UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS
AT KANSAS CITY

CORA E. BENNETT, Individually and On Behalf of All Others Similarly Situated, Plaintiff, vs. SPRINT NEXTEL CORPORATION, et al., Defendants.	)	Civil Action No. 2:09-cv-02122-EFM-KMH

MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS AND AWARD OF ATTORNEYS' FEES AND EXPENSES AND LEAD PLAINTIFFS' EXPENSES PURSUANT TO 15 U.S.C. §78u-4(a)(4)

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I. INTRODUCTION

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Lead Plaintiffs PACE Industry Union-Management Pension Fund ("PACE"), Skandia Mutual Life Insurance Company ("Skandia"), and the West Virginia Investment Management Board ("WVIMB") respectfully move this Court for an order: (1) approving the proposed settlement (the "Settlement") of this securities class action (the "Litigation"); (2) approving the proposed Plan of Allocation of settlement proceeds; (3) awarding attorneys' fees of 22% of the Settlement Amount and litigation expenses in the amount of $3,434,112.10, plus interest earned thereon; and (4) awarding Lead Plaintiffs for time and expenses incurred in prosecuting the Litigation in the amount of $42,920.44.[1]

Under the terms of the proposed Settlement, as set forth in the Stipulation, Defendants have paid $131,000,000 in cash into an interest-bearing escrow account maintained on behalf of the Class, in exchange for the dismissal with prejudice of all claims brought against them. This Settlement represents a very good recovery for the Class, particularly in light of the considerable expense, delay, and risks posed by continued litigation. The $131,000,000 recovered for Sprint investors is one of the 100 largest recoveries in a securities class action and the fourth largest recovery ever in a securities class action in the 10th Circuit.

As discussed below and in the accompanying declarations, the significant risks involved in taking this Litigation further and through trial, when measured against the immediate benefit of the Settlement, strongly support approval of this Settlement.

On April 10, 2015, the Court entered its Order Preliminarily Approving Settlement and Providing for Notice (ECF No. 286) ("Preliminary Approval Order"), which directed that a hearing be held on August 5, 2015, to determine the fairness, reasonableness, and adequacy of the

[1] Unless otherwise noted, all capitalized terms used herein are defined in the March 26, 2015 Stipulation of Settlement (the "Stipulation"). ECF No. 284-1.

Settlement. In accordance with the Preliminary Approval Order, as of May 6, 2015, Notices of Proposed Settlement of Class Action (the "Notice") were mailed to over 550,333 potential Class Members and nominees. *See* Declaration of Stephen J. Cirami Regarding Notice Dissemination and Publication ("Cirami Decl."), ¶11. In addition, pursuant to the Preliminary Approval Order, the Notice, Proof of Claim form, Stipulation and its Exhibits, and Preliminary Approval Order were posted on the Claims Administrator's website, and a Summary Notice was published in *Investor's Business Daily* and transmitted over the *BusinessWire* on April 28, 2015. *Id.*, ¶¶12, 14. To date, not a single objection to the proposed Settlement has been made.

In light of their informed assessment of the strengths and weaknesses of the claims and defenses asserted, and the substantial Settlement Amount, Lead Plaintiffs and Lead Counsel believe that the Settlement is eminently fair, reasonable, and adequate, and provides a very good result for the Class. Accordingly, Lead Plaintiffs respectfully request that the Court approve this Settlement. Moreover, the Plan of Allocation, which was developed with the assistance of Lead Plaintiffs' economics and damages experts, is fair and reasonable and, therefore, should also be approved by the Court.

In addition, as compensation for their persistent and effective advocacy in the face of considerable opposition and risk, and with the support of the Lead Plaintiffs, Lead Counsel respectfully move the Court for an award of attorneys' fees in the amount of 22% of the Settlement Amount, litigation expenses in the amount of $3,434,112.10, and $42,920.44 for the time and expenses incurred by the Lead Plaintiffs in connection with their representation of the Class pursuant to 15 U.S.C. §78u-4(a)(4).

As discussed herein, Lead Counsel's fee request is reasonable and below the percentages typically awarded in securities class actions in this and other Circuits. As described in detail in the

declarations of Class Counsel,[2] Lead Counsel have devoted substantial efforts and resources litigating this case and achieving this Settlement. Lead Counsel undertook the representation of the Class on a contingent fee basis and no payment has been made to date for their six years of service or for the litigation expenses they have advanced on behalf of the Class. No party, other than PACE, Skandia, and WVIMB, moved to be appointed as lead plaintiff and no other counsel sought to be appointed as lead counsel. Had Lead Plaintiffs and Lead Counsel not taken the initiative and accepted the risk in bringing and pursuing this action, it is doubtful that Class Members would have recovered anything from Defendants.

For all the reasons set forth herein and in the accompanying declarations, Lead Counsel respectfully submit that the requested attorneys' fees are fair and reasonable under the applicable legal standards and should be awarded by the Court.

II. PROCEDURAL AND FACTUAL BACKGROUND

This was hard fought litigation over six years. Defendants, represented by two of the largest law firms in the country, zealously utilized every procedural mechanism to oppose Lead Plaintiffs' claims. Defendants filed comprehensive briefing seeking to dismiss this litigation and, when that motion was denied, sought leave to immediately appeal the Court's order, which the Court also denied. *See* Declaration of Tor Gronborg in Support of Final Approval of Class Action Settlement and the Plan of Allocation of Settlement Proceeds and Award of Attorneys' Fees and Expenses and Lead Plaintiffs' Expenses Pursuant to 15 U.S.C. §78u-4(a)(4) ("Gronborg Decl."), ¶¶21-24.

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[2] Declaration of James M. Hughes Filed on Behalf of Motley Rice LLC ("Motley Rice") in Support of Application for Award of Attorneys' Fees and Expenses ("Motley Rice Decl."), Declaration of Tor Gronborg Filed on Behalf of Robbins Geller Rudman & Dowd LLP ("Robbins Geller") in Support of Application for Award of Attorneys' Fees and Expenses ("Robbins Geller Decl."), and Declaration of Norman E. Siegel Filed on Behalf of Stueve Siegel Hansen LLP ("Stueve Siegel") in Support of Application for Award of Attorneys' Fees and Expenses ("Stueve Siegel Decl.") (collectively, "Lodestar and Expense Submissions"). "Class Counsel" is defined as Lead Counsel Motley Rice and Robbins Geller and Liaison Counsel Stueve Siegel.

Defendants opposed Lead Plaintiffs' motion for class certification and filed a motion to strike the expert report Lead Plaintiffs submitted in support of class certification. *Id.*, ¶¶28-30. When the Court granted class certification, Defendants sought permission to file a Rule 23(f) appeal, which the Tenth Circuit ultimately denied. *Id.*, ¶32. Lead Counsel then oversaw mailed notice to more than 480,000 individuals and entities, published the class notice in two publications and established a website for dissemination of information to the Class. *Id.*, ¶¶2-5. Ultimately, 24 individual investors opted out of the litigation and not a single institutional investor opted out. *Id.*, ¶4.

Discovery in this Litigation was unusually challenging. Because so much of the evidence critical to the factual development of Lead Plaintiffs' claims was either in the hands of non-parties or Sprint's former employees, Lead Counsel subpoenaed 61 individuals and companies across the United States and Europe. *Id.*, ¶74. These subpoenas required extensive coordination with these non-parties and, in the case of KPMG, motion practice in the United States District Court for the Western District of Missouri on a complex privilege issue related to specific types of auditor documents. *Id.*, ¶77. These non-parties ultimately produced 1.7 million pages of documents and Lead Counsel took five depositions of individuals from Deutsche Bank, KPMG, Ernst & Young and Goldman Sachs. *Id.*, ¶¶75, 78.

