

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE SONUS NETWORKS, INC.
SECURITIES LITIGATION-II

Civil Action No. 06-CV-10040 (MLW)

**LEAD PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF
THE PETITION FOR (1) ATTORNEY'S FEES, (2) A CASE CONTRIBUTION
AWARD TO LEAD PLAINTIFF, AND (3) REIMBURSEMENT OF EXPENSES**

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PRELIMINARY STATEMENT

Wolf Popper LLP (“Wolf Popper” or “Lead Counsel”), Court-appointed Lead Counsel for Lead Plaintiff the Public Employees’ Retirement System of Mississippi (“MPERS” or “Lead Plaintiff”) and the Settlement Class (collectively, “Plaintiffs”), respectfully submits this memorandum of law in support of its (1) petition on behalf of all Plaintiffs’ Counsel¹, pursuant to Rules 23(h) and 54(d)(2) of the Federal Rules of Civil Procedure, for an award of attorney’s fees, (2) reimbursement of Plaintiffs’ Counsel’s litigation expenses and (3) for a case contribution award to Lead Plaintiff.

Through its litigation efforts Lead Counsel has obtained a benefit of nine million six hundred thousand dollars (\$9,600,000.00) for the Settlement Class (the “Settlement Benefit”), to be paid by Sonus Networks, Inc. (“Sonus” or the “Company”), on behalf of the other named Defendants.² The Settlement Fund has been fully funded and has accrued interest since February 17, 2009, represents the culmination of Lead Counsel’s litigation efforts since this Court approved MPERS’ selection of Lead Counsel in December 2006.

As compensation for these efforts in obtaining a \$9.6 million benefit for the Settlement Class, Lead Counsel respectfully requests that the Court (1) award an attorney’s fee to Plaintiffs’ Counsel out of the Settlement Fund equal to seventeen percent (17%) of the

¹ Plaintiffs’ Counsel, as used herein, shall mean Wolf Popper LLP and Berman DeValerio.

² In addition to the \$9.5 million cash payment (representing the “Settlement Fund”), Sonus, on behalf of all Defendants, has also agreed to pay up to \$100,000 of the costs of publishing, producing and disseminating the Settlement Notice and Publication Notice. This amount benefits the Settlement Class as the costs of Notice would otherwise be paid from the Settlement Amount, reducing the amount available for distribution. See Stipulation of Settlement (“Stipulation”), dated January 14, 2009, [Docket Entry No. 81], ¶5. As of March 13, 2009, the costs of mailing, printing and publishing the Settlement Notice and Publication Notice already total approximately \$117,000, thus the total benefit of \$9.6 million has been realized. See Declaration of James A. Harrod In Support of Final Approval of Proposed Settlement And Award of Attorney’s Fees And Expenses (the “Settlement Declaration”), ¶4. As costs of Notice here clearly exceed \$100,000, this amount should be considered as an additional benefit to the Class. See, e.g., Staton v. Boeing Co., 327 F.3d 938, 975 (9th Cir. 2003) (noting that where the defendant pays the justifiable cost of notice to the class, it is reasonable “to include that cost in a putative common fund benefiting the plaintiffs for all purposes, including the calculation of attorneys’ fees.”); In re Fidelity/Micron Sec. Litig., 167 F.3d 735, 737 (1st Cir. 1999) (pursuant to Rule 23(c)(2), the incursion of settlement administration and notice expenses were “necessary” [and required] to bring this action “to a climax.”).

Settlement Benefit, or \$1,632,000, including interest on such fee at the same rate and for the same period as earned by the Settlement Fund, and (2) order reimbursement of Plaintiffs' Counsel's litigation expenses out of the Settlement Fund, in the amount of \$34,506.28.

This fee petition is governed by an agreement negotiated between Lead Counsel and MPERS at the outset of the litigation. The schedule of percentage fees awarded to all Plaintiffs' counsel is incorporated in the retention agreement previously submitted to the Court on January 30, 2009. See January 30, 2009, Declaration of James A. Harrod, Exhibit A [Docket Entry # 83]. Moreover, Lead Plaintiff has reviewed, and approved this fee and expense petition. See Declaration of George W. Neville, Esq. In Support of Final Approval of Class Action Settlement and Award of Attorney's Fees Expenses and a Case Contribution Award, ¶9 ("MPERS Declaration"), annexed as Exhibit H to the Settlement Decl.

As discussed below, the requested attorney's fee falls well below the range of fees that are customarily sought by, and awarded to, experienced counsel in similar contingent-fee litigation in this Circuit and elsewhere. The requested fee is clearly reasonable based on the pertinent factors assessed by courts in this Circuit, including the risk of nonpayment, the time and labor required, the novelty and difficulty of the factual and legal issues, the amount involved and the results obtained, and the experience and skill of class counsel.

The reasonableness of the requested fee is even more clear when compared to Plaintiffs' Counsel's lodestar since Plaintiffs' Counsel's fee request represents a discount to its lodestar in this action. This lodestar "cross-check" further confirms the reasonableness of the fee requested in view of the risks undertaken by Plaintiffs' Counsel in pursuing the claims asserted, the quantum of work performed, and the results achieved for the benefit of the Settlement Class.

This petition includes a request for a case contribution award to Lead Plaintiff in the amount of \$9,680. Such awards are provided for under the Private Securities Litigation Reform Act of 1994 (“PSLRA”), 15 U.S.C. 78u-4(a)(4), and the modest amount requested by Lead Plaintiff is appropriate in light of the diligent efforts undertaken by MPERS and the result it achieved for the benefit of the Settlement Class. Moreover, compensation for the time spent dedicated to this litigation is appropriate where counsel from the Office of the Attorney General of the State of Mississippi would have otherwise been working on a number of unrelated non-PSLRA, fee-shifting cases for which the State would likely have been compensated and instead was required to devote time and effort to the Sonus litigation.

ARGUMENT

I. THE REQUESTED ATTORNEY’S FEE IS REASONABLE AND SHOULD BE AWARDED

A. The Common Fund Doctrine

The Supreme Court has long recognized the “common fund” exception to the general rule that a litigant bears his or her own attorney’s fees. Trustees v. Greenough, 105 U.S. 527 (1882). The Court explained the rationale for the common fund principle in Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980):

[T]his Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole Jurisdiction over the fund involved in the litigation allows a court to prevent . . . inequity by assessing attorney’s fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

See also In re Tyco Int’l, Ltd. Multidistrict Litig., 535 F. Supp. 2d 249, 265 (D.N.H. 2007) (“By assessing attorneys’ fees and litigation expenses against a common fund, the court spreads these costs proportionately among those benefitted by the suit.”) (citing Boeing, 444

U.S. at 478).

