

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

PRAKASH MOHANTY, Individually and on ) Case No. 1:16-cv-12336-IT  
Behalf of All Others Similarly Situated, )  
)  
Plaintiff, )  
) CLASS ACTION  
vs. )  
)  
AVID TECHNOLOGY, INC., LOUIS )  
HERNANDEZ, JR., and ILAN SIDI, )  
)  
Defendants. )  
)  
\_\_\_\_\_ )

**MEMORANDUM OF LAW IN SUPPORT OF LEAD COUNSEL’S MOTION FOR  
AN AWARD OF ATTORNEYS’ FEES, PAYMENT OF EXPENSES, AND AN AWARD  
TO LEAD PLAINTIFF PURSUANT TO 15 U.S.C. §78u-4(a)(4)**

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Court-appointed lead plaintiff, David Wayne Hammond (“Lead Plaintiff”), respectfully submits this memorandum of law in support of Lead Counsel’s<sup>1</sup> motion for an award of attorneys’ fees and expenses and Lead Plaintiff’s application for a compensatory award for time incurred in prosecuting the Action pursuant to 15 U.S.C. §78u-4(a)(4).<sup>2</sup>

## **I. INTRODUCTION**

The \$1.325 million cash Settlement obtained by Lead Counsel for the Class represents a very good recovery for the Class, considering the risk of proceeding with the litigation further, including through summary judgment and trial. In order to achieve this recovery, Lead Counsel devoted substantial time and financial resources to the prosecution of the Action. Indeed, in connection with the initial complaint (filed on November 21, 2016) and the Corrected Amended Complaint for Violations of the Federal Securities Laws (the “Complaint”) (filed on April 19, 2017), Lead Counsel conducted an extensive pre-filing investigation which included, *inter alia*, a comprehensive review of Avid’s press releases, public statements, SEC filings, regulatory filings and reports, and securities analysts’ reports and advisories about the Company, researched the applicable law with respect to the claims asserted in the Action and the potential defenses thereto, and engaged an investigator to interview potential witnesses. Lead Counsel also expended time in connection with complying with the lead plaintiff provisions of the Private Securities Litigation Reform Act of 1995 (“PSLRA”). After Defendants filed their motion to dismiss the Complaint, claiming that it failed to meet the PSLRA’s high pleading bar, Lead Counsel researched and

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<sup>1</sup> Lead Counsel refers to Johnson Fistel, LLP (“Johnson Fistel”) and Liaison Counsel refers to Hutchings Barsamian Mandelcorn, LLP (“Hutchings”), and collectively Johnson Fistel and Hutchings are sometimes referred to herein as “Counsel.”

<sup>2</sup> Unless otherwise defined herein, all capitalized terms used herein are defined in the Stipulation and Agreement of Settlement, dated November 30, 2017 (the “Stipulation”) (Dkt. No. 50-2).



drafted comprehensive opposition papers. Lead Counsel also communicated with consultants regarding potential damages.<sup>3</sup>

Lead Counsel also spent considerable time preparing for the mediation of the Action, including the preparation of the mediation statement, participating in extensive settlement discussions (including an all-day mediation session in New York, New York), as well as continued follow-up emails and telephone calls with the Mediator for several weeks following the in-person mediation. Lead Counsel's efforts resulted in the \$1.325 million recovery for the Class. Finally, once the Parties agreed to the Settlement, Lead Counsel spent considerable time negotiating, preparing, and finalizing settlement-related documents including, *inter alia*, the Stipulation of Settlement, exhibits thereto, and memoranda in support of the Settlement. Following the entry of the Notice Order by the Court which, among other things, granted preliminary approval to the Settlement and directed that Notice be disseminated in the form and manner detailed in the Notice Order, Lead Counsel established the Escrow Account for the Settlement Amount and worked with the Claims Administrator to ensure that adequate and sufficient notice was published and mailed pursuant to the Court's Notice Order. *See* Fistel Decl. at ¶¶9, 37-39, 57, 75. Lead Counsel undertook all of these efforts without any compensation and despite substantial litigation risks in a very challenging case. *Id.* at ¶¶58, 40-49, 63-64, 68.

The result achieved here is particularly significant when viewed against the myriad of risks Lead Plaintiff and Lead Counsel faced in establishing both liability and damages on the securities claims, particularly in the face of the unique hurdles set forth in the PSLRA. On liability,

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<sup>3</sup> *See* Declaration of Michael I. Fistel, Jr. in Support of (1) Lead Plaintiff's Motion for Final Approval of Class Action Settlement, Approval of the Plan of Allocation, and Final Certification of the Class for Settlement Purposes; and (2) Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Expenses, and an Award to Lead Plaintiff Pursuant to 15 U.S.C. §78u-4(a)(4) ("Fistel Decl."), along with its exhibits, submitted herewith, at ¶¶3-28.

Defendants, through able counsel, denied each and every claim and allegation of wrongdoing Lead Plaintiff alleged in the Action, and there was a significant risk that at the motion to dismiss stage, the summary judgment stage, at trial, or on appeal, Defendants could prevail on any of their numerous defenses to liability. *See* Fistel Decl. at ¶¶40-49.

