UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE ACUITY BRANDS, INC. SECURITIES LITIGATION	Civil Action No. 1:18-cv-02140-MHC

CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND LITIGATION EXPENSES

LABATON SUCHAROW LLP
James W. Johnson *(pro hac vice)*
Michael H. Rogers (*pro hac vice*)
Irina Vasilchenko (*pro hac vice*)
Philip J. Leggio (*pro hac vice*)
140 Broadway
New York, New York 10005
Telephone: (212) 907-0700
Facsimile: (212) 818-0477
Emails: jjohnson@labaton.com
mrogers@labaton.com
ivasilchenko@labaton.com
pleggio@labaton.com

KESSLER TOPAZ MELTZER & CHECK, LLP
Andrew L. Zivitz (*pro hac vice*)
Johnston de F. Whitman, Jr. (*pro hac vice*)
Joshua E. D'Ancona (*pro hac vice*)
280 King of Prussia Road
Radnor, Pennsylvania 19087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056
Emails: azivitz@ktmc.com
jwhitman@ktmc.com
jdancona@ktmc.com

Counsel for Class Representative the Public Employees' Retirement System of Mississippi and Class Counsel for the Class
[additional counsel on signature page]

Class Counsel Kessler Topaz Meltzer & Check, LLP and Labaton Sucharow LLP, Court-appointed Class Counsel for Class Representative the Public Employees' Retirement System of Mississippi and the Class, will move this Court, at the Settlement Hearing to be held on June 3, 2022 at 10:00 a.m., in Courtroom 1905, at the Richard B. Russell Federal Building and United States Courthouse, 75 Ted Turner Drive, SW, Atlanta, GA 30303, or by video or telephonic conference in the Court's discretion, under Rule 23(h) of the Federal Rules of Civil Procedure, for an order granting an award of attorneys' fees and Litigation Expenses in the above-captioned securities class action.[1]

In support of this Motion, the undersigned submit the accompanying Joint Declaration of Andrew L. Zivitz and James W. Johnson and exhibits thereto, and the supporting Memorandum of Law.

A proposed Order granting the requested relief will be submitted with Class Counsel's reply submission on or before May 27, 2022, after the deadline for objecting to the Motion has passed.

Dated: April 29, 2022

Respectfully submitted,

s/ Andrew L. Zivitz
Andrew L. Zivitz (*pro hac vice*)

[1] All capitalized terms used and not otherwise defined herein have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated as of December 2, 2021 (ECF No. 158-3) ("Stipulation").

Johnston de F. Whitman, Jr. (*pro hac vice*)
Joshua E. D'Ancona (*pro hac vice*)
KESSLER TOPAZ
MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, Pennsylvania 19087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056
Emails: azivitz@ktmc.com
jwhitman@ktmc.com
jdancona@ktmc.com

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Irina Vasilchenko (*pro hac vice*)
Philip J. Leggio (*pro hac vice*)
LABATON SUCHAROW LLP
140 Broadway
New York, New York 10005
Telephone: (212) 907-0700
Facsimile: (212) 818-0477
Emails: jjohnson@labaton.com
mrogers@labaton.com
ivasilchenko@labaton.com
pleggio@labaton.com

Counsel for Class Representative the Public Employees' Retirement System of Mississippi and Class Counsel for the Class

s/ Michael A. Caplan
Michael A. Caplan
Georgia Bar No. 601039
CAPLAN COBB LLP
75 Fourteenth Street, NE, Suite 2750
Atlanta, Georgia 30309
Telephone: (404) 596-5600

Facsimile: (404) 596-5604
Email: mcaplan@caplancobb.com

Liaison Counsel for Class Representative the Public Employees' Retirement System of Mississippi and Liaison Counsel for the Class

Jason M. Kirschberg (*pro hac vice*)
GADOW TYLER, PLLC
511 E. Pearl Street
Jackson, Mississippi 39201
Telephone: (601) 355-0654
Facsimile: (601) 510-9667
Email: jason@gadowtyler.com

Additional Counsel for Class Representative the Public Employees' Retirement System of Mississippi

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2022, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to counsel of record by operation of the Court's electronic filing system.

s/ Andrew L Zivitz
Andrew L Zivitz

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE ACUITY BRANDS, INC. SECURITIES LITIGATION	Civil Action No. 1:18-cv-02140-MHC

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

LABATON SUCHAROW LLP
James W. Johnson *(pro hac vice)*
Michael H. Rogers (*pro hac vice*)
Irina Vasilchenko (*pro hac vice*)
Philip J. Leggio (*pro hac vice*)
140 Broadway
New York, New York 10005
Telephone: (212) 907-0700
Facsimile: (212) 818-0477
Emails: jjohnson@labaton.com
mrogers@labaton.com
ivasilchenko@labaton.com
pleggio@labaton.com

KESSLER TOPAZ MELTZER & CHECK, LLP
Andrew L. Zivitz (*pro hac vice*)
Johnston de F. Whitman, Jr. (*pro hac vice*)
Joshua E. D'Ancona (*pro hac vice*)
280 King of Prussia Road
Radnor, Pennsylvania 19087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056
Emails: azivitz@ktmc.com
jwhitman@ktmc.com
jdancona@ktmc.com

