UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
NORTHERN DIVISION

SHERYL COHEN FINE, *et al.*, Individually and on behalf of all others similarly situated, Plaintiffs, v. BOWL AMERICA, INC., *et al.*, Defendants.	Case No. 1:21-cv-01967-SAG

MEMORANDUM OF LAW IN SUPPORT OF CO-LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

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Plaintiffs' Counsel respectfully submit this motion pursuant to Rules 23(h) and 54 of the Federal Rules of Civil Procedure for an Order: (1) awarding Plaintiffs' Counsel[1] attorneys' fees of 28% of the Settlement Fund and Litigation Expenses of $336,349.03, and (2) awarding Plaintiffs and Class Representatives Sheryl Cohen Fine and John Risner $7,500 each, pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §78(u)-4(a)(4), to be paid from the Settlement Fund.

I. INTRODUCTION

Plaintiffs' Counsel have successfully resolved this class action in exchange for an all cash payment of $2.175 million to the Class. Plaintiffs' Counsel request an award of attorneys' fees of 28% of the total settlement amount, or $609,000 and reimbursement of $336,349.03 in litigation expenses they incurred in prosecuting and resolving this matter.[2] The requested fee award represents a significant discount (i.e. negative multiplier) from Plaintiffs' Counsel's lodestar of $3,285,382.25. Plaintiffs also request $7,500 as reimbursement to each of the Class Representatives for their time and service overseeing the litigation.

In awarding fees from a common fund in a class action, courts within the Fourth Circuit consider multiple factors, as discussed below. Here, Plaintiffs' Counsel devoted over 4100 hours to

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[1]Co-Lead Counsel" or "Plaintiffs' Counsel" means Cohen Milstein Sellers & Toll PLLC and Kohrman Jackson Krantz LLP. All capitalized terms used and not otherwise defined in this Memorandum have the meanings given to them in the Stipulation and Agreement of Settlement, dated as of August 27, 2024 (the "Stipulation"), previously filed with the Court (ECF No. 154-3). Emphasis is added and citations are omitted throughout, unless otherwise noted.

[2] The Trusts, who were the original lead plaintiffs in the Action, advanced funding for the litigation by agreeing to provide $250,000 to Co-Lead Counsel, subject to Co-Lead Counsel repaying the initial funding amount from any settlement or judgment if the Court awarded attorneys' fees and expenses. Co-Lead Counsel were paid by the Trusts during the pendency of the Action and will repay that amount ($250,000) out of any fee and expense award approved by the Court. The Trusts' advances are described in the fee affidavits submitted by Co-Lead Counsel. *See* Exs. 1-E ("Sommers Decl." and 1-F ("Krantz Decl.").

obtain a cash recovery of $2.175 million for the Class. The Settlement was achieved through the skill, experience, and effective advocacy of Plaintiffs' Counsel in the face of considerable risk and an aggressive defense mounted by Defendants. *See generally* Joint Declaration of Richard A. Speirs and Brett S. Krantz in Support of (i) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation; and (ii) Co-Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses ("Joint Decl."), submitted herewith.[3] Among other things, Plaintiffs' Counsel investigated the factual and legal basis for the claims alleged; filed the initial and amended complaints; overcame in part, multiple motions to dismiss by Defendants; fully litigated a motion for class certification and a motion to compel the production of privileged documents; conducted discovery of Defendants and non-parties; reviewed and analyzed thousands of pages of documents produced by Defendants and non-parties during discovery; searched for and reviewed documents produced by Plaintiffs; took or defended numerous depositions; engaged in full expert discovery including expert depositions; fully briefed a motion and cross motion for summary judgment; and engaged in an intensive mediation process conducted by Judge (then Magistrate Judge) Adam Abelson leading to the Settlement. *Id*., ¶¶16-50.

Plaintiffs' Counsel's efforts to date have been largely without compensation and the bulk of the fee has been wholly contingent upon the result achieved. Through Plaintiffs' Counsel's significant amount of work, they have demonstrated that they were prepared to take this case through trial if the Parties were unable to agree to a resolution that provided fair, reasonable, and adequate relief to the Class. In addition, Plaintiffs – who have overseen the Action – approve of and endorse the requested fee, and to date not a single Class Member has filed an objection to the request for an

[3] All exhibits referenced herein are attached to the Joint Declaration. For clarity, citations to exhibits that themselves have attached *exhibits* will be referenced as "Ex. __ - __." The first numerical reference is to the designation of the entire exhibit attached to the Joint Declaration ("1") and the second reference is to the exhibit designation within the exhibit itself.

award of fees and reimbursement of expenses which was disclosed in the Notice[4]

The requested fee is supported by the factors considered by courts in the Fourth Circuit when evaluating the reasonableness of fee requests and is consistent with fees routinely awarded for similar class action settlements. *See, e.g., See In re Celebrex Antitrust Litig.*, 2018 WL 2382091, at *5 (E.D. Va. Apr. 18, 2018) (awarding attorneys one-third fee). *See also In re Constellation Energy Grp., Inc. Sec. Litig.*, No. 1:08-cv-02854-CCB, slip op. (D. Md. Nov. 4, 2013) (awarding fees of one third of recovery, plus expenses) (Ex. I-1); *Deem v. Ames True Temper, Inc.*, 2013 WL 2285972, at *6 (S.D. W. Va. May 23, 2013) ("the one-third fee requested by counsel is very much in line with fee awards in similar common-fund cases"); *Anselmo v. W. Paces Hotel Grp.*, LLC, 2012 U.S. Dist. LEXIS 164618, at *10 (D.S.C. Nov. 19, 2012) ("The approximate 33% for fees provided here is reasonable in light of all pertinent factors, including precedent and beneficial results obtained."); *Smith v. Krispy Kreme Doughnut Corp.*, 2007 U.S. Dist. LEXIS 2392, at *6 (M.D.N.C. Jan. 10, 2007) ("In this jurisdiction, contingent fees of one-third (33.3%) are common."); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001) (citing affidavit of Professor John C. Coffee, Jr. of Columbia University Law School, in which 289 class action settlements are compiled ranging from under $1 million to $50 million, with average fee percentage of 31.71% and median of one-third).

