UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BEEZLEY v. FENIX PARTS, INC., *et al.*	Case No. 1:17-cv-07896 Honorable Charles R. Norgle

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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I. PRELIMINARY STATEMENT

Following approximately three years of litigation, Lead Counsel have obtained an all cash, non-reversionary settlement of $3,300,000 (the "Settlement Amount") for the benefit of the Settlement Class in the above-captioned action (the "Action").[1] This is an excellent result in the face of substantial risks, and is the product of Lead Counsel's vigorous, persistent, and skilled efforts. Lead Counsel now respectfully move this Court for an award of attorneys' fees in the amount of 33⅓% of the Settlement Fund (*i.e.*, $3.3 million, plus interest accrued thereon), and reimbursement of $170,640.35 in Litigation Expenses. The Litigation Expenses consist of $140,640.35 in expenses incurred by Plaintiffs' Counsel while prosecuting the Action, and $30,000 ($10,000 each) to Plaintiffs pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA") for reimbursement of their costs, including lost wages, in connection with their representation of the Settlement Class.

As detailed below and in the accompanying Joint Declaration, the Settlement represents an excellent recovery for the Settlement Class under the circumstances.[2] In the absence of settlement, the Action would likely have continued for years through the class certification stage, fact and expert discovery, summary judgment, trial, and likely appeals. Plaintiffs and Lead Counsel faced substantial obstacles in proving liability and damages, yet nevertheless reached a timely and

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[1] Unless otherwise defined herein, capitalized terms have the same meanings as defined in the Stipulation and Agreement of Settlement, dated November 6, 2019 (the "Stipulation," ECF No. 131-1), or the concurrently filed Declaration of Ex Kano S. Sams II and Adam M. Apton in Support of (I) Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation; and (II) Lead Counsel's Motion for Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Joint Declaration"). All citations to "¶ __" and "Ex. __" in this memorandum refer to paragraphs in, and Exhibits to, the Joint Declaration. Unless otherwise indicated, all emphasis is added and all citations and quotations are omitted.

[2] The Joint Declaration is an integral part of this submission and, for the sake of brevity, Plaintiffs refer the Court to the Joint Declaration for a detailed description of, *inter alia*: the procedural history and the prosecution of the claims; the negotiations leading to the Settlement; the risks and uncertainties of continued litigation; and a description of the services Lead Counsel have provided for the Class.

substantial resolution for the Class.

It was not easy. Defendants were represented by highly-skilled litigators, and Lead Counsel faced numerous hurdles and risks, including the heightened pleading standards of the PSLRA, the high cost of conducting the factual investigation and retaining the experts needed to litigate a complex securities case, and the high 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). As a result, courts dismiss a significant number of securities cases at the outset. Nor do the risks end at the pleading stage. Even when a plaintiff is successful at trial, payment is not guaranteed. *See 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) *aff'd sub. nom Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012).

Despite facing long odds, Lead Counsel have vigorously pursued this case for over three years. Among other things, Lead Counsel:

- reviewed and analyzed SEC filings, press releases, publicly-available documents, reports, announcements, news articles, investor conference call transcripts, analyst reports, and other public information regarding the Fenix and the other Defendants;
- worked with a damages and loss causation expert to analyze the Company's stock-price movement;
- retained and worked with a private investigator who conducted numerous interviews of former Company employees and other third parties;
- drafted the comprehensive, factually-detailed, 129-page Complaint incorporating the forgoing factual research and investigation;
- researched, drafted, and filed an omnibus opposition to Defendants' motions to dismiss;
- prepared for, attended, and participated in the status conference held by the Court on July 27, 2018;
- researched, briefed, and successfully opposed Defendants' motion for reconsideration;

- researched, briefed, and successfully opposed Defendants' motion for protective order;
- prepared and served numerous discovery requests and third-party subpoenas;
- reviewed and analyzed tens of thousands of pages of documents produced by Defendants and third parties;
- researched and fully briefed the motion for class certification, which included an expert report on market efficiency;
- drafted a detailed mediation statement that set forth the facts of the case and analyzed the strengths and weaknesses of the Action and potential damages;
- drafted a comprehensive response to Defendants' mediation statement;
- engaged in a full-day mediation session overseen by Michelle Yoshida, Esq., of Phillips ADR Enterprises, an experienced and well-respected mediator;
- continued settlement negotiations after the mediation session;
- drafted and then negotiated the Stipulation and related exhibits; and
- drafted the preliminary approval and final approval briefs. Lead Counsel undertook these investigative and litigation efforts on a ***fully contingent basis***. ¶¶11(a)-(r), 15-63.

