

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

BEAVER COUNTY EMPLOYEES')
RETIREMENT FUND; ERIE COUNTY)
EMPLOYEES' RETIREMENT SYSTEM;)
and LUC DE WULF, Individually and on)
Behalf of All Others Similarly Situated,)

Plaintiffs,)

vs.)

TILE SHOP HOLDINGS, INC.; ROBERT)
A. RUCKER; THE TILE SHOP, INC.;)
TIMOTHY C. CLAYTON; PETER J.)
JACULLO, III; JWTS, INC.; PETER H.)
KAMIN; TODD KRASNOW; ADAM L.)
SUTTIN; WILLIAM E. WATTS;)
ROBERT W. BAIRD & CO.)
INCORPORATED; CITIGROUP)
GLOBAL MARKETS, INC.; CJS)
SECURITIES, INC.; HOULIHAN LOKEY)
CAPITAL, INC.; PIPER JAFFRAY &)
CO.; SIDOTI & COMPANY, LLC;)
TELSEY ADVISORY GROUP LLC; and)
WEDBUSH SECURITIES, INC.,)

Defendants.)

Civ. No. 0:14-cv-00786-ADM-TNL

CLASS ACTION

MEMORANDUM OF LAW IN
SUPPORT OF CLASS COUNSEL'S
MOTION FOR ATTORNEYS' FEES
AND EXPENSES AND
REIMBURSEMENT OF CLASS
REPRESENTATIVES' COSTS AND
EXPENSES

DATE: May 3, 2017
TIME: 10:00 a.m.
CTRM: The Honorable Ann D.
Montgomery

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I. INTRODUCTION

Class Counsel have succeeded in obtaining a settlement consisting of a cash fund of \$9,500,000 on behalf of the Class.¹ The Settlement is a highly favorable result and was achieved through the skill, tenacity and effective advocacy of Class Counsel. As compensation for their efforts in achieving this result, Class Counsel seek an award of attorneys' fees of 24% of the Settlement Amount, plus expenses incurred in the prosecution of the Action in the amount of \$913,028.91, plus interest on these amounts at the same rate and for the same period as that earned by the Settlement Fund.²

The requested attorneys' fees are warranted in light of the highly favorable recovery obtained for the Class, the extensive efforts of counsel in obtaining this result, and the significant risks in bringing and prosecuting this Action. This case did not settle at an early stage. Rather, the Settlement was the result of aggressive and protracted litigation and was reached only after fact and expert discovery was complete, motions for summary judgment and to exclude expert testimony were pending and a March 13, 2017 trial date was looming. Defendants mounted strong opposition throughout the Action, raising numerous legal and factual obstacles at every stage. Class Counsel overcame almost every hurdle, including successfully opposing in large part Defendants' motions to dismiss and obtaining certification of a class over Defendants' determined opposition.

The Action is subject to the provisions of the PSLRA and therefore litigation was extremely risky and difficult from the outset. The effect of the PSLRA is to make it harder for investors to bring and successfully resolve securities class actions. In recognizing the

¹ All capitalized terms used herein have the meanings assigned to them in the Stipulation of Settlement dated January 13, 2017 ("Stipulation" or "Settlement").

² Under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), fees and expenses awarded to counsel for the Class include "prejudgment interest actually paid to the class." 15 U.S.C. §78u-4(a)(6).

significant challenges investors face under the PSLRA, in a *per curiam* opinion, retired Supreme Court Justice Sandra Day O'Connor recognized that, "[t]o 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). Despite these risks, Class Counsel undertook representation of the Class on a contingent fee basis.

In addition to these risks, the investigation, prosecution and settlement of this Action required great skill and an extensive effort by Class Counsel. Class Counsel marshalled considerable resources and committed substantial amounts of time and expenses in the prosecution of the Action. As set forth in more detail in the Joint Declaration of Matthew L. Mustokoff and Joseph Russello in Support of (I) Class Representatives' Motion for Final Approval of Class Action Settlement and Plan of Distribution; and (II) Class Counsel's Motion for Attorneys' Fees and Expenses and Reimbursement of Class Representatives' Costs and Expenses ("Joint Decl."), submitted herewith, Class Counsel, among other things: (i) conducted a thorough pre-trial investigation into the Class' claims; (ii) drafted a detailed consolidated class action complaint; (iii) successfully opposed in large part Defendants' motions to dismiss; (iv) engaged in (and completed) extensive fact and expert discovery; (v) filed and argued four motions to compel which were each granted in part; (vi) successfully moved for class certification; (vii) moved for partial summary judgment; (viii) opposed Defendants' summary judgment motions; (ix) filed motions to exclude the testimony of three of Defendants' experts; (x) responded to Defendants' motions to exclude the testimony of Class Representatives' experts; and (xi) participated in protracted settlement negotiations, including formal mediation sessions with three different highly qualified mediators. In total,

Plaintiffs' Counsel³ and their paraprofessionals spent over 23,000 hours in prosecuting this Action with an aggregate lodestar of \$12,041,515.50. As a result, the requested fee of 24% of the Settlement Fund, or \$2,280,000, represents a significant discount from counsel's lodestar resulting in a negative multiplier.⁴

