UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE AEGEAN MARINE PETROLEUM NETWORK, INC. SECURITIES LITIGATION	)	Case No. 1:18-cv-04993 (NRB)
	)	Hon. Naomi Reice Buchwald

MEMORANDUM OF LAW IN SUPPORT OF LEAD COUNSEL'S MOTION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES AND THE ESTABLISHMENT OF A LITIGATION EXPENSE FUND

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Pursuant to Federal Rules of Civil Procedure 23(h) and the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(a)(4), Lead Counsel Berman Tabacco respectfully submits this Memorandum of Law in Support of their Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses[1] and the Establishment of a Litigation Expense Fund ("Fee and Expense Application).

I. INTRODUCTION

Lead Counsel and Lead Plaintiff the Utah Retirement Systems ("URS") have achieved excellent settlements with PricewaterhouseCoopers Auditing Company S.A. ("PwC Greece") and Deloitte Certified Public Accountants, S.A. ("Deloitte Greece") that together provide a $29.8 million recovery for the Settlement Class plus production of documents, including audit papers, which Lead Plaintiff intends to use in connection with the remainder of the Action.[2]

Lead Counsel hereby respectfully applies for (a) an award of attorneys' fees in the amount of 25% of each of the Gross Settlement Funds,[3] for a total of $7,450,000, plus interest, and reimbursement of $350,318.76 in expenses that were reasonably and necessarily incurred by Lead Counsel and Lowenstein Sandler LLP ("Lowenstein" or "Bankruptcy Counsel")[4] in prosecuting and resolving this Action against the Settling Defendants on behalf of the Settlement Class; (b) an award to Lead Plaintiff pursuant to 15 U.S.C. § 78u-4(a)(4) in the amount of $10,000; and (c) an order establishing a Litigation Expense Fund of $500,000 from the Partial Settlement Funds for the continued prosecution of this Action against the Non-Settling Defendants, including for

[1] All capitalized terms not otherwise defined herein have the same meaning as in the Notice of (I) Pendency of Class Action and Proposed Partial Settlements; and (II) Final Approval Hearing For The Partial Settlements, Plans of Allocation, Motion For Approval of Attorneys' Fees and Reimbursement of Litigation Expenses and Application For The Establishment of a Litigation Expense Fund (the "Omnibus Notice") (ECF No. 359-1), or in the supporting Declaration of Nicole Lavallee ("Lavallee Decl." or "Lavallee Declaration"), filed contemporaneously herewith. Unless otherwise indicated, all emphasis is added and all alterations, internal quotation marks and citations are omitted.

[2] A motion for final approval of these Partial Settlements is being filed concurrently herewith.

[3] The "Gross Settlement Funds" refers to $29.8 million settlements, including the $14.9 million settlement with PwC Greece (the "PwC Greece Settlement" or "PwC Greece Settlement Fund") and the $14.9 million settlement with Deloitte Greece (the "Deloitte Greece Settlement" or "Deloitte Greece Settlement Fund").

[4] Lead Counsel retained Lowenstein to assist in protecting Settlement Class Members' interests in matters arising from Aegean's bankruptcy and to represent the Class in the Bankruptcy Action (defined below). Lavallee Decl. ¶¶31-36.

expenses related to the process of conducting discovery overseas.

The requested fee and expense award is fair and reasonable. The prosecution of this Action has been undertaken on an entirely contingent basis and Lead Counsel and Lowenstein each have incurred $9,118,359.75 and $547,065.50, respectively, of lodestar from inception through June 30, 2022 and $350,318.76 in expenses. Lavallee Decl. Ex. 1-2, 4, at Ex. A. The requested percentage is fully consistent with the fee percentages awarded in comparable complex securities class actions cases and results in a negative multiplier of 0.77. The expenses incurred are the typical expenses normally reimbursed from common funds. The requested fee is also reasonable given Lead Counsel's efforts, the magnitude and complexities of this Action, the litigation risks in bringing and prosecuting this complex Action and, most importantly, the result achieved in the Partial Settlements.

Importantly, Lead Counsel's fee request is based on an ex-ante fee agreement negotiated by Lead Plaintiff, a sophisticated institutional investor with experience negotiating fees with counsel and evaluating fee requests. URS is the public pension system for Utah public employees and retirees and is responsible for managing over $40 billion in assets. Having expended significant time overseeing this litigation and Lead Counsel's efforts throughout the prosecution of this Action, URS has endorsed the requested fee as fair and reasonable.[5] Moreover, the reaction of the Settlement Class to date has been overwhelmingly positive.

Relatedly, given URS's extensive efforts overseeing this Action on behalf of the Settlement Class (*see* Lead Plaintiff Decl. ¶¶4-6), the requested award to reimburse Lead Plaintiff for its expenses in prosecuting this Action on behalf of the Settlement Class is entirely reasonable. *See* 15 U.S.C. § 78u-4(a)(4).

Finally, as detailed below, given that the continued prosecution of this Action against the Non-Settling Defendants will involve extensive discovery efforts overseas, the establishment of a Litigation Expense Fund of $500,000 is appropriate.

[5] *See* Declaration of Kevin Catlett on behalf of URS ("Lead Plaintiff Decl." or "Lead Plaintiff Declaration") (submitted herewith as Ex. 5 to the Lavallee Decl.), at ¶¶4-6, 8, 10.

II. PRELIMINARY STATEMENT

Lead Counsel have vigorously prosecuted this Action and will continue to do so. In particular, they exhausted considerable resources to (a) investigate the claims and defenses at issue; (b) review Aegean's public U.S. Securities and Exchange Commission ("SEC") filings, annual reports, press releases, earnings calls and other publicly available information spanning over a decade; (c) review analysts' reports and articles relating to Aegean; (d) work with investigative staff to uncover relevant facts and witnesses; (e) research legal issues and analyze documents filed in connection with several court cases involving Aegean and/or some Non-Settling Defendants, including a significant volume of pleadings and discovery filed in the Aegean Bankruptcy Action[6] and pleadings filed in cases brought in the U.S. and overseas by the Litigation Trustee appointed pursuant to Aegean's Chapter 11 Plan of Reorganization; (f) work extensively with forensic auditing consultants regarding the alleged accounting fraud as well as the alleged liability of the Settling Defendants in issuing their audit opinions; (g) prepare a comprehensive Consolidated Class Action Complaint ("Complaint") (ECF No. 81); (h) retain and work with Bankruptcy Counsel, Lowenstein, to protect the Settlement Class's claims by, among other things, successfully opposing Aegean's efforts, through the Bankruptcy Action, to release all investors' claims under the federal securities laws—including those against not just Aegean but also third parties such as the Settling Defendants; (i) consult and work with damages consultants; (j) consult with international privacy law consultants; (k) work on extensive briefing to oppose Defendants' motions to dismiss; (l) research applicable law with respect to the claims asserted in Lead Plaintiff's Complaint and the potential defenses thereto; (m) consult with foreign counsel on various matters; (n) issue numerous document requests and subpoenas; (o) engage in extensive meet and confers with Defendants and non-parties; and (p) obtain and commence review of a significant number of documents produced; and (q) work with the Court-appointed Claims

[6] Five months after the first complaint was filed in this Action, Aegean filed proceedings under Chapter 11 of the U.S. Bankruptcy Code. *See* Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re Aegean Marine Petroleum Network, Inc.*, No. 18-13374 (MEW) (Bankr. S.D.N.Y. Nov. 6, 2018), ECF No. 1 ("Bankruptcy Action").