As compensation for their considerable efforts on behalf of the Settlement Class, Lead Counsel seeks an award equal to 33⅓% of the Settlement Amount (plus interest accrued thereon), and reimbursement of Litigation Expenses in the amount of $170,640.35. The requested fee is reasonable and consistent with fees regularly awarded in class action settlements within the Seventh Circuit. The reasonableness of the requested fee may also be confirmed by the use of a lodestar cross-check. Here, the requested fee would result in a multiplier of only 1.03, which is also well within the range of multipliers that are commonly awarded in complex class actions with substantial contingency risks.

For these reasons, as well as those set forth below and in the Joint Declaration, Lead Counsel respectfully submit that the requested attorneys' fees are fair and reasonable and should be award by the Court. The reimbursement of costs and expenses requested by Lead Counsel and Plaintiffs are likewise reasonable, and they were necessarily incurred in the successful prosecution of the Action. Accordingly, they too should be approved.

II. ARGUMENT

A. Lead Counsel Are Entitled to Attorneys' Fees from the Common Fund

Under the "equitable" or "common fund" doctrine long-established in *Trustees v. Greenough*, 105 U.S. 527, 529-30 (1881), attorneys who create a common fund to be shared by a class are entitled to an award of fees and expenses from that fund as compensation for their work. *See, e.g.*, *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("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"); *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"). In addition to providing just compensation, awards of attorneys' fees from a common fund attract skilled counsel to represent those who seek redress for damages inflicted on classes of persons. *See, e.g.*, *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) ("The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel."); *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 720 ("*Synthroid I*") (7th Cir. 2001) ("[A]wards net of fees could rise with the level of fees if a higher payment attracts the best counsel."). Indeed, the Supreme Court emphasizes that private securities cases are "'an indispensable tool with which defrauded investors can recover their losses' – a matter crucial to the integrity of domestic capital markets." *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308, 320 n.4 (2007). Accordingly, common fund fee awards encourage and support meritorious class actions and thereby promote compliance with the federal securities laws.

B. The Awarded Fee Should Be a Percentage of the Fund

In *Blum v. Stenson*, 465 U.S. 886 (1984), the Supreme Court held that under the "common fund doctrine" a reasonable fee may be based "on a percentage of the fund bestowed on the class."

Id. at 900 n.16. Although courts within this Circuit in "common fund cases have discretion to choose either the lodestar or the percentage method of calculating fees," *In re Trans Union Corp. Privacy Litig.*, No. 00 C 4729, 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 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 percentage of the fee method is preferable because it more closely replicates the contingency fee market rate for counsel's legal services." *McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 816 (E.D. Wis. 2009). Additionally, "there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration." *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 566 (7th Cir. 1994); *see also In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572-73 (7th Cir. 1992) (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"). As a result, the percentage method has "emerged as the favored method for calculating fees in common-fund cases in this district." *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 80 F. Supp. 3d 838, 844 (N.D. Ill. 2015).

Conversely, courts in this Circuit have been strongly critical of employing the lodestar method to determine a fee award in class action settlements. *See In re Synthroaid Mktg. Litig.*, 325 F.3d 974, 979-80 ("*Synthroid II*") (7th Cir. 2003) (noting that the lodestar method may create a conflict of interest between the attorney and client and may reward inefficiency). Courts have reasoned that "[t]he use of a lodestar cross-check in a common fund case is unnecessary, arbitrary,

and potentially counterproductive." *Kaufman v. Am. Express Travel Related Servs., Co.*, No. 07-CV-1707, 2016 WL 806546, at *13 n.19 (N.D. Ill. Mar. 2, 2016); *see also Silverman v. Motorola, Inc.*, No. 07 C 4507, 2012 WL 1597388, at *4 (N.D. Ill. May 7, 2012) ("It is unnecessary to resort to a lodestar calculation to reinforce the same conclusion" reached by using a percentage-of-the-fund method). Additionally, "a straight hourly calculation does not properly account for the result achieved by counsel." *McKinnie*, 678 F. Supp. 2d at 816.[3]