Moreover, the reasonableness of the 28% fee request is confirmed with a lodestar cross-check which demonstrates that the fee requested would result in a ***negative*** multiplier of 0.18. A negative multiplier means that counsel is seeking to be paid for only a fraction of the lodestar expended on the litigation. *See In re Initial Pub. Offering Sec. Litig.,* 2011 WL 2732563, at *9 (S.D.N.Y. July 8, 2011) (noting that, with a negative multiplier, "every firm … was thus

[4] The deadline for filing objections is November 28, 2024. To the extent that any objections are filed Plaintiffs' Counsel will address them in their reply brief.

compensated for a small fraction of the time spent on the case"); *see also In re Marsh & McLennan Cos. Inc. Sec. Litig.,* 2009 WL 5178546, at *20 (S.D.N.Y. Dec. 23, 2009) ("The percentage fee requested represents a negative multiplier of 0.44 to the lodestar. Thus, not only are Lead Counsel not receiving a premium on their lodestar, their fee request amounts to a deep discount from their lodestar.") Thus, the lodestar cross-check further supports the requested fee.

Separately, Plaintiffs Fine and Risner seek awards of $7,500 each pursuant to the PSLRA, 15 U.S.C. §78u-4(a)(4), in connection with their participation in the litigation and representation of the Class. They support their applications with declarations setting forth the basis for the awards. *See* Declaration of Sheryl Cohen Fine ("Fine Decl."), Ex. 1-G; Declaration of John Risner ("Risner Decl."), Ex. 1-H. Finally, Plaintiffs' Counsel seeks reimbursement of $336,349.03 in incurred and unreimbursed litigation expenses. For all the following reasons, Co-Lead Counsel respectfully request that the Court: (1) award Plaintiffs' Counsel attorneys' fees of 28% of the Settlement Fund and Litigation Expenses of $336,349.03; and (2) award Ms. Fine and Mr. Risner $7,500 each for their service as Class Representatives.

II. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE

A. The Settlement Creates a Common Fund from Which a "Percentage-of-the-Fund" Fee Would Be Appropriate

Under Rule 23(h), "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). As the Supreme Court has recognized, a "lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). This common fund doctrine is based on the inherent powers of the federal court to "prevent . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Id.*

The two methods of calculating attorneys' fees in class actions are the percentage-of-the-

fund method and the lodestar method. *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 260 (E.D. Va. 2009). The percentage-of-the-fund method involves an award based on a percentage of the class's recovery, set by the court based on several factors. *Id*. The lodestar method requires multiplying the number of hours worked by counsel by a reasonable hourly rate, the product of which the court can then adjust by employing a "multiplier." *Id.* The Supreme Court has suggested that percentage-of-recovery is the appropriate method for awarding fees under the common fund doctrine. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("[U]nder the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class").

Most federal courts of appeals have also endorsed the percentage-of-recovery method as the appropriate method for determining an award of attorneys' fees in common fund cases.[5]

"While the Fourth Circuit has not definitively answered this debate, other districts within this Circuit, and the vast majority of courts in other jurisdictions consistently apply a percentage of the fund method for calculating attorneys' fees in common fund cases." *Mills*, 265 F.R.D. at 260; *see, e.g.*, *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, 2016 WL 1070819, at *5 (E.D. Va. Mar. 15, 2016) ("District Courts within this Circuit have also favored the percentage method."); *Archbold v. Wells Fargo Bank, N.A.*, 2015 WL 4276295, at *5 (S.D.W. Va. July 14, 2015) ("[T]here is a clear consensus among the federal and state courts, consistent with Supreme Court precedent, that the award of attorneys' fees in common fund cases should be based on a percentage of the recovery."); *Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 502 (E.D. Va. 1995) ("Although the Fourth

[5] *See, e.g.*, *Heien v. Archstone*, 837 F.3d 97, 100 (1st Cir. 2016); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 49 (2nd Cir. 2000); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821-22 (3rd Cir. 1995); *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012); *Rawlings v. Prudential- Bache Props., Inc.*, 9 F.3d 513, 515-16 (6th Cir. 1993); *Rawa v. Monsanto Co.*, 934 F.3d 862, 870 (8th Cir. 2019); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-50 (9th Cir. 2002); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994); *Camden I. Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1268-70 (D.C. Cir. 1993).

Circuit has not yet ruled on this issue, 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."); *Jones v. Dominion Res. Servs., Inc.*, 601 F. Supp. 2d 756, 758 (S.D.W. Va. 2009) ("The percentage method has overwhelmingly become the preferred method for calculating attorneys' fees in common fund cases.").

These courts recognize that the percentage-of-the-fund method is "more efficient and less burdensome than the traditional lodestar method, and offers a more reasonable measure of compensation for common fund cases." *Strang*, 890 F. Supp. at 503. It also better aligns the interests of class counsel and class members because it ties the attorneys' fee award to the overall result achieved, rather than hours expended by the attorneys. *Thomas v. FTS USA, LLC*, 2017 WL 1148283, at *3 (E.D. Va. Jan. 9, 2017), *see also Deem*, 2013 WL 2285972, at *5 ("The percentage method 'is designed to allow courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure.'" (quoting *In re Prudential Ins. Co. Am. Sales Litig.*, 148 F.3d 283, 333 (3d Cir. 1998)).