Administrator to provide notice of the Partial Settlements to Settlement Class Members. *See* Lavallee Decl. ¶¶7-8 & Section III.

The Partial Settlements were reached only after the preparation of a comprehensive Complaint, extensive briefing on nine separate motions to dismiss, answers filed, discovery commenced and prolonged settlement discussions. Lavallee Decl. ¶¶25-30, 37-61. After the agreements in principle were reached, the Settling Parties diligently negotiated and prepared settlement papers and Lead Counsel worked with a damages expert on the plan for allocating the two Net Settlement Funds. *Id*. ¶62. The Court granted preliminary approval of the Partial Settlements on June 3, 2022 and the Partial Settlement Funds were deposited into escrow accounts on July 14 and 22, 2022. *Id*. ¶63.

Lead Counsel respectfully refers the Court to the Lavallee Declaration for a description of the history of the Action (*see* Lavallee Decl. ¶¶24-63); the efforts involved in the drafting and defending of the Complaint (*id.* ¶¶8, 27-30); the nature of the claims asserted (*id.* ¶27); the negotiations leading to the Partial Settlements (*id.* ¶¶10, 54-63); the risks and uncertainties of continued litigation, particularly as against foreign defendants and with related bankruptcy proceedings pending (*id.* ¶¶6, 9, 64-76); and a description of the services counsel provided for the benefit of the Class, including efforts before the Bankruptcy Court (*id.* ¶¶7-8, 24-53).

III. ARGUMENT

A. Lead Counsel and Lowenstein are Entitled to an Award of Attorneys' Fees Under the Common Fund Doctrine

It is well-settled that an attorney who pursues a lawsuit that succeeds in the creation of a common fund for the benefit of a class is entitled to receive attorneys' fees from the common fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole"). *See also Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000) (the common fund doctrine "prevents unjust enrichment of those benefitting from a lawsuit without contributing to its cost").

Courts have further recognized that, in addition to providing just compensation, awards of reasonable attorneys' fees from a common fund should ensure that "competent counsel continue[s] to be willing to undertake risky, complex, and novel litigation." *In re Initial Pub. Offering Sec. Litig.*, 226 F.R.D. 186, 198 n.64 (S.D.N.Y. 2005); *see also In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) ("In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives."). Compensating plaintiffs' counsel for the risks they face is crucial, because "[s]uch actions could not be sustained if plaintiffs' counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class." *Hicks v. Morgan Stanley*, No. 01 CIV. 10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005). Moreover, the Supreme Court has emphasized that "meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 478 (2013); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).

To assess the reasonableness of attorneys' fees under the common fund doctrine, courts apply the "lodestar" method or the "percentage of the fund" method. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). However, "[t]he trend in this [Second] Circuit is toward the percentage method." *Id.* This method is particularly efficient from a public policy standpoint for rewarding the work of class counsel and does not waste judicial resources analyzing thousands of hours worked where counsel obtained a superior result. *See In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240 (CM), 2007 WL 2230177, at *16 (S.D.N.Y. July 27, 2007) ("From a public policy perspective, the percentage method is the most efficient means of compensating the work of class action attorneys. It does not waste judicial resources analyzing thousands of hours of work, where counsel obtained a superior result." (citing *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1306 (E.D.N.Y. 1985) (criticizing lodestar approach as tending to "encourage excess discovery, delays and late settlements, while it

discourages rapid, efficient and cheaper resolution of litigation"))). The percentage-of-the-recovery method is particularly appropriate in PSLRA cases given that it comports with the express language of the statute. *See* 15 U.S.C. § 78u-4(a)(6) ("Total attorneys' fees and expenses … shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.").

Accordingly, this Court should use the percentage-of-recovery method to determine the reasonableness of Lead Counsel's fee request here. Nevertheless, applying either test, the requested fee of 25% of the Partial Settlement Funds is entirely reasonable.

Here, Lead Counsel's efforts, with Lowenstein's able assistance, have thus far resulted in the creation of an $29.8 million common fund for the benefit of the Settlement Class. As detailed below, paying Lead Counsel's reasonable fee request from that common fund properly compensates counsel for bringing and pursuing the claims against the Settling Defendants and furthers an essential purpose of the federal securities laws.

1. The *Goldberger* Factors Confirm that the Requested 25% Fee is Fair and Reasonable

In *Goldberger*, the Second Circuit set forth the following criteria for courts in this Circuit to consider when analyzing fee applications in a common fund case: (a) the magnitude and complexities of the action; (b) the litigation risks involved; (c) the quality of class counsel's representation; (d) the size of the requested fee in relation to the recoveries obtained; (e) the time and labor expended by class counsel; and (f) public policy considerations. 209 F.3d at 50. In addition, "courts in the Second Circuit consider the reaction of the Class to the fee request in deciding how large a fee to award." *Fleisher v. Phoenix Life Ins. Co.*, No. 11 Civ. 8405 (CM), 2015 WL 10847814, at *23 (S.D.N.Y. Sept. 9, 2015).

As set forth below, consideration of the *Goldberger* factors demonstrates the reasonableness of Lead Counsel's present fee request on behalf of itself and Lowenstein.

(a) The Magnitude and Complexity of the Action Support the Requested Fee

The first *Goldberger* factor—the magnitude and complexity of the litigation—supports Lead Counsel's fee request. As multiple courts have recognized, "[c]lass action suits have a well-deserved reputation as being most complex, and securities class actions are notably difficult and notoriously uncertain to litigate." *Lea v. Tal Educ. Grp.*, No. 18-CV-5480 (KHP), 2021 WL 5578665, at *9 (S.D.N.Y. Nov. 30, 2021); *Fogarazzo v. Lehman Bros., Inc.*, No. 03 Civ. 5194 SAS, 2011 WL 671745, at *3 (S.D.N.Y. Feb. 23, 2011) ("securities actions are highly complex"); *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV- 3400 (CM) (PED), 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (securities class actions are "notably difficult and notoriously uncertain").

In addition, as detailed below, the magnitude and complexity of this Action was heightened by various factors specific to the Action and stemming from Aegean's Bankruptcy Action.

(1) Magnitude and Complexities Unique to this Action

As detailed in the Lavallee Declaration and the final approval brief filed concurrently herewith, this Action raised additional challenges specific to the claims alleged generally and particularly as to the Settling Defendants. *See* Lavallee Decl. ¶¶64-74.

