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OKLAHOMA FIREFIGHTERS PENSION  
AND RETIREMENT SYSTEM,  
Individually and on Behalf of  
All Others Similarly Situated,

Plaintiff,

v.

NEWELL BRANDS INC., MICHAEL B.  
POLK, JOHN K. STIPANCICH, SCOTT  
H. GARBER, BRADFORD R. TURNER,  
MICHAEL T. COWHIG, THOMAS E.  
CLARKE, KEVIN C. CONROY, SCOTT  
S. COWEN, DOMENICO DE SOLE,  
CYNTHIA A. MONTGOMERY,  
CHRISTOPHER D. O'LEARY, JOSE  
IGNACIO PEREZ-LIZAU, STEVEN J.  
STROBEL, MICHAEL A. TODMAN, and  
RAYMOND G. VIAULT,

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: HUDSON COUNTY

DOCKET NO.: HUD-L-003492-18

Civil Action

**MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S APPLICATION FOR  
AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION  
COSTS AND EXPENSES, AND CLASS REPRESENTATIVE'S REQUEST FOR A  
SERVICE AWARD**

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**I. INTRODUCTION**

As detailed in the accompanying Memorandum of Law in Support of Final Settlement Approval and the Certification of Deborah Clark-Weintraub, the Parties have reached a proposed Settlement that would resolve the Class' claims here in exchange for a cash payment of \$102,500,000. It is respectfully submitted that this recovery is an excellent result for the Class, which Class Representative and Plaintiff's Counsel<sup>1</sup> secured after over four years of fiercely-contested litigation.

Plaintiff's Counsel submits this Memorandum in support of their request for attorney's fees and costs, as they prosecuted the Action on a wholly contingent basis, and have not received any compensation for their work to date and have also covered all costs of the litigation. The work they performed here was extensive, and included: (a) reviewing over 2,400,000 pages of documents produced by Defendants and third-parties; (b) producing over 30,600 pages of documents from Class Representative; (c) briefing a Motion to Dismiss, a Motion for Reconsideration, a Motion for Class Certification, three Motions for Summary Judgment and eight Motions to Strike experts; (d) filing letters raising several discovery disputes; (e) serving comprehensive interrogatory

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<sup>1</sup> Class Counsel, Scott+Scott Attorneys at Law LLP, is submitting this Memorandum and request on behalf of itself, Local Counsel Cohn Lifland Pearlman Hermann & Knopf LLP, and Hedin Hall LLP. They are collectively "Plaintiff's Counsel."

responses; (f) drafting multiple mediation statements and presentations; (g) taking fourteen fact depositions and defending two others; (h) overseeing eight expert reports; and (i) taking five expert depositions and defending five others.

The work Plaintiff's Counsel performed resulted in a substantial benefit to the Class, as, at \$102,500,000, the proposed Settlement is twelve times greater than the median securities class action settlement in 2021, which was \$8 million. Further, the proposed Settlement would have been the **largest** class action settlement bringing only claims under the Securities Act in 2021, and the **fifth largest** securities action of any kind that year. (Data for settlements in 2022 is not yet complete, but based on information presently available the proposed Settlement would have similar ranks that year as well). The proposed Settlement also recovered a far larger portion of damages than securities class actions typically do.

In similar actions, courts have awarded fees of 33-1/3% percent of the Settlement, which is what Plaintiff's Counsel requests here. That request is essentially equal to Plaintiff's Counsel's collective lodestar, or billing, for prosecuting the case and for undertaking 40,550.3 hours of work in doing so.

Class Representative, a sophisticated institutional investor, fully supports this fee request, which creates a presumption that

it is reasonable. Similarly, no Class member has objected to this request as of this filing.

As discussed herein, and in the accompanying Weintraub Certification, Class Counsel respectfully submits that the requested fee is fair and reasonable under the applicable standards in the Third Circuit and New Jersey. In particular, the fee is reasonable given the substantial risks that this complex case entailed, including with respect to establishing the merits and damages, overcoming Defendants' hard-fought opposition at every phase of the litigation, and the potential for non-payment. Further, it is reasonable given Plaintiff's Counsel's considerable litigation efforts, and the outstanding result Plaintiff's Counsel thereby achieved for the Class in the face of those risks.

Plaintiff's Counsel also respectfully requests reimbursement for their litigation costs, which were reasonably necessary to prosecute the Action. In addition, Class Representative requests a service award for its considerable, and important efforts, on behalf of the Class. Courts routinely approve such requests under similar circumstances, and, for the reasons set forth herein, all of the foregoing requests should respectfully be granted.

