UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

IN RE WILMINGTON TRUST SECURITIES LITIGATION	Master File No. 10-cv-00990-ER
	(Securities Class Action)
This document relates to: ALL ACTIONS	Hon. Eduardo Robreno
	ELECTRONICALLY FILED

BRIEF IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

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Dated: September 17, 2018

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Court-appointed Lead Counsel, Saxena White P.A. ("Saxena White") and Bernstein Litowitz Berger & Grossmann LLP ("BLB&G") respectfully submit this memorandum of law in support of their motion, pursuant to Fed. R. Civ. P. 23(h), for an award of attorneys' fees in the amount of 28% of the Settlement Fund, or $58.8 million, plus interest at the same rate as earned by the Settlement Fund.[1] Lead Counsel also seek reimbursement of: (i) $6,790,044.82 in litigation expenses reasonably and necessarily incurred by Plaintiffs' Counsel[2] in prosecuting and resolving the Action; and (ii) $55,456.06 in costs and expenses incurred by Lead Plaintiffs directly related to their representation of the Settlement Class.

I. Preliminary Statement

After eight years of hard-fought litigation, Lead Plaintiffs have secured a total cash recovery of $210 million to settle all claims in this Action. While courts have uniformly recognized that securities class actions are notoriously complex and risky, this case was uniquely so, and approval of attorneys' fees of 28% of the Settlement Funds reflects these notable factors:

Extensive litigation efforts: the Settlements are the product of eight years of diligent and complex work by Lead Plaintiffs and Lead Counsel, including an extensive investigation that involved contacting more than 80 potential witnesses to uncover evidence years before the Government—including evidence relating to the Ten Percent Rule, the materially understated ALLL,

[1] All capitalized terms that are not otherwise defined herein shall have the meanings ascribed to them in the Stipulation and Agreement of Settlement with Wilmington Trust Defendants and Underwriter Defendants, dated May 15, 2018 (D.I. 821-1) (the "Wilmington Trust/Underwriter Stipulation"); the Stipulation and Agreement of Settlement with KPMG, dated May 25, 2018 (D.I. 821-2) (the "KPMG Stipulation," and together with the Wilmington Trust/Underwriter Stipulation, the "Stipulations"); or in the Joint Declaration of Hannah Ross and Joseph E. White, III in Support of (I) Lead Plaintiffs' Motion for Final Approval of Class Action Settlements and Plan of Allocation and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Joint Declaration" or "Joint Decl."), filed herewith. All citations to "¶" in this memorandum refer to paragraphs in the Joint Declaration and citations to "Ex." in this memorandum refer to exhibits to the Joint Declaration).

[2] Plaintiffs' Counsel consists of Lead Counsel and Liaison Counsel Chimicles & Tikellis LLP ("Chimicles").

and KPMG's knowledge of the Bank's widespread deficiencies. Based on this in-depth investigation, Lead Counsel prevailed over nearly 2,000 pages of motion to dismiss briefing to embark on an extensive discovery campaign, during which they reviewed nearly 13 million pages of documents, took, defended, or otherwise participated in 39 depositions (amounting to nearly 11,000 pages of testimony and almost 900 exhibits), and succeeded—after two-and-a-half years of motion practice and hearings—in compelling the Defendants to produce over 35,000 documents totaling approximately 360,000 pages of documents that they withheld pursuant to the assertion of the bank examination privilege by the Federal Reserve and other regulators, which were critical to the successful prosecution of this Action. As the Court recognized during the July 2, 2018 Hearing, the vast bulk of this work was done independently of the Government's work in the Criminal Action.

The unique risks and difficulties of this Action: despite Lead Counsel's diligent and exhaustive efforts, success in this Action was far from assured. Indeed, the Court dismissed Lead Plaintiffs' First Amended Complaint in its entirety for failure to plead falsity. Throughout the Action, Defendants asserted numerous credible arguments on liability and damages that posed a significant risk of a lesser or no recovery if the litigation continued, not the least of which was that the Bank's financial results were never restated and that the purportedly illicit practices were in fact widely known and "blessed" by KPMG and the Bank's regulators. In the face of these obstacles, Lead Counsel remained steadfast in pursuit of their claims: between October 2014 and December 2016, Lead Counsel continually fought to lift the multiple stays requested by the Government to complete discovery, take depositions, and resolve this Action on terms favorable to the Class.

Unanimous class-wide support: While the deadline for objections has not yet passed, the Settlement Class to date has unanimously approved of the Settlement, the Plan of Allocation and the requested fees and expenses. Notably, the Settlement Class consists of approximately 80% institutional investors. Importantly, Lead Plaintiffs also endorse this Motion.

Arm's-length settlement negotiations: the Settlements are the product of the Parties' extensive, arm's-length negotiations. Significantly, Lead Plaintiffs and Lead Counsel rejected an opportunity to settle the case in June 2012 after the Court initially dismissed the Action in its entirety, and instead pressed on with their litigation efforts, which culminated in the $210 million recovery here.

