UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LANDMEN PARTNERS INC., Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. THE BLACKSTONE GROUP L.P., et al., Defendants.	Civil Action No. 08-cv-03601 CLASS ACTION MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

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MISCELLANEOUS

Counsel for Lead Plaintiffs and Class Representatives Martin Litwin and Francis Brady ("Plaintiffs' Counsel") respectfully submit this memorandum of law in support of their motion for an award of attorneys' fees and reimbursement of litigation expenses pursuant to Fed. R. Civ. P. 23(h) and 54(d)(2) and 15 U.S.C. §78u-4(a)(6). Concurrently herewith, Lead Plaintiffs have filed a motion seeking final approval of the settlement reached in this litigation ("Settlement") with Defendants The Blackstone Group L.P. ("Blackstone"), Stephen A. Schwarzman, Peter G. Peterson, Hamilton E. James, and Michael A. Puglisi ("Individual Defendants") (collectively, Blackstone and the Individual Defendants are "Defendants").

I. PRELIMINARY STATEMENT

Plaintiffs' Counsel seek an award of attorneys' fees of one-third (33.33%) of the Settlement Fund, or approximately $28,333,333, and $1,047,005.77 for costs and expenses Plaintiffs' Counsel incurred in litigating this case on behalf of the Class. Plaintiffs' Counsel has achieved an outstanding result for the Class of $85,000,000 in cash plus interest earned thereon ("Settlement Fund"). Indeed, the Settlement here equates to a recovery that is, based on Plaintiffs' expert's trial damages estimate, ***four to eleven times higher*** than the median recovery of individual class member's recoverable damages in similar securities class actions. *See* Declaration of Professor Geoffrey P. Miller, ¶31 ("Miller Declaration") annexed as Exhibit B to the Declaration of David A.P. Brower in Support of Plaintiffs' Motions for Final Approval of Class Notice, Final Approval of the Proposed Settlement, Final Approval of the Proposed Plan of Allocation, and Plaintiffs' Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Brower Declaration").

The prosecution of this Action was undertaken by Plaintiffs' Counsel on an entirely contingent basis, and was settled almost literally on the eve of trial. As more fully described below, Plaintiffs' Counsel has incurred $13,742,142.25 in time and $1,047,005.77 in expenses that would

not be compensated or reimbursed unless Plaintiffs' Counsel achieved a recovery for the benefit of the Class.

Courts in this District and elsewhere frequently grant percentage-of-the-recovery fee awards where a common fund has been recovered for a class equal to, and, indeed, above the percentage of the Settlement Fund that Plaintiffs' Counsel seeks here. *See infra*, §A.3.d. As demonstrated below, and in the accompanying Brower Declaration and the Miller Declaration, the requested one-third fee award is eminently fair and reasonable, particularly in view of the substantial risks attendant to this litigation and the excellent result achieved.

The requested fee is also fair and reasonable under either application of a lodestar/multiplier analysis or a "lodestar crosscheck." *See Goldberger v. Integrated Res., Inc*., 209 F.3d 43, 47 (2d Cir. 2000), further discussed below. Plaintiffs' Counsel has expended 30,524.95 hours prosecuting this Action on behalf of the Class, for an aggregate lodestar of $13,742,142.50. Accordingly, the requested fee represents a 2.06 multiplier of Plaintiffs' Counsel's lodestar, which is far lower than multipliers routinely awarded in such cases.

In accordance with the Court's August 30, 2013 Preliminary Approval Order (Dkt. No. 172), to date, 216,667 Notices were mailed to potential Class Members beginning on September 11, 2013, the Summary Publication Notice was published in INVESTOR'S BUSINESS DAILY on September 17, 2013, and published three separate times over *Business Wire* (on September 13, 17, and 20, 2013), and the Notice and related documents are posted on the website established for this Settlement by the Claims Administrator (www.BlackstoneIPOCase.com). *See* Declaration of Carole Sylvester Re: A) Mailing of the Notice of Proposed Settlement of Class and the Proof of Claim and Release Form; B) Publication of the Summary Notice; and C) Internet Posting, dated October 8, 2013("Sylvester Decl."), ¶¶3-13, annexed as Exhibit A to the Brower Declaration. The notices described the proposed

Settlement, the maximum attorneys' fees Plaintiffs' Counsel would seek (up to 33.33%), and Class Members' right to object to that request. No objections have been received thus far relating to the Settlement or the requested attorneys' fees.[1] In addition, the Notice advised that Plaintiffs' Counsel would seek expenses not to exceed $2 million. Plaintiffs' Counsel seek expenses of $1,047,005.77 – well below that ceiling.

In sum, the proposed Settlement here, which was achieved solely through the efforts of Plaintiffs' Counsel on the eve of trial in the face of a vigorous defense, represents an outstanding result in an exceedingly difficult case. Consequently, Plaintiffs' Counsel's motion for an award of attorneys' fees and expenses should be granted.

II. FACTUAL BACKGROUND

For a full discussion of the procedural history and summary of the Action, as well as the proposed Settlement, the Court is respectfully referred to the accompanying Brower Declaration. This memorandum will, instead, focus on the legal and factual matters relevant to attorneys' fees awards in class actions where a common fund has been recovered for a plaintiff class.

III. ARGUMENT

A. Plaintiffs' Counsel Are Entitled to an Award of Attorneys' Fees

1. The Legal Standards Governing Awards of Attorneys' Fees

It is well-settled that attorneys who achieve a benefit for members of a class are entitled to compensation for rendering the services that resulted in conferring such benefit. The Supreme Court has recognized that "a lawyer who recovers a common fund for the benefit of persons other than . . . his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van*

[1] The deadline for requests for exclusion and objections is November 12, 2013. Accordingly, Plaintiffs' Counsel will report to the Court one week before the Settlement Hearing scheduled for December 18, 2013 to address requests for exclusion and any objections.

Gemert, 444 U.S. 472, 478 (1980); *see also Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164 (1939); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 126 (1885); *Trustees v. Greenough*, 105 U.S. 527, 536 (1882).[2]

In addition to providing just compensation, awards of attorneys' fees from a common fund "serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons" and, as a result, help to discourage future alleged misconduct of a similar nature.[3] Indeed, the Supreme Court has repeatedly emphasized that private securities actions, such as this one, are "an essential supplement to criminal prosecutions and civil enforcement actions" brought by the US Securities and Exchange Commission ("SEC"). *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *see also Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005) ("The securities statutes seek to maintain public confidence in the marketplace" and "[t]hey do so by deterring fraud, in part, through the availability of private securities fraud actions.").[4]

As in most other Circuits, the "common fund" doctrine has been approved by the Second Circuit and courts in this District. *E.g.*, *Goldberger*, 209 F.3d at 47 (finding that the common fund

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[2] All citations and footnotes are omitted and emphasis is added, unless otherwise noted.