The common fund doctrine encourages counsel to protect the rights of persons having relatively small claims while preventing counsel's unjust enrichment. The Supreme Court has "long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission[.]" Tellabs v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2504 (2007) (citing cases); see also Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338 (1980) (class actions have important role of "vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost"); J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (private actions provide "a most effective weapon in the enforcement" of the federal securities laws and are "a necessary supplement to [SEC] action").

B. The Percentage-of-Fund Method is Preferred in Awarding Attorney's Fees in Common Fund Cases

Courts favor awarding fees from a common fund based upon the percentage-of-the-fund method. See Blum v. Stenson, 465 U.S. 886, 900 n.16 (1984) (stating that in common fund cases "a reasonable fee is based on a percentage of the fund bestowed on the class"). The First Circuit held in In re Thirteen Appeals Arising Out of the San Juan DuPont Plaza Hotel Fire Litig., 56 F.3d 295 (1st Cir. 1995), that district courts retain discretion in common fund cases to calculate counsel fees either on a percentage-of-fund, or "POF," basis or by using the lodestar method. The court stated, however, that use of the lodestar method in common fund cases "breaks from precedent," id. at 305, and that "[o]ur decision is driven both by our recognition that use of the POF method in common fund cases is the prevailing praxis and by the

distinct advantages that the POF method can bring to bear in such cases.”³ Id. at 307; see also Nilsen v. York County, 400 F. Supp. 2d 266, 270-71 (D. Me. 2005) (“As between the two methods, the First Circuit has noted that the percentage-of-funds method is the prevailing practice, and that it may have distinct advantages over the lodestar approach.”).

The First Circuit has recognized that the percentage-of-fund method is easier to apply than the lodestar method, which “forc[es] the judge to review the time records of a multitude of attorneys in order to determine the necessity and reasonableness of every hour expended.” Thirteen Appeals, 56 F.3d at 307. In contrast, the court stated, “the POF method permits the judge to focus on ‘a showing that the fund conferring a benefit on the class resulted from’ the lawyers’ efforts.” Id. (quoting Camden I Condo. Ass’n v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991)). The First Circuit noted that the “shift in focus lessens the possibility of collateral disputes that might transform the fee proceeding into a second major litigation.” Id.; see also In re Relafen Antitrust Litig., 231 F.R.D. 52, 77-78 (D. Mass. 2005) (concluding, based on Thirteen Appeals, that percentage method is most appropriate in common fund case where pool of money is to be divided among class members).

Finally, the Court of Appeals made the related point that the percentage method better reflects the market value of counsel’s services than the lodestar approach:

[B]ecause the POF technique is result-oriented rather than process-oriented, it better approximates the workings of the marketplace. We think that Judge Posner captured the essence of this point when he wrote that “the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character.” . . . [T]he market pays for the result achieved.

Id. at 307 (quoting In re Continental Ill. Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992)); see also

³ The First Circuit noted in Thirteen Appeals that the Eleventh and District of Columbia Circuits expressly require the use of the percentage-of-the-fund method in all common fund cases. 56 F.3d at 307; see Camden I Condo. Ass’n v. Dunkle, 946 F.2d 768, 771 (11th Cir. 1991); Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1271-72 (D.C. Cir. 1993). No Court of Appeals has mandated the use of the lodestar method to the exclusion of the percentage-of-fund method.

Tyco, 535 F. Supp. 2d at 265 (“The POF method is appropriate in common fund cases because it ‘rewards counsel for success and penalizes it [counsel] for failure.’”) (quoting In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 821 (3d Cir. 1995)); In re Sequoia Sys., Inc. Sec. Litig., No. 92- 11431-WD, 1993 WL 616694, at *2 (D. Mass. Sept. 10, 1993) (percentage fee awards “ensure that those who are engaged in the plaintiff’s side of securities litigation are not unduly discouraged from prompt resolution of these cases and full pursuit of the claims of plaintiffs who, absent such counsel, would be unlikely to have any vindication of the rights that they have in this setting.”)

1. Because the Requested Percentage Fee Is Consistent With the Fee Agreement Between Lead Plaintiff and Lead Counsel It is Presumably Fair

The requested fee of 17% comports with the arms-length fee agreement made in advance with Lead Plaintiff MPERS, a sophisticated litigant in securities fraud class action cases. See MPERS Decl., ¶9. As discussed below, the requested percentage award sought is also in keeping with, or lower than, what the market pays counsel to handle such protracted and risky cases on a fully contingent basis.

“[C]ourt[s], ‘should accord a presumption of reasonableness to any fee request submitted pursuant to [an] agreement ... between a properly-selected lead plaintiff and properly-selected lead counsel.’” Craig v. Sears Roebuck & Co., 253 F. Supp. 2d 1046, 1051 (N.D. Ill. 2003) (citation omitted). Here, the percentage fee requested is the result of a negotiation between Lead Plaintiff and Lead Counsel and courts have generally been deferential to such agreements. In Pavlidis v. New England Patriots Football Club, 675 F. Supp. 707 (D. Mass. 1987), attorneys in a common fund case sought an award of attorney fees pursuant to a contingent fee agreement that they had previously filed with the court. Id. at 709. The court, in determining whether the

requested fee was fair and reasonable, listed a number of factors the court could consider but noted that it “must apply these factors in the context that there is an existing contingency fee agreement, which, absent extenuating circumstances, should be enforced according to its terms.” *Id.* at 710. The court then upheld the fee agreement as fair and reasonable following an examination of defendants’ objections. See *id.* at 711-12; see also *In re Synthroid Marketing Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) (noting that “actual [fee] agreements” and “data from securities suits where large investors have chosen to hire counsel up front” are probative of appropriate percentage).

C. The Requested Attorney’s Fee Is Reasonable Based on an Analysis of the Applicable *Johnson* Factors

The First Circuit has “embraced,” if not formally adopted, the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), “for use in sculpting fee awards.” *Nilsen*, 400 F. Supp. 2d at 273 (“The majority of Circuits review percentage-of-funds fee awards by using multifactor tests in which the district courts must examine and set forth findings on each factor.”); *Coutin v. Young & Rubicam Puerto Rico, Inc.*, 124 F.3d 331, 337 n.3 (1st Cir. 1997) (citing *Johnson*, 488 F.2d at 717-19 and *Segal v. Gilbert Color Sys., Inc.*, 746 F.2d 78, 86 (1st Cir. 1984)).⁴ The *Johnson* factors are:

- (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorney(s) due to acceptance of the case; (5) the customary fee; (6) the nature of the fee (fixed or contingent); (7) the time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability**

⁴ The Second, Third, and Sixth Circuits require multifactor analyses, with some variation in the actual factors, in assessing the reasonableness of a percentage-based fee. See *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000); *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516-17 (6th Cir. 1993). The Fourth, Tenth, and Eleventh Circuits have explicitly adopted the twelve *Johnson* factors. See *MRRM, P.A. v. W.R. Grace & Co.*, 404 F.3d 863, 867-68 (4th Cir. 2005); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454-55 (10th Cir. 1988); *Camden I*, 946 F.2d at 775; but see *Tyco*, 535 F. Supp. 2d at 266 (“draw[ing] loosely” on five of the factors employed by the Second and Third Circuits that the court deemed most relevant).

of the attorney(s); (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) the size of awards in similar cases.

