UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PHILIP FRYMAN, et al.,

Plaintiffs,

v.

ATLAS FINANCIAL HOLDINGS, INC., SCOTT D. WOLLNEY, and PAUL A. ROMANO,

Defendants.

Case No. 1:18-cv-01640

Hon. Franklin U. Valderrama
United States District Judge

Hon. Sheila M. Finnegan
United States Magistrate Judge

Telephonic Hearing Date: September 6, 2023
Time: 10:00 a.m.

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

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Court-appointed Lead Counsel, Glancy Prongay & Murray LLP ("Lead Counsel"), respectfully submits this memorandum of law in support of its Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses.[1]

I. PRELIMINARY STATEMENT

Plaintiffs' Counsel[2] obtained an all-cash, non-reversionary settlement of $5,000,000 (the "Settlement") for the benefit of the Settlement Class in the above-captioned action (the "Action"). This is an outstanding outcome in the face of substantial risks and is the result of Plaintiffs' Counsel's vigorous, persistent, and skilled efforts. Lead Counsel now moves this Court for an award of attorneys' fees in the amount of 33⅓% of the Settlement Fund (*i.e.*, $1,666,500, plus interest accrued thereon), and reimbursement of $141,075.97 in Litigation Expenses. The Litigation Expenses consist of $118,575.97 in out-of-pocket costs incurred by Plaintiffs' Counsel while prosecuting the Action, and an aggregate of $22,500 to Plaintiffs for reimbursement of the reasonable costs (including the cost of time spent) incurred in prosecuting the Action on behalf of the Settlement Class pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(a)(4).

As detailed below and in the accompanying Wolke Declaration,[3] the Settlement represents an excellent recovery for the Settlement Class under the circumstances. In the absence of a settlement,

[1] All capitalized terms used herein that are not otherwise defined have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated November 28, 2022 (ECF No. 141-1) (the "Stipulation"), or the concurrently-filed Declaration of Kara M. Wolke in Support of: (I) Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation; and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Wolke Declaration"). Citations herein to "¶__" and "Ex. __" refer, respectively, to paragraphs in and exhibits to, the Wolke Declaration. All internal quotations and citations are omitted unless otherwise stated.

[2] Plaintiffs' Counsel consists of Lead Counsel, Court-appointed liaison counsel Lawrence Kamin, LLC, and the Law Offices of Howard G. Smith. ¶3.

[3] The Wolke Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the procedural history and the prosecution of the claims at issue; the negotiations leading to the proposed Settlement; the risks and uncertainties of continued litigation; and a description of the services Plaintiffs' Counsel have provided for the benefit of the Settlement Class.

the Action likely would have continued for years, through the completion of fact discovery, expert discovery, summary judgment, trial, and likely appeals. Plaintiffs and their counsel faced substantial obstacles in proving liability and damages, yet nevertheless reached a timely and substantial resolution for the Settlement Class.

The Settlement was not easily achieved. Defendants were represented by highly skilled litigators, and Plaintiffs' Counsel faced numerous hurdles and risks from the outset, including the heightened pleading standards and automatic discovery stay of the PSLRA, the high cost of experts and investigators needed to litigate a complex securities fraud case, and a substantial risk of non-payment. These are not idle risks. "To be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action." *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009) (O'Connor, J., by designation); *see also Jorling v. Anthem, Inc.*, 836 F. Supp. 2d 821, 831 (S.D. Ind. 2011) (discussing the PSLRA's "heightened pleading requirements, making it more difficult for plaintiffs to survive a motion to dismiss, and thus receive the keys to unlock the discovery process."). Indeed, "[t]he court needs to look no further than its own order dismissing the ... litigation to assess the risks involved." *In re Xcel Energy, Inc. Sec., Deriv. & "ERISA" Litig.*, 364 F. Supp. 2d 980, 1003 (D. Minn. 2005); *see also* ECF No. 92 (opinion and order granting Defendants' motion to dismiss). Nor do the risks end at the pleading stage. Even when a plaintiff is successful at trial, payment is not guaranteed. *See, e.g., Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 414, 433 (7th Cir. 2015) (reversing and remanding jury verdict of $2.46 billion in securities action after 13 years of litigation on loss causation grounds and error in jury instructions); *Robbins v. Koger Props.*, 116 F.3d 1441, 1449 (11th Cir. 1997) (reversing $81 million jury verdict for securities fraud).