This Action involves an alleged massive fraud involving complex accounting shenanigans that spanned at least eight years. While new management determined that fraud had occurred, it also acknowledged that this fraud was both concealed and that documents had been destroyed. Lavallee Decl. ¶19. Moreover, since many Defendants are Greek residents and Aegean's headquarters and financial accounting hub was located in Greece, there are significant hurdles related to the efforts and costs of obtaining evidence to prove this action including: (a) gathering documentary evidence, much of which would have been written in Greek and located in Greece and the United Kingdom where Aegean's records may be found, and in Luxembourg, Cyprus or the Marshall Islands, countries where the Bankruptcy Litigation Trustee has instituted proceedings and/or where Aegean-related entities are believed to be domiciled; (b) the fact that Defendants and others would assert privileges under Europe's recently enacted privacy and security law, the

General Data Protection Regulation ("GDPR"); (c) the costly and time-consuming nature of translating relevant documents obtained in discovery and deposing witnesses abroad, including through the Hague Convention; and (d) the difficulty of enforcing any judgment obtained against foreign defendants. Lavallee Decl. ¶¶71-72. *See, e.g.*, *Rabbi Jacob Joseph Sch. v. Allied Irish Banks, P.L.C.*, No. 11-CV-05801 (DLI)(VVP), 2012 WL 3746220, at *7 (E.D.N.Y. Aug. 27, 2012) ("Courts in the Second Circuit have widely recognized that obtaining evidence through the Hague Convention and letters rogatory are cumbersome and inefficient, and hardly make litigation in the United States convenient.").

Since the Settling Defendants were Aegean's independent auditors, it is important to consider the complexities related to pursuing claims against them specifically. These complexities include establishing the extent to which the Settling Defendants' audit opinions contained false and misleading statements regarding Aegean's financial statements and/or internal controls over financial reporting for fiscal years 2013 to 2016; the Settling Defendants' compliance with the Public Company Accounting Oversight Board's ("PCAOB") professional auditing standards; whether the fraud was concealed from the Settling Defendants; and the extent to which the alleged red flags would have placed a reasonable auditor on notice of the alleged fraud. Lavallee Decl. ¶¶65-67.

In addition, issues such as the extent to which certain transactions should have been flagged by the Settling Defendants as fraudulent, and the extent to which the Settling Defendants adequately adhered to applicable auditing standards, among other issues, would be proven primarily through expert testimony, which means that fact discovery would have been followed by extensive expert discovery. Both sides would ultimately be required to rely on expert testimony at trial "with no guarantee whom the jury would believe." *In re Cendant Corp. Litig.*, 264 F.3d 201, 239 (3d Cir. 201); *see also City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 CM GWG, 2014 WL 1883494, at *9 (S.D.N.Y. May 9, 2014) ("Undoubtedly, the Parties' competing expert testimony on damages would inevitably reduce the trial of these issues to a risky 'battle of the experts' and the 'jury's verdict with respect to damages would depend on its reaction to the

complex testimony of experts, a reaction that is inherently uncertain and unpredictable.'"), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015).

While Lead Plaintiff believes that its claims against the Settling Defendants are meritorious, it recognizes that there are significant risks to the Settlement Class. The risk of dismissal in securities class actions is substantial and does not disappear as the case progresses. *See, e.g., In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-CIV-8557 CM, 2014 WL 7323417, at *16 (S.D.N.Y. Dec. 19, 2014) (noting that "nearly 48% of all securities class actions have been dismissed on motions prior to trial, while plaintiffs who succeeded at trial have found their judgments overturned on post-trial motions or appeal"). Indeed, the Settling Defendants presented several arguments in connection with their motions to dismiss and answers and likely would have raised numerous arguments at summary judgment or at trial on the merits. *See infra* Section III.A.1.(b).

Even if Lead Plaintiff defeated summary judgment motions filed by the Settling Defendants and was successful against the Settling Defendants at trial, Lead Plaintiff's efforts in establishing its claims would not, in all likelihood, end with a judgment at trial but would continue through one or more levels of appellate review. And, in complex litigation such as this, "even a victory at trial does not guarantee recovery." *FLAG Telecom*, 2010 WL 4537550, at *27.

(2) Magnitude and Complexities Added by the Bankruptcy Action

From the outset, Lead Plaintiff and Lead Counsel were mindful of the financial circumstances of Aegean and the impact that such circumstances could have on the recovery for the class. Indeed, Aegean, which filed for bankruptcy protection within days of Lead Plaintiff and Lead Counsel being appointed, could not be named as a defendant in this Action by virtue of the automatic stay in bankruptcy. Lavallee Decl. at 9 n.5.

The Bankruptcy Action, which involved numerous subsidiaries and related companies, added to the complexity of obtaining a recovery for the Settlement Class. Lavallee Decl. ¶¶31-36. The Bankruptcy Action increased the complexity of both gathering and introducing evidence to

prove the claims asserted in the Action and adds the additional complexity that there could be multiple parties seeking recovery from Defendants and from any D&O insurance.

In light of the complexities introduced by the Bankruptcy Action, Lead Counsel retained Lowenstein, counsel specializing in bankruptcy litigation and, in particular, the intersection of Chapter 11 bankruptcy and complex securities litigation, to monitor Aegean's bankruptcy proceedings and assist Lead Counsel in protecting the interests of class members. Lavallee Decl. ¶31. Lead Counsel, working with Bankruptcy Counsel, identified and took a number of steps to protect the interests of the Settlement Class from significant risks stemming from the Bankruptcy Action. *Id*. ¶¶31-36.

First, among other things, Aegean included a third-party release (the "Third-Party Release") as part of its initially proposed plan of reorganization (the "Chapter 11 Plan") that would have stripped Lead Plaintiff and the proposed class of their likely only source of compensation—the instant Action. Lavallee Decl. ¶¶33, 81; Declaration of Michael S. Etkin ("Etkin Decl." or "Etkin Declaration") (submitted herewith as Ex. 4 to the Lavallee Decl.), at ¶¶5-9. Among other terms harmful to the Settlement Class, the Third-Party Release purported to release the direct claims of the Settlement Class against numerous, solvent, non-debtor defendants, including Aegean's former independent auditors—*i.e.*, the Settling Defendants. *Id.*

Second, the Chapter 11 Plan also purported to permit the Litigation Trustee to "pursue any and all insurance proceeds under any and all D&O Liability Insurance Policies available to any defendant(s) in connection with the Litigation Claims in order to satisfy any settlement or judgment obtained by the Litigation Trust in respect of such claims," but failed to expressly preserve equivalent rights for Lead Plaintiff and the proposed class. Lavallee Decl. ¶34; Etkin Decl. ¶¶9-10.