Id. (emphasis added to factors analyzed below). Analysis of the applicable factors supports a seventeen percent attorney’s fee. The fourth, seventh, tenth and eleventh factors are generally inapplicable or are unlikely to be probative to this Petition and are not specifically addressed. However, none of those factors weigh against the requested fee. The discussion of the Johnson factors continuing below, is presented in general order of significance. See In re Xcel Energy, Inc. Sec., Derivative & “ERISA” Litig., 364 F. Supp. 2d 980, 993 (D. Minn. 2005) (“Plainly, not all of the individual Johnson factors will apply in every case, so the court has wide discretion as to which factors to apply and the relative weight to assign to each.”).

1. The Customary Fee and the Size of Awards in Similar Cases

If a percentage fee is similar, or less, than what counsel would have been able to otherwise negotiate in the marketplace, it is presumably reasonable. See Missouri v. Jenkins, 491 U.S. 274, 285 (1989); Thirteen Appeals, 56 F.3d at 307 (percentage-of-fund method “better approximates the workings of the marketplace” than lodestar method). If this were a non-class or representative litigation, the customary fee arrangement would similarly be contingent, on a percentage basis, and in the range of as much as one-third (or more) of the recovery. See Blum, 465 U.S. at 903 n.* (“In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.”); see also Nilsen, 400 F. Supp. 2d at 282-83 (applying “market-mimicking” approach, which seeks to emulate market price for legal services in light of risk of nonpayment and normal level of compensation in the market, and awarding fee of 25% of \$3.3 million common fund in civil rights action). Here the fee was in fact negotiated between

Lead Plaintiff and Lead counsel, as discussed above.

A 17 percent fee falls significantly below the range of fees regularly awarded by district courts within this Circuit. “Courts in the First Circuit have recognized that fee awards in common fund cases typically range from 20 to 30 percent.” In re Lupron Mktg. & Sales Practices Litig., No. 01-CV-10861 RGS, 2005 WL 2006833, at *5 (D. Mass. Aug. 17, 2005) (citing, *inter alia*, In re Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D. 197, 216 n.45 (D. Me. 2003); Conley v. Sears, Roebuck & Co., 222 B.R. 181, 187 (D. Mass. 1998); and In re Fleet/Norstar Sec. Litig., 935 F. Supp. 99, 109 (D.R.I. 1996)); *see also* Mazola v. May Dep’t Stores Co., No. 97 CV 10872-NG, 1999 WL 1261312, at *4 (D. Mass. Jan. 27, 1999) (“The normal percentage awarded by federal courts is 20-30% of the value of the settlement, with 25% being a ‘benchmark.’ . . . [D]istrict court cases . . . show that, in this circuit, percentage fee awards range from 20% to 35% of the fund. This approach mirrors that taken by the federal courts in other jurisdictions.”) (citing cases; record citation omitted); In re StockerYale, Inc. Sec. Litig., No. 1:05CV00177-SM, 2007 WL 4589772, at *6 (D.N.H. Dec. 18, 2007) (awarding 33% of \$3.4 million common fund); Gorsey v. I. M. Simon & Co., No. 86-1875-Z, 1991 WL 181439, at *2 (D. Mass. Sept. 4, 1991) (awarding 25% fee, reduced from requested 41% fee, of \$850,000 settlement). Indeed, in Nilsen, as noted above, Judge Hornby thoroughly considered the various methods for fixing a reasonable fee in a class action and finally settled on 25 percent, partly in the “hope that it will generate better evidence of the attorney fee market in future cases and more rational and predictable awards.” 400 F. Supp. 2d at 283.

Further, several judges in this District have issued unpublished orders awarding attorney’s fees at percentages much greater than seventeen percent in securities class actions.

See In re Transkaryotic Therapies, Inc. Sec. Litig., No. 03-10165-RWZ (D. Mass. June 3, 2008) (24%); In re Lernout & Hauspie Speech Products, N.V. Sec. Litig., No. 99-10237 (NG) (D. Mass. Mar. 30, 2009) (33%); Parkside Cap. Ltd. v. Xerium Tech. Inc., No. 06-10991-RWZ (D. Mass. Feb. 18, 2009) (25%); Bobbitt v. Filipowski, No. 04-12263-PBS (D. Mass. July 1, 2008) (30%); In re American Tower Corp. Sec. Litig., No. 06-CV-10933 (MLW) (D. Mass. June 11, 2008) (22.69%); In re Eaton Vance Corp. Sec. Litig., No. 01 CV 10911 EFH (D. Mass. Apr. 26, 2006) (30%); Deckler v. Ionics, Inc., No. 03-CV-10393-WGY (D. Mass. Apr. 4, 2005) (30%); In re Segue Software, Inc. Sec. Litig., No. 99-10891-RGS (D. Mass. July 31, 2001) (33%); Chalverus v. Pegasystems, Inc., No. 97-12570-WGY (D. Mass. Dec. 19, 2000) (33%); In re V-Mark Software, Inc. Sec. Litig., No. 05-12249-EFH (D. Mass. Nov. 24, 1998) (33- 1/3%); In re Zoll Med. Corp. Sec. Litig., No. 94-11579-NG (D. Mass. Oct. 5, 1998) (33-1/3%); Friedberg v. Discreet Logic Inc., No. 96-11232-EFH (D. Mass. Nov. 25, 1997) (30%); Abato v. Marcam Corp., No. 94-11625-WGY (D. Mass. July 29, 1996) (33-1/3%); In re Cambridge Biotech Corp. Sec. Litig., No. 93-12486-REK (D. Mass. Apr. 4, 1996) (30% of cash and stock); In re Copley Pharm., Inc. Sec. Litig., No 94-11897 (WGY) (D. Mass. Feb. 8, 1996) (33-1/3%) (annexed collectively to the Settlement Decl. as Exhibit F).

In addition to the recent history of fee awards at rates much greater than 17 percent, a well-regarded empirical study of attorney's fees in class actions nationwide also supports the requested fee. Theodore Eisenberg and Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27 (2004) (hereinafter "Eisenberg and Miller") (annexed to Settlement Declaration as Exhibit E).⁵

Eisenberg and Miller used the data to develop an innovative "lookup table" by which

⁵ Professors Theodore Eisenberg and Geoffrey P. Miller studied two comprehensive sets of class action decisions between 1993 and 2002 and concluded that client recovery is overwhelmingly the most important determinant of the fee award.

courts can easily and effectively evaluate the reasonableness of a fee request by comparing the request with average awards in cases of similar magnitude. See id. at 72-73 & table 7. The “lookup table” sets forth, in ten deciles, recovery ranges, mean and median fee percents, and standard deviation fee percentages. Id. at 73 (table 7). Eisenberg and Miller suggest that fee requests falling within one standard deviation of the mean should be viewed as presumptively reasonable. Fee requests falling within one and two standard deviations above the mean should be viewed as potentially reasonable but in need of affirmative justification, and fee requests falling more than two standard deviations above the mean should be viewed as presumptively unreasonable. Id. at 74.

