UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

In re CARTER'S, INC. SECURITIES LITIGATION	))))	Civil Action No. 1:08-CV-2940-AT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

OVERVIEW OF THE CLAIMS AGAINST PWC 4

ARGUMENT 4

I. A "REASONABLE PERCENTAGE OF THE FUND" RECOVERED IS THE PROPER METHOD FOR AWARDING ATTORNEYS' FEES IN THE ELEVENTH CIRCUIT 4

A. The 30% Fee Request Is Fair and Reasonable 5

B. A Fee Approved by Lead Plaintiff Is Entitled to a Presumption of Reasonableness 7

II. THE REQUESTED FEE IS FAIR AND REASONABLE UNDER THE APPLICABLE FACTORS 8

A. The Time and Labor Required 9

B. The Novelty and Difficulty of the Issues 12

C. The Skill Required to Perform the Legal Services Properly, and the Experience, Reputation, and Ability of the Attorneys 16

D. The Customary and Contingent Nature of the Fee 17

E. The Amount Involved and Results Achieved 19

F. Awards in Similar Cases 21

G. Reaction of the Settlement Class to Date 21

III. REIMBURSEMENT OF LITIGATION EXPENSES 22

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

Behrens v. Wometco Enters., Inc.,
118 F.R.D. 543 (S.D. Fla. 1988)....................22

Blum v. Stenson,
465 U.S. 886 (1984)....................4, 11

Camden I Condominium Association v. Dunkle,
946 F.2d 768 (11th Cir. 1991)....................4, 8, 9, 16, 21

Carpenters Health & Welfare Fund v. Coca-Cola Co.,
587 F. Supp. 2d 1266 (N.D. Ga. 2008)....................22

In re Cendant Corp. Litig.,
264 F.3d 201 (3d Cir. 2001)....................7

In re Checking Account Overdraft Litig.,
830 F. Supp. 2d 1330 (S.D. Fla. 2011)....................18

David v. Am. Suzuki Motor Corp.,
No. 08-CV-22278, 2010 WL 1628362 (S.D. Fla. Apr. 15, 2010)....................16

In re Friedman's, Inc. Sec. Litig.,
No. 1:03–cv–3475–WSD, 2009 WL 1456698
(N.D. Ga. May 22, 2009)....................18, 19, 22

Garfield v. NDC Health Corp.,
466 F.3d 1255 (11th Cir. 2006)....................14

Ingram v. The Coca-Cola Co.,
200 F.R.D. 685 (N.D. Ga. 2001)....................12

In re Jiangbo Pharm., Inc., Sec. Litig.,
884 F. Supp. 2d 1243 (S.D. Fla. 2012)....................14

Mashburn v. Nat'l Healthcare, Inc.,
684 F. Supp. 679 (M.D. Ala. 1988)....................11

In re Merrill Lynch Tyco Research Sec. Litig.,
249 F.R.D. 124 (S.D.N.Y. 2008) 20

In re MetLife Demutualization Litig.,
689 F. Supp. 2d 297 (E.D.N.Y. 2010) 5

In re MicroStrategy, Inc. Sec. Litig.,
172 F. Supp. 2d 778 (E.D. Va. 2001) 11

In re The Mills Corp. Sec. Litig.,
265 F.R.D. 246 (E.D. Va. 2009) 7

Norman v. Hous. Auth. of Montgomery,
836 F.2d 1292 (11th Cir. 1988) 17

Pinto v. Princess Cruise Lines Ltd.,
513 F. Supp. 2d 1334 (S.D. Fla. 2007) 12, 18

Pub. Emps. Ret. Assoc. of Colo. v. Deloitte & Touche LLP,
551 F.3d 305 (4th Cir. 2009) 14

Ressler v. Jacobson,
149 F.R.D. 651 (M.D. Fla. 1992) .... *passim*

Ressler v. Jacobson,
822 F. Supp. 1551 (M.D. Fla. 1992)...16

Robbins v. Koger Props., Inc.,
116 F.3d 1441 (11th Cir. 1997) 18

In re Royal Ahold N.V. Sec. & ERISA Litig.,
461 F. Supp. 2d 383 (D. Md. 2006)...11

In re Sterling Fin. Corp. Sec. Class Action,
No. 07-2171, 2009 WL 2914363 (E.D. Pa. Sept. 10, 2009)...............................13

Strube v. Am. Equity Inv., Life Ins. Co.,
226 F.R.D. 688 (M.D. Fla. 2005) 20

In re Sunbeam Sec. Litig.,
176 F. Supp. 2d 1323 (S.D. Fla. 2001) 12, 17

In re Sunterra Corp. Sec. Litig.,
199 F. Supp. 2d 1308 (M.D. Fla. 2002)..14

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007)..5

Waters v. Int'l Precious Metals Corp.,
190 F.3d 1291 (11th Cir. 1999) 6, 11

Winkler v. NRD Mining, Ltd.,
198 F.R.D. 355 (E.D.N.Y. 2000)..19

DOCKETED CASES

In re Cbeyond Inc. Sec. Litig.,
No. 1:08-cv-1666 (CC) (N.D. Ga. Jan. 5, 2010) 6

In re ChoicePoint, Inc. Sec. Litig.,
Civil Action No.: 1:05-CV-00686-JTC (N.D. Ga. July 21, 2008)......................6