Co-Lead Counsel's application based on the percentage-of-fund method is therefore consistent with the law in this and other circuits. As explained below, the factors courts consider when assessing percentage-of-fund requests demonstrate the reasonableness of Co-Lead Counsel's requested fee, as does a cross-checking of the requested amount against Plaintiffs' Counsel's calculated lodestar.

B. A Fee Equal to 28% of the Settlement Fund Is Comparable to Awards in Similar Cases

The Supreme Court has observed that it has "consistently looked to the marketplace as our guide to what is 'reasonable.'" *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989). "Within the Fourth Circuit, contingent fees of roughly 33% are common." *Earls v. Forga Contracting, Inc*., 2020 WL 3063921 at *4 (W.D.N.C. June 8, 2020). Here, Plaintiffs' Counsel's 28% fee request is eminently reasonable when considering the customary awards in similar cases in this District and the Fourth Circuit. *See e.g*., *Kelly v. Johns Hopkins Univ*., 2020 WL 434473, at *3 (D. Md. Jan. 28, 2020) (finding that a "great weight of authority more than demonstrates that a one-third fee is justified in this case"); *Celebrex* , 2018 WL 2382091, at *5 ("Fee awards of one-third of the settlement amount are commonly awarded in cases analogous to this one"). Indeed, in securities class actions, courts in this Circuit often award fees of one-third. *See e.g., In re 2U Inc. Sec. Litig.,* No. 8:19-cv-03455-TDC, ECF No. 258 (D. Md. Dec. 9, 2022) (awarding 33.4% of $37 million settlement); *In re Star Sci., Inc. Sec. Litig*., 2015 WL 13821326, at *1 (E.D. Va. June 26, 2015) (awarding one-third of recovery in securities class action); *In re Constellation Energy Grp. Inc. Sec. Litig*., 2013 WL 12461134, at *1 (D. Md. Nov. 4, 2013) (attorneys' fees of 33-1/3% of the Settlement Fund in securities class action "is fair and reasonable under the 'percentage-of-recovery' method"). Here, Plaintiffs are requesting less than one-third of the Settlement Fund. The requested fee is especially supported here because courts generally award higher percentages on smaller settlement amounts and those percentages tend to go down as the dollar value of the settlement increases. *See* Eisenberg, Theodore and Miller, Geoffrey P., "Attorney Fees in Class Action Settlements: An Empirical Study" (2004). Cornell Law Faculty Publications. Paper 356. *http://scholarship.law.cornell.edu/facpub/356.* Indeed, it is not unusual for lower valued securities settlements to result in fee awards exceeding the 28% sought here. *In re Sundial Growers Inc. Sec. Litig*., No. 19-cv-08913-ALC, slip op. at 2 (S.D.N.Y. Oct. 6, 2022) (awarding 33 1/3% of $7 million

settlement) (Ex. 1-I); *The Penn. Ave. Funds v. INYX Inc*., No. 08-CV-6857--PKC, slip op. at 5 (S.D.N.Y. May 4, 2012) (awarding 33 1/3% of $1.1 million settlement) (Ex. 1-I); *In re Hi-Crush Partners L.P. Sec. Litig*., 2014 WL 7323417, at *12 (S.D.N.Y. Dec. 19, 2014) (awarding 33 1/3% of $3.8 million settlement and noting that "[i]n this Circuit, courts routinely award attorneys' fees that run to 30% and even a little more of the amount of the common fund"); *Fogarazzo v. Lehman Bros. Inc*., 2011 WL 671745, at *4 (S.D.N.Y. Feb. 23, 2011) (awarding 33.3% of $6.75 million settlement); and *In re NQ Mobile Inc. Sec. Litig*., No. 1:13-cv-07608, slip op. at 1 (S.D.N.Y. Mar. 11, 2016) (awarding 30% of $5.1 million settlement) (Ex. 1-I).

Accordingly, it is respectfully submitted that Co-Lead Counsel's request for 28% of the $2.175 million Settlement here would be consistent with a substantial body of case law in this Circuit and elsewhere.

C. Co-Lead Counsel's Fee Request Is Fair and Reasonable Under Fourth Circuit Factors

"In determining the reasonableness of attorneys' fees, courts look at the following factors: (1) the result obtained for the class; (2) the presence or absence of substantial objections by members of the class to the fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by the plaintiffs' counsel; and (7) awards in similar cases." *In re Genworth Sec. Litig.*, 210 F. Supp. 3d 837, 843 (E.D. Va. 2016). Certain district courts in this Circuit have applied a slightly different version of this standard, replacing the sixth factor with public policy considerations. *See, e.g.*, *Celebrex*, 2018 WL 2382091, at *4; *Mills*, 265 F.R.D. at 261 (citing, *inter alia*, *Goldberger*, 209 F.3d at 50).

There is some disagreement as to whether to apply the above seven factors, which were adopted from the Third Circuit's opinion in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 (3d Cir. 2000), or the 12-factor test from the Fifth Circuit adopted in *Barber v. Kimbrell's, Inc.*, 577

F.2d 216, 226 (4th Cir. 1978) (citing *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714 (5th Cir. 1974)).[6] *See Galloway v. Williams*, 2020 WL 7482191, at *5 (E.D. Va. Dec. 18, 2020); 5 Newberg on Class Actions §15:82 (5th ed. 2011) ("The Fourth Circuit utilized the Fifth Circuit's *Johnson* factors in a statutory fee-shifting case, so some district courts have utilized those factors in setting a percentage in common fund cases, while other district courts have used the Second Circuit's *Goldberger* factors and/or the Third Circuit's *Gunter* factors."). However, many of these *Johnson/Barber* factors overlap with the *Gunter* factors or are "subsumed in the calculation of the hours reasonably expended and the reasonableness of the hourly rate." *Galloway*, 2020 WL 7482191, at *6, 10-11; *see also Genworth*, 210 F. Supp. 3d at 843 (using the 7-factor Third Circuit test in evaluating the reasonableness of the requested fee and incorporating the *Johnson*/*Barber* factors into the lodestar cross-check).