Further, the Court should consider the Class' reaction to the attorneys' fees and expenses which counsel seek. Pursuant to the Court's Order Preliminarily Approving Settlement and Providing for Notice and Settlement Hearing ("Preliminary Approval Order"), copies of the Notice of Class Action Determination, Proposed Settlement, and Hearing on Settlement ("Notice") and the Proof of Claim and Release form ("Claim Form"), in the forms approved by the Court have been mailed to 29,903 potential members of the Class and their nominees. In addition, the Summary Notice was published once in *The Wall Street Journal* and once over the *PR Newswire*.⁵ The Notice advises Class Members that Class Counsel, on behalf of Plaintiffs' Counsel, will apply to the Court for an award of attorneys' fees in an amount not to exceed 24% of the Settlement Fund plus expenses not to exceed \$1,200,000. While the deadline for objecting to the requested attorneys' fees and

³ Plaintiffs' Counsel refers collectively to Class Counsel, Robbins Geller Rudman & Dowd LLP and Kessler Topaz Meltzer & Check, LLP, Liaison Counsel, Chestnut Cambronne PA, and additional counsel, Johnson & Weaver, LLP.

⁴ See Declaration of Joseph Russello Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Robbins Fee Decl."); Declaration of Matthew L. Mustokoff Filed on Behalf of Kessler Topaz Meltzer & Check, LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Kessler Fee Decl."); Declaration of Jeffrey D. Bores Filed on Behalf of Chestnut Cambronne PA in Support of Application for Award of Attorneys' Fees and Expenses ("Chestnut Fee Decl."); and Declaration of Frank J. Johnson Filed on Behalf of Johnson & Weaver, LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Johnson Fee Decl."), submitted herewith.

⁵ See Declaration of Carole K. Sylvester Regarding (A) Mailing of the Notice and Proof of Claim, (B) Publication of the Summary Notice, and (C) Requests for Exclusion Received to Date ("Sylvester Decl."), ¶¶3-10, 13, submitted herewith.

expenses – April 3, 2017 – has not passed, to date, not a single objection to Class Counsel’s fee and expense request has been received.

Class Counsel firmly believe that the Settlement obtained is the result of their creative and diligent efforts as well as their reputations as attorneys who are unwavering in their dedication to the interests of the Class and unafraid to zealously prosecute a meritorious case through trial and subsequent appeals. In a case asserting claims based on complex legal and factual issues which were opposed by highly skilled and experienced defense counsel, Class Counsel succeeded in securing a highly favorable result for the Class. As a result, Class Counsel submit that the 24% fee requested is fair and reasonable when considered under the applicable standards, particularly in view of the substantial risks of bringing and pursuing this Action, the extensive litigation efforts, and the results achieved for the Class. In addition, Class Counsel submit that the expenses requested are also reasonable in amount and were necessarily incurred for the successful prosecution of this Action.

Importantly, the fees and expenses requested by Class Counsel are supported by all three Class Representatives and the fee request is made in accordance with Beaver County Employees’ Retirement Fund’s (“Beaver County”), and Erie County Employees’ Retirement System’s (“Erie County”) retainer agreements entered into at the beginning of the case, a process envisioned by Congress when it enacted the PSLRA.⁶ Moreover, in determining that

⁶ The following Class Representative declarations are being concurrently filed in support of the Court’s final approval of the Settlement and the reasonableness of Class Counsel’s request for an award of attorneys’ fees and expenses: (1) Declaration of Mary Schaaf, County Controller for Erie County, Pennsylvania in Support of: (A) Class Representatives’ Motion for Final Approval of Class Action Settlement; (B) Class Counsel’s Motion for Attorneys’ Fees and Expenses; and (C) Erie County Employees’ Retirement System’s Request for Reimbursement of Costs and Expenses (“Erie County Decl.”); (2) Declaration of Andrea M. Cantelmi, Chief County Solicitor for Beaver County, Pennsylvania in Support of: (A) Class Representatives’ Motion for Final Approval of Class Action Settlement; (B) Class Counsel’s Motion for Attorneys’ Fees and Expenses; and (C) Beaver County Employees’ Retirement Fund’s Request for Reimbursement of Costs and Expenses (“Beaver County Decl.”); and (3) Declaration of Luc DeWulf in Support of: (A) Class Representatives’ Motion for Final Approval of Class Action Settlement; (B) Class Counsel’s Motion for

the 24% fee request was reasonable, Class Representatives took into account “the work Plaintiffs’ Counsel performed and the result obtained for the benefit of the Class.” Erie County Decl., ¶7; Beaver County Decl., ¶7; DeWulf Decl., ¶7. Class Representatives were actively involved in the litigation, and believe that the Settlement represents a good recovery for the Class. Erie County Decl., ¶6; Beaver County Decl., ¶6; DeWulf Decl., ¶6. Because of this involvement, Class Representatives are in a unique position to evaluate the work of counsel, the results achieved and the effort required to obtain this highly favorable result. As the Third Circuit held in *In re Cendant Corp. Litig.*, 264 F.3d 201 (3d Cir. 2001), “courts should afford a presumption of reasonableness to fee requests submitted pursuant to an agreement between a properly-selected lead plaintiff and properly-selected lead counsel.” *Id.* at 220.