To protect the interests of the class, Lead Counsel and Bankruptcy Counsel filed a lengthy objection to approval of the disclosure statement and vote solicitation procedures for Aegean's proposed plan on numerous grounds, which included objecting to the legal permissibility of the Third-Party Release and explicitly preserving any available rights to insurance proceeds for the

class. Ultimately, Lead Counsel, through Bankruptcy Counsel: (a) opposed Aegean's efforts during the bankruptcy proceedings to release all investors' claims under the federal securities laws, which would have included those against other third parties such as the Settling Defendants; (b) negotiated and ultimately obtained Bankruptcy Court approval of a complete carve-out of the Settlement Class Members' claims from the proposed sweeping release language; (c) obtained modifications to the plan of reorganization, preserving Lead Plaintiff's right to assert its claims to the proceeds from the D&O policies, which insurance would be applicable to claims against certain of Aegean's officers and directors, such as the CFO Spyros Gianniotis; and (d) preserved the rights of Lead Plaintiff, on behalf of the Settlement Class, to pursue and obtain discovery after confirmation of the Chapter 11 Plan. Lavallee Decl. ¶¶34-36; Etkin Decl. ¶¶11-19.

Accordingly, the magnitude and complexity of this Action support the conclusion that the requested fee is fair and reasonable.

(b) The Litigation Risks Support the Requested Fee

The second factor—the risks of the litigation—is often considered the most important *Goldberger* factor. *In re Comverse Tech., Inc. Sec. Litig*., No. 06-CV-1825 (NGG)(RER), 2010 WL 2653354, at *5 (E.D.N.Y. June 24, 2010); *see also McDaniel v. Cty. of Schenectady*, 595 F.3d 411, 424 (2d Cir. 2010) ("[t]he level of risk associated with litigation . . . is 'perhaps the foremost factor' to be considered in assessing the propriety of a multiplier"); *In re PPDAI Grp. Inc. Sec. Litig*., No. 18-CV-6716 (TAM), 2022 WL 198491, at *15 (E.D.N.Y. Jan. 21, 2022) ("the risk of litigation, which is 'often cited as the first, and most important, *Goldberger* factor,' weighs in favor of approving the requested fee").

As the Second Circuit has long recognized:

> No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 470 (2d Cir. 1974), *abrogated by Goldberger v.*

Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000).

The contingency risk here was very significant and fully supports the requested fee. Lead Counsel undertook this Action on a strictly contingent basis and prosecuted the claims with no guarantee of compensation or recovery of any litigation expenses. *See In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999) (class counsel not only undertook risks of litigation but advanced its own funds and financed the litigation). Although Lead Counsel, with the able assistance of Bankruptcy Counsel and expert consultants, worked diligently and succeeded in developing a compelling case sufficient to influence the Settling Defendants' decision to resolve the case at this level, Lead Counsel and Lead Plaintiff recognized from the outset of this Action that there were significant uncertainties and risks concerning proof of liability and damages and the availability of affirmative defenses to the Settling Defendants. *See* Lavallee Decl. ¶¶64-76.

Each of the complexities described in Section III.A.1.(a). above, added to the risk of this Action. Indeed, courts in this District have recognized the unique risks of continued litigation are heightened when a bankruptcy proceeding is pending. *See, e.g., Knox v. John Varvatos Enters. Inc*., 520 F. Supp. 3d 331, 352 (S.D.N.Y. 2021) (approving plaintiffs motion for attorney's fees because, *inter alia*, "plaintiffs' counsel expended many hundreds of hours" litigating the action despite being informed that the defendant company was "on the verge of bankruptcy"), *aff'd sub nom. Chaparro v. John Varvatos Enters., Inc*., No. 21-446-CV, 2021 WL 5121140 (2d Cir. Nov. 4, 2021); *Siler v. Landry's Seafood House-N.C., Inc*., No. 13-CV-587 RLE, 2014 WL 2945796, at *10 (S.D.N.Y. June 30, 2014) (approving motion for attorneys' fees when "Class Counsel faced the general risk of recovery, namely, non-collection because of potential bankruptcy"); *see also In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 427 (S.D.N.Y. 2001) (noting the "risks, burdens and uncertainties of continued litigation" "particularly true in light of the substantial risk of possible non-collectability of any judgment posed by … bankruptcy, … weakened financial condition, and the possible negation of certain Individual Defendants' insurance coverage").

Moreover, courts recognize that the risks of litigation are compounded when defendants are foreign entities as this fact raises numerous challenges noted above. *See, e.g., Teachers' Ret.*

Sys. of La. v. A.C.L.N., Ltd. (A.C.L.N.), No. 01-CV-11814 (MP), 2004 WL 1087261, at *2 (S.D.N.Y. May 14, 2004) (approving fees and settlement where "[m]any of the defendants, witnesses and documents are beyond the subpoena power of the Court and many relevant documents have been seized by foreign government authorities and may not be available").

Moreover, there were significant risks to establishing the Settling Defendants' liability. The Settling Defendants contended in their motion to dismiss and answers, *inter alia*, that Lead Plaintiff cannot establish its liability for a variety of reasons, including: (i) Aegean management was responsible for the preparation of Aegean's financial statements, and the Settling Defendants relied on management's representations; (ii) the fraud was concealed from them because Aegean's insiders engaged in fraudulent accounting entries and fictitious documentation to conceal the fraud, including by falsifying and forging bank statements, audit confirmations, contracts, invoices and third-party certifications; (iii) the alleged red flags were either unknown to them or widely known and insufficient to put them on notice that Aegean was engaged in fraud; (iv) they lacked the requisite intent and conducted their audits in accordance with the applicable standards of their profession; and (v) their audit opinions were mere statements of opinion that are only actionable if it is established that they believed that their opinions were false or their statements omitted material information rendering their audits misleading. *See* Lavallee Decl. ¶¶66-67.

Moreover, any resolution of these issues necessarily involves a "battle of the experts," with the concomitant risk that the jury could credit the Settling Defendants' experts over those of Lead Plaintiffs' experts. *Hicks*, 2005 WL 2757792, at *6 (reasoning that "a 'battle of the experts' . . . creates a significant obstacle to plaintiffs in establishing liability"); *Am. Bank Note Holographics*, 127 F. Supp. 2d at 426-27 (a jury could be swayed by experts for Defendants thereby minimizing or eliminating losses). If the trier of fact were to find the Settling Defendants' experts more credible, it would negatively affect Lead Plaintiff's claims and might preclude any recovery by Lead Plaintiff or the Settlement Class.

Moreover, the Settling Defendants also asserted that, even if liable, Aegean insiders would be far more liable given that Aegean's records had been falsified and that the Settlement Class

relied on the insiders, not the Settling Defendants. *See* Lavallee Decl. ¶67. Thus, Lead Counsel was also cognizant of the Settling Defendants' intention or potential to assert potential proportionate fault defenses. *See* 15 U.S.C. § 78u-4(f)(2)(B). If the trier of fact is persuaded by the Settling Defendants' potential arguments that any judgment obtained at trial against them must be reduced pursuant to the proportional liability provisions of the federal securities laws, this could potentially reduce or eliminate the recovery from the Settling Defendants. *Id*. ¶70.