Despite facing long odds, Plaintiffs' Counsel vigorously pursued this case for more than four

and a half years. *See generally* ¶¶39-61. Among other things, Plaintiffs' Counsel:

- Conducted a thorough investigation of the claims asserted in the Action, which included: (a) a review and analysis of (i) Atlas's SEC filings, press releases, investor conference calls, and other public statements; (ii) publicly available documents, announcements, and news articles concerning Atlas; and (iii) research reports prepared by securities and financial analysts regarding Atlas; (b) interviews with former employees and other potential witnesses with relevant information; and (c) consultations with accounting, loss causation and damages experts;
- Drafted four comprehensive and detailed complaints—including the 91-page Fourth Amended Complaint (excluding exhibits) (the "Complaint")—based on Plaintiffs' Counsel's extensive investigation;
- Engaged in substantial briefing related to Defendants' motions to dismiss and Defendants' Motion for Clarification of Rulings on Loss Causation and Standing ("Motion for Clarification"), which resulted in the Court partially sustaining the Complaint and denying the Motion for Clarification in its entirety;
- Engaged in discovery, which included, *inter alia*: (a) researching and drafting initial disclosures; (b)propounding and responding to discovery requests; (c) negotiating an agreed confidentiality order and a protocol to govern the production of electronically stored information and other documents; (d) serving two subpoenas *duces tecum* on third-parties as well as Freedom of Information Act ("FOIA") requests for documents to Atlas's insurance regulators in Illinois, Missouri, and New York; (e) meeting and conferring with counsel for Defendants and third-parties; and (f) conducting a targeted review and analysis the more than 320,900 pages of documents produced by Defendants and third parties;
- Exchanged documents and mediation briefs containing detailed analyses of the strengths, risks, and potential issues in the litigation with Defendants, participated in a full-day mediation session with an experienced neutral, and engaged in several days of further negotiations that culminated in a mediator's recommendation to resolve the Action for $5,000,000 in cash for the benefit of the Settlement Class;
- Worked with Plaintiffs' damages expert to craft a plan of allocation that treats Plaintiffs and all other members of the proposed Settlement Class fairly; and
- Drafted the Stipulation and related exhibits, as well as the preliminary approval and final approval briefs. *See* ¶¶39-65.

As compensation for their considerable efforts on behalf of the Settlement Class, Plaintiffs' Counsel seek an award equal to 33⅓% of the Settlement Fund and reimbursement of out-of-pocket litigation expenses in the amount of $118,575.97. The requested fee award is reasonable and consistent with the market rate for fees regularly awarded in class action settlements within the Seventh Circuit. Moreover, although "[a] lodestar cross-check is not required in this Circuit[,]" (*Hale*

v. State Farm Mut. Auto. Ins. Co., 2018 WL 6606079, at *13 (S.D. Ill. Dec. 16, 2018)), the requested fee award equates to a multiplier of 1.10, which is well within the range of multipliers that are commonly awarded in complex class actions with substantial contingency risks such as this one. *See* ¶¶100-111 (lodestar/multiplier analysis).

For these reasons, as well as those set forth below and in the Wolke Declaration, Lead Counsel respectfully submits that the requested attorneys' fees are fair and reasonable under the applicable standards and should be awarded by the Court. The Litigation Expenses requested by Plaintiffs' Counsel and the Plaintiffs are likewise reasonable and the expenses were necessarily incurred in the successful prosecution of the Action. Accordingly, they too should be approved.

II. THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE

A. Counsel Are Entitled To An Award Of Attorneys' Fees From The Common Fund

The Supreme Court has long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Similarly, the Seventh Circuit has held that "[w]hen a case results in the creation of a common fund for the benefit of the plaintiff class, the common fund doctrine allows plaintiffs' attorneys to petition the court to recover its fees out of the fund." *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 563 (7th Cir. 1994) ("*Florin I*"); *see also Sutton v. Bernard*, 504 F.3d 688, 691-92 (7th Cir. 2007) (the "common fund doctrine" is "based on the equitable notion that those who have benefited from litigation should share in its costs").

B. The Requested Attorneys' Fee Award Should Be A Percentage Of The Fund

The Seventh Circuit is unique among federal circuits in that it requires district courts to replicate the market for legal services when it sets fees in class actions. *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 957 (7th Cir. 2013) ("[A]ttorneys' fees in class actions should approximate the

market rate that prevails between willing buyers and willing sellers of legal services."); *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("*Synthroid I*") ("We have held repeatedly that, when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services . . . .").

Although courts within this Circuit "have discretion to choose either the lodestar or the percentage method of calculating fees" in common fund cases (*In re Trans Union Corp. Privacy Litig.*, 2009 WL 4799954, at *9 (N.D. Ill. Dec. 9, 2009)), the Seventh Circuit has strongly endorsed the percentage of the fund method because it most closely approximates the manner in which attorneys are compensated in the marketplace for contingent work. *See Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) ("When the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee *is* the 'market rate.'"); *Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998) ("When a class suit produces a fund for the class, it is commonplace to award the lawyers for the class a percentage of the fund . . . in recognition of the fact that most suits for damages in this country are handled on the plaintiff's side on a contingent-fee basis."). Indeed, the prevailing, if not exclusive, method of compensating class counsel is by a contingent fee arrangement: "The lawyers for the class receive no fee if the suit fails, so their entitlement to fees is inescapably contingent." *Florin I*, 34 F.3d at 565, quoting *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 569 (7th Cir. 1992).

The Seventh Circuit has also recognized "that there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration." *Florin I*, 34 F.3d at 566; *In re Cont'l Ill. Sec. Litig.*, 962 F.2d at 572-73 (noting that it is easier to award a percentage "than it would be to hassle over every item or category of hours and expenses and what multiple to fix and so forth"). And, they have likewise acknowledged the many disadvantages of the lodestar method.

See In re Synthroid Mktg. Litig., 325 F.3d 974, 979-80 (7th Cir. 2003) (noting that the lodestar method creates the "incentive to run up the billable hours"). Given the goal of trying to mimic the market, and the pros and cons of each method, it is no surprise that "[i]n a common fund class action settlement, the Seventh Circuit Court of Appeals uses a percentage of the relief obtained rather than a lodestar or other basis." *Bell v. Pension Comm. of ATH Holding Co., LLC*, 2019 WL 4193376, at *3, *5 (S.D. Ind. Sept. 4, 2019); *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 80 F. Supp. 3d 838, 844, 859 (N.D. Ill. Feb. 20, 2015) (finding that the percentage method has "emerged as the favored method for calculating fees in common-fund cases in this district").[4]

Accordingly, Lead Counsel respectfully submit that the Court should award attorneys' fees based on a percentage of the common fund obtained.[5]

C. The Requested Fee Award Is Fair And Reasonable Under Applicable Seventh Circuit Factors

When considering the reasonableness of a requested fee award, the Seventh Circuit "has consistently directed district courts to do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Synthroid I*, 264 F.3d at 718; *Sutton*, 504 F.3d at 692. In applying this standard, courts in the Seventh Circuit consider the following factors: (1) "awards made by courts in other class actions"; (2) "the quality of legal services rendered"; and (3) "the contingent nature of the case." *Taubenfeld v. AON Corp.*, 415 F.3d 597, 600 (7th Cir. 2005); *Synthroid I*, 264 F.3d at 721 ("The market rate for legal fees

[4] *See also Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 637 (7th Cir. 2011) (affirming district court award and its finding that a "pure percentage fee approach best replicated the market for ERISA class action attorneys."); *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998) ("we have never ordered the district judge to ensure that the lodestar result mimics that of the percentage approach.").

