IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

DAVID G. RAY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Plaintiff, v. TIERONE CORPORATION, GILBERT G. LUNDSTROM, EUGENE B. WITKOWICZ, MICHAEL J. FALBO, AND CHARLES W. HOSKINS, Defendants.	Case No. 8:10-cv-00199 **LEAD PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND AWARD TO LEAD PLAINTIFFS**
DOUGLAS L. STEJSKAL, Plaintiff, v. GILBERT G. LUNDSTROM, Defendant.	Member Case No. 4:10-cv-3177
DOUGLAS L. STEJSKAL, Plaintiff, v. JAMES A. LAPHEN, Defendant.	Member Case No. 8:10-cv-332

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I. PRELIMINARY STATEMENT[1]

While the "PSLRA [] significantly altered the landscape of attorneys' fee awards in securities class actions," one feature of that landscape was left untouched. *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 180 (3d Cir. 2005). Namely, that "[i]f Class Counsel were not successful, they risked losing everything." *In re Enron Corp. Sec. Litig.*, 586 F. Supp. 2d 732, 790-791 (S.D. Tex. 2008). Through the efforts of Plaintiffs' Counsel, as described more fully in the Kim Declaration, Plaintiffs have achieved a substantial settlement consisting of a $3.1 million cash payment. Lead Counsel requests an award of fees in the amount of one-third (33.3%) of the Settlement Fund or approximately $1,033,333. Lead Counsel also request reimbursement from the Settlement Fund of $77,907.41 in actual expenses. *E.g.*, Kim Decl., ¶ 67.

The Settlement recovers approximately 13.5% of Plaintiffs' best case estimate of damages of $23 million for the Class and is reasonable result, particularly when viewed in light of the considerable risks posed by continued litigation and uncertainty of proving liability. *E.g.*, Kim Decl., ¶¶ 22, 41-45. Defendants have contended that "the maximum damages the Settlement Class could recover is likely to be far closer to the Settlement Amount." *See* Notice attached to Bravata Decl., Ex. A, attached as Exhibit 2 to the Index. This recovery is largely attributable to Lead Counsel's litigation efforts and was achieved only after a thorough investigation, substantial motion practice and intensive arm's-length negotiation process with a nationally regarded mediator. *E.g.*, Kim Decl., ¶¶ 6, 16-22.

[1] Unless otherwise defined, capitalized terms herein have the same meanings attributed to them in the Stipulation and Agreement of Settlement, dated May 25, 2012.

The reaction of the Class also strongly supports the requested fee. Pursuant to the Preliminary Approval Order, over 13,000 Notices were mailed to potential Class Members, including large and sophisticated institutional investors. *See* Declaration of Josephine Bravata Concerning Mailing of Notice of Pendency and Settlement of Class Action and Proof of Claim and Release Form ("Bravata Decl."), ¶¶ 4-6 (attached as Exhibit 2 to Index filed herewith). The Notice advised Class Members that Lead Counsel intended to apply to the Court for an award of attorneys' fees representing up to one-third (33.3%) of the Settlement Fund and that Lead Counsel would seek reimbursement of Plaintiffs' Counsel's out-of-pocket expenses not to exceed $100,000. *E.g.*, Bravata Decl., Ex. A. Similar disclosures were made in the Summary Notice. *Id.*, Ex. C.The deadline to file objections is October 11, 2012. The deadline to seek exclusion from the class was September 14, 2012.

To date, only three objections and seven requests for exclusion have been filed with respect to the Settlement. *See* Bravata Decl., ¶¶ 9-10, & Exs. D-E. Of the objections and requests for exclusion, only one submission concern Lead Counsel's requested fee, filed by a shareholder Gary Peck representing 200 shares of TierOne stock. The "objection" was included in Mr. Peck request for exclusion. Notwithstanding that Mr. Peck's objection should be denied as conclusory, because Mr. Peck has sought exclusion from the Settlement, he has no standing to object. Thus, his objection should be overruled as moot.

