UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CHRISTOPHER MACHADO, and MICHAEL RUBIN, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. ENDURANCE INTERNATIONAL GROUP HOLDINGS, INC., HARI RAVICHANDRAN, and TIVANKA ELLAWALA, Defendants.	Case No.: 1:15-cv-11775-GAO CLASS ACTION

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Court-appointed Lead Counsel, Glancy Prongay & Murray LLP ("GPM" or "Lead Counsel"), having achieved a Settlement of $18,650,000 in cash for the benefit of the Settlement Class, respectfully submit this memorandum of law in support of their motion for an award of attorneys' fees in the amount of 33 1/3% of the Settlement Fund, or $6,216,667, plus interest earned at the same rate as the Settlement Fund, on behalf of all Plaintiffs' Counsel.[1] Lead Counsel also seek (i) reimbursement of $155,370.34 in litigation expenses that were reasonably and necessarily incurred by Plaintiffs' Counsel in prosecuting and resolving the Action, and (ii) awards pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA") in the total amount of $7,000 for Plaintiffs' costs directly related to their representation of the Settlement Class.

PRELIMINARY STATEMENT

The proposed Settlement, which provides for the cash payment of $18,650,000 in exchange for the resolution of the Action, represents an excellent result for the Settlement Class. As discussed below, Plaintiffs faced numerous challenges to proving both liability and damages that posed the serious risk of no recovery, or a substantially lesser recovery, for the Settlement Class. Defendants had strong defenses to Plaintiffs' claims and there was considerable uncertainty throughout the case as to whether Plaintiffs would be able to obtain any recovery. Nonetheless, the Settlement was achieved through the skill, tenacity and effective advocacy of

[1] "Plaintiffs' Counsel" consist of Lead Counsel, liaison counsel, Block & Leviton LLP ("B&L"), and WeissLaw, LLP ("WeissLaw"). All capitalized terms not otherwise defined herein have the meanings set forth in the Stipulation and Agreement of Settlement, dated July 6, 2018 (ECF No. 77-1) (the "Stipulation") or in the Declaration of Lionel Z. Glancy in Support of (I) Plaintiffs' Motion for Final Approval of Class Action Settlement, Class Certification and Plan of Allocation, and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Litigation Expenses (the "Glancy Declaration" or "Glancy Decl."), filed concurrently herewith. Unless otherwise noted, all citations to "¶__" and "Ex." refer, respectively, to paragraphs in, and exhibits to, the Glancy Declaration.

Plaintiffs' Counsel, which vigorously litigated this Action for over three years on an entirely contingent fee basis against highly skilled defense counsel. Plaintiffs' Counsel had to devote substantial amounts of time and resources before the Settlement could be obtained. ¶¶ 3, 88.

As detailed in the accompanying Glancy Declaration,[2] Plaintiffs' Counsel devoted a significant amount of time, effort and resources to pursuing this litigation and achieving the proposed Settlement. Among other things, Plaintiffs' Counsel: (i) conducted a thorough and wide-ranging investigation into the claims asserted, including a detailed review and analysis of a large volume of publicly available information, as well as interviews with dozens of former Endurance employees; (ii) prepared and filed an initial complaint and three detailed amended complaints based on Lead Counsel's extensive investigation (including the 105-page Third Amended Complaint); (iii) opposed Defendants' motions to dismiss both the second and third amended complaints; (iv) reviewed and analyzed Endurance's settlement with the U.S. Securities and Exchange Commission ("SEC"); (v) negotiated and executed a tolling agreement with Defendants with respect to potential Securities Act claims; (vi) reviewed and analyzed more than 1.4 million pages of documents from Defendants that had previously been provided to the SEC in connection with the investigation into the Company; (vii) consulted with an accounting expert; (viii) consulted with experts regarding damages, market efficiency and loss causation issues throughout the Action; and (ix) engaged in extensive settlement negotiations and mediation efforts, which included the preparation of a mediation brief addressing liability, loss causation

[2] The Glancy Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*, the factual and procedural history of the Action (¶¶ 7-14); the efforts involved in the drafting and defending of the complaints (¶¶ 15-34); the negotiations leading to the Settlement (¶¶ 35-43); the risks and uncertainties of continued litigation (¶¶ 48-59); and a description of the services that Plaintiffs' Counsel provided for the benefit of the Settlement Class (¶¶ 3,76).

and damages, along with exhibits, a full-day mediation session with the Honorable Daniel Weinstein (Ret.) of JAMS, and lengthy subsequent negotiations. ¶¶ 40-41.

Plaintiffs' Counsel undertook these significant efforts without any compensation and in the face of substantial litigation risks in a very challenging case. The Settlement achieved here through Plaintiffs' Counsel's efforts is particularly noteworthy when viewed against the significant risks that Plaintiffs and their counsel would have had to overcome to prevail in this complex securities fraud litigation. Indeed, Plaintiffs would have faced substantial challenges in establishing both liability and damages in the Action.