In re Clarus Corp. Sec. Litig.,
No. 1:00-CV-2841-CAP (N.D. Ga. Jan. 6, 2005) 6

In re Harbinger Corp. Sec. Litig.,
No. 1:99-CV-2353-MHS (N.D. Ga. Oct. 18, 2001) 6

In re Healthtronics Surgical Servs., Inc. Sec. Litig.,
No. 1:03-CV-2800-CC (N.D. Ga. Dec. 1, 2005)...6

In re iXL Enters., Inc, Sec. Litig.,
No. 1:00-CV-2347-CC (N.D. Ga. Aug. 5, 2003) 6

In re Medirisk, Inc. Sec. Litig.,
No. 1:98-CV-1922-CAP (N.D. Ga. Mar. 22, 2004) 6

In re Profit Recovery Group Int'l, Inc. Sec. Litig.,
No. 00-cv-1416 (N.D. Ga. May 26, 2005) 6

In re Theragenics Corp. Sec. Litig.,
No. 1:99-CV-0141-TWT (N.D. Ga. Sept. 29, 2004)..6

STATUTES

15 U.S.C. §77z-1(a)(6)..5

15 U.S.C. §78u-4(e)..15

OTHER AUTHORITIES

1 Alba Conte, *Attorney Fee Awards*, §2.19 (3d ed. 2006) 22

Labaton Sucharow LLP, Court-appointed Lead Counsel for Plymouth County Retirement System ("Lead Plaintiff" or "Plymouth")[1] and the Settlement Class, respectfully submits this memorandum of law in support of its motion, pursuant to Rule 23(h) and 54(d)(2) of the Federal Rules of Civil Procedure, for an order approving Lead Counsel's motion for attorneys' fees and reimbursement of litigation expenses, to be paid out of the Settlement Fund established by the proposed settlement with PricewaterhouseCoopers LLP ("PwC") (the "PwC Settlement" or "Settlement") of the Consolidated Action.[2]

PRELIMINARY STATEMENT

As set forth in the Stipulation, PwC has paid $3,300,000 in cash to settle the

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[1] All capitalized terms used herein, unless otherwise defined, have the same meaning as that set forth in the Stipulation and Agreement of Settlement with PricewaterhouseCoopers LLP (the "Stipulation"), dated April 21, 2013 (ECF No. 156-3).

[2] Lead Counsel's motion is supported by the accompanying Declaration of Jonathan Gardner in Support of Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation and Lead Counsel's Motion for Attorneys' Fees and Reimbursement of Litigation Expenses (the "Gardner Declaration" or "Gardner Decl."), incorporated herein by reference, and the Declaration of William R. Farmer, Executive Director of Plymouth County Retirement System, in Support of Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses, Ex. 1 to the Gardner Decl. All exhibits referenced herein are annexed to the Gardner Declaration. For clarity, citations to exhibits that themselves have attached exhibits, will be referenced as "Ex. ___ - ___." The first numerical reference is to the designation of the entire exhibit attached to the Gardner Declaration and the second reference is to the exhibit designation within the exhibit itself.

claims against it in the Consolidated Action and resolve all Released Claims against PwC and the Released Defendant Parties.[3] The Settlement will end the Consolidated Action.

The PwC Settlement is the result of Lead Counsel's diligent effort, skill, and effective advocacy, with Lead Plaintiff's oversight and involvement, and provides an immediate and substantial recovery to the Settlement Class, which faced the significant risk of a much smaller recovery - or no recovery - from PwC were the Consolidated Action to continue. As detailed in the Gardner Declaration, Lead Counsel vigorously pursued the investigation, development, and prosecution of the alleged claims against PwC.

In connection with the PwC Settlement, and on behalf of all Plaintiffs' counsel who have contributed to the prosecution or settlement of the Consolidated Action, Lead Counsel respectfully seeks an award of attorneys' fees in the amount of 30% of the Settlement Fund, or $990,000, and litigation expenses of $57,414.06,

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[3] The PwC Settlement is in addition to the previously approved $20 million settlement with Carter's and the individual defendants (the "Carter's Settlement"). In connection with the Carter's Settlement, Lead Counsel requested attorneys' fees and expenses incurred in the prosecution or resolution of the Consolidated Action from inception of the case through April 13, 2012. Lead Counsel's instant motion for attorneys' fees and expenses for the PwC Settlement requests attorneys' fees and expenses incurred from April 14, 2012 through August 16, 2013.

with interest earned on both amounts at the same rate as is earned by the Settlement Fund.