The fairness and reasonableness is confirmed when cross-checked with Plaintiffs' Counsel's lodestar. Plaintiffs' Counsel spent a total of 913.9 hours of professional time having a market value of approximately $527,007 in prosecuting this litigation, and the requested fee compensates them for time and labor, as well as the risk associated with litigating this case on a fully contingent basis. *E.g.*, Kim Decl., ¶¶ 48-52.

For the reasons set forth more fully below, Lead Counsel respectfully submits that such attorneys' fees and expenses are fair and reasonable under applicable legal standards and in light of the contingency risk undertaken, and should be awarded by the Court.

II. SPECIFIC EFFORTS OF PLAINTIFFS' COUNSEL

This brief description of the Action reveals not only the complexities of the case, but also the host of factual and legal issues that Lead Counsel and counsel under its direction (collectively "Plaintiffs' Counsel") had to convincingly address in order to achieve the Settlement. As explained in the Kim Declaration, the substantial work performed by Plaintiffs' Counsel includes:

- review and analysis of relevant filings made by TierOne with the United States Securities and Exchange Commission (the "SEC");
- review and analysis of defendants' public documents, conference calls and press releases;
- review and analysis of securities analysts' reports and advisories concerning the Company;
- review and analysis information readily obtainable on the Internet;
- interviews of over a dozen witnesses with personal knowledge of the relevant facts through Lead Counsel's private investigators;
- consultation with experts in banking and banking regulations, forensic accounting, and damages;
- substantial motion practice, including the drafting of the Initial Complaint, Consolidated Amended Complaint and Second Amended Consolidated Complaint;
- pressing and preserving the Class claims in Bankruptcy Court;

- preparation and participation in extensive settlement negotiations with the aid of a nationally regarded mediator, Judge Layn R. Phillips (ret.); and

- obtaining the settlement offer following arm's-length negotiations with defense counsel and prepare the documents necessary to obtain preliminary and final approval of the Settlement.

Plaintiffs' Counsel's effort to successfully resolve this Action Litigation has been without compensation of any kind, and payment of attorneys' fees was and always has been wholly contingent upon the result achieved.

As compensation for these efforts, Lead Counsel requests this Court to award attorneys' fees of 33.3% of the Settlement Fund or $1,033,333 plus $77,907.41 in unreimbursed expenses. Plaintiffs' Counsel's 33.3% fee request is not only consistent with a great number of decisions, both in this Circuit and across the country, but is appropriate compensation for the result Lead Counsel has obtained for the Class.

Finally, the Court should consider Class Members' reaction to the award sought. An aggregate of 13,986 Claim Packets, which included the detailed Notice and a Proof of Claim form, were mailed to potential members of the Settlement Class. *See* Bravata Decl., ¶ 5. The Notice advised Class members of the terms of this Settlement, the proposed attorneys' fees and expenses request, and of Class Members' right to object and/or opt out. The Class also was informed that Plaintiffs' Counsel could apply for a fee of up to 33.3% of the settlement amount. Bravata Decl., Ex. A. The deadline for exclusions was September 14, 2012, and for objections is October 11, 2012. To date, there has been one submission purporting to object to the requested fee award that was filed by Gary Peck in his request for exclusion. *See* Bravata Decl., Ex. E.

For the reasons set forth herein, the requested attorneys' fees and expenses and award to Lead Plaintiffs are fair and reasonable under the applicable legal standards.

III. THE REQUESTED FEE SHOULD BE APPROVED

A. Applicable Authority

An award of attorneys' fees rest with the sound discretion of the district court. *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999). "[T]he burden rests with counsel to establish a factual basis to support the award." *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 246 (8th Cir. 1996). "Decisions of the district court regarding attorney fees in a class action settlement will generally be set aside only upon a showing that the action amounted to an abuse of discretion." *Petrovic*, 200 F.3d at 1156; *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005); *In re US Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir 2002).

Under Rule 23(e), the "claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e); *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975). The court's approval includes a determination that any fee awarded to counsel is reasonable. *See In re US Bancorp Litig*, 291 F.3d at 1038.