To start, Plaintiffs would have faced significant difficulties in overcoming Defendants' statute of limitations arguments. Defendants claimed that both the Securities Act and Exchange Act claims based on Endurance's IPO materials fell outside of their respective one and two year limitations periods. While Plaintiffs maintain that their claims were timely asserted, Defendants proffered a novel argument regarding whether Plaintiffs' claims could relate-back to the filing of the original complaint. ¶ 52.

Defendants also raised a number of credible arguments directed at the adequacy of Plaintiffs' falsity and scienter allegations. Defendants argued and would continue to argue that they had not made any materially false or misleading statements regarding the non-GAAP metrics, and even if some of the non-GAAP metrics were incorrect, those non-GAAP metrics were not material to investors. ¶ 50. Further, Plaintiffs would have faced significant hurdles in proving that the Defendants acted with the requisite scienter. Defendants had argued and would continue to argue that Plaintiffs had not alleged any motive to engage in fraud based on their class period trading histories, and could not point to any witnesses or other particularized facts that supported their allegations that Defendants knowingly or recklessly committed securities fraud. Further the SEC only pursued negligence claims (rather than scienter based claims)

against the Individual Defendants. ¶ 51.

Even if Plaintiffs had succeeded in establishing liability, Defendants made a number of loss causation and damages arguments that, if accepted, could have substantially reduced or eliminated damages altogether. While Plaintiffs would have argued that the declines in Endurance's stock price were attributable to corrections of the alleged misstatements and omissions concerning Endurance's non-GAAP metrics, Defendants would have asserted that much of the decline was due to other negative news, and that even if some portion of the decline in Endurance's stock price was caused by corrective disclosures, damages were minimal. For example, Defendants argued that the November 2015 stock price decline was not due to the revelation that Endurance's non-GAAP metrics were misstated, but rather was in reaction to Endurance's announcement that it was acquiring Constant Contact for $1.1 billion. Further, Defendants claimed that that the release of the Gotham Report on April 28, 2015 and the December 17, 2015 revelation that Endurance was the subject of an SEC investigation were not corrective disclosures because: (i) the Gotham Report did not reveal any new facts to the market; and (ii) the announcement of an investigation into wrongdoing does not itself reveal any wrongdoing. If Defendants' arguments concerning the alleged disclosures were accepted by the Court or a jury, then the Settlement Class's damages would have been significantly reduced. ¶¶ 54-55.

In light of these significant risks, the $18,650,000 cash recovery is an excellent result and demonstrates the high quality of Plaintiffs' Counsel's representation. As compensation for their significant efforts and achievements on behalf of the Settlement Class, Lead Counsel request a fee award in the amount of 33 1/3% of the Settlement Fund and reimbursement of $155,370.34 in litigation expenses that were necessarily incurred in the prosecution and resolution of the Action. As discussed below, the requested fee is well within the range of fees awarded in

comparable class action settlements, whether considered as a percentage of the Settlement or in relation to Plaintiffs' Counsel's lodestar. Indeed, the requested fee represents a multiplier of 1.77 on Plaintiffs' Counsel's lodestar, which is within the range of multipliers typically awarded in class actions with substantial contingency risks such as this one.

Lead Plaintiff, Christopher Machado, and named Plaintiff, Michael Rubin, have been actively involved in overseeing the Action on behalf of the class. *See* Declaration of Christopher Machado ("Machado Decl."), Ex. 2, at ¶¶ 3-5; Declaration of Michael Rubin ("Rubin Decl."), Ex. 3, at ¶¶ 3-5. Plaintiffs carefully evaluated the fee request at the conclusion of the Action in light of the result obtained, the work performed by Plaintiffs' Counsel, and the risks of the litigation, and each has endorsed the fee request as fair and reasonable. *See* Machado Decl. ¶¶ 8-9; Rubin Decl. ¶¶ 8-9. In addition, the reaction of the Settlement Class to date also supports the request. While the deadline for objections has not yet passed, to date, no objections to the attorneys' fees or expenses set forth in the Notices have been received. ¶ 6. Moreover, to date, there have been no requests for exclusion. Ex. 4 at ¶ 17.

For all the reasons set forth below, Lead Counsel respectfully requests that the Court approve the application for an award of attorneys' fees and reimbursement of Litigation Expenses.

ARGUMENT

I. PLAINTIFFS' COUNSEL ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES FROM THE COMMON FUND

The U.S. Supreme Court and the First Circuit have 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 In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995). Awards of reasonable attorneys' fees from a

"common fund" provide compensation that "encourages capable plaintiffs' attorneys to aggressively litigate complex, risky cases like this one" and spread the costs of the litigation "proportionately among those benefitted by the suit." *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 265 (D.N.H. 2007). Accordingly, Plaintiffs' Counsel are entitled to an award of attorneys' fees from the Settlement Fund created by the Settlement.

II. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE UNDER EITHER THE PERCENTAGE-OF-THE-FUND METHOD OR THE LODESTAR METHOD

Fees awarded to counsel from a common fund can be determined under either the percentage-of-the-fund method or the lodestar method. *See Thirteen Appeals*, 56 F.3d at 307. Under either method, the requested fee is fair and reasonable.

