 13364168, at *3 (D.N.J. Apr. 1, 2011) (emphasis in original). Courts in the Third Circuit use current rates when calculating lodestar for purposes of a lodestar cross-check in common fund cases. *E.g. In re Elec. Carbon Prod. Antitrust Litig.*, 447 F. Supp. 2d 389, 410 (D.N.J. 2006) (noting that an "adjustment to the current rates [is] typically required for the lodestar calculation" in a common fund case.)

Lead Counsel's rates are reasonable. Lead Counsel may use nationwide prevailing rates for experienced securities class action attorneys rather than those of general practitioners in this District. *Gilbert v. Abercrombie & Fitch, Co.*, No. 2:15-CV-2854, 2016 WL 4159682, at *14 (S.D. Ohio Aug. 5, 2016), *report and recommendation adopted*, No. 2:15-CV-2854, 2016 WL 4449709 (S.D. Ohio Aug. 24, 2016). Rates similar to the rates sought here were recently approved in several securities class actions. *See, e.g., Mikhlin v. Oasmia Pharmaceutical AB*, 19-cv-4349-NGG-RER (E.D.N.Y.), ECF No. 39-2 (fee awarded at ECF No. 45); *Luo v. Sogou Inc.*, 19-cv-230-LJL (S.D.N.Y.), ECF No. 113-12 (fee awarded at ECF No. 124).

In 2018, a court in this Circuit acknowledged that an hourly rate of $1,250 was reasonable in a securities class action. *In re Wilmington Tr. Sec. Litig.*, No. 10-CV-0990-ER, 2018 WL 6046452, at *10 n.4 (D. Del. Nov. 19, 2018). The highest hourly rate of any of Lead Counsel's attorneys in this case is $1,025. Further, Judge Alejandro of this District recently approved similar hourly rates for Lead Counsel because its "attorneys have substantial experience in complex class action litigation, and their hourly rates are within the range charged by attorneys with comparable experience levels for litigation of a similar nature." *Whiteley v. Zynerba Pharms., Inc.*, No. CV 19-4959, 2021 WL 4206696, at *14 (E.D. Pa. Sept. 16, 2021) (approving hourly rate of $1,100 for Lead Counsel's top billing attorney).

Lead Counsel's lodestar confirms that the requested one-third fee is fair and reasonable. Lead Counsel devoted an aggregate of 4,451.28 hours prosecuting and resolving this Action for a lodestar of $2,423,348.25, generating a fractional multiplier of 0.38. (Horne Decl. ¶¶24-26). In other words, Lead Counsel request a fee worth only 38% of the lodestar value of their time.

IV. THE COURT SHOULD AWARD REIMBURSEMENT OF LEAD COUNSEL'S OUT-OF-POCKET EXPENSES BECAUSE THEY ARE REASONABLE AND WERE REASONABLY NECESSARY TO ACHIEVE THE SETTLEMENT

"In the Third Circuit, it is standard practice to reimburse litigation expenses in addition to granting fee awards." *McDonough v. Toys R Us, Inc.*, 80 F. Supp. 3d 626, 658 (E.D. Pa. 2015). Indeed, "'[c]ounsel in common fund cases are entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case.'" *Universal Travel*, 2017 WL 2734714, at *13. The Court need not examine individual receipts; a summary of expenses suffices. *Chemi v. Champion Mortg.*, No. 2:05-CV-1238(WHW), 2009 WL 1470429, at *13 (D.N.J. May 26, 2009).

Here, as documented in their firms' books and records, Lead Counsel's out-of-pocket expenses were $296,111.74. (Horne Decl. ¶27). The largest expenses were for experts. Plaintiffs

paid $190,531 to their financial expert who among other things prepared expert reports and testified in support of Plaintiffs' motion for class certification – money well spent given that class certification was no slam dunk. (*See id*.) Plaintiffs spent $4,209.61 on an FDA expert sorely needed to understand and make allegations concerning the FDA's regulations of drugs, devices, and drug/device combinations. *Id*. Also significant were $10,984.69 in fees paid to investigators to former employees for information to support Plaintiffs' complaints. *Id*. The $55,387.85 in document hosting and analysis fees were not only significant but necessary because of the substantial number of documents produced in discovery. *Id.* Lead Counsel also paid $10,500 for a mediator. *Id*. The remaining expenses are fees for online legal research, copying, mail, court and filing fees, court reporter fees, and communications to the putative class. *Id.* Courts routinely allow reimbursement of similar expenses. *See W. Palm Beach Police Pension Fund v. DFC Glob. Corp.*, No. CV 13-6731, 2017 WL 4167440, at *9 (E.D. Pa. Sept. 20, 2017) (approving reimbursement for "Items such as photocopying, telephone and fax charges, express mail charges, expert witness fees, travel and lodging, and computer-assisted research are necessary for the prosecution of a large class action lawsuit."); *In re Remeron End-Payor Antitrust Litig.*, No. CIV. 02-2007 FSH, 2005 WL 2230314, at *32 (D.N.J. Sept. 13, 2005) (approving reimbursement of "costs expended for purposes of prosecuting this litigation, including substantial fees for experts; . . . travel and lodging expenses; [and] copying costs"); *In re Cendant Corp., Deriv. Action Litig*., 232 F. Supp. 2d 327, 344 (D.N.J. 2002) (consultants and computer assisted research); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 482 (S.D.N.Y. 2013) (mediator's fees); *Katz v. China Century Dragon Media, Inc.*, No. LACV1102769JAKSSX, 2013 WL 11237202, at *8 (C.D. Cal. Oct. 10, 2013) (press releases).