Rule 23(h) was subsequently adopted to specifically address fee awards in the class actions setting. Fed. R. Civ. P. 23(h). It allows a court to award "reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." *In re UnitedHealth Group Incorporated PSLRA Litigation*, 643 F.Supp.2d 1094, 1101 (D. Minn. 2009)

B. Percentage of Recovery Approach for Awarding Fees in Common Funds Cases

It has long been recognized that "[a]n attorney who recovers a common fund for the benefit of others 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). "To recover fees from a common fund, attorneys

must demonstrate that their services were of some benefit to the fund or enhanced the adversarial process." *Petrovic*, 200 F.3d at 1157. The purpose of the common fund doctrine is to compensate lead counsel for services rendered and to prevent "unjust enrichment." *In re Charter Commc'ns Inc*, 2005 WL 4045741, at *13 (E.D. Mo. June 30, 2005).

In common fund cases, "a reasonable fee is based on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 903 n.16 (1984). Under the PSLRA, "Congress plainly contemplated that percentage-of-recovery would be the primary measure of attorneys' fees awards in federal securities class actions." *See In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 586 (S.D.N.Y. 2008); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005). The PSLRA explicitly "limits any award of attorneys' fees and expenses to a 'reasonable percentage' of any recovery." *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d 383, 385 (D. Md. 2006). The "Eighth Circuit has approved the 'percentage of the fund' methodology to evaluate attorneys' fees in common-fund settlements," *In re St. Paul Travellers Sec. Litig.*, 2006 WL 1116118, at *1 (D. Minn. April 25, 2006), and "indicated that the percentage of the benefit method is preferred in common fund situations." *In re IBP, Inc. Sec. Litig.*, 328 F. Supp. 2d 1056, 1064 (D.S.D. 2004).

"This methodology rewards efficiency and provides plaintiffs' counsel with a strong incentive to effectuate the maximum possible recovery under the circumstances." *St. Paul*, 2006 WL 1116118, at *1; *Desert Orchid Partners, L.L.C. v. Transaction Sys. Architects, Inc.*, 2007 WL 703515, at *4 (D. Neb. Mar. 2, 2007). "There are strong policy reasons behind the judicial and legislative preference for the percentage of recovery method of determining attorney fees in these cases." *Xcel*, 364 F. Supp. 2d at 991 (footnote omitted); *see Report of the Third Circuit Task Force*, Court Awarded Attorney Fees, 108 F.R.D. 237, 254 (Oct. 8, 1985).

First, it is consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated on a percentage-of-the-recovery method. *See In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992). Second, it rewards efficiency and provides plaintiffs' counsel with a strong incentive to effectuate the maximum possible recovery under the circumstances. *See Xcel*, 364 F. Supp. 2d at 993; Charles Silver, *Due Process and the Lodestar Method: You Can't Get There From Here*, 74 Tul. L. Rev. 1809 (2000). Third, the use of the percentage method decreases the burden imposed upon courts by the "lodestar" method and assures that class members do not experience undue delay in receiving their share of the settlement. *See Telik*, 576 F. Supp. 2d at 585 (the "'primary source of dissatisfaction' with the lodestar methodology 'was that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits.'") (citation omitted).

Lastly, fee awards in successful cases promote the private enforcement of important areas of federal and state law, including the federal securities laws. In particular, the Exchange Act "seek to maintain public confidence in the marketplace. They do so by deterring fraud, in part, through the availability of private securities fraud actions." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005) (citation omitted). The Supreme Court has emphasized that private securities actions serve as the "'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) (citations omitted).

C. The Requested Fee Percentage Is Reasonable

"The Eighth Circuit has not established factors that a district court should consider when calculating the reasonable percentage to award attorney fees in a common fund case." *Xcel*, 364 F. Supp. 2d at 992. The case-law in this Circuit, however, applies several factors that are

incorporated herein and discussed below. *See id.*; *Charter*, 2005 WL 4045741, at *15-19; *St. Paul*, 2006 WL 1116118, at *1-*2; *IBP, Inc. Sec. Litig.*, 328 F. Supp. 2d at 1064-65.