The Settlements are exceptional: together, the proposed Settlements are the second largest securities class action recovery ever obtained in Delaware and rank among the top ten such recoveries in the Third Circuit. Totaling $210 million, the recovery accounts for nearly 40% of the Class's maximum likely recoverable damages, which is eight times greater than the median 5% median recovery in the Third Circuit.[3]

In sum, Lead Counsel's fee request of 28% of the Settlement Fund is reasonably, justified by the extraordinary result here, and satisfies all of the Third Circuit's *Gunter* factors. Accordingly, Lead Counsel respectfully request that the Court approve their request for attorneys' fees and reimbursement of litigation expenses.[4]

II. The Standard Governing the Award of Attorneys' Fees in Common Fund Cases

A. Lead Counsel are Entitled to a Fee from the Common Fund They Created

It is well-settled that an attorney who maintains a lawsuit that results in the creation of a fund or benefit in which others have a common interest may obtain fees from that common fund. *See, e.g.*, *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("a litigant or a lawyer who recovers a common

[3] Cornerstone Research, *Securities Class Action Settlements: 2017 Review and Analysis*, at 19-20 (2018) (median recovery of damages in Third Circuit from 2008-2017 was 5% while median recovery of damages against financial institutions was 4.8%).

[4] The Joint Declaration of Joseph E. White, III and Hannah Ross is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, among other things, the history of the Action and a description of the services Lead Counsel provided for the benefit of the Settlement Class (¶¶1-6, 8-54, 65-106); the negotiations leading to the Settlement (¶¶26-27,161-63); and the risks and uncertainties of continued litigation (¶¶169-188).

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"); *In re Cendant Corp. Sec. Litig* ("*Cendant I*"), 404 F.3d 173, 197 (3d Cir. 2005) ("attorneys whose efforts create, discover, increase, or preserve a common fund are entitled to compensation") (citation omitted).

As courts recognize, in addition to providing just compensation, awards of fair attorneys' fees from a common fund ensure that "competent counsel continue[s] to be willing to undertake risky, complex, and novel litigation." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000) (citations omitted); *see also In re Worldcom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) ("In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives."); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 51 (2d Cir. 2000) ("There is also commendable sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest."). Indeed, the Supreme Court has emphasized that private securities actions such as the instant action provide "'a most effective weapon in the enforcement' of the securities laws and are 'necessary supplement to [SEC] action.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).

B. The Court Should Award Attorneys' Fees Using the Percentage Approach

"For many years both the Supreme Court and Third Circuit have favored calculating attorneys' fees as a percentage of the class recovery." *In re CIGNA Corp. Sec. Litig.*, 2007 WL 2071898, at *4 (E.D. Pa. July 13, 2007) (citing *Boeing*, 444 U.S. at 478-79). The Third Circuit and the district courts within it have repeatedly approved the percentage-of-recovery method of awarding fees in common fund securities fraud cases "because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'" *In re Rite Aid Corp. Sec. Litig*, ("*Rite Aid I*")

396 F.3d 294, 300 (3d Cir. 2005), (quoting *In re Prudential Ins. Co.*, 148 F.3d 283, 333 (3d Cir. 1998)); *see also AT&T*, 455 F.3d at 164 ("In a common fund case such as this one, the percentage-of-recovery method is generally favored."); *Viropharma*, 2016 WL 312108, at *15 ("The percentage-of-recovery method is 'generally favored' in cases involving a settlement that creates a common fund.") (quoting *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 330 (3d Cir. 2011)); *In re Cendant Corp. Litig.* ("*Cendant II*"), 264 F.3d 201, 220 (3d Cir. 2001) ("For the past decade, counsel fees in securities litigation have generally been fixed on a percentage basis rather than by the so-called lodestar method.").

The use of the percentage-of-recovery method also comports with the language of the PSLRA, which states 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) (emphasis added); *see also Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) (when drafting the PSRLA, Congress "indicated a preference for the use of the percentage method"). Thus, "the PSLRA has made percentage-of-recovery the standard for determining whether attorneys' fees are reasonable." *Cendant I*, 404 F.3d at 188 n.7.

C. The Requested Fee Enjoys a Presumption of Reasonableness Because It Has Been Authorized by the Court-Appointed Lead Plaintiffs

The Third Circuit has explained that "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." *Cendant I* at 220. Here, Lead Plaintiffs—sophisticated institutional investors with experience in shareholder actions and precisely the type of fiduciaries that Congress envisioned when it enacted the PSLRA—authorized and support the requested fee.[5]

[5] Congress enacted the PSLRA in large part to encourage investors with a significant financial stake in the outcome of a securities class action to assume control of securities class actions and "increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the