For all the reasons discussed herein, the Memorandum of Law in Support of Class Representatives’ Motion for Final Approval of Class Action Settlement and Plan of Distribution (“Settlement Memorandum”), the Joint Declaration, and the fee and expense declarations, Class Counsel respectfully request that the Court approve their request for an award of attorneys’ fees and expenses, including reimbursement of the reasonable costs and expenses of Erie County, Beaver County and DeWulf in the amounts of \$5,239.10, \$3,142.59, and \$10,000.00, respectively, in connection with their representation in accordance with the PSLRA. Erie County Decl., ¶¶11-13; Beaver County Decl., ¶¶11-13; DeWulf Decl., ¶¶8-9.

II. HISTORY OF LITIGATION

The Court is respectfully referred to the Joint Declaration for a detailed description of the procedural history of the Action, the claims asserted, the efforts of counsel in obtaining

Attorneys’ Fees and Expenses; and (C) His Request for Reimbursement of Costs and Expenses (“DeWulf Decl.”).

this result, the negotiation and substance of the Settlement, the substantial risks and uncertainties of the Action and the reasonableness of the fee and expense request.

III. THE LEGAL STANDARD GOVERNING THE AWARD OF ATTORNEYS' FEES

A. A Reasonable Percentage of the Fund Recovered Is the Preferred Approach for Awarding Attorneys' Fees in Common Fund Cases

For their efforts in creating a \$9,500,000 common fund, Class Counsel seek a reasonable percentage of the fund recovered as attorneys' fees. In *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996), the Eighth Circuit approved the percentage method in awarding attorneys' fees from a common fund. Indeed, "[i]n the Eighth Circuit, use of a percentage method of awarding attorney fees in a common-fund case is not only approved, but also 'well established.'" *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 991 (D. Minn. 2005) (citation omitted). Supporting authority for the percentage method in other Circuits is overwhelming.⁷

It has long been recognized in equity that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The purpose of this doctrine is to avoid unjust enrichment and to spread litigation costs proportionately among all the beneficiaries. *Id.* This rule, known as the

⁷ Two circuits have ruled that the percentage method is *mandatory* in common fund cases. *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991). Other circuits and commentators have expressly approved the use of the percentage method. *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994) (authorizing percentage method and holding that use of lodestar/multiplier method was abuse of discretion); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) (citing footnote 16 of *Blum v. Stenson*, 465 U.S. 886 (1984) recognizing both "implicitly" and "explicitly" that a percentage recovery is reasonable in common fund cases); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir. 1993); Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 254 (Oct. 8, 1985).

common fund doctrine, is firmly rooted in American case law. *See, e.g., Trustees v. Greenough*, 105 U.S. 527 (1882); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885).

In *Blum*, 465 U.S. at 900 n.16, the United States Supreme Court stated that the percentage method of computing fees was the proper approach in the “common fund” context where, as here, the fees are paid out of (not in addition to) the fund recovered. Courts in this Circuit almost uniformly use the percentage-of-the-fund approach in awarding attorneys’ fees in common fund cases. *See, e.g., Khoday v. Symantec Corp.*, No. 11-cv-180 (JRT/TNL), 2016 U.S. Dist. LEXIS 55543, at *24 (D. Minn. Apr. 5, 2016) (awarding 33-1/3% of a \$40 million settlement, noting “[a] routine calculation of fees involves the common-fund doctrine, which is based on a percentage of the common fund recovered”) (citations omitted). *See also, e.g., In re St. Jude Med., Inc. Sec. Litig.*, No. 0:10-cv-00851-SRN-TNL, 2015 U.S. Dist. LEXIS 181941, at *3 (D. Minn. June 12, 2015) (awarding 29% of a \$50 million settlement); *In re E.W. Blanch Holdings, Inc. Sec. Litig.*, No. 01-258 (JNE/JGL), 2003 WL 23335319, at *3 (D. Minn. June 16, 2003) (awarding 33-1/3% of \$20 million settlement fund); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (upholding 36% fee award); *In re Eng’g Animation Sec. Litig.*, 203 F.R.D. 417, 419 (S.D. Iowa 2001) (awarding 33-1/3% of \$2.5 million settlement); *In re Airline Ticket Comm’n Antitrust Litig.*, 953 F. Supp. 280, 286 (D. Minn. 1997) (awarding 33-1/3% of \$86 million settlement).

Compensating counsel in common fund cases on a percentage basis makes eminently good sense. First, it is consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated on a percentage-of-the-recovery method.⁸ Second, it provides plaintiffs’ counsel with a strong incentive to obtain the

⁸ Courts are encouraged to look to the private marketplace in setting a percentage fee. *See In re Cont’l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (“The judicial task might be simplified if the judge and the lawyers [spent] their efforts on finding out what the market in

maximum possible recovery under the circumstances.⁹ Indeed, one of the nation's leading scholars in the field of class actions and attorneys' fees, Professor Charles Silver of the University of Texas School of Law, has concluded that the percentage method of awarding fees is the only method of awarding fees that is consistent with class members' due process rights. Charles Silver, *Class Actions in the Gulf South Symposium: Due Process and the Lodestar Method: You Can't Get There From Here*, 74 Tul. L. Rev. 1809 (June 2000).