[5] Use of the percentage method in the context of securities fraud cases is further supported by the text of the PSLRA, which provides 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" recovered for the class. 15 U.S.C. § 78u-4(a)(6); *see also In re Worldcom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005).

depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case."). These factors strongly support the requested fee award.

1. A 33⅓% Award Is Consistent With Seventh Circuit Authority

"[A]ttorneys' fees from analogous class action settlements are indicative of a rational relationship between the record in this similar case and the fees awarded by the district court." *Taubenfeld*, 415 F.3d at 600. In complex class action cases like this one, courts within the Seventh Circuit have held that percentages in the range of 33⅓% to 40% of the recovery are appropriate. *See Meyenburg v. Exxon Mobil Corp.*, 2006 WL 2191422, at *2 (S.D. Ill. July 31, 2006) ("33⅓% to 40% (plus the cost of litigation) is the standard contingent fee percentages in this legal marketplace for comparable commercial litigation."); *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) ("A customary contingency fee would range from 33⅓% to 40% of the amount recovered."); *Hale*, 2018 WL 6606079, at *10 ("Courts within the Seventh Circuit, and elsewhere, regularly award percentages of 33.3% or higher to counsel in class action litigation.").[6]

In addition to finding awards of one-third or more reasonable, courts in the Seventh Circuit—including this Court—have repeatedly granted such awards in complex contingency fee litigation such as this one, including in cases with much larger recoveries. *See Young v. Cty. of Cook*, 2017 WL 4164238 at *2 (N.D. Ill. Sept 20, 2017) (one-third of $32.5 million fund); *Hale*, 2018 WL 6606079, at *13, *16 (one-third of $250 million settlement); *Beesley v. Int'l Paper Co.*, 2014 WL 375432, at *2 (S.D. Ill. Jan. 31, 2014) (awarding 33.3% of $30 million settlement); *Pierrelouis v. Gogo, Inc.*, 2022 WL 7950362, at *1-2 (N.D. Ill. Aug. 31, 2022) (awarding 33⅓% of $17.3 million settlement); *Macovski v. Groupon, Inc.*, 2022 WL 17256417, at *1-2 (N.D. Ill. Oct. 28, 2022) (awarding 33⅓% of

[6] *See also Swift v. Direct Buy, Inc.*, 2013 WL 5770633, at *8 (N.D. Ind. Oct. 24, 2013) (the "payment of 33% of the common fund is widely accepted by the Seventh Circuit as a reasonable fee in a class action.").

$13.5 million settlement); *Retsky*, 2001 WL 1568856, at *3 (awarding 33.3% of $14 million settlement).[7] Accordingly, this factor supports the requested fee award. *See Heekin v. Anthem, Inc.*, 2012 WL 5878032, at *5, n.3 (S.D. Ind. Nov. 20, 2012) (awarding 33.3% of $90 million fund in securities class action, plus expenses; collecting cases and stating that "there is support from other cases in this Circuit and nationally to support a percentage market rate of 33.3%."); *Hale*, 2018 WL 6606079, at *8 (noting that the empirical evidence shows "sophisticated clients and sophisticated class representatives regularly agree to pay 33.33% or more in risky, complex litigation, even when potential rewards are very large.").

Moreover, the requested fee is reasonable under the Seventh Circuit's articulated assessment in *Redman v. RadioShack Corp*, 768 F.3d 622, 630 (7th Cir. 2014). In *Redman*, the Seventh Circuit held that "the ratio that is relevant to assessing the reasonableness of the attorneys' fees ... is the ratio of (1) the fee to (2) the fee plus what the class members received." *Id*. Accordingly, the ratio should exclude the cost of administering the settlement and the value of any *cy pres* award. *Id.* at 630; *Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014). Here, the Settlement Amount is $5,000,000; the requested attorneys' fee is $1,666,500; the requested PSLRA awards for Plaintiffs total $22,500; the estimated claims administration fee is $225,000; and the *cy pres* award is expected to be negligible. ¶112. The *Redman* ratio, then, is (1) $1,666,500 to (2) $4,752,500,[8] or 35.0%,[9] which is certainly within the range of reasonableness. *See Neals v. Partech, Inc.*, Case No. 1:19-cv-05660, ECF 140 (N.D. Ill. Jul. 20, 2022) (Valderrama, J.) (approving fee request that "equates to 35% of the Settlement Fund, less the amount paid for notice and the proposed incentive award."); *Sanchez v. Roka Akor*

[7] *See also* Ex. 8 (collecting Seventh Circuit cases with 33% or higher fee awards).