[3] *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 585 (S.D.N.Y. 2008); *see also In re Veeco Instruments Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 U.S. Dist. LEXIS 85554, at *8 (S.D.N.Y. Nov. 7, 2007) (same); *In re Giant Interactive Grp., Inc.*, 279 F.R.D. 151, 165 (S.D.N.Y. 2011) (an award of appropriate attorneys' fees should "'provid[e] lawyers with sufficient incentive to bring common fund cases that serve the public interest" and "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'")). Fees that fully reward excellent results encourage the successful prosecution of meritorious cases.

[4] *Accord Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (securities actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action'") (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)). Indeed, as Congress recognized in passing the Private Securities Litigation Reform Act of 1995 ("PSLRA"): "Private securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action. Such private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs. This legislation seeks to return the securities litigation system to that high standard." *See* H.R. Conf. Rep. No. 104-369, at 31 (1995).

doctrine "prevents unjust enrichment of those benefitting [sic] from a lawsuit without contributing to its cost"); *Savoie v. Merchs. Bank*, 166 F.3d 456, 460 (2d Cir. 1999) ("A party whose initiative confers a benefit upon a class of people is entitled to recover its costs – including attorneys' fees – from the common fund."); *In re Am. Bank Note Holographics*, 127 F. Supp. 2d 418, 430 (S.D.N.Y. 2001) (holding that "the costs of litigation should be spread among the fund's beneficiaries"); *see also* FED. R. CIV. P. 23(h) (providing that "the court may award reasonable attorney's fees and nontaxable costs authorized by law").

2. Plaintiffs' Counsel Should Be Awarded a Percentage of the Common Fund that Their Efforts Created

Plaintiffs' Counsel respectfully submit that this Court should award a fee based on a percentage of the common fund obtained for the Class. While Plaintiffs' Counsel's requested fee is also reasonable when analyzed or cross-checked under the lodestar/multiplier methodology (*see* §A.4 *infra*), the Supreme Court has indicated that attorneys' fees in common fund cases should be generally based on a percentage of the fund. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("under the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class").[5] Indeed, the Second Circuit has expressly approved the "'percentage-of-the-fund'" method for awards of fees in common fund cases, recognizing that "the lodestar method

[5] *See also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (stating that the percentage method "'directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation'" and noting that the "trend in this Circuit is toward the percentage method."); *Savoie*, 166 F.3d at 460 ("percentage-of-the-fund method has been deemed a solution to certain problems that may arise when the lodestar method is used in common fund cases"); *Fogarazzo v. Lehman Bros.*, No. 03 Civ. 5194 (SAS), 2011 U.S. Dist. LEXIS 17747, at *6 (S.D.N.Y. Feb. 23, 2011) ("'The trend in this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.'"); *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 U.S. Dist. LEXIS 120953, at *43 (S.D.N.Y. Dec. 23, 2009) ("the percentage method continues to be the trend of district courts in this Circuit and has been expressly adopted in the vast majority of circuits").

proved vexing" and has resulted in "an inevitable waste of judicial resources." *Goldberger*, 209 F.3d at 48-49.[6]

The text of the "PSLRA" itself also supports awarding attorneys' fees in securities cases using the percentage method, as it 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" recovered for the class. 15 U.S.C. §78u-4(a)(6); 15 U.S.C. §77z-1(a)(6). Several courts have concluded that, in using this language, Congress expressed a preference for the percentage method when awarding attorneys' fees in securities class actions. *See, e.g.*, *Telik*, 576 F. Supp. 2d at 586; *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005) (PSLRA expressly contemplates that "the percentage method will be used to calculate attorneys' fees in securities fraud class actions"); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) (by using this language, Congress "indicated a preference for the use of the percentage method" rather than the lodestar method).

Given the Supreme Court's indication that the percentage method is proper in this type of case, the Second Circuit's explicit approval of the percentage method, the trend among the District Courts in this Circuit to award fees based on the percentage-of-the-recovery, and the language of the

[6] All Courts of Appeal to consider the matter, with the exception of the Fourth Circuit, have approved of the percentage method with two Circuits (the Eleventh and D.C. Circuits) requiring its use in common fund cases. *See In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305-07 (1st Cir. 1995); *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006); *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012), *cert denied*, __ U.S. __, 133 S. Ct. 317 (2012); *Rawlings v. Prudential-Bache Props*, 9 F.3d 513, 515-17 (6th Cir. 1993); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269-71 (D.C. Cir. 1993). Further, although "The United States Court of Appeals for the Fourth Circuit has not decided which of the general approaches to adopt . . . the 'current trend among the courts of appeal favors the use of a percentage method to calculate an award of attorneys' fees in common fund cases.'" *Singleton v. Domino's Pizza, LLC*, No. DKC 11-1823, 2013 U.S. Dist. LEXIS 142528, at *30 (D. Md. Oct. 2, 2013).

PSLRA, Plaintiffs' Counsel respectfully submit that the Court should award them attorneys' fees based on a percentage of the Settlement Amount.

3. The Percentage Fee Requested Is Reasonable and Should Be Granted

In this case, Plaintiffs' Counsel seeks one-third of the Settlement Fund in attorneys' fees. In *Goldberger*, the Second Circuit set forth the following factors for courts in this Circuit to consider when analyzing fee applications in a common fund case:

1. the time and labor expended by counsel;
2. the magnitude and complexities of the litigation;
3. the risk of the litigation;
4. the quality of representation;
5. the requested fee in relation to the settlement; and
6. public policy considerations.

209 F.3d at 50; *accord City of Detroit v. Grinnell Corp*., 495 F.2d 448, 470 (2d Cir. 1974).

The "key consideration required by the PSLRA 'is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members.'" *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 438 (2d Cir. 2007) (quoting Advisory Comm. Notes to FED. R. CIV. P. 23, 2003 Amendments); *see also* Miller Decl., ¶23; *see also Grinnell* Factor 5, *supra*. Here, the requested fee is consistent with awards typically granted in securities class actions in this Circuit, and is particularly reasonable in light of Plaintiffs' Counsel's clear satisfaction of the *Goldberger/Grinnell* factors, including the extraordinary percentage recovery of damages achieved for the Class.

a. The Time and Labor to Produce an Excellent Settlement

The recovery obtained for the Class would not have been possible without the efforts of Plaintiffs' Counsel, who devoted more than five years and over 30,000 hours of time to prosecuting this Action on a purely contingent basis.