Given the result achieved, the difficulties involved in a case against an outside auditor, the skill required, and risks undertaken, Lead Counsel respectfully submits that the requested fee award is fair and reasonable. Indeed, as discussed *infra*, courts in this District, recognizing the risks and effort generally expended by counsel to obtain such favorable results, have frequently awarded similar and higher fees in complicated securities cases with comparable recoveries. *See infra*, Section I.A.

Plymouth, a sophisticated institutional investor that has been involved throughout the prosecution of the Consolidated Action, also supports the requested fee and expenses award. *See* Ex. 1 ¶¶1-3, 6-7. Moreover, although Notices have been mailed to almost 120,000 potential Settlement Class Members stating that Lead Counsel would seek fees of up to 30% of the Settlement Fund and expenses not to exceed $200,000, plus interest on such amounts, not a single Settlement Class Member has filed an objection to these requests to date.[4] *See* Gardner Decl. ¶¶18, 20-21. The Court should grant Lead Counsel's motion in its entirety.

[4] The deadline for filing objections is September 17, 2013. Any objections that are received subsequent to this filing will be addressed in Lead Counsel's reply papers, to be filed no later than October 1, 2013.

OVERVIEW OF THE CLAIMS AGAINST PWC

For the sake of brevity, Lead Counsel respectfully refers the Court to the Gardner Declaration for, *inter alia*: a detailed history of the Consolidated Action; the nature of the claims asserted against PwC; the investigation undertaken; the negotiations leading to settlement; the value of the PwC Settlement compared to the risks of continued litigation; and a description of the services provided by Lead Counsel.

ARGUMENT

I. A "REASONABLE PERCENTAGE OF THE FUND" RECOVERED IS THE PROPER METHOD FOR AWARDING ATTORNEYS' FEES IN THE ELEVENTH CIRCUIT

In *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), the Supreme Court reiterated established precedent that under the common fund doctrine "a reasonable fee is based on a percentage of the fund bestowed on the class." Following Supreme Court precedent, the Eleventh Circuit, in *Camden I Condominium Association v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991), determined that "the percentage of the fund approach is the better reasoned in a common fund case….[h]enceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit

of the class."[5]

In addition to providing just compensation, awarding attorneys' fees from a common fund serves to "encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and therefore discourage future misconduct of a similar nature." *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 356 (E.D.N.Y. 2010). Indeed, the Supreme Court has long recognized that private securities cases are "an essential supplement to criminal prosecutions and civil enforcement actions," and "'an indispensable tool with which defrauded investors can recover their losses' – a matter crucial to the integrity of domestic capital markets." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313, 320 n.4 (2007).

A. The 30% Fee Request Is Fair and Reasonable

The Eleventh Circuit has found that "the 'majority of common fund fee awards fall between 20% to 30% of the fund,'" and has accordingly directed district courts to consider the 20% to 30% range a "benchmark" for percentage fee awards, which "may be adjusted in accordance with the individual circumstances

[5] The Private Securities Litigation Reform Act of 1995 ("PSLRA") also endorses a percentage analysis when awarding attorneys' fees in securities class actions. *See* 15 U.S.C. §77z-1(a)(6) ("Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.").

of each case." *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1294 (11th Cir. 1999).

A review of fee awards in common fund securities class actions with comparable recoveries within this District indicates that the requested 30% fee is fair and reasonable. *See, e.g., In re Cbeyond Inc. Sec. Litig.*, No. 1:08-cv-1666 (CC), slip op. at 2 (N.D. Ga. Jan. 5, 2010) (awarding 30% of $2.3 million settlement) (submitted herewith as part of compendium of unpublished opinions, Ex. 7); *In re ChoicePoint, Inc. Sec. Litig.*, Civil Action No.: 1:05-CV-00686-JTC, slip op. at 1 (N.D. Ga. July 21, 2008) (awarding 30% of settlement fund of $10 million settlement) (*Id.*); *In re Healthtronics Surgical Servs., Inc. Sec. Litig.*, No. 1:03-CV-2800-CC, slip op. at 12 (N.D. Ga. Dec. 1, 2005) (awarding 33% of $2.825 million settlement) (*Id.*); *In re Profit Recovery Group Int'l, Inc. Sec. Litig.*, No. 00-cv-1416, slip op. at 7 (N.D. Ga. May 26, 2005) (awarding 33 1/3% of $6.75 million settlement) (*Id.*); *In re Clarus Corp. Sec. Litig.*, No. 1:00-CV-2841-CAP, slip op. at 7 (N.D. Ga. Jan. 6, 2005) (awarding 33 1/3% of $4.5 million settlement) (*Id.*); *In re Theragenics Corp. Sec. Litig.*, No. 1:99-CV-0141-TWT slip op. at 12 (N.D. Ga. Sept. 29, 2004) (awarding 33 1/3% of $10 million settlement) (*Id.*)*; In re Medirisk, Inc. Sec. Litig.*, No. 1:98-CV-1922-CAP, slip op. at 9 (N.D. Ga. Mar. 22, 2004) (awarding 33 1/3% of $4 million settlement) (*Id.*); *In re iXL Enters., Inc,*

Sec. Litig., No. 1:00-CV-2347-CC, slip op. at 6 (N.D. Ga. Aug. 5, 2003) (awarding 30% of $2.5 million settlement) (*Id.*); *In re Harbinger Corp. Sec. Litig.*, No. 1:99-CV-2353-MHS, slip op. at 9-10 (N.D. Ga. Oct. 18, 2001) (awarding 33 1/3% of $2.25 million settlement) (*Id.*).