In *Taubenfeld v. Aon Corp.*, 415 F.3d 597 (7th Cir. 2005), the Seventh Circuit provided guidance for the award of attorneys' fees in a securities class action:

> [W]hen deciding on appropriate fee levels in common-fund cases, courts must 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. . . . Although [it is] impossible to know *ex post* exactly what terms would have resulted from arm's length bargaining *ex ante*, courts must do their best to recreate the market by considering factors such as actual fee contracts that were privately negotiated for similar litigation, information from other cases, and data from class-counsel auctions.

Id. at 599. In affirming a fee award of the settlement fund plus expenses, the court considered, *inter alia*, the following factors: (1) "awards made by courts in other class actions" which "amount[ed] to 30-39% of the settlement fund;" (2) "the quality of legal services rendered;" and (3) "the contingent nature of the case." *Id.* at 600.

As discussed below, an award of 33⅓% of the Settlement Amount plus expenses in this case is the most appropriate method to "recreate the market" given the nature and scope of the Action,

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[3] Even under a lodestar analysis, the fee request would result in a multiplier of only 1.03 on a lodestar of $1,071,590.75 (¶108), which is well within the range of reasonableness. *See, e.g.*, *Harman v. Lyphomed, Inc.*, 945 F.2d 976 (7th Cir. 1991) (stating that multipliers of up to 4.0 have been approved); *In re Superior Beverage/Glass Container Consol. Pretrials*, 133 F.R.D. 119, 132 (N.D. Ill. 1990) (noting that "[w]e have awarded multipliers between 1.5 and 2.2 depending on the relative contribution of the various class counsel."); *Schulte v. Fifth Third Bank*, 805 F.Supp.2d 560, 598 (N.D. Ill. 2011) (awarding one-third of the $9.5 million fund, equating to 2.5 multiplier, and stating that "[w]hile many courts in this circuit have criticized the use of a lodestar cross-check in common fund cases, the fee request here would nevertheless survive such an analysis.").

awards in similar cases, the contingent nature of the representation, the risks undertaken, and the substantial result achieved for the Settlement Class.

C. The Requested Fee Is Reasonable and Appropriate as a Percentage of the Common Fund

1. The 33⅓% Attorneys' Fee Request Is Entirely Consistent with Seventh Circuit Authority

The Seventh Circuit has "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, 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. Courts consider "the value that the market would have placed on [Class] Counsel's legal services had its fee been arranged at the outset" to "avoid[ ] assigning a value based on nothing more than a subjective judgment regarding [Class Counsel's] work." *Sutton*, 504 F.3d at 693-94. Additionally, the "market rate for legal fees 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." *Synthroid I*, 264 F.3d at 721.

Applying these principles, this Court has recognized that "***[c]ourts routinely hold that one-third of a common fund is an appropriate attorneys' fees award in class action settlement[s.]***" *Koszyk v. Country Fin. a/k/a CC Servs., Inc.*, No. 16 CIV. 3571, 2016 WL 5109196, at *4 (N.D. Ill. Sept. 16, 2016) (Norgle, J.). Other courts have held similarly. *See, e.g.*, *Taubenfeld*, 415 F.3d at 599-600 (noting courts in this district have awarded fees of 30-39% of the settlement fund); *Gaskill v. Gordon*, 160 F.3d 361, 362-63 (7th Cir. 1998) (affirming award of 38% of fund); *Gupta v. Power Sols. Int'l, Inc.*, No. 1:16-CV-08253, 2019 WL 2135914, at *1 (N.D. Ill. May 13, 2019) (awarding

33⅓% of $8.5 million settlement fund).[4] Plaintiffs' request, therefore, comports with the authority in this Circuit.[5]