As detailed in the Brower Declaration, Plaintiffs' Counsel has expended a tremendous amount of effort and resources in investigating, filing, prosecuting, and resolving this Action. *See* Brower Declaration, *passim*. These efforts included, among other things:

- identifying potential claims available to purchasers of Blackstone common units (Brower Decl., ¶¶5, 28, 283);
- conducting a substantial factual investigation, including contacts with and interviews of prospective witnesses with relevant knowledge concerning the claims asserted and a comprehensive review of publicly available information regarding Blackstone and the events and circumstances at issue in the Action (Brower Decl., ¶¶6, 28, 283);
- reviewing tens of thousands of pages public filings, articles, analyst reports, and other documents concerning Blackstone (Brower Decl., ¶¶5, 29, 283);
- retaining and consulting extensively with experts and consultants in the fields of securities, economics, finance, and real estate (Brower Decl., ¶¶5, 6, 30, 283);
- researching and drafting the consolidated amended complaint (Brower Decl., ¶¶5, 31-33, 283);
- researching and preparing a brief and arguing in opposition to Defendants' motion to dismiss (Brower Decl., ¶¶36, 38, 283);
- successfully appealing to the Second Circuit this Court's decision granting Defendants' motion to dismiss (Brower Decl., ¶¶5, 42-48, 283);
- opposing Defendants' petition for a writ of certiorari to the Supreme Court following the Second Circuit's reversal (Brower Decl., ¶¶51, 283);
- negotiating and/or litigating numerous procedural and discovery disputes with Defendants and third-parties, including, *inter alia*, pre-trial matters relating to the scope of discovery and production of documents by Defendants and numerous third parties, and the admissibility of Defendants' experts' opinions and testimony (Brower Decl., ¶¶5, 52-217, 283);

- reviewing and analyzing more than four million pages of internal Blackstone and third-party documents (Brower Decl., ¶¶5, 141, 283);

- deposing 13 fact witnesses concerning the relevant events in this case (Brower Decl., ¶¶5, 142, 283);

- obtaining certification of the Class of Blackstone purchasers (Brower Decl., ¶¶121, 181, 199, 283);

- conducting substantial expert discovery, which included assisting rebuttal damages and real estate/securitization 'experts in preparing their reports, presenting them both for deposition and the rebuttal damages expert for a supplemental deposition; and deposing Defendants' experts (one on two separate occasions);

- researching and drafting opposition to Defendants' motion for summary judgment, orally arguing the motion, and preparing materials for the Court regarding these issues after the argument (Brower Decl., ¶¶5, 162, 202, 283);

- researching and preparing 11 motions in *limine* in connection with the trial (Brower Decl., ¶¶5, 188, 283);

- drafting oppositions to the motions in *limine* filed by Defendants (Brower Decl., ¶¶5, 213, 283);

- preparing and engaging in negotiations and discussions regarding the contents of the joint pretrial order pursuant to the Court's July 18, 2013 Trial Announcement, including an exhibit list containing more than 450 potential trial exhibits, witness lists, deposition designations, jury instructions and the verdict form (Brower Decl., ¶¶5, 177, 203, 283);

- preparing the myriad of other materials for trial, which was set for September 16, 2013 (23 days before the Settlement was reached) (Brower Decl., ¶¶5, 210-11, 283);

- engaging in protracted and difficult settlement negotiations over a period of years, that included three failed mediations and only finally resulted in the proposed Settlement through marathon multilateral negotiations, under the auspices of the Hon. Daniel Weinstein (Ret.), on May 29, 2013, and was immediately followed by complex and adversarial negotiations of the forms of the Stipulation of Settlement and accompanying notices and orders executed on August 28, 2013 (Brower Decl., ¶¶5, 218-28, 283);

- working closely with Plaintiffs' damages consultant to develop a proposed plan for allocating the Settlement Amount to the Class (Brower Decl., ¶¶11, 271-77);

- preparing papers seeking preliminary approval of the proposed Settlement (Brower Decl., ¶¶228-32));

- responding to the Court's inquiries regarding matters relevant to claims administration, including preparing and submitting forms of the mailing declaration and final distribution papers;

- responding to inquiries from investors and other interested parties relating to the Settlement (Brower Decl., ¶¶283); and

- preparing the papers seeking final approval of the proposed Settlement (Brower Decl., ¶283).

The significant amount of time and effort devoted to this Action by Plaintiffs' Counsel confirm that the fee request here is reasonable.[7]

Furthermore, Professor Miller has reviewed the hours and allocation of work between and among the attorneys at Plaintiffs' Counsel's firms and has opined that, for a huge securities litigation of this type, the time expended by Plaintiffs' Counsel is reasonable, supporting the proposition that Plaintiffs' Counsel expended their time usefully, efficiently, and with a focus on avoiding unnecessary or duplicative efforts. *See* Miller Decl., ¶¶67-72. Accordingly, the time and labor expended by counsel amply supports the requested fee.

b. The Complexity, Magnitude, and Risks of Litigation

The "magnitude and complexities" and the "risk of the litigation" are factors to be considered by the Court in determining the appropriateness of the requested fee. *Goldberger*, 209 F.3d at 50. The subject matter of this litigation involved highly complex and esoteric financial issues,[8] and, as the Court itself witnessed in the courtroom, it was vigorously defended, and fraught with difficult legal and factual issues. *See* Brower Decl., ¶¶253-64. There can be no dispute that the Action was

[7] The Brower Declaration also includes as Exhibits D-F the separate fee and expense declarations submitted by Plaintiffs' Counsel, which contain details concerning the amount of time expended and expenses incurred by each firm in prosecuting the Action.

[8] Courts have long recognized that securities class actions are notoriously complex and difficult to prove. *See, e.g.*, *Fogarazzo*, 2011 U.S. Dist. LEXIS 17747, at *10 ("securities actions are highly complex"); *In re Flag Telecom Holdings*, No. 02-CV-3400CM) (PED), 2010 U.S. Dist. LEXIS 119702, at *43 (S.D.N.Y. Nov. 5, 2010) (courts have long recognized that securities class litigation is "notably difficult and notoriously uncertain").

fraught with risk to Plaintiffs. Indeed, a study of securities class actions filed between 1996 through 2011, found that 32% of the cases that reached the point of a motion to dismiss were dismissed in defendants' favor.[9] In fact, that is exactly what happened here: the Court dismissed Plaintiffs' complaint in its entirety. And the case only survived because Plaintiffs appealed to the Second Circuit, where success was far from certain because, in 2011, the Second Circuit's reversal rate in civil cases was only 8.8%.[10] Thus, just undertaking representation of a class in this type of case entails very substantial risks not faced in other types of litigation.

Here, Plaintiffs' Counsel faced and overcame not only the very real risk of a dismissal at the pleading stage, but additional risks specific to the nature of an investment in Blackstone and its particularly tenacious principals. Plaintiffs encountered, and would have certainly continued to encounter, significant risks in establishing the existence of materially misleading or inaccurate statements in Blackstone's offering documents and other necessary elements to establish a violation of Section 11 of the Securities Act of 1933. For example, in their motion to dismiss, Defendants vigorously asserted that none of the individual components of the investments at issue – which were made by private equity and real estate investment funds managed by Blackstone – were material, and there was no need to include any information about them in the Registration Statement. Defendants continued to press that theory through expert discovery and on summary judgment. It is certainly possible the Court or the trier of fact would have agreed with Defendants' position that no material information was withheld regarding FGIC, Freescale or Blackstone's real estate investments because no single investment was material to Blackstone's financial performance. Plaintiffs also faced

[9] *See* Securities Class Action Filings - 2011 Year in Review, at 18 (Cornerstone Research 2012), available at: www.cornerstone.com/securities_class_action_filings_2011_year_in_review.