Thus, it is respectfully submitted that Lead Counsel's fee request of 30% is reasonable.

B. A Fee Approved by Lead Plaintiff Is Entitled to a Presumption of Reasonableness

In enacting the PSLRA, Congress intended to encourage sophisticated institutional investors with substantial financial stakes in a litigation to serve as plaintiffs and play an active role in supervising and directing the litigation, including selecting and monitoring counsel. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 261-62, 282 (3d Cir. 2001). Fees negotiated between a PSLRA lead plaintiff and its counsel should, therefore, be accorded great weight. *See, e.g., In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 261 (E.D. Va. 2009) ("a fee request that has been approved and endorsed by properly-appointed lead plaintiffs . . . enjoys a presumption of reasonableness").

Here, Plymouth is a sophisticated institution with relevant experience in negotiating fees with counsel and in evaluating the results of securities class action settlements. Plymouth approves and endorses the requested fee as fair and

reasonable in light of, *inter alia*, the substantial work Lead Counsel has done in pursuing the claims against PwC on a contingent basis, the risks of continuing the claims against PwC, and the excellent result obtained on behalf of the Settlement Class. *See* Ex. 1 ¶¶1-3, 6-7. Accordingly, the requested fee is entitled to a presumption of reasonableness.

II. THE REQUESTED FEE IS FAIR AND REASONABLE UNDER THE APPLICABLE FACTORS

In *Camden I*, the Eleventh Circuit recognized that there "is no hard and fast rule mandating a certain percentage of a common fund which may reasonably be awarded as a fee because the amount of any fee must be determined upon the facts of each case." 946 F.2d at 774. *Camden I* recommended that district courts consider several factors, including:

> (1) the time and labor required; (2) the novelty and the difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; (12) awards in similar cases.

Id. at 772 n.3 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (11th Cir. 1974)). *Camden I* recognized additional factors that a court may

consider in awarding a percentage fee award, including "the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel. . . and the economics involved in prosecuting a class action." *Id*. at 775. An analysis of the most relevant factors confirms that the fee requested is fair and reasonable.

A. The Time and Labor Required

A review of the effort and time expended by Lead Counsel supports the requested fee. The Gardner Declaration details the breadth and depth of work by Plaintiffs' counsel to prosecute the claims against PwC, the time expended, and the diligence of those efforts. Indeed, the Settlement was reached at a point in the litigation where Plaintiffs' counsel had committed extensive resources to understanding the facts and challenges posed by the claims and defenses, and the factors that would impact any recovery. As set forth in greater detail in the Gardner Declaration, the proceedings related to PwC to date have included:

- Extensive investigation, including review and analysis of: (1) filings with the U.S. Securities and Exchange Commission ("SEC"); (2) publicly available information (including press releases, public statements, analyst reports, and advisories and media reports about the Company); (3) pleadings and disclosures in the SEC's action against Joseph M. Elles ("Elles") (Carter's Executive Vice President of Sales during the Class Period), the criminal proceeding by the United States Department of Justice ("DOJ") against Elles, the SEC's action against Joseph Pacifico ("Pacifico") (Carter's President until December 21, 2009), and the SEC's action against Michael H. Johnson (a former

divisional merchandise manager at one of Carter's largest customers); and (4) the applicable law and accounting rules governing the claims. Gardner Decl. ¶¶53-57.

- Contentious motion practice including: (1) investigating and drafting the initial complaint, First Amended Complaint, and the Second Amended Complaint; (2) researching and responding to PwC's motion to dismiss the Second Amended Complaint; and (3) researching and responding to PwC's motion for reconsideration of the Court's Order denying PwC's motion to dismiss. *Id*. ¶¶42-49.

- Identifying more than 168 potential witnesses, contacting 114, and interviewing approximately 68 third parties with knowledge of the relevant issues to the Consolidated Action. *Id*. ¶¶14, 55.

- Consulting with an experienced accounting expert regarding the substantive accounting issues in the alleged accommodations fraud, and further exploring the factual and legal issues regarding loss causation and class-wide damages by consulting with a damages expert. *Id*. ¶¶14, 57.

- Performing confirmatory discovery which included the review of PwC's workpapers produced to the SEC during its investigation of the Company. *Id*. ¶¶14, 56.

- Extended settlement negotiations including several discussions between counsel and an in-person, full-day mediation session before former United States District Court Judge Layn R. Phillips, a highly regarded and experienced mediator. *Id*. ¶¶15, 58-60.