Notably, "fee award reasonableness factors 'need not be applied in a formulaic way' because each case is different, 'and in certain cases, one factor may outweigh the rest.'" *Boyd v. Coventry Health Care Inc*., 299 F.R.D. 451, 463 (D. Md. 2014). Given the overlap in the factors considered within the Fourth Circuit, a consideration of the relevant factors under each of the standards supports Co-Lead Counsel's requested fee. Under either test, however, the requested fee easily satisfies the standards for reasonableness and approvability.

1. Co-Lead Counsel Obtained a Very Favorable Result for the Settlement Class

[6] The *Johnson*/*Barber* factors are: "(1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases." *Barber*, 577 F.2d at 226 n.28. Here, factors seven and eleven are not probative.

"The first and most important factor for a court to consider when making a fee award is the result achieved." *Genworth*, 210 F. Supp. 3d at 843; *see also Thomas*, 2017 WL 1148283, at *3 ("[T]he Court gives the most weight to the results obtained." (citing, *inter alia*, *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)). The Settlement provides $2.175 million in cash (or approximately $0.90 per share) for the benefit of the Class and reflects approximately 30% of Plaintiffs' expert's maximum estimate of reasonably recoverable aggregate damages of approximately $7.2 million and approximately 90% of Defendants' expert's estimated maximum damages amount of $2.4 million ¶¶58, 64. This percentage of recovery vastly exceeds recoveries in other approved securities settlements. *See, e.g.*, *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 667 n.22 (E.D. Va. 2001) (citing *Orman v. Am. Online, Inc.*, 1998 WL 1969646 (E.D. Va. Dec. 14, 1998), which approved a $35 million settlement amounting to approximately 5% of the maximum potential recovery); *see also In re Merrill Lynch & Co. Research Reports Sec. Litig.,* 246 F.R.D. 156, 167 (S.D.N.Y. 2007) (approving settlement that was "between approximately 3% and 7% of estimated damages"); *Schuler v. Meds. Co*., 2016 WL 3457218, at *8 (D.N.J. June 24, 2016) (approving settlement representing approximately 4% of estimated damages, noting that the recovery "fell squarely within the range of previous settlement approvals").

According to Cornerstone Research, which conducts annual and semi-annual reviews of securities class action settlements, for cases with total estimated damages (based on Cornerstone's analysis of settlements of less than $25 million from 2014 to 2022 plaintiffs recovered 18.8% of total estimated damages and 15.2% of estimated damages in 2023. *See* Ex. 1-B, Laarni T. Bulan and Laura E. Simmons, *Securities Class Action Settlements – 2023 Review and Analysis* (Cornerstone Research 2024), at 6. Having achieved a recovery of approximately 30% of the maximum estimated damages,

Plaintiffs greatly exceeded the average recovery for smaller settlements.[7]

Co-Lead Counsel obtained this recovery as a result of their effective advocacy on behalf of the Class and efficient prosecution of this case through decisions on Defendants' motions to dismiss the Complaint and the progression into fact and expert discovery, including review of thousands of pages of documents produced by Defendants and third parties and full briefing on summary judgment motions. ¶¶37-44. Furthermore, Plaintiffs' motion for certification of the class was fully briefed, argued and decided. As discussed in the Joint Declaration and Class Plaintiffs' Memorandum of Law in Support of Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation, there were significant risks that the Class might recover substantially less than the Settlement Amount—or nothing at all—if the case were to survive the pending summary judgment motion and proceed through continued litigation to a jury trial, followed by inevitable appeals. ¶¶51-6.

Importantly, Plaintiffs faced challenges in being able to prove to the ultimate fact finder that Defendants breached their fiduciary duty. Defendants strenuously argued at the motion to dismiss and summary judgment stages, and would continue to maintain at and trial, that (among other things) Plaintiffs would not be able to prove that Plaintiffs do not have sufficient facts to overcome the exculpatory provision in Bowl America's charter. Even if Plaintiffs prevailed on this issue at summary judgment (and this was a significant challenge), Defendants would certainly argue to the jury that Plaintiffs cannot prove that Defendants received "an improper benefit or profit in money, property, or services" or acted with "active and deliberate dishonesty" providing them with a defense under Maryland law. Defendants also assert that notwithstanding the exculpatory clause, Plaintiffs cannot

[7] While the cases in these studies present federal securities law claims for purchasers or sellers of stock rather than state law claims for stockholders as are asserted here, the data in these studies is nonetheless informative and strongly supports the strength of the settlement and the reasonableness of the fee being sought.

rebut the presumption of the business judgment rule under Maryland law because the Termination Fee was not unreasonable and more significantly, that they did not act fraudulently or unconscionably in approving the Merger. Ex 1 at ¶54. Even if Plaintiffs prevailed on this critical issue before the jury, it would certainly then become a prime issue for appeal by Defendants.

Plaintiffs also faced ongoing risks associated with the pending motions for summary judgment, Defendants' intention to revisit class certification, *in limine* motions seeking to limit damages or exclude evidence, trial, and likely appeals, which would extend the litigation for years and might lead to a smaller recovery or no recovery at all. The Court's modification of its class certification decision or granting of summary judgment in Defendants' favor potentially could have resulted in little or no recovery for the Class. *Id.* at ¶57.