Counsel for Class Representative the Public Employees' Retirement System of Mississippi and Class Counsel for the Class
[additional counsel on signature page]

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

Page

Page

DOCKETED CASES

STATUTES

RULES

Court-appointed Class Counsel Kessler Topaz Meltzer & Check, LLP and Labaton Sucharow LLP (collectively "Class Counsel") respectfully submit this memorandum of law in support of their motion, on behalf of Plaintiff's Counsel,[1] for an award of attorneys' fees in the amount of 25% of the Settlement Fund, or $3,937,500 plus interest. By their motion, Class Counsel also seek payment of $1,056,895.24 for Litigation Expenses reasonably incurred by Plaintiff's Counsel in prosecuting the Action, as well as $39,250 in reimbursement to Class Representative the Public Employees' Retirement System of Mississippi ("Mississippi PERS" or "Class Representative") for costs directly related to its representation of the Class, as authorized by the Private Securities Litigation Reform Act of 1995 ("PSLRA").[2]

PRELIMINARY STATEMENT

Following nearly three years of dedicated litigation efforts, Class Counsel successfully negotiated a settlement of the Action with Defendants. The proposed

[1] "Plaintiff's Counsel" refers collectively to (i) Class Counsel, Kessler Topaz Meltzer & Check, LLP and Labaton Sucharow LLP; (ii) Court-appointed Liaison Counsel, Caplan Cobb LLP; and (iii) Gadow Tyler PLLC, additional counsel to Class Representative.

[2] All capitalized terms used and not otherwise defined in this Memorandum have the meanings ascribed to them in the Stipulation and Agreement of Settlement, dated as of December 2, 2021 (the "Stipulation" or "Stip."), previously filed with the Court (ECF No. 158-3) or in the Joint Declaration of Andrew L. Zivitz and James W. Johnson ("Joint Declaration" or Joint Decl.") filed herewith. Citations to "¶ __" are to paragraphs in the Joint Declaration. Emphasis is added and citations are omitted throughout unless otherwise noted.

Settlement, if approved by the Court, will resolve this litigation in its entirety in exchange for a cash payment of $15.75 million. The Settlement not only eliminates the risks of continued litigation—e.g., the possibility of an adverse ruling for the Class on Defendants' appeal of this Court's Class Certification Order (pending when the Settlement was reached) and Defendants' likely formidable challenges to liability, loss causation and damages, as well as the uncertainties, delays and expense of expert discovery, summary judgment motions, trial, and post-trial appeals—but it also provides a meaningful percentage of the Class's potential damages as estimated by Class Representative's damages expert.

The $15.75 million all-cash recovery was achieved through the skill, experience, and effective advocacy of Class Counsel in the face of considerable risk and an aggressive defense mounted by Defendants, who were represented by able and knowledgeable counsel. The Settlement was reached only after Class Counsel conducted a far-reaching investigation resulting in the detailed Complaint, briefed Defendants' motion to dismiss the Complaint (which Class Counsel defeated in part), obtained certification of the Class and defended that ruling in the context of Defendants' Rule 23(f) petition and subsequent Appeal, and pursued myriad sources for document discovery, including propounding document subpoenas on 10 non-parties and moving to compel Defendants' production of documents on two separate

occasions. *See generally* Joint Declaration submitted herewith.[3] As a result of these efforts, Class Counsel obtained and analyzed approximately 300,000 pages of documents produced by Defendants and non-parties and participated in 22 depositions. Class Counsel also engaged in protracted settlement negotiations with Defendants, including the exchange of mediation briefing and participation in two full-day mediation sessions (ten months apart), with the assistance of an experienced and highly respected mediator. This dedication of effort resulted in a very favorable and significant cash recovery for the Class.

As compensation for their efforts, Class Counsel, on behalf of Plaintiff's Counsel, respectfully request an award of attorneys' fees in the amount of 25% of the Settlement Fund. Plaintiff's Counsel's efforts to date have been without compensation of any kind and a fee has been wholly contingent upon the result achieved. Through Class Counsel's dedication to the case, they demonstrated that they were prepared to take this Action through trial if Defendants failed to agree to a resolution that provided fair, reasonable, and adequate relief to the Class. Since fee awards are designed to encourage counsel to achieve the best possible result for the

[3] All exhibits referenced below are attached 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 alphabetical reference is to the exhibit designation within the exhibit itself.

class, the amount requested in this case is warranted, if not modest, given the significant amount of work dedicated by Plaintiff's Counsel. As discussed herein, the requested 25% fee is in line with the 25% "benchmark" regularly awarded in the Eleventh Circuit in securities class actions with comparable recoveries. The requested fee of $3,937,500 also represents a *negative* multiplier of 0.22 on Plaintiff's Counsel's "lodestar" of more than $18 million, meaning that counsel are seeking only a portion of their actual legal fees in the case.

In addition, Class Counsel seek payment of Litigation Expenses in the amount of $1,096,145.24, which amount includes Class Representative's request for reimbursement pursuant to the PSLRA for its costs and expenses (including lost wages) in connection with its representation of the Class in the amount of $39,250. The Litigation Expenses, as discussed below, were reasonable and necessary for the successful prosecution of the Action.