Plaintiffs' counsel expended more than 1,132 hours in connection with the prosecution or resolution of the Consolidated Action from April 14, 2012 through August 16, 2013, resulting in a "lodestar" of $705,583.50 (the result of multiplying the number of hours worked by counsel's current billing rates). *See* Ex. 4

(Summary of Lodestars and Expenses); Exs. 5-A and 6-A. While not required in the Eleventh Circuit, an analysis of the requested fee under the "lodestar/multiplier" approach further supports the reasonableness of a 30% award. *See, e.g., Waters*, 190 F.3d at 1298 ("while we have decided in this circuit that a lodestar calculation is not proper in common fund cases, we may refer to that figure for comparison"). Here, based on the $3.3 million Settlement Fund, the requested 30% award results in a multiplier of approximately 1.4.[6] Lead Counsel's work, however, will continue beyond approval of the Settlement, with no additional compensation.

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[6] The multiplier is calculated by dividing the $990,000 fee request by the $705,583.50 lodestar of Plaintiffs' counsel. It is appropriate to use counsel's current rates in order to compensate for the delay in payment and inflation. *See, e.g., Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 679, 700 (M.D. Ala. 1988).

As supported by Plaintiffs' counsel's sworn declarations, their rates are the same as those used in other securities or shareholder litigation. They are also commensurate with rates used by peer defense-side law firms litigating matters of a similar magnitude. *See* sample of defense firm billing rates compiled by Labaton Sucharow from bankruptcy court filings in 2012, Ex. 8. *See also Blum*, 465 U.S. at 895 n.11 (explaining that courts should consider whether "the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation."); *In re Royal Ahold N.V. Sec. & ERISA Litig.,* 461 F. Supp. 2d 383, 386 n.6 (D. Md. 2006) (approving fees in securities class action and holding that rates were "within a reasonable range for the national firms that prosecuted the case"); *In re MicroStrategy, Inc. Sec. Litig.*, 172 F. Supp. 2d 778, 788 (E.D. Va. 2001) (finding rates were "within the range of reasonableness for PSLRA cases, where the market for class action attorneys is nationwide and populated by very experienced attorneys with excellent credentials").

This is below the range of multipliers frequently awarded in class action settlements of similar magnitude in courts within the Eleventh Circuit. *See, e.g., Pinto v. Princess Cruise Lines Ltd.,* 513 F. Supp. 2d 1334, 1344 (S.D. Fla. 2007) (approving a lodestar of less than 2 and noting that lodestar multipliers "'in large and complicated class actions' range from 2.26 to 4.5"); *Ingram v. The Coca-Cola Co*., 200 F.R.D. 685, 694-96 (N.D. Ga. 2001) (awarding fee representing a multiplier between 2.5 and 4); *Mashburn,* 684 F. Supp. at 702 ("A multiplier of approximately 3.1 in a national class action securities case is not unusual or unreasonable."). The multiplier here is less than the 1.86 multiplier that the Court awarded in the Carter's Settlement.[7] Accordingly, the time and labor required amply demonstrate the reasonableness of the attorneys' fee request.

B. The Novelty and Difficulty of the Issues

Lead Plaintiff faced all the "multi-faceted and complex legal questions endemic" to cases based on alleged violations of federal securities law. *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1334 (S.D. Fla. 2001); *Ressler v. Jacobson*, 149 F.R.D. 651, 654 (M.D. Fla. 1992) (same). Moreover, "securities actions have become more difficult from a plaintiff's perspective in the wake of the

[7] The Carter's Settlement multiplier was calculated by dividing the $5,600,000 fee request by the $3,018,556 lodestar of Plaintiffs' counsel. *See* ECF No. 122-1 at 11.

PSLRA." *In re Sterling Fin. Corp. Sec. Class Action*, No. 07-2171, 2009 WL 2914363, at *4 (E.D. Pa. Sept. 10, 2009). This Consolidated Action was no exception.

Lead Plaintiff and Lead Counsel faced several difficult issues in prosecuting the claims against PwC, including a vigorously contested motion to dismiss involving complicated facts and legal issues that challenged Lead Plaintiff's claims against PwC. Although the Court denied PwC's motion to dismiss, PwC's motion for reconsideration of that decision was pending at the time the Settling Parties agreed to settle. Therefore, there was a risk that Lead Plaintiff's claims would not have survived following a decision by the Court on PwC's motion for reconsideration, or after one or more motions for summary judgment following the completion of fact and expert discovery. *See* Gardner Decl. ¶69.

PwC would continue to argue at summary judgment and at trial that, with respect to liability, *inter alia*, (i) PwC's audits complied with all professional standards (*i.e.*, GAAS and GAAP); and (ii) Lead Plaintiff could not establish that PwC possessed the necessary scienter. *Id*. ¶¶69-71. With regard to scienter, PwC would likely assert that Elles and Pacifico concealed the alleged fraud from PwC and from Carter's internal accounting department by creating false documentation regarding accommodations, and that independent investigations by the DOJ, and

the SEC have not contradicted PwC's position. *Id*. ¶70. PwC would also continue to argue that it had no motive to assist Carter's in manipulating its accommodations practices, and that PwC remains Carter's outside auditor even after Carter's Audit Committee fully investigated the accommodations fraud and restated its financial statements for fiscal years 2004 through 2008. *Id*.