Specifically, Lead Counsel's fee request of 28% is directly related to the "fee cap" that these sophisticated Lead Plaintiffs required Lead Counsel to enter into at the early stages of the litigation. *See* Joint Decl. ¶¶191-92. Further, in connection with their approval of the Settlements, each Lead Plaintiff re-reviewed Lead Counsel's fee request and have authorized the requested 28% fee. *See* Declaration of Scott Myers on behalf of the Coral Springs Police Pension Fund (the "Myers Decl.") (attached as Ex. C-1), at ¶¶7-8; Declaration of George Mitchell on behalf of the Pompano Beach General Employees Retirement System (the "Mitchell Decl.") (attached as Ex. C-2), at ¶¶10-11; Declaration of Brett Ciskoski on behalf of the St. Petersburg Firefighters' Retirement System (the "Ciskoski Decl.") (attached as Ex. C-3), at ¶¶7-8; Declaration of Kristen Santos on behalf of the Merced County Employees' Retirement Association (the "Santos Decl.") (attached as Ex. C-4), at ¶¶7-8; Declaration of James Henry Beno on behalf of the Automotive Industries Pension Trust Fund (the "Beno Decl.) (attached as Ex. C-5), at ¶¶7-8. These facts are due significant weight. *See In re Lucent Techs., Inc., Sec. Litig.*, 327 F. Supp. 2d 426, 442 (D.N.J. 2004) ("Significantly, the Lead Plaintiffs, both of whom are institutional investors with great financial stakes in the outcome of the litigation, have reviewed and approved Lead Counsel's fees and expenses request.").

III. The Requested Fee of 28% of the Settlement Fund is Fair and Reasonable Under the Third Circuit's *Gunter* Factors

Under Third Circuit law, district courts have considerable discretion in setting an appropriate percentage-based fee award in traditional common-fund cases. *See, e.g.*, *Gunter*, 223 F.3d at 195 ("We give [a] great deal of deference to a district court's decision to set fees."); *GMC*, 55 F.3d at 821. In exercising that broad discretion, the Third Circuit has noted that a district court should consider, "among other things," the following factors in determining a fee award: (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the

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selection and actions of plaintiff's counsel." *See* H.R. Rep. No. 104-369, at 32 (1995) (Conf. Rep.), 1995 WL 709276.

class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases. *Gunter*, 223 F.3d. at 195. These fee-award factors "need not be applied in a formulaic way . . . and in certain cases, one factor may outweigh the rest." *Id.*; *see also Schuler v. Meds. Co.*, No. 14-1149 (CCC) 2016 WL 3457218, at *9 (D.N.J. June 24, 2016). Each of these factors supports the award of the reasonable fee that Lead Counsel request here.

A. The Size and Nature of the Common Fund Created and the Number of Persons Benefitted by the Settlement

Courts have consistently recognized that the result achieved is a major factor to be considered in awarding fees. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("the most critical factor is the degree of success obtained"); *Viropharma*, 2016 WL 312108 at *16.

Here, Lead Counsel have secured a recovery that provides for a substantial and certain payment of $210,000,000, which accounts for nearly 40% of the Class's maximum likely recoverable damages. *See* Joint Decl. ¶2 & Ex. B ¶16. This recovery dwarfs the Third Circuit median recovery of 5% of damages, and the median recovery against financial institutions of 4.8%.[6] Importantly, as the Court recognized at the Preliminary Hearing, a significant amount of work that formed the basis for this extraordinary recovery was done prior to, and independently of, the government's work in the Criminal Action. Hr'g Tr. 36:6-24.

B. The Absence of Objections by Class Members to the Fee Request

The Notice, which was sent to potential Settlement Class Members and their nominees and posted on the Settlement's publicly accessible website and Lead Counsel's firm websites, provided that Lead Counsel would apply for an award of attorneys' fees in an amount not to exceed 28% of the

[6] Cornerstone Research, *Securities Class Action Settlements: 2017 Review and Analysis*, at 19-20 (2018).

Settlement Fund. *See* Joint Decl. ¶208.[7] The Notice also advised Settlement Class Members that they could object to the fee request and explained the procedure for doing so. *Id.* at ¶208. The fact that there have been no objections to date[8] is significant, particularly given that approximately 80% of Wilmington Trust's shares at the end of the Class Period were held by sophisticated institutional investors with financial stakes in the litigation.

C. The Skill and Efficiency of Lead Counsel

The Settlements, which provide a substantial benefit to the Class, required significant skill and demonstrates the ability of Lead Counsel. *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 131 (D.N.J. 2002) ("[t]he single clearest factor reflecting the quality of class counsels' services to the class are the results obtained") (quoting *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 149 (E.D. Pa. 2000)); *see also Bodnar v. Bank of Am. N.A.*, 2016 WL 4582084, at *9 (E.D. Pa. Aug. 4, 2016). The substantial and certain recovery obtained for the Settlement Class is the direct result of the efforts of highly skilled and specialized attorneys who possess substantial experience in the prosecution of complex securities class actions.[9] Indeed, Lead Counsel's reputation as attorneys who will zealously prosecute a meritorious case through trial and appeals enabled them to negotiate the outstanding recovery for the benefit of the Settlement Class.