1. The Percentage of Recovery Falls Within the Range of those Awarded in this Circuit

An appropriate fee is intended to approximate what counsel would receive if they were bargaining for their services in the open marketplace. *See Missouri v. Jenkins*, 491 U.S. 274, 285 (1989). Courts in this circuit "have frequently awarded attorney fees between twenty-five and thirty-six percent of a common fund in other class actions." *See Xcel*, 364 F. Supp. 2d at 998 (listing cases and percentages). An award of 36% of the settlement fund was deemed reasonable by the Eighth Circuit in *In Re Bancorp Litig*, 291 F.3d at 1038. In *Brehm v. Capital Growth Fin.*, this court determined an award of 33.3% in a partial settlement to be reasonable. 2010 WL 481008 (D. Neb. February 4, 2010).

Here, the attorneys' request for an award of 33.3% is well within the range of percentages courts in this Circuit have awarded in similar securities class action. *See, e.g.*, *In re E.W. Blanch Holdings, Inc. Sec. Litig.*, 2003 WL 23335319 (D. Minn. June 16, 2003) (awarding 33.3% of a $20 million settlement)*; In re Select Comfort Corp. Secs. Litig.*, No. 99-884 (D. Minn. Feb. 28, 2003) (awarding 33.3% of the $ 5,750,000 settlement); *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp.2d 1057, 1064 (D. Minn. 2010) (33.3% of $16.5 million settlement).[2]

[2] Other jurisdictions set one-third of the common fund as benchmark for class action fee awards for settlements of similar or smaller amounts. *See, e.g., In re Blech Sec. Litig.*, 2002 WL 31720381 (S.D.N.Y. Dec. 4, 2002) (awarding 33-1/3% of $2,795,000 settlement fund); *Becher v. Long Island Lighting Co.*, 64 F. Supp. 2d 174, 182 (E.D.N.Y. 1999) (one-third fee of $7.8 million, is "well within the range accepted by courts in this circuit"); *Berchin v. General Dynamics Corp.*, 1996 WL 465752, at * 2 (S.D.N.Y. Aug. 14, 1996) (33% of first $3 million); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (upheld fee award of 33.3% of $1.725 million settlement); *In re StockerYale, Inc. Secs. Litig.*, 2007 WL 4589772, at *6 (D.N.H. Dec. 18, 2007) (33% of $3.4 million settlement fund); *Smith v. Dominion Bridge Corp.*, 2007 WL 1101272, at *10 (E.D. Pa. Apr. 11, 2007) (33% of $750,000); *Schulte v. Fifth Third Bank*,

Lastly, the requested fee is comparable to the average of fee awards in a study of securities class actions conducted by the National Economic Research Associates ("NERA") which found: "For settlements below $5 million, for example, median plaintiffs' attorneys' fees are 33% of the settlement amount; while settlements over $500 million, median fees fall to 11%." *See* Renzo Comolli, Ron Miller, John Montgomery, Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2012: Settlement bigger, but fewer* (the "NERA Study"), at p. 30, attached as Ex. 4 to Index.

2. The Results Achieved

The Advisory Committee Note to Federal Rule of Civil Procedure Rule 23(h) states that "[f]or a percentage approach to fee measurement, results achieved is the basic starting point." (Emphasis added.) *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"). Courts in this Circuit are in accord. *See, e.g.*, *Xcel*, 364 F. Supp. 2d at 994.

The Settlement Fund created here consisting of $3.1 million (plus interest) is an excellent result. This amount, representing approximately 13.5% of the total estimated damages, as calculated by Counsel for Plaintiffs (Kim Decl., ¶ 22), is an excellent recovery. *See In re Rite Aid Corp. Sec. Litig.*, 146 F.Supp.2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, class action settlements have typically recovered "between 5.5% and 6.2% of the class members'

2011 WL 3269340, at *31 (N.D. Ill. July 29, 2011) ("A number of fee awards in common-fund cases from within the Seventh Circuit show that an award of 33-1/3% of the settlement fund is within the reasonable range"; approving 33.3% of $9.5 million); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1298 (11th Cir. 1999) (one-third award of $40 million); *Ratner v. Bennett*, 1996 WL 243645 (E.D. Pa. May 8, 1996) (35% award in securities action of $400,000); *Faircloth v. Certified Fin. Inc.*, 2001 WL 527489, at *12 (E.D. La. May 16, 2001) (35% award of $1.534 million).

estimated losses); *In re Prudential Sec., Inc. L.P. Litig.*, 1995 WL 798907 (S.D.N.Y. Nov. 20, 1995) (approving settlement of between 1.6% and 5% of claimed damages).