**II. CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES OF 33 AND 1/3% IS FAIR AND REASONABLE, AND CONSISTENT WITH FEES IN SIMILAR CASES**

**A. In Common Fund Cases Like This One, Courts Routinely Award Attorneys' Fees Based on a Percentage of the Fund**

Courts have long held that when, as here, a lawsuit results in a common fund for class members, the class' attorneys may obtain fees from that fund. *E.g., 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.”).<sup>2</sup> Common funds encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of people, and discourage similar future misconduct. To that point, the United States Supreme Court has explained that private securities actions, like this one, provide “a most effective weapon in the enforcement of the securities laws and are a necessary supplement to [SEC] action.” *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985).

In turn, as further detailed below (at §II.B), courts instruct that when counsel’s efforts result in the creation of a common fund for the benefit of a class, counsel’s fees should be determined as a percentage of the fund, including in securities actions, because it aligns the interests of counsel and of the

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<sup>2</sup> Unless otherwise noted, all emphasis is added and all quotations and citations are omitted.



class to achieve the best result. *E.g.*, *Boeing*, 444 U.S. at 478-79; *In re Viropharma Inc. Sec. Litig.*, 2016 WL 312108, at \*15 (E.D. Pa. Jan. 25, 2016) (The percentage-of-recovery method is generally favored in cases involving a settlement that creates a common fund) (collecting Third Circuit cases). As the Third Circuit explained, the “goal in percentage fee-award cases” is to “ensur[e] that competent counsel continue to be willing to undertake risky, complex, and novel litigation,” by compensating them for the risk they take on and the success they achieve. *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2020). Courts may also confirm the reasonableness of an award of attorneys’ fees under the percentage method by using the lodestar multiplier - a multiple of the attorneys’ billing in the case - as a cross-check, taking into account the contingent nature of common fund cases, and related factors. *Id.* at 199; *infra* §II.C.

**B. The Percentage-of-the Fund Method, and the Related *Gunter* Factors, Support the Requested Fee**

To determine an award under the percentage-of-the-fund method, courts in the Third Circuit and throughout the country consider the following factors: (1) the size of the fund created and the number of persons benefited; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or the fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and

duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) awards in similar cases. *E.g.*, *Gunter*, 223 F.3d at 195 n.1; *Sutter v. Horizon Blue Cross Blue Shield of N.J.*, 406 N.J. Super. 86, 105 (App. Div. 2009); *In re Schering-Plough Corp. Enhance ERISA Litig.*, 2012 WL 1964451, at \*3 (D.N.J. May 31, 2012). These are referred to as the "*Gunter* factors," which "need not be applied in a formulaic way . . . in certain cases, one factor may outweigh the rest." *Gunter*, 223 F.3d at 195 n.1.

Here, the *Gunter* factors show that a 33-1/3% fee award to Plaintiffs' Counsel for achieving this outstanding recovery is both justified and appropriate.

**1. The Size and Nature of the Common Fund Created and the Number of Persons Benefited by the Settlement**

Courts have consistently recognized that the result achieved is one of the primary factors in making a fee award. *E.g.*, *Viropharma*, 2016 WL 312108, at \*16 (the "most critical factor" is the "degree of success obtained").

The result here is outstanding by any measure. At \$102.5 million, it is twelve times greater than the median securities class action settlement in 2021, which was \$8 million. ¶8.<sup>3</sup> Moreover, the proposed Settlement would have been the **largest** class

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<sup>3</sup> All cites to "¶¶\_\_" are to the Certification of Deborah Clark-Weintraub dated January 16, 2023, filed concurrently herewith.

action settlement bringing only claims under the Securities Act - that is bringing only non-fraud claims - in 2021, and the **fifth largest** securities action of any kind that year. ¶8 (citing Janeen McIntosh & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2021 Full-Year Review*, NERA Econ. Consulting, at 23 (Jan. 25, 2022), [https://www.nera.com/content/dam/nera/publications/2022/PUB\\_2021\\_Full-Year\\_Trends\\_012022.pdf](https://www.nera.com/content/dam/nera/publications/2022/PUB_2021_Full-Year_Trends_012022.pdf)).<sup>4</sup>