Even surviving summary judgment in full and prevailing at trial would not have guaranteed a recovery larger than the $2.175 million Settlement. *See Miller v. Asensio & Co., Inc.*, 364 F.3d 223, 235 (4th Cir. 2004) (affirming judgment on jury verdict determining liability but awarding zero damages to plaintiffs); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant); *In re BankAtlantic Bancorp, Inc.*, 2011 WL 1585605, at *20-22 (S.D. Fla. Apr. 25, 2011) (following jury verdict for plaintiffs on liability, district court granted defendants' motion for judgment as a matter of law because there was insufficient evidence of loss causation), *aff'd*, 688 F.3d 713 (11th Cir. 2012).

Balanced against the many significant challenges of continued litigation and compared to the results achieved in many other securities class action settlements, the Settlement provides an excellent result for the Class and supports Co-Lead Counsel's request for attorneys' fees.

2. The Presence or Absence of Substantial Objections by Members of the Class

"A lack of objections by class members as to fees requested by counsel weighs in favor of

the reasonableness of the fees." *Genworth*, 210 F. Supp. 3d at 844. To date, not a single Class Member has objected to the Settlement or Co-Lead Counsel's fee request or Class Representatives' request for reimbursement awards. ¶¶78, n.5, 87, 126. Moreover, Class Representatives support the requested fee. See Exs. 1-G at ¶8, 1-H at ¶8. However, the deadline for objections is November 28, 2024, and Co-Lead Counsel will further address any objections in their reply papers, if necessary.

3. The Quality of Co-Lead Counsel's Work Supports the Requested Fee

The quality of the representation is another factor supporting Co-Lead Counsel's fee request. *See id.* ("The skill required in complex cases such as this involving massive discovery efforts and complicated issues of fact and law also weighs in favor of supporting the substantial attorneys' fees award in this case."). Co-Lead Counsel have substantial experience litigating securities cases and class actions nationwide, and reputations for achieving significant results in complex litigation. *See* Exs. 1-E at 8, 1-F at 10. Here, Co-Lead Counsel used their skill and experience to obtain a good result for the Class in the face of significant hurdles. These efforts included drafting complaints addressing complex corporate transactions and presenting both federal securities law and Maryland state law issues; briefing further complex issues on motions to dismiss, a motion for class certification, and summary judgment, and preparing and responding to expert reports addressing complex issues relating to corporate mergers and damages. ¶¶16-50.

Further, courts often evaluate the quality of the work performed by plaintiff's counsel in light of the quality of the opposition's representation. *See, e.g.*, *Mills*, 265 F.R.D. at 262 (noting that counsel reached a favorable settlement against "experienced and sophisticated defense attorneys"); *Smith v. Krispy Kreme Doughnut Corp.*, 2007 WL 119157, at *2 (M.D.N.C. Jan. 10, 2007) ("Additional skill is required when the opponent is a sophisticated corporation with sophisticated counsel."). Here, Defendants are represented by highly skilled and experienced securities litigators at DLA Piper LLP and Foley & Lardner LLP, two of the leading defense law

firms in the United States.

It was in the face of skilled and vigorous opposition that Co-Lead Counsel were able to obtain the benefits for the Class that they did. This factor weighs in favor of the requested fee award.

4. The Duration and Complexity of This Action Support the Requested Fee

"In evaluating the complexity and duration of the litigation, courts consider not only the time between filing the complaint and reaching settlement, but also the amount of motions practice prior to settlement and the amount and nature of discovery." *Jones*, 601 F. Supp. 2d at 761.

Here, the claims not only involved the complexities of establishing securities law violations under the Exchange Act, but also establishing a breach of fiduciary duty under Maryland law in the face of the significant hurdle of the statutory exculpation defense available to Defendants.

Against this unique and difficult backdrop, Plaintiffs' Counsel demonstrated the quality of their work as they efficiently achieved the Settlement through vigorous, hard-fought litigation, which included: (i) filing complaints after conducting a comprehensive investigation into the allegedly wrongful acts, by, among other efforts, a review and analysis of Bowl America filings with the SEC, a review and analysis of publicly available documents and analyst reports; (ii) fully briefing Defendants' wide-ranging motions to dismiss; (iii) extensive discovery efforts that included serving document requests and analyzing the production of documents produced by Defendants and non-parties; (iv) fully briefing and arguing Plaintiffs' motion for class certification; (v) briefing a motion to compel on contested privilege issues; (vi) submitting expert reports addressing termination fees, valuation and damages; (vii) completing discovery, including defending two class plaintiff depositions, defending the deposition of Plaintiffs' expert, and deposing numerous witnesses and Defendants' experts; and (viii) briefing motions and cross-motions for summary judgment. In consultation with their damages' expert, Co-Lead Counsel evaluated the potential damages in the case and negotiated in mediation sessions to secure the $2.175 million recovery. ¶¶16-50.

Moreover, this litigation spanned over three years during which time Co-Lead Counsel was largely uncompensated. This factor too supports the requested fee. *See e.g. In re MicroStrategy*, 172 F. Supp. 2d 778, 787 (E.D. Va. 2001).

Accordingly, this case's complexity and duration of the intense litigation efforts strongly support the reasonableness of Co-Lead Counsel's fee request.