For one of the two datasets, the lookup table indicates that for settlements between \$5.2 million and \$9.7 million, the mean percentage fee is 28.7 percent with a standard deviation of 5.3 percent. Id. at 73 (table 7.B). A fee equal to 17 percent of the \$9.6 million Benefit is two standard deviations below that mean. For the other dataset, the mean percentage fee at the \$9.6 million recovery level is 25.6 percent with a standard deviation of 7 percent. Id. at 73 (table 7.A). The requested 17 percent fee is more than one standard deviation below the 25.6 percent mean in that dataset. Eisenberg and Miller further found that the median fee in all securities class actions is exactly 25 percent. Id. at 50. Under Eisenberg and Miller’s methodology, therefore, the requested fee is presumptively reasonable and should be awarded in the absence of contrary information.⁶

Courts in this District have awarded fees in excess of those benchmarks established in

⁶ The Eisenberg and Miller study has been favorably cited by district courts evaluating the reasonableness of attorney’s fee requests. See Hicks v. Morgan Stanley & Co., No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) (approving a 30 percent fee in the settlement securities class action for \$10 million, noting Eisenberg and Miller’s finding that the mean percent fee for settlements between \$9.7 million and \$15 million was a comparable 28 percent); In re Educ. Testing Serv. Praxis Principles of Learning and Teaching: Grades 7- 12 Litig., 447 F. Supp. 2d 612 (E.D. La. 2006) (approved a 29% fee in an \$11.1 million settlement, by considering a “benchmark” percentage based exclusively on the Eisenberg and Miller study).

either the Eisenberg and Miller study or the 25% benchmark mentioned in The Manual For Complex Litigation. THE MANUAL FOR COMPLEX LITIGATION, FOURTH §14.121 (“Attorney fees awarded under the percentage method are often between 25% and 30% of the fund. Several courts have established benchmarks . . . Awarding attorneys 25% of a common fund represents a typical benchmark”) (citations and footnotes omitted). For example, in Relafen, 231 F.R.D. 52, Judge Young awarded a 33-1/3 percent fee in the \$75 million settlement of an antitrust class action. One objecting class member argued that under Eisenberg and Miller’s methodology, class counsel’s fee should be no more than the 23.9 percent mean at the corresponding level of recovery. Id. at 80. Judge Young characterized Eisenberg and Miller as “thorough and objective,” but overruled the objection and awarded a fee *greater* than Eisenberg and Miller’s “mean” percent fee. Id. Although Judge Young declined to adopt Eisenberg and Miller’s methodology as “the be all and end all of analysis,” the court observed that a 33-1/3 percent fee remained supportable under their approach. Id. at 81 & n.22 (The court “notes the amount requested here falls just outside of one standard deviation.”).

In sum, Lead Counsel submits that the requested 17 percent fee is well below benchmark and customary attorney’s fee awards commonly made in class action settlements in this and other Circuits, and is unquestionably in the range of percentage fees typically awarded in litigation of this kind. Accordingly, this factor amply supports the fee requested.

2. The Contingent Nature of the Fee and the Risk of Nonpayment

“Many cases recognize that the risk assumed by an attorney is ‘perhaps the foremost factor’ in determining an appropriate fee award.” Lupron, 2005 WL 2006833, at *4 (quoting Goldberger, 209 F.3d at 54). This risk encompasses not only the risk of zero payment, but also the risk of underpayment. See Continental Ill., 962 F.2d at 569-70.

The contingency risk here was real from the outset and supports the requested fee. Plaintiffs' Counsel undertook this action on a strictly contingent-fee basis, and invested a substantial amount of time and money to prosecute the action with no guarantee of compensation or recovery of costs. There was a substantial risk of nonpayment throughout this litigation.⁷ As noted herein and further elaborated upon in the Final Approval Memorandum⁸, the merits of the claims involve complex issues concerning damages, loss causation and the statute of limitations that have been sharply disputed from the inception of the case and, assuming that this action proceeded beyond the pleading stage, would have been disputed on summary judgment and at trial in the absence of the Settlement. See Relafen, 231 F.R.D. at 80 (adopting counsel's argument that "Class Counsel alone bore the risk of the case being dismissed at the pretrial stage, of not prevailing at trial, or even losing on appeal"). In particular, proving damages presented a significant, constant risk given the content of the disclosures that Lead Plaintiff alleged to have resulted in the dissipation of the artificial inflation in Sonus stock and the movement of Sonus's stock price during (and after) the Settlement Class Period. See Lupron, 2005 WL 2006833, at *4 ("History is replete with cases in which plaintiffs prevailed at trial on issues of liability, but recovered little or nothing by way of damages.") (citing instances).

Moreover, since the motion to dismiss had not been decided it was possible that the case could be dismissed at the pleading stage. Given the heightened pleading standard imposed by the PSLRA and the increasing scrutiny exacted on plaintiffs at the class certification stage, there were significant risks that the case could falter at either of those junctures. The age of the case

⁷ Since the fee request results in a negative multiple to Plaintiffs' Counsel's lodestar, the request does not reflect a premium for the contingency risks of non-payment or underpayment.

⁸ See Lead Plaintiff's Memorandum of Law In Support of Its Motion for Final Approval of the Proposed Settlement and Plan of Allocation of the Net Settlement Fund (the "Final Approval Memorandum") at pp. 17-23, filed contemporaneously.

posed substantial risk related to Lead Plaintiffs' ability to obtain sufficient evidence to prove its case, which risk would have become manifest on a summary judgment motion or at trial. See Settlement Decl. ¶¶30-39.

Notwithstanding the risk of nonpayment, Lead Counsel committed substantial financial resources and labor to the prosecution of this case and achieved a compromise on favorable terms.

In sum, Lead Counsel bore substantial risks in bringing this litigation, which was by no means a "sure thing," on a contingent-fee basis. These risks would have supported a contingency multiple of lodestar and further demonstrate the reasonableness of the fee request.

3. The Time and Labor Required

The proposed Settlement is the product of considerable time and labor expended by Lead Counsel. In connection with the filing of the Complaint, Lead Counsel conducted an extensive investigation into the facts and law underlying the issues in this case. This investigation included a review of Sonus's Settlement Class Period SEC filings and other public disclosures and pertinent media reports; interviews of dozens of former Sonus employees; a preliminary damages and loss causation analysis; and analysis of applicable including published opinions of this Court, and in this Circuit, in securities cases. See Settlement Decl. ¶¶10-12.