The quality of opposing counsel is also relevant to evaluating the quality of Lead Counsel's services. *See, e.g., Ikon*, 194 F.R.D. at 194. Here, Defendants were represented by eleven of the nation's most preeminent defense firms, whose experience and skill is beyond dispute. Wilmington

[7] A Summary Notice was also published in *Investor's Business Daily* and released over *PR Newswire*. Joint Decl. ¶208.

[8] The deadline for submitting objections is October 12, 2018. As provided in the Preliminary Approval Order, Lead Plaintiffs will file reply papers no later than October 25, 2018 addressing any objections that may be received.

[9] Lead Counsel's experience is set forth in their firm resumes, which are attached as Exhibit 3 to the Declaration of Joseph E. White, III, and Exhibit 3 to the Declaration of Hannah Ross. The White Declaration and Ross Declaration, respectively, are attached as Exhibits D-2 and D-1 to the Joint Declaration.

Trust itself was represented by Skadden, Arps, Slate, Meagher & Flom LLP, Williams & Connolly, and Venable LLP; while other Defendants were represented by Simpson Thatcher; Morgan Lewis; Hogan Lovells; Paul Hastings; McCarter & English; Pepper Hamilton; Dalton & Associates P.A.; Krovatin Klingeman LLC; and Wilks Lukoff & Bracegirdle LLC. These firms brought a veritable army to bear against Lead Counsel. Joint Decl. ¶¶197-199. At one point, Wilmington Trust had ***125*** attorneys from Skadden working this case on its behalf. Sep. 16, 2014 Hr'g Tr. 12:7-13. Lead Counsel's ability to obtain a favorable settlement for the Settlement Class in the face of this formidable legal opposition further confirms the quality of Lead Counsel's representation and supports the requested fee award.

D. The Complexity and Duration of the Litigation

Securities fraud class actions are regularly acknowledged to be particularly complex and expensive to litigate, usually requiring expert testimony on several issues, including loss causation and damages. *See, e.g., In re Genta Sec. Litig.*, 2008 WL 2229843, at *3 (D.N.J. May 28, 2008) ("This [securities fraud] action involves complex legal and factual issues, and pursuing them would be costly and expensive."); *In re Datatec Sys., Inc. Sec. Litig.*, 2007 WL 4225828, at *3 (D.N.J. Nov. 28, 2007) ("[R]esolution of [accounting and damages issues] would likely require extensive and conceptually difficult expert economic analysis. . . . Trial on [scienter and loss causation] issues would [be] lengthy and costly to the parties.").

The $210 million recovery here is substantial in light of the complexity of this case and the significant risks and expenses that the Settlement Class would have faced had this litigation continued. *See* Joint Decl. ¶¶200-206. Had the Parties not agreed to settle, the Parties would have proceeded with extensive (and expensive) expert discovery and depositions, and then proceeded to summary judgment. To survive summary judgment, Lead Plaintiffs would need to muster sufficient evidence to establish the elements of their claims, including, *e.g.*, scienter (that Defendants acted intentionally or recklessly

misled Wilmington Trust investors) and loss causation (that Defendants' false and misleading statements caused their alleged loss).

The scienter requirement is commonly regarded as the most difficult element to prove in a securities fraud claim. *See, e.g.*, *Fishoff v. Coty Inc.*, 2010 WL 305358, at *2 (S.D.N.Y. Jan. 25, 2010) (2d Cir. 2011) ("[T]he element of scienter is often the most difficult and controversial aspect of a securities fraud claim"). Even gross negligence by Defendants would be insufficient to support Plaintiffs' fraud-based claims under the Exchange Act, and Defendants would likely make compelling arguments that they had no intent to mislead investors because Defendants believed the practices at issue were known of (and implicitly blessed by) the Bank's regulators and auditors.

In addition, Lead Plaintiffs' theory of damages in this action was largely related to the Bank's corrective disclosures concerning increases to its loan loss reserves, a topic not at issue in the Criminal Action. While guilty verdicts in the Criminal Action would have greatly supported the elements of falsity and scienter in this Action, the elements of loss causation and damages required significantly more evidence and expert opinion, all of which would have been aggressively challenged by Defendants. For example, Defendants would have argued that much if not all of the decline in Wilmington Trust's stock price were collateral consequences of the ongoing global financial crisis, a broad macroeconomic event that wreaked particular havoc on the real estate lending industry—precisely the subject of many of Plaintiffs' allegations here. This argument has had some success in other cases. *See, e.g.*, *Glove v. DeLuca*, 2006 WL 2850448, at *37 n.67 (W.D. Pa. Sept. 29, 2006) ("When the plaintiff's loss coincides with a marketwide phenomenon causing comparable losses to other investors, the prospect that the plaintiff's loss was caused by the fraud decreases, and a plaintiff's claim fails when it has not adequately [pled] facts which, if proven, would show that its loss was caused by the alleged misstatements as opposed to intervening events." (internal quotations omitted)). Moreover, Defendants would argue that the massive decline in the

price of Wilmington Trust securities at the end of the Class Period related solely to the fire sale purchase of Wilmington Trust by M&T Bank at half the Bank's trading price, not any disclosure of alleged fraud. If this argument was successful, nearly one-third of the Class's recoverable damages could have been wiped out.