In light of these significant risks, the recovery is a very good result and demonstrates the high quality of Lead Counsel's representation. Indeed, Lead Counsel estimates that the recovery here is approximately 6.8% of the likely recoverable damages, which exceeds a recent Cornerstone Research study which found that the median recovery as a percentage of estimated damages in all securities class action settlements was 2.5% during 2006-2015 and only 1.8% in 2015. *See* Fistel Decl. at ¶¶32-33, 50, and at Ex. 3.

As compensation for their significant efforts and achievements on behalf of the Class, Lead Counsel requests a fee award in the amount of 33 1/3% of the Settlement Fund, or \$441,666.67, and payment of litigation expenses in the amount of \$55,542.50.<sup>4</sup> As discussed below, the requested fee is well within the range of fees awarded in comparable class action settlements, whether considered as a percentage of the Settlement or on a lodestar basis. In fact, the requested fee represents only 70.39% of Counsel's total lodestar—representing a negative multiplier of 0.7039 (*i.e.*, a significant discount) on Counsel's time. *See* Fistel Decl. at ¶¶73-74.

Finally, pursuant to 15 U.S.C. §78u-4(a)(4), Lead Plaintiff applies for a compensatory award of \$7,940.90 for the significant time he spent dedicated to the prosecution of the Action.<sup>5</sup>

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<sup>4</sup> Lead Plaintiff approves of the requested fee and expense amounts. *See* Declaration of David Wayne Hammond in Support of Lead Plaintiff's Motion for Final Approval of Class Action Settlement and for an Award to Lead Plaintiff Pursuant to 15 U.S.C. §78u-4(A)(4) (Ex. 6 ("Hammond Decl."), submitted herewith, at ¶8.

<sup>5</sup> *See* Hammond Decl. at ¶9.

For the reasons set forth below, Lead Counsel respectfully requests that the Court approve its application for an award of attorneys' fees and reimbursement of expenses, as well as Lead Plaintiff's application for an award pursuant to 15 U.S.C. §78u-4(a)(4), in the amounts requested.

## **II. HISTORY AND BACKGROUND OF THE ACTION**

The Court is respectfully referred to the accompanying Fistel Decl. for a full discussion of, *inter alia*, the factual background and procedural history of the Action, the litigation efforts of Lead Counsel, the significant risks of continued litigation, and a discussion of the negotiations leading to the Settlement.

## **III. ARGUMENT**

### **A. LEAD COUNSEL'S FEE REQUEST IS REASONABLE AND FAIR**

Having obtained a significant recovery for the Class, Lead Counsel, who pursued this case on a wholly contingent basis, requests attorneys' fees of \$441,666.67, representing 33 1/3% of the total recovery. Lead Counsel's diligence and substantial efforts during this litigation, as outlined above and detailed in the Fistel Decl., resulted in obtaining a substantial recovery for the Class.

#### **1. Attorneys' Fees Should Be Awarded from the Settlement Fund**

The Supreme Court has "long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought . . . by the Department of Justice and the Securities and Exchange Commission." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (citation omitted). The Supreme Court also "has recognized consistently 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).

Courts in this Circuit follow the “common fund” doctrine. *See Bezdek v. Vibram USA Inc.*, No. 12-10513, 2015 U.S. Dist. LEXIS 5508, at \*54-55 (D. Mass. Jan. 16, 2015) (“Under the common fund doctrine, where attorneys succeed in obtaining a fund that benefits the class, they are entitled to ‘a reasonable attorney’s fee from the [settlement] fund as a whole.’”) (citing *Boeing*, 444 U.S. at 478); *In re Tyco Int’l Multidistrict Litig.*, 535 F. Supp. 2d 249, 265 (D.N.H. 2007) (same)). “This is rooted in ‘the equitable principle that those who have profited from litigation should share its costs.’” *Bezdek* at \*19 (citing *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 n.6 (1st Cir. 1995)); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000) (same); *Tyco*, 535 F. Supp. 2d at 265 (“By assessing attorneys’ fees and litigation expenses against a common fund, the court spreads these costs proportionately among those benefitted by the suit.”). In addition to providing just compensation, awards of fair attorneys’ fees from a common fund encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, discourage future misconduct of a similar nature, and thereby promote private enforcement of, and compliance with, the federal securities laws. *See, e.g., Jenkins v. Trustmark Nat’l. Bank*, 300 F.R.D. 291, 307 (S.D. Miss. 2014).