B. Consideration of Relevant Factors Support the Fee Requested

In examining the factors that make a 24% fee appropriate, it is instructive to look at the factors typically considered by the courts in this and other Circuits. The key issue is whether the requested fee is reasonable. *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999). Although the "Eighth Circuit has not laid out factors that a district court must consider when determining whether a percentage of the common fund is reasonable, . . . this District has relied on factors set forth by other Circuits, including the following:

(1) the benefit conferred on the class; (2) the risk to which plaintiffs' counsel was exposed; (3) the difficulty and novelty of the legal and factual issues of the case; (4) the skill of the lawyers, both plaintiffs' and defendants'; (5) the time and labor involved; (6) the reaction of the class; and (7) the comparison

fact pays not for the individual hours but for the ensemble of services rendered in a case of this character."); *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 959 (7th Cir. 2013) (approving 27.5% fee of \$200,000,000 settlement based on a market rate analysis).

⁹ In *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986), the court stated:

The contingent fee uses private incentives rather than careful monitoring to align the interests of lawyer and client. The lawyer gains only to the extent his client gains. . . . The unscrupulous lawyer paid by the hour may be willing to settle for a lower recovery coupled with a payment for more hours. Contingent fees eliminate this incentive and also ensure a reasonable proportion between the recovery and the fees assessed to defendants. . . .

At the same time as it automatically aligns interests of lawyer and client, rewards exceptional success, and penalizes failure, the contingent fee automatically handles compensation for the uncertainty of litigation.

Id. at 325-26.

between the requested attorney fee percentage and percentages awarded in similar cases.”

Khoday, 2016 U.S. Dist. LEXIS 55543, at *25 (citations omitted). Indeed, “[m]any of the factors overlap, and not all of the individual factors will apply in every case, affording the Court wide discretion in the weight to assign each factor.” *Id.* Consideration of these factors confirms the reasonableness of the fee requested.

1. The Benefit to the Class

Many courts recognize that the result achieved is an important factor considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (“most critical factor is the degree of success obtained”); *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 630 (D. Colo. 1976) (“the amount of the recovery, and end result achieved are of primary importance, for these are the true benefit to the client”); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 547-48 (S.D. Fla. 1988) (“The quality of work performed in a case that settles before trial is best measured by the benefit obtained.”), *aff’d*, 899 F.2d 21 (11th Cir. 1990).

Through diligent pursuit of the Class’ claims and skillful negotiation, Class Counsel have created a Settlement Fund of \$9,500,000, plus interest. This Settlement has been achieved by Class Counsel’s extensive litigation efforts and hard-fought, arm’s-length negotiations. Class Counsel put together an experienced team of lawyers, investigators and experts that are responsible for this noteworthy result. Moreover, given the defenses to liability and damages raised by Defendants in their summary judgment and expert exclusion motions and during settlement negotiations, the Settlement is a highly favorable result. *See, e.g., Khoday*, 2016 U.S. Dist. LEXIS 55543, at *27 (“By itself, the cash settlement is beneficial to the class, but weighed against the inherent risks of trial, this Court finds that the \$60 million cash settlement provides a substantial and immediate benefit to the class.”).

This Settlement confers a substantial and immediate benefit on the Class in contrast to the additional delays, costs, and uncertainty of continued litigation. The \$9.5 million Settlement Fund obtained for the benefit of the Class also represents a significant percentage of the Class' estimated damages. Based on Class Representatives' damages expert's estimate of the Class' maximum provable damages, the Settlement represents approximately 6.8% to 9.5% of the Class' estimated damages of \$100 million to \$140 million. This range of recovery far exceeds the median recovery of estimated damages in similar securities class actions settled in 2016 (2.5%) by a multiple of 2.7 to 3.8. *See* Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements: 2016 Review and Analysis* at 7, Fig. 6 (Cornerstone Research 2017).¹⁰ The Settlement also exceeds the median settlement as a percentage of estimated damages in this Circuit for the period 2007 through 2016 (3.3%). *Id.* at 23, Appx. 3.

2. The Contingent Nature of the Case and the Risk to Which Plaintiffs' Counsel Was Exposed

Plaintiffs' Counsel undertook this Action on a contingent fee basis, assuming a significant risk that the Action would yield no recovery and leave them uncompensated. Unlike counsel for Defendants, who are paid an hourly rate and paid for their expenses on a regular basis, Plaintiffs' Counsel have not been compensated for any time or expense since this case began, expending over 23,000 hours of attorney and para-professional time equating to approximately \$12 million in lodestar and incurring more than \$900,000 in expenses. Class Counsel knew that if their efforts were not successful, they would not generate a fee and their expenses would not be paid.

Courts have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. For example, in awarding counsel's

¹⁰ Attached as Ex. 1 to the Joint Decl.

attorneys' fees in *In re Prudential-Bache Energy Income P'ships Sec. Litig.*, No. 888, 1994 U.S. Dist. LEXIS 6621 (E.D. La. May 18, 1994), the court noted the risks that plaintiffs' counsel had taken:

Although today it might appear that risk was not great based on Prudential Securities' global settlement with the Securities and Exchange Commission, such was not the case when the action was commenced and throughout most of the litigation. Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

Id. at *16.

Similarly, the Seventh Circuit has acknowledged that the risk of loss is real and should be considered in a motion for attorneys' fees. It reversed the district court's order that had rejected counsel's contention that lawyers faced the risk of nonpayment. *Sutton v. Bernard*, 504 F.3d 688, 694 (7th Cir. 2007) ("Because 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.").