In light of the protracted, 8 year-long history of this Action, Lead Counsel and Lead Plaintiffs were fully prepared to litigate their case through trial and appeals if the Settlements had not been reached. Nonetheless, these and other risks were significant.

E. The Risk of Non-Payment

"Courts routinely recognize that the risks created by undertaking an action on a contingency fee basis militates in favor of approval." *In re Schering-Plough Corp.*, 2012 U.S. Dist. LEXIS 75213, at *19 (D.N.J. May 31, 2012); *see also Warner Commc'ns*, 618 F. Supp. at 747-49 (collecting cases). Lead Counsel undertook this action on an entirely contingent basis, taking the risk that the litigation would yield little or no recovery, and leave them uncompensated for their time and out-of-pocket expenses. Lead Counsel have not been compensated for any time or expenses in this case for nearly eight years. In contrast, Defendants' counsel has been paid for their time in this case on a regular basis.

As the Joint Declaration details, from the start, Lead Counsel faced numerous significant risks in this case that easily could have resulted in a smaller recovery or no recovery at all—as evidenced most obviously by the fact that Lead Plaintiffs' First Amended Complaint was dismissed in its entirety. ¶¶5-6, 24. Further, at no point could Lead Counsel simply rely on the Criminal Action—rather, the Criminal Action itself created additional risk and uncertainty. This Action was stayed multiple times at the Government's request, preventing Lead Counsel from taking depositions for over two years. Additionally, the prospect that the Defendants would pay a settlement or monetary judgment in connection with the Criminal Action – which eventually occurred in October 2017 when the Government settled with Wilmington Trust – created additional risk in prosecuting this Action,

because that recovery in the Criminal Action would be offset against the Class's possible recovery here and lower any possible recovery in this class action. This is because the applicable securities law precludes any recovery in excess of actual damages. *See, e.g.*, 15 U.S.C. §§ 78bb(a). Nonetheless, that Lead Counsel persevered in the face of these and other significant risks strongly favor approval of the requested fee.

F. The Significant Time Devoted to this Case by Lead Counsel

Since the inception of the case, Plaintiffs' Counsel have expended 195,075.13 hours in the prosecution of this litigation with a resulting lodestar of $79,976,223.50 and incurred $6,790,044.82 in litigation expenses for the benefit of the Settlement Class. Over nearly eight years, Plaintiffs' Counsel investigated and prosecuted this Action vigorously, and only settled as they were preparing for expert discovery and summary judgment briefing—by which time there were over ***800 entries*** on the docket for this case. The Joint Declaration describes Lead Counsel's exhaustive efforts more fully, including:

- conducting a thorough investigation and drafting four amended complaints, in connection with which Lead Counsel interviewed over 80 former Wilmington Trust employees;
- briefing four separate rounds of motions to dismiss, ***each*** of which involved five separate briefs submitted by the various defendant groups—meaning that, in total, Lead Counsel responded to 20 separate briefs, totaling nearly 1000 pages of briefing (with nearly another 1000 pages of exhibits);
- successfully moving for class certification, which involved consulting closely with a professor at the MIT Sloan School of Business to prepare two expert reports in support and defending his deposition;
- successfully compelling Defendants—after over two years of briefing, status conferences, and meet-and-confers—to produce over 35,000 documents totaling 360,000 pages that Defendants were withholding subject to the so-called bank examination privilege asserted by the Federal Reserve and other regulators; and
- undertaking document, deposition and written discovery, which involved the production and review of nearly 13 million pages of documents, 39 depositions, and numerous hotly contested discovery motions—including defying the odds by successfully overcoming the assertion of the bank examination privilege by federal and state regulators.

At all times, Lead Counsel conducted their work with skill and efficiency, conserving resources and avoiding any duplication of efforts. The foregoing represents a very significant commitment of time and resources, while taking on the substantial risk of recovering nothing for their efforts. Accordingly, this factor favors granting the requested award of fees and expenses.

G. The Requested Fee is Within the Range of Fees Typically Awarded in Actions of this Nature

While there is no benchmark for the percentage of fees to be awarded in common fund cases, the Third Circuit has observed that fee awards generally range from 19% to 45% of the settlement fund. *GMC*, 55 F.3d at 822. Here, Lead Counsel is requesting a fee of 28%, which is fair and reasonable. Indeed, a review of 289 settlements demonstrates that the "median value . . . turns out to be one-third." *Merck Vytorin*, 2010 WL 547613, at *11 (citing *GMC*, 55 F.3d at 822); *Datatec*, 2007 WL 4225828, at *8 ("[c]ourts within the Third Circuit often award fees of 25% to 33 1/3% of the recovery.") (citation omitted).