Lead Counsel took fact and 30(b)(6) depositions of 38 additional individuals in cities across the country. *Id.*, ¶71. In total, for both party and non-party depositions, Lead Counsel took more than 260 hours of deposition testimony from Defendants and 25 hours of non-party testimony, and more than 1,400 documents were marked as deposition exhibits. *Id.*, ¶72.

In addition to the 1.7 million pages produced by non-parties, Defendants produced more than 2.5 million pages of documents in fact discovery. *Id.*, ¶¶40, 70. These documents were located and produced pursuant to a predictive coding process, which Class Counsel believe is the first time such a process has been endorsed and supervised by a court in this District. *See* Stueve Siegel Decl., ¶22.

Because of the technical complexities inherent in predictive coding, the Court appointed Daniel J. Capra as a Special Master to oversee this process. ECF No. 146. Throughout the Litigation, Lead and Liaison Counsel and counsel for Defendants regularly participated in conference calls with both Judge Humphreys and Special Master Capra with regard to the status of discovery. Gronborg Decl., ¶¶38-39, 50, 53, 56, 58, 60, 63.

The parties additionally engaged in extensive expert discovery. As part of the class certification briefing, Defendants submitted a market efficiency report from Professor Mukesh Bajaj. *Id.*, ¶¶28, 80. Lead Counsel reviewed and analyzed his report and, after issuing a subpoena to Professor Bajaj, reviewed over 130,000 pages in preparation for Professor Bajaj's deposition on June 15, 2012. *Id.*, ¶80.

Lead Plaintiffs additionally produced an expert report and supporting documents from Candace L. Preston, who testified that Sprint bonds traded in an efficient market during the Class Period. *Id.*, ¶82. Lead Counsel produced Ms. Preston for her deposition on May 31, 2012, and produced more than 52,000 pages of documents related to this report. *Id.*, ¶83. In addition to Ms. Preston, Lead Counsel engaged four additional outside experts who were to provide expert analysis concerning Sprint's accounting for and reporting of goodwill and merger synergies, the valuation of Sprint assets that comprised the goodwill and Sprint's goodwill writeoff, the customer base at Sprint, and other market efficiency issues. *Id.*, ¶¶85-88. Lead Counsel also used forensic accountants to analyze Sprint's disclosures regarding the merger with Nextel, the purchase price allocation, and financial metrics and results impacting Sprint's value dating back several years prior to the Class Period. *Id.*, ¶¶90-99.

This extensive discovery provided Lead Counsel with full knowledge of the strengths and weaknesses of their case and formed the foundation for settlement discussions with Defendants,

which ultimately led to this Settlement. *See id.*, ¶100. The Settlement and Plan of Allocation and Lead Counsel's requests for fees and expenses are fair and reasonable and should be approved.

III. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT

A. Standards for Final Approval of Class Action Settlements

"It is well settled, as a matter of sound policy, that the law should favor the settlement of controversies." *Grady v. De Ville Motor Hotel, Inc.*, 415 F.2d 449, 451 (10th Cir. 1969). "In the class action context in particular, 'there is an overriding public interest in favor of settlement,'" because settlement of complex disputes "minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources." *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 313 (7th Cir. 1980).[3]

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of the settlement of the claims of a certified class. "The authority to approve a settlement of a class . . . action is committed to the sound discretion of the trial court." *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984). "In exercising its discretion, the trial court must approve a settlement if it is fair, reasonable and adequate." *Jones*, 741 F.2d at 324. In the Tenth Circuit, the following factors are analyzed in determining whether this standard is met:

> (1) whether the proposed settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable.

Rutter & Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1188 (10th Cir. 2002); *Jones*, 741 F.2d at 324 (same). As set forth herein and detailed in the Gronborg Declaration, the Settlement is a favorable result for the Class and satisfies these factors. Gronborg Decl., ¶¶117-118.

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[3] Citations and footnotes are omitted throughout, unless otherwise indicated.

B. The Settlement Was Fairly and Honestly Negotiated

Critical to any assessment of the merits of a settlement is whether the proposed settlement was fairly and honesty negotiated. *Lucas v. Kmart Corp*., 234 F.R.D. 688, 693 (D. Colo. 2006). This factor has been emphasized by the Tenth Circuit and the facts and circumstances in this case support the Court's approval of the Settlement. In fact, "[t]here are numerous indicia that the settlement negotiations in this case have been fair, honest and at arm's length." *Id.*

There should be no doubt that the parties to this Litigation have "'vigorously advocated their respective positions throughout the pendency of the case.'" *Id.* This action has been vigorously contested, with over 280 docket entries over the course of the past six years. The parties have extensively briefed numerous complex issues, including Defendants' motion to dismiss, interlocutory appeal on the order denying dismissal, class certification, and discovery disputes. With guidance from Magistrate Judge Humphreys and Special Master Capra, the parties addressed dozens of scheduling and discovery disputes, including complex and unique issues involving discovery of electronic data and the use of predictive coding. *See* Gronborg Decl., ¶¶3(g), 38-39, 50, 53, 56, 58, 60, 63.

Furthermore, the "settlement agreement itself took [many] months to negotiate, and came only after" previous attempts at private mediation with former Oklahoma federal court judge Layn Phillips, a sophisticated and well-respected mediator, were unsuccessful. *Lucas*, 234 F.R.D. at 693. In addition, all parties were represented by "multiple counsel with expertise on the [securities laws] and complex class action litigation," and the Settlement was only achieved when the parties agreed to Judge Phillips' mediator's proposal. *Id.*

Where, as here, "the settlement resulted from arm's-length negotiations between experienced counsel after significant discovery had occurred, the Court may presume the settlement to be fair, adequate, and reasonable." *Id.*

C. Serious Questions of Law and Fact Existed that Created Significant Risk of Obtaining a Less Favorable Result After Continued Litigation

"Although it is not the role of the Court at this stage of the litigation to evaluate the merits, it is clear that the parties could reasonably conclude that there are serious questions of law and fact that exist such that they could significantly impact this case if it were litigated." *Lucas*, 234 F.R.D. at 693-94. The Litigation here presented a panoply of complex factual and legal issues making a favorable outcome for the Class uncertain at best. Gronborg Decl., ¶¶100-110. Before reaching the Settlement, Lead Counsel thoroughly investigated and analyzed sufficient information to weigh the benefits of the Settlement against the risks of continued litigation.

Defendants strenuously and vigorously argued at every stage of the Litigation that the Class's claims lacked merit and that, even if liability was established, the Class did not suffer any legally cognizable economic harm. *See, e.g.*, Gronborg Decl., ¶¶100-110. Defendants maintained that their statements regarding Sprint's goodwill were protected statements of opinion and that they were made in reliance upon two sets of auditors. Similarly, Defendants testified and argued that they could not be liable for any statements regarding Sprint's customer credit standards, because they were made in reliance upon subject matter experts at Sprint and, in any event, analysts and investors were aware of all changes in Sprint's credit policies. Although the Court denied Defendants' motion to dismiss, "that ruling provide[d] no guarantee that [plaintiff would] ultimately prevail on the merits" and establish that Defendants' statements were false and misleading. *McNeely v. Nat'l Mobile Health Care, LLC*, No. CIV-07-933-M, 2008 U.S. Dist. LEXIS 86741, at *36 (W.D. Okla. Oct. 27, 2008).