[10] Judicial Business of the United States Courts, Supplemental Tables, "U.S. Courts of Appeals—Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2011," *available at* www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/B05Sep11.pdf.

significant challenges in proving damages. Defendants advanced, primarily through expert testimony, a "negative causation" defense – i.e., that any losses were caused by external factors (in particular, the financial crisis in 2007-08) unrelated to the alleged misrepresentations or omissions, and that no Blackstone-specific revelation occurred during the Class period that could be linked to an alleged misstatement or omission in Blackstone's offering documents. If successful, these contentions could have dramatically reduced or eliminated recoverable damages. While Plaintiffs and Plaintiffs' Counsel believe they had strong factual responses to these arguments, a jury might have been swayed by Defendants' arguments and found in their favor. *See* Brower Decl., ¶¶265-67.

The complexity and risks of litigation are discussed at length in the Brower Declaration and Plaintiffs' accompanying memorandum in support of approval of the proposed Settlement. Suffice it to say, the obstacles to Plaintiffs' success on the merits and recovery on a judgment larger than the amount offered by the Settlement are legion. As the Second Circuit recognized in *Grinnell,* "despite the most vigorous and competent of efforts, success is never guaranteed." 495 F.2d at 471. A trial could turn on close questions of law and fact and also would involve a high degree of risk. The costs and duration of trial preparation and trial would likely be substantial, and appeals could follow regardless of the outcome at trial. In sum, this litigation was complex and contained substantial risk – which is "'perhaps the foremost factor to be considered in determining' the award of appropriate attorneys' fees." *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 246 F.R.D. 156, 173 (S.D.N.Y. 2007) ("*ML Tech*.") (citing cases); *accord In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 02 MDL 1484 (JFK), 2007 U.S. Dist. LEXIS 9450, at *54 (S.D.N.Y. Feb. 1, 2007) ("*ML Funds*").

Moreover, counsel's efforts were undertaken from the outset on a wholly contingent basis. "The courts of this Circuit, including this district, have expressly recognized that the contingent

nature of counsel's fee, with the built-in risk of litigation, is a highly relevant factor in determining the fee to be awarded." *In re Lloyd's Am. Trust Fund Litig*., No. 96 Civ. 1262 (RWS), 2002 U.S. Dist. LEXIS 22663, at *81 (S.D.N.Y. Nov. 26, 2002); *accord Am. Bank*, 127 F. Supp. 2d at 430.[11] Despite the very real possibility that Plaintiffs might not prevail and that counsel would receive nothing for their efforts, Plaintiffs' Counsel devoted enormous amounts of their time and resources to press the Class members' claims. As the Second Circuit has long recognized:

> No one expects a lawyer to give his services at bargain rates in a civil matter on behalf of a client who is not impecunious. No 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. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

Grinnell, 495 F.2d at 470.

Courts have recognized that the risk of non-payment in similarly complex cases is real and heightened when, as here, Plaintiffs' Counsel press to achieve the very best result possible. Indeed, there are numerous class actions in which counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise. Even judgments initially affirmed on appeal by an appellate panel do not assure a recovery. *See, e.g*., *Backman v. Polaroid Corp*., 910 F.2d 10 (1st Cir. 1990) (after 11 years of litigation, and following a jury verdict for plaintiffs and an

[11] *See also Flag Telecom*, 2010 U.S. Dist. LEXIS 119702, at *79 ("Courts in the Second Circuit have recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award."); *In re Warner Commc'ns. Sec. Litig.*, 618 F. Supp. 735, 747 (S.D.N.Y. 1985), ("Numerous cases have recognized that the attorneys' contingent fee risk is an important factor in determining the fee award."), *aff'd*, 798 F.2d 35 (2d Cir. 1986); Third Circuit Task Force on Selection of Class Counsel, 74 TEMP. L. REV. 689, 691-92 (Winter 2001) ("It is plaintiffs' counsel who work to obtain whatever recovery any member of the class who has not opted out of the litigation will receive. The fact that there will be no payment if there is no settlement or trial victory means that there is greater risk for plaintiffs' counsel in these class action cases than in cases in which an hourly rate or flat fee is guaranteed. The quid pro quo for the risk, and for the delay in receiving any compensation in the best of circumstances, is some kind of risk premium if the case is successful.").

affirmance by a First Circuit panel, plaintiffs' claims were dismissed by an en banc decision and plaintiffs recovered nothing).

Similarly, even the most promising cases can be eviscerated by a sudden change in the law after years of litigation. *See, e.g.*, *In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d 469 (S.D.N.Y. 2010) (after completion of extensive foreign discovery, 95% of plaintiff class's damages were eliminated by the Supreme Court's reversal of 40 years of unbroken circuit court precedent in *Morrison v. Nat'l Austl. Bank Ltd.*, __ U.S. __, 130 S. Ct. 2869 (2010)). Other significant cases have been lost after the investment of tens of thousands of hours of attorney time and millions of dollars on expert and other litigation costs at summary judgment or after trial.[12]

Unlike counsel for the Defendants, who are paid substantial hourly rates and reimbursed for their expenses on a regular basis, Plaintiffs' Counsel have not been compensated for any of their time (over 30,500 hours) with a lodestar value of over $13.74 million, or compensated for any of their more than $1 million in litigation expenses incurred over more than five years since the Action was commenced. Moreover, Plaintiffs' Counsel would not have been compensated for their time or expenses at all had they been unsuccessful in this Action. Because the fee to be awarded in this matter is entirely contingent, the only certainties from the outset were that there would be no fee without a successful result, and that a successful result, if any, could be achieved only after lengthy and difficult effort.

[12] *See, e.g.*, *Robbins v. Koger Props.*, 116 F.3d 1441 (11th Cir. 1997) (reversal of jury verdict of $81 million against accounting firm after a 19-day trial); *Bentley v. Legent Corp.*, 849 F. Supp. 429 (E.D. Va. 1994) (directed verdict after plaintiffs' presentation of its case to the jury), *aff'd sub nom, Herman v. Legent Corp.*, 50 F.3d 6 (4th Cir. 1995); *Landy v. Amsterdam*, 815 F.2d 925 (3d Cir. 1987) (directed verdict for defendants after five years of litigation); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning plaintiffs' verdict following two decades of litigation); *In re Apple Computer Sec. Litig.*, No. C-84-20148(A)-JW, 1991 U.S. Dist. LEXIS 15608 (N.D. Cal. Sept. 6, 1991) ($100 million jury verdict vacated on post-trial motions); *In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486 CW (EDL), 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) (defense verdict after four weeks of trial).