While securities cases have always been complex and difficult to prosecute, the PSLRA has only increased the difficulty in successfully prosecuting a securities class action. Indeed, the risk of no recovery in complex cases of this type is very real. There are numerous cases where plaintiffs' counsel in contingent cases such as this, after expending thousands of hours, have received no compensation despite their diligence and expertise. As the court in *Xcel*, 364 F. Supp. 2d at 994, recognized: "The risk of no recovery in complex cases of this sort is not merely hypothetical. Precedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy."

For example, in *In re Oracle Corp. Sec. Litig.*, No. C 01-00988 SI, 2009 U.S. Dist. LEXIS 50995 (N.D. Cal. June 16, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010), a case that

Robbins Geller prosecuted, the court granted summary judgment to defendants after eight years of litigation, and after plaintiffs' counsel incurred over \$6 million in expenses, and worked over 100,000 hours, representing a lodestar of approximately \$40 million. And, in a case against JDS Uniphase Corporation, after a lengthy trial involving securities claims, the jury reached a verdict in defendants' favor. *See In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486 CW (EDL), 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007). Similarly, even the most promising case can be eviscerated by a sudden change in the law after years of litigation. In *In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d 469, 471-73 (S.D.N.Y. 2010), 95% of plaintiffs' damages were eliminated by the Supreme Court's reversal of some 40 years of unbroken circuit court precedents in *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010), after plaintiffs had completed extensive foreign discovery.

Because the fee in this matter was entirely contingent, the only certainties were that there would be no fee without a successful result and that such a successful result would be realized only after considerable and difficult effort. Here, Plaintiffs' Counsel committed significant resources of both time and money to vigorously and successfully prosecute this Action for the Class' benefit.

3. The Difficulty and Novelty of the Legal and Factual Issues of the Case and Risks Attendant to the Litigation

The difficulty and novelty of the issues involved in a case are significant factors to be considered in making a fee award. Courts have long recognized that securities class actions present inherently complex and novel issues. Retired Judge Finesilver noted in *Miller v. Woodmoor Corp.*, No. 74-F-988, 1978 U.S. Dist. LEXIS 15234, at *11-*12 (D. Colo. Sept. 28, 1978):

The benefit to the class must also be viewed in its relationship to the complexity, magnitude, and novelty of the case. . . .

Despite years of litigation, the area of securities law has gained little predictability. There are few "routine" or "simple" securities actions. Courts

are continually modifying and/or reversing prior decisions in an attempt to interpret the securities law in such a way as to follow the spirit of the law while adapting to new situations which arise. Indeed, many facets of securities law have taken drastically new directions during the pendency of this action.

Judge Finesilver's comments ring even more true today. The adoption of the PSLRA has made the successful prosecution of securities cases more complex and uncertain. *See In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA").¹¹ From the outset, this PSLRA action was a difficult and highly uncertain securities case that involved complex issues of law and fact. Indeed, "[t]he process and scope of discovery in this case is indicative of the issues' complexity." *Khoday*, 2016 U.S. Dist. LEXIS 55543, at *28. As discussed in the Joint Declaration (*see* ¶¶47-60) and the Settlement Memorandum (*see* §III.C.1.), substantial risks and uncertainties in this Action made it far from certain that Class Counsel would secure any recovery, let alone \$9.5 million.

The PSLRA added significant risks to Lead Plaintiffs' ability to survive Defendants' motions to dismiss. After Congress passed the PSLRA, courts have dismissed cases at the pleading stage in response to defendants' arguments that the complaints do not meet the PSLRA's heightened pleading standards, making it clear that the risk of no recovery (and hence no fee) has increased exponentially. *See Goldstein v. MCI WorldCom*, 340 F.3d 238,

¹¹ Even before Congress passed the PSLRA, courts had noted that a securities case "by its very nature, is a complex animal." *Clark v. Lomas & Nettleton Fin. Corp.*, 79 F.R.D. 641, 654 (N.D. Tex. 1978), *vacated on other grounds*, 625 F.2d 49 (5th Cir. 1980). *See also Miller*, 1978 U.S. Dist. LEXIS 15234, at *11-*12:

The benefit to the class must also be viewed in its relationship to the complexity, magnitude, and novelty of the case. . . . Despite years of litigation, the area of securities law has gained little predictability. There are few "routine" or "simple" securities actions.

241 (5th Cir. 2003) (affirming dismissal of securities fraud action against Bernard Ebbers and WorldCom even though Ebbers was later convicted criminally).

A study of securities class actions filed and resolved between January 2000 and December 2012 found that 55% of cases filed in the Eighth Circuit were dismissed in defendants' favor. *See* Dr. Renzo Comolli, Sukaina Klein, Dr. Ronald I. Miller & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2012 Full-Year Review* at 18, Fig. 16 (NERA Jan. 29, 2013). As one court has noted: "An unfortunate byproduct of the PSLRA is that potentially meritorious suits will be short-circuited by the heightened pleading standard." *Bryant v. Avado Brands, Inc.*, 100 F. Supp. 2d 1368, 1377 (M.D. Ga. 2000), *rev'd on other grounds sub nom. Bryant v. Dupree*, 252 F.3d 1161 (11th Cir. 2001).

