

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

IN RE ADVANCE AUTO PARTS, INC.,
SECURITIES LITIGATION

Case No. 1:18-cv-00212-RTD-SRF

CLASS ACTION

**CLASS COUNSEL’S MOTION FOR AN AWARD
OF ATTORNEYS’ FEES AND LITIGATION EXPENSES**

Pursuant to Federal Rule of Civil Procedure 23(h) and this Court’s Order Preliminarily Approving Settlement and Providing for Notice dated January 11, 2022 (D.I. 356), and upon (i) the Declaration of Sharan Nirmul in Support of (A) Class Representative’s Motion for Final Approval of Settlement and Plan of Allocation; and (B) Class Counsel’s Motion for an Award of Attorneys’ Fees and Litigation Expenses (and exhibits thereto); (ii) the Brief in Support of Class Counsel’s Motion for an Award of Attorneys’ Fees and Litigation Expenses; and (iii) all other papers and proceedings herein, Class Counsel Kessler Topaz Meltzer & Check, LLP, on behalf of Plaintiff’s Counsel, will and hereby does move this Court, before the Honorable Robert T. Dawson, on June 13, 2022, at 10:00 a.m. at the United States District Court for the District of Delaware, J. Caleb Boggs Federal Building, 844 N. King St., Wilmington, DE, or at such other location and time as set by the Court, for entry of an order granting an award of attorneys’ fees and Litigation Expenses in the above-captioned securities class action.

A proposed Order granting the requested relief will be submitted with Class Counsel’s reply papers after the deadline for objecting to the motion has passed.

Dated: May 9, 2022

Respectfully submitted,

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Date: May 9, 2022

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Pursuant to Rule 23(h) of the Federal Rules of Civil Procedure (“Rules”), Court-appointed Class Counsel Kessler Topaz Meltzer & Check, LLP (“Kessler Topaz” or “Class Counsel”) respectfully submits this Brief in support of its motion for (i) an award of attorneys’ fees for Plaintiff’s Counsel¹ in the amount of 25% of the Settlement Fund; (ii) payment of \$2,373,807.51 for Litigation Expenses reasonably and necessarily incurred in prosecuting and resolving the Action; and (iii) reimbursement of \$13,737.50 to Court-appointed Class Representative the Public Employees’ Retirement System of Mississippi (“MPERS” or “Class Representative”) for its costs directly related to representing the Class, as authorized by the PSLRA.²

I. INTRODUCTION

Following more than three years of dedicated litigation efforts, Class Counsel successfully negotiated a settlement of the Action with Defendants. The Settlement, if approved by the Court, will resolve this highly contentious litigation in its entirety in exchange for \$49,250,000 in cash. Based on Class Counsel’s and Class Representative’s thorough understanding of the risks and uncertainties in this litigation as well as the assessment of approximate class-wide damages, the Settlement is an excellent result for the Class. The Settlement not only eliminates the possibility of an adverse ruling for the Class on Defendants’ Renewed Motion for Reconsideration of the

¹ Plaintiff’s Counsel consists of: (i) Kessler Topaz; (ii) Court-appointed Liaison Counsel deLeeuw Law LLC (“deLeeuw Law”); and (iii) Gadow Tyler, PLLC (“Gadow Tyler”), additional counsel for Class Representative.

² All capitalized terms not defined herein have the meanings set forth in the Stipulation and Agreement of Settlement dated December 23, 2021 (D.I. 355-1) and in the Declaration of Sharan Nirmul (“Nirmul Declaration” or “Nirmul Decl.”) filed herewith. The Nirmul Declaration is an integral part of this submission and, for the sake of brevity herein, Class Representative respectfully refers the Court to the Nirmul Declaration for a detailed description of, *inter alia*: the procedural history of the Action and Class Counsel’s extensive litigation efforts (¶¶ 18-144); the settlement negotiations (¶¶ 145-53); and the risks of continued litigation (¶¶ 154-70). Citations to “¶ _” herein refer to paragraphs in the Nirmul Declaration and citations to “Ex. _” herein refer to exhibits to the Nirmul Declaration. All internal citations, quotation marks, and footnotes have been omitted and emphasis has been added unless otherwise indicated.

Court's motion to dismiss ruling or Defendants' Summary Judgment Motion (both pending at the time of settlement), as well as the risk, delays, and expense of trial and post-trial appeals, but it also recovers a significant portion of the Class's damages.