Finally, Class Representative—an institutional investor who oversaw the prosecution of the Action—approves of and endorses the requested fee.[4] This endorsement is particularly significant because the PSLRA was enacted to encourage sophisticated institutional investors to seek lead plaintiff status and

[4] *See* Declaration of Ta'Shia S. Gordon on Behalf of Mississippi PERS ("Mississippi PERS Decl."), ¶ 7, Ex. 1.

oversee securities class actions. Moreover, although 120,940 Notices have been disseminated advising that Class Counsel would seek fees not to exceed 25% of the Settlement Fund and expenses not to exceed $1.375 million, not a single Class Member has filed an objection to these requests to date.

In sum, Class Counsel respectfully request that the Court approve the requested attorneys' fees and Litigation Expenses.

ARGUMENT

I. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE AND WARRANT THE COURT'S APPROVAL

A. The Settlement Creates a Common Fund from Which a "Percentage-of-the-Fund" Fee Would Be Appropriate

Under Rule 23(h), "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). As the Supreme Court has recognized, 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." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991); *see also In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 353 (N.D. Ga. 1993) (fees are awarded "to compensate successful attorneys" for the "benefits they have achieved . . . the risks

. . . taken in prosecuting a long and complex case," and "the hours and expenses . . . invested in the case").

The Supreme Court has also suggested that percentage-of-recovery is the appropriate method for awarding fees under the common fund doctrine. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("[U]nder the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class . . . ."). Likewise, the Eleventh Circuit has held that, "attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." *Camden I*, 946 F.2d at 774; *accord Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1242 (11th Cir. 2011); *see also In re Equifax Inc. Customer Data Breach Sec. Litig.*, 2020 WL 256132, at *31 (N.D. Ga. Mar. 17, 2020), *aff'd and rev'd in part*, 999 F.3d 1247 (11th Cir. 2021) (this method is the "exclusive method in this Circuit for calculating fees in a common fund case").[5]

Class Counsel's application based on the percentage-of-recovery method is therefore consistent with the law in this Circuit. As explained below, the factors

[5] The use of the percentage method also comports with the PSLRA, which states that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff 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).

courts consider when assessing percentage-of-recovery requests demonstrate the reasonableness of Class Counsel's requested fee.

B. The Requested Fee of 25% Is Comparable to Awards in Similar Cases

The requested fee of 25% is a reasonable percentage of the Settlement Fund under the percentage-of-recovery method. Indeed, the Eleventh Circuit has established that 25% of a settlement fund is the "benchmark" fee award in common fund cases. *Camden I*, 946 F.2d at 774-75 ("[t]he majority of common fund fee awards fall between 20% to 30% of the fund" and district courts consider the middle of that range – 25% – a "benchmark" that "may be adjusted in accordance with the individual circumstances of each case"); *Equifax Data Breach*, 2020 WL 256132, at *31 ("[t]ypically, awards range from 20% to 30%, and 25% is considered the 'benchmark percentage'" in common fund cases).

A review of percentage fee awards approved by courts within this Circuit in securities common fund cases with comparable recoveries confirms that a 25% fee here would be fair and reasonable. *See, e.g.*, *In re Flowers Food Sec. Litig.*, 2019 WL 6771749, at *1 (M.D. Ga. Dec. 11, 2019) (awarding 33 1/3% of $21 million settlement); *In re Synovus Fin. Corp.*, 2014 WL 12756149, at *1 (N.D. Ga. Nov. 18, 2014) (awarding 30% of $11.75 million settlement); *In re Carter's Inc. Sec. Litig.*, No. 1:08CV-2940-AT, slip op. at 2 (N.D. Ga. May 31, 2012) (awarding 28% of $20

million settlement) (Ex. 10)[6]; *In re Friedman's, Inc. Sec. Litig.*, 2009 WL 1456698, at *2-4 (N.D. Ga. May 22, 2009) (awarding 30% of $14.9 million settlement); *In re ChoicePoint Inc. Sec. Litig.*, No. 1:05-CV-00686-JTC, slip op. at 1 (N.D. Ga. July 21, 2008) (awarding 30% of $10 million settlement) (Ex. 10); *City of St. Clair Shores Gen. Emp. Ret. Sys. v. Lender Processing Servs., Inc.* No. 10-1073, slip op. at 3 (M.D. Fla. Mar. 4, 2014) (awarding 25% of $13.1 million settlement) (Ex. 10).

Awards of 25% or more have also been given in cases with larger settlement amounts. *See, e.g.*, *City of Sunrise Gen. Emps.' Ret. Plan v. FleetCor Techs., Inc., et al.,* No. 1:17-cv-02207-LMM, slip op at 2-3 (N.D. Ga. Apr. 15, 2020) (awarding 25% of $50 million settlement) (Ex. 10); *In re Rayonier Inc. Sec. Litig.*, Case No. 3:14-cv-1395-J-32JBT, slip op. at 6-7 (M.D. Fla. Oct. 5, 2017) (awarding 30% of $73 million settlement) (Ex. 10).