Defendants steadfastly maintained that they did nothing wrong and although the majority of Class Representatives' claims survived Defendants' motions to dismiss, difficult issues of proof remained as to key elements of Class Representatives' claims, including materiality, scienter, loss causation and damages. Even if Class Counsel were successful against Defendants at trial and obtained a significant judgment for the Class, Class Counsel's efforts to establish liability and damages in the Action, in all likelihood, would not end with a judgment in this Court, but would continue through one or more levels of appellate review. In cases such as this, even a victory at trial does not guarantee ultimate success. Both trial and judicial review are unpredictable and could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself. Indeed, as the court observed in *In re Warner Commc'ns Sec. Litig.*:

Even a victory at trial is not a guarantee of ultimate success. If plaintiffs were successful at trial and obtained a judgment for substantially more than the amount of the proposed settlement, the defendants would appeal such judgment. An appeal could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself.

618 F. Supp. 735, 747-48 (S.D.N.Y. 1985) (citing numerous examples), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

In sum, this highly complex case has been extensively litigated and vigorously contested over an extended period of time. Despite the novelty and difficulty of the issues raised, counsel secured a highly favorable result for the Class.

4. The Skill of the Lawyers Involved

The quality of the representation by Class Counsel and the standing of Class Counsel are important factors that support the reasonableness of the requested fee. *See Khoday*, 2016 U.S. Dist. LEXIS 55543, at *28-*29 (“The skill and extensive experience of counsel in complex litigation is relevant in determining fair compensation.”). This Settlement was achieved by Class Counsel, two of the preeminent class action securities litigation firms in the country, with decades of experience in prosecuting and trying complex class actions.¹² Class Counsel’s experience and skill were demonstrated by the efficient and highly effective prosecution of this Action, culminating in the highly favorable settlement before the Court. In short, the result achieved is the clearest reflection of counsel’s skill and expertise. *See In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 261 (D. Del. 2002) (class counsel “showed their effectiveness in the case at bar through the favorable cash settlement they were able to obtain”), *aff'd*, 391 F.3d 516 (3d Cir. 2004). As the court recognized in *Edmonds v. United States*, 658 F. Supp. 1126, 1137 (D.S.C. 1987), the “prosecution and management of a complex national class action requires unique legal skills and abilities.” In the instant matter, Class Counsel achieved a highly favorable result for the Class, due in large part to their experience and expertise in litigating complex class actions.

¹² See the firm resumes of Class Counsel which are attached as Exhibit G to the Robbins Fee Declaration and Exhibit C to the Kessler Fee Declaration. Liaison Counsel, Chestnut Cambronne PA, and additional counsel, Johnson & Weaver, LLP, are also experienced complex litigation firms. See firm resumes attached as Exhibit F to the Chestnut Fee Declaration and Exhibit D to the Johnson Fee Declaration.

The quality of opposing counsel is also important in evaluating the quality of Class Representatives' counsel's work.¹³ The Defendants were represented by experienced lawyers with significant experience in defending complex actions. Notwithstanding this formidable opposition, Class Counsel's ability to present a strong case and to demonstrate their willingness and ability to continue to vigorously prosecute the Action through trial and the inevitable appeals enabled Class Counsel to achieve a favorable settlement for the Class.

5. Time and Effort Required

Plaintiffs' Counsel marshaled considerable resources and time in the research, investigation, prosecution and settlement of the Action. The legal and factual obstacles to recovery in this case were significant, but did not deter Class Counsel. A detailed discussion of the efforts and the obstacles overcome to reach the Settlement are set forth in the Settlement Memorandum, the Joint Declaration and above. In total, Plaintiffs' Counsel and their paraprofessionals spent over 23,000 hours in prosecuting this Action with a resulting lodestar of \$12,041,515.50. As a result, the requested fee of 24% of the Settlement Fund, or \$2,280,000, represents a significant discount from counsel's lodestar – resulting in a negative multiplier – which further confirms the reasonableness of the requested fee.¹⁴

¹³ See, e.g., *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1063 (D. Minn. 2010) (finding the fact that defendant's attorneys "consist[ing] of multiple well-respected and capable defense firms" which "consistently challenged Plaintiffs throughout the litigation" supported class counsel's fee request); *King Res.*, 420 F. Supp. at 634; *In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977); *Arenson v. Bd. of Trade*, 372 F. Supp. 1349, 1354 (N.D. Ill. 1974).

¹⁴ In complex contingent litigation such as this Action, lodestar multipliers between 2 and 5 are commonly awarded. See, e.g., *Khoday*, 2016 U.S. Dist. LEXIS 55543, at *33 (finding a multiplier of "less than two" to be "below the range of multipliers commonly accepted in other cases"); *Yarrington*, 697 F. Supp. 2d at 1065 (awarding fee representing a 2.26 multiplier); *Xcel*, 364 F. Supp. 2d at 999 (awarding fee representing a 4.7 multiplier); *In re Charter Commc'ns, Inc.*, No. 4:02-cv-1186 CAS, 2005 WL 4045741, at *22 (E.D. Mo. June 30, 2005) (finding 5.61 multiplier to be "within the range of multipliers awarded in comparable complex cases"); *Cohn v. Nelson*, 375 F. Supp. 2d 844, 862 (E.D. Mo. 2005) ("In shareholder litigation, courts typically apply a multiplier of 3 to 5 to compensate counsel for the risk of contingent representation.").