In similarly sized settlements, courts in this Circuit and around the country have regularly awarded fees of 28% of the settlement fund:

Case	Settlement	Fee Awarded	Multiplier	Stage of Litigation
In re Merck & Co., Inc. Vytorin/Zetia Sec. Litig. 2013 WL 5505744, at **3, 46 (D.N.J. Oct. 1, 2013)	$215 million	28%	1.34	Pre-trial
Schuh v. HCA Holdings, Inc. No. 11-cv-1033 (M.D. Tenn.) (Ex. H at pp. 204, 272-73)	$215 million	30%	undisclosed	Summary judgment pending
In re Genworth Financial Inc. Sec. Litig. 2016 WL 7187290, at **1-2 (E.D. Va. Sep. 26, 2016)	$219 million	28%	1.97	Discovery/Class certification motion pending

Silverman v. Motorola, Inc. 2012 WL 1597388, at *4 (N.D. Ill. May 7, 2012)	$200 million	27.5%	undisclosed	Summary judgment pending
In re Linerboard Antitrust Litig., 2004 WL 1221350, at **1, 16, 19 (E.D. Pa. June 2, 2004)	$202.5 million	30%	2.66	Discovery/Class Certification

Notably, *HCA Holdings* in the chart above alleged only Section 11 claims, which do not include the demanding scienter element that the Section 10(b) claims asserted here have.

IV. The Requested Fee is Reasonable Under a Lodestar Cross-Check

Although courts in this Circuit almost uniformly apply the percentage approach to determine attorneys' fees in common fund cases like this one, a court may, but is not required to, use a lodestar "cross-check" to confirm the reasonableness of the requested fee.[10] A lodestar cross-check is a tool to "ensure that the percentage approach does not lead to a fee that represents an extraordinary lodestar multiple." *Cendant I*, 404 F.3d at 188. "The goal of this practice is to ensure that the proposed fee award does not result in counsel being paid a rate vastly in excess of what any lawyer could reasonably charge per hour, thus avoiding a 'windfall' to lead counsel." *Cendant II.*, 264 F.3d at 285.

The lodestar method, set forth in *Lindy Bros. Builders, Inc. of Phil. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), involves a two-step process. First, the court ascertains the "lodestar" figure by multiplying the number of hours reasonably worked by the reasonable, normal hourly rate of counsel. Second, the court may adjust the lodestar to account for the contingent nature and risks of the litigation, the results obtained, and the quality of the services counsel has rendered. *See id.* at 167-68. A multiplier "need not fall within any pre-defined range, provided that the [d]istrict

[10] "Even if such a cross-check is performed, 'the lodestar cross-check does not trump the primary reliance on the percentage of [the] common fund.'" *Bodnar*, 2016 WL 4582084, at *5 (quoting *Rite Aid I*, 396 F.3d at 307).

court's analysis justifies the award." *Schuler,* 2016 WL 3457218, at *10 (citing *Rite Aid I*, 396 F.3d at 307).

Finally, to perform the lodestar cross-check, the court should determine what the effective multiplier is, and then determine whether the resulting fee would be so unreasonable as to warrant a downward adjustment. As noted, the cumulative lodestar of the services performed by Plaintiffs' Counsel in this litigation is $79,976,223.50. Lead Counsel seek an award of 28% of the Settlement Fund, which equals $58.8 million (before interest). Therefore, the requested fee represents a ***substantial negative multiplier*** to counsel's time of 0.74. This multiplier is in line with, and in many instances substantially lower than, multipliers applied in other securities fraud cases. *See Bodnar,* 2016 WL 4582084, at *6 (holding that a positive 4.69 multiplier with respect to a $9,075,000 attorney fee award was "appropriate and reasonable"). Further, courts have awarded fees representing multipliers of 3, 4, 5, or even more times the lodestar to reflect the contingency-fee risk and other relevant factors. *See Schuler,* 2016 WL 3457218, at *9 (approving 3.57 multiplier); *In re Rite Aid Corp. Sec. Litig.*("*Rite Aid III*"), 362 F. Supp. 2d 587 (E.D. 2005) (6.96 multiplier); *Aetna*, 2001 WL 20928, at *15 (3.6 multiplier).

The declarations submitted by Plaintiffs' Counsel contain the lodestar calculations, showing that Plaintiffs' Counsel expended 195,075.13 hours of attorney and professional-support-staff time prosecuting this Action. *See* White Decl. ¶5 & Ex. 1; Ross Decl. ¶5 & Ex. 1; Kriner Decl. ¶5 & Ex. 1. These hours have been multiplied by the current hourly rates of the attorneys and professional support staff who worked on the litigation to arrive at the base lodestar amount of $79,976,223.50.[11] The

[11] The accompanying declarations of counsel include descriptions of the legal background and experience of the firms that worked on this case, which support the hourly rates submitted. Lead Counsel's rates are fair and reasonable for this legal market. For example, Skadden—who for some time represented certain Defendants—submitted in Delaware Bankruptcy Court last a year a sworn declaration of its market rates that had partners billing at up to $1335 per hour. *See In re Triangle USA Petroleum Corp.*, No. 16-11566 (Doc. No. 892) (D. Del. Bktcy) (May 8, 2017). Ex. H at pp. 277-79. In that same action, Skadden represented that it billed its Counsel mainly at hourly rates of $1090, and associates between $495 and up to $965. All of these rates are in line with, or exceed, Lead Counsel's rates.

lodestar cross-check and 0.74 multiplier here confirms that the fee request here is reasonable and well in the range regularly approved by courts in the Third Circuit. *See Martin v. Foster Wheeler Energy Corp.*, 2008 WL 906472, at *8 (M.D. Pa. Mar. 31, 2008) ("Lodestar multiples of less than four (4) are well within the range awarded by district courts in the Third Circuit."); *Prudential*, 148 F.3d at 341 ("[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.").