Thus, it is respectfully submitted that Class Counsel's 25% fee request is reasonable and comparable to customary fees awarded in these types of cases.

C. Class Counsel's Fee Request Is Fair and Reasonable under Eleventh Circuit Authority

In *Camden I*, the Eleventh Circuit recommended that district courts consider several factors in determining whether a requested fee is reasonable, including:

[6] All unreported decisions are submitted herewith in a compendium attached to the Joint Declaration as Exhibit 10.

> (1) the time and labor required; (2) the novelty and the difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

946 F.2d at 772 n.3 (citing *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (11th Cir. 1974)). *Camden I* also recognized additional factors for consideration in awarding a percentage fee award, including "the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel. . . and the economics involved in prosecuting a class action." *Id*. at 775. An analysis of the most relevant factors confirms that the fee requested here is fair and reasonable.[7]

1. The Time and Labor Required

A review of the effort and time expended by Plaintiff's Counsel supports the requested fee. The Joint Declaration details the breadth and depth of Plaintiff's Counsel's efforts to prosecute the Class's claims against Defendants, the time

[7] With respect to the seventh and eleventh factors, respectively, there were no particular time limitations at issue in the Action and Class Counsel have represented Mississippi PERS in a number of cases over the years in which Mississippi PERS was appointed lead plaintiff.

expended, and the diligence of those efforts. Indeed, the Settlement was reached at a point in the litigation where Plaintiff's Counsel had committed extensive resources to understanding the facts and challenges posed by the claims and defenses at issue, and the factors that would impact any recovery. As detailed in the Joint Declaration, Plaintiff's Counsel, *inter alia*: (i) conducted a comprehensive factual investigation of the claims at issue in the Action, including numerous interviews with former Acuity employees and other persons with potentially relevant knowledge (¶¶ 27-29); (ii) drafted the detailed Complaint (¶ 30); (iii) researched and drafted an opposition to Defendants' comprehensive motion to dismiss the Complaint, which the Court granted in part and denied in part (¶¶ 31-40); (iv) engaged in extensive discovery, including taking or defending 22 depositions, reviewing approximately 300,000 pages of documents, and addressing multiple discovery disputes (¶¶ 42-71); (v) briefed and obtained class certification (¶¶ 72-80); (vi) opposed Defendants' Rule 23(f) Petition and subsequent Appeal (¶¶ 81-91); (vii) consulted with experts regarding loss causation, damages, and liability issues (¶¶ 66-71); and (viii) engaged in extensive settlement negotiations and formal mediation (¶¶ 94-99).

Plaintiff's Counsel expended more than 33,000 hours in connection with the prosecution and resolution of the Action resulting in a "lodestar" of $18,111,103.50. ¶ 150; *see also* Exs. 4-A, 5-A, 6-A, & 7-A, Ex. 8 (Summary Table of Lodestars and

Expenses). While not required in the Eleventh Circuit, an analysis of the requested fee under the "lodestar/multiplier" approach further supports the reasonableness of a 25% award. *See, e.g., Waters v. Int'l Precious Metal Corp.*, 190 F.3d 1291, 1298 (11th Cir. 1999) ("while we have decided in this circuit that a lodestar calculation is not proper in common fund cases, we may refer to that figure for comparison"). Here, based on the $15.75 million Settlement, a 25% fee award would result in a "multiplier" of approximately 0.22, i.e., a significant discount on Plaintiff's Counsel's lodestar.[8] Moreover, Plaintiff's Counsel's work will continue beyond approval of the Settlement, with no additional compensation. ¶ 150.

This fractional or "negative" multiplier is well below the range of multipliers frequently awarded in class action settlements of similar magnitude in courts within the Eleventh Circuit. *See, e.g., Equifax Data Breach*, 2020 WL 256132, at *39

[8] The multiplier is calculated by dividing the $3,937,500 fee request by the $18,111,103.50 lodestar. It is appropriate to use counsel's current hourly rates in order to compensate for the delay in payment and inflation. *See, e.g., Mashburn v. Nat'l Healthcare, Inc*., 684 F. Supp. 679, 700 (M.D. Ala. 1988). Given the timing of the Settlement and its preliminary approval by the Court, Plaintiff's Counsel have used their 2021 hourly rates to calculate their lodestar, which rates are comparable to those used in other securities or shareholder litigation. They are also commensurate with rates used by peer defense-side law firms litigating matters of a similar magnitude. *See* sample of defense firm hourly rates compiled by Labaton Sucharow from bankruptcy court filings in 2021 (Ex. 9). *See also Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984) (explaining that courts should consider whether "the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation").

(awarding fee representing 2.62 multiplier as "consistent with multipliers approved in other cases"); *Columbus Drywall & Insulation, Inc. v. Masco Corp*., 2012 WL 12540344, at *5 & n.4 (N.D. Ga. Oct. 26, 2012) (finding multiplier of 4 times lodestar "well within" the accepted range). Accordingly, the time and labor required amply demonstrate the reasonableness of the attorneys' fee request.