Thus, the significant litigation risks undertaken by Lead Counsel support the requested fee.

(c) The Quality of Lead Plaintiff's Counsel's Representation Supports the Requested Fee

The quality of representation is another important factor that supports the reasonableness of the requested fee. As noted above, Lead Counsel, working with Lowenstein, achieved significant Partial Settlements in this Action despite the fact that securities fraud claims against independent auditors are challenging and Aegean's Bankruptcy Action posed additional road-blocks to obtaining a successful result for the Settlement Class. *Wal-Mart*, 396 F.3d at 117 ("Of course, 'the quality of representation is best measured by results.'").

The Partial Settlements—which will provide a substantial benefit to the Settlement Class (an estimated 8.5% of damages, which is on the higher range of reported values for securities fraud class action settlements), and an agreement to produce certain documents—required significant skill to obtain and demonstrate the ability of Lead Counsel. Lavallee Decl. ¶¶4, 77-79. Lead Counsel have thus far prosecuted the case vigorously, provided high-quality legal services and achieved a great result for the Settlement Class in these Partial Settlements. As outlined, Lowenstein, as skilled Bankruptcy Counsel, played a significant role in protecting the interests of the Settlement Class. *See* Etkin Decl. ¶¶2-20. Moreover, the effort and skill of Lead Counsel in investigating the claims asserted in the Action, drafting the Complaint, opposing the Settling Defendants' motions to dismiss and presenting a strong case throughout settlement discussions was essential to achieving a meaningful resolution of the Action. *See* Lavallee Decl. ¶¶7-8, 24-60, 101.

Moreover, the "skill and prior experience" of counsel in the field is relevant to determining fair compensation. *A.C.L.N.*, 2004 WL 1087261, at *6. Lead Counsel has many years of experience in complex federal civil litigation, particularly in the prosecution of securities and other class actions. Lavallee Decl. ¶¶55-61, 101 & Ex. 3. Bankruptcy Counsel likewise has significant experience in the realm of bankruptcy law and proceedings, including chapter 11 bankruptcy cases of issuers of publicly traded securities that are the subject of pending securities litigation such as this Action. Etkin Decl. ¶2 & Ex. B.

The quality of opposing counsel is also important in evaluating the services rendered by Lead Counsel. *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement."). Here, the Settling Defendants were represented by very skilled attorneys in this Action: Michael Bongiorno of WilmerHale on behalf of PwC Greece and Thomas N. Kidera of Orrick, Herrington & Sutcliffe LLP on behalf of Deloitte Greece. *See* Lavallee Decl. ¶¶55, 58, 60-61. These attorneys zealously fought Lead Plaintiff's claims but, notwithstanding this formidable opposition, Lead Counsel was nonetheless able to develop Lead Plaintiff's case so as to resolve the litigation on terms highly favorable to the Settlement Class. *Id.*

(d) The Requested Fee is Reasonable in Relation to the Total Settlement Amount

The requested 25% fee award is well within the range of percentage fees that courts in the Second Circuit have awarded in comparable complex cases. *See, e.g., In re BHP Billiton Limited Sec. Litig.*, No. 1:16-cv-01445-NRB (S.D.N.Y. Apr. 10, 2019), ECF No. 139 (awarding attorneys' fees of 30% of $50 million settlement); *In re Intercept Pharms., Inc. Sec. Litig.*, No. 1:14-cv-01123-NRB (S.D.N.Y. Sept. 10, 2016), ECF No. 136 (awarding attorneys' fees of 28.63% of $55 million settlement); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding 33-1/3% of $586 million settlement fund); *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 249 (2d Cir. 2007) (affirming district court's award of 30% of $42.5 million settlement fund); *In re Facebook, Inc.*,

IPO Sec. & Deriv. Litig., 343 F. Supp. 3d 394, 418 (S.D.N.Y. 2018) (approving 25% of a $35 million settlement fund); *In re Sadia S.A. Sec. Litig.*, No. 08 Civ. 9528 (SAS), 2011 WL 6825235, at *3 (S.D.N.Y. Dec. 28, 2011) (awarding 30% of $27 million settlement). Moreover, as discussed below, the fee request is also reasonable under the lodestar methodology since the requested fee represents a negative multiplier.

Not to be overlooked are the additional substantial benefits of URS obtaining access to voluminous documents that the Settling Defendants will provide, which Lead Plaintiff intends to use in the remainder of this Action. Lavallee Decl. ¶¶4, 56, 59, 75.

In sum, the fee requested is reasonable in relation to the size of the Partial Settlements.

(e) Time and Labor Expended by Lead Counsel Support the Requested Fee

As detailed in the Lavallee Declaration at ¶¶99-109 & Exs. 1-2, Lead Counsel has devoted substantial time (over 12,315.10 hours), expenses (over $350,318.76) and effort to the prosecution of the claims. Indeed, the magnitude, complexity and unique risks discussed herein required Lead Counsel to expend considerable efforts. *Id*. ¶¶7-8 & Section III. Moreover, thus far, discovery efforts have included, among other things, serving three sets of document requests, one set of interrogatories, and 14 subpoenas, engaging in dozens of meet and confers with Defendants and third parties and receiving and starting to review over 174 gigabytes of documents received in discovery, some of which are in Greek. Lead Counsel have also worked with URS to review and produce 13,800 pages of documents in response to the requests served on them. *Id*. ¶¶37-53.

It was not until after Lead Counsel engaged in extensive investigation, prepared its comprehensive Complaint, engaged in extensive motion practice, delved into concurrent bankruptcy proceedings, undertook various other litigation efforts and participated in intensive negotiations, which included considerations of the risks and challenges, that it was able to reach agreement to settle the Action. Once each Partial Settlement was reached, Lead Counsel negotiated settlement papers and retained and worked with its Claims Administrator to ensure that notice of the Partial Settlements was properly given to the Settlement Class Members. *Id*. ¶62 &

Section IV.

As Bankruptcy Counsel, Lowenstein provided ongoing monitoring, guidance, preparation of pleadings and counseling regarding bankruptcy issues and, under the direction of Lead Plaintiff and Lead Counsel, worked to preserve the rights and claims of Lead Plaintiff and the putative class in several significant ways. Etkin Decl. ¶¶3-20. It also provided advice to Lead Plaintiff and Lead Counsel with respect to certain D&O insurance and data privacy issues (areas where Lowenstein has extensive subject-matter expertise) that arose in connection with the Chapter 11 Plan and the Action. *Id.*

Moreover, Lead Counsel and Lead Plaintiff have and will expend considerable effort and expense to work with the Claims Administrator on these Partial Settlements and will continue to pursue the claims against the remaining Non-Settling Defendants.