Taking into account the significant complexity of the issues, the magnitude and risks of the Action, and the contingent nature of the representation, the requested fee is reasonable and justified. *Accord ML Tech*, 246 F.R.D. at 172-73 ("Securities class litigation 'is notably difficult and notoriously uncertain.' . . . The Court agrees here that 'this Case is complex with difficult liability issues.'"); *ML Funds*, 2007 U.S. Dist. LEXIS 9450, at *47-*48 (same). Thus, the magnitude, complexity, and risks of this litigation all support approval of the request for attorneys' fees.

c. Quality of Representation

Another *Goldberger* factor is the quality of the representation. *See Warner*, 618 F. Supp. at 748 ("[T]he quality of plaintiffs' counsels' work can be measured by a number of factors, including the benefit obtained for the class . . . ."). Here, the high quality of the representation by Plaintiffs' Counsel is clearly evidenced by the recovery obtained for the Class, which reflects a recovery of individual Class Members' compensable damages many times larger than recoveries in similar securities class actions. *See supra* at §A.3.d; *see also* Miller Decl., ¶¶23-35.

The standing, reputation, and prior experience of plaintiffs' counsel are also relevant in determining fair compensation. *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 165 (S.D.N.Y. 1989). The resumes of Plaintiffs' Counsel's firms attached as part of Exhibits D, E, and F to the Brower Declaration clearly demonstrate that those firms include highly experienced practitioners in areas of complex class action and securities litigation, some with more than 30 years of experience in the area.

The quality and vigor of opposing counsel is also relevant in evaluating the quality of the services rendered. *See, e.g.*, *Warner*, 618 F. Supp. at 749.[13] Plaintiffs' Counsel were faced with

[13] *See also 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 proves the caliber of representation that was necessary to achieve the Settlement"); *In re Adelphia Commc'ns Corp. Sec. & Deriv. Litig.*, No. 03 MDL 1529 (LMM), 2006 U.S.

formidable opposition in this litigation as Blackstone was represented by Simpson Thacher & Bartlett, one of the country's largest and best known securities litigation firms, which spared no effort or expense in the defense of Blackstone and its principals. That Plaintiffs' Counsel was able to obtain the very substantial recovery here when faced with such formidable opposing counsel, representing very formidable clients, is additional confirmation of the quality of the representation, and likewise supports the reasonableness of Plaintiffs' Counsel's fee request. *See ML Tech*, 246 F.R.D. at 174 ("'The quality of opposing counsel is also important in evaluating the quality of Class Counsels' [sic] work.'") (quoting *In re KeySpan Corp. Sec. Litig.*, No. CV 2001-5852 (ARR) (MDG), 2005 U.S. Dist. LEXIS 29068, at *35 (E.D.N.Y. Aug. 25, 2005)).

d. The Requested Fee Award in Relation to the Settlement

"When determining whether a fee request is reasonable in relation to a settlement amount, 'the court compares the fee application to fees awarded in similar securities class-action settlements of comparable value.'" *In re Comverse Tech., Inc.*, No. 06-CV-1825 (NGG) (RER), 2010 U.S. Dist. LEXIS 63342, at *10 (E.D.N.Y. June 24, 2010).

"Traditionally, courts in this Circuit and elsewhere have awarded fees in the 20%-50% range in class actions." *Warner*, 618 F. Supp. at 749. The one-third percentage of the recovery fee award that Plaintiffs' Counsel requests here is consistent with attorneys' fees awarded to successful plaintiffs' counsel in other federal securities class actions in this Circuit,[14] and in other circuits.[15] *See*

Dist. LEXIS 84621, at *15 (S.D.N.Y. Nov. 17, 2006) ("The fact that the settlements were obtained from defendants represented by 'formidable opposing counsel from some of the best defense firms in the country' also evidences the high quality of lead counsel's work.").

[14] The following is a non-comprehensive list of ***reported*** cases in this Circuit where courts awarded attorneys' fees of one-third (33.33%) or more of the common fund recovered to plaintiffs' counsel plus expenses in federal securities law class actions. *See, e.g.*, *Giant Interactive*, 279 F.R.D. at 166; *In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895, 2011 U.S. Dist. LEXIS 53007, at *18 (S.D.N.Y. May 13, 2011-); *Fogarazzo*, 2011 U.S. Dist. LEXIS 17747, at *1; *Menkes v. Stolt-Nielsen S.A.*, No. 3:03CV00409 (DJS), 2011 U.S. Dist. LEXIS 7066, at *14 (D. Conn. Jan. 25, 2011); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516

Miller Decl., ¶22 and Exs. B & C thereto. Moreover, attorney fee awards of one-third or more of a common fund recovered is also consistent with fee awards to successful plaintiffs' counsel in other types of class actions in this Circuit,[16] and in other circuits.[17] *See id*.

(S.D.N.Y. 2009); *RMED Int'l, Inc. v. Sloan's Supermarkets, Inc.*, 94 Civ. 5587 (PKL) (RLE), 2003 U.S. Dist. LEXIS 8239, at *6 (S.D.N.Y. May 15, 2003); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003); *Maley*, 186 F. Supp. 2d at 367-68; *In re APAC Teleservices, Inc. Sec. Litig.*, No. 97 Civ. 9145 (BSJ), 1999 U.S. Dist. LEXIS 17908 (S.D.N.Y. Nov. 12, 1999); *Dubin v. E.F. Hutton Grp.*, 878 F. Supp. 616 (S.D.N.Y. 1995); *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 326 (E.D.N.Y. 1993).

[15] The following is a non-comprehensive list of ***reported*** cases in other Circuits where courts awarded attorneys' fees of one-third (33.33%) or more of the common fund recovered to plaintiffs' counsel plus expenses in federal securities law class actions. *See, e.g.*, *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000); *In re Interpool, Inc. Sec. Litig.*, No. 3:04-cv-00321-SRC (D.N.J. Sept. 9, 2006); *In re Ravisent Techs., Inc. Sec. Litig.*, No. 00-CV-1014, 2005 U.S. Dist. LEXIS 6680, at *35, *51 (E.D. Pa. Apr. 18, 2005); *In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, No. 02-ML-1475-DT(RCx), 2005 U.S. Dist. LEXIS 13627, at *61 (C.D. Cal. June 10, 2005); *In re Corel Corp. Sec. Litig.*, 293 F. Supp. 2d 484, 497-98 (E.D Pa. 2003); *In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 431-34 (E.D. Pa. 2001); *In re Olicom Sec. Litig*., Master File No. 3:94-CV-0511-D (N.D. Tex. Aug. 30, 1996) (awarding 33-1/3% of total recovery, plus expenses); *In re Pub. Serv. Co.*, No. 91-0536M, 1992 U.S. Dist. LEXIS 16326 (S.D. Cal. July 28, 1992); *Antonopulos v. N. Am. Thoroughbreds, Inc*., No. 87-0979G (CM), 1991 U.S. Dist. LEXIS 12579, at *8-*9 (S.D. Cal. May 6, 1991) (awarding one-third fee plus expenses in securities class action); *Malanka v. de Castro*, No. 85-2154-MC, 1990 U.S. Dist. LEXIS 18171 (D. Mass. Nov. 20, 1990); *Valente v. Pepsico, Inc.*, No. 4537, 1979 U.S. Dist. LEXIS 11952 (D. Del. June 4, 1979) (fee and expense award equal to 38.8% of total recovery).