5. Co-Lead Counsel Faced the Significant Risk of Nonpayment

Co-Lead Counsel undertook this case on a largely contingent basis and ran a substantial risk of almost no recovery whatsoever. *See* Joint Decl. ¶¶105-106. The risk of receiving little or no recovery is a factor courts in this Circuit recognize when considering an award of attorneys' fees. *See, e.g.*, *Mills*, 265 F.R.D. at 263 ("'[C]ounsel bore a substantial risk of nonpayment . . . [t]he outcome of the case was hardly a foregone conclusion, but nonetheless counsel accepted representation of the plaintiff and the class on a contingent fee basis, fronting the costs of litigation.'"); *Phillips v. Triad Guar. Inc.*, 2016 WL 2636289, at *6 (M.D.N.C. May 9, 2016) (finding fee award justified where, …"[l]ead [c]ounsel bore the risks involved with surviving dispositive motions, obtaining class certification, proving liability, causation, and damages, prevailing with experts, and litigating through trial and possible appeals" knowing "'that the only way [they] would be compensated was to achieve a successful result'"). As can be seen from Co-Lead Counsel's total lodestar, even with the initial funding from the Trusts, counsel bore a substantial risk of nonpayment for the lion's share of their fees and expenses. *See* Exs. 1-E, 1-F.

In addition to the risk of non-recovery at trial, "any victory at trial in this case would have to withstand appeals which could reverse or limit any award by a jury." *Genworth*, 210 F. Supp. 3d at 844. Numerous securities claim successes have been eliminated in appellate proceedings. *See, e.g., Miller,* 364 F.3d at 235 (affirming judgment on jury verdict finding liability but awarding zero damages to plaintiffs); *Taylor v. First Union Corp. of S.C.*, 857 F.2d 240, 243, 247 (4th Cir. 1988)

(after two trials, reversing jury verdict on material misrepresentation grounds); *Stuckey v. Geupel*, 854 F.2d 1317, 1317 (4th Cir. 1988) (upholding judgment notwithstanding the verdict and setting aside $2.1 million award to plaintiffs on loss causation grounds); *Robbins*, 116 F.3d at 1441, 1446, 1449 (jury verdict of $81 million for plaintiffs against accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant).

Lastly, Plaintiffs' Counsel incurred $336,349.03 in Litigation Expenses to prosecute the case, which would not have been repaid absent a successful result. *See* Exs. 1-E at ¶6, 1-F at ¶8 *See Mills*, 265 F.R.D. at 263 (noting uncertainty of the case outcome, defendants' rigorous defense, and that "[l]ead [c]ounsel devoted thousands of hours on the case and fronted nearly $3 million in costs in the process" to conclude that factor weighed in favor of awarding the requested fee); *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 516 (W.D. Pa. 2003) ("Aside from investing their time, counsel had to front copious sums of money. Thus, the risks that counsel incurred in prosecuting this case were substantial and further support the requested fee [and expense] award."). Accordingly, the risk of non-payment also weighs in favor of the requested fee award.

6. Plaintiffs' Counsel Necessarily Devoted Over 4100 Hours to Prosecuting the Action

Plaintiffs' Counsel devoted considerable time and effort to researching, investigating, and litigating this case. *See* Joint Decl. ¶¶105. As set forth in the Joint Declaration and Plaintiffs' Counsel's individual Fee and Expense Declarations,[8] Plaintiffs' Counsel dedicated 4153.55 hours to prosecuting this case, resulting in a total lodestar of $3,285,382.25. Ex. 1-E and 1-F. Plaintiffs' Counsel could have spent this significant attorney time litigating other matters, which weighs in favor of awarding the requested fees. *See, e.g.*, *Seaman v. Duke Univ.*, 2019 WL 4674758, at *4

[8] Plaintiffs' Counsel's Fee and Expense Declarations include the Sommers Declaration and Krantz Declarations attached as Ex. 1-E and Ex. 1-F, respectively.

(M.D.N.C. Sept. 25, 2019) (highlighting that the "attorneys and staff have worked over 12,500 hours since it began" which "was time and money the attorneys could have directed to other simpler and less risky opportunities" supported the fee request). The time and resources Plaintiffs' Counsel committed to the Action similarly weigh in favor of the requested fee.

7. Public Policy Considerations Support the Requested Fee

The Supreme Court has emphasized that private securities actions are "an essential supplement to criminal prosecutions and [SEC] civil enforcement actions…." *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313 (2007); *accord Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (private securities actions provide "a most effective weapon in the enforcement" of the securities laws and "are a necessary supplement to [SEC] action"). Compensating counsel for bringing these actions is important because "[s]uch actions could not be sustained if plaintiffs' counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class." *Hicks v. Morgan Stanley*, *et al.*, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005). A "central factor in fixing the amount of attorneys' fees is 'to ensure that competent, experienced counsel will be encouraged to undertake the often risky and arduous task of representing a class." *Mills*, 265 F.R.D. at 260.

In complex securities cases, fee awards have been enhanced by courts "to provide an incentive for competent lawyers to pursue such actions in the future." *MicroStrategy*, 172 F. Supp. 2d at 788. Public policy "generally favors attorneys' fees that will induce attorneys to act and protect individuals who may not be able to act for themselves but also will not create an incentive to bring unmeritorious actions." *Jones*, 601 F. Supp. 2d at 765 (citing *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 142 (S.D.N.Y. 2008); *MicroStrategy*, 172 F. Supp. 2d at 789 n.36). "The cost and difficulty [of bringing a meritorious complex class action] naturally stands as a deterrent from doing so, and one object of an award of attorneys' fees should be to counteract this deterrence and incentivize competent attorneys to pursue these cases when necessary." *Mills*, 265 F.R.D. at 263.

Accordingly, it is respectfully submitted that these public policy considerations support awarding the fee requested here, which would fairly compensate Plaintiffs' Counsel for their work.

8. 28% of the Settlement Fund Would Provide a Fee Comparable to Those Approved in Similar Cases

Courts look "to fee awards in analogous cases to determine the reasonableness of the percentage requested." *Mills*, 265 F.R.D at 263-64. Here, Co-Lead Counsel's request of 28% is reasonable when considering the awards in similar cases in this District and in the Fourth Circuit. *See* Section II.B., *supra*.