The proposed Settlement also compares very favorably to other securities class actions in terms of the percentage of the recovery. The most recent annual survey and analysis of securities class action settlements, published by NERA Economic Consulting ("NERA"), calculates that during the period 2012-2020 the median settlement in securities class actions: recovered only 2.3% of investor losses for cases with losses of between \$200 million and \$399 million; and recovered just 1.3% of investor losses for cases of between \$1 billion and \$4.9 billion in losses. ¶8 (citing McIntosh & Starykh, *supra*). Here, Defendants maintained, for various reasons, that there were no damages at all, but also argued in the alternative that there were many other factors that limited damages. Class Representative's expert calculated that if the

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<sup>4</sup> The parties that compile and assess securities class actions have not yet completed their work for 2022, but based on years prior to 2021 and on information available to date regarding 2022, this Settlement would rank similarly in 2022 to how it would have ranked in 2021.

jury accepted Defendants' views of those limiting factors the maximum recoverable damages would be \$333,600,000. ¶6. While Class Representative's expert conceded that there were certain factors that limited damages, he opined that those factors had less impact than Defendants argued. ¶7. Based on all possible outcomes that might result from the experts' differing opinions on causation, Class Representative's expert calculated that the median recoverable damages were \$1,292,400,000. ¶7.

Thus, with \$333,600,000 as the low end of the reasonable range of recoverable damages at trial, the proposed \$102,500,000 Settlement is a 30.7% recovery, far greater than the median 2.3% recovery for comparable cases. Similarly, with \$1,292,400 as the high end of the reasonable damages range, the proposed Settlement is an 8% recovery, also far greater than the median 1.3% for comparable cases.

In addition, numerous Class members will benefit from the proposed Settlement. Given that there were 223.8 million relevant Newell shares issued pursuant to the Offering Documents, and that roughly 207,000 Settlement Notice Packets were disseminated to potential Class members under the Notice program, thousands of investors are eligible to participate in the recovery.

Accordingly, the size of the common fund, the strength of the recovery, and the widespread benefits it will convey all fully support the requested fee award. *E.g., In re Flonase Antitrust*

*Litig.*, 951 F. Supp. 2d 739, 747 (E.D. Pa. 2013) (granting 33-1/3% fee award on \$150 million recovery because it was "a sizeable settlement, and provides immediate and certain payment to the class members").

## **2. The Skill and Efficiency of Plaintiff's Counsel**

This factor turns on the "quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." *Viropharma*, 2016 WL 312108, at \*16.

As detailed in the previous section, the quality of the result here is excellent, but that result is also noteworthy because it came in the face of substantial difficulties. With respect to the merits, Defendants raised strong opposition throughout the case on critical issues, and continue to deny that they engaged in any wrongdoing. They argued that the Offering Documents were free of material misstatements and omissions and contained all required disclosures, and that the alleged misstatements were otherwise not actionable as a matter of law. Defendants also argued that the relevant evidence showed that the claims were time-barred and, in any event, that the Individual Defendants had conducted a reasonable investigation and, therefore, were exempt from liability under the Securities Act. Class Representative

accordingly faced significant hurdles in proving the merits of the claims and it was uncertain whether the Class would ultimately prevail at summary judgment or trial. ¶93.

In addition, assuming the Class could overcome those merits obstacles, Defendants still raised significant arguments regarding causation and damages. As is customary in complex securities cases, Class Representative and Defendants were relying on expert testimony to assist the jury in deciding those issues at trial. Here, Defendants' expert insisted that the declines in Newell's stock price following the Offering did not correct any of the alleged untrue statements or omissions in the Offering Documents but, rather, resulted from new, unrelated events that arose after the Offering. While Class Representative's expert opined with equal vigor that the opposite was true, how a jury would react to competing expert testimony is inherently uncertain and this battle of the experts presented significant risks as to whether the jury would find any damages at all and if so in what amount. Further, Defendants had moved to exclude the testimony of Class Representative's damages expert, and if that motion were granted it would have made the damages issues even more difficult for the Class to win at trial. ¶94.

On top of that, notwithstanding the considerable amount of work that had already occurred in this Action at the time the Settlement was reached, this case was far from finished.

Substantial, complex, expensive, and lengthy litigation remained ahead including argument on the Parties' three summary judgment motions and eight motions to strike experts,<sup>5</sup> pre-trial proceedings, trial, post-trial motions, and appeals. So, even if Class Representative had survived summary judgment, each of those events would have delayed a resolution and could have resulted in dismissal of the entire case or otherwise reduced the value of the claims, creating enormous risk for the Class.