The fact that these extensive efforts were undertaken—and will continue to be undertaken—on a contingent basis in a case with heightened challenges to establishing liability and collecting from foreign defendants as well as increased expenses strongly supports the requested fee.

(f) Public Policy Considerations Further Support the Fee Request

Courts in the Second Circuit have held that "public policy concerns favor the award of reasonable attorneys' fees in class action securities litigation." *FLAG Telecom*, 2010 WL 4537550, at *29. In fact, public policy supports granting attorneys' fees that are sufficient to encourage plaintiffs' counsel to bring securities class actions, which are recognized to be a most effective weapon in the enforcement of the securities laws. *See Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 373 (S.D.N.Y. 2002) ("In considering an award of attorney's fees, the public policy of vigorously enforcing the federal securities laws must be considered."); *In re Priceline.com, Inc. Sec. Litig.*, No. 00-CV-1884 (AVC), 2007 WL 2115592, at *5 (D. Conn. July 20, 2007) ("The award of the percentage requested here will encourage enforcement of the securities laws and support attorneys' decisions to take these types of cases on a contingent fee

basis."); *Amgen*, 568 U.S. at 478 (private actions to enforce are an essential supplement).

The policy considerations in favor of the fee requests are particularly important here given that this Action appears to be Aegean's shareholders' only hope of obtaining any compensation for their losses against the Settling Defendants and given Lead Counsel's efforts in the Bankruptcy Action. Indeed, as described above, Aegean sought, through the Bankruptcy Action, to extinguish the Settlement Class Members' potential securities fraud claims against not just the Debtors but all the Defendants named here ***including the Settling Defendants***, Aegean's independent auditors. It was only as a result of Lead Counsel's affirmative efforts to retain and work with Bankruptcy Counsel that it succeeded in preventing Aegean from using its Chapter 11 Plan to release the claims alleged in this Action through the Bankruptcy Action, including claims against the Settling Defendants. Moreover, while the Litigation Trustee has commenced actions against several alleged wrongdoers, it has not commenced proceedings against the Settling Defendants, which would be particularly challenging since Aegean's retention agreements with the Settling Defendants provide that any dispute must be litigated in Greece. Lavallee Decl. ¶81.

Thus, in sum, the public policy factor further supports awarding attorneys' fees.

(g) Lead Plaintiff's Approval of the Fee Request and the Reaction of the Settlement Class to Date Supports the Requested Fee

Lead Plaintiff URS is a sophisticated institutional investor that manages more than $40 billion in assets for Utah's public employees, was substantially involved in the prosecution of the Action and had direct involvement from its commencement through the negotiations of the Partial Settlements. Lavallee Decl. ¶¶116-18; Lead Plaintiff Decl. ¶¶4-6. At the commencement of the case, Lead Plaintiff negotiated a retainer agreement with Lead Counsel and the 25% fee requested here comports with this retainer agreement. *See* Lavallee Decl. ¶¶107-08; Lead Plaintiff Decl. ¶8. Moreover, after having been actively involved in overseeing the prosecution of the case and the settlement negotiations and as part of its diligent involvement acting as a fiduciary for the Settlement Class in the Action, Lead Plaintiff has reviewed and approved the requested fee as fair, reasonable and necessary to the successful prosecution and resolution of this Action, and thus

warranting Court approval. *See* Lavallee Decl. ¶107; Lead Plaintiff Decl. ¶¶7-8, 10. In reaching this conclusion, Lead Plaintiff considered factors such as work performed by Lead Counsel, and the substantial recovery obtained, particularly given the complexity and the risks here. *Id*.

Lead Plaintiff's approval of Lead Counsel's fee request should be given significant weight. *See In re Bear Stearns Cos., Inc. Sec., Deriv., & ERISA Litig.*, 909 F. Supp. 2d 259, 272 (S.D.N.Y. 2012) ("When class counsel in a securities lawsuit have negotiated an arm's-length agreement with a sophisticated lead plaintiff possessing a large stake in the litigation, and when that lead plaintiff endorses the application following close supervision of the litigation, the court should give the terms of that agreement great weight."); *Comverse Tech.*, 2010 WL 2653354, at *4 ("The fact that this fee request is the product of arm's-length negotiation between Lead Counsel and the lead plaintiff is significant."); *EVCI Career Colls.*, 2007 WL 2230177, at *16 (public policy considerations support fee awards in cases in which large public pension funds, serving as lead plaintiffs, "conscientiously" supervise the work of lead counsel, and give their endorsement to the fee request); *WorldCom*, 388 F. Supp. 2d at 356 ("[W]hen class counsel in a securities lawsuit have negotiated an arm's-length agreement with a sophisticated lead plaintiff possessing a large stake in the litigation, and when that lead plaintiff endorses the application following close supervision of the litigation, the court should give the terms of that agreement great weight."). Indeed, courts in this District have stated that "courts should accord a *presumption of reasonableness* to any fee request submitted pursuant to a retainer agreement that was entered into between a properly-selected lead plaintiff and a properly-selected lead counsel." *EVCI Career Colls.*, 2007 WL 2230177, at *16 n.4 (quoting *Cendant Corp.*, 264 F.3d at 282); *see also Woburn Ret. Sys. v. Salix Pharms., Ltd.*, No. 14-CV-8925 (KMW), 2017 WL 3579892, at *8 (S.D.N.Y. Aug. 18, 2017) ("[T]his Court finds no reason to deny the presumption of correctness to the fee agreement between Lead Counsel and Lead Plaintiff."). URS—a sophisticated institutional investor—is precisely the type of fiduciary that Congress envisioned would represent a class when it enacted the PSLRA. *See* H.R. Rep. No. 104-369, at 32 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 731; 141 Cong. Rec. S19146-01.

The reaction of the Settlement Class also supports the requested fee. As of August 8, 2022, the Claims Administrator has sent out over a total of 41,879 Omnibus Notices informing potential Settlement Class Members that Lead Counsel intended to apply to the Court for an award of attorneys' fees in an amount not to exceed 25% of the Partial Settlement Amounts. *See* A.B. Data Decl. ¶¶2-14, 18 & Ex. A.[7] While the time to object to the Fee and Expense Application does not expire until August 23, 2022, to date, not a single objection has been received. *Id*. at ¶21. Should any objections be received, Lead Counsel will address them in its reply papers.

2. A Lodestar Cross-Check Supports the Requested Fee

To ensure the reasonableness of a fee awarded under the percentage-of-the-fund method, the Second Circuit permits district courts to "cross-check" the proposed award against counsel's lodestar. *See Goldberger*, 209 F.3d at 50 (for a cross check performed, the hours documented "need not be exhaustively scrutinized by the district court…. Instead, the reasonableness of the claimed lodestar can be tested by the Court's familiarity with the case").