2. The Novelty and Difficulty of the Issues

Class Representative and Class Counsel faced all the "multi-faceted, complex legal questions, including proving falsity, scienter, materiality, causation and damages" endemic to cases based on alleged violations of federal securities law. *In re Health Ins. Innovations Sec. Litig*., 2021 WL 1341881, at *11 (M.D. Fla. Mar. 23, 2021). Indeed, courts have acknowledged that "securities class action litigation is 'notably difficult and notoriously uncertain.'" *In re NetBank, Inc. Sec. Litig*., 2011 WL 13353222, at *3 (N.D. Ga. Nov. 9, 2011). This Action was no exception.

As an initial matter, Class Representative faced the risks posed by Defendants' pending Rule 23(f) Appeal, which was fully briefed through the efforts of Class Counsel and scheduled for oral argument at the time the Parties reached the Settlement. ¶¶ 106-08. Although Class Counsel believe they skillfully navigated the issues raised by Defendants and would have ultimately defeated the appeal, there was a risk that the Eleventh Circuit could have reversed and remanded (or vacated)

the Court's Class Certification Order and dramatically reduced or foreclosed entirely any recovery for the Class.

Class Counsel also confronted a number of challenges to establishing Defendants' liability and damages in the Action. Regarding the element of falsity, Defendants would have likely argued that the five surviving statements in the Action were literally true and constituted non-actionable opinion statements. For example, Defendants would likely contend that their October 7, 2015 statement that Acuity was "seeing good growth" in sales to Home Depot was literally true arguing that Acuity's retail sales to Home Depot actually increased during the period in which the statement was made. Defendants would further assert that they in fact believed their October 7, 2015, January 8, 2016, June 29, 2016, and April 4, 2017 competition statements were accurate when made, and that these statements contained no material untrue facts, on the basis that, in the periods addressed by these statements, Acuity performed well versus its largest competitors while increasing its net sales, gross margin, and market share year-over-year. ¶¶ 109-12.

Class Counsel also faced challenges in proving that Defendants made the alleged false statements intentionally or recklessly (i.e., with scienter). Defendants would likely seek to prove that they did not act with scienter by arguing that Acuity's sales, margins, and market share continued to grow during the Class Period which,

they would claim, shows that they believed that increased competition was not materially affecting Acuity's performance at the time of the alleged misstatements. Additionally, with respect to Defendants' statement regarding Acuity's relationship with Home Depot, Defendants would likely seek to show that, at the time of the statement, Acuity had just completed a year of record sales growth with Home Depot and was projecting future sales growth with Home Depot, as indicating that Defendants reasonably believed that the two companies were still mutually driving growth and were strategically aligned. ¶¶ 113-15.

Even assuming that the claims survived the above risks, Class Representative would have confronted considerable additional challenges in establishing loss causation and damages. Class Counsel dedicated significant time and resources to crafting rebuttals to Defendants' arguments in this regard. Had the Action continued, Defendants would likely assert that the alleged corrective disclosures did not reveal any allegedly concealed truth about Acuity's relationship with Home Depot or the impact of competition, on the basis that, *inter alia*, none of the alleged disclosures made any mention of competition headwinds or Home Depot. ¶ 117. Defendants would also argue that Class Representative would be unable to disaggregate the effect of information unrelated to the alleged fraud that was disclosed alongside the alleged corrective disclosures. For example, Defendants would contend, as they did

at the class certification stage, that Class Representative would be unable to separate the purportedly confounding economic impact of the 42 alleged misstatements that were dismissed from the five alleged misstatements that were sustained, and would also likely point to other information released on the alleged corrective disclosure dates that could have potentially led to Acuity's common stock price decline. ¶ 118. If accepted by the Court or a jury, in whole or part, such points would dramatically limit any potential recovery for the Class, or eliminate it altogether.

Although Class Representative believes it could rebut these arguments with expert testimony, survive summary judgment, and prevail at trial, the causation and damages issues required, and would continue to require, a considerable amount of legal and factual expertise and would likely be resolved through a battle of experts, the outcome of which is notoriously difficult to assess. *See, e.g., Ressler v. Jacobson*, 822 F. Supp. 1551, 1554 (M.D. Fla. 1992) ("In the 'battle of experts,' it is impossible to predict with any certainty which arguments would find favor with the jury."). Accordingly, this factor also supports the requested fee award.

3. The Skill Required to Perform the Legal Services Properly, and the Experience, Reputation, and Ability of the Attorneys

In determining a reasonable fee, the Court should consider "the skill and acumen required to successfully investigate, file, litigate, and settle a complicated

class action lawsuit such as this one," *David v. Am. Suzuki Motor Corp.*, 2010 WL 1628362, at *8 n.15 (S.D. Fla. Apr. 15, 2010), and "the experience, reputation, and ability of the attorneys" involved. *Camden I*, 946 F.2d at 772 n.3.

As discussed *supra*, Section II.B., this was a complex case involving numerous contested facts and legal issues requiring skilled counsel to represent the Class and bring about the Settlement. Class Counsel are among the nation's preeminent law firms in this area of practice and have served as lead or co-lead counsel on behalf of major institutional investors in numerous class litigations since the enactment of the PSLRA. ¶ 151; Exs. 4-D, 5-C. Class Counsel were also ably assisted by the other Plaintiff's Counsel firms. Exs. 6-C, 7-C. Thus, the experience, reputation, and ability of Plaintiff's Counsel support the fee request.