A. The Requested Attorneys' Fees Are Reasonable Under the Percentage-of-the-Fund Method

The First Circuit has approved of the percentage method in common fund cases, noting that it is the prevailing method and that it "offers significant structural advantages in common fund cases, including ease of administration, efficiency, and a close approximation of the marketplace." *Thirteen Appeals*, 56 F.3d at 308. As a court in this District has noted, the percentage method "appropriately aligns the interests of the class with the interests of the class counsel[,] . . . is 'less burdensome to administer than the lodestar method,' . . . 'enhances efficiency' and does not create a 'disincentive for the early settlement of cases.'" *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 377 (D. Mass. 1997).

The requested fee of 33 1/3% is within the typical range of percentage fees awarded in the First Circuit in comparable class action cases. *See In re Neurontin Mktg. & Sales Practices Litig.*, 2014 WL 5810625, at *3 (D. Mass. Nov. 10, 2014) (noting that "nearly two-thirds of class action fee awards based on the percentage method were between 25% and 35% of the common fund."); *see also Hill v. State St. Corp.*, 2015 WL 127728, at *2 (D. Mass. Jan. 8, 2015)

(O'Toole, J.) (citing *Neurontin*).[3]

A review of attorneys' fees awarded in comparable securities class actions settlements in this District strongly supports the reasonableness of the 33 1/3% fee request here. *See Biopure Corp. Sec. Litig.*, No. 1:03-cv-12628-NG (D. Mass. Sept. 24, 2007) (Dkt. 180) (awarding 33 1/3%); *In re StockerYale, Inc. Sec. Litig*., 2007 WL 4589772, at *6 (D.N.H. Dec. 18, 2007) (same); *In re: Network Engines, Inc. Sec. Litig*., No. 03-cv-12529-JLT (D. Mass. July 25, 2006) (Dkt. 84) (same); *In re Nx Networks Sec. Litig*., No. 00-11850-JLT (D. Mass. Nov. 22, 2004) (Dkt. 85) (same); *In re Allaire Corp. Sec. Litig*., No. 00-11972-WGY (D. Mass. Dec. 1, 2003) (Dkt. 124) (same); *In re Lernout & Haupsie Speech Products, N.V. Sec. Litig*., No. 1:99-cv-10237-NG (D. Mass 2009) (Dkt. 144) (awarding 33%); *In re Polymedica Corp. Sec. Litig.*, No. 1:00-cv-12426-WGY (D. Mass. Sept. 5, 2007) (Dkt. 167) (same); *In re Ibis Tech. Sec. Litig*., No. 04-cv-10446-RCL (D. Mass. April 26, 2007) (same); *Swack v. Credit Suisse First Boston LLC*, No. 02-cv-11943-DPW (D. Mass. June 26, 2006) (Dkt. 114) (same); *Ahearn v. Credit Suisse First Boston LLC*, No. 03-10956 JLT (D. Mass. June 7, 2006) (same) (Exs. 10-18).[4]

[3] Other courts have reached a similar conclusion. *See In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001) (review of 289 settlements demonstrates "average attorney's fee percentage [of] 31.71%" with a median value that "turns out to be one-third"); *Shaw v. Toshiba Am. Info. Sys., Inc*., 91 F. Supp. 2d 942, 972 (E.D. Tex. 2000) ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.").

[4] *See also In re PHC, Inc. Shareholder Litig.*, Case No. 11-cv-11049-PBS (D. Mass April 2, 2019) (Dkt. 487) (1/3 of judgment awarded); *Gordan v. Mass. Mutual Life Ins. Co.*, No. 13-cv-30184-MAP (D. Mass Oct. 31, 2016) (Dkt. 136) (33 1/3% awarded); *Lapan v. Dick's Sporting Goods, Inc.*, No. 1:13-cv-11390-RGS (D. Mass. April 19, 2016) (Dkt. 220) (same); *Dahl v. Bain Capital Partners LLC*, No. 1:07-cv-12388-WGY (D. Mass. Feb. 23, 2015) (Dkts. 1052; 1121) (same); *Bilewicz v. FMR LLC*, 2014 WL 8332137, at *6 (D. Mass. Oct. 16, 2014) (same); *Natchitoche Par. Hospital Serv. Dist. v. Tyco Int'l, Ltd*., No. 05-12024-PBS (D. Mass. March 12, 2010) (Dkt. 407) (same); *In re Relafen Antitrust Litig*., 231 F.R.D. 52, 82 (D. Mass. 2005) (same); *Laurenzano v. BlueCross*, No. 1:99-cv-11751-WGY (D. Mass June 6, 2003) (Dkt. 75) (same) (Exs. 19-23).