Further, the Notice informed Settlement Class Members that Lead Counsel would seek reimbursement of expenses up to $325,000 and to date, no Settlement Class Members have objected. (SCS Decl. at ¶¶15-16). The Court should therefore award Lead Counsel its documented out-of-pocket litigation expenses.

V. THE COURT SHOULD AWARD PLAINTIFFS $10,000 EACH FOR THEIR WORK ON BEHALF OF THE SETTLEMENT CLASS

The Court should also grant Plaintiffs compensatory awards of $10,000 each, or $20,000 in total, for the time and effort they put into representing the Settlement Class. The PSLRA authorizes awards to reimburse representative plaintiffs for their "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). "[T]he Third Circuit favors encouraging class representatives, by appropriate means, to create common funds and to enforce laws—even approving 'incentive awards' to class representatives." *Yedlowski*, 2016 WL 6661336, at *23.

Courts in the Third Circuit recognizes that "there would be no benefit to the [s]ettlement [c]lass [m]embers if [p]laintiffs had not stepped forward and prosecuted this matter to [] resolution." *Zynerba*, 2021 WL 4206696, at *15. Thus, they allow awards to lead plaintiffs of similar amounts. *Li v. Aeterna Zentaris Inc.*, No. 314CV07081PGSTJB, 2021 WL 2220565, at *2 (D.N.J. June 1, 2021) (awarding each of three class representatives $17,500 in case that settled after class certification); *Elkin v. Walter Inv. Mgmt. Corp.*, No. 2:17-CV-02025-JCJ, 2018 WL 8951073, at *2 (E.D. Pa. Dec. 18, 2018) (awarding $10,000 to lead plaintiff when case settled before motion to dismiss decided); *Par Pharm.*, 2013 WL 3930091, at *11 (awarding $18,000 to lead plaintiff); *Barel v. Bank of Am.*, 255 F.R.D. 393, 403 (E.D. Pa. 2009) (awarding $10,000 to lead plaintiff). The awards to lead plaintiffs are in line with those approved in the Third Circuit and amount to less than 1% of the Settlement Fund.

Plaintiffs have supervised this litigation for five years. They prepared for and attended their depositions. They searched for and produced documents, reviewed pleadings, and ensured Lead Counsel was adequately representing the Class.

Mr. Bleiler has spent most of his life in Philadelphia. He started this case as a financial industry professional but has since graduated from the Drexel University School of Law. He devoted 90 hours to this case and sat for his deposition during his second-year midterms. He communicated with Counsel more than 150 times and never let a month go by without requesting an update.

Mr. Bayney is an engineer. His employer makes the world's most sophisticated semiconductor manufacturing machines, each of which costs approximately $100 million. His job is to provide customers with analysis and solutions when these machines break down. He spent 73 hours litigating this case and spent 2 vacation days preparing for and attending his deposition.

Further, a lack of objections further supports the awards to Plaintiffs. *Schuler v. Medicines Co.*, No. CV 14-1149 (CCC), 2016 WL 3457218, at *11 (D.N.J. June 24, 2016) (noting the lack of objections in granting awards); *Universal Travel*, 2017 WL 2734714, at *14 (same). The Notice informed Settlement Class Members Plaintiffs may seek compensatory awards of up to $20,000 in total, or $10,000 each, for their representation of the Settlement Class, and there has been no objection to that request. (SCS Decl. Ex. A). That no one objected further supports reimbursing Plaintiffs for their costs and expenses in prosecuting this Action

VI. CONCLUSION

For the foregoing reasons, the Court should: (i) award attorneys' fees of one-third of the Settlement; (ii) award reimbursement of expenses of $296,111.74; and (iii) award each Lead Plaintiff $10,000.

Dated: June 1, 2022

Respectfully submitted,

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Lead Counsel for Lead Plaintiffs and the Proposed Settlement Class

CERTIFICATE OF SERVICE

I hereby certify that on this on June 1, 2022, a true and correct copy of the foregoing document was served by CM/ECF to the Parties registered to the Court's CM/ECF system.

/s/ Jacob A. Goldberg
Jacob A. Goldberg