In particular, Lead Counsel undertook very significant efforts to re-confirm and validate information contained in the complaint in the predecessor action based on confidential witnesses. Id. ¶10.

Subsequently, Plaintiffs drafted a lengthy brief in opposition to Defendants' motion to dismiss on issues of statute of limitations, loss causation, damages and controlling person liability. In addition to the legal research, analysis and drafting in connection with Lead

Plaintiff's opposition to that motion, Lead Counsel made several supplemental submissions in further opposition to defendants' motions to dismiss.

While the motion to dismiss was pending before the Court, the parties agreed to conduct settlement discussions. These discussions were informed by a review and analysis of the publicly available information about Sonus and the allegations in the Complaint, as well as the information obtained through Lead Counsel's investigation provided by confidential witnesses, analysis provided by FMA concerning damages and loss causation, and an analysis of applicable legal precedent impacting the issues in the case. See Settlement Decl. ¶¶16-24. Lead Plaintiff's analysis also involved a review of settlements of comparable actions and the standards for class certification in the First Circuit. Lead Plaintiff requests, and Sonus produced informally, documents concerning Sonus's operating results and financial performance during the putative class period. Sonus also made presentations to Lead Counsel concerning the relative merits of the claims alleged in the Complaint. Id., ¶¶16-18. These discussions ensued over a two month period.

After a settlement in principle had been reached, as memorialized in an October 3, 2008 Memorandum of Understanding (the "MOU"), Lead Plaintiff conducted confirmatory discovery. Id., ¶¶25-27. Sonus produced and Lead Counsel reviewed and analyzed approximately 7,500 pages of largely confidential documents, including archived email and email attachments from certain of the Individual Defendants. These documents concerned the matters relevant to this Action. After reviewing the documents produced by Sonus, Lead Plaintiff took the depositions of (a) Defendant Hassan M. Ahmed, who during the class period was Sonus's CEO, President and a member of the Board of Directors (b) Defendant Jeffrey Mayersohn, Sonus's Vice-President of Customer Support and Professional Services during the class period, and (c) Stephen

Collins, Sonus's Vice President, North American Sales.

The number of hours spent by Plaintiffs' counsel, which were spent efficiently and without duplication of effort, also reflect the substantial efforts entailed in bringing this action to a successful conclusion. Plaintiffs' counsel spent 3,289 hours litigating this action and achieving the Settlement, resulting in a combined lodestar of \$2,050,689.75. See Lodestar and Expenses Summary, Settlement Decl., Exhibit B, based on Wolf Popper and Berman DeValerio lodestar schedules, annexed as Exhibits C and attached to Exhibit D, respectively; see also StockerYale, 2007 WL 4589772, at *7 (awarding 33-1/3% fee where, among other things, counsel logged 1,239 hours).

Owing to the deadlines set in the Court's Order for Notice and Hearing, this lodestar does not include the time counsel will spend preparing the additional submissions in support of final approval, in order to address issues arising out of objections or exclusion requests. Further, if the Court approves the Settlement, it will be necessary for Lead Counsel to devote additional hours to oversight of the settlement administration and distribution process and filing a motion to authorize distribution of the Net Settlement Fund, for which counsel will not receive any additional compensation. Lead Counsel submits that the time and effort put in by Plaintiffs' counsel amply support the requested attorney's fee.

4. The Novelty and Difficulty of the Questions

Securities class actions are well-recognized for their complexity and difficulty. See In re Sumitomo Copper Litig., 189 F.R.D. 274, 281 (S.D.N.Y. 1999) (“[F]ederal courts . . . have long recognized that [securities class action] litigation is notably difficult and notoriously uncertain.” (internal quotes and citations omitted.)); Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977) (“[C]lass action suits have a well deserved reputation as being most complex.”). This

case was unquestionably complex and raised numerous difficult issues requiring expertise, the application of experience in similar matters, time and rigorous analysis.

The damages issues here are vigorously disputed and center on complex issues of loss causation that have been the subject of significant renewed debate since the Supreme Court's decision in Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336 (2005). In their motion to dismiss, Defendants challenged Plaintiffs' loss causation allegations by stressing that the disclosures Lead Plaintiff had identified as dissipating the inflation in Sonus common stock did not reveal fraud or disclose information that defendants were under prior obligation to disclose. These thorny issues of loss causation would require significant expertise to prove that statistically significant declines in Sonus's stock price were proximately caused by information that had previously been misrepresented or omitted. As the court in Tyco observed: "[T]he still-developing law of loss causation in securities cases created significant risk and uncertainty for plaintiffs. According to plaintiffs' theory, the misstatements by [defendants] proximately caused investors' losses, as shown by drops in Tyco's stock prices following the . . . corrective disclosures. None of those disclosures, however, involved a specific admission of fraud Instead, the disclosures mostly related to the integrity of Tyco's management." Tyco, 535 F. Supp. 2d at 260.

Ultimate resolution of the loss causation and damages issues would depend almost entirely upon expert testimony, leading unavoidably to a "battle of the experts" and the accompanying risk of limited or zero recovery. See id. at 260-61 ("Proving loss causation [at trial] would be complex and difficult. Moreover, even if the jury agreed to impose liability, the trial would likely involve a confusing 'battle of the experts' over damages. If, faced with conflicting expert testimony, the jury chose to embrace the most conservative estimate of

damages, then the ultimate award might turn out to be less than the proposed settlement.”).

Defendants have also raised significant defenses related to the statute of limitations, which they assert began to run from September 26, 2001, the first date on which Plaintiffs’ assert loss causation. Lead Plaintiff has contested this argument, and argued that the Settlement Class was not on inquiry notice until well after that date, and not until the January 16, 2002 removal of the “carrier class” designation from Sonus’s public statements. While Lead Plaintiff was confident that it could defeat this argument at the pleading stage, it certainly would have been re-introduced at summary judgment and trial. To rebut the defense Plaintiffs would be required to establish that the September 26, 2001 disclosures satisfy the standard under Dura for loss causation while not triggering inquiry notice under the applicable authority relating to the statute of limitations. See Final Approval Memorandum at pp. 22-23. Such balancing act would have been difficult and would require skillful advocacy.

In addition to the complexities posed by specific loss causation and statute of limitations issues, Lead Plaintiff bore the burden of proving scienter against the defendants and of obtaining a decision certifying the class.