[16] The following is a non-comprehensive list of ***reported*** cases in this Circuit where courts awarded attorneys' fees of one-third (33.33%) or more of the common fund recovered to plaintiffs' counsel plus expenses in non-securities class actions. *See, e.g.*, *Anwar v. Fairfield Greenwich Ltd.*, No. 09-CV-118 (VM), 2012 U.S. Dist. LEXIS 78929, at *11 (S.D.N.Y. June 1, 2012); *Alli v. Boston Mkt. Corp.*, No. 3:10-cv-00004-JCH, 2012 U.S. Dist. LEXIS 54695, at *9 (D. Conn. Apr. 17, 2012); *Sewell v. Bovis Lend Lease LMB, Inc.*, No. 09 Civ. 6548 (RLE), 2012 U.S. Dist. LEXIS 53556, at *38 (S.D.N.Y. Apr. 16, 2012); *Guippone v. BH S&B Holdings, LLC*, No. 09 Civ. 01029 (CM), 2011 U.S. Dist. LEXIS 126026, at *38 (S.D.N.Y. Oct. 28, 2011); *Johnson v. Brennan*, No. 10 Civ. 4712 (CM), 2011 U.S. Dist. LEXIS 105775, at *37 (S.D.N.Y. Sept. 16, 2011); *Reyes v. Altamarea Grp.*, No. 10-CV-6451 (RLE), 2011 U.S. Dist. LEXIS 115984, at *19 (S.D.N.Y. Aug. 16, 2011); *Hens v. ClientLogic Operating Corp.*, No. 05-CV-381S, 2010 U.S. Dist. LEXIS 139126, at *6 (W.D.N.Y. Dec. 19, 2010); *Clark v. Ecolab Inc.*, No. 07 Civ. 8623 (PAC), 2010 U.S. Dist. LEXIS 47036, at *27 (S.D.N.Y. May 11, 2010); *Khait v. Whirlpool Corp*., No. 06-6381 (ALC), 2010 U.S. Dist. LEXIS 4067, at *22 (E.D.N.Y. Jan. 20, 2010); *Prasker v. Asia Five Eight LLC*, 08 Civ. 5811 (MGC), 2010 U.S. Dist. LEXIS 1445, at *3, *16 (S.D.N.Y. Jan. 4, 2010); *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06 Civ. 4270 (PAC), 2009 U.S. Dist. LEXIS 27899, at *16 (S.D.N.Y. Mar. 31, 2009); *Stefaniak v. HSBC Bank USA, N.A*., No. 1:05-CV-720 S, 2008 U.S. Dist. LEXIS 53872 (W.D.N.Y. June 28, 2008); *Spann v. AOL Time Warner, Inc*., No. 02 Civ. 8238 (DLC), 2005 U.S. Dist. LEXIS 10848, at *24 (S.D.N.Y. June 7, 2005); *In re Med. X-Ray Film Antitrust Litig*., No. CV-93-5904, 1998 U.S. Dist. LEXIS 14888, at *20 (E.D.N.Y. Aug. 7, 1998); *Green v. Emersons, Ltd.*, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶93, 263 (S.D.N.Y. 1987); *Lewis v. Musham*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶97,946 (S.D.N.Y. 1981); *Van*

e. Public Policy Considerations Fully Support the Requested Fee

The Second Circuit has also held that "public policy considerations" should be afforded weight when determining the fee awarded to plaintiffs' counsel in class actions. *Goldberger*, 209 F.3d at 50; *see also Flag Telecom*, 2010 U.S. Dist. LEXIS 119702, at *83 ("'[p]ublic policy concerns favor the award of reasonable attorneys' fees in class action securities litigation'"); *ML Funds*, 2007 U.S. Dist. LEXIS 9450, at *69 (same). Private lawsuits, such as this, serve to further the objective of the federal securities laws to protect investors and consumers against fraud and other deceptive practices. *Eltman v. Grandma Lee's, Inc*., No. 82 Civ. 1912, 1986 U.S. Dist. LEXIS 24902, at *25 (E.D.N.Y. May 29, 1986); *see also Bateman Eichler*, 472 U.S. at 310 (holding that lawsuits brought by investors provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action'"); *Maley*, 186 F. Supp. 2d at 373 ("In considering an award of attorney's fees, the public policy of vigorously enforcing the federal securities laws must be considered.").

The Second Circuit has taken into account the social and economic value of class actions and the need to encourage counsel to undertake such litigation. *See, e.g.*, *Alpine Pharmacy v. Chas.*

Gemert v. Boeing Co., 516 F. Supp. 412 (S.D.N.Y. 1981); *Beech Cinema, Inc. v. Twentieth Century Fox Film Corp.*, 480 F. Supp. 1195 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 1106 (2d Cir. 1980).

[17] The following is a non-comprehensive list of ***reported*** cases in other Circuits where courts awarded attorneys' fees of one-third (33.33%) or more of the common fund recovered to plaintiffs' counsel plus expenses in non-securities class actions. *See, e.g.*, *Waters v. Cook's Pest Control, Inc.*, No. 2:07-cv-00394 LSC, 2012 U.S. Dist. LEXIS 99129, at *43 (N.D. Ala. July 17, 2012); *Temp. Servs. v. Am. Int'l Grp.*, No. 3:08-cv-00271-JFA, 2012 U.S. Dist. LEXIS 86474, at *19, *36 (D.S.C. June 22, 2012); *In re Schering-Plough Corp.*, No. 08-1432 (DMC) (JAD), 2012 U.S. Dist. LEXIS 75213, at *17-*22 (D.N.J. May 31, 2012); *Hall v. AT&T Mobility LLC*, No. 07-5325 (JLL), 2010 U.S. Dist. LEXIS 109355, at *71-*72 (D.N.J. Oct. 13, 2010); *In re Ready-Mixed Concrete Antitrust Litig*., No. 1:05-cv-00979-SEB-TAB, 2010 U.S. Dist. LEXIS 85003, at *14 (S.D. Ind. Aug. 17, 2010); *Helmick v. Columbia Gas Transmission*, No. 2:07-cv-00743, 2010 U.S. Dist. LEXIS 65808, at *15 (S.D. W. Va. July 1, 2010); *Payson v. Capital One Home Loans, LLC*, No. 07-CV-2282-DWB, 2009 U.S. Dist. LEXIS 25418 (D. Kan. Mar. 26, 2009); *In re Vitamins Antitrust Litig*., No. 99-197 (TFH), 2001 U.S. Dist. LEXIS 25067, at *68 (D.D.C. July 13, 2001); *Antonopulos*, 1991 U.S. Dist. LEXIS 12579, at *8-*9.