[8] $5,000,000 – $22,500 - $225,000 = $4,752,500.

[9] The denominator excludes settlement administration costs and PSLRA awards, but not litigation costs. *See Leung v. XPO Logistics, Inc.*, 326 F.R.D. 185, 200 and n. 5-6 (N.D. Ill. 2018) (Chang, J.) (similar calculation excluded $298,321 in settlement administration costs and a $10,000 incentive award in the denominator, but not $52,458.90 litigation costs) (citing *Pearson*, 772 F.3d at 780-82).

Chicago LLC, 2017 WL 1425837, at *6 (N.D. Ill. Apr. 20, 2017) (approving a request of fees equal to "effectively 39.5% of the common fund" after applying the *Redman* ratio). Moreover, if the Court were to include estimated interest earned on the Settlement Fund after payment of the requested attorneys' fees and prior to distribution ($168,944)—which it should because Settlement Class Members will receive this money—the *Redman* ratio is reduced to 34.1%. ¶112.

2. The Quality Of Legal Services Rendered And The Amount Of Work

The "market price for legal fees depends . . . in part on the quality of [the firm's] performance, [and] in part on the amount of work necessary to resolve the case." *Sutton*, 504 F.3d at 693. From the inception of the Action, Plaintiffs' Counsel sought to obtain the maximum recovery for the Settlement Class. This case required an in-depth investigation, a thorough understanding of Atlas' business model, comprehensive knowledge of the securities laws, significant work with experts, and the skill to respond to a host of legal and factual issues raised by Defendants at every step of the litigation. *See* ¶¶39-60. Plaintiffs' Counsel spent over 2,393.10 hours of attorney and paraprofessional time investigating the claims, working with experienced investigators, drafting four detailed amended complaints, opposing three motions to dismiss, conducting discovery, consulting with outside accounting and financial experts, and preparing for and participating in a full-day mediation session that included further briefing by the Parties. And, during settlement negotiations, Plaintiffs' Counsel demonstrated their willingness to continue litigating rather than accept a settlement that was not in the best interest of the Settlement Class. Indeed, the Settlement was only obtained as a result of a mediator's proposal after the Parties were unable to reach agreement on an appropriate settlement value. Plaintiffs' Counsel's diligent efforts, as well as their skill and expertise, enabled them to overcome significant hurdles—including the dismissal of the case—and to negotiate an excellent result for the Settlement Class. Plaintiffs' Counsel's hard work on this litigation, and the high caliber of that work, supports Plaintiffs' Counsel's request. *See Hale*, 2018 WL 6606079, at *10.

The quality of opposing counsel is also important in evaluating the value of Plaintiffs' Counsel's work. *See, e.g.*, *Beesley*, 2014 WL 375432, at *2 ("[l]itigating this case against formidable defendants and their sophisticated attorneys required Class Counsel to demonstrate extraordinary skill and determination."). Plaintiffs' Counsel was opposed in this Action by counsel from DLA Piper LLP (US), a firm with a reputation for vigorous advocacy in the defense of complex civil cases. Notwithstanding this opposition, Plaintiffs' Counsel were able to develop their case and persuade Defendants to settle on terms favorable to the Settlement Class. Accordingly, the quality of the representation supports the requested fee award.