Lead Plaintiff bore the burden to prove that Defendants made materially false and misleading statements concerning Sonus’s financial results, product demand and performance intentionally or with reckless disregard for the truth. Recklessness has been defined as “a highly unreasonable omission, involving not merely simple, or even inexcusable, negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious the actor must have been aware of it.” SEC v. Ficken, 546 F.3d 45, 47-48 (1st Cir. 2008) (quoting Greebel v. FTP Software, Inc., 194 F.3d 185, 198 (1st Cir. 1999)). After the commencement

of this action, the Supreme Court held that Defendants' explanations regarding scienter must be taken into account at the pleading stage as well as at trial: "A plaintiff alleging fraud in a § 10(b) action . . . must plead facts rendering an inference of scienter *at least as likely* as any plausible opposing inference. At trial, she must then prove her case by a 'preponderance of the evidence.' Stated otherwise, she must demonstrate that it is *more likely* than not that the defendant acted with scienter." Tellabs, 127 S. Ct. at 2513.

The facts surrounding Sonus's alleged misrepresentations about product quality, demand and performance raise sharply disputed issues concerning, among other things, Sonus's products' ability to carry voice traffic with "carrier class" reliability; whether the decline in demand for Sonus's products during the Settlement Class Period was the product of an industry-wide decline in spending or the product of poor product quality and undisclosed technical deficiencies. See Settlement Decl. ¶32. The alleged false statements would need to be made with scienter, proof of which is notoriously difficult, particularly where the evidence is circumstantial. "[T]he proof of scienter in fraud cases is often a matter of inference from circumstantial evidence," and is generally subject to multiple interpretations. Reisman v. KPMG Peat Marwick LLP, 965 F. Supp. 165, 172 (D. Mass. 1997) (quoting Herman & MacLean v. Huddleston, 459 U.S. 375, 390 n.30 (1983)); see also In re Stone & Webster, Inc. Sec. Litig., 253 F. Supp. 2d 102, 129 n.12 (D. Mass. 2003), aff'd in part, vacated in part on other grounds, 414 F.3d 187 (1st Cir. 2005) ("Absent a signed confession, detailing each defendant's state of mind, it is difficult to imagine what form such 'direct' evidence might take."). Here, where the events occurred as long as eight years ago, issues of proof on all elements of the case would be difficult, but scienter would be particularly difficult given the lapses in memory likely to accompany the passage of time. See Settlement Decl. ¶37.

In sum, the complexity and difficulty of establishing liability and damages in this action, and the difficulties posed by Defendants' affirmative defenses, clearly support the reasonableness of the requested 17 percent fee.

5. The Amount Involved and the Results Obtained

The Settlement provides the Settlement Class with a gross \$9.6 million benefit, and was secured despite the many risks and complexities discussed above. Plaintiffs' damages consultant has estimated that the Settlement Class, assuming a jury finding of liability on all of Plaintiffs' claims, suffered recoverable damages of approximately \$30 million to \$170 million. On a summary judgment motion and at trial, Defendants would contend that any declines in Sonus common stock on September 27, 2001 and January 16, 2002 were not caused by Defendants' misstatements concerning Sonus's product quality or demand, or the Company's business prospects. Accordingly, Defendants would no doubt proffer a damages estimate far lower than \$9.6 million.

The \$9.6 million Settlement Benefit represents either 30.1 percent, at the low end, or 5.6 percent, at the high end, of Plaintiffs' estimated classwide damages.⁹ This compares favorably, particularly in light of the risks and costs of continued litigation, to "the average 5.5%-6.2% of estimated losses recovered in securities fraud class [action] settlements since 1995." In re Charter Commc'ns, Inc. Sec. Litig., No. MDL 1506, 2005 WL 4045741, at *6 (E.D. Mo. June 30, 2005) (citing In re Rite Aid Corp. Sec. Litig., 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001)); see also In re Cendant Corp. Litig., 264 F.3d 201, 242 n.22 (3d Cir. 2001) (noting that approved settlement recoveries in securities class actions typically range from

⁹ As noted in the Final Approval Memorandum, at pp. 17-19, the issues related to loss causation resulting from Sonus's September 26, 2001 disclosure (which accounting for approximately \$140 million of the \$170 million in total damages) may have made establishing damages greater than \$30 million (the damages resulting from Sonus's January 16, 2002 disclosure) difficult.

1.6% to 14% of claimed damages). See also Final Approval Memo., pp. 9-12. Lead Counsel submits that given these factors, the Settlement is an excellent result and the requested attorney's fee is reasonable.

6. The Skill Required to Perform the Legal Services Properly and the Ability of the Attorneys

Plaintiffs' Counsel's representation of the Settlement Class during this litigation and achieving the Settlement has required skill, rigor and experience. As reflected in the firm resumes previously submitted to the Court, counsel have substantial expertise in this practice area, and the Settlement was obtained only through the application of such expertise. See Relafen, 231 F.R.D. at 80 (acknowledging quality representation and efforts of class counsel).

Defendants, ably represented here by two major law firms with established securities litigation practices, mounted an aggressive and vigorous defense and stood firm during the settlement negotiations. See Xcel, 364 F. Supp. 2d at 995 ("Defendants' attorneys . . . consistently put plaintiffs' counsel through the paces. All counsel consistently demonstrated considerable skill and cooperation to bring this matter to an amicable conclusion."); In re Global Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 467 (S.D.N.Y. 2004) ("Securities Lead Counsel obtained the Settlement in the face of vigorous opposition by defendants who were represented by some of the nation's leading law firms."). Moreover, "it is reasonable for Lead Counsel and the other plaintiffs' firms to be as well paid as their adversaries who did not work on a contingency basis." Charter, 2005 WL 4045741, at *17. This factor, and indeed all of the pertinent Johnson factors discussed above, support the requested attorney's fee.¹⁰

¹⁰ The reaction of the Settlement Class to the requested fee, while not one of the formal Johnson factors, is also relevant. See Relafen, 231 F.R.D. at 79-80 ("examin[ing] and carefully consider[ing] each of the objections" to the requested fee); Tyco, 535 F. Supp. 2d at 269 (considering number and merits of objections to fee request). Under the Court's February 4, 2009 Order for Notice and Hearing, Class members have until May 15, 2009 to submit objections, and Plaintiffs will file responses to any objections by June 5, 2009. As of the date hereof, no objections

D. The Requested Attorney’s Fee Is Reasonable When Cross-Checked Against Plaintiffs’ Counsel’s Lodestar

While this Court is not required to cross-check the requested 17 percent fee against Plaintiffs’ counsel’s lodestar in determining whether the fee is reasonable, see Relafen, 231 F.R.D. at 81 (citing Thirteen Appeals, 56 F.3d at 307), when a lodestar is used as a cross-check the focus is not on the “necessity and reasonableness of every hour” of the lodestar, but rather on the broader question of whether the requested fee appropriately reflects the degree of time and effort expended by counsel. Tyco, 535 F. Supp. 2d at 270 (quoting Thirteen Appeals, 56 F.3d at 307); see also In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 306 (3d Cir. 2005) (“The lodestar cross-check calculation need entail neither mathematical precision nor bean counting.”) (footnote omitted). The Supreme Court has indicated that the use of current, rather than historical, billing rates is appropriate in examining the lodestar because current rates more adequately compensate for inflation and loss of use of funds. See Jenkins, 491 U.S. at 283-84.