Indeed a recent study, the median settlement value as a percentage of damages for cases such as this one with $23 million in damages, is 9.1%; the average is 10.2%. *See* Nera Report, at 29, Ex. 4 to Index. Here, the Settlement provides Class Members with approximately 13.5% of Plaintiffs' estimated best possible result, assuming not only complete victory (including proof of loss causation), but Defendants' unlimited resources for payment of a judgment. The result here is nearly 48% higher than the historical median, and is 32% higher better than the historical median.[3] This is an excellent result.

Thus, the results achieved by Lead Counsel, in light of the legal and factual complexity and magnitude of this case and the significant difficulties of establishing both liability and damages, are adequate, justifying an award of 33.3%.

3. The Difficulty and Risks Attendant to the Litigation

Numerous cases recognize that risk is an important factor in determining the fee award. *See, e.g., Xcel*, 364 F. Supp. 2d at 994. Uncertainty in ultimately obtaining recovery is highly relevant in determining risk. "Securities fraud class actions are by their nature, complex and difficult to prove." *Charter*, 2005 WL 4045741, at *15. Such is the case at hand. While securities cases have traditionally been complex and difficult to prosecute, the PSLRA has enhanced its difficulty. Recent United States Supreme Court decisions have interpreted the securities laws in a manner less than favorable to plaintiffs on pleading scienter, loss causation

[3] The percentage for the mean was calculated by taking the difference between 13.5% and the mean, and dividing the difference with the mean. The percentage for the median was calculated the same way taking the difference from 13.5% and dividing it into the median.

and scheme liability. *See Dura*, 544 U.S. at 345; *Stoneridge Inv. Partners, LLC v. Scientific-Atlantic, Inc.*, 552 U.S. 148 (2008).

The risks of further litigation are also analyzed in connection with approval of the Settlement itself and will not be discussed at length herein. The Court is respectfully referred to paragraphs ¶¶ 38-45 of the Kim Declaration. In sum, the risks faced by the Class in this securities class action are significant, particularly given the dictates of the PSLRA, proof of class-wide damages, and the additional risks of maintaining class certification through trial.

4. The Skill Required and Quality, Efficiency and Complexity of the Work

The "prosecution and management of a complex national class action requires unique legal skills and abilities." *Edmonds v. United States*, 658 F.Supp. 1126, 1137 (D.S.C.1987). Here, the quality of Plaintiffs' Counsel's work on this case is reflected in the excellent result obtained. *See Behrens v. Wometco Enter.*, Inc., 118 F.R.D. 534, 547-48 (S.D. Fla. 1988). The standing and prior experience of Plaintiffs' Counsel are relevant in determining fair compensation. *See, e.g., City of Detroit v. Grinell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974). Lead Counsel and counsel working under its direction, have extensive and significant experience in the highly specialized field of securities class action litigation. A copy of the Lead Counsel and counsel working under its direction firm resumes are attached as Exhibits 5 and 6, to the Index.

Given the complexity of the issues presented in this Action, including the hotly contested issues of falsity, materiality, scienter, loss causation, and damages, it is Lead Counsel's opinion that only highly skilled counsel could have successfully represented the Class and obtained such a favorable recovery. Kim Decl., ¶¶ 52-55. In fact, in order to effectively plead and prosecute the Action, Lead Counsel was required to become familiar with complex banking regulations and

rules and related accounting rules and treatments, probe complex issues regarding the pleading and proof of falsity and materiality, scienter, and loss causation and damages. Moreover, it is particularly important to reward attorneys with skill and standing for pursuing such cases as "the stated goal in percentage fee-award cases [is] 'ensuring that competent counsel continue to be willing to undertake risky, complex and novel litigation." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000).