2. Lead Counsel Provided the Class with Quality Legal Services That Produced Excellent Benefits

In evaluating Lead Counsel's fee request, the Seventh Circuit emphasizes that courts should consider the "quality of legal services rendered." *Taubenfeld*, 415 F.3d at 600; *Synthroid I*, 264 F.3d at 721. Securities litigation is "notoriously difficult and unpredictable." *Maher v. Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983); *see also In re Suprema Specialties, Inc. Sec. Litig.*, No. 02-168(WHW), 2008 WL 906254, at *11 (D.N.J. Mar. 31, 2008) ("[T]his case's complexity is undeniable, given its facts and area of law, securities law."). Indeed, "prosecution and management of a complex national class action requires unique legal skills and abilities." *Edmonds v. U.S.*, 658 F. Supp. 1126, 1137 (D.S.C. 1987).

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[4] *See also Meyenburg v. Exxon Mobil Corp.*, No. 3:05-cv-15-DGW, 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."); *Schulte*, 805 F. Supp. 2d at 598 ("A number of fee awards in common-fund cases from within the Seventh Circuit show that an award of 33.3% of the settlement fund is within the reasonable range."); *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97 C 7694, 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."); *Goldsmith v. Tech. Sols. Co.*, No. 92 C 4374, 1995 WL 17009594, at *8 (N.D. Ill. Oct. 10, 1995) ("It seems therefore, that the fees being requested in this case, *i.e.* 33 1/3%, are in fact in line with that which has, in previous cases, been approved."); *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d at 842 (awarding fees of one-third of the common fund); *Beesley v. Int'l Paper Co.*, No: 3:06-cv-703-DRH-CJP, 2014 WL 375432, at *1, *4 (S.D. Ill. Jan. 31, 2014) (awarding one-third of $30 million class recovery); *In re Great Lakes Dredge & Dock*, No. 13-CV-02115, slip op. (N.D. Ill. Sep. 17, 2015) (Ex. 11) (awarding 33 1/3%); *In re Acura Pharms., Inc. Sec. Litig.*, No. 10-CV-5757, slip op. (N.D. Ill. Mar. 14, 2012) (Ex.12) (awarding 33 1/3%); *In re Plasma-Derivative Protein Therapies Antitrust Litig.*, No. 09 C 7666, slip op. (N.D. Ill. Jan. 22, 2014) (Ex. 13) (awarding 33 1/3%); *In re Potash Antitrust Litig.*, No. 1:08-CV-6910, slip op. (N.D. Ill. June 12, 2013) (Ex. 14) (awarding 33 1/3%).

[5] A few courts in this Circuit have applied a sliding-scale approach to attorneys' fees. However, "[w]hile a sliding scale fee structure was applied in [*Synthroid II*]" it "was not made mandatory for all class action cases." *Heekin v. Anthem, Inc.*, No. 1:05-CV-01908-TWP, 2013 WL 752637, at *3 (S.D. Ind. Feb. 27, 2013); *see also Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079, at *12 (S.D. Ill. Dec. 16, 2018) (rejecting argument that the decreasing sliding scale "is the only permissible model" and awarding 33⅓% of $1.056 billion settlement). Application of the sliding scale is discretionary and is designed to avoid a windfall of attorneys' fees in mega-fund cases. *Silverman*, 739 F.3d at 959. Because the $3.3 million Settlement here does not constitute a mega-fund, the application of a sliding scale is unnecessary.

From the inception of the Action, Lead Counsel sought to obtain the maximum recovery for the Settlement Class. This case required an in-depth investigation, extensive briefing, expert discovery efforts, and the skill to respond to a host of legal and factual issues raised by Defendants at every stage of the litigation. *See* ¶¶11(a)-(p), 15-63. Lead Counsel demonstrated a willingness to continue to litigate rather than accept a settlement that was not in the best interest of the Settlement Class. This fact is demonstrated by the unsuccessful initial result of the mediation and by Lead Counsel's further negotiation efforts to obtain the Settlement. ¶¶59-61.