Here, Plaintiffs’ counsel collectively devoted 3,289 hours to the prosecution and settlement of this litigation as of the date hereof, resulting in a total lodestar of \$2,050,689.75. See Settlement Decl., Exhibit B. This lodestar yields a negative multiplier of 0.8. Given the number of hours invested by counsel at competitive rates, the risks undertaken and the results achieved, no multiple of lodestar is to be awarded based on the percentage fee capped by counsel’s agreement with Lead Plaintiff. A negative multiple is inherently reasonable as courts in this Circuit routinely award multiples ranging as high as 8. See Tyco, 535 F. Supp. 2d at 271 (finding multiplier of 2.697, on fee of 14.5% of \$3.2 billion settlement, “relatively low” and “appropriately compensates counsel for the risk that they

to the Settlement, Plan of Allocation or requested attorney’s fees and expenses have been filed with the Court or received by Plaintiffs’ Counsel.

assumed in litigating the case”); Relafen, 231 F.R.D. at 82 (finding multiplier of 2.02 on fee of 33-1/3% “appropriate” without extended discussion); Mazola, 1999 WL 1261312, at *3 (awarding 20 percent fee that yielded a multiplier of “less than 3”); Conley, 222 B.R. at 182 (awarding fee representing 20-25% of value added to settlement by debtor’s counsel, yielding multiplier of 8.9).¹¹

Lead Counsel has achieved an excellent result for the Settlement Class in an efficient and expeditious manner, and have avoided unnecessary expenditure of judicial and private resources. Lead Counsel’s focused litigation strategy and prompt, successful resolution of the action tends to support the requested fee. See In re Fidelity/Micron Sec. Litig., No. Civ. 95-12676-RGS, 1998 WL 313735, at *4 n.11 (D. Mass. June 5, 1998) (while action settled before discovery and requested fee would result in multiplier, “counsel should not be unduly penalized for promptly resolving litigation that could easily have been protracted”), vacated on other grounds, 167 F.3d 735 (1st Cir. 1999). Further, as Judge Woodlock remarked during the fairness hearing held in the Sequoia Systems securities litigation:

[T]he Lodestar figure here is one that might otherwise give me pause but for the evaluation that I’ve made of this case and the quality of the counsel involved in this case and the speed with which [this] relatively complex litigation has been resolved. I think that is a function of the quality of the counsel involved, their ability to get to the core of the case, the jugular of the case promptly, and effect a prompt resolution. ***That prompt resolution is a time value to the members of the class themselves.*** And I would not want to put myself in the position of in some way providing a disincentive to prompt resolution of the case simply because there were to be early on greater disparity between the Lodestar figure and the percentage figure involved in the case.

Sequoia Sys., 1993 WL 616694, at *1 (emphasis added).

¹¹ Courts in other Circuits are generally in accord. See, e.g., Rite Aid, 396 F.3d at 298-99, 303-04 (no abuse of discretion where district court approved fees with “fairly common” lodestar multiplier of 4.07, despite objection that multiplier could not exceed 3) (cited in Relafen, 231 F.R.D. at 82); Kurzweil v. Philip Morris Cos., Nos. 94 Civ. 2373 (MBM), 94 Civ. 2546 (BMB), 1999 WL 1076105, at *3 (S.D.N.Y. Nov. 30, 1999) (awarding 30% fee, equaling 2.46 multiplier, and noting that “multipliers of between 3 and 4.5 have been common in federal securities cases”) (Mukasey, J.).

In sum, Lead Counsel respectfully submits that a lodestar cross-check of Plaintiffs' Counsel's requested 17 percent fee further supports that that such fee request, when viewed in light of the results obtained and fees awarded in comparable cases, should be approved.

II. THE EXPENSES INCURRED BY PLAINTIFFS' COUNSEL ARE REASONABLE AND SHOULD BE REIMBURSED FROM THE SETTLEMENT FUND

In addition to an award of attorney's fees, counsel who create a common fund for the benefit of a class are entitled to reimbursement of reasonable litigation expenses from the fund. See In re Fidelity/Micron Sec. Litig., 167 F.3d 735, 737 (1st Cir. 1999) (“[L]aw firms are not eleemosynary institutions, and lawyers whose efforts succeed in creating a common fund are entitled not only to reasonable fees, but also to recover from the fund, as a general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax.”).

Here, Lead Counsel, on behalf of all Plaintiffs' Counsel, respectfully seek reimbursement of litigation and claims and settlement administration expenses in the amount of \$34,506.28. The declarations of Plaintiffs' Counsel, provide the Court with itemized schedules of the categories of expenses incurred. Settlement Decl., Exhibits C and D. The principal expenses incurred in the course of prosecuting this Action and achieving this Settlement include amounts paid and owing to Plaintiffs' consulting damages expert, court reporting costs for the depositions taken during confirmatory discovery and others amounts incidental to the prosecution of this matter.

Lead Counsel submits that the expenses were reasonably and necessarily incurred in prosecuting this action, achieving the proposed Settlement and should be reimbursed from the Settlement Fund.

III. THIS COURT SHOULD GRANT LEAD PLAINTIFF'S REQUEST FOR A CASE CONTRIBUTION AWARD

Lead Plaintiff respectfully moves for a reimbursement award for time spent to prosecute the Action. Over the course of this litigation, Lead Plaintiff expended 50 hours to fulfill its duties as a representative of, and fiduciary for, the Settlement Class. See MPERS Decl., ¶10. Accordingly, Lead Plaintiff requests an award of \$9,680 as reasonable compensation for making that contribution to the Settlement Class.

The PSLRA permits “the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of the class.” 15 U.S.C. § 78u-4(a)(4). Congress, in fact, intended to grant courts discretion to approve awards in appropriate cases. See H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 35 (1995) (“[L]ead plaintiffs should be reimbursed for reasonable costs and expenses associated with service as lead plaintiff, including lost wages, and [the committee] grants the courts discretion to award fees accordingly.”); S. Rep. No. 104-98 (1995) (“[T]he Committee grants courts discretion to award the lead plaintiff reimbursement for ‘reasonable costs and expenses’ (including lost wages) directly relating to representation of the class.”).