The quality of opposing counsel is also important in evaluating the quality of the work done by Plaintiff's Counsel. *See, e.g., In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977); *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Colo. 1976); *Arenson v. Bd. of Trade*, 372 F. Supp. 1349, 1354 (N.D. Ill. 1974). Plaintiffs were opposed in this litigation by several very skilled, highly respected, and nationally-recognized defense counsel that specialized in the highly complex field of securities class action defense. *See* Kim Decl., ¶¶ 53-55.

At every stage of the proceedings, Plaintiffs' Counsel was required to perform with a high level of skill, efficiency, and professionalism. In the face of strong opposition from several large nationally-recognized defense firms, Lead Counsel evaluated the merits and risks presented, negotiated a very favorable amount for the Class, and settled the litigation on an excellent basis for the Class. Such quality, efficiency and dedication should be rewarded.

5. The Time and Labor Involved

By the time the settlement was reached, Lead Counsel had conducted an extensive investigation, reviewed and analyzed thousands of pages of documents, interviewed many witnesses, consulted a banking expert, forensic accountant, and damages expert; and engaged in extensive motion practice. *See* Kim Decl., ¶ 6.

For instance, the Settlement was achieved only after Lead Counsel, or its agents, inter alia: (a) review and analysis of relevant filings made by TierOne with the United States Securities and Exchange Commission (the "SEC"); (b) review and analysis of defendants' public documents, conference calls and press releases; (c) review and analysis of securities analysts' reports and advisories concerning the Company; (d) review and analysis information readily obtainable on the Internet; (e) interviews of over a dozen witnesses with personal knowledge of the relevant facts through Lead Counsel's private investigators; (f) consultation with experts in banking and banking regulations, forensic accounting, and damages; (g) substantial motion practice, including the drafting of the Initial Complaint, Consolidated Amended Complaint and Second Amended Consolidated Complaint; (h) pressing and preserving the Class' claims in the bankruptcy court; (i) preparation and participation in extensive settlement negotiations with the aid of a nationally regarded mediator, Judge Layn R. Phillips (ret.); and (j) obtaining the settlement offer following arm's-length negotiations with defense counsel and prepare the documents necessary to obtain preliminary and final approval of the Settlement. *See* Kim Decl., ¶ 6.

This substantial litigation activity informed plaintiffs that, while their case had strengths, it also had significant weaknesses, which, along with a number of external factors, had to be, and were, conscientiously evaluated in determining what course of action was in the best interest of the Class. *See Xcel*, 364 F. Supp. 2d at 995. The requested fee is reasonable in light of the time and labor required to bring about this extraordinary result in this complex case.

6. A Lodestar Cross-Check Shows the Fee Request is Reasonable

The Eighth Circuit has recognized the primacy of the percentage of recovery approach, and has recommended the use of the lodestar method as a 'cross check.' *Charter*, 2005 WL

4045741, at *17; *Yarrington*, 697 F. Supp. 2d at 1065 ("The lodestar method confirms the appropriateness of the requested fee award.") "The lodestar cross-check need entail neither mathematical precision nor bean counting but instead is determined by considering the unique circumstances in each case." *Id*. (quoting *In re Xcel*, 364 F. Supp. 2d at 999). Furthermore, in cases where fees are calculated using the lodestar method, counsel may be entitled to a multiplier to reward them for taking on risk and producing high-quality work, such as the case here. *UnitedHealth Group Inc. PSLRA Litig.*, 643 F. Supp. 2d at 1106.[4]

Here, the total lodestar for Plaintiffs' Counsel is $527,007 for 913.9 hours of professional time. *See* Kim Decl.,¶23. Thus, counsel's fee request is equal to approximately 1.96 times the lodestar, a multiplier which is well in line with multipliers approved by Courts across the country. Finally, it should be noted that, had counsel sought to recover its fees under the lodestar method, its fee request under that method would have been presumptively reasonable. *See, e.g.*, *UnitedHealth Group Inc. PSLRA Litig.*, 643 F. Supp. 2d at 1106 (finding that a multiplier of 6.5 is appropriate under Eighth Circuit standards.). Plaintiffs' Counsel thus respectfully submits that its fee request is reasonable and the appropriate amount to award in this case. *See In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 2007 WL 2230177, at * 17, n.7 (S.D.N.Y. July 27, 2007) ("[l]odestar multipliers of nearly 5 have been deemed 'common' by courts in this District.") (citing cases); *see also In re AT&T Corp.*, 455 F.3d 160, 173 (3rd Cir. 2006)