V. Lead Counsel's Application for Reasonably Incurred Litigation Expenses Should Be Approved

Lead Counsel also respectfully request that this Court reimburse $6,790,044.82 in litigation expenses that Plaintiffs' Counsel advanced in the prosecution of this Action. All of those expenses, which are set forth in declarations submitted by Plaintiffs' Counsel, were reasonably necessary for the prosecution of this litigation. *See* White Decl. ¶7 & Ex. 2; Ross Decl. ¶7 & Ex. 2; Kriner Decl. ¶7 & Ex. 2. Counsel in a class action are entitled to recover expenses that were "adequately documented and reasonable and appropriately incurred in the prosecution of the class action." *Viropharma*, 2016 WL 312108, at *18 (quoting *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995)).

The expenses for which Lead Counsel seek reimbursement are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed hourly, including, among others, expert fees, on-line research, court reporting and transcripts, photocopying, and postage expenses.[12] These expense items are billed separately by Plaintiffs' Counsel, and such charges are not duplicated in the firm's hourly rates.

The largest expense is for retention of Lead Plaintiffs' experts, which totals $4,673,493.31, or 68.8% of the total litigation expenses incurred by Plaintiffs' Counsel. In Lead Counsel's judgment, these expenses were reasonable and necessary. This litigation involved highly technical subject-matter

[12] A complete breakdown by category of the expenses incurred by Plaintiffs' Counsel is set forth in Exhibit E to the Joint Declaration.

with complicated and industry-specific regulatory oversight, including among other things: the application of judgment-driven accounting and auditing standards in calculating a bank's allowance for loan losses; underwriting standards in commercial real estate lending, including practices with respect to appraisals; asset review standards and an historical risk analysis of a significant percentage of the Bank's real estate portfolio; and statistical analysis of real estate market risk; and the demonstration of loss causation and damages in the face of Defendants' significant challenges.

Satisfying the demanding pleading standards required that Lead Counsel consult with several experts in these fields from the start, and Lead Counsel continued to utilize these and other experts for essential roles throughout the prosecution of this Action. For example, in support of Lead Plaintiffs' successful motion for class certification, Lead Plaintiff retained an MIT professor to submit two reports and sit for a lengthy deposition. Further, experts also provided valuable assistance in formulating Lead Counsel's discovery strategy by identifying and analyzing the numerous technical documents that were critical to Lead Plaintiffs' allegations, including auditor work papers for over three years of audits; regulatory examination findings and reports; voluminous loan approval and review documentation spanning over a decade; and internal accounting memoranda. Finally, at the time the Parties agreed to settle, the deadline for expert reports was imminent—for the second time, in fact, having been postponed months before—and Lead Plaintiffs' numerous experts had done substantial work on their reports required under the Federal Rules of Civil Procedure. These experts, and the work they did, are described in greater detail in the Joint Declaration. ¶¶115-153.

The second largest expense is for the document management and litigation support from an electronic discovery vendor in the amount of $1,148,997.99, or 16.9% of the total amount of expenses. This amount, while significant, is not surprising given that this litigation involved nearly 13 million pages of documents, hosted over years. As described further in the Joint Declaration, Lead Counsel took aggressive steps to ensure that these costs were kept as minimal as possible. ¶¶80, 92, 212, 217.

The Notice informed potential Settlement Class Members that Lead Counsel would apply for reimbursement of litigation expenses in an amount not to exceed $7,500,000, which may include the reasonable costs and expenses of Lead Plaintiffs directly related to their representation of the Settlement Class. *See* Joint Decl. Ex. G. The total amount of expenses requested by Lead Counsel is $6,845,500.88, which includes $6,790,044.82 in reimbursement of litigation expenses incurred by Plaintiffs' Counsel and $55,456.06 in reimbursement of costs and expenses incurred by Lead Plaintiffs, an amount significantly below the amount listed in the Notice. To date, there has been no objection to the request for expenses.

VI. Lead Plaintiffs Should Be Awarded Their Reasonable Costs and Expenses Under 15 U.S.C. § 78u-4(a)(4)

In connection with their request for reimbursement of litigation expenses, Lead Counsel also seek reimbursement of the costs and expenses incurred directly by Lead Plaintiffs. For the avoidance of doubt, this request is not for an incentive payment or any other form of recovery beyond that which is entitled to all Settlement Class members. Rather, this request is ***only*** for reimbursement for the time spent by Lead Plaintiffs throughout these eight years of hard-fought litigation, as specifically permitted by the PSLRA. 15 U.S.C. § 78u-4(a)(4) (an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be made to "any representative party serving on behalf of a class.").