Additionally, "[t]he percentage-of-the-fund method of awarding attorneys' fees in class actions should approximate the fee which would be negotiated if the lawyer were offering his or her services in the private marketplace." *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808, at *16 (D.N.J. Nov. 9, 2005). "Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation." *Id.*; *see also Thomas*, 2017 WL 1148283, at *5 ("[A]ny discussion of percentage awards should acknowledge the age-old assumption that a lawyer receives a third of his client's recovery under most contingency agreements."). Consideration of the awards in similar cases strongly supports the requested award of 28% of the Settlement Fund.

D. A Cross-Check of Plaintiffs' Counsel's Lodestar Confirms the Reasonableness of the Fee Request

Courts often supplement their analysis of the percentage-of-fund method with the lodestar "cross-check." "A lodestar cross-check first computes the plaintiffs' attorneys' reasonable hourly rate for the litigation and multiplies that rate by the number of hours dedicated to the case," and "then compares that figure with the attorneys' fees award, typically resulting in a positive multiplier." *Genworth*, 210 F. Supp. 3d at 845. When using the lodestar as a cross-check, courts "take a somewhat truncated approach to the lodestar analysis" and "generally do not apply the same

scrutiny in a lodestar cross-check as they do when using the lodestar method to calculate the fee." *Thomas*, 2017 WL 1148283, at *6; *see also Jones*, 601 F. Supp. 2d at 765 (explaining that when "using the lodestar method as a cross-check," the court "need not apply the 'exhaustive scrutiny' normally required by that method"). The requested fee of 28%, or $609,000, reflects a negative multiplier of 0.18.

Since fee awards in contingent class actions, particularly securities class actions, are designed to encourage efficient litigation and great results, courts recognize that a fee award often "include a reward or enhancement beyond the lodestar figure to account for the difficulty of the case, the degree of success achieved, and other qualitative factors." *MicroStrategy*, 172 F. Supp. 2d at 787 (stating that a fee should "adequately compensate lead counsel for the time expended on the case"). Multipliers are appropriate to encourage efficiency and to compensate for the delay in payment and additional risks because, unlike defense firms who are guaranteed payment win or lose and paid immediately, plaintiffs' counsel are only paid at the end of the case and only if the case is successful. *See, e.g.*, *id.* at 788 (noting because securities cases are essentially contingent fee cases, "there is no fee unless there is a recovery and the fee awarded must bear a reasonable relation to the size of the recovery"). Because the fee request here is significantly less than counsel's full lodestar – what is referred to as a "negative multiplier" -- there is no enhancement which results in a fee that is demonstrably reasonable.

Plaintiffs' Counsel and their professionals have expended more than 4100 hours in the prosecution of this Action with a resulting lodestar of $3,285,382.25 based on their current hourly rates,[9] yielding a negative multiplier of 0.18 on Plaintiffs' Counsel's lodestar, assuming a 28% fee

[9] This lodestar is based on counsel's current rates, which is "appropriate to account for the delay in payment to counsel." *Seaman*, 2019 WL 4674758, at *5. The Supreme Court and many other courts have held that the use of current *rates* is proper since such rates compensate for inflation and the loss of use of funds. *See Missouri*, 491 U.S. at 283-84.

award. *See* ¶105; Exs. 1-E, 1-F. The fact that the requested fee is substantially less than the lodestar strongly supports its reasonableness. *See In re Lithium Ion Batteries Antitrust Litig*., 2019 WL 3856413, at *8 (N.D. Cal. Aug. 16, 2019) (finding requested fee "particularly appropriate where the lodestar cross-check results in a negative multiplier"); *In re Bear Stearns Cos., Inc. Sec., Derivative & ERISA Litig*., 909 F. Supp. 2d 259, (S.D.N.Y. 2012) (negative multiplier was a "strong indication of the reasonableness of the [requested] fee"). Accordingly, the 28% fee request here is reasonable under both the percentage-of-the-fund approach and the lodestar approach.

Further, Plaintiffs' Counsel's hourly rates are "within the range of reasonableness for PSLRA cases, where the market for class action attorneys is nationwide and populated by very experienced attorneys with excellent credentials." *MicroStrategy*, 172 F. Supp. 2d at 788. The hourly rates of Co-Lead Counsel are based on periodic analyses of rates used by firms performing comparable work. *See* Ex. 1-E, Ex. 1-F. Co-Lead Counsel recognize that, in some instances, their rates may be higher than the prevailing rates in this District. However, and leaving aside the specialized nature of Co-Lead Counsel's practice area, given that the lodestar multiplier is reasonable, even if their rates were reduced, the negative lodestar multiplier would still be within the acceptable range. The hourly billing rates Plaintiffs' Counsel used to calculate the lodestar multiplier are the reasonable and customary rates charged by contingency firms in securities fraud cases. Plaintiffs' Counsel's rates range from $425 to $1320 for partners, $995 to $1215 for Of Counsel, and $275 to $755 for associates. *See* Joint Decl., ¶99. Courts in this District and the Fourth Circuit have approved of lodestar cross-checks using similar rates in private securities class actions. *See Neustar*, 2015 WL 8484438, at *10 (approving 2015 rates for securities litigators in a Section 10(b) case of $800 to $975 for partners and $420 to $700 for associates).