The Court should also consider the "quality of the opposition" plaintiff's counsel faced in awarding the fee. *Columbus Drywall,* 2012 WL 12540344, at *4. Defendants are represented by King & Spalding LLP, an experienced and nationally recognized defense firm. The ability of Class Counsel to obtain such a favorable Settlement for the Class in light of such qualified legal opposition confirms the quality of the representation. This factor supports Class Counsel's fee request.

4. The Preclusion of Other Employment

When Class Counsel undertook to represent Class Representative in this

matter, it was with the expectation that a significant amount of time and effort in its prosecution, and large sums in out-of-pocket expenses, would be required. The time spent by Plaintiff's Counsel here was at the expense of the time that they could have devoted to other matters. Accordingly, this factor supports the requested fee.

5. The Customary and Contingent Nature of the Fee

Fees in class action lawsuits of this nature are typically contingent because virtually no individual possesses a large enough stake in the litigation to justify paying attorneys on an hourly basis. Courts have consistently recognized that the contingency risk is a major factor in determining the award of fees. *See In re NetBank, Inc. Sec. Litig.*, 2011 WL 13353222, at *3 ("courts have recognized that contingent risk is an important factor in determining fee awards"); *In re Friedman's, Sec. Litig.*, 2009 WL 1456698, at *3 (N.D. Ga 2009) ("A contingency fee arrangement often justifies an increase in the award of attorneys' fees."); *Pinto v. Princess Cruise Lines Ltd.*, 513 F. Supp. 2d 1334, 1339 (S.D. Fla. 2007) ("attorneys' risk is '"perhaps the foremost" factor' in determining an appropriate fee award").

Success in contingent litigation is never guaranteed. Plaintiffs' counsel in securities litigation often spend years in litigation, expending thousands of hours and millions of dollars, yet receiving no compensation. Even a victory at the trial stage is not a guarantee of success. *See, e.g., Robbins v. Koger Props., Inc.*, 116 F.3d

1441, 1449 (11th Cir. 1997) (reversing jury verdict of $81.3 million in securities class action on loss causation grounds and judgment entered for defendant).[9] Here, as explained above, Class Representative faced a number of hurdles that could have resulted in a smaller recovery for the Class, or no recovery. Indeed, because the fee in this matter was entirely contingent, the only certainty was that there would be no fee without a successful result, and this risk justifies the requested fee.

6. The Amount Involved and Results Achieved

"It is well-settled that one of the primary determinants of the quality of the work performed is the result obtained." *Friedman's*, 2009 WL 1456698, at *3. Here, the $15.75 million cash recovery for the Class is an excellent result given the risks of maintaining class certification in light of Defendants' pending Rule 23(f) Appeal, the difficulties of establishing liability for securities violations, and the risks in establishing the Class's full amount of damages, or prevailing after trial on a likely appeal. It was only through Class Counsel's extensive efforts in preparing the Complaint following a comprehensive investigation, vigorously opposing Defendants' motion to dismiss, obtaining class certification, and developing the case

[9] *See also In re BankAtlantic Bancorp, Inc. Sec. Litig.*, 2011 WL 1585605, at *1 (S.D. Fla. Apr. 25, 2011), *aff'd, Hubbard v. BankAtlantic Bancorp, Inc. Sec. Litig.* 688 F.3d 713 (11th Cir. 2012) (overturning jury verdict in favor of plaintiff class estimated at $42 million, and granting judgment as a matter of law to defendants).

through discovery that Class Representative could achieve the Settlement.

The Settlement also represents a meaningful portion of the Class's reasonably recoverable damages, as estimated under various potential scenarios analyzed by Class Representative's damages expert. Here, assuming the Class's claims survived Defendants' 23(f) Appeal, likely summary judgment challenges, and prevailed on all aspects of its theory of liability and damages, the Class's aggregate damages were estimated to be approximately $950 million. ¶ 119. However, had the Action continued to trial, Defendants would have challenged damages arguing that they were significantly less than $950 million, or even zero.

There are various scenarios that could have affected the maximum amount of the Class's potentially recoverable damages. For example, if Defendants were successful in showing that the statements made early in the Class Period regarding competition and Home Depot were not false and misleading or were not made with the requisite scienter -- essentially shortening the Class Period to begin in June 2016 (when the last competition misstatement was made), estimated aggregate damages would be approximately $577 million. If, in addition, Defendants were successful in getting the first corrective disclosure on October 5, 2016 (which faced significant loss causation challenges) dismissed, estimated aggregate damages would be approximately $498 million. And, if Defendants were also successful in getting the