Numerous courts have approved reasonable awards to compensate lead plaintiffs for the time and effort they spent on behalf of a class. In *In re Marsh & McLennan Cos., Inc. Securities Litigation*, 2009 WL 5178546 (S.D.N.Y. Dec. 23, 2009), the court awarded $144,657 to the New Jersey Attorney General's Office and $70,000 to certain Ohio pension funds, to compensate them "for their reasonable costs and expenses incurred in managing this litigation and representing the Class." *Id.* at *21. As the court noted, their efforts were "precisely the types of activities that support awarding reimbursement of expenses to class representatives." *Id.*; *see also In re Royal Dutch/Shell Transp. Sec. Litig.*, No. 04-374

(JAP), 2008 WL 9447623, at *29 (D.N.J. Dec. 9, 2008) (awarding "$150,000 to Lead Plaintiffs [Pennsylvania State Employees' Retirement System and the Pennsylvania Public School Employees' Retirement System] to compensate them for their reasonable costs and expenses directly relating to their representation of the Class pursuant to 15 U.S.C. § 78u–4(a)(4)"); *In re Veritas Software Corp.. Sec. Litig.*, No. 1:04-cv-00831-SLR, slip op. at 1 (D. Del. Aug. 5, 2008) (D.I. 144) (awarding each lead plaintiff $15,000 in PSLRA case); *In re Par Pharm. Sec. Litig.*, No. 06-3226 (ES), 2013 WL 3930091, at *11 (D.N.J. July 29, 2013) ($18,000 award to lead plaintiff in PSLRA case based on time and effort devoted to the case); *In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510 (CPS) (SMG), 2007 WL 2743675, at *19 (E.D.N.Y. Sept. 18, 2007) (granting PSLRA awards where, as here, "the tasks undertaken by employees of Lead Plaintiffs reduced the amount of time those employees would have spent on other work and these tasks and rates appear reasonable to the furtherance of the litigation").

Here, for time spent by their employees furthering and supervising the prosecution of the Action, Lead Plaintiff Coral Springs Police Pension Fund seeks an award of $7,556 (*see* Myers Decl. ¶11); Lead Plaintiff Pompano Beach General Employees Retirement System seeks an award of $11,538.24 (*see* Mitchell Decl. ¶14; Lead Plaintiff St. Petersburg Firefighters' Retirement System seeks an award of $22,109 (*see* Ciskoski Decl. ¶11); and Lead Plaintiff Merced County Employees' Retirement Association seeks an award of $14,252.82 (*see* Santos Decl. ¶¶11-14). Employees of Lead Plaintiffs took an active role in the litigation, including reviewing significant pleadings and briefs in the Action, communicating regularly with Lead Counsel regarding developments in the Action, authorizing settlement discussions, monitoring the progress of settlement negotiations, and approving the Settlement. *See* Myers Decl. ¶¶4,5,10; Mitchell Decl. ¶¶4,8,13; Ciskoski Decl. ¶¶4,5,10; Santos Decl. ¶¶4,12; Beno Decl. ¶4. The requested reimbursement amount is based on the number of hours that Lead Plaintiffs' employees committed to these activities, multiplied by a reasonable hourly rate for their time. Moreover, as noted above, the Notice informed potential Settlement Class Members that

Lead Counsel's request for reimbursement of expenses might include the reasonable costs and expenses of Lead Plaintiffs related to their representation of the Settlement Class, and there has been no objection to that request. The award sought by Lead Plaintiffs is reasonable and justified under the PSLRA based on their involvement in the Action from inception to the Settlement, and should be granted.[13]

VII. Conclusion

For all of these reasons, Lead Counsel respectfully request that the Court award: (i) attorneys' fees in the amount of 28% of the Settlement Funds, or $58.8 million plus interest at the same rate as earned by the Settlement Funds; (ii) $6,790,044.82 in reimbursement of the reasonable litigation expenses that Plaintiffs' Counsel incurred in connection with the prosecution of this Action; and (iii) reimbursement of $55,456.06 in costs to the Lead Plaintiffs.

[13] Lead Plaintiff Automotive is not seeking reimbursement under the PSLRA for the time it expended in representing the Class in this Action. However, Automotive's fund counsel, the law firm of Saltzman & Johnson, devoted 100.6 hours to the prosecution of this Action on behalf of Automotive and the Class. Specifically, Saltzman & Johnson oversaw Automotive's production of documents, assisted Automotive's Chairman in preparation for his deposition, and reviewed case updates and discovery responses with Lead Counsel, among other things. *See* Declaration of Anne Bevington, ¶¶3-5 (attached as Exhibit F). Lead Counsel BLB&G will reimburse Saltzman & Johnson for its time and expenses as set forth in the Bevington Declaration directly from the attorneys' fees awarded in this Action.

Dated: September 17, 2018

Respectfully submitted,

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