Additionally, attorneys' fees in the range of 33 1/3% have been approved in numerous comparable securities class actions in other Circuits. *See, e.g., City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *11-*12 (S.D.N.Y. May 9, 2014) (awarding 33% and collecting cases), *aff'd sub nom. Arbuthnot v. Pierson*, 607 Fed. Appx. 73 (2d Cir. 2015); *Waters v. In'l Precious Metals Corp.*, 190 F.3d 1291, 1295 (11th Cir. 1999) (affirming attorneys' fee award of 33 1/3%); *In re Pacific Enter. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming award of 33% of common fund).[5]

In sum, the fees commonly awarded in securities class actions involving comparable settlements strongly demonstrate the reasonableness of the requested fee.

B. The Requested Attorneys' Fees Are Reasonable Under the Lodestar Method

If fees are awarded on a percentage basis, the lodestar approach may be used as a check on the appropriateness of the percentage fee, but is not required. *See Thirteen Appeals*, 56 F.3d at 307; *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, 2009 WL 2408560, at *1 (D. Mass. Aug. 3, 2009); *In re Lupron Mktg. & Sales Prac. Litig.*, 2005 WL 2006833, at *3 (D. Mass. Aug. 17, 2005); *Relafen*, 231 F.R.D. at 81.

When lodestar is used as a cross-check, "the focus is not on the 'necessity and reasonableness of every hour' of the lodestar, but on the broader question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys." *Tyco*, 535 F. Supp. 2d at 270 (quoting *Thirteen Appeals*, 56 F.3d at 307); *see also In re WorldCom Inc. Sec.*

[5] *See also In re Merck & Co., Inc. Vytorin ERISA Litig.*, 2010 WL 547613, at *11 (D.N.J. 2010) (awarding 33 ⅓% and noting that "awards in similar common fund cases appear analogous" and award was "consistent with other similar cases"); *Parmelee v. Santander Consumer USA Holdings Inc.*, 2019 WL 2352837, at *1 (N.D. Tex. 2019) (awarding 33 1/3%); *Wilson v. LSB Industries, Inc.*, No. 1:15-cv-07614-RA (S.D.N.Y. June 28, 2019) (Dkt. 197) (same); *Gupta v. Power Solutions International, Inc.*, 2019 WL 2135914 (N.D. Ill. May 13, 2019) (same); *Singh v. 21Vianet Group, Inc.*, 2018 WL 6427721, at *1 (E.D. Tex. 2018) (same) (Ex. 24).

Litig., 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005) ("Where the lodestar fee is used as 'a mere cross-check' to the percentage method of determining reasonable attorneys' fees, 'the hours documented by counsel need not be exhaustively scrutinized by the district court.'"). In this case, the lodestar method—whether used directly or as a "cross-check" on the percentage method—strongly demonstrates the reasonableness of the requested fee.

Here, Plaintiffs' Counsel spent a total of 7,433.15 hours of attorney and other professional support time prosecuting the Action from its inception through August 8, 2019. ¶ 82. Based on Plaintiffs' Counsel's current rates, their collective lodestar for this period is $3,508,288.75.[6] *See id*. The requested 33 1/3% fee, which amounts to $6,216,667 (before interest), therefore represents a multiplier of 1.77 on Plaintiffs' Counsel's lodestar.[7]

The requested 1.77 multiplier on Plaintiffs' Counsel's lodestar is well within the range of multipliers commonly awarded in securities class actions and other comparable litigation. Indeed, in class actions with significant contingency risks, fees representing multiples above the lodestar are typically awarded to reflect contingency risks and other relevant factors. *See New England Carpenters*, 2009 WL 2408560, at *2 (awarding multiplier of 8.3); *Tyco*, 535 F. Supp.

[6] The Supreme Court and courts in this Circuit have approved the use of current hourly rates in calculating the base lodestar figure as a means of compensating for the delay in receiving payment and the loss of the interest. *See Missouri v. Jenkins*, 491 U.S. 274, 284 (1989); *Cohen v. Brown Univ.*, 2001 WL 1609383, at *1 (D.N.H. Dec. 5, 2001); *accord In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *9 (S.D.N.Y. Nov. 7, 2007) ("The use of current rates to calculate the lodestar figure has been repeatedly endorsed by courts as a means of accounting for the delay in payment inherent in class actions and for inflation.").

[7] Lead Counsel's lodestar is calculated based on their standard hourly rates, which range from $395 to $550 for associates and from $650 to $960 for partners. ¶ 79. These rates have been approved in other securities class actions and shareholder litigation and are consistent with the rates charged by other attorneys practicing in the area of securities class action litigation, including attorneys at the defense counsel firms against whom Plaintiffs' Counsel routinely litigate. Ex. 9; *see also* Ex. 27, Valeo 2017 Attorney Hourly Rate Report, 228 (Ropes & Gray's hourly billing rates for Boston ***in 2017*** ranged from $968 to $1,219 for partners and from $408 to $825 for associates).