In cases like this, fees representing multiples of the lodestar are regularly awarded to reflect the contingency-fee risk and other relevant factors. *See, e.g.*, *FLAG Telecom*, 2010 WL 4537550, at *26 ("Under the lodestar method, a positive multiplier is typically applied to the lodestar in recognition of the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors."); *Comverse*, 2010 WL 2653354, at *5 ("Where . . . counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar.").[8]

However, Lead Counsel here seeks no multiplier. The Lavallee Declaration contains the

[7] "A.B. Data Decl." refers to the Declaration of Jack Ewashko Regarding Mailing of Notice and Publication of Summary Notice (submitted herewith as Ex. 6 to the Lavallee Decl.).

[8] In fact, in complex contingent litigation, lodestar multipliers between 2 and 5 are commonly awarded as reasonable. *See Wal-Mart*, 396 F.3d at 123 (multiplier of 3.5); *Davis v. J.P. Morgan Chase & Co*., 827 F. Supp. 2d 172, 185 (W.D.N.Y. 2011) (multiplier of 5.3); *Cornwell v. Credit Suisse Grp.*, No. 08-cv-03758 (VM), 2011 WL 13263367, at *2 (S.D.N.Y. July 20, 2011) (multiplier of 4.7); *Comverse*, 2010 WL 2653354, at *5 (2.78 multiplier); *In re Telik, Inc. Sec. Litig*., 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008) (multiples of over 4 are routinely awarded); *In re Bisys Sec. Litig.*, No. 04-3840 (JSR), 2007 WL 2049726, at *3 (S.D.N.Y. July 16, 2007) (2.99 multiplier); *In re AremisSoft Corp. Sec. Litig*., 210 F.R.D. 109, 135 (D.N.J. 2002) (4.3 multiplier); *Maley*, 186 F. Supp. 2d at 369 (4.65 multiplier).

lodestar calculation and summary details for Lead Counsel and Bankruptcy Counsel by timekeeper. *See* Lavallee Decl. ¶¶99-109 & Ex. 1; Etkin Decl. ¶21 & Ex. A-1. Through June 30, 2022, Lead Counsel expended 12,315.10 hours and Bankruptcy Counsel expended 523.5 hours of attorney and professional support staff time in the prosecution of this Action for the benefit of the Settlement Class. *See id*. Collectively, Plaintiffs' counsel devoted 12,838.6 hours of attorney and professional support time in the prosecution of the Action. These hours have been multiplied by the current hourly rates[9] of the attorneys and professional support staff who worked on the Action to arrive at the lodestar amount of $9,665,425.25. *See id*.[10]

Since the 25% fee request represents a negative multiplier, the lodestar cross check fully supports a finding that the requested fees are reasonable. *See, e.g., In re NTL, Inc. Sec. Litig.*, No. 02-cv-3013, 2007 WL 1294377, at *8 (S.D.N.Y. May 2, 2007) (negative lodestar multiplier indicates the fee was "reasonable because it will not bring a windfall to co-lead plaintiffs' counsel"); *Marsh*, 265 F.R.D. at 151 (fee request was significantly less than the lodestar, "which strongly suggests that the requested fee is reasonable"); *In re Blech Sec. Litig*., No. 94 CIV. 7696 (RWS), 2000 WL 661680, at *5 (S.D.N.Y. May 19, 2000) (reasonableness of fee request was "reinforced by evidence that the percentage fee would represent a negative multiplier").

B. Lead Counsel's Litigation Expenses Are Reasonable and Should Be Reimbursed

Lead Counsel also respectfully request the reimbursement of $350,318.76 in litigation expenses that Lead Counsel advanced in connection with the prosecution and resolution of this

[9] The Supreme Court and courts in this Circuit have approved the use of current hourly rates to calculate the lodestar figure as a means of compensating for the delay in receiving payment, inflation, and the loss of interest. *See Mo. v. Jenkins by Agyei*, 491 U.S. 274, 284 (1989); *see also In re Nassau Cty. Strip Search Cases*, 12 F. Supp. 3d 485, 496 (E.D.N.Y. 2014). The Lavallee and Etkin Declarations include, as exhibits thereto, firm biographies that describe the legal background and experience of Berman Tabacco and Lowenstein, which support the hourly rates submitted. Lavallee Decl. Ex. 3; Etkin Decl. Ex. B. Here, the billing rates used are reasonable for complex securities litigation and consistent with market rates accepted by courts. Lavallee Decl. ¶104; Etkin Decl. ¶21.

[10] The lodestar reported here does not include work that Lead Counsel will continue to perform on behalf of the Settlement Class if the Court approves the Partial Settlements, including working with Claims Administrator throughout the claims process. Moreover, Lead Counsel will continue to prosecute this Action, on a contingent basis, against the Non-Settling Defendants, both of whom are Greek nationals.

Action. All these expenses, which are summarized by category in the Lavallee Declaration and in the Etkin Declaration, were reasonably necessary for the prosecution of this Action and may be properly recovered by counsel. Lavallee Decl. ¶¶110-15 & Ex. 2; Etkin Decl. ¶22 & Ex. A-2. These expenses include consultant/expert fees and expenses, online factual and legal research expenses, among other litigation expenses. Lavallee Decl. ¶¶112-14. Moreover, these expenses are the type that are necessarily incurred in litigation and routinely charged to clients billed by the hour. Pursuant to the terms of the retainer agreement with Lowenstein, Lead Counsel reimbursed Lowenstein for its expenses throughout the prosecution of this Action, and these expenses are included in Lead Counsel's expert/consultant expense category. Thus, Lead Counsel only seeks reimbursement of its own expenses.[11] While Lead Counsel expended monies for travel, lodging and meals, it is not asking for reimbursement of such expenses at this time. It is well recognized that such expenses are reasonable. *See, e.g.*, *In re China Sunergy Sec. Litig*., No. 07 Civ. 7895 (DAB), 2011 WL 1899715, at *6 (S.D.N.Y. May 13, 2011) (attorneys should be compensated "for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were 'incidental and necessary to the representation'"); *FLAG Telecom*, 2010 WL 4537550, at *30 ("It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class.").

The Court-approved Omnibus Notice informed potential Settlement Class Members that Lead Counsel would seek the reimbursement of Lead Counsel's expenses in an amount not to exceed $380,000, in excess of the amount sought. *See* A.B. Data Decl. Ex. A. To date, there have been no objections to the maximum expense amount set forth in the Omnibus Notice. Lavallee Decl. ¶127; A.B. Data Decl. ¶21. Moreover, Lead Plaintiff supports the reimbursement of expenses incurred by counsel as fair, reasonable, and necessary to the successful prosecution and resolution of this Action. *See* Lead Plaintiff Decl. ¶¶8, 10. Accordingly, reimbursement of Lead Counsel's expenses of $350,318.76 should be approved as fair, reasonable and appropriate.

[11] Berman Tabacco's Expert/Consultant fees and costs include a retainer paid to Lowenstein, which shall be taken into account when distributing fees to Lowenstein.