6. The Reaction of the Class to Date

In addition to Class Representatives' approval of the requested attorneys' fees, the reaction of the Class to date also supports the requested fee. As discussed above, through March 17, 2017, the Court-appointed Claims Administrator, Gilardi & Co. LLC, has disseminated the Notice and Claim Form to more than 29,000 potential Class Members and nominees informing them, among other things, that Class Counsel would apply to the Court for an award of attorneys' fees in an amount not to exceed 24% of the Settlement Fund. While the deadline for objecting to Class Counsel's fee request is not until April 3, 2017, to date, not a single objection to the maximum fee (and expenses) set forth in the Notice has been received. Should any objections be received, Class Counsel will address them in their reply papers.

7. The Fee Requested Reflects the Market Rate in Similar Complex Contingent Litigation

The requested fee of 24% of the Settlement Fund is in line with or below attorneys' fees repeatedly awarded by district courts in other complex class actions cases. In this district, "courts 'have frequently awarded attorney fees between twenty-five and thirty-six percent of a common fund in class actions.'" *Yarrington*, 697 F. Supp. 2d at 1064 (quoting *U.S. Bancorp*, 291 F.3d at 1038) (affirming a fee award representing 36% of the settlement fund as reasonable). Moreover, as noted above, in *Xcel*, the court cited to numerous decisions from this district where courts have awarded fees of 25% or more of a common fund. *Xcel*, 364 F. Supp. 2d at 998. The requested fee is also supported by an analysis of fee awards in securities class actions conducted in 2017 by National Economic Research Associates ("NERA"), an economics consulting firm. Using data from securities class actions from 1996 through 2016, the study found that for settlements of between \$5 million and \$24 million, where this Settlement falls, the median fee award was between 27.5% and 30% of the settlement amount. *See* Dr. Stefan Boettrich and Svetlana Starykh, *Recent*

Trends in Securities Class Action Litigation: 2016 Full-Year Review at 39, Fig. 32 (NERA Jan. 23, 2017).

The requested fee is also reasonable when compared to the private marketplace, a comparison encouraged by the courts. *See Cont'l Ill.*, 962 F.2d at 572. Supreme Court Justices Brennan and Marshall observed in their concurring opinion in *Blum*: “In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.” *Blum*, 465 U.S. at 903. Similarly, in the securities class action context, Judge Marvin Katz of the Eastern District of Pennsylvania noted that in private contingent litigation, fee contracts have traditionally ranged between 30% and 40% of the total recovery. *Ikon*, 194 F.R.D. at 194. These percentages are the prevailing market rates throughout the United States for contingent representation.

IV. COUNSEL’S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED FOR THE CLASS

Class Counsel also request payment of Plaintiffs’ Counsel’s expenses that they incurred to successfully prosecute and resolve this Action, plus interest on such amount at the same rate as earned by the Settlement Fund. As set forth in the individual firm fee declarations submitted herewith, Plaintiffs’ Counsel incurred litigation expenses in the amount of \$913,028.91 in connection with the prosecution of the Action on behalf of the Class. “The requested costs must be relevant to the litigation and reasonable in amount.” *Yarrington*, 697 F. Supp. 2d at 1067. All of Plaintiffs’ Counsel’s expenses are reasonable in amount and were necessary for the successful prosecution of the Action, and therefore should be paid. *See Xcel*, 364 F. Supp. 2d at 1000 (finding that expenses of photocopy, postage, messenger services, document depository, telephone and facsimile charges, filing

and witness fees, computer-assisted legal research, expert fees and consultants, and meal, hotel and transportation charges for travel are proper in a class action).

V. THE CLASS REPRESENTATIVES ARE ENTITLED TO REIMBURSEMENT OF REASONABLE COSTS AND EXPENSES

Pursuant to the PSLRA, the Court may award “reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class.” 15 U.S.C. §78u-4(a)(4). Class Representatives Erie County, Beaver County and DeWulf request reimbursement of \$5,239.10, \$3,142.59, and \$10,000.00, respectively. *See* Erie County Decl., ¶¶11-13, Beaver County Decl., ¶¶11-13, and DeWulf Decl., ¶¶8-9. As set forth in their declarations, each Class Representative devoted substantial time to the oversight of, and participation in, the litigation, including reviewing pleadings, communicating regularly with counsel, preparing for and providing depositions, complying with Defendants’ discovery requests, and consulting with and directing Class Counsel regarding all of the foregoing and in connection with settling the litigation. *See* Erie County Decl., ¶¶4-5, Beaver County Decl., ¶¶4-5, and DeWulf Decl., ¶¶3-5.