As a result, reimbursement awards “are not uncommon in class action cases and are within the discretion of the court.” Frank v. Eastman Kodak Co., 228 F.R.D. 174, 187 (W.D.N.Y. 2005). Indeed, courts in the First Circuit have found that “[i]ncentive awards are recognized as serving an important function in promoting class action settlements, particularly where [] the named plaintiffs participated actively in the litigation.” In re Lupron Mktg. Sales Practices Litig., 228 F.R.D. 75, 98 (D. Mass. 2005). Moreover, “because a named plaintiff is an essential ingredient of any class action, an incentive award can be appropriate to encourage or induce an individual to participate in the suit.” Relafen, 231 F.R.D. at 82 (citing In re Compact

Disc Minimum Advertised Price Antitrust Litig., 292 F. Supp. 2d 184, 189 (D. Me. 2003)); see Bussie v. Allamerica Fin. Corp., No. Civ.A. 97-40204-NMG, 1999 WL 342042, at *3 (D. Mass. May 19, 1999) (“In the context of securities litigation, incentive awards have received approval from courts as a means of compensating named plaintiffs for acting on behalf of a class and furthering the goals of class actions and the enforcement of federal securities laws.”) (citing cases).

One court in the First Circuit appears to have limited such awards to “‘reasonable costs and expenses’ over and above [a lead plaintiff’s] *pro rata* share of the recovery, and not to a traditional ‘compensation’ or ‘incentive’ award.” Swack v. Credit Suisse First Boston, LLC, No. 02-11943-DPW, 2006 WL 2987053, at *5 (D. Mass. Oct. 4, 2006).¹² Other courts in this Circuit, and in others, have awarded PSLRA lead plaintiffs compensation either for their time (as requested here) or for “services rendered to the class.” See In re Transkaryotic Therapies, Inc. Sec. Litig., No. 03-10165-RWZ (D. Mass. June 3, 2008) (awarding two class representatives over \$20,000 each as reimbursement for their time and expenses) (order annexed as the first order in Exhibit F to the Settlement Decl.); see also New Eng. Health Care Employees Pension Fund v. Fruit of the Loom, Inc., 234 F.R.D. 627, 635 (W.D. Ky. 2006) (compensating lead plaintiffs in consideration of time and expenses); In re Xcel, 364 F. Supp. 2d at 1000 (awarding \$100,000 collectively to eight lead plaintiffs for services rendered to class).¹³

¹² Under Credit Suisse, a representative plaintiff seeking reimbursement “must provide the court with meaningful evidence demonstrating his or her actual costs and expenses directly relating to the representation of the class, and those actual costs and expenses must be reasonable.” Id. Furthermore, “plaintiff should document the value of any lost opportunities – such as lost employer-granted vacation time, lost sales commissions, or missed business opportunities – and costs paid in relation to the litigation.” Id. While other authorities have not required such a showing, as discussed below, MPERS has clearly offered meaningful evidence of “lost opportunities.”

¹³ There are many decisions supporting a general incentive award to representative, or lead, plaintiffs in common fund class actions. See Denney v. Jenkins & Gilchrist, 230 F.R.D. 317, 354-55 (S.D.N.Y. 2005), aff’d in part, vacated in part on other grounds, 443 F.3d 253 (2d Cir. 2006) (granting application and finding \$10,000 to each lead plaintiff to be “modest” and “comparable” amount when compared to other incentive awards); Genden v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 700 F. Supp. 208, 209-10 (S.D.N.Y. 1988) (granting \$ 20,085 reimbursement

In this case, Lead Plaintiff unquestionably deserves the modest reimbursement award requested. Indeed, as a public pension fund with experience litigating similar representative actions, MPERS brought significant added value to the Settlement Class in this case. As part of its oversight of the litigation, Lead Plaintiff regularly conferred with counsel and reviewed multiple filings in the Action, including without limitation, complaints, briefing on Defendants' motions to dismiss, and all settlement documents. See MPERS Decl., ¶¶4-7. MPERS was also actively involved in all settlement negotiations and was fully prepared to participate actively in discovery, including depositions, if settlement talks broke down. See MPERS Decl., ¶8. Likewise, courts should "consider the relationship between the requested incentive award and the amounts recovered by absent class members under the settlement." Denney, 230 F.R.D. at 355 (footnote omitted). The requested compensatory award requested here is incredibly modest, constituting only 0.1% (or one one-thousandth) of the Settlement Benefit. Courts routinely approve much larger awards in PSLRA cases. See, e.g., In re Top Tankers, Inc. Sec. Litig., No. 06 Civ. 13761(CM), 2008 WL 2944620 (S.D.N.Y. July 31, 2008) (granting reimbursement award of approximately 0.3% of settlement fund to lead plaintiffs); Hicks v. Morgan Stanley, 2005 WL 2757792 (granting incentive award of approximately 0.1% of settlement fund to lead plaintiff).

Lead Plaintiff has clearly demonstrated that the time it spent managing and supervising this Action would have otherwise been spent working on other matters where it was likely to receive compensation for its time. MPERS Decl. ¶¶10-17. Lead Counsel was supervised in this

with respect to \$4 million settlement); Ingram v. The Coca-Cola Co., 200 F.R.D. 685, 694 (N. D. Ga. 2001) (approving incentive awards of \$303,000, which were nearly eight times greater than class payments). Among the purposes that are advanced by such awards are "to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and incur such expenses in the first place." Hicks v. Stanley, No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *10 (S.D.N.Y. Oct. 24, 2005).

Action by two senior attorneys from Office of the Attorney General of the State of Mississippi, George W. Neville and Geoffrey Morgan. Id., ¶5. Mr. Morgan and Mr. Neville spend significant time working on and supervising outside litigation where their time is or, could be, compensable. Id., ¶¶13-14. Directly as a result of the time expended by Mr. Morgan and Mr. Neville on this Action, the State of Mississippi was deprived of their time to work on such other matters where the state would be compensated for Mr. Neville and Mr. Morgan's time, resulting in a lost opportunity to the State. Id., ¶¶15-16. The rates at which Lead Plaintiff seeks compensation for Mr. Neville's and Mr. Morgan's time, \$190 and \$200 per hour, respectively, are eminently reasonable and at or below comparable rates in Jackson, Mississippi. Id., ¶¶10-11. This request for compensation of the lost earning opportunity of the State is within the authority granted by the PSLRA to compensate Lead Plaintiff for the "reasonable costs and expenses (including lost wages) directly relating to" MPERS representation of the Settlement Class in this Action. See 15 U.S.C. § 78u-4(a)(4). Therefore it is eminently reasonable that MPERS receive the modest amount requested as compensation for its time.

Accordingly, MPERS's request for a reimbursement award is well within the bounds of reasonableness and should be granted.

CONCLUSION

For the foregoing reasons, Lead Counsel for Lead Plaintiff MPERS, on behalf of all Plaintiffs' Counsel, respectfully requests that this Court award attorney's fees in the amount of \$1,632,000, plus accrued interest, order reimbursement of expenses in the amount of \$34,506.28, and award a case contribution award to Lead Plaintiff in the amount of \$9,680.

Dated: April 17, 2009

Respectfully submitted,

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Plaintiffs' Local Counsel

CERTIFICATE OF SERVICE

On April 17, 2009, I caused a copy of this
Document to be served by electronic mail via
the electronic filing system upon all counsel record.

/s/ James A. Harrod

James A. Harrod