alleged corrective disclosure on January 9, 2017 dismissed (a plausible result given Defendants' loss causation and disaggregation arguments), estimated aggregate damages would be no more than $215 million. Under these more likely scenarios, the Settlement represents approximately 2.7% to 7.3% of the Class's estimated damages. ¶ 120. These recovery percentages are in line with other court-approved securities settlements. *See, e.g., Thorpe v. Walter Inv. Mgmt. Corp.,* 2016 WL 10518902, (S.D. Fla. Oct. 14, 2016) (approving $24 million settlement representing 5.5% of maximum damages and noting settlement is an "excellent recovery"); *Int'l Brotherhood of Elec. Workers Local 697 Pension Fund v. Int'l Game Tech., Inc.*, 2012 WL 5199742, at *3 (D. Nev. Oct. 19, 2012) (approving $12.5 million settlement representing 3.5% of damages and noting amount to be within the median recovery in securities class actions settled in the last few years). The $15.75 million Settlement also exceeds the median reported recovery in securities class actions in 2021, which was $8 million (excluding merger objection settlements, settlements for $0 to the class, and settlements of $1 billion or greater). *See* Ex. 2 at 20.

7. Awards in Similar Cases

Class Counsel's requested fee of 25% of the Settlement Fund is within the range of attorneys' fees typically awarded in class action cases with similar recoveries within this Circuit. *See supra* Section I.B.; *see also Camden I*, 946 F.2d

at 774-75 (noting a benchmark range of between 20%-30% of the common fund).

8. Reaction of the Class to Date

More than 120,000 copies of the Notice were provided to potential Class Members and known brokers and nominees. *See* Ex. 3, ¶¶ 2-10. Additionally, the Summary Notice was published in *The Wall Street Journal* and transmitted over the internet using *PR Newswire* on February 1, 2022. *Id.,* ¶ 12.

The Notice states that Class Counsel will apply for fees not to exceed 25% of the Settlement Fund and payment of Litigation Expenses in an amount not to exceed $1.375 million, plus interest on both amounts, and that the deadline for filing objections to Class Counsel's request for fees and expenses is May 13, 2022. *See* Ex. 3-A at 2, 9-10. To date, not a single objection to the fee and expense amounts set forth in the Notice has been received.[10] ¶ 127. "The lack of numerous objections is evidence that the requested fee is fair." *Friedman's*, 2009 WL 1456698, at *3.

II. CLASS COUNSEL'S REQUEST FOR AN AWARD OF LITIGATION EXPENSES IS REASONABLE

Class Counsel also request an award of reasonable and necessary Litigation Expenses incurred by Plaintiff's Counsel to prosecute the Action. Since the inception of the case, Plaintiff's Counsel have incurred $1,056,895.24 in expenses. It is well

[10] Should any objections be filed, they will be addressed in Class Counsel's reply papers due May 27, 2022.

established that "class counsel's reasonable and necessary out-of-pocket expenses should be reimbursed." *Carpenters Health & Welfare Fund v. Coca-Cola Co.*, 587 F. Supp. 2d 1266, 1272 (N.D. Ga. 2008).

The amount requested is detailed in Plaintiff's Counsel's declarations. *See* Exs. 4-B & C, 5-B, 6-B, & 7-B. Class Counsel submit that the expenses, which include expert and consultant fees, mediation fees, the costs of electronic discovery, depositions, electronic research, photocopying, postage, meals, and transportation, were reasonably and necessarily incurred in prosecuting and resolving the Action.

The largest component of Plaintiff's Counsel's expenses (i.e., $660,777.38, or approximately 63% of their total expenses) was incurred for experts and consultants. At various times in the litigation, Class Counsel consulted with experts in the fields of market efficiency, loss causation, and damages, as well as an expert with knowledge regarding issues related to the evaluation of the impact of competition in the LED lighting market on Acuity and the pricing for its products. ¶¶ 66-71, 158. Class Counsel also retained and worked with an Eleventh Circuit appellate expert to defend the Class against Defendants' Rule 23(f) Petition. *Id*.

The next largest expense (i.e., $110,340.86, or approximately 10% of Plaintiff's Counsel's total expenses) was for document hosting and management/litigation support. Class Counsel retained a vendor to host the

documents produced in the Action in a sophisticated electronic database and litigation support platform. Class Counsel used the database to, among other things: (i) review the approximately 300,000 pages of documents produced by Defendants and non-parties; (ii) process documents so that they would be in a searchable format; and (iii) convert and upload hard documents so that they would be searchable. ¶ 159.

Another substantial component of Plaintiff's Counsel's Litigation Expenses (i.e., $72,868.61, or approximately 7% of their total expenses) was incurred for the costs of court reporters, videographers, and transcripts in connection with the 22 depositions they took or defended during the course of the Action. ¶ 160.

The remaining expenses for which Class Counsel seek reimbursement were necessary for the successful prosecution and settlement of the claims and are of the type for which payment is routinely ordered. *See Equifax Data Breach*, 2020 WL 256132, at *40 (awarding expenses for "court reporter fees; document and database reproduction and analysis; e-discovery costs; expert witness fees; travel for meetings and hearings; paying the mediator; and other customary expenditures" and finding such expenses "are reasonable and were necessarily incurred on behalf of the class").

Class Counsel's request for the payment of $1,056,895.24 in Litigation Expenses is reasonable and should be approved.