Even assuming Lead Plaintiffs established the falsity of Defendants' statements, at each stage of the Litigation Defendants argued that Lead Plaintiffs and the Class would not be able to establish the critical element of loss causation. Given the negative news about Sprint throughout the second

half of 2007 and the start of the credit crisis and 2008 recession, Defendants argued that any losses suffered by Class Members were the result of factors unrelated to the disclosure of the alleged fraud. In addition, the amount of damages incurred by Class Members was fiercely contested by the parties. Defendants never wavered from their position that there were no damages – and in the end, this crucial element at trial would have been reduced to a "'battle of experts.'" *In re Warner Commc'ns Sec. Litig*., 618 F. Supp. 735, 744 (S.D.N.Y. 1985) (approving settlement where "it is virtually impossible to predict with any certainty which testimony would be credited"), *aff'd*, 798 F.2d 35 (2d Cir. 1986); *In re Veeco Instruments Sec. Litig*., No. 05 MDL 0165 (CM), 2007 U.S. Dist. LEXIS 85629, at *30 (S.D.N.Y. Nov. 7, 2007) ("The jury's verdict with respect to damages would depend on its reaction to the complex testimony of experts, a reaction which at best is uncertain.").

Thus, because "there were numerous factual and legal questions yet to be addressed in this litigation that could have had a serious impact on the results for either side," this factor also supports granting final approval of the Settlement. *Lucas*, 234 F.R.D. at 694.

D. The Value of an Immediate Recovery Outweighs the Mere Possibility of Future Relief After Protracted and Expensive Litigation

"If this case were to be litigated, in all probability it would be many years before it was resolved." *Lucas*, 234 F.R.D. at 694. This action, already pending for six years, was expected to take at least one more year for the parties and Court to complete the pretrial proceedings, including summary judgment, *Daubert* motions, and motions *in limine*, and a lengthy trial. Given that Defendants sought to appeal two previous rulings by this Court, similar attempts to appeal these pre-trial rulings were likely, which could have taken many more years to complete. Assuming the parties proceeded through trial and Lead Plaintiffs obtained a favorable jury verdict, the verdict could be modified by this Court or reversed on appeal. *See, e.g.*, *In re Apollo Grp., Inc. Sec. Litig.*, No. CV 04-2147-PHX-JAT, 2008 U.S. Dist. LEXIS 61995 (D. Ariz. Aug. 4, 2008) (reversing jury

verdict in plaintiffs' favor), *rev'd*, No. 08-16971, 2010 U.S. App. LEXIS 14478, at *2 (9th Cir. June 23, 2010) (finding that the "district court erred in granting [defendants] judgment as a matter of law"); *see also In re BankAtlantic Bancorp Sec. Litig*., No. 07-6152-CIV-UNGARO, 2011 U.S. Dist. LEXIS 48057 (S.D. Fla. Apr. 25, 2011) (reversing jury verdict in plaintiff's favor and granting defendants' post-trial motion for judgment as a matter of law).

Even if Lead Plaintiffs obtained a favorable jury verdict, post-trial collection efforts could take many more years of litigation. For example, on May 7, 2009 and after seven years of hard-fought litigation in *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc*., 756 F. Supp. 2d 928, (N.D. Ill. 2010), the jury returned a verdict in plaintiff's favor in this securities class action trial. Because of post-verdict challenges, a judgment was not entered until October 17, 2013, which was then appealed. As it stands today, after 15 years of litigation, and despite a favorable jury verdict six years ago, not a single class member has received a penny from the defendants. Here, as in *Household*, Lead Plaintiffs could not be certain that they could promptly collect on a post-trial monetary judgment even if they did reach and prevail at trial.

In sum, the ultimate resolution of this action on the merits at trial and on appeal, and in turn, any monetary compensation to injured Class Members, would likely be many years down the road, if at all. *See, e.g*., *Feerer v. Amoco Prod. Co*., No. Civ. 95-0012 JC/WWD, 1998 U.S. Dist. LEXIS 22248, at *26 (D.N.M. May 28, 1998) (noting that if the case was not settled, trial would last for a month if not longer and "even if a favorable jury verdict had been obtained, inevitably an appeal would have followed and, conservatively, would have resulted in a delay of, at least, two years before any relief would have been available to the Class"); *see also Reynolds v. Benefit Nat'l Bank*, 288 F.3d 277, 284 (7th Cir. 2002) ("To most people, a dollar today is worth a great deal more than a dollar ten years from now.").

The $131,000,000 Settlement here provides guaranteed and immediate relief to the Class. *Lucas*, 234 F.R.D. at 694 ("the proposed settlement agreement provides the class with substantial, guaranteed relief"); *McNeely*, 2008 U.S. Dist. LEXIS 86741, at *37 (finding that class "is better off receiving compensation now as opposed to being compensated, if at all, several years down the line, after the matter is certified, tried, and all appeals are exhausted"). Moreover, as discussed herein at §V.C.1, the $131,000,000 Settlement is an exemplary recovery for damaged Class Members and a far higher percentage of potential damages than is typical in cases like this. Thus, the "immediate recovery" factor also weighs in favor of granting final approval.

E. The Recommendation of Experienced Counsel Weighs Heavily in Favor of Approval of the Settlement

"'Counsels' judgment as to the fairness of the agreement is entitled to considerable weight.'" *Lucas*, 234 F.R.D. at 695; *McNeely*, 2008 U.S. Dist. LEXIS 86741, at *37-*38 (same). Here, Lead Counsel have significant experience and expertise in securities and other complex class action litigation and have negotiated numerous other class action settlements throughout the country. *See* Robbins Geller Decl., Ex. H; Motley Rice Decl., Ex. G; Stueve Siegel Decl., Ex. A. Lead Counsel used that expertise and experience to diligently prosecute this Litigation, reaching a favorable result for Members of the Class. Lead Counsel's and the Lead Plaintiffs' judgment is that the Settlement is fair, reasonable, and adequate and warrants the Court's approval. Gronborg Decl., ¶¶117-118. The recommendation of experienced counsel strongly supports granting final approval of the Settlement.

IV. THE PLAN OF ALLOCATION IS FAIR, REASONABLE, AND ADEQUATE

If the Court approves the proposed Settlement, upon completion of the claims submission process, the Net Settlement Fund will be distributed to Members of the Class according to the Plan of Allocation set forth in the Notice. *See* ECF No. 284-3 at 14-36 for the text of the Plan of Allocation. Assessment of the adequacy of a plan of allocation in a class action is """governed by

the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate.'"'" *Law v. NCAA*, 108 F. Supp. 2d 1193, 1196 (D. Kan. 2000), *aff'd*, 246 F.3d 681 (10th Cir. 2001). "'An allocation formula need only have a reasonable, rational basis, particularly if recommended by "experienced and competent" class counsel.'" *Lucas*, 234 F.R.D. at 695; *Law*, 108 F. Supp. 2d at 1196 (noting that the court gives substantial weight to the opinions of experienced counsel regarding the fairness of allocation).

Here, Lead Counsel prepared the Plan of Allocation after careful consideration of the facts developed over nearly four years of discovery and with the assistance of economics and damages experts for both common stock and bond securities. Gronborg Decl., ¶¶119-121. The detailed Plan of Allocation addresses the allocation of the Net Settlement Fund among Class Members who were damaged by their purchase of Sprint common stock and any of 10 separate bond issuances. For each of the securities, the Plan of Allocation takes into account the impact of Defendants' alleged misstatements and identifies damages and provides for the allocation of the Net Settlement Fund based on when during the Class Period the common stock or bonds were purchased. In addition, the Plan of Allocation accounts for each of the alleged disclosure periods – January 18, 2008 and February 28-29, 2008 – as well as the PSLRA's statutory 90-day look back period, in identifying damages and providing for an allocation of the Net Settlement Fund based on when the covered Sprint securities were sold. Finally, the Plan of Allocation provides that, if the total claims made by Class Members exceeds the Net Settlement Fund, each claimant's share of the Net Settlement Fund will be determined based on the percentage that his, her or its claim bears to the total claims for all claimants. Lead Plaintiffs and Lead Counsel believe that this method of allocation has a reasonable and rational basis, is fair and equitable, and, therefore, warrants the Court's approval. *Id.*, ¶¶119-121.

V. THE REQUESTED ATTORNEYS' FEES AND EXPENSE AWARD SHOULD BE APPROVED

A. Lead Counsel Are Entitled to a Reasonable Percentage of the Common Fund

Fee awards in meritorious cases promote private enforcement of, and compliance with, the federal securities laws, which "seek to maintain public confidence in the marketplace. They do so by deterring fraud, in part, through the availability of private securities fraud actions." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345 (2005); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). For over fifty years, the Supreme Court has repeatedly emphasized that private securities actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).

The Supreme Court has long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (in common fund cases, "a reasonable fee is based on a percentage of the fund bestowed on the class"). The purpose of the common fund doctrine is to fairly and adequately compensate class counsel for services rendered and to ensure "'that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense.'" *Gottlieb v. Barry*, 43 F.3d 474, 482 (10th Cir. 1994) (awarding 22.5% of $44 million settlement fund) (quoting *Boeing*, 444 U.S. at 478).

In 1995, Congress passed the PSLRA and codified the percentage-of-recovery approach for awarding fees in common fund securities fraud cases. 15 U.S.C. §78u-4(a)(6). Under the PSLRA, "Congress plainly contemplated that percentage-of-recovery would be the primary measure of attorneys' fees awards in federal securities class actions." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp.

2d 570, 586 (S.D.N.Y. 2008); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005). Indeed, by its plain terms, the PSLRA sets the "award of attorneys' fees and expenses to 'a reasonable percentage' of any recovery." *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d 383, 385 (D. Md. 2006).

The Tenth Circuit has generally adhered to the percentage of the fund method for awarding attorneys' fees in common-fund cases such as this.[4] In *Gottlieb*, for instance, the Tenth Circuit explained that a percentage method for setting a fee "is less subjective than the lodestar plus multiplier approach," matches the marketplace most closely thus providing better incentive to counsel, and is better suited where class counsel "was initially retained on a contingent fee basis." 43 F.3d at 484; s*ee also Uselton v. Commercial Lovelace Motor Freight*, 9 F.3d 849, 853 (10th Cir. 1993) (accepting the propriety of the percentage approach "rather than lodestar" in the awarding of attorneys' fees). Likewise, in *Consumers Gas & Oil v. Farmland Indus.*, 863 F. Supp. 1357, 1361 (D. Colo. 1993), the court made the point – in the context of a discussion on common fund cases – that when attorneys' fees are premised on a contingent recovery, "a percentage fee is customary if not universal."

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[4] *See, e.g.*, *Gottlieb*, 43 F.3d at 482 ("the more recent trend [in determining a fee award in a common fund case] has been toward utilizing the percentage method in common fund cases"); *In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1269 (D. Kan. 2006) (noting that percentage of fund analysis is preferred method for awarding fees in common fund cases); *Vaszlavik v. Storage Tech. Corp.*, No. 95-B-2525, 2000 U.S. Dist. LEXIS 21140, at *4 (D. Colo. Mar. 9, 2000) ("[w]hile enhanced lodestar cases remain instructive, the Tenth Circuit has expressed 'a preference for the percentage of the fund method' . . . ."); *Anderson v. Merit Energy Co.*, No. 07-cv-00916-LTB-BNB, 2009 U.S. Dist. LEXIS 100681, at *13 (D. Colo. Oct. 20, 2009) (applying percentage method); *Lewis v. Wal-Mart Stores, Inc.*, No. 02-CV-0944-CVE-FHM, 2006 U.S. Dist. LEXIS 87681, at *2-*3 (N.D. Okla. Dec. 4, 2006) (same); *Sprint*, 443 F. Supp. 2d at 1269 (same); *Millsap v. McDonnell Douglas Corp.*, No. 94-CV-633-H (M), 2003 U.S. Dist. LEXIS 26223, at *21 (N.D. Okla. May 28, 2003) (same); *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303, 1316 (D.N.M. 2002) (same); *Vaszlavik*, 2000 U.S. Dist. LEXIS 21140, at *5 (same). *See also* Declaration of Richard H. Ralston ("Ralston Decl."), ¶25, submitted herewith.

"There are strong policy reasons behind the judicial and legislative preference for the percentage of recovery method of determining attorney fees in these cases." *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 991 (D. Minn. 2005); *see also Report of the Third Circuit Task Force, Court Awarded Attorney Fees*, 108 F.R.D. 237, 254 (3d Cir. Oct. 8, 1985). First, "[the percentage] methodology rewards efficiency and provides plaintiffs' counsel with a strong incentive to effectuate the maximum possible recovery under the circumstances." *In re St. Paul Travelers Sec. Litig.*, No. 04-3801 (JRT/FLN), 2006 U.S. Dist. LEXIS 23191, at *10 (D. Minn. Apr. 25, 2006); *see also In re N.M. Indirect Purchasers Microsoft Corp. Antitrust Litig.*, 149 P.3d 976, 993 (N.M. Ct. App. 2006) ("The percentage method is preferred in some jurisdictions, including the Tenth Circuit, because this method rewards efficient and prompt resolutions of class actions.").[5]

Second, the percentage method is consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated on a percentage-of-the-recovery method. *See In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992).

Third, use of the percentage method decreases the burden imposed upon courts by the "lodestar" method, and assures that class members do not experience undue delay in receiving their share of the settlement. *See Telik*, 576 F. Supp. 2d at 585 ("the 'primary source of dissatisfaction' with the lodestar methodology 'was that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits'").

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[5] *See also Shaw v. Interthinx, Inc.*, No. 13-cv-01229-REB-NYW, 2015 U.S. Dist. LEXIS 52783, at *13-*14 (D. Colo. Apr. 21, 2015) ("'The Tenth Circuit favors the common fund approach, as opposed to the lodestar method, because a percentage of the common fund is less subjective than the lodestar plus multiplier approach, matches the marketplace most closely, and is the better suited approach when class counsel were retained on a contingent fee basis . . . .'") (awarding one third of common fund) (quoting *Lucken Family Ltd. P'ship, LLLP v. Ultra Res., Inc.*, No. 09-cv-01543-REB-KMT, 2010 U.S. Dist. LEXIS 144366, at *6 (D. Colo. Dec. 22, 2010) (citing *Uselton*, 9 F.3d at 853)).

B. Lead Counsel Seek Only 22% of the Fund, a Percentage Well Below What Courts in This Circuit Have Found to Be Reasonable

An appropriate fee is intended to approximate what counsel would receive if they were bargaining for their services in the open marketplace. *See Missouri v. Jenkins*, 491 U.S. 274, 285 (1989). The Tenth Circuit recognizes that a fee of 25% of the fund is the "'benchmark'" award in common fund cases. *Millsap*, 2003 U.S. Dist. LEXIS 26223, at *25 (citing *Gottlieb*, 43 F.3d at 488). Awards above the 25% benchmark are common in complex cases, such as this one: "Regardless of whether a percentage of the fund or enhanced lodestar approach is used, class action fee awards are ***typically 30%*** of the fund created by the settlement." *Vaszlavik*, 2000 U.S. Dist. LEXIS 21140, at *4-*5 (awarding 30% of settlement fund) (emphasis added); *Horton v. Leading Edge Mktg., Inc.*, No. 04-cv-00212-EWN-CBS, 2008 U.S. Dist. LEXIS 11761, at *8 (D. Colo. Feb. 4, 2008) (fee of 23% was "less than the customary contingency fee of one-third of the recovery, and on the low end of the range of fees granted by federal courts in common fund cases").

Lead Counsel's request for attorneys' fees of 22% falls at the lower end of fee percentages awarded by courts in the Tenth Circuit in common fund cases. *See, e.g.*, *In re Bank of Am. Wage & Hour Emp't Litig.*, No. 10-MD-2138-JWL, 2013 U.S. Dist. LEXIS 180056, at *22 (D. Kan. Dec. 18, 2013) (awarding 25%, which was "well within the range of awards granted in the context of class action settlements and approved by the Tenth Circuit"); *Lowery v. City of Albuquerque*, No. CIV 09-0457 JB/WDS, 2013 U.S. Dist. LEXIS 35626, at *140 (D.N.M. Feb. 27, 2013) (awarding 30%, which was "within the range of awards that other courts within the Tenth Circuit have approved"); *Barr v. Qwest Commc'ns Co., LLC*, No. 1:01-cv-00748-WYD-KLM, 2013 U.S. Dist. LEXIS 4662, at *13 (D. Colo. Jan 11, 2013) (awarding 25%, which was "well within the range of reasonable percentage-fee awards in this Circuit"); *Fankhouser v. XTO Energy, Inc.*, No. CIV-07-798-L, 2012 U.S. Dist. LEXIS 147197, at *8 (W.D. Okla. Oct. 12, 2012) (awarding "nearly 36 percent" of

settlement fund); *Cox v. Sprint Commc'ns Co. L.P.*, No. 6:10-cv-01262-KGG, 2012 U.S. Dist. LEXIS 162576, at *9 (D. Kan. Nov. 14, 2012) (awarding 26%, which was "well within the range of reasonable percentage-fee awards in this Circuit").[6] Based on the fees awarded in other complex class action cases, including those where the recovery for Class Members was far less in comparison to the Settlement achieved here, Lead Counsel's 22% fee request is both fair and reasonable.

C. The "*Johnson* Factors" Support the Reasonableness of Lead Counsel's Fee Request

Courts in this jurisdiction consider the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) for added guidance on setting reasonable fees. *See Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) (noting that "federal courts have relied heavily on the factors articulated in [*Johnson*] in calculating and reviewing attorneys' fees awards"); *see also Gottlieb*, 43 F.3d at 482 n.4 (citing *Johnson*, 488 F.2d at 717-19). The *Johnson* factors are: (1) time and labor required; (2) novelty and difficulty of the issues; (3) skill required to perform the legal services properly; (4) preclusion of other employment; (5) customary

[6] *See also In re Spectranetics Corp. Sec. Litig.*, No. 08-cv-02048-REB-KLM, slip op. at 3 (D. Colo. Apr. 4, 2011) (fee award of 28% of the settlement fund) (Ex. 10); *W. Palm Beach Firefighters' Pension Fund v. Startek, Inc.*, No. 05 Civ. 01265 (WDM)(MEH), slip op. at 2 (D. Colo. Dec. 21, 2009) (fee award of 25% of the settlement fund) (Ex. 11); *In re Rhythms Sec. Litig.*, No. 02 Civ. 35 (JLK)(CBS), slip op. at 7 (D. Colo. Apr. 3, 2009) (fee award of 30% of the settlement fund) (Ex. 12); *McNeely*, 2008 U.S. Dist. LEXIS 86741, at *46 (awarding 33% and noting that "[f]ees in the range of at least one-third of the common fund are frequently awarded in class action cases of this general variety"); *In re Williams Sec. Litig.*, No. 02 Civ. 72-SPF (FHM), slip op. at 2 (N.D. Okla. Feb. 12, 2007) (fee award of 25% of the settlement fund) (Ex. 13); *Lewis*, 2006 U.S. Dist. LEXIS 87681, at *4-*5 (fee award of 33% of the settlement fund); *In re Boston Chicken, Inc. Sec. Litig.*, No. 97-cv-1308-WDM-PAC, 2006 U.S. Dist. LEXIS 56267, at *5-*6 (D. Colo. Aug. 10, 2006) (fee award of 32% of the settlement fund); *In re Novell, Inc. Sec. Litig.*, No. 2:99-Civ-995 (TC), slip op. at 1 (D. Utah May 26, 2005) (fee award of 30% of the settlement fund) (Ex. 14); *In re Pre-Paid Sec., Inc. Litig.*, No. CIV-01-0182-C, slip op. at 9 (W.D. Okla. Dec. 4, 2004) (fee award of 30% of the settlement fund) (Ex. 15); *Cimarron Pipeline Constr., Inc. v. Nat'l Council on Comp. Ins.*, No. 89 Civ. 822, 1993 U.S. Dist. LEXIS 19969, at *4-*5 (W.D. Okla. June 8, 1993) ("[f]ees in the range of 30-40% of any amount recovered are common in complex and other cases taken on a contingent fee basis").

fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) amount involved and results obtained; (9) experience, reputation, and ability of the attorneys; (10) undesirability of the case; (11) nature and length of professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19. The weight to be given to each of the *Johnson* factors varies from case to case, and each factor is not always applicable in every case. The factors applicable to this Litigation are addressed below.[7]

When evaluated under the *Johnson* factors, Lead Counsel's fee request is reasonable.

1. The Amount Involved and the Results Obtained

"While other criteria in determining reasonable attorney fees are legitimate considerations, the amount of the recovery, and end result achieved, is of primary importance." *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 605 (D. Colo. 1974). In addition, this factor "'may be given greater weight [in a common fund case when the court] determines that the recovery was highly contingent and that the efforts of counsel were instrumental in realizing recovery on behalf of the class.'" *Millsap*, 2003 U.S. Dist. LEXIS 26223, at *29 (quoting *Brown*, 838 F.2d at 456). Through their extensive efforts during the prosecution and settlement of this Litigation, Lead Counsel has obtained a recovery of $131,000,000. This is the fourth largest recovery in a securities class action in 10th Circuit history and one of the 100 largest recoveries ever in a securities class action.

The Settlement is not only large relative to other cases, but represents a significant recovery for Class Members. With the assistance of Lead Plaintiffs' damages experts, Lead Counsel estimates that the Class's maximum recoverable damages if successful on all claims at trial were approximately $967 million. The Settlement represents a significant percentage of the Class's

[7] The following factors do not pertain to this Litigation: time limitations imposed by the client or the circumstances, and the nature and length of the professional relationship with the client. Thus, Lead Counsel will not analyze these factors. *See Uselton*, 9 F.3d at 854 (recognizing that "'rarely are all of the *Johnson* factors applicable'").

maximum estimated recoverable damages – approximately 13.5% – and does so while avoiding the substantial risks Lead Plaintiffs faced in establishing the Class's full amount of damages at trial. Gronborg Decl., ¶¶107-110. Indeed, the Settlement far outweighs the average recovery in securities fraud class actions, particularly for a case of this size. According to a recent report published by Cornerstone Research, between 2005 and 2013, the median recovery in securities cases with estimated damages of $500 to $999 million was only 1.8%.[8] The recovery here is more than seven times larger than the median recovery in similarly sized cases. That Lead Counsel has secured such a result in the face of significant risks demonstrates that the requested fee of 22% is reasonable and fair.

2. The Customary Fee – the Percentage Requested Falls Below Those Typically Awarded in This Circuit

As discussed above, Lead Counsel's request for 22% of the fund is far below percentages approved as fair and reasonable by other courts in this Circuit. *See* §V.B, *supra*; *see also* Ralston Decl., ¶24.

3. Time and Labor Required

a. The Time and Labor Dedicated by Lead Counsel Justifies the Requested Fee

The amount of time and labor Lead Counsel dedicated to the prosecution and settlement of the Litigation also demonstrates the reasonableness of the 22% fee request. As detailed in the Gronborg Declaration, Lead Counsel vigorously prosecuted this Litigation against Defendants for over six years. This case was settled only after Lead Counsel (i) conducted detailed investigative interviews of witnesses, including former employees of Sprint, (ii) filed a comprehensive

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[8] *See* Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements: 2014 Review and Analysis*, at 9 (Cornerstone Research 2015), *available at* https://www.cornerstone.com/GetAttachment/701f936e-ab1d-425b-8304-8a3e063abae8/Securities-Class-Action-Settlements-2014-Review-and-Analysis.pdf.

consolidated complaint, (iii) successfully opposed Defendants' motions to dismiss and for interlocutory appeal, (iv) identified, retained and consulted with numerous experts, (v) conducted extensive discovery, including addressing complicated issues surrounding the search and production of electronically stored information, reviewing and analyzing over 2.5 million pages of documents produced by Defendants, over 1.7 million pages of documents produced by third parties, and taking 38 depositions, (vi) responded to discovery propounded by Defendants, including defending four client and expert depositions, and (vii) engaged in vigorous and protracted settlement negotiations with Defendants' counsel, with the continued assistance of an experienced mediator.[9] Gronborg Decl., ¶¶20, 22, 34-79, 85-88, 111-114. These efforts paved the way for Lead Counsel to obtain a substantial financial recovery for the Class, and Lead Counsel should now be compensated for their efforts.

b. A Lodestar Cross-Check Also Supports Lead Counsel's Fee Request

The requested fee not only represents a reasonable percentage of the benefit obtained, but also reasonably reflects the work invested by Lead Counsel. As demonstrated by the Lodestar and Expense Submissions, over 86,000 hours, resulting in an aggregate lodestar of $39,854,693.50, have been invested in this Litigation.[10] As a result, Lead Counsel's request for an award of 22% of the Settlement Amount ($28.82 million, before interest) amounts to significantly ***less*** than the time actually spent on this case. In other words, Lead Counsel's request for attorneys' fees reflects a

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[9] Lead Counsel has and will continue to perform legal work on behalf of the Class should the Court approve the proposed Settlement and Plan of Allocation. Additional resources will be expended assisting Class Members with their Proof of Claim forms and related inquiries and working with the claims administrator, Garden City Group, Inc., to ensure the smooth progression of claims processing.

[10] This lodestar was calculated using Lead Counsel's usual hourly rates, which resulted in a blended rate that is lower than blended rates that have been approved in this District. *See* Ralston Decl., ¶37.

27.69% discount on the time actually spent litigating the matter and results in the application of a negative multiplier.

While courts in this Circuit regularly approve positive multipliers,[11] courts have repeatedly recognized that the reasonableness of a fee request under the percentage method is reinforced by evidence that the percentage fee would represent a negative multiplier of the lodestar. *See Cox*, 2012 U.S. Dist. LEXIS 162576, at *12 (finding that the Kansas-only portion of a cumulative $41,500,000 attorneys' fee request was reasonable, in part because it was "subject to a ***negative*** multiplier") (emphasis in original); *Barr*, 2013 U.S. Dist. LEXIS 4662, at *17 ("based on the 25-percent fee-and-expense award sought, and the lodestar crosscheck, which confirms a negative multiplier, the fee-and-expense award is far from excessive"); *In re Thornburg Mortg., Inc.*, 912 F. Supp. 2d 1178, 1259 (D.N.M. 2012) ("The attorneys' fees represent a negative multiplier of the total lodestar amount and are an acceptable percentage of the Class' award. This litigation has been vigorously litigated over a period of five years. The Court finds that the attorneys' fees and expenses are reasonable and fair. While the attorneys' fees are substantial in isolation, in comparison to what Co-Lead Counsel put into the case, they did not hit a home run. The Court agrees with Co-Lead Counsel that a reasonable award of attorneys' fees is necessary to further the public policy behind the securities laws and will incentivize high-caliber attorneys to take on risky cases to vindicate the rights of shareholders.").

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[11] *See, e.g.*, *Vaszlavik*, 2000 U.S. Dist. LEXIS 21140, at *7-*8 (noting that "[c]ourts in common fund cases regularly award multipliers of two to three times the lodestar or more to compensate for risk and to reflect the quality of the work performed"); *In re Miniscribe Corp*., 309 F.3d 1234, 1245 (10th Cir. 2002) (affirming application of a 2.57 multiplier); *Brewer v. S. Union Co*., 607 F. Supp. 1511, 1535 (D. Colo. 1984) (applying a multiplier of 3); *In re Crocs., Inc. Sec. Litig*., No. 07-cv-2351-PAB-KLM, 2014 U.S. Dist. LEXIS 134396, at *12-*13 (D. Colo. Sept. 18, 2014) (holding that the 1.23 multiplier was "well below" other approved multipliers that range from 2.5 to 4.6).

Accordingly, a 22% fee request is fair and reasonable under a percentage-of-the-fund method or a lodestar cross-check analysis.

4. The Novelty and Difficulty of the Legal and Factual Questions Support Lead Counsel's Fee Request

An analysis of the novelty and difficulty of the issues involved in the Litigation also favors granting Lead Counsel's request for attorneys' fees. "Securities fraud class actions are by their nature, complex and difficult to prove." *In re Charter Commc'ns, Inc.*, No. 4:02-CV-1186 CAS, 2005 U.S. Dist. LEXIS 14772, at *47-*48 (E.D. Mo. June 30, 2005). In this Litigation, not only were Lead Plaintiffs faced with the inherent complexities involved in this type of action, but there were also additional complexities presented here, including extensive electronic discovery disputes (*see* Gronborg Decl., ¶¶49-52) and the shifting legal landscape regarding statements of opinion (*see* §V.C.4.a below), which required substantial investigation and analysis. *See In re King Res. Co. Sec. Litig*., 420 F. Supp. 610, 632 (D. Colo. 1976) (finding novelty and difficulty of issues supported requested fees where "[t]he litigation . . . involved unique and substantial issues of law in the technical area of SEC Rule 10b-5 . . . difficult, complex and oft-disputed class action questions, and difficult questions regarding computation of damages").

a. Risk in Establishing Liability

Lead Plaintiffs faced substantial risks in moving forward with the Litigation, and in opting to settle the Litigation, Lead Plaintiffs and Lead Counsel considered, among other things, the significant risks attendant to the Class's claims. For instance, Defendants strenuously argued that their statements were not false and involved only opinions for which they could not be liable. Defendants' arguments centered on the legal holdings in *Fait v. Regions Fin. Corp.*, 655 F.3d 105 (2d Cir. 2011), and *MHC Mutual Conversion Fund, L.P. v. Sandler O'Neill & Partners, L.P.*, 761 F.3d 1109 (10th Cir. 2014). Both cases were issued after the motion to dismiss order in this case,

and Defendants insisted that the holdings in both cases immunized their statements regarding Sprint's goodwill. While Lead Plaintiffs disagreed with Defendants' contentions, there was a substantial risk of recovering limited or no damages if the Court or jury agreed with any of Defendants' arguments. Gronborg Decl., ¶¶100-110. The parties also disputed and spent a great deal of time and energy in discovery on Defendants' reliance defense. Defendants asserted that their reliance on outside auditors and internal disclosure controls meant they could not be liable for any of the alleged false statements. Again, Lead Plaintiffs disagreed, but recognized that Defendants would be able to present testimony from numerous third parties that would call into question the Defendants' liability.

b. Risk in Establishing Causation and Damages

Even if Lead Plaintiffs ultimately succeeded in overcoming each and every defense Defendants could raise regarding liability, Lead Plaintiffs also faced risks in establishing causation and damages. Lead Plaintiffs would be required to prove that Defendants' alleged false statements and omissions of material fact inflated the price of both Sprint common stock and bonds during the Class Period, and that, upon the disclosures of such misinformation, the price of these Sprint securities dropped, damaging Lead Plaintiffs and the Class. *See Dura*, 544 U.S. at 341-42. Lead Plaintiffs also would be required to prove the amount of the artificial inflation that came out of the securities following the January 18, 2008 and February 28-29, 2008 disclosures.

Although Lead Counsel worked extensively with causation and damages experts for both the common stock and bonds, and believed they would be able to present expert testimony to meet Lead Plaintiffs' burden on loss causation and establish damages with respect to each alleged corrective disclosure, Defendants undoubtedly would advocate for a substantially smaller damages figure, or zero. This is particularly true in this case, where each of the disclosures included negative news about Sprint unrelated to the alleged fraud and were made in the context of a global credit crisis.

The jury would have been presented with expert testimony on the portions of Sprint's securities price decline related to the disclosure of the alleged fraud and tasked with determining what amount, if any, of the price declines were fraud-related damages. As a result, the crucial element of damages would almost certainly have been reduced at trial to a "battle of the experts." Gronborg Decl., ¶¶107-110; *see, e.g.*, *In re EVCI Career Coll. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240 (CM), 2007 U.S. Dist. LEXIS 57918, at *24 (S.D.N.Y. July 27, 2007) (noting unpredictability of battle of damage experts); *see also In re Cendant Corp. Litig.*, 264 F.3d 201, 239 (3d Cir. 2001) ("establishing damages at trial would lead to a 'battle of experts' . . . with no guarantee whom the jury would believe"). As a result of the foregoing risks, the Class would by no means be assured of a ruling in its favor. The novelty and difficulty of these legal and factual questions further support the Settlement achieved and the requested attorneys' fees.

5. The Skill Required and the Experience, Reputation, and Ability of Lead Counsel Support the Requested Fee

The skill required and the experience, reputation, and ability of the attorneys, also support the requested fee award. *See Johnson*, 488 F.2d at 717-19. Lead Counsel are among the nation's preeminent law firms in class action securities litigation and have successfully litigated and tried numerous class actions on behalf of major institutional investors. *See* Robbins Geller Decl., Ex. H; Motley Rice Decl., Ex. G. Liaison Counsel Stueve Siegel is a similarly skilled complex litigation firm that, consistent with Local Rule 5.4.2(c)(3), meaningfully participated in the successful prosecution of this matter. Stueve Siegel Decl., ¶20 & Ex. A.

The quality of opposing counsel is also important in evaluating the quality of services rendered by Lead Counsel. *See, e.g.*, *Warner Commc'ns*, 618 F. Supp. at 749 ("The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work."); *Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 U.S. Dist. LEXIS 27077, at *100 (N.D. Tex.

Nov. 8, 2005) (weighing standing of opposing counsel when determining attorneys' fees "because such standing reflects the challenge faced by plaintiffs' attorneys"). In this Litigation, the Defendants are represented by experienced and skilled defense counsel, including two of the largest and most respected defense firms in the world, Skadden, Arps, Slate, Meagher & Flom LLP and Baker & McKenzie, as well as the Kansas City firm Rouse Hendricks German May PC, which spared no effort in the defense of their clients' claims. In the face of this formidable opposition, Lead Counsel developed their case so as to persuade Defendants to agree to a substantial $131 million financial recovery for the Class.

6. The Contingent Nature of the Fee Weighs in Favor of the Requested Award

Courts in this Circuit have found that "the risk of non-recovery" weighs heavily in considering an award of attorneys' fees. *Vaszlavik*, 2000 U.S. Dist. LEXIS 21140, at *9-*10; *see also Shaw*, 2015 U.S. Dist. LEXIS 52783, at *19 (contingent fee "'is designed to reward . . . counsel for taking the risk of prosecuting a case without payment during the litigation, and the risk that the litigation may be unsuccessful'"). Lead Counsel has prosecuted this Litigation on a wholly contingent basis and has borne all the risks, including surviving dispositive motions, obtaining class certification, proving liability, causation and damages, prevailing in the "battle of the experts," and litigating the case through trial and possible appeals. Lead Counsel understood from the outset that it was embarking on a complex, expensive, and lengthy litigation, which would require the investment of millions of dollars and many thousands of hours of attorney time, with no guarantee of ever being compensated for the investment of such time and money. Lead Counsel also understood that Defendants would (and, in fact, did) retain large and highly experienced corporate defense firms to mount a strong defense. In undertaking this risk, Lead Counsel were obligated to, and did, ensure

that sufficient resources were dedicated to the prosecution of this Litigation. *See generally* Gronborg Decl., ¶¶17-99.

The risks of contingent litigation are highlighted by the fact that a dramatic change in the law can result in the dismissal of a claim after a great deal of time and effort has been expended on the case. Recently, the Supreme Court has shown great interest in class action cases generally, as well as securities cases in particular. *See, e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, __ U.S. __, 134 S. Ct. 2398 (2014); *Comcast Corp. v. Behrend*, __ U.S. __, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541 (2011); *AT&T Mobility LLC v. Concepcion*, __ U.S. __, 131 S. Ct. 1740 (2011); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010). As a result of these and other developments, many cases are lost on summary judgment after thousands of hours have been invested in successfully opposing motions to dismiss and pursuing discovery. Indeed, recent cases demonstrate the real risks associated with such developments. *See, e.g.*, *In re Vivendi Universal, S.A. Sec. Litig.*, 842 F. Supp. 2d 522 (S.D.N.Y. 2012) (granting judgment on the pleadings following change of law in *Morrison*); *In re Williams Sec. Litig.-WCG Subclass*, 558 F.3d 1130, 1143 (10th Cir. 2009) (affirming grant of summary judgment for energy company in PSLRA case based on Supreme Court decision in *Dura*). Thus, there existed a real risk that Lead Counsel (and the Class) would invest substantial resources and efforts and receive nothing. *See Eatinger v. BP America Prod. Co.*, No. 07-1266-EFM-KMH, slip op. at 14 (D. Kan. Sept. 17, 2012) ("Finally, the contingent nature of the case meant that at the end of the day, Class Counsel could have been left with no fee and no recovery of the enormous expenses that it had paid and carried for years.") (Ex. 16).

7. The Preclusion of Other Employment by Lead Counsel Supports the Requested Fee

As demonstrated by the 86,467 hours incurred in prosecuting this action, Lead Counsel were precluded from other employment – including hourly or other contingent fee litigation – due to their acceptance of this Litigation. Accordingly, this factor weighs in favor of approving the fee request. *See Lucas v. Kmart Corp.*, No. 99-cv-01923-JLK-CBS, 2006 U.S. Dist. LEXIS 51420, at *18 (D. Colo. July 27, 2006) ("Large-scale class actions . . . necessarily require a great deal of work, and a concomitant inability to take on other cases.").

8. The Undesirability of the Case Supports the Requested Attorneys' Fees and Expenses

Securities cases have often been recognized as "undesirable" due to the financial burden on counsel, and the time demands of litigating class actions of this size and complexity. *See, e.g.*, *Eatinger*, No. 07-1266-EFM-KMH, slip op. at 13 ("The time, effort, and out-of-pocket investment makes a class action undesirable to most attorneys."); *Millsap*, 2003 U.S. Dist. LEXIS 26223, at *41 ("This case is . . . undesirable, in the way that all contingent fee cases are undesirable, because it produced no income, but has required significant expenditures . . . ."). As stated above, Lead Counsel were the only firms to file a complaint and the only firms to move to lead this action on behalf of the Class. The Seventh Circuit recently recognized that "[l]ack of competition [to serve as lead counsel] not only implies a higher fee but also suggests that most members of the securities bar saw this litigation as too risky for their practices." *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013).

D. The Reaction to the Requested Fee by the Class Supports the Reasonableness of Lead Counsel's Fee Request

Although not specifically cited as a factor for consideration by the Tenth Circuit, courts also recognize the significance of the Class Members' reaction to the request for attorneys' fees and

expenses. *See generally Sprint*, 443 F. Supp. 2d at 1262. Lead Plaintiffs fully support the Settlement and Lead Counsel's request for their fees and expenses. Declaration of Maria Wieck ("Wieck Decl."), ¶5; Declaration of Craig Slaughter ("Slaughter Decl."), ¶5; Declaration of Michael Lanser ("Lanser Decl."), ¶5 (collectively, "Lead Plaintiff Declarations"), filed herewith. Here, notice of the proposed Settlement was mailed to over 550,000 potential Class Members and nominees, advising them that Lead Counsel would be requesting an award of attorneys' fees not to exceed 22% of the Settlement Amount and litigation expenses not to exceed $4 million plus interest on both amounts at the same rate earned on the Settlement Fund, all to be paid from the Settlement Fund. As of the filing of this memorandum, not one recipient of the Class Notice has objected to these requests.

E. Lead Counsel Are Entitled to an Award of Their Reasonable Litigation Expenses

"As with attorneys' fees, an attorney who creates or preserves a common fund for the benefit of a class is entitled to receive reimbursement of all reasonable costs incurred." *Vaszlavik*, 2000 U.S. Dist. LEXIS 21140, at *11. Here, Lead Counsel request an award of litigation expenses and charges, in the amount of $3,434,112.10 incurred by Lead Counsel to date in connection with the prosecution of the Litigation on behalf of the Class, plus interest on such amount at the same rate as earned by the Settlement Fund. A large portion of these expenses was used to pay for investigation and discovery costs, Lead Plaintiffs' experts and consultants, and the Parties' mediation sessions. The remaining expenses and charges relate to photocopying of documents, on-line research, messenger services, postage, express mail and next day delivery, long distance telephone and facsimile expenses, meals, travel, and other incidental expenses directly related to the prosecution of this Litigation. *See* Lodestar and Expense Submissions of Class Counsel. To date, no objections have been received regarding Lead Counsel's expense request. Accordingly, Lead Counsel respectfully requests an award of $3,434,112.10 for these expenses.

VI. THE REQUESTED PSLRA-EXPENSE AWARD FOR LEAD PLAINTIFFS SHOULD BE APPROVED

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 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).[12] Here, as set forth in the Declarations of Michael Lanser (¶6), Maria Wieck (¶¶1, 6), and Craig Slaughter (¶6), PACE, Skandia, and WVIMB are seeking $13,927.69, $14,647.50 and $14,345.25, respectively, in lost wages and expenses in connection with their representation of the Class.

Lead Plaintiffs have been fully committed to pursuing their claims against Defendants since before moving for appointment as Lead Plaintiff. Lead Plaintiffs have actively and effectively fulfilled their obligations as representatives for the Class, complying with all of the many demands placed upon them during the prosecution and settlement of the Litigation, and providing invaluable assistance to Lead Counsel. Among other things, Lead Plaintiffs reviewed and approved motions and Court filings, participated in Class discovery, and analyzed and approved mediation and settlement strategy. *See* Wieck Decl., ¶3; Slaughter Decl., ¶3; Lanser Decl., ¶3. These are precisely the types of activities courts have found to support awards to class representatives. *See Xcel*, 364 F. Supp. 2d at 1000 (granting awards to lead plaintiffs where they reviewed pleadings, communicated with counsel, indicated willingness to appear at trial, kept informed of settlement negotiations, and effectuated policies of federal securities laws); *see also In re Am. Int'l Grp., Inc.*,

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[12] In enacting the PSLRA, Congress intended to grant courts discretion in this regard. *See* H.R. Conf. Rep. No. 104-369, at 35 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 734 (lead plaintiffs should be compensated for activities "associated with service as lead plaintiff . . . and [the committee] grants the courts discretion to award fees accordingly").

No. 04 Civ. 8141 (DAB), 2010 U.S. Dist. LEXIS 129196, at *19 (S.D.N.Y. Dec. 2, 2010) (granting PSLRA award of $30,000 to institutional lead plaintiffs "to compensate them for the time and effort they devoted on behalf of a class"); *In re Marsh & McLennan Cos. Inc. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 U.S. Dist. LEXIS 120953, at *60 (S.D.N.Y. Dec. 23, 2009) (awarding over $200,000 to lead plaintiffs for their time spent supervising lead counsel's work).

Lead Counsel respectfully submit that Lead Plaintiffs' participation in the Litigation fully warrants the Court's approval of an award to Lead Plaintiffs in the amount of $13,927.69 for PACE, $14,647.50 for Skandia, and $14,345.25 for WVIMB.

VII. CONCLUSION

After more than six years of extensive, complex, and vigorous litigation, a settlement has been reached in this Litigation that is fair, reasonable, and in the best interests of the Class. The Plan of Allocation is also fair. Lead Plaintiffs respectfully request the Court grant final approval of the Settlement and the Plan of Allocation.

As a result of their efforts in achieving the Settlement and their significant commitment of both time and expenses, Lead Counsel also respectfully request that the Court approve their application for an award of fees and litigation expenses, and Lead Plaintiffs' time and expense request.

Dated: May 8, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 8, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notifications of such filing to all counsel of record.

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