2d at 271 (2.7 multiplier); *Relafen*, 231 F.R.D. at 82 (finding a "multiplier of 2.02" to be "appropriate" based on comparison of cases); *StockerYale*, 2007 WL 4589772, at *6-*7 (2.17 multiplier); *Roberts v. TJX Cos., Inc.*, 2016 WL 8677312, at *13 (D. Mass. Sept. 30, 2016) (1.96 multiplier).[8] In addition, Lead Counsel will continue to expend additional hours following the approval of the Settlement, overseeing the Claims Administrator's processing of claims received and the distribution to eligible claimants, but will not seek any further fees.

In sum, whether calculated as a percentage of the fund or under the lodestar method, the requested fee is well within the range of fees awarded by courts in securities class actions.

III. FACTORS CONSIDERED BY COURTS IN THE FIRST CIRCUIT CONFIRM THAT THE REQUESTED FEE IS FAIR AND REASONABLE

Although the First Circuit has not set forth a comprehensive list of factors to be considered when evaluating an attorneys' fees request pursuant to the percentage-of-the-fund method, District Courts within the Circuit have assessed the reasonableness of proposed fees by considering the following factors, which track those used by the Second and Third Circuits in evaluating percentage fee awards:

> (1) the size of the fund and the number of persons benefitted; (2) the skill, experience, and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risks of the litigation; (5) the amount of time

[8] *See also Hoff v. Popular Inc.*, 2011 WL 13209610, at *2 (D.P.R. Nov. 2, 2011) (3.13 multiplier); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008) ("In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts."); *Vizcaino v. Microsoft Word*, 290 F.3d 1043, 1051 (9th Cir. 2002) (finding multipliers ranged as high as 19.6, though most run from 1.0 to 4.0); *Harman v. Lyphomed, Inc.*, 945 F.2d 976 (7th Cir. 1991) (stating that multipliers of up to 4.0 have been approved); *Cornwell v. Credit Suisse Grp.*, No. 08-cv-03758-VM (S.D.N.Y. July 18, 2011) (Dkt. No. 117 at 2, 4) (awarding fee representing a 4.7 multiplier) Ex. 25; *In re Comverse Tech., Inc. Sec. Litig.*, 2010 WL 2653354, at *5 (E.D.N.Y. June 24, 2010) (awarding fee representing a 2.78 multiplier and noting that, "[w]here, as here, counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar"); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (awarding fee representing a 4.65 multiplier, which was "well within the range awarded by . . . courts throughout the country").

> devoted to the case by counsel; (6) awards in similar cases; and (7) public policy considerations, if any.

See Hill, 2015 WL 127728, at *17; *Lupron*, 2005 WL 2006833, at *3; *Relafen*, 231 F.R.D. at 79. Consideration of these factors further confirms that the fee requested here is reasonable.

A. The Amount of the Recovery Supports the Requested Fee

Here, Lead Counsel have achieved a substantial recovery of $18,650,000 for the benefit of the Settlement Class, which represents a range of 6% to 26% of the ***maximum*** recoverable class-wide aggregate damages of approximately $310 million (Plaintiffs' maximum estimate) to $71 million (maximum damages if Defendants' argument were accepted).[9] By way of comparison, from 1996 through 2018, the median recovery in securities class actions with estimated damages ranging from $200-$399 million was 2.6%, 4.7% for cases with damages ranging from $50-99 million, and approximately 2.6% of estimated damages in all securities class action settlement in 2018. ¶ 46 (citing NERA Report at 35, Fig. 27).

Furthermore, the percentage of damages recovered compares favorably with other securities fraud settlements. *See Medoff v. CVS Caremark Corp.*, 2016 WL 632238, at *6 (D.R.I. Feb. 17, 2016) (approving a settlement representing 5.33% of estimated recoverable damages as "well above the median percentage of settlement recoveries in comparable securities class action cases"); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (a recovery of approximately 6.25% was "at the higher end of the range of reasonableness of recovery in class action[] securities litigations"). Accordingly, Lead Counsel respectfully submit that the Settlement is an outstanding result that strongly supports the requested attorneys' fee.

[9] Defendants of course did, and would continue to, assert that they did not violate the federal securities laws and that Plaintiffs and the putative class suffered no damages.

B. The Skill and Experience of Counsel Support The Requested Fee

Considerable litigation skills were required in order for Plaintiffs' Counsel to achieve the Settlement. This was a complex case involving a number of distinct factual and legal issues. Given the many contested issues, it took highly skilled counsel to represent the class and bring about the substantial recovery that has been obtained. ¶ 47.

As demonstrated by Plaintiffs' Counsel's firm resumes, GPM, B&L and WeissLaw are among the nation's leading securities class action firms. Exs. 6-8. Lead Counsel submit that the skill of these attorneys, the quality of their efforts in the litigation, their substantial experience in securities class actions, and their commitment to the litigation were key elements in enabling Lead Counsel to negotiate the favorable settlement. *Hill*, 2015 WL 127728, at *17 (recognizing counsel's extensive experience in securities class action litigation as contributing to the achievement of a settlement).