3. The Market Rewards Risk, And This Case Was Tremendously Risky

As noted by the Seventh Circuit in *Synthroid I*, "the market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear." 264 F.3d at 721; *see also Silverman*, 739 F.3d at 958 ("The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel."). "Thus, [w]hen determining the reasonableness of a fee request, courts put a fair amount of emphasis on the severity of the risk (read: financial risk) that class counsel assumed in undertaking the lawsuit." *Hale*, 2018 WL 6606079, at *8. Indeed, as the Seventh Circuit has emphasized, "court[s] must also be careful to sustain the incentive for attorneys to continue to represent such clients on an inescapably contingent basis." *Florin v. Nationsbank of Ga., N.A.*, 60 F.3d 1245, 1247 (7th Cir. 1995) ("*Florin II*"). In applying this factor, "risk is to be assessed as of the time of the inception of the litigation." *In re Gould Sec. Litig.*, 727 F. Supp. 1201, 1208 (N.D. Ill. 1989).[10]

Here, Plaintiffs' Counsel undertook the Action on a fully contingent basis, assuming the significant risk that the litigation would yield no recovery and leave them uncompensated. Unlike

[10] *See also Florin I*, 34 F.3d at 565 (directing district court to determine fair attorneys' fees in class action by considering the probability of success at the outset of litigation).

defense counsel, who are typically paid an hourly rate and regularly reimbursed for their expenses, Plaintiffs' Counsel have not been compensated for ***any*** time or reimbursed for ***any*** of their out-of-pocket expense since this case began over four and half years ago. ¶116. And the risks in this case were not illusory; rather, they were very real from the time it was initiated, and they continued throughout the litigation—as evidenced by the Court's dismissal of the Third Amended Complaint. ECF No. 92; *see also In re BankAtlantic Bancorp, Inc. Sec. Litig.*, No. 07-61542-CIV., 2011 WL 1585605, at *6, *38 (S.D. Fla. Apr. 25, 2011) (granting judgment as a matter of law for defendants after jury returned verdict for plaintiffs). Leaving aside the many obstacles to recovery inherent in a complex securities fraud class action—including, but not limited to, the PSLRA's heightened pleading standard and automatic stay of discovery (15 U.S.C. § 78u-4(b)(3)(B))—this was a particularly unattractive and highly risky case.[11]

One proxy for assessing risk is whether there were other cases filed, or other lead plaintiff movants. The PSLRA requires the plaintiff or plaintiffs who file the first class action complaint to "publish[], in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class—(I) of the pendency of the action, the claims asserted therein, and the purported class period; and (II) that, not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class." 15 U.S.C. § 78u-4(a)(3)(A). Here, Lead Plaintiff Fryman filed the initial and only complaint in this case, published notice, and there were no other movants. *See* ECF Nos. 1, 18-19, 30. This "[l]ack of competition not only implies a higher fee, but also suggests that most members of the securities bar saw this litigation as too risky for their practices." *Silverman*, 739

[11] *See Silverman*, 739 F.3d at 958 (observing that "Defendants prevail outright in many securities suits."); *see also In re Xcel*, 364 F. Supp. 2d at 994 ("[p]recedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy.").

F.3d at 958.

Moreover, Atlas never formally restated its financial statements. When companies restate their financials, they are admitting a material misstatement of their financial reporting. A case predicated on a restatement is, therefore, less risky because the misstatement and materiality elements of a securities fraud claim are already met. *See In re Schering-Plough Corp. Enhance Sec. Litig.*, 2013 WL 5505744 at *30 (D.N.J. Oct. 1, 2013) (granting fee request where the case was the antithesis of cases where liability is virtually certain due to a financial restatement); *In re Xcel*, 364 F. Supp. 2d at 995 (noting that one of the many hurdles plaintiffs faced was the fact that the case did not involve a restatement of financials).[12]

Plaintiffs' Counsel's assumption of this contingency fee risk, and the extensive litigation of the Action in the face of these risks, strongly supports the reasonableness of the requested fee. *See Taubenfeld*, 415 F.3d at 600 (approving requested fee and noting that "lead counsel was taking on a significant degree of risk of nonpayment with the case."); *see also* ¶¶69-84 (discussing risks).