The fair and reasonable nature of the Settlement is further illustrated by the result obtained by Lead Counsel. As explained in further detail in the Joint Declaration, the total ***maximum*** damages if Plaintiffs were successful on all claims would be approximately $22 million. Thus, the $3.3 million Settlement represents approximately 15% of the total ***maximum*** damages ***potentially*** available in this Action. ¶9, 23. In comparison, the median recovery in securities class actions in 2018 was approximately 2.6% of estimated damages. *See* Ex. 5 (Stefan Boettrich and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation*: 2018 Full-Year Review (NERA Jan. 29, 2019) at p. 36, Fig. 28. Thus, Lead Counsel's diligent efforts, skill, and expertise enabled them to negotiate an excellent result for the Settlement Class.

3. The Requested Attorneys' Fees Are Fair and Reasonable in Light of the Contingent-Fee Nature of the Representation

The contingent nature of the representation further demonstrates the propriety of Lead Counsel's requested fee. Lead Counsel undertook the Action on a contingent-fee basis, assuming significant risk that the litigation would yield no recovery and leave them uncompensated. Unlike counsel for Defendants, who are typically paid an hourly rate and are regularly reimbursed for their expenses, Lead Counsel have not been compensated for any time or expense since this case began ***more than three years ago***. Courts have consistently held that the risk of receiving little or no

recovery is a major factor in considering an award of attorneys' fees. *See, e.g.*, *Taubenfeld*, 415 F.3d at 600 (noting that a court should consider "the contingent nature of the case" and that "lead counsel was taking on a significant degree of risk of nonpayment with the case."); *Synthroid I*, 264 F.3d at 721 ("The market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear.").

At the outset and throughout the Action, Lead Counsel assumed significant risks that Defendants would successfully defend this case at every stage of litigation. ¶¶64-83. Initially, Plaintiffs faced the very real risk of dismissal. Indeed, the Court dismissed the Underwriter Defendants on the same statute-of-limitations grounds raised by Defendants in their Motion to Dismiss. In addition to the risk of dismissal and the major hurdle of obtaining class action status, Plaintiffs and Lead Counsel faced numerous additional risks at summary judgment and trial. *Id.*

First, Plaintiffs and Lead Counsel faced risks related to establishing Defendants' liability. Defendants forcefully argued that Plaintiffs would not have been able to establish the elements of their claims under the Securities Act and the Exchange Act. ¶¶67-73. For instance, among other things, Defendants argued that: (1) Plaintiffs' claims would have failed because Plaintiffs would not have proven a false or misleading omission or statement of fact; (2) none of the alleged misrepresentations were actionable because they constituted immaterial or forward-looking statements that were protected by the safe harbor provision of the PSLRA; (3) Plaintiffs would not have been able to establish loss causation; and (4) Plaintiffs would have failed to establish control-person liability pursuant to Section 20(a) of the Exchange Act and Section 15 of the Securities Act. ¶68.

Second, Defendants argued that Plaintiffs would not have established scienter for their claims brought pursuant to the Exchange Act. ¶71. Defendants argued that Plaintiffs' scienter allegations

merely amounted to: (1) vague claims from a confidential witness with no clear connection to management or the alleged fraudulent activity; (2) generic motive-and-opportunity allegations that apply to every corporation; (3) speculation regarding the dismissal of the Company's independent auditor and changes to the composition of Fenix's audit committee; and (4) conclusory accusations of willfulness predicated upon management's certifications and the SEC investigation. *Id.* Defendants also argued that Plaintiffs would have failed to prove facts probative of scienter with respect to each Defendant, *i.e.*, no admissions of wrongdoing, no suspicious stock sales, and that Defendants made their statements in good faith. *Id.*

Third, even assuming Plaintiffs overcame the above risks and successfully established Defendants' liability, Plaintiffs would have confronted considerable challenges in establishing loss causation and class-wide damages. ¶¶74-76. Defendants would have contested class certification and would have raised arguments at summary judgment and trial which, if accepted by the Court or a jury, could have drastically reduced, or eliminated, the Settlement Class's potential recovery. *Id.* The arguments raised by the Parties would have rested, in large part, upon experts to support their respective positions. *Id.* A jury's reaction to such expert testimony is highly unpredictable, and Lead Counsel recognized that, in such a battle, there is the possibility that a jury could be swayed by Defendants' expert(s) and could find only a fraction of the amount of damages Plaintiffs contended were suffered by the Settlement Class, or none at all. *Id.* Thus, the amount of damages that the Settlement Class would actually recover at trial, even if successful on liability issues, was uncertain. *See, e.g.*, *In re Cendant Corp. Litig.*, 264 F.3d 201, 239 (3d Cir. 2001) ("[E]stablishing damages at trial would lead to a 'battle of experts' with each side presenting its figures to the jury and with no guarantee whom the jury would believe."); *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 506 (W.D. Pa. 2003) ("A jury would therefore be faced with competing expert opinions representing