Indeed the difficulty of establishing scienter is a substantial risk in any action under Section 10(b), and is enhanced with respect to outside auditors. *See, e.g*., *Garfield v. NDC Health Corp*., 466 F.3d 1255, 1270 (11th Cir. 2006) (affirming dismissal of securities fraud claims against auditor for failure to plead scienter); *In re Jiangbo Pharm., Inc., Sec. Litig*., 884 F. Supp. 2d 1243, 1268 (S.D. Fla. 2012) (dismissing securities fraud claims against external auditor for failure to plead scienter); *In re Sunterra Corp. Sec. Litig*., 199 F. Supp. 2d 1308, 1335–37 (M.D. Fla. 2002) (finding plaintiffs failed to establish auditors acted with scienter); *see also Pub. Emps. Ret. Assoc. of Colo. v. Deloitte & Touche LLP*, 551 F.3d 305, 316 (4th Cir. 2009) (affirming dismissal of securities fraud claims against outside auditor on element of scienter).

In response, Lead Plaintiff would argue that PwC's failure to detect the fraud over a period of more than five years, when Carter's newly hired chief financial officer uncovered the fraud within a matter of months, supports that PwC's audits

were so recklessly deficient that they amounted to no audit at all. However, it is likely that Lead Plaintiff would need to introduce complex expert testimony regarding PwC's audits, and risk confusing the jury. Thus, there is a real risk that the Court or a jury would find PwC was, at most, negligent and not severely reckless, as the securities laws require for liability. Gardner Decl. ¶72.

The calculation and proof of the damages suffered by the Settlement Class also presented difficult issues that Lead Counsel, working with consulting experts, needed to navigate, and would continue to face at summary judgment and trial. PwC would likely continue to argue that there was no loss causation because Lead Plaintiff cannot establish that any of the corrective disclosures relate to PwC. *Id.* ¶73. Additionally, PwC would argue that damages would be curtailed by the PSLRA's 90-day "bounce-back" cap on damages, 15 U.S.C. §78u-4(e). *Id.* Furthermore, PwC would argue that its responsibility would be significantly diminished under the PSLRA proportionate liability provision. *Id.* ¶74; Lead Plaintiff's Memorandum of Law in Support of Motion for Final Approval of Class Action Settlement and Plan of Allocation, Section I.C.(b).

Although Lead Plaintiff believes it could rebut these arguments with expert testimony, survive summary judgment, and prevail at trial, the causation and damages issues required, and would continue to require, a considerable amount of

legal and factual expertise and would necessarily be resolved through a battle between experts, the outcome of which is notoriously difficult to assess. *See, e.g.*, *Ressler v. Jacobson*, 822 F. Supp. 1551, 1554 (M.D. Fla. 1992) ("In the 'battle of experts,' it is impossible to predict with any certainty which arguments would find favor with the jury.").

Accordingly, this factor also supports the reasonableness of the requested attorneys' fee.

C. The Skill Required to Perform the Legal Services Properly, and the Experience, Reputation, and Ability of the Attorneys

The Court should consider "the skill and acumen required to successfully investigate, file, litigate, and settle a complicated class action lawsuit such as this one," *David v. Am. Suzuki Motor Corp.*, No. 08-CV-22278, 2010 WL 1628362, at *8 n.15 (S.D. Fla. Apr. 15, 2010), and "the experience, reputation, and ability of the attorneys" involved. *Camden I*, 946 F.2d at 772 n.3.

As discussed *supra*, Section II.B., this is a complex case involving difficult factual and legal issues. Moreover, the numerous contested issues required highly skilled counsel to represent the class and bring about the Settlement. Labaton Sucharow is among the nation's preeminent law firms in this area of practice and has served as lead or co-lead counsel on behalf of major institutional investors in

numerous class litigation since the enactment of the PSLRA.[8] Thus, the experience, reputation, and ability of Lead Counsel was a factor in obtaining the result achieved here.

This Court should also consider the "quality of the opposition the plaintiffs' attorneys faced" in awarding Lead Counsel a fee. *Sunbeam*, 176 F. Supp. 2d at 1334; *Ressler*, 149 F.R.D. at 654. PwC is represented by King & Spalding, LLP, an experienced and nationally recognized defense firm. The ability of Lead Counsel to obtain such a favorable Settlement for the Settlement Class in light of such qualified legal opposition confirms the quality of the representation.