4. The Stakes Of The Action Favor The Requested Fees

The Court should also consider the "stakes of the case" in assessing a reasonable attorneys' fee award. *Synthroid I*, 264 F.3d at 721. By virtually any metric, this was high stakes, complex litigation. The Settlement Class's total losses were significant, estimated by Plaintiffs' Counsel's expert to be as high as $68.6 million. Plaintiffs' Counsel also had a great deal at stake, with the risk of non-payment

[12] Defendants were well aware of the importance of a restatement. As the Court pointed out in partially denying the motion to dismiss the Fourth Amended Complaint, "Defendants make much of the fact that Atlas never made a financial restatement for any of the audited financial statements that incorporated the opinion statements about reserves and internal controls." *Fryman v. Atlas Financial Holdings, Inc.*, 2022 WL 1136577, at *19 (N.D. Ill. Apr. 18, 2022). While the Court ultimately rejected this argument, it also acknowledged that "a restatement of financials is further evidence of materiality in a Rule 10b-5 falsity claim." *Id.* Notably, for purposes of assessing risk, this case was filed on March 5, 2018 (ECF No. 1), Atlas' dispute with its auditors was not disclosed until April 30, 2019 (more than a year later), and it wasn't until February 2020 (nearly two years later) that Atlas belatedly filed its 2018 10-K revising its earlier reported results. *See id.*

for their $1,521,316.14 in lodestar and the burden of advancing $118,575.97 in out-of-pocket costs, which would only be recouped if they were successful. Conversely, Defendants faced a multi-million dollar claim and were vigorous participants in this litigation. Consequently, the "stakes of the case" support the requested fee. *See Heekin*, 2012 WL 5878032, at *5; *see also Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 598 (N.D. Ill. 2011) ("stakes in the case are high given the size of the Class, the scale of the challenged activity, the complexity and costs of the legal proceedings, and the amount of money involved.").

5. Reaction Of The Settlement Class Supports The Requested Award

Pursuant to the Court's May 12, 2023 Amended Preliminary Approval Order, the Claims Administrator mailed 7,213 copies of the Notice Packet to potential Settlement Class Members and nominees informing them that, among other things, Lead Counsel intended to apply to the Court for an award of attorneys' fees in an amount not to exceed 33⅓% of the Settlement Fund and up to $215,000 in Litigation Expenses. *See* Ex. 1-A (Notice) at ¶5. While the deadline to file objections has not yet passed, to date, not a single objection to any aspect of the Settlement, including the fee and expense request, has been received. *See Spano v. Boeing Co.*, 2016 WL 3791123, at *1 (S.D. Ill. Mar. 31, 2016) ("This Court finds the lack of any significant number of objections to be a sign of the Class's overwhelming support for Class Counsel's request.").[13]

D. The Requested Fee Is Also Reasonable Using the Lodestar Method

Although the Seventh Circuit does not mandate use of a lodestar calculation as a secondary measure of reasonableness when the percentage-of-the-recovery approach is employed, *see Rohm & Haas Pension Plan*, 658 F.3d at 636 ("consideration of a lodestar check is not an issue of required methodology"), Plaintiffs' Counsels' requested attorneys' fees are also reasonable under the lodestar

[13] Each of the Plaintiffs, including Mr. Fryman, who filed the initial complaint in the Action, support Lead Counsel's application for a 33⅓% fee award. *See* Ex. 4 at ¶¶9-10; Ex. 5 at ¶¶9-10; Ex. 6 at ¶¶8-9.

method. As detailed in the Wolke Declaration, Plaintiffs' Counsel spent 2,393.10 hours of attorney and other professional time prosecuting the Action for the benefit of the Settlement Class, amounting to a lodestar of $1,521,316.14. ¶¶106-07; Exs. 2-3.