very different damage estimates, thus adding further uncertainty as to how much money–if any–the Class might recover at trial.").

Fourth, Plaintiffs would have faced other risks had the litigation continued. ¶¶78-79. For example, the Company announced that the SEC closed its investigation of Fenix on January 19, 2018. *Id.* This development potentially had ramifications for Plaintiffs' theory of liability and potential recovery of damages. *Id.* Indeed, Defendants undoubtedly would have argued that because the SEC closed its investigation, the risks that Plaintiffs alleged in the Complaint failed to materialize, therefore undermining Plaintiffs' theory of liability and eliminating any basis for the recovery of damages. *Id.* While Plaintiffs believed they had viable responses to such arguments, there existed a very real possibility that if the Court or the jury were to accept any of Defendants' arguments, Plaintiffs' recovery could have been severely diminished – or, indeed, eliminated. *See, e.g.*, *In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486 CW(EDL), 2007 WL 4788556, at *1 (N.D. Cal. Nov. 27, 2007) (jury verdict for defendants after lengthy trial).

Finally, any jury verdict in favor of the Settlement Class likely would have been subjected to post-trial motions and appeal. ¶80. These motions and appeals could ultimately result in no recovery at all. *See Robbins v. Koger Prop., Inc.*, 116 F.3d 1441, 1446, 1449 (11th Cir. 1997) (reversing judgment in plaintiffs' favor and entering judgment in favor of defendant); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1221, 1233 (10th Cir. 1996) (overturning plaintiffs' verdict obtained after two decades of litigation).[6]

[6] *See also In re Apple Comput. Sec. Litig.*, No. C-84-20148(A)-JW, 1991WL 238298 (N.D. Cal. Sept. 6, 1991) (verdict against two individual defendants, but court vacated judgment on motion for judgment notwithstanding verdict); *Backman v. Polaroid Corp.*, 910 F.2d 10, 18 (1st Cir. 1990) (where the class won a substantial jury verdict and motion for J.N.O.V. was denied, on appeal the judgment was reversed and the case was dismissed – after 11 years of litigation); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 309 (2d Cir. 1979) (multimillion dollar judgment reversed after lengthy trial); *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, 2011 WL 1585605, at *6, *38 (granting judgment as a matter of law for defendants after jury

Accordingly, because the fee in this matter was entirely contingent, the only certainty was that Lead Counsel would receive no compensation without a successful result and that such a result would only be realized after considerable time and effort. Lead Counsel committed significant amounts of both time and money to the vigorous and successful prosecution of this litigation for the benefit of the Settlement Class. In light of the skill of Defendants' counsel and the legal and factual difficulties of the Action, the risk that Lead Counsel would never be compensated was very real, and it should be considered when determining whether the requested fee is reasonable under Seventh Circuit authority. *See, e.g.*, *Sutton*, 504 F.3d at 694 (reversing district court's fee award and stating "[b]ecause the district court failed to provide for the risk of loss, the possibility exists that Counsel, whose only source of a fee was a contingent one, was undercompensated"). Indeed, the contingent nature of Lead Counsel's representation strongly favors approval of the requested fee.

4. The Reaction of the Settlement Class Supports the Requested Award

The reaction of the Settlement Class also supports the requested award. The Claims Administrator has disseminated over 10,000 copies of the Postcard Notice to potential Settlement Class Members and nominees, informing them of how to obtain the Notice, and posted the Notice on a website devoted to the Action. ¶¶84-87; Ex. 1 ("Ewashko Decl."), at ¶12. The Notice informed Settlement Class Members that Lead Counsel would apply for attorneys' fees of no more than 33⅓% of the Settlement Amount, plus expenses not to exceed $250,000, and that Class Members had the right to object to this fee and expense request. Ex. 1-C ("Notice") at ¶¶5, 66, 73. So far, no objections to the fee and expense request and no exclusion requests have been received. ¶116; Ewashko Decl. ¶¶21. Further, once filed, this Motion will be posted to the Action's website so that Class Members will know the specific amount of fees and expenses being sought before the

returned verdict for plaintiffs).