In the face of these risks, Plaintiff's Counsel won multiple motions to advance the case. For example, Plaintiff's Counsel: defeated Defendants' Motion to Dismiss and Motion for Reconsideration, won the Motion for Class Certification, and won several discovery disputes that garnered important documents and depositions for the Class. ¶¶20-28, 49. Plaintiff's Counsel also diligently developed the claims through discovery, as set forth in the Class' Summary Judgment papers, resulting in this outstanding result. ¶¶20-44, 71-78.

It is also noteworthy that the Settlement here exceeded Defendants' available insurance and that Newell had to contribute to the Settlement with its own cash. ¶¶10, 96. Moreover, Newell

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<sup>5</sup> Although these motions had been withdrawn during the telephonic conference the court held on September 12, 2022, they were scheduled to be refiled in the event the Parties' third mediation on September 14, 2022 was unsuccessful. See Letter from T. Scrivo, Esq. to Hon. Christine M. Vanek (Sept. 22, 2022) (Trans. ID LCV20223411993).

did not have sufficient funds to meet the high end of the Class' reasonable damages range at trial, and even a verdict at the low end of that range would have threatened Newell's ability to operate. ¶96.

The result that Plaintiff's Counsel achieved here is in keeping with their record of achieving significant recoveries for investors in securities matters as well as other complex litigation, and exemplifies the specialized experience of its attorneys. ¶¶115-18 (summarizing Plaintiff's Counsel's substantial experience in similar cases); Certification of Daryl F. Scott Ex. D (Scott+Scott Resume); Certification of Peter S. Pearlman Ex. D (Cohn Lifland Pearlman Herrmann & Knopf ("CLPHK") LLP Resume); Certification of David H. Hall Ex. D (Hedin Hall LLP Resume). See *La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*, 2009 WL 4730185, at \*8 (D.N.J. Dec. 4, 2009) (finding the "skill and efficiency of the attorneys involved is high" because plaintiff's counsel had "substantial experience in class action litigation, particularly securities litigation, as illustrated by the Declarations of Counsel accompanying their fee application").

That Defendants were represented by well-respected attorneys at King & Spalding and O'Toole Scrivo, who vigorously contested every aspect of the case throughout the litigation, further demonstrates Class Counsel's skill and efficiency in achieving this result.



For all of the foregoing reasons, this factor also strongly supports the requested fee award.

### **3. The Complexity and Duration of the Litigation**

This factor takes into account the issues and scope of the case, as well as the type of work required to prosecute and resolve the case. See *Gunter*, 223 F.3d at 197. Indicators of significant complexity include when counsel filed “motions dealing with, *inter alia*, class certification, complicated discovery disputes,” “not only deposed numerous witnesses, but also consulted many experts in the field,” and briefed summary judgment during “four-and-half years” of active litigation. *Id.*

“[S]ecurities class actions are inherently complex.” *Sealed Air*, 2009 WL 4730185 at \*8. Indeed, as set forth in the preceding section, this Action involves the circumstances identified in *Gunter*, with numerous merits disputes, particularized arguments presented by different Defendants, and highly-technical issues regarding accounting, causation and damages. To parse these issues, Plaintiff’s Counsel deposed fourteen fact witnesses, and the Parties collectively submitted fifteen expert reports from eight different experts, each of whom was deposed at least once, and two of whom were deposed twice. ¶¶53-58, 61, 68. Accordingly, by the time all Motions for Summary Judgment and the related Motions to Strike Expert Testimony were fully briefed, the Parties had submitted hundreds of pages just in statements and counter

statements of disputed fact, and hundreds of documentary exhibits. ¶¶71-78. These are precisely the circumstances that this factor captures. See *Gunter*, 223 F.3d at 197.

Moreover, as discussed above, had the Action not settled, it would have taken years of additional complex work through trial and appeal to attempt to reach a resolution - and at any point during that time the claims could have been dismissed entirely or dramatically reduced in value. Thus this factor also weighs strongly in favor of the requested fee award.

#### **4. The Risk of Non-Payment**

The risk that counsel takes in prosecuting a client's case on a contingent matter, and in particular of non-payment for doing so, also supports a fee award. *Schering-Plough*, 2012 WL 1964451, at \*7 ("Courts routinely recognize that the risk created by undertaking an action on a contingency fee basis militates in favor of approval" of fee awards, approving 33-1/3% fee.).