Pfizer & Co., 481 F.2d 1045, 1050 (2d Cir. 1973). As a practical matter, class actions can be maintained only if competent counsel can be obtained to prosecute them. This will occur if courts award reasonable and adequate compensation for their services where successful results are achieved. As former Chief Judge Brieant stated in *Union Carbide*, 724 F. Supp. at 169:

> A large segment of the public might be denied a remedy for violations of the securities laws if contingent fees awarded by the courts did not fairly compensate counsel for the services provided and the risks undertaken.

Here, the Settlement was achieved without the assistance of any governmental department or agency. Instead all of the facts and theories of liability were developed solely by Plaintiffs' Counsel and pressed solely by them to achieve the only compensation obtained for Blackstone investors. The need to generously incentivize plaintiffs' counsel to be willing to assume the risks of this type of litigation without the advantage of piggy-backing a governmental proceeding and thus going it alone to represent investors where the government is too busy or disinterested in pursuing a possible claim further militates in favor of the fee award requested here. *See In re Priceline.com, Inc.*, No. 3:00-cv-1884 (AVC), 2007 U.S. Dist. LEXIS 52538, at *17 (D. Conn. July 20, 2007) ("The award of the percentage requested here will encourage enforcement of the securities laws and support attorneys' decisions to take these types of cases on a contingent fee basis.").

The preventative/deterrent public policy goal of litigation under the Securities Act further demonstrates that Plaintiffs' Counsel's prosecution of this Action entitles them to a substantial fee award. *See* Miller Decl., ¶94. As the court in *Feit v. Leasco Data Processing Equipment Corp*., 332 F. Supp. 544 (E.D.N.Y 1971), explained: "The civil liability sections of the 1933 Act, when properly applied, act as independent and effective enforcement provisions. A 'class action under Fed. R. Civ. P. 23 could be particularly effective and . . . compensatory damages, especially when multiplied in a class action, have a potent deterrent effect.'" *Id*. at 567 (quoting *Globus v. Law Research Serv*., 418

F. 2d 1276, 1286 (2d Cir. 1969)). Here, Defendants' "materiality" expert, Professor Subramanian, opined that other private equity firms that went public after this suit was filed made the types of enhanced disclosures in their registration statements that Plaintiffs complained were omitted from Blackstone's Registration Statement because of this litigation. *See* Expert Report of Professor Guhan Subramanian, dated April 16, 2013, ¶93. Therefore, this Action had the very effect on other, subsequent public offerings of securities that the private right of action under the Securities Act was intended to have. *See Feit,* 332 F. Supp. at 563-67. That impact should be considered by the Court in awarding fees in this case. *See, e.g.*, *Young v. Verizon's Bell Atl. Cash Balance Plan*, 748 F. Supp. 2d 903, 915 (N.D. Ill. 2010) (noting that fee awards are especially appropriate where "a plaintiff's suit set an important precedent").[18]

4. Plaintiffs' Counsel's Fee Request Is Reasonable Under a Lodestar/Multiplier Analysis and Should Be Granted

Even where courts use the percentage-of-the-recovery methodology to award attorneys' fees, the Second Circuit has encouraged the practice of using the lodestar/multiplier approach to perform a "cross-check" on the reasonableness of the percentage awarded. *Goldberger*, 209 F.3d at 50; *ML Tech*, 246 F.R.D. at 175-76. Here, under the lodestar/multiplier approach, the requested attorneys' fees are fair and reasonable.

The lodestar is calculated by multiplying the number of hours expended on the entire litigation by a particular attorney by his or her current hourly rate. The hourly billing rate applied is

[18] *See also Andrews v. Chevy Chase Bank FSB*, 706 F. Supp. 2d 916, 925 (E.D. Wis. 2010) (awarding fees where the plaintiff created "an important precedent relating to the right to rescind an adjustable rate mortgage after inadequate disclosure of a variable interest rate"); *Mikaloff v. Walsh*, No. 5:06-96, 2009 U.S. Dist. LEXIS 31908, at *15 (N.D. Oh. Mar. 30, 2009) (awarding fees because the plaintiff's "case has been cited in several other jurisdictions and will likely remain an important precedent on this issue"); *Mendes v. Sullivan*, No. 99-11468-NG, 2002 U.S. Dist. LEXIS 27772, at *21 (D. Mass. July 11, 2002) (noting that "where, as here, the case sets important precedents, the public is benefited, counsel should be appropriately compensated").

the hourly rate that is normally charged in the community where the counsel practices – i.e., the "market rate." *See Blum*, 465 U.S. at 895; *see also Hensley v. Eckerhart*, 461 U.S. 424, 447 (1983) (Brennan, J., concurring in part, dissenting in part) ("market standards should prevail"); *Luciano v. Olsten Corp.*, 109 F.3d 111, 115 (2d Cir. 1997) ("The 'lodestar' figure should be 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'") (citing *Blum*, 465 U.S. at 896 n.11). In addition, the Supreme Court and other courts have held that the use of *current* rates is proper since such rates more adequately compensate for inflation and loss of use of funds. *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989).[19] Here, the rates used by Plaintiffs' Counsel are commensurate with market rates that courts in this District and around the country have repeatedly found to be reasonable given the nature of such work and the risks associated with prosecuting class actions on a contingent basis. *See generally* Miller Decl., ¶¶44-66.