As detailed in the Joint Declaration, the number of hours spent by Plaintiffs' Counsel was reasonable given their robust investigation, litigation of Defendants' motions to dismiss, discovery

efforts including expert discovery, and briefing class certification and summary judgment. The complexity of the legal issues involved, and the intensity of the defense mounted, and skill of Defendants' Counsel, also support the number of hours spent by Plaintiffs' Counsel. Notably, Co-Lead Counsel anticipate expending additional time in connection with administering the Settlement. Plaintiffs' Counsel therefore respectfully submits that the lodestar was reasonably calculated and further supports the requested fee. ¶¶16-50, 98, 104.

Considering these factors, particularly the complexity and challenges in the Action and the skill and experience of counsel, it is respectfully submitted that the lodestar cross-check confirms the reasonableness of the requested fee, and that, overall, an award of the requested 28% fee would be reasonable under the circumstances of this case.

III. CO-LEAD COUNSEL'S REQUEST FOR REIMBURSEMENT OF LITIGATION EXPENSES IS REASONABLE

Co-Lead Counsel also request an award of reasonable and necessary Litigation Expenses incurred to prosecute this Action. Since the inception of the case, Plaintiffs' Counsel have incurred $336,349.03 in Litigation Expenses. The categories of expenses for which reimbursement is sought are the types of expenses that are customary and necessary to litigate cases of this type. "It is well-established that plaintiffs who are entitled to recover attorneys' fees are also entitled to recover reasonable litigation-related expenses as part of their overall award." *Singleton*, 976 F. Supp. 2d at 689. Such costs may include "those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services." *Spell v. McDaniel*, 852 F.2d 762, 771 (4th Cir. 1988).

The amount requested is based on the declarations of Plaintiffs' Counsel.[10] The expenses are broken down in each declaration by type and amount. The categories of expenses for which an

[10] *See* Exs. 1-E, 1-F.

award is sought include, among other things, expert costs, electronic discovery costs, deposition expenses, filing and service fees, work-related travel and meal costs, duplicating, overnight mail, electronic research, and settlement administration and notice costs. These are precisely the type of expenses routinely paid by hourly clients in non-contingent private litigation. *See, e.g.*, *Reynolds v. Fidelity Invs. Institutional Operations Co.,* 2020 WL 92092, at *4 (M.D.N.C. Jan. 8, 2020) (explaining that "mailing costs, online legal research, long-distance telephone use, expert and mediator fees, travel expenses for mediation and court proceedings, and court filing fees . . . are 'reasonable out-of-pocket expenses . . . which are normally charged to a fee-paying client, in the course of providing legal services'") (quoting *Singleton*, 976 F. Supp. 2d at 689).

Co-Lead Counsel's request for the payment of $336,349.03 in expenses from the common fund is reasonable and should be approved.

In addition, Epiq, the Settlement Administrator has estimated its fees at $69,979 for the notice and administration costs which are included in the total expenses. Plaintiffs' Counsel also seeks approval to pay these expenses to Epiq.

IV. THE REQUESTED CLASS REPRESENTATIVE AWARDS ARE REASONABLE

The PSLRA limits a class representative's recovery to an amount "equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class," but it also provides that "[n]othing in this paragraph shall be construed to limit 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 a class." 15 U.S.C. §78u-4(a)(4). Class Plaintiffs Sheryl Cohen Fine and John Risner request approval of modest awards in the amount of $7,500 each, in connection with the time they dedicated to representing the Class.[11]

[11] *See* Exs. 1-G at ¶7 and 1-H at ¶7.

District courts in the Fourth Circuit have approved such awards to compensate class representatives for the "hours of . . .time related to the supervision of this action." *Genworth*, 210 F. Supp. 3d at 846; *see also In re Comput. Sci. Corp. Sec. Litig.*, 2013 WL 12155436, at *2 (E.D. Va. Sept. 20, 2013) (awarding "[c]lass [r]epresentative reimbursement of its reasonable costs for the time devoted to the matter"); *Sponn v. Emergent Biosolutions, Inc.*, 2019 WL 11731087, at *2 (D. Md. Jan. 25, 2019) (same).

Here, as described in Ms. Fine and Mr. Risner's declarations, they have been committed to pursuing the Class claims—and have taken an active role in so doing including seeking to become class representatives. *See* Exs. 1-G at ¶¶3-4 and 1-H at ¶¶3-4. Each (i) regularly communicated with counsel regarding the posture and progress of the Action; (ii) reviewed significant pleadings and motions filed in the Action; (iii) searched for and produced documents and responded to written discovery from Defendants; (iv) expended substantial time and effort preparing for and testifying during depositions conducted by defense counsel; (v) participated in settlement discussions; and (vi) evaluated and approved the proposed Settlement. *Id*. These efforts required them to dedicate time and resources to the Action that they would have otherwise devoted to their professional endeavors and, thus, represented a cost to the Class Representatives.

Like the litigation expenses in this case, the requested awards are consistent with cost and expense awards in similar cases. *See, e.g.*, *Genworth*, 210 F. Supp. 3d at 846 (awarding $23,128 for time relating to supervision of the action); *Comput. Sci.*, 2013 WL 12155436, at *2 (awarding $28,881 for time and $32,024 for expenses). Class Representatives Fine and Risner respectfully request that their awards be approved.

V. CONCLUSION

For the reasons discussed above, Co-Lead Counsel respectfully request that the Court: (1) award Co-Lead Counsel, 28% of the Settlement Fund as attorneys' fees; (2) approve payment

of Litigation Expenses incurred by Co-Lead Counsel in the amount of $336,349.03; and (3) award Plaintiffs Fine and Risner $7,500 each. A proposed order will be submitted with Co-Lead Counsel's reply papers, after the deadline for objections has passed.

DATED: November 21, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2024, I caused the foregoing to be electronically filed with the Clerk of Court via CM/ECF, which will send a notice of electronic filing to all registered users.

By: */s/ Daniel S. Sommers*
Daniel S. Sommers