There are numerous contingent cases such as this one that were ultimately dismissed after class counsel expended thousands of hours and overcame multiple interim hurdles, resulting in counsel receiving no compensation at all. For example, in a securities case against JDS Uniphase that advanced through trial, the jury decided for defendants, and the case ended with no compensation for counsel. See *In re JDS Uniphase Corp. Sec. Litig.*, 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007). Likewise, in

a securities action against Oracle, the court granted summary judgment to defendants and dismissed the claims after eight years of litigation, leaving counsel with substantial unreimbursed time and expenses. *In re Oracle Corp. Sec. Litig.*, 2009 WL 1709050 (N.D. Cal. June 19, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010).

Just so, here, there were multiple issues and events, discussed in the preceding sections, which could have resulted in the risky securities claims at issue being dismissed entirely. That Plaintiff's Counsel prosecuted this action on a wholly contingent basis despite the heightened risk of non-payment and made a substantial commitment of time and resources thus supports the requested fee award.

#### **5. Plaintiff's Counsel Devoted Significant Time to this Case**

Another factor in the fee award is the time that counsel devoted to the case. Thus, in *Flonase*, the fact that "class counsel spent more than 40,000 hours over the course of more than four years litigating this case" which was "necessary for the successful prosecution of this case, considering both the complexity of the issues and the robust defense mounted by the defendants," supported the court's award of a 33-1/3% fee. 951 F. Supp. 2d at 748.

Likewise, achieving the outstanding result here required a substantial commitment from Plaintiff's Counsel. Among other

things, Plaintiff's Counsel: (a) reviewed over 2,400,000 pages of documents produced by Defendants and third-parties; (b) produced over 30,000 pages from Class Representative; (c) briefed a Motion to Dismiss, a Motion for Reconsideration, a Motion for Class Certification, three Motions for Summary Judgment and eight Motions to Strike experts; (d) filed letters raising several discovery disputes; (e) served comprehensive interrogatory responses; (f) drafted multiple mediation statements and presentations; (g) took fourteen fact depositions and defended two others; (h) oversaw eight expert reports; and (i) took five expert depositions and defended five others.

As set forth in accompanying Certifications, across all Plaintiff's Counsel, this work required 40,550.30 hours. ¶126. Also, that work is not the end of Plaintiff's Counsel efforts on this matter, as they are currently engaged in supporting approval of the Settlement along with assisting potential Class members and the Claims Administrator with the Notice and Claims process, which if the Settlement is approved, Plaintiff's Counsel will continue to work on thereafter.

The amount, complexity and skill of the work involved here, particularly facing the risk of non-payment, support the requested fee award.

## **6. The Response of the Class**

The response of the client to the requested fee is another factor in the award. *Gunter*, 223 F.3d at 199. The Notice informed the Class that Plaintiff's Counsel would seek a fee award of up to 33-1/3%, and, though the deadline for submitting an objection is not until January 30, 2023, to date there are no objections to the requested fee. "The absence of any objection weighs in favor of the fee request." *Bredbenner v. Liberty Travel, Inc.*, 2011 WL 1344745, at \*20 (D.N.J. Apr. 8, 2011).

Courts have also held that "[w]here the Lead Plaintiff approves the Lead Plaintiff's counsel's request[ed] fee award – as Lead Plaintiff does here – the Court should afford the fee requested a presumption of reasonableness." *Viropharma*, 2016 WL 312108, at \*15. Importantly, the Plaintiff and Class Representative here, a sophisticated institutional investor, fully supports the requested fee award, in light of the excellent recovery achieved despite significant risks, and the substantial time Plaintiff's Counsel committed. See Declaration of Chase Rankin ("Rankin Decl.") ¶¶7-9. This factor weighs in favor of the requested fee award as well.

## **7. Courts Award Fees of 33-1/3% of the Settlement Fund in Similar Actions**

Courts in similar actions in the Third Circuit and elsewhere have regularly awarded 33-1/3%, the requested fee here. See