D. The Customary and Contingent Nature of the Fee

Fees in class action lawsuits of this nature are contingent because virtually no individual possesses a sufficiently large stake in the litigation to justify paying her attorneys on an hourly basis. *See id.*; *see also Norman v. Hous. Auth. of*

[8] Labaton Sucharow has served as lead counsel in a number of high profile matters, for example: *In re Am. Int'l Group, Inc. Sec. Litig.*, No. 04-8141 (S.D.N.Y.) (representing the Ohio Public Employees Retirement System, State Teachers Retirement System of Ohio, and Ohio Police & Fire Pension Fund and reaching settlements of $1 billion); *In re HealthSouth Corp. Sec. Litig.*, No. 03-1501 (N.D. Ala.) (representing the State of Michigan Retirement System, New Mexico State Investment Council, and the New Mexico Educational Retirement Board and securing settlements of more than $600 million); and *In re Countrywide Sec. Litig.*, No. 07-5295 (C.D. Cal.) (representing the New York State and New York City Pension Funds and reaching settlements of more than $600 million). *See* Gardner Decl. ¶91; Ex. 5-C.

Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988). Thus, the Court should give substantial weight to the contingent nature of Lead Counsel's fees when assessing the fee request. Indeed, courts have consistently recognized that the risk of receiving little or no recovery is a major factor in determining the award of fees. *See In re Checking Account Overdraft Litig*., 830 F. Supp. 2d 1330, 1364 (S.D. Fla. 2011) ("Numerous cases recognize that the contingent fee risk is an important factor in determining the fee award."); *Pinto*, 513 F. Supp. 2d at 1339 ("attorneys' risk is '"perhaps the foremost" factor' in determining an appropriate fee award"); *In re Friedman's, Inc. Sec. Litig.,* No. 1:03–cv–3475–WSD, 2009 WL 1456698, at *3 (N.D. Ga. May 22, 2009) ("A contingency fee arrangement often justifies an increase in the award of attorneys' fees.").

Success in contingent litigation such as this is never guaranteed. In other cases, plaintiffs' counsel in shareholder litigation have spent years in litigation, expending thousands of attorney hours and millions of dollars, yet receiving no compensation at all. Even a victory at the trial stage is not a guarantee of success. *See, e.g., Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1449 (11th Cir. 1997) (reversing jury verdict of $81.3 million in securities class action against accounting

firm on loss causation grounds and judgment entered for defendant).[9] Here, Lead Plaintiff faced a number of hurdles that could have resulted in a lesser or no recovery. *See supra*, Section II.B. Indeed, because the fee in this matter was entirely contingent, the only certainty was that there would be no fee without a successful result. Thus, the substantial risks of contingency justify the requested fee.

E. The Amount Involved and Results Achieved

"It is well-settled that one of the primary determinants of the quality of the work performed is the result obtained." *Ressler*, 149 F.R.D. at 655; *see also Friedman's*, 2009 WL 1456698, at *3 (same). The Settlement here is comprised of a $3.3 million cash recovery for the Settlement Class, an excellent recovery against an outside auditor given the substantial difficulties of establishing liability for securities violations and the risks that would be involved in establishing damages, or prevailing after trial on a likely appeal. It was only through Lead Counsel's extensive efforts in preparing two amended complaints following comprehensive investigation, vigorously opposing PwC's motion to dismiss and motion for

[9] *See also In re JDS Uniphase Corp. Sec. Litig.*, No. 02-1486 (N.D. Cal.) (jury verdict for defendants after five years of litigation); *Winkler v. NRD Mining, Ltd.*, 198 F.R.D. 355 (E.D.N.Y. 2000) (granting defendants' motion for judgment as matter of law after verdict for plaintiffs).

reconsideration, and developing the case through interviews and expert analysis that allowed Lead Plaintiff to achieve the Settlement.

According to an analysis prepared by Lead Plaintiff's consulting damages expert, the maximum aggregate damages Lead Plaintiff could have obtained at trial due to the accommodations fraud (the only fraud alleged against PwC) was approximately $64.5 million. *See* Gardner Decl. ¶¶13, 90. Thus, the $3.3 million settlement with PwC - Carter's outside auditor and only one of the defendants named in the Consolidated Action - represents approximately 5% of the total estimated damages amount.[10] *Id*. This percentage compares favorably with other court-approved settlements in PSLRA cases in this and other circuits. *See, e.g., Strube v. Am. Equity Inv., Life Ins. Co*., 226 F.R.D. 688, 698 (M.D. Fla. 2005) (approving settlement equal to 2% of estimated potential recovery); *In re Merrill Lynch Tyco Research Sec. Litig*., 249 F.R.D. 124, 135 (S.D.N.Y. 2008) (approving $4.9 million settlement equal to 3% of estimated damages and noting that the "estimated recovery of three percent of the total damages estimated by the plaintiffs, does not meaningfully diverge from the range of reasonableness for settlements of similar-sized securities class actions").

[10] When combined with the $20 million Carter's Settlement, Lead Counsel has recovered approximately 36% of the total estimated damages for claims related to the accommodations fraud. *See id*.

In light of these facts, the recovery here of $3.3 million is an excellent result.