C. Lead Plaintiff Should Be Reimbursed for Its Reasonable Costs and Expenses Under 15 U.S.C. § 78u-4(a)(4)

Lead Counsel also seeks reimbursement of $10,000 in costs and expenses that were directly incurred by Lead Plaintiff in connection with its representation of the Settlement Class in this Action. Pursuant to the PSLRA, 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). The request here is only for the reimbursement of some of the time spent by URS in connection with its service as the Court-appointed Lead Plaintiff in this Action, which is specifically permitted by the PSLRA. *See* Lavallee Decl. ¶¶116-18; Lead Plaintiff Decl. ¶¶4-6.

As detailed in the Lavallee Declaration, URS took an active role in the leadership of this Action and has been fully committed to pursuing this Action as a fiduciary for the class. Lavallee Decl. ¶¶116-18. *See also* Lead Plaintiff Decl. ¶¶4-5. Throughout the litigation, Lead Plaintiff communicated regularly with Lead Counsel regarding litigation strategy and developments and reviewed pleadings, motions, discovery requests and responses, and the Court's orders and opinions. Lead Plaintiff Decl. ¶5. Lead Plaintiff also attended the hearing on the motions to dismiss telephonically, searched for and produced 13,800 pages of documents and actively participated in settlement negotiations. *Id.* Lead Plaintiff dedicated significant time and resources in these efforts, which required its employees to devote time to this Action that otherwise would have been devoted to their regular duties at URS. *Id.* ¶6.

Courts routinely approve similar or greater awards to reimburse lead plaintiffs pursuant to 15 U.S.C. § 78u-4(a)(4). *See, e.g.*, *In re Intercept Pharms., Inc. Sec. Lit.*, No. 1:14-cv-01123-NRB (S.D.N.Y. Oct. 20, 2016), ECF No. 141 (awarding over $12,000 in reimbursement of expenses to plaintiffs); *In re Signet Jewelers Ltd. Sec. Litig.*, No. 1:16-cv-06728-CM-SDA, 2020 WL 4196468, at *23-24 (S.D.N.Y. July 21, 2020) (awarding $25,410 in reimbursement expenses to Lead Plaintiff "based on a conservative estimate of the amount of time expended in connection with the [a]ction"); *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *21 (S.D.N.Y. Dec. 23, 2009) (awarding over $214,000 to lead

plaintiffs noting that their efforts were "precisely the types of activities that support awarding reimbursement of expenses to class representatives"); *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695CM, 2007 WL 4115808, at *12 (S.D.N.Y. Nov. 7, 2007) (awarding institutional lead plaintiff over $16,000).

Moreover, the Court-approved Omnibus Notice advised potential Settlement Class Members that, in addition to seeking fees and reimbursement of its own expenses, Lead Counsel may seek reimbursement of the Lead Plaintiffs' expenses. *See* A.B. Data Decl. Ex. A. To date, there have been no objections to an expense reimbursement award to URS. *See id.* ¶21.

Accordingly, the $10,000 award sought by Lead Plaintiff is reasonable and justified under the PSLRA based on URS's prosecution of the Action and should be granted.

D. Lead Counsel Request an Order Authorizing the Establishment of a Litigation Expense Fund in the Amount of $500,000

While this Partial Settlement will end the litigation against the Settling Defendants, Lead Plaintiff intends to continue to vigorously pursue their claims against the Non-Settling Defendants. Lavallee Decl. ¶¶119-21, 123. Given the fact that this continued prosecution will require discovery of witnesses and documents overseas and translation of records and other expenses, Lead Counsel request the establishment of a Litigation Expense Fund in the amount of $500,000 to help fund future expenses, $250,000 from each Gross Settlement Fund. *Id.* Lead Counsel anticipate that this Litigation Expense Fund will only cover a small portion of all future expenses and Lead Counsel fully intend to expend a significant contribution of time and funds to the continued prosecution of this action. *Id.* The Litigation Expense Fund, however, will represent an investment by the Settlement Class in the future vigorous prosecution of this action against the arguably more culpable, Non-Settling Defendants. While any case against individual defendants has heightened risks, particularly where, as here, they reside outside the United States, Lead Counsel believe that there is a reasonable likelihood of a substantial monetary recovery against either or both individuals and that having this additional "war chest" will substantially enhance those prospects.

As for the mechanics of such a Litigation Expense Fund, Lead Counsel would set aside the

Litigation Expense Fund as a separate, interest-bearing account. Lavallee Decl. ¶¶120-24. Lead Counsel will periodically withdraw amounts from the Fund to pay for reasonable and necessary litigation costs and expenses. *Id.* Lead Counsel anticipate the majority of these expenses would be for costs associated with foreign discovery and expert/consultant expenses. *Id.* Lead Counsel will maintain a full accounting of all sums advanced from Litigation Expense Fund. *Id.* Further, Lead Counsel will submit quarterly *in camera* summaries to the Court, detailing all withdrawals and will submit a full accounting at the conclusion of the litigation. *Id.* Lead Counsel would draw down the fund to defray such expenses at their own risk. *Id.* If at any time the Court determines that an expense advanced was unwarranted, Lead Counsel would be required to promptly reimburse the Litigation Expense Fund. *Id.* Class members were advised of this request in the Omnibus Notice and were given until August 23, 2022 to object to it. *See* A.B. Data Decl. Ex. A. To date, no such objections have been received. *Id.* ¶¶15, 127.

Courts presiding over complex class actions have found appropriate the use of funds from partial settlements to help support the continuing litigation. *See, e.g., In re Worldcom, Inc. Secs. Litig.*, No. 02-3288C, 2004 WL 2591402, at *1, 22 (S.D.N.Y. Nov. 12, 2004) (approving the establishment of a $5 million litigation fund from the proceeds of a partial settlement); *A.C.L.N.*, 2004 WL 1087261, at *5-6 (approving the use of $250,000 of a $5.5 million partial settlement to be used for future expenses such as expert fees and deposition costs); *see also In re Satyam Computer Servs. Ltd. Sec. Litig.*, No. 09-MD-2027-BSJ, slip op. at 4, ¶11 (S.D.N.Y. Sept. 13, 2011), ECF No. 365 (Jones, J.) (establishing a litigation fund in the amount of $1 million to fund the continued prosecution of the action against the non-settling defendants).

IV. CONCLUSION

For the foregoing reasons, Lead Counsel respectfully request that the Court (a) award attorneys' fees in the amount of 25% of the Gross Settlement Funds plus interest; (b) approve the reimbursement of $350,318.76 of Lead Counsel's expenses, plus an award of $10,000 to Lead Plaintiff pursuant to 15 U.S.C. § 78u-4(a)(4); and (c) approve disbursement of $500,000 for the establishment of the Litigation Expense Fund.

Dated: August 9, 2022

Respectfully submitted,

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