**2. The Court Should Award Attorneys’ Fees Using the Percentage of Recovery Method with a Lodestar Cross-Check**

The Supreme Court has endorsed the percentage of recovery method, stating that “under the ‘common fund doctrine[,]’ . . . a reasonable fee is based on a percentage of the fund bestowed on the class.” *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). The First Circuit has also approved the percentage method in common fund cases, noting that it is the “prevailing praxis” in common fund cases because it “offers significant structural advantages in common fund cases, including ease of administration, efficiency, and a close approximation of the marketplace.” *Thirteen*

*Appeals*, 56 F.3d at 308. Specifically, courts in this Circuit often “use the percentage of fund (‘POF’) method with a lodestar cross-check to evaluate the fee request.” *Tyco*, 535 F. Supp. 2d at 265; *U.S. v. 8.0 Acres of Land*, 197 F.3d 24, 33 (1st Cir. 1999); *Thirteen Appeals*, 56 F.3d at 307-08; *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 78 (D. Mass. 2005) (“The First Circuit and several district courts in this circuit have approved the use of the percentage of fund method in common fund cases where a pool of money is to be divided among class members.”). This method “is appropriate in common fund cases because it rewards counsel for success and penalizes [counsel] for failure.” *Tyco*, 535 F. Supp. 2d at 266 (quotation omitted). Finally, while “the First Circuit does not require courts to examine a fixed laundry list of factors,” courts in this Circuit do draw upon the factors considered in the Second and Third Circuits to determine whether a fee is reasonable and appropriate. *Id.* (citations omitted).

Additionally, the PSLRA provides that “[t]otal attorneys’ fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.” 15 U.S.C. §78u-4(a)(6). Thus, “the PSLRA has made percentage-of-recovery the standard for determining whether attorneys’ fees are reasonable.” *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 188 n.7 (3d Cir. 2005). Given the fact that this securities class action is a “paradigmatic common fund case,” *In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 852, 860 (W.D. Pa. 1995) (quotation omitted), and given the “distinct advantages” provided by applying the percentage of recovery method in such cases, Lead Counsel respectfully submits that the Court should apply the percentage of recovery method, cross-checked with lodestar, to approve Lead Counsel’s requested fees. *Thirteen Appeals*, 56 F.3d at 307-08.

### 3. An Award of 33 1/3% of the Settlement Fund Is Appropriate

Using the percentage of recovery method, the court “shapes the counsel fee based on what it determines is a reasonable percentage of the fund recovered for those benefitted by the litigation.” *Thirteen Appeals*, 56 F.3d at 305 (citation omitted). The requested 33 1/3% fee is within the range of percentage fees typically awarded in the First Circuit in comparable cases. *See, e.g., Lauture v. A.C. Moore Arts & Crafts, Inc.*, No. 17-cv-10219, 2017 U.S. Dist. LEXIS 195147, at \*3 (D. Mass. Nov. 28, 2017) (Dein, J.) (finding one-third fee award of \$2.9 million settlement “appropriate because it mimics the market” and declining to perform a lodestar cross-check); *Roberts v. TJX Cos.*, No. 13-cv-13142-ADB, 2016 U.S. Dist. LEXIS 136987, at \*45 (D. Mass. Sep. 30, 2016) (Burroughs, J.) (finding fee award of one-third of the fund recovered, including a lodestar multiplier of nearly 2, to be “reasonable in light of the counsel’s efforts—consolidating the three class actions, preparing for mediation, engaging in extensive settlement negotiations, undertaking a substantial amount of work in approving the settlement, administering the required notice to class members, and administering the settlement itself—and the significant risk they assumed in taking the case on a wholly contingent basis, to be reasonable.”); *Lapan v. Dick’s Sporting Goods*, No. 13-cv-11390-RGS, Dkt. Nos. 220-21 (D. Mass. April 19, 2016) (Stearns, J.) (approving thirty-three and one-third percent of \$3.3 million settlement); *Barbosa v. Publishers Circulation Fulfillment, Inc.*, No. 08-cv-10873 (D. Mass. Nov. 25, 2009) (Dein, J.) (approving one-third fee award of \$1.4 million settlement fund); *Swack v. Credit Suisse First Bos., LLC*, No. 1:02-cv-11943-DPW, Dkt. No. 114 (D. Mass. Jul. 18, 2006) (Woodlock, J.) (awarding 33%); *Relafen*, 231 F.R.D. at 80-82 (awarding 33.3% of \$75 million settlement fund; 2.02 multiplier of counsel’s lodestar); *In re StockerYale, Inc. Sec. Litig.*, No. 1:05-cv-00177, 2007 U.S. Dist. LEXIS

94004, at \*6-\*7 (D.N.H. Dec. 18, 2007) (awarding 33.3% of \$3.4 million settlement; 2.17 multiplier).

While “[t]he First Circuit has not endorsed a specified set of factors to be used in determining whether a fee request is reasonable,” *Relafen*, 231 F.R.D. at 79, courts in this Circuit often consider several factors in considering an award of attorney’s fees, including: “(1) the size of the fund and the number of persons benefitted; (2) the skill, experience, and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risks of the litigation; (5) the amount of time devoted to the case by counsel; (6) awards in similar cases; and (7) public policy considerations, if any.” *Medoff v. CVS Caremark Corp.*, No. 09-cv-554-JNL, 2016 U.S. Dist. LEXIS 19135, at \*26 (D.R.I. Feb. 17, 2016). Each of these factors supports the award requested here.