*Pearlstein v. Blackberry Ltd.*, No. 13-CV-7060, 2022 WL 4554858 (S.D.N.Y. Sept. 29, 2022) (awarding 33-1/3% of \$165 million securities settlement); *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 3:02-cv-1152-M, 2018 WL 1942227 (N.D. Tex. Apr. 25, 2018) (awarding 33-1/3% of \$100 million securities settlement); *In re Apollo Grp. Inc. Sec. Litig.*, No 04-CV-2147, 2012 WL 1378677 (D. Ariz. Apr. 20, 2012) (awarding 33-1/3% of \$145 million securities settlement); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467 (S.D.N.Y. 2009) (awarding 33-1/3% of \$586 million securities settlement); see also *In re Neurontin Antitrust Litig.*, No. 02-CV-2731, 2014 WL 12962880 (D.N.J. Aug. 6, 2014) (awarding 33-1/3% of \$190.4 million antitrust settlement); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739 (E.D. Pa. 2013) (awarding 33-1/3% of \$150 million antitrust settlement); *Haddock v. Nationwide Life Ins. Co.*, No. 3:01-cv-1552 (SRU), 2015 WL 13942222 (D. Conn. Apr. 9, 2015) (awarding 35% of \$140 million ERISA settlement); *Cabot E. Broward 2 LLC v. Cabot*, No. 16-CIV-DIMITROULEAS/SNOW, 2018 WL 5905415 (S.D. Fla. Nov. 9, 2018) (awarding 33-1/3% of \$100 million fiduciary duty and fraud settlement); *In re Titanium Dioxide Antitrust Litig.*, No. 10-CV-00318(RDB), 2013 WL 6577029 (D. Md. Dec. 13, 2013) (awarding 33-1/3% of \$163.5 million antitrust settlement); *In re U.S. Foodservice, Inc. Pricing Litig.*, No. 3:07-md-1894, 2014 WL 12862264 (D. Conn. Dec. 9, 2014) (awarding 33-1/3% of \$297 million

RICO and contract settlement); *Standard Iron Works v. ArcelorMittal*, No. 08 C 5214, 2014 WL 7781572 (N.D. Ill. Oct. 22, 2014) (awarding 33-1/3% of \$163.9 million antitrust settlement); *Eaton v. Halifax PLC*, No. MON-L-2365-03, slip op. at 1 (N.J. Super. Ct. Law Div. May 26, 2011) (awarding 33-1/3% of securities settlement); *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136 (E.D. Pa. 2000) (awarding 33-1/3% of fraudulent-misrepresentation settlement).

As in the cases cited above, for all the reasons set forth in the preceding sections, a fee award of 33-1/3% for achieving this excellent and hard-fought result is well-justified and should respectfully be granted.

**C. THE LODESTAR MULTIPLIER CROSS-CHECK ALSO SUPPORTS THE REQUESTED FEE**

Courts may also use a lodestar multiplier to confirm the appropriateness of a requested fee award under the percentage-of-the-recovery method. *E.g.*, *Bredbenner*, 2011 WL 1344745, at \*21. Lodestar is counsel's billing on a case, and the "multiplier" is the number of times the lodestar goes into the requested fee award. *Id.* A multiplier therefore is an enhancement for "the contingent nature or risk involved in a particular case and the quality of the attorneys' work," similar to the *Gunter* factors discussed above. *Id.* The "Third Circuit has recognized that multiples ranging from one to four are frequently awarded in common fund

cases when the lodestar method is applied.” *Id.* at \*21-22 (approving 1.88 crosscheck multiplier and noting that the Third Circuit has approved a cross-check multiplier of 3 in a “relatively simple” case that did not “carry risks as to liability”).

The requested fee here under the percentage recovery - \$34,166,666 - is approximately equal to Plaintiff’s Counsel’s combined lodestar. Thus there is almost no multiplier here. In performing the tasks detailed above (see *supra* §II.B.5), Plaintiff’s Counsel combined to work 40,550.3 hours, for a total lodestar of \$32,226,328.00 million, through October 19, 2022, the day that they filed the Motion for Preliminary Approval of the Proposed Settlement. ¶¶123-26. Plaintiff’s Counsel has continued to do work since then with regard to final approval along with the Notice and Claims process, and if the Settlement is finally approved they will continue to do such work thereafter - thus Plaintiff’s Counsel’s actual work on the case is and will be greater than the foregoing lodestar.

This information is set forth in Plaintiff’s Counsel’s Certifications and is supported by summaries that show individual biller’s positions, total hours, hours by particular tasks, rates and total billing, all of which was assembled from contemporaneous time records. ¶123; see also Certification of Daryl F. Scott (Scott+Scott); Certification of Peter S. Pearlman (CLPHK); Certification of David H. Hall (Hedin Hall). The rates that