Courts have also recognized that the quality of the opposition faced by plaintiffs' counsel should also be taken into consideration in assessing the quality of plaintiffs' counsel's performance. Here, Defendants were represented by Wilmer Cutler Pickering Hale and Dorr LLP, McDermott Will & Emery LLP, and Donnelly, Conroy & Gelhaar LLP, highly experienced and well-respected defense firms, which vigorously defended the Action for more than three years. ¶ 86. Notwithstanding this formidable opposition, Lead Counsel's thorough investigation, opposition to Defendants' motions to dismiss, and discovery efforts, positioned Plaintiffs to achieve a favorable recovery for the Settlement Class. Thus, this factor easily supports the reasonableness of the requested fee. *See, e.g.*, *Schwartz v. TXU Corp.*, 2005 WL 3148350, at *30 (N.D. Tex. Jan. 13, 2006) ("The ability of plaintiffs' counsel to obtain such a favorable settlement for the Class in the face of such formidable legal opposition confirms the superior quality of their representation").

C. The Complexity and Duration of the Litigation Support the Requested Fee

There can be no dispute that this litigation was complex and vigorously litigated by both Plaintiffs and Defendants. Courts have long recognized that securities class actions are generally complex and difficult. *Hill*, 2015 WL 127728, at *18 (recognizing the complex nature of securities class action litigation, including significant motion practice and discovery efforts spanning many years, as contributing to counsel's fee award); *see also Aeropostale*, 2014 WL 1883494, at *16 ("the complex and multifaceted subject matter involved in a securities class action such as this supports the fee request"). The claims asserted in the litigation were complex and Lead Counsel had to demonstrate substantial expertise in order to marshal evidence on these matters through their extensive investigation and discovery efforts. ¶¶ 15-42. Lead Counsel confronted these myriad difficulties and were able to achieve an excellent recovery for the Settlement Class. *A fortiori*, this factor also supports the fee requested.

D. The Risk of Non-Payment Was High

The fully contingent nature of Lead Counsel's fee and the substantial risks posed by the litigation are also very important factors supporting the requested fee. "Many cases recognize that the risk [of non-payment] assumed by an attorney is perhaps the foremost factor in determining an appropriate fee award." *Hill*, 2015 WL 127728, at *18 (quoting *Lupron*, 2005 WL 2006833, at *4). Furthermore, "[n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974).

As noted above and in the Glancy Declaration (¶¶ 48-59), from the outset, it was apparent that Plaintiffs' Counsel faced significant challenges to establishing liability and damages in this Action. Nonetheless, Plaintiffs' Counsel devoted an enormous amount of resources to the

vigorous and effective prosecution of the case and made every effort to obtain the recovery achieved here for the benefit of the class.

In the face of these uncertainties regarding the outcome of the case, Plaintiffs' Counsel prosecuted the Action on a wholly contingent basis, knowing that the litigation could last for years and would require the devotion of a substantial amount of attorney time and a significant advance of litigation expenses with no guarantee of any compensation. Indeed, Lead Counsel was the only firm that moved to take on the risks of prosecuting this Action in the lead appointment process. ¶¶ 11, 87-91. Plaintiffs' Counsel's assumption of this contingency fee risk, both in terms of time and hard out-of-pocket costs, strongly supports the reasonableness of the requested fee. *See CVS Caremark*, 2016 WL 632238, at *9 ("Where, as here, lead counsel undertook this action on a contingency basis and faced a significant risk of non-payment, this factor weighs more heavily in favor of rewarding litigation counsel."); *TJX*, 2016 WL 8677312, at *13 (fact that "Class Counsel took the case on a contingency fee basis, assuming significant risk in litigating the case" strongly supported the fee award); *see also Hill*, 2015 WL 127728, at *18 (quoting *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("[t]here was significant risk of non-payment in this case, and Plaintiffs' Counsel should be rewarded for having borne and successfully overcome that risk.")).

E. The Amount of Time Devoted to the Litigation by Plaintiffs' Counsel Supports the Requested Fee

The extensive time and effort expended by Plaintiffs' Counsel in prosecuting the Action and achieving the Settlement also establish that the requested fee is justified and reasonable. *See Hill*, 2015 WL 127728, at *19. The Glancy Declaration details the substantial efforts of Plaintiffs' Counsel in prosecuting the Plaintiffs' claims over the course of the litigation. Among other things, Plaintiff's Counsel:

- conducted a detailed factual investigation into the allegedly fraudulent misrepresentations made by Defendants, including (i) a thorough review of publicly available information such as SEC filings, press releases, analyst reports, and news articles, (ii) identifying, locating and interviewing dozens of former Endurance employees with possible knowledge related to the allegations in the Action; and (iii) consulting with experts in the fields of accounting, loss causation and damages (¶¶ 15, 21, 30);
- drafted the initial complaint and three detailed amended complaints (including the 105-page Third Amended Complaint) (¶¶ 10, 21-34);
- researched and drafted two oppositions to Defendants' motions to dismiss (¶¶ 23-34);
- negotiated and executed a tolling agreement with Defendants related to the Securities Act claims; (¶¶ 3, 32 n.7)
- reviewed and analyzed over 1.4 million pages of documents produced by Defendants (¶¶ 36-37);
- engaged in extensive arm's-length settlement negotiations and mediation efforts, which involved the preparation of a mediation brief (including exhibits) addressing liability, loss causation and damages, a full-day mediation session with the Hon. Daniel Weinstein, and lengthy follow-up negotiations after the mediation (¶¶ 40-42); and
- prepared and negotiated the Stipulation and exhibits, as well as the preliminary approval brief. (¶¶42-43)