Accordingly, the requested fee of 33⅓% of the Settlement Fund, which equates to $1,666,500 (before interest), represents a multiplier of approximately 1.10 on Plaintiffs' Counsel's lodestar. ¶107. The requested 1.10 multiplier is well ***below*** the range of multipliers commonly awarded in comparable complex litigation. *See, e.g.*, *Spano*, 2016 WL 3791123, at *3 ("In risky litigation such as this, lodestar multiplier can be reasonable in the range between 2 and 5"); *Hale*, 2018 WL 6606079, at *14 (lodestar cross-check approving 2.83 multiplier); *see also Lowry v. RTI Surgical Holdings, Inc.*, 20-cv-01939 (MFK) (N.D. Ill. Jan. 26, 2022) (ECF Nos. 112, ¶72; 115) (approving fee application resulting 3.10 multiplier); ¶107 (gathering cases).

III. PLAINTIFFS' COUNSELS' EXPENSES SHOULD BE REIMBURSED

"It is well established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses, which includes such things as expert witness costs; computerized research; court reports; travel expense; copy, phone and facsimile expenses; and mediation." *Beesley*, 2014 WL 375432, at *3; *see also Synthroid I*, 264 F.3d at 722.

Here, Plaintiffs' Counsel incurred at total of $118,575.97 in out-of-pocket litigation expenses. ¶117. The expenses, and a categorization thereof, are attested to in each individual firm's declaration (Exs. 2-3), and totaled by category for the Court's convenience in the Wolke Declaration. ¶117. The expenses are the types reimbursed by clients in the marketplace, are below the amount set forth in the Notice sent to potential Settlement Class Members, were necessary for the successful prosecution of the Action, and are reasonable in amount. They should, therefore, be reimbursed from the common fund. *See Abbott*, 2015 WL 4398475, at *4; *Beesley*, 2014 WL 375432, at *3.

IV. PLAINTIFFS SHOULD BE AWARDED THEIR COSTS AND EXPENSES

Class representatives are permitted to recover unreimbursed costs (including the cost of time spent) while serving on behalf of the class. 15 U.S.C. § 78u-4(a)(4). Courts "routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." *Hicks v. Morgan Stanley*, 2005 WL 2757792, at *10 (S.D.N.Y. Oct. 24, 2005).

Plaintiffs respectfully request $7,500 each for Messrs. Fryman, Hovasapyan, and Chuan. Their efforts on behalf of the Settlement Class are detailed in their individual declarations. Ex. 4 at ¶¶12-13; Ex. 5 at ¶¶12-13; Ex. 6 at ¶¶11-12. The time it took to engage in these tasks is time that could have been devoted to other personal or professional activities, and they are "precisely the types of activities that support awarding reimbursement of expenses to class representatives." *In re Marsh & McLennan Cos. Sec. Litig*., 2009 WL 5178546, at *21 (S.D.N.Y. 2009). Moreover, the amount requested is consistent with awards in other complex cases.[14]

Accordingly, Lead Counsel respectfully requests that the Court approve the awards. *See Bell*, 2019 WL 4193376, at *6 ("Without [Plaintiff's] commitment to pursuing these claims, the successful recovery for the Class would not have been possible.").

V. CONCLUSION

For the foregoing reasons, Lead Counsel respectfully requests that the Court grant the fee and expense application.

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[14] *See Beezley v. Fenix Parts, Inc.*, 2020 WL 4593823, at *2 (N.D. Ill. Aug. 7, 2020) (awarding $10,000 to each of three lead plaintiffs); *Shah v. Zimmer Biomet Holdings, Inc.*, 2020 WL 5627171, at *13 (N.D. Ind. Sept. 18, 2020) (awarding $15,000 to each of four lead plaintiffs); *Will v. Gen. Dynamics Corp.*, 2010 WL 4818174, at *4 (S.D. Ill. Nov. 22, 2010) (awarding $25,000 to each of three named plaintiffs); *Cook*, 142 F.3d at 1016 (upholding award of $25,000 to class representative); *In re Signet Jewelers Limited Sec. Litig.*, 2020 WL 4196468, at *23-24 (S.D.N.Y. July 21, 2020) (collecting cases; awarding lead plaintiff $25,410).

Dated: August 2, 2023

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2023, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all registered ECF participants.

s/ Kara M. Wolke
Kara M. Wolke