These are precisely the types of activities that courts have found to support awards to lead plaintiffs. *See, e.g., Xcel*, 364 F. Supp. 2d at 1000 (awarding \$100,000 collectively to eight lead plaintiffs who “fully discharged their PSLRA obligations and have been actively involved throughout the litigation [including] communicat[ing] with counsel [reviewing] counsels’ submissions [and keeping] informed of the settlement negotiations”); *In re Am. Int’l Grp., Inc.*, No. 04 Civ. 8141 (DAB), 2010 U.S. Dist. LEXIS 129196, at *19 (S.D.N.Y. Dec. 2, 2010) (granting PSLRA award of \$30,000 to institutional lead plaintiffs “to compensate them for the time and effort they devoted on behalf of a class”); *IBEW Local 697 Pension Fund v. Int’l Game Tech., Inc.*, No. 3:09-cv-00419-MMD-WGC, 2012 U.S. Dist.

LEXIS 151498, at *15 (D. Nev. Oct. 19, 2012) (awarding lead plaintiff \$5,832.85 and named plaintiff \$4,050.00 to reimburse them for time spent “reviewing briefs, participating in depositions, answering discovery responses and consulting with counsel”); *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144(CM), 2009 U.S. Dist. LEXIS 120953, at *61 (S.D.N.Y. Dec. 23, 2009) (awarding \$144,657.14 to the New Jersey Attorney General’s Office and \$70,000.00 to the Ohio Funds, which was requested to “compensate them for their reasonable costs and expenses incurred in managing this litigation and representing the Class”). The awards sought by Class Representatives here are reasonable and fully justified under the PSLRA based on their extensive involvement in the Action and the amount of time they devoted for the benefit of the Class and, therefore, should be granted.

VI. CONCLUSION

Based on the foregoing and upon the entire record herein, Class Counsel respectfully request that the Court award attorneys’ fees in the amount of 24% of the Settlement Fund plus expenses in the amount of \$913,028.91, in addition to the interest earned thereon at the same rate and for the same period as that earned on that portion of the Settlement Fund until paid. Class Counsel also request that the Court award Erie County, Beaver County and

DeWulf their expenses in representing the Class in the amount of \$5,239.10, \$3,142.59, and \$10,000.00, respectively.

DATED: March 20, 2017

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

BEAVER COUNTY EMPLOYEES')
RETIREMENT FUND; ERIE COUNTY)
EMPLOYEES' RETIREMENT SYSTEM;)
and LUC DE WULF, Individually and on)
Behalf of All Others Similarly Situated,)

Plaintiffs,)

vs.)

TILE SHOP HOLDINGS, INC.; ROBERT)
A. RUCKER; THE TILE SHOP, INC.;)
TIMOTHY C. CLAYTON; PETER J.)
JACULLO, III; JWTS, INC.; PETER H.)
KAMIN; TODD KRASNOW; ADAM L.)
SUTTIN; WILLIAM E. WATTS;)
ROBERT W. BAIRD & CO.)
INCORPORATED; CITIGROUP)
GLOBAL MARKETS, INC.; CJS)
SECURITIES, INC.; HOULIHAN LOKEY)
CAPITAL, INC.; PIPER JAFFRAY &)
CO.; SIDOTI & COMPANY, LLC;)
TELSEY ADVISORY GROUP LLC; and)
WEDBUSH SECURITIES, INC.,)

Defendants.)

Civ. No. 0:14-cv-00786-ADM-TNL

CLASS ACTION

CERTIFICATE OF COMPLIANCE
WITH LOCAL RULE 7.1 WORD-
COUNT AND TYPE-SIZE LIMITS
REGARDING MEMORANDUM OF
LAW IN SUPPORT OF CLASS
COUNSEL'S MOTION FOR
ATTORNEYS' FEES AND EXPENSES
AND REIMBURSEMENT OF CLASS
REPRESENTATIVES' COSTS AND
EXPENSES

I, Joseph Russello, hereby certify that the Memorandum of Law in Support of Class Counsel's Motion for Attorneys' Fees and Expenses and Reimbursement of Class Representatives' Costs and Expenses complies with the word-count limitation of Local Rule 7.1(f), and the type-size limitation of Local Rule 7.1(h). The Memorandum was prepared using Microsoft Word 2010, and is in a 13-point font. The Memorandum contains 6,794 words, exclusive of the caption designation, tables of contents and authorities and signature-block text. I further certify that the word-count function of my word-processing software has been applied specifically to include all text, including headings, footnotes and quotations.

DATED: March 20, 2017

Respectfully submitted,

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Responses and Replies

[0:14-cv-00786-ADM-TNL Beaver County Employees' Retirement Fund et al v. Tile Shop Holdings, Inc. et al](#)

CV,PROTO

U.S. District Court

U.S. District of Minnesota

Notice of Electronic Filing

The following transaction was entered by Russello, Joseph on 3/20/2017 at 4:48 PM CDT and filed on 3/20/2017

Case Name: Beaver County Employees' Retirement Fund et al v. Tile Shop Holdings, Inc. et al

Case Number: [0:14-cv-00786-ADM-TNL](#)

Filer: Beaver County Employees' Retirement Fund
Erie County Employees Retirement System
Luc De Wulf

Document Number: [391](#)

Docket Text:

MEMORANDUM in Support re [389] MOTION for Attorney Fees - Class Counsel's Motion for Attorneys' Fees and Expenses and Reimbursement of Class Representatives' Costs and Expenses filed by Beaver County Employees' Retirement Fund, Erie County Employees Retirement System, Luc De Wulf. (Attachments: # (1) LR7.1/LR72.2 Word Count Compliance Certificate)(Russello, Joseph)

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