[4] *See In re Ravisent Sec. Litig*., 2005 WL 906361, at *12 (E.D. Pa. April 18, 2005) (fee represented a multiplier of 3.1 of the lodestar); *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *16 (E.D. Pa. June 2, 2004) (noting that from 2001 through 2003, the average multiplier approved in common fund cases was 4.35); *Cullen v. Whitman Medical Corp.*, 197 F.R.D. 136, 150-51 (E.D. Pa. 2000) (lodestar of $1.2 million would require multiplier of 2.04 in order to match awarded fees of one-third of $7.3 million common fund); *In re Safety Components*, 166 F. Supp.2d 72, 103 (D.N.J. 2001) (lodestar of $534,000 would require multiplier of 2.81 in order to match awarded fees of $1.5 million); *In re Medical XRay Film*

(reaffirming prior holding that 2.99 multiplier was reasonable in case that lasted "four months, 'discovery was virtually nonexistent'")

7. The Reaction of the Class Supports the Requested Award

The Settlement has been overwhelmingly approved by Class Members. As sworn by the Claims Administrator, over 13,000 Claim Packets were mailed to potential Settlement Class Members and a Summary Notice was published in *Investor's Business Daily* and electronically on *GlobeNewswire* and made available to the public on the Claims Administrator's website. Bravata Decl., ¶ 5. Settlement Class Members were informed in the Notice that Plaintiffs' Counsel would apply for attorneys' fees of up to 33.3% of the Settlement Fund, plus reimbursement of litigation costs and expenses, plus interest, and were advised of their right to object to Lead Counsel's fee request. To date, two objections and seven requests for exclusion have been received. *See* Bravata Decl., ¶¶ 9-10.

Of the objections and requests for exclusion, only one submission concerns Lead Counsel's requested fee, filed by a shareholder Gary Peck representing 200 shares of TierOne stock. The "objection" was included in Mr. Peck request for exclusion. Because Mr. Peck has sought to be excluded from the Class he cannot by definition object to it. *See In re Sunrise Sec. Litig.*, 131 F.R.D. 450, 459 (E.D. Pa. 1990) (only class members may object to a proposed settlement, collecting authorities). Therefore his objection should be overruled. Given the lack of any substantial objection to the requested fee, this factor weighs in favor of the requested fee.

D. Plaintiff's Counsel Expenses Are Reasonable and Were Necessary to Achieve the Benefit Obtained

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Antitrust Litig., 1998 WL 661515, at *7 (E.D.N.Y. Aug. 7, 1998) (fee represented a multiplier on the attorneys' lodestar of 1.67).

Plaintiffs' Counsel's expenses are reasonable and were necessarily incurred as a part of Counsel's efforts to achieve an excellent recovery for the Class. Plaintiffs' Counsel has incurred expenses in an aggregate amount of $77,907.41 in prosecuting this litigation. These expenses are detailed in the declaration of Counsel submitted to the Court in support of this Motion. *See* Kim Decl., Exs. A & B. No objection has been received as to the requested reimbursement of expenses. *See* Bravata Decl., Exs. D-E.

The Court should approve Plaintiffs' request for reimbursement of Plaintiffs' Counsel's expenses. Courts have found that counsel for the Class are entitled to reimbursement for those types of out-of-pocket expenses that an attorney would normally expect the client to pay. *Pinkham v. Camex, Inc.*, 84 F.3d 292, 294-295 (8th Cir. 1996) (*citing West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 87 n.3 (1991)). ("such costs were reasonable out-of- pocket expenses of the kind normally charged to clients by attorneys, and thus should have been included as part of the reasonable attorney's fees awarded"); *see also Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42*, 8 F.3d 722, 725-26 (10th Cir. 1993) (expenses reimbursable if they would normally be billed to a client); *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995) (same); *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (same).