III. THE REQUESTED PSLRA AWARD TO CLASS REPRESENTATIVE IS REASONABLE

Class Representative Mississippi PERS also requests reimbursement of its reasonable costs in the amount of $39,250, pursuant to 15 U.S.C. §78u-4(a)(4), incurred in connection with its representation of the Class. The PSLRA specifically provides that an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be made to "any representative party serving on behalf of a class." 15 U.S.C. §78u-4(a)(4).

As set forth in its accompanying declaration, Mississippi PERS seeks reimbursement for the time its representatives devoted to supervising and participating in the Action. *See* Ex. 1, ¶¶ 8-10. As explained in the declaration, Class Representative: (i) regularly consulted with Class Counsel; (ii) reviewed significant pleadings and briefs filed in the case and various orders entered by the Court; (iii) gathered and produced documents to Defendants; (iv) prepared for and provided deposition testimony of two witnesses; (v) participated in two mediation sessions and related communications over the course of a year; and (vi) consulted with Class Counsel concerning the parameters for an appropriate resolution of the case and ultimately agreed to the terms of the Settlement. *Id.*

The requested award of $39,250 for Mississippi PERS is consistent with cost and expense awards in securities class action cases within the Eleventh Circuit and

nationwide. *See, e.g., Flowers Foods*, 2019 WL 6771749, at *2 (awarding plaintiffs $10,000 each for the time they dedicated to the case); *see also In re Bank of Am. Corp. Sec., Derivative & ERISA Litig.*, 772 F.3d 125, 132-134 (2d Cir. 2014) (affirming $450,000 award to representative plaintiffs for time spent by their employees); *In re Computer Sci. Corp. Sec. Litig.*, No. 1:11-cv-610-TSE-IDD, slip op. at 4 (E.D. Va. Sept. 20, 2013) (awarding $60,905 to lead plaintiff in connection with its time and out-of-pocket expenses) (Ex. 10); *In re Dr. Reddy's Laboratories Ltd. Sec. Litig.*, No. 3:17-cv-06436-PGS-DEA, slip op. at 2 (D.N.J. Dec. 23, 2020) (awarding lead plaintiff $27,500 for time dedicated to the case) (Ex. 10); *In re Conn's, Inc. Sec. Litig.*, No. 4:14-cv-00548-KPE, slip op. at 3 (S.D. Tex. Oct. 11, 2018) (awarding class representatives $4,916.60, $2,880.00, and $22,127.46) (Ex. 10). Accordingly, Mississippi PERS's request warrants approval.

CONCLUSION

For the reasons discussed above, Class Counsel respectfully request that the Court award: (i) Class Counsel 25% of the Settlement Fund as attorneys' fees; (ii) Litigation Expenses incurred by Plaintiff's Counsel in the amount of $1,056,895.24, plus accrued interest; and (iii) $39,250 to Class Representative Mississippi PERS, pursuant to 15 U.S.C. §78u-4(a)(4).

Dated: April 29, 2022

Respectfully submitted,

s/ Andrew L. Zivitz

Andrew L. Zivitz (*pro hac vice*)
Johnston de F. Whitman, Jr. (*pro hac vice*)
Joshua E. D'Ancona (*pro hac vice*)
KESSLER TOPAZ MELTZER & CHECK, LLP
280 King of Prussia Road
Radnor, Pennsylvania 19087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056
Emails: azivitz@ktmc.com
jwhitman@ktmc.com
jdancona@ktmc.com

James W. Johnson (*pro hac vice*)
Michael H. Rogers (*pro hac vice*)
Irina Vasilchenko (*pro hac vice*)
Philip J. Leggio (*pro hac vice*)
LABATON SUCHAROW LLP
140 Broadway
New York, New York 10005
Telephone: (212) 907-0700
Facsimile: (212) 818-0477
Emails: jjohnson@labaton.com
mrogers@labaton.com
ivasilchenko@labaton.com
pleggio@labaton.com

Counsel for Class Representative the Public Employees' Retirement System of Mississippi and Class Counsel for the Class

s/ Michael A. Caplan

Michael A. Caplan
Georgia Bar No. 601039
CAPLAN COBB LLP
75 Fourteenth Street, NE, Suite 2750
Atlanta, Georgia 30309
Telephone: (404) 596-5600
Facsimile: (404) 596-5604
Email: mcaplan@caplancobb.com

Liaison Counsel for Class Representative the Public Employees' Retirement System of Mississippi

Jason M. Kirschberg (*pro hac vice*)
GADOW TYLER, PLLC
511 E. Pearl Street
Jackson, Mississippi 39201
Telephone: (601) 355-0654
Facsimile: (601) 510-9667
Email: jason@gadowtyler.com

Additional Counsel for Class Representative the Public Employees' Retirement System of Mississippi

RULE 7.1(D) CERTIFICATION

The undersigned counsel certifies that this document has been prepared with one of the font and point selections approved by the Court in Civil Local Rule 5.1(C).

s/ Andrew L. Zivitz
Andrew L. Zivitz

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2022, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to counsel of record by operation of the Court's electronic filing system.

s/ Andrew L. Zivitz
Andrew L. Zivitz