Plaintiff's Counsel uses have been regularly approved by courts, and are consistent with rates charged by other plaintiff and defense firms in the securities bar, including in the relevant localities. *E.g.*, *Banerjee v. Avinger, Inc.*, No. 17-cv-3400-CW, 2018 WL 6040194, at \*3 (N.D. Cal. Oct. 24, 2018) (approving fee award, including to Class Counsel, and finding that "the rates charged are commensurate with those charged by attorneys with similar experience"); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 13 Civ. 7789, 2018 WL 5839691, at \*5 (S.D.N.Y. Nov. 8, 2018) (approving partner rates including for Class Counsel of \$630-\$1,375, and associate rates of \$325 to \$625), *aff'd sub nom. Kornell v. Haverhill Ret. Sys.*, 790 F. App'x 296 (2d Cir. 2019); *Okla. Police Pension Fund & Ret. Sys. v. Teligent, Inc.*, No. 1:19-cv-03354-VM, 2021 WL 5630806, at \*1 (S.D.N.Y. Dec. 1, 2021) (using lodestar to crosscheck a percentage fee award, and accepting Class Counsel's rates); see Nat'l Law Journal, *The 50th Annual Survey of Law Firm Economics* (2022 ed.).

Taking the requested fee award and dividing it by Plaintiff's Counsel's lodestar results in a multiplier here of 1.06, which is smaller than the multiplier awarded in similar actions. *E.g.*, *Pearlstein*, 2022 WL 4554858 (awarding lodestar multiplier of 1.61-2.15 for \$165 million settlement); *Apollo*, 2012 WL 1378677 (awarding lodestar multiplier of 1.74 for \$145 million settlement); *Neurontin Antitrust Litig.*, 2014 WL 12962880

(awarding lodestar multiplier of 1.99 for \$191 million settlement); *Flonase Antitrust Litig.*, 951 F. Supp. 2d 739 (awarding lodestar multiplier of 2.99 for \$150 million settlement); *U.S. Foodservice*, 2014 WL 12862264 (awarding lodestar multiplier of 2.23 for \$297 million settlement); *ArcelorMittal*, 2014 WL 7781572 (awarding lodestar multiplier of 1.97 for \$163.9 million settlement).

As the 1.06 multiplier here is at the low end of the range that courts commonly approve, the lodestar crosscheck strongly supports the requested fee of 33-1/3%.

### **III. PLAINTIFF'S COUNSEL'S APPLICATION FOR REASONABLY INCURRED LITIGATION EXPENSES SHOULD BE APPROVED**

Counsel may also recover from the common fund they helped establish the expenses that they incurred in prosecuting the Action. *E.g.*, *Bredbenner*, 2011 WL 1344745, at \*18. "The test for this inquiry is whether the particular costs are the type routinely billed by attorneys to paying clients in similar cases." *Schering-Plough*, 2012 WL 1964451, at \*8. The types of expenses that courts routinely approve under this inquiry include those for experts, mediation, court reporting and transcripts, research, transportation, duplicating and postage. *Flonase*, 951 F. Supp. 2d at 751 (approving expense request and noting that "[t]wo-thirds of this [expense] amount reflects fees paid [to] experts" and the

next largest category is "document management" for discovery and litigation support); *Viropharma*, 2016 WL 312108, at\* 18.

The expenses that Plaintiff's Counsel seeks reimbursement for here, which are documented in their Certifications and taken from cost records that their firms maintain, all fall within the foregoing categories, and were reasonably necessary to successfully prosecute this Action. See ¶133; see also Certification of Daryl F. Scott (documenting Scott+Scott expenses); Certification of Peter S. Pearlman (documenting CLPHK expenses); Certification of David H. Hall (documenting Hedin Hall expenses). For example:

- (a) Experts: \$1,829,532.97. This was the primary cost in the case. Class Representative retained four well-respected experts to provide testimony for the jury on four broad subject matters, and they collectively submitted eight reports, sat for five depositions and assisted with mediation and other matters.
- (b) Document Production/Storage: \$256,778.53. There were millions of pages worth of documents produced by Defendants, Class Representative and non-parties, all of which were stored on an electronic discovery platform that enabled the sorting, review and assessment of the evidence in the case.

- (c) Mediation: \$129,010.00. The parties retained the Hon. Daniel Weinstein (Ret.) of JAMS, a mediator with a strong national reputation and extensive experience in mediating complex securities actions, who oversaw three mediations, participated in additional negotiations and reviewed various materials, in helping to facilitate a resolution of the case.
- (d) Court Reporters/Transcripts: \$111,856.12. This covers hearings across four years of litigation, and more than twenty depositions.
- (e) Online Research: \$54,036.75. This covers PACER, Westlaw, and other services, billed at cost, and used to obtain filings, analyst reports and legal research.
- (f) Travel: \$31,929.76. This covers meals, hotels and transportation over four years of litigation.