The categories of expenses for which counsel seek reimbursement are the type of expenses routinely charged to paying clients and, therefore, should be reimbursed out of the common fund.

Among the significant items of expense incurred by Plaintiffs' Counsel on behalf of the Class was the cost of retaining banking, accounting and damages experts, consultants, and a nationally recognized mediator – all of whom were necessary for the successful prosecution and resolution of the Litigation on behalf of the Class. Kim Decl., ¶ 71. *See Hiegel v. Hill*, 771 F.2d

358, 360 (8th Cir. 1985); *Bunda v. Potter*, 2006 WL 266513, at *9 (N.D. Iowa January 31, 2006); *In re Immune Response Securities Litigation*, 497 F. Supp. 2d 1166, 1178 (S.D. Cal. 2007).

Other significant expenses involved travel, lodging and related expenses for the mediation, court appearances, meetings with Defendants' counsel, meetings with Plaintiffs' experts, and Plaintiffs. Where possible, Lead Counsel participated in these matters by telephone, resulting in considerable savings of expense to the Class. Travel and lodging expenses were necessary to the prosecution of the action, were reasonable in amount and are properly charged against the fund created. *Pinkham*, 84 F.3d at 294-5, *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 395-96 (5th Cir.2003); *Grand Elec., LLC v. IBEW Local 265*, 2011 WL 6740408, at *17 (D. Neb. December 21, 2011); *Hite v. Vermeer Mfg. Co.*, 361 F. Supp. 2d 935, 955 (S.D. Iowa 2005).

Similarly, photocopying and scanning costs associated with document production and ECF filings and comparable costs are customarily reimbursed in common fund cases. *See Morrow v. Weinerman & Assocs., LLC*, 2012 WL 1593301 (D. Minn. May 7, 2012); *Emmenegger v. Bull Moose Tube Co.*, 33 F. Supp. 2d 1127, 1133-34 (E.D. Mo. 1998). Other expenses include providing notices to the Class pursuant to the PSLRA early notice provisions.

E. Award to Lead Plaintiffs Should be Approved

Lead Plaintiffs each requests that the Court award it $2,000 in connection with the reasonable costs and expenses incurred through their representation of the Settlement Class, for a total of $6000. The PSLRA provides that courts are empowered to approve such awards to reimburse plaintiffs for reasonable costs and expenses related to the representation of the class. *See* 15 U.S.C. §78u-4(a)(4). Lead Plaintiffs have diligently and completely fulfilled their

obligations as representative plaintiff in the present action by: (1) reviewing the initial complaint and the Amended Complaints; (2) reviewing the parameters of the Settlement and participating in the negotiations thereof; and (3) discussing all of the foregoing matters with Plaintiffs' Counsel. In the case of Mr. Valentino, he appeared at the Preliminary Approval Hearing on behalf of the Lead Plaintiffs. Thus, it is respectfully submitted that under the circumstances present here, approval of this award is warranted. *See, e.g., In re Xcel Energy, Inc., Sec., Deriv. & ERISA Litig.*, 364 F. Supp. 2d 980, 1000 (D. Minn. 2005).

IV. CONCLUSION

For the foregoing reasons, Lead Counsel's Motion for approval of attorneys' fees should be granted in its entirety.

Dated: September 25, 2012

Respectfully submitted,

THE ROSEN LAW FIRM, P.A.

By: /s/ Phillip Kim

Laurence M. Rosen, Esq.(pro hac vice)
Phillip Kim, Esq. (pro hac vice)
Christopher Hinton, Esq., #4113213
275 Madison Avenue, 34th Floor
New York, New York 10016
Telephone: (212) 686-1060
Fax: (212) 202-3827
Email: lrosen@rosenlegal.com
Email: pkim@rosenlegal.com
Email: chinton@rosenlegal.com

Lead Plaintiffs' Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of September, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all CM/ECF participants and counsel of record.

In addition, I certify that on September 25, 2012 copies of the foregoing documents were mailed via United States first class regular mail to the following non CM/ECF participants:

Douglas J. Stejskal
PO Box 1222
Columbus, NE 68602

By: /s/ Phillip Kim