The total lodestar for services here, through October 1, 2013, was $13,742,142.25. This represents 30,524.95 hours spent by attorneys and paralegals. *See* Brower Decl., ¶286. The detailed breakdown of all such hours demonstrates that the work was distributed efficiently among partners, associates, and paraprofessionals. *See* Brower Decl. at Exs. D-F. Moreover, the amount of participation by senior personnel in this litigation was justified "because the large majority of the hours worked were spent on complicated tasks, such as the drafting of pleadings and motions, and conducting extensive settlement negotiations." *ML Tech.*, 246 F.R.D. at 176 (finding that "[t]here is

[19] Courts in this Circuit have long approved the use of current hourly rates to calculate the base lodestar figure as a means of compensating for the delay in receiving payment that is inherent in class actions, inflationary losses, and the loss of access to legal and monetary capital that could otherwise have been employed had class counsel been paid on a current basis during the pendency of the litigation. *See N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1153 (2d Cir. 1983); *Union Carbide*, 724 F. Supp. at 163; *Veeco*, 2007 U.S. Dist. LEXIS 85554, at *28-*29.

no indication that counsel failed to delegate work, where appropriate, to more junior personnel"); *see also ML Funds*, 2007 U.S. Dist. LEXIS 9450, at *73-*74 (same).[20]

Typically, under the lodestar method of fee computation, a multiplier is applied to the lodestar in order to compensate for the results achieved, the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other *Grinnell*/*Goldberger* factors. *See Goldberger*, 209 F.3d at 47 (holding that the reasonableness of the multiplier is assessed by considering the same factors as those analyzed in order to arrive at a suitable percentage attorneys' fee); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467-68 (S.D.N.Y. 2004).[21]

"Lodestar multipliers of nearly 5 have been deemed 'common' by courts in this District." *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, No. 05 Civ. 10240 (CM), 2007 U.S. Dist. LEXIS 57918, at *56 n.7 (S.D.N.Y. July 27, 2007); *accord Wal-Mart Stores*, 396 F.3d at 123 (finding as reasonable a lodestar multiplier of 3.5) (citing *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (holding that "multipliers of between 3 and 4.5 have become common")); *see also* Miller Decl. ¶¶87-89 (and cases cited therein). Plaintiffs' Counsel's requested fee of one-third of the Settlement Fund represents a relatively small multiplier of only 2.06 times Plaintiffs' Counsel's aggregate lodestar. As demonstrated above, this is well within, if not well

[20] Nevertheless, "where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50.

[21] *See also Flag Telecom*, 2010 U.S. Dist. LEXIS 119702, at *76 ("Under the lodestar method, a positive multiplier is typically applied to the lodestar in recognition of the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors."); *Comverse*, 2010 U.S. Dist. LEXIS 63342, at *14 ("Where . . . counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar."); *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 761 (S.D. Ohio 2007) ("the Court rewards [] lead counsel that takes on more risk, demonstrates superior quality, or achieves a greater settlement with a larger lodestar multiplier").

below, the range of multipliers deemed not only reasonable, but common, by the courts in the Second Circuit and elsewhere.

Given Plaintiffs' Counsel's clear satisfaction of the *Goldberger*/*Grinnell* factors (*see* §A.3 *supra*), the extraordinary high percentage of Class Members' recoverable damages recovered, *see* Miller Decl. ¶¶23-35, which reflects the quality of Plaintiffs' Counsel's representation of the Class against highly experienced and well-financed opponents, on a fully contingent basis, undertaken by them with full knowledge of the risks they faced from the outset over five years ago, which required them to bring the Action to the eve of trial to achieve a satisfactory settlement, Plaintiffs' Counsel respectfully submits their requested one-third of the Settlement Fund, or a 2.06 multiplier of their lodestar, is both fair and reasonable.

B. Plaintiffs' Counsel Should Be Awarded for Expenses Reasonably Incurred in Connection with This Action

Plaintiffs' Counsel also request payment of their litigation expenses that were reasonably and necessarily incurred in the prosecution of this Action. *See* Brower Decl., ¶¶310-15. "It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advance to a class." *Flag Telecom*, 2010 U.S. Dist. LEXIS 119702, at *86. Indeed, in this District, "[c]ourts routinely grant the expense requests of class counsel." *In re Gilat Satellite Networks, Ltd*., No. CV-02-1510 (CPS)(SMG), 2007 U.S. Dist. LEXIS 68964, at *60 (E.D.N.Y. Sept. 18, 2007).

Moreover, "[g]ranting requests for expenses is consonant with the public policy underlying fee awards in common fund cases." *Key-Span Corp.*, 2005 U.S. Dist. LEXIS 29068, at *59. "Since counsel in a class action will necessarily incur substantial costs and expenses over the course of many years and will presumably have paid the expenses by the time a fee request is considered by the Court, providing for reimbursements of costs and expenses is a component of affording adequate

compensation to counsel in order to encourage attorneys to pursue common fund cases." *Id*. Thus, "Counsel is entitled to reimbursement from the common fund for reasonable litigation expenses." *ML Tech*, 246 F.R.D. at 178 (citing cases).[22]

Plaintiffs' Counsel incurred a total of $1,047,005.77 in reasonable and necessary litigation expenses on behalf of the Class from the inception of the Action through October 11, 2013 of the type typically incurred and customarily charged to clients in litigation. Brower Decl., ¶310; *see also id.*, Exhibits D, E, and F. These expenses include, among others, the costs of experts and consultants, online legal and factual research, developing and maintaining the electronic discovery platform that counsel used to code, review, analyze and search the over four million pages of documents produced in the course of the Action, court fees, travel expenses, copying costs, facsimile charges, court reporting services, postage and delivery expenses, experts' fees, and Judge Weinstein's mediation fees. Brower Decl., ¶¶312, 314. [23] The foregoing expense items are billed separately, and such charges are not duplicated in the respective firms' billing rates.

The Notice advised that Plaintiffs' Counsel would be seeking payment of litigation expenses in an amount not to exceed $2 million to be paid from the Settlement Amount. Although the actual request is almost a million dollars less than projected in the Notice, to date, no objections have been received regarding the maximum expense figure set forth therein.

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[22] *See also China Sunergy*, 2011 U.S. Dist. LEXIS 53007, at *17 (in a class action, attorneys may be compensated "for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were 'incidental and necessary to the representation'"); *ML Funds*, 2007 U.S. Dist. LEXIS 9450, at *78-*79 (*accord*); *In re Indep. Energy Holdings PLC Sec. Litig*., 302 F. Supp. 2d 180, 183 n.3 (S.D.N.Y. 2003) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients."); *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they 'were incidental and necessary to the representation' of those clients.").

[23] *See, e.g.*, *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' reimburses attorneys [and] [f]or this reason, they are properly chargeable to the Settlement fund.").

In sum, Plaintiffs' Counsel respectfully submit that the expenses sought here ($1,047,005.77) were all reasonably and necessarily incurred, are of the type customarily reimbursed in securities cases, and should be approved.

IV. CONCLUSION

Accordingly, for all of the reasons set forth herein and in the Brower Declaration, Plaintiffs' Counsel respectfully submit that the requested fee is fair and reasonable and request that the Court award attorneys' fees equal to one-third of the Settlement Fund ($28,333,333), and reimbursement of their litigation expenses in the amount of $1,047,005.77, together with interest thereon at the same rate as earned on the Settlement Fund until paid.

DATED: October 10, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2013, I served true and correct copies of the foregoing Memorandum of Law In Support of Plaintiffs' Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses on Defendants' counsel by causing copies to be sent by the ECF system and by electronic mail on the following:

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