F. Awards in Similar Cases

Lead Counsel's requested fee of 30% of the Settlement Fund is within the range of fees typically awarded in class action cases with similar recoveries in this Circuit. *See supra* Section I.A.; *see also Camden I*, 946 F.2d at 774-75 (noting a benchmark range of between 20%-30% of the common fund).

G. Reaction of the Settlement Class to Date

More than 115,000 copies of the Notice and Proof of Claim ("Notice Packet") were mailed to all potential Settlement Class Members that did not file a claim in connection with the Carter's Settlement, and to known brokers and nominees. *See* Declaration of Claims Administrator, dated August 28, 2013, Ex. 3 ¶¶8, 11-13. Additionally, potential Settlement Class Members who submitted a claim in connection with the Carter's Settlement by May 21, 2012 were mailed a copy of the Notice and a letter explaining that they did not need to submit a Proof of Claim since the information previously submitted in the Carter's Settlement will be used to determine eligibility in the PwC Settlement. *Id.* ¶9. 4,012 such Notices and letters were mailed. *Id.* The Summary Notice was published in *Investor's Business Daily* and transmitted over *PR Newswire*. *Id.* ¶15.

The Notice stated that Lead Counsel would apply for fees of up to 30% of

the Settlement Fund and reimbursement of expenses in an amount not to exceed $200,000 plus interest on both amounts, and that the deadline for filing objections to the fee motion is September 17, 2013. *See* Ex. 3-A at 2, 7. To date, not a single objection to the requested fee or expense award has been received.[11] Gardner Decl. ¶22. "The lack of numerous objections is evidence that the requested fee is fair." *Friedman's,* 2009 WL 1456698, at *3; *Ressler*, 149 F.R.D. at 656 (noting that the lack of objections is "strong evidence of the propriety and acceptability" of the fee request).

III. REIMBURSEMENT OF LITIGATION EXPENSES

"Class counsel's reasonable and necessary out-of-pocket expenses should be reimbursed." *Carpenters Health & Welfare Fund v. Coca-Cola Co.,* 587 F. Supp. 2d 1266, 1272 (N.D. Ga. 2008); *see also Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 543, 549 (S.D. Fla. 1988); 1 Alba Conte, *Attorney Fee Awards*, §2.19, at 73-74 (3d ed. 2006) ("an attorney who creates or preserves a common fund by judgment or settlement for the benefit of a class is entitled to receive reimbursement of reasonable fees and expenses involved").

Plaintiffs' counsel have incurred, without reimbursement, litigation expenses during the period from April 14, 2012 through August 16, 2013 totaling

[11] Should any objections be filed, they will be addressed in Lead Counsel's reply papers due October 1, 2013.

$57,414.06.[12] Exs. 5 and 6. Lead and Liaison Counsel have each submitted a declaration, that itemizes the various categories of expenses incurred. *See* Exs. B-B and 6-B. Lead Counsel submits that the expenses, which include costs such as expert and consultant fees, mediation fees, electronic research, photocopying, postage, meals and transportation, were reasonably and necessarily incurred in prosecuting or resolving the Consolidated Action. The majority of the expenses, $22,150.00, related to the costs of mediating the claims. Approximately $14,000 of the expenses relate to experts. These expenses were critical to Lead Counsel's understanding of the claims and damages against PwC in the Consolidated Action, its success in achieving the proposed Settlement, and in formulating the Plan of Allocation for the Settlement.

Because counsel were aware that they might not recover any of these expenses unless and until the litigation was successfully resolved, they took steps to minimize expenses whenever practical to do so. Gardner Decl. ¶95. The expenses for which Lead Counsel seeks reimbursement were necessary for the successful prosecution and settlement of the claims and are of the type routinely

[12] Counsel have been reimbursed for expenses incurred in prosecuting or resolving the Consolidated Action from inception of the case through April 13, 2012 in connection with the Carter's Settlement. In connection with the PwC Settlement, Lead Counsel is therefore only seeking expenses incurred thereafter.

charged to clients billed by the hour. Lead Plaintiff has approved Lead Counsel's request for reimbursement of expenses. *See* Ex. 1 ¶¶1-3, 6-7. In addition, the Notice apprised potential Settlement Class Members that Lead Counsel would seek reimbursement of expenses in an amount not to exceed $200,000. Ex. 3-A at 2, 7. The requested amount of $57,414.06 is substantially less than the amount stated in the Notice.

Because the litigation expenses incurred by Plaintiffs' counsel are of the type routinely approved in class actions and were essential to the successful prosecution and resolution of the Consolidated Action with respect to PwC, the Court should grant reimbursement of the expenses.

CONCLUSION

The Court should grant Lead Counsel's motion for attorneys' fees and reimbursement of litigation expenses. A proposed order will be submitted with Lead Counsel's reply papers, after the deadline for objecting has passed.

Dated: August 30, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 5.1

Counsel hereby certifies that this document has been prepared with Times New Roman 14 point type, which is one of the font and point selections approved by the court in LR 5.1C.

Dated: August 30, 2013

/s/ David J. Worley
David J. Worley