February 14, 2020 deadline for objections.

D. Lead Counsel's Expenses Were Reasonable and Necessary for the Benefit of the Settlement Class

Attorneys who generate a common fund for a class are entitled to the reimbursement of reasonable litigation expenses from that fund. *Synthroid I*, 264 F.3d at 722. To prosecute the Action to resolution, Plaintiffs' Counsel incurred reasonable and necessary costs and expenses in the amount of $140,640.35. ¶¶119-120. A significant component of Plaintiffs' Counsel's expenses is the cost of experts and investigators. ¶123. Plaintiffs' Counsel consulted experts in the fields of market efficiency, loss causation, and damages. *Id.* In addition, Plaintiffs' Counsel retained a well-respected and experienced mediator, Michelle Yoshida, to over the mediation discussions, which ultimately led to settlement. ¶124. Plaintiffs' Counsel were also required to travel in connection with the Action and incurred the related costs of meals, lodging, and transportation. ¶125. Plaintiffs' Counsel also incurred the costs of online research, such as Westlaw, Bloomberg, and PACER. *Id.* The expenses at issue are the types reimbursed by individual clients in the marketplace and therefore should be reimbursed from the common fund. *See Abbott v. Lockheed Martin Corp.*, No. 06-cv-701-MJR-DGW, 2015 WL 4398475, at *4 (S.D. Ill. July 17, 2015) ("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 reporters; travel expense; copy, phone and facsimile expenses and mediation."). Thus, the Court should grant Lead Counsel's request for reimbursement of litigation expenses.

E. Plaintiffs Are Entitled to Reimbursement of Costs Under the PSLRA

Pursuant to 15 U.S.C. §§ 77z-1(a)(4), 78u-4(a)(4), Plaintiffs are permitted to recover unreimbursed costs (including the cost of time spent) incurred while serving as lead plaintiff. As this Court has recognized, "Plaintiffs in class and collective actions play a crucial role in bringing justice

to those who would otherwise be hidden from judicial scrutiny." *Koszyk*, 2016 WL 5109196, at *2. "Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Id*.

Plaintiffs respectfully request a total award of $10,000 for each Plaintiff. As set forth in their declarations, Plaintiffs: (a) regularly communicated with Lead Counsel regarding the posture and progress of the case; (b) reviewed pleadings and briefs filed in the Action; (c) reviewed Court Orders; (d) responded to discovery requests by, and produced documents to, Defendants; (e) communicated with Lead Counsel regarding the preparation and execution of a declaration in support of Lead Plaintiffs' motion for class certification; (f) reviewed the mediation brief; (g) consulted with Lead Counsel regarding the mediation and settlement negotiations; and (h) evaluated and approved the proposed Settlement. Exs. 2-4. These are "precisely the types of activities that support awarding reimbursement of expenses to class representatives." *In re Marsh & McLennan Cos. Sec. Litig*., No. 04 Civ. 8144, 2009 WL 5178546, at *21 (S.D.N.Y. 2009). Indeed, Courts – including this one – have routinely granted similar awards to plaintiffs for reimbursement of expenses in similar cases. *See e.g.*, *Koszyk*, 2016 WL 5109196, at *2 (awarding service awards of $10,000); *In re Northfield Labs., Inc. Sec. Litig.*, No. 06 C 1493, 2012 WL 2458445, at *5 (N.D. Ill. June 26, 2012) (awarding $10,000). Accordingly, Lead Counsel respectfully request that the Court grant the requested PSLRA awards.

III. CONCLUSION

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

Dated: January 31, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the forgoing document to be filed on January 31, 2020, with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all attorneys appearing in this matter.

s/ Ex Kano S. Sams II
Ex Kano S. Sams II