Based on these and similar costs, in total, Plaintiff's Counsel seek reimbursement for \$2,442,716.43 that they reasonably incurred in prosecuting Action, which is consistent with reimbursement amounts that courts regularly approve in similar cases. *E.g.*, *Pearlstein*, 2022 WL 4554858 (S.D.N.Y. Sept. 29, 2022) (awarding \$4,278,824.37 in costs in \$165 million settlement); *Halliburton*, 2018 WL 1942227 (awarding \$5,969,540.84 in costs in \$100 million settlement); *Apollo*, 2012 WL 1378677 (awarding \$1,557,692.33 in costs in \$145 million settlement); *Initial Pub.*

*Offering Sec. Litig.*, 671 F. Supp. 2d 467 (awarding \$46,941,556.96 in \$586 million settlement); *Neurontin*, 2014 WL 12962880 (awarding \$2,213,537.35 in costs in \$191 million settlement); *Flonase*, 951 F. Supp. 2d 739 (awarding \$2,069,433 in costs in \$150 million settlement); *Titanium Dioxide*, 2013 WL 6577029 (awarding \$4,569,271.86 in costs in \$163.5 million settlement).

It is significant that the Notice informed Class members that Plaintiff's Counsel would seek reimbursement of up to \$2,750,000 in costs, which is greater than the amount they are now seeking, and there are currently no objections to that request. See ¶¶90, 105. Class Representative also fully supports this request. See Rankin Decl. ¶¶7-9.

For the foregoing reasons, and as Plaintiff's Counsel "had a strong incentive to conserve their expenses, given that they were incurred with no guarantee of recovery," Plaintiff's Counsel's request for reimbursement of \$2,442,716.43 is appropriate, and should respectfully be approved. *Flonase*, 951 F. Supp. 2d at 751.

#### **IV. THE REQUESTED AWARD TO THE CLASS REPRESENTATIVE IS APPROPRIATE**

Class representatives who, through their efforts, bring and pursue actions that benefit a class, commonly receive an incentive award from the common fund to "compensate [them] for services they provided and the risks they incurred" in prosecuting the action. *E.g.*, *Sealed Air*, 2009 WL 4730185, at \*10 (approving \$25,000 award

to class representative who, among other things, was deposed, reviewed discovery documents and consulted with class counsel during the case).

Here, Class Representative served an important role in securing the substantial recovery for the Class. As set forth in its Declaration, among other things, it: (i) regularly communicated with Class Counsel concerning the status, progress, and any updates related to the Action; (ii) reviewed pleadings, briefs, orders, and other documents filed in the Action; (iii) conferred with Class Counsel concerning litigation, mediation, and settlement strategy; (iv) participated in discovery, including collecting and producing documents, reviewing interrogatories (and responses and objections thereto), and sitting for an all-day deposition; (v) participated in mediations, including attending an all-day mediation; and (vi) evaluated and approved the proposed Settlement subject to the Court's approval. Rankin Decl. ¶¶5, 11. This work was also considerable, given the four years of litigation and extensive record it spanned. *Id.*

In light of the service, time, and resources Class Representative devoted, it requests an award of \$25,000, which is well within the amount that courts grant in similar cases. *E.g.*, *Pearlstein*, 2022 WL 4554858 (awarding \$100,000 service award to each of two class representatives in \$165 million settlement); *Halliburton*, 2018 WL 1942227 (awarding \$100,000 service award to

class representative in \$100 million settlement); *Cabot*, 2018 WL 5905415 (awarding \$50,000 service award to each of two class representatives in \$100 million breach of fiduciary duty and fraud settlement); *Sealed Air*, 2009 WL 4730185, at \*10 (approving \$25,000 service award to class representative). Moreover, the amount requested is less than the maximum \$50,000 amount indicated in the Notice, and there are currently no objections to that request. Class Representative's requested service award is therefore appropriate, and should respectfully be granted.

#### **V. CONCLUSION**

For the reasons set forth above, the Court should respectfully: (1) grant Plaintiff's Counsel request for a fee award of 33-1/3% of the Settlement Fund, plus interest; (2) grant Plaintiff's Counsel \$2,442,716.43 for reimbursement of its costs plus interest; and (3) grant Class Representative a service award of \$25,000.

Dated: January 16, 2023

Respectfully submitted,

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*/s/ Peter S. Pearlman*

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