As noted above, Plaintiffs' Counsel expended a total of more than 7,433 hours investigating, prosecuting and resolving the litigation through August 8, 2019 with a total lodestar value of over $3,508,288.75 million. ¶ 82. The substantial time and effort devoted to this case was critical in obtaining the favorable result achieved by the Settlement, and confirms that the fee request here is reasonable.

F. Awards in Similar Cases Support The Requested Fee

As discussed above in Section II.A, Lead Counsel's requested fee is well within the range of fee awards in class action cases in this Circuit and across the country. *See* Section II.A, *supra*. Moreover, the reasonable percentage fee award represents a multiplier of only 1.77, which is well within the norm awarded in class action cases with substantial contingency risks. *See* Section II.B, *supra*. Consequently, this factor strongly supports the reasonableness of the requested fee.

G. Public Policy Considerations Support the Requested Fee

A strong public policy concern exists for rewarding firms for bringing successful securities litigation. The Supreme Court has emphasized that private securities actions such as this are "an essential supplement to criminal prosecutions and civil enforcement actions" brought by the SEC. *See Tellabs, Inc. v. Makor Issues & Rights, 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.'"); *see also Hill*, 2015 WL 127728, at *19. Compensating plaintiffs' counsel for the risks they take in bringing these actions is essential, 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*, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005).

Accordingly, public policy favors granting Lead Counsel's fee and expense application. *See CVS Caremark*, 2016 WL 632238, at *9 ("public policy supports rewarding counsel for prosecuting securities class actions, especially where counsel's dogged efforts—undertaken on a wholly contingent basis—result in satisfactory resolution for the class"); *Hill*, 2015 WL 127728, at *19 ("public policy favors granting reasonable attorneys' fees to Plaintiffs' Counsel that will adequately compensate them for their efforts and the risks they undertook"); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *29 (S.D.N.Y. Nov. 8, 2010) (if the "important public policy [of enforcing the securities laws] is to be carried out, the courts should award fees which will adequately compensate Lead Counsel for the value of their efforts, taking into account the enormous risks they undertook").

H. Plaintiffs Have Approved the Requested Fee

As set forth in Plaintiffs' respective declarations, both Lead Plaintiff Christopher Machado and named Plaintiff Michael Rubin played an active role in the prosecution and resolution of the litigation, and thus had a sound basis for assessing the reasonableness of the fee request. *See* Machado Decl. ¶¶ 3-5; Rubin Decl. ¶¶ 3-5. Plaintiffs carefully evaluated the fee request at the conclusion of the litigation and fully support and approve the fee request as fair and reasonable in light of the result obtained, the work performed by Plaintiffs' Counsel, and the risks of the litigation. *See* Machado Decl. ¶¶ 8-9; Rubin Decl. ¶¶ 8-9. Plaintiffs' endorsement of the fee request in this PSLRA action supports its approval as fair and reasonable.

Accordingly, Plaintiffs' approval of the fee request should be given substantial weight by the Court. *See CVS Caremark*, 2016 WL 632238, at *9 (Lead Plaintiffs' consent to the fee request weighed in favor of concluding that the request was reasonable); *Hill*, 2015 WL 127728, at *19 (endorsement of Lead Plaintiffs supported approval of the requested fees).

I. The Reaction of the Settlement Class to Date Supports the Requested Fee

The reaction of the Settlement Class to date also supports the fee request. As of August 5, 2019, the Claims Administrator has disseminated the Postcard Notice to 30,070 potential Settlement Class Members and nominees informing them of Lead Counsel's intention to apply to the Court for an award of attorneys' fees of 33 1/3% of the Settlement Fund, and reimbursement of Litigation Expenses up to $225,000, including possible awards to Plaintiffs for their time and expenses in representing the Settlement Class. *See* Ex. 4 (Segura Decl., at ¶¶ 7, 13 and Ex. A; *see also* Ex. C at 15). In addition, on February 11, 2019, JND caused the Summary Notice to be published in *Investor's Business Daily* and transmitted over the *PR Newswire*. *Id*. at ¶ 14; Ex. B. While the time to object does not expire until August 23, 2019, to date, no objections to the

request for attorneys' fees and expenses have been received.[10] ¶ 6. Accordingly, this factor supports approval of the requested fee. *See Hill*, 2015 WL 127728, at *19 ("the favorable reaction of the class … support[s] approval of the requested fees."); *CVS Caremark*, 2016 WL 632238, at *9 (noting significance of fact that no class member objected to the fee request).