**a. The Size of the Fund and the Number of Persons Benefitted**

Here, Lead Counsel achieved a substantial recovery of \$1,325,000 for the benefit of the Class. The Settlement here is an all-cash settlement, and numerous members of the Class will now receive compensation that was otherwise uncertain when the case began. The Settlement achieved represents a very good result for members of the Class, particularly in light of the substantial risks posed in the Action. Specifically, Lead Counsel estimates that the Settlement Amount is approximately 6.8% of the likely recoverable damages, which exceeds a recent Cornerstone Research study which found that the median recovery as a percentage of estimated damages in all securities class action settlements was 2.5% during 2006-2015 and only 1.8% in 2015. *See* Laarni T. Bulan, Glen M. Ryan, and Laura E. Simmons, *Securities Class Action Settlements: 2015 Review and Analysis* at 9, Figure 8 (Cornerstone Research 2016), Fistel Decl., Ex. 3; *see also In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (citing studies indicating that the

average securities fraud class action settlement since 1995 has resulted in a recovery of 5.5%-6.2% of estimated losses).

As such, Lead Counsel submits that the Settlement obtained is a testament to the quality of its representation and supports the reasonableness of the requested fee. Indeed, one of the “distinct advantages” of the percentage-of-the-fund method is that it directly incorporates the value of the recovery obtained into the calculation of the fee. *See Duhaime v. John Hancock Mutual Life Ins. Co.*, 989 F. Supp. 375, 377 (D. Mass. 1997) (noting that an advantage of the percentage method is that it “focuses on result, rather than process, which better approximates the workings of the marketplace” and provides that “the greater the value secured for the class, the greater the fee earned by class counsel”).

**b. The Skill, Experience, and Efficiency of the Attorneys Involved**

The quality of the representation by counsel and the standing of counsel at the bar are important factors that support the reasonableness of the requested fee. The quality of the representation here is best evidenced by the quality of the result achieved. *See In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM)(PED), 2010 U.S. Dist. LEXIS 119702, at \*28 (S.D.N.Y. Nov. 8, 2010); *In re Bisys Sec. Litig.*, No. 04 Civ. 3840 (JSR), 2007 U.S. Dist. LEXIS 51087, at \*3 (S.D.N.Y. July 16, 2007). It took a great deal of skill to achieve a settlement at this level in this particular case. Lead Counsel is a national shareholder’s rights law firm with significant experience in securities litigation like the Action, as well as in other shareholder and complex litigation.<sup>6</sup> The favorable Settlement achieved by Lead Counsel is attributable to the

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<sup>6</sup> *See* Declaration of Michael I. Fistel, Jr. of Johnson Fistel, LLP in Support of Lead Counsel’s Motion for an Award of Attorneys’ Fees, Payment of Expenses, and an Award to Lead Plaintiff Pursuant to 15 U.S.C. §78u-4(a)(4) (“Johnson Fistel Decl.”) at Ex. C (Johnson Fistel, LLP firm résumé). The Johnson Fistel Decl., along with its exhibits, is attached as Ex. 4 to the Fistel Decl.



diligence, determination, hard work, and reputation of counsel, who developed, litigated, and successfully negotiated the Settlement of this Action and obtained a substantial immediate cash recovery in a very difficult case. *See Teachers' Ret. Sys. v. A. C. L. N, Ltd.*, No. 01-CV-11814 (MP), 2004 U.S. Dist. LEXIS 8608, at \*6 (S.D.N.Y. May 14, 2004).

Finally, courts repeatedly recognize that the quality of the opposition faced by plaintiffs' counsel should also be taken into consideration in assessing the quality of counsel's performance. *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("The high quality of defense counsel opposing Plaintiffs' efforts further provides the caliber of representation that was necessary to achieve the Settlement."). Here, Defendants are represented by highly-experienced and well-respected lawyers from the prominent national law firm of Ropes & Gray LLP, whose attorneys presented a very skilled defense and spared no effort or expense in representing their clients. Notwithstanding this formidable opposition, Lead Counsel's ability to present a strong case and to demonstrate its willingness to vigorously prosecute the Action through trial and then inevitable appeals enabled Lead Counsel to achieve this very favorable Settlement for the benefit of the Class. *See, e.g., Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 U.S. Dist. LEXIS 27077, at \*100 (N.D. Tex. Nov. 8, 2005) ("The ability of plaintiffs' counsel to obtain such a favorable settlement for the Class in the face of such formidable legal opposition confirms the superior quality of their representation"); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004) ("The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work") (citation omitted). As such, this factor further supports the requested percentage.

**c. The Complexity and Duration of the Litigation**

This Action was extremely complex and vigorously litigated by both Lead Plaintiff and Defendants. Courts have long recognized that securities class actions are generally complex and

difficult. See *City of Providence v. Aéropostale, Inc.*, No. 11 Civ. 7132, 2014 U.S. Dist. LEXIS 64517, at \*46 (S.D.N.Y. May 9, 2014) (“[T]he complex and multifaceted subject matter involved in a securities class action such as this supports the fee request.”); *Fogarazzo v. Lehman Bros.*, No. 03 Civ. 5194, 2011 U.S. Dist. LEXIS 17747, at \*10 (S.D.N.Y. Feb. 23, 2011) (“[C]ourts have recognized that, in general, securities actions are highly complex.”); *In re Bayer AG Sec. Litig.*, No. 03 Civ. 1546 (WHP), 2008 U.S. Dist. LEXIS 101350, at \*11 (S.D.N.Y. Dec. 15, 2008) (Noting that “shareholder actions are notoriously complex and difficult to prove.”); *Mathes v. Roberts*, 85 F.R.D. 710, 713-14 (S.D.N.Y. 1980); *Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971). Further, “securities actions have become more difficult from a plaintiff’s perspective in the wake of the PSLRA.” *In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000).

As described in greater detail in the Settlement Memorandum<sup>7</sup> and in the Fistel Decl., the claims asserted in the Action were both difficult and complex, and Defendants denied each and every claim and allegation of wrongdoing Lead Plaintiff alleged in the Action. See Fistel Decl. at ¶¶3-28. Even assuming Lead Plaintiff received a favorable ruling on Defendants’ motion to dismiss, engaging in fact and expert discovery regarding events that occurred several years earlier would have taken a large investment of additional time and expense. Further, the trial of liability issues alone in the Action would have involved substantial attorney and expert time, the introduction of voluminous documentary and deposition evidence, vigorously contested motions, and the considerable expenditures of judicial resources. In addition, this Action has been and was expected to continue to be vigorously contested and, as discussed *supra* at §III.A.3.b, Defendants

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<sup>7</sup> The Settlement Memorandum refers to the Memorandum of Law in Support of Lead Plaintiff’s Motion for Final Approval of Class Action Settlement, Approval of the Plan of Allocation, and Final Certification of the Class for Settlement Purposes, submitted herewith.

are represented by very experienced and qualified attorneys. *See In re Brown Co. Sec. Litig.*, 355 F. Supp. 574, 592-93 (S.D.N.Y. 1973) (standing of opposing counsel underscores complexity of litigation and challenges faced by class counsel). Thus, this factor fully supports the fee requested.

**d. The High Risk of Non-Payment**

The fully contingent nature of Lead Counsel's fee and the substantial risks posed by the litigation are also very important factors supporting the requested fee. "Many cases recognize that the risk [of non-payment] assumed by an attorney is perhaps the foremost factor in determining an appropriate fee award." *In re Lupron Marketing & Sales Practice Litig.*, No. MDL 1430, 2005 U.S. Dist. LEXIS 17456, at \*15 (D. Mass. Aug. 17, 2005); *see also Hill v. State St. Corp.*, No. 09-12146-CAO, 2015 U.S. Dist. LEXIS 2166, at \*11 (D. Mass. Jan. 8, 2015). Moreover, "[n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974).

From the outset of this case, it was apparent that Lead Counsel faced significant challenges to establishing liability and damages, and there was a significant risk that the case could be litigated for many years but result in no recovery for the class and no payment for counsel. Nonetheless, Lead Counsel devoted significant resources to the vigorous and effective prosecution of the case and made every effort to obtain the recovery achieved here for the benefit of the Class. As is detailed further in both the Settlement Memorandum and in the Fistel Decl., the significant litigation risks present in this Action left the possibility of no recovery at all, absent the Settlement, a real possibility. *See* Settlement Memorandum at 7-9; Fistel Decl. at ¶¶40-49.

In the face of these uncertainties regarding the outcome of the case, Lead Counsel prosecuted this Action on a wholly contingent basis, knowing that the litigation could last for years and require the devotion of a substantial amount of attorney time and significant litigation

expenses, with no guarantee of any compensation. Lead Counsel’s assumption of this contingency fee risk, and its determined litigation in the face of these risks, strongly supports the reasonableness of the fee. *See Marsh*, 265 F.R.D. at 148 (S.D.N.Y. 2010) (“There was significant risk of non-payment in this case, and Plaintiffs’ Counsel should be rewarded for having borne and successfully overcome that risk.”); *In re OCA, Inc. Sec. & Derivative Litig.*, No. 05-2165, 2009 U.S. Dist. LEXIS 19210, at \*70 (E.D. La. Mar. 2, 2009) (Where counsel faced challenges in establishing scienter and loss causation and in proving liability and damages at trial, “the risk plaintiffs’ counsel undertook in litigating this case on a contingency basis must be considered in its award of attorneys’ fees, and thus an upward adjustment is warranted.”). Accordingly, this factor strongly supports the reasonableness of the requested fee.

**e. The Amount of Time Devoted to the Case by Counsel**

The extensive time and effort expended by Lead Counsel in prosecuting this Action and achieving the Settlement also establish that the requested fee is justified and reasonable. *See Hill*, 2015 U.S. Dist. LEXIS 2166, at \*11. Indeed, Lead Counsel expended substantial effort and time in prosecuting the Action on behalf of Lead Plaintiff and the Class. *See Johnson Fistel Decl.* at ¶¶2-6. Specifically, Counsel expended a total of 1,134.6 hours investigating, prosecuting and resolving this action through February 11, 2018, with a total lodestar value of \$627,452.50. *See Johnson Fistel Decl.* at ¶5, and at Ex. A; Declaration of Theodore M. Hess-Mahan, Esq., Of Counsel to Hutchings Barsamian Mandelcorn, LLP, in Support of Lead Counsel’s Motion for an Award of Attorneys’ Fees, Payment of Expenses, and an Award to Lead Plaintiff Pursuant to 15 U.S.C. §78u-4(a)(4) (“Hutchings Decl.”) at ¶5, and Ex. A.<sup>8</sup> The substantial time and effort devoted

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<sup>8</sup> The Hutchings Decl., along with its exhibits, is attached as Ex. 5 to the Fistel Decl.

to this case were critical in obtaining the favorable result achieved by the Settlement, and confirms that the fee request is reasonable.

**f. Awards in Similar Cases**

Lead Counsel’s fee request of 33 1/3% of the recovery is consistent with fee awards in comparable securities fraud and antitrust class actions. “For example, it is very common to see 33% contingency fees in cases with funds of less than \$10 million, and 30% contingency fees in cases with funds between \$10 million and \$50 million.” *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 445 (E.D.N.Y. 2014); *see also Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 972 (E.D. Tex. 2000) (“Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.”).

Indeed, as detailed *supra* at III.A.3, Courts in this District have repeatedly approved similar fee requests in complex litigation such as the Action.<sup>9</sup> Thus, this factor strongly supports the reasonableness of the requested fee.

**g. Public Policy Considerations**

Public policy also supports rewarding firms for bringing successful securities litigation. The Supreme Court has emphasized that private securities actions such as this Action 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) (citation omitted); *see also Tellabs*, 551 U.S. at 313. Accordingly, public policy favors granting

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<sup>9</sup> The same holds true for securities class action settlements in other jurisdictions. *See, e.g., Aéropostale*, 2014 U.S. Dist. LEXIS 64517, at \*33, \*60 (awarding fees of 33% of \$15 million settlement where maximum damages were \$163 million); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 374 (S.D.N.Y. Jan. 29, 2002) (awarding 33.3% of settlement fund valued at over \$11.5 million).

Lead Counsel's fee and expense application here. *See In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 474 (D.P.R. Sep. 13, 2011); *Tyco*, 535 F. Supp. 2d at 270; *Flag Telecom*, 2010 U.S. Dist. LEXIS 119702, at \*84-85 (If the "important public policy [of enforcing the securities laws] is to be carried out, the courts should award fees which will adequately compensate Lead Counsel for the value of their efforts, taking into account the enormous risks they undertook.").

**h. The Reaction of the Class to Date Supports the Requested Fee**

To date, pursuant to the Court's January 12, 2018 Notice Order, more than 7,388 copies of the Notice were mailed to potential Class Members by the Claims Administrator advising that Lead Counsel intended to apply to the Court for an award of attorneys' fees not to exceed 33 1/3% of the Settlement Amount, plus expenses not to exceed \$75,000, with interest on both amounts, and a Lead Plaintiff award of up to \$10,000. *Fistel Decl.* at ¶¶75, 78. The time to object to the fee, expense, and Lead Plaintiff award requests expires on April 9, 2018. To date, not a single objection to any of the foregoing amounts set forth in the Notice has been received. *Id.* at ¶¶9, 57, 75, 78. If any timely objections are received, Lead Counsel will address them in a reply memorandum, which will be filed with the Court no later than April 23, 2018.

**4. A Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee**

In the First Circuit, "[t]he lodestar approach (reasonable hours spent times reasonable hourly rates, subject to a multiplier or discount for special circumstances, plus reasonable disbursements) can be a check or validation of the appropriateness of the percentage of funds fee, but is not required." *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. 05-11148-PBS, 2009 U.S. Dist. LEXIS 68419, at \*8 (D. Mass. Aug. 3, 2009) (citation omitted);

*accord Thirteen Appeals*, 56 F.3d at 307; *Lupron*, 2005 U.S. Dist LEXIS 17456, at \*15; *Relafen*, 231 F.R.D. at 81.

When the lodestar is used as a cross-check, “the focus is not on the ‘necessity and reasonableness of every hour’ of the lodestar, but on the broader question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys.” *Tyco*, 535 F. Supp. 2d at 270 (quoting *Thirteen Appeals*, 56 F.3d at 307); *see also In re WorldCom Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. Sept. 21, 2005) (“Where the lodestar fee is used as ‘a mere cross-check’ to the percentage method of determining reasonable attorneys’ fees, ‘the hours documented by counsel need not be exhaustively scrutinized by the district court.’”). In this case, the lodestar method—whether used directly or as a “cross-check” on the percentage method—strongly demonstrates the reasonableness of the requested fee.

As of February 11, 2018, Lead Counsel, Liaison Counsel, and their respective paraprofessionals have expended more than 1,134.6 hours in prosecuting this Action, with a total lodestar value of \$627,452.50, at current billing rates normally charged for comparable litigation work.<sup>10</sup> *See* Johnson Fistel Decl. at ¶5, and at Ex. A; Hutchings Decl. at ¶5, and at Ex. A. These

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<sup>10</sup> The Supreme Court and courts in this Circuit have approved the use of current hourly rates in calculating the base lodestar figure as a means of compensating for the delay in receiving payment and the loss of the interest. *See Missouri v. Jenkins*, 491 U.S. 274, 284 (1989); *Cohen v. Brown Univ.*, No. 99-485-B, 2001 U.S. Dist. LEXIS 20714, at \*5 (D.N.H. Dec. 5, 2001); *accord In re Veeco Instruments Inc. Secs. Litig.*, No. 05 MDL 01695(CM), 2007 U.S. Dist. LEXIS 85554, at \*28 (S.D.N.Y. Nov. 7, 2007) (“The use of current rates to calculate the lodestar figure has been repeatedly endorsed by courts as a means of accounting for the delay in payment inherent in class actions and for inflation.”). Further, in determining whether the rates are reasonable, the Court should take into account the attorneys’ professional reputation, experience, and status. Here, Lead Counsel is a prominent, experienced, and well-regarded shareholder litigation firm with a national practice, with offices in New York, New York, San Diego, California, and Marietta, Georgia. *See* Johnson Fistel Decl. at ¶¶10-11, and Ex. C (Johnson Fistel, LLP firm résumé). Additionally, and by way of comparison, according to a February 2016 *The Wall Street Journal* article, partners at Ropes & Gray, counsel for Defendants in the Action, based on data that is at least two years old, had billable rates ranging between \$895.00-\$1,450.00 per hour. *See* Fistel Decl. at Ex. 7. Lead

lodestar figures are based on hourly records created contemporaneously and maintained in the records of counsel. *See* Johnson Fistel Decl. at ¶3; Hutchings Decl. at ¶3. Indeed, while multipliers are often awarded in securities fraud class actions or similar complex litigation,<sup>11</sup> here Lead Counsel’s fee request amounts to a significant *negative* multiplier of 0.7039, or a discount of more than 29% on Counsel’s normal hourly rate, further underscoring the reasonableness of the fee requested. *See, e.g., Hill v. State St. Corp.*, No. 1:09-cv-12146-GAO, 2014 U.S. Dist. LEXIS 179702, at \*47-48 (D. Mass. Nov. 26, 2014) (recognizing “the fact that counsel are seeking fees below the amount of class counsel’s lodestar does support the reasonableness of the requested fee.”); *Flag Telecom*, 2010 U.S. Dist. LEXIS 119702, at \*77 (“Lead Counsel’s request for a percentage fee representing a significant discount from their lodestar provides additional support for the reasonableness of the fee request.”); *Veeco Instruments*, 2007 U.S. Dist. LEXIS 85554, at \*31-32 (“Not only is Plaintiffs’ Counsel not receiving a premium on their lodestar to compensate them for the contingent risk factor, their fee request amounts to a deep discount from their lodestar. Thus, the lodestar ‘cross-check’ unquestionably supports” the fee award).<sup>12</sup>

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Counsel respectfully submits that, in light of the foregoing, the hourly rates are reasonable here.

<sup>11</sup> *See, e.g., Payment Card Antitrust Litig.*, 991 F. Supp. 2d at 448 (using multiplier of 3.41); *Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 7961(CM), 2014 U.S. Dist. LEXIS 37872, at \*85 (S.D.N.Y. Mar. 21, 2014) (finding that multiplier of 3.05 was “reasonable”); *Kurzweil v. Philip Morris Cos.*, No. 94 Civ. 2373(MBM), 1999 U.S. Dist. LEXIS 18378, at \*8 (S.D.N.Y. Nov. 30, 1999) (noting multipliers between 3 and 4.5 are common in federal securities cases and awarding 2.46 multiplier); *In re Interpublic Sec. Litig.*, No. 02 Civ. 6527, 2004 U.S. Dist. LEXIS 21429, at \*36 (S.D.N.Y. Oct. 27, 2004) (awarding multiplier of 3.96); *New England Carpenters Health Benefits Fund*, 2009 U.S. Dist. LEXIS 68419, at \*10 (awarding 8.3 multiplier); *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-CV-1825, 2010 U.S. Dist. LEXIS 63342, at \*10 (E.D.N.Y. June 24, 2010) (awarding 2.78 multiplier); *Tyco*, 535 F. Supp. 2d at 271 (awarding 2.7 multiplier); *Relafen*, 231 F.R.D. at 82 (awarding 2.02 multiplier); *Maley*, 186 F. Supp. 2d at 369, 370 (awarding a fee representing a 4.65 multiplier, which was “well within the range awarded by courts in this Circuit and courts throughout the country”).

<sup>12</sup> In addition to the time expended to date, Lead Counsel will expend additional time directing the claims administration process and final distribution, and will not seek additional compensation



Thus, whether calculated as a percentage of the fund or under the lodestar method, the requested fee is well within the range of fees routinely awarded by courts in securities class actions and other complex litigation, and should be approved.

**5. Lead Counsel's Expenses Are Reasonable and Were Necessary to Achieve the Benefit Obtained**

Lead Counsel also requests reimbursement in the amount of \$55,542.50 in expenses incurred by Plaintiffs' Counsel while prosecuting the Action, which is less than the \$75,000.00 amount in the Notice. Counsel have submitted declarations regarding these expenses, which are properly recovered by counsel. *See* Johnson Fistel Decl. at ¶¶7-8, and at Ex. B; Hutchings Decl. at ¶¶6-7, and at Ex. B. It is well established that expenses are properly recovered by counsel. *See, e.g., Hill*, 2045 U.S. Dist. LEXIS 179702, at \*53 ("Lawyers who recover a common fund for a class are entitled to reimbursement of litigation expenses that were reasonably and necessarily incurred in connection with the litigation."); *In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999) ("[L]aw firms are not eleemosynary institutions, and lawyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover from the fund, as a general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax."). Counsel's expenses include the costs of hiring experts, consultants, investigators, travel, transcription services, mediating the Class' claims, and computerized research. These expenses were critical to Lead Plaintiff's success in achieving the Settlement. *See Global Crossing*, 225 F.R.D. at 468 ("The expenses incurred – which include investigative and expert witnesses, filing fees, service of process, travel, legal research and document production and review – are the type for which 'the paying, arms' length market'

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for this work. *See* Johnson Fistel Decl. at ¶6.

reimburses attorneys . . . [f]or this reason, they are properly chargeable to the Settlement fund.”). To date, not a single objection to the expense amount set forth in the Notice has been received. Fistel Decl. at ¶¶75, 78. Accordingly, Lead Counsel respectfully requests payment for these expenses, plus interest earned on such amount at the same rate as that earned by the Settlement.

**B. THE PROPOSED LEAD PLAINTIFF AWARD IS REASONABLE AND SHOULD BE PERMITTED**

The PSLRA permits Lead Plaintiff to seek an “award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class . . . .” 15 U.S.C. § 78u-4(a)(4) In accordance with the PSLRA and the inherent powers of the Court, courts routinely grant reimbursement of substantial sums to lead plaintiffs and class representatives. *See, e.g., In re Evergreen Ultra Short Opportunities Fund Secs. Litig.*, No. 08-11064-NMG, 2012 U.S. Dist. LEXIS 17471, at \*8 (D. Mass. Dec. 10, 2012) (reimbursing institutional lead plaintiffs a total of \$54,626 for the time that their employees spent assisting in prosecution of the action, where lead plaintiffs had “worked closely with counsel throughout the case, communicated with counsel on a regular basis, reviewed and provided input with respect to counsel’s submissions, provided information, produced documents, and participated in settlement discussions”).

Here, Lead Plaintiff at all times adequately represented the Class. Lead Plaintiff has represented the interests of the Class zealously throughout the litigation and has no individual interest or claim that is antagonistic to the Class. Moreover, Lead Plaintiff devoted substantial time and effort to prosecuting the Action, including time spent: reviewing pleadings, motions, and other documents, searching for and providing documentation concerning his investment in Avid to Lead Counsel, communicating with Lead Counsel concerning the status of the case, staying apprised of all developments in the case, and participating in discussions regarding the Settlement. *See* Fistel Decl. at ¶¶80-83; Hammond Decl. at ¶¶3-6, 9.

The foregoing efforts are precisely the types of activities courts have found to support reimbursement to class representatives based on the value of the time expended by their employees. *See, e.g., Evergreen Ultra*, 2012 U.S. Dist. LEXIS 17471, at \*8; *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 U.S. Dist. LEXIS 120953, at \*61 (S.D.N.Y. Dec. 23, 2009) (awarding over \$200,000 to lead plaintiffs to compensate them “for their reasonable costs and expenses incurred in managing this litigation and representing the Class” and noting that these efforts were “precisely the types of activities that support awarding reimbursement of expenses to class representatives”). Indeed, Lead Plaintiff spent more than 100 hours dedicated to the prosecution of the Action. Hammond Decl. at ¶9. Applying an hourly rate of \$78.12, which is based on Lead Plaintiff’s annual income as a Program Manager for a leading global security company in the Boston-metro area, the unreimbursed expense for Lead Plaintiff’s time expended in the Action is \$7,940.90. Hammond Decl. at ¶9. Lead Counsel submits that the relatively modest request of an award in the amount of \$7,940.90 to compensate Lead Plaintiff for his time and service to the Class, as well as to function as an incentive for others to serve as lead plaintiff in future cases, is reasonable in this case.

#### **IV. CONCLUSION**

Based on the foregoing, and for the reasons stated in the Settlement Memorandum, the Fistel Decl., and all other supporting materials being submitted herewith, Lead Counsel respectfully requests that the Court (i) award attorneys’ fees in the amount of 33 1/3% of the Settlement Fund, *i.e.*, \$441,666.67 in cash; (ii) approve payment of \$55,542.50 in aggregate expenses; and (iii) grant an award to Lead Plaintiff in the amount of \$7,940.90.

DATED: February 23, 2018

Respectfully submitted,

**JOHNSON FISTEL, LLP**  
MICHAEL I. FISTEL, JR.

*s/ Michael I. Fistel, Jr.*

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**CERTIFICATE OF SERVICE**

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on February 23, 2018.

*s/ Michael I. Fistel, Jr.*

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