IV. THE LITIGATION EXPENSES INCURRED ARE REASONABLE AND WERE NECESSARY TO ACHIEVE THE BENEFIT OBTAINED

Lead Counsel's fee application includes a request for reimbursement of expenses that were reasonably incurred and necessary to the prosecution of the Action. ¶¶ 95-102. These expenses are properly recoverable. *See In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999) ("lawyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover from the fund . . . expenses, reasonable in amount, that were necessary to bring the action to a climax"); *Hill*, 2015 WL 127728, at *20 ("Lawyers who recover a common fund for a class are entitled to reimbursement of litigation expenses that were reasonably and necessarily incurred in connection with the litigation."). As set forth in detail in the Glancy Declaration, Plaintiffs' Counsel incurred $155,370.34 in litigation expenses on behalf of the Settlement Class. ¶ 98.

The types of expenses for which Lead Counsel seek reimbursement were necessarily incurred in litigation and are routinely charged to classes in contingent litigation and clients billed by the hour. These expenses include, among others, costs and fees for experts, on-line legal and factual research, photocopying, filing fees, costs related to the production and storage of electronic discovery, travel costs, working meals, and mediation fees. ¶¶ 98-101; *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004) ("The expenses incurred-

[10] Lead Counsel will address any objections that may be received in the reply papers to be filed with the Court on September 6, 2019.

which include investigative and expert witnesses, filing fees, service of process, travel, legal research and document production and review-are the type for which 'the paying, arms' length market' reimburses attorneys. For this reason, they are properly chargeable to the Settlement fund."). Moreover, from the outset, Lead Counsel were aware that they might not recover any of these expenses or, at the very least, would not recover anything until the Action was successfully resolved. Thus, Lead Counsel were motivated to, and did, take significant steps to minimize these expenses wherever practicable without jeopardizing the vigorous and efficient prosecution of the action. ¶ 95.

The Notices informed potential Settlement Class Members that Lead Counsel would apply for reimbursement of litigation expenses for all Plaintiffs' Counsel in an amount not to exceed $225,000. The amount of expenses requested, $155,370.34, is well below the amount listed in the Notices and, to date, there has been no objection to the request for expenses. ¶ 6.

V. PLAINTIFFS SHOULD BE AWARDED THEIR REASONABLE COSTS AND EXPENSES PURSUANT TO THE PSLRA

In connection with the Lead Counsel's request for payment of litigation expenses, Plaintiffs seek a total of $7,000 ($5,000 for Lead Plaintiff Machado and $2,000 for named Plaintiff Rubin) in PSLRA awards to reimburse costs and expenses incurred by them directly relating to their representation of the Settlement Class. ¶¶ 104-05; Exs. 2 and 3. The PSLRA specifically provides that an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be made to "any representative party serving on behalf of a class." 15 U.S.C. §§ 77z-1(a)(4), 78u-4(a)(4). *See Hill*, 2015 WL 127728, at *21 (awarding a total of $40,436 in PSLRA expenses to three lead plaintiffs); *Ahearn v. Credit Suisse First Boston LLC*, No. 03-CV-10956-JLT (D. Mass. June 7, 2006) (Dkt. No. 82 at 5-6) (awarding a total of $35,000 in PSLRA expenses to two lead plaintiffs) (Ex. 26).

As set forth in their respective declarations, Plaintiffs have actively and effectively fulfilled their obligations as representatives of the Settlement Class. Plaintiffs, among other things: (i) participated in regular discussions with Plaintiffs' Counsel concerning the prosecution of the litigation and the strengths of the claims; (ii) reviewed significant pleadings and briefs and; (iii) were closely involved in mediation efforts and settlement negotiations. *See* Machado Decl. ¶¶ 3-5; Rubin Decl. ¶¶ 3-5.

The foregoing efforts are precisely the types of activities that Courts have found to support reimbursement to class representatives. *See, e.g.*, *In re Evergreen Ultra Short Opportunities Fund Sec. Litig.*, 2012 WL 6184269, at *2 (D. Mass. Dec. 10, 2012); *In re Marsh & McLennan Cos. Sec. Litig.*, 2009 WL 5178546, at *21 (S.D.N.Y. Dec. 23, 2009) (awarding over $200,000 to lead plaintiffs to compensate them spent supervising the litigation and noting that these efforts were "precisely the types of activities that support awarding reimbursement of expenses to class representatives").

The Notices specifically stated that Plaintiffs would "apply for awards for their reasonable time and expenses in representing the Settlement Class in an amount not to exceed $225,000," and, to date, there has been no objection to this request. Accordingly, Lead Counsel respectfully request that the Court award $5,000 to Christopher Machado and $2,000 to Michael Rubin as reimbursement for their reasonable costs and expenses incurred in representing the Settlement Class.

CONCLUSION

For the foregoing reasons, Lead Counsel respectfully request that the Court its fee and expense application.

Dated: August 9, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the above Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing on August 9, 2019.

By: */s/ Jason M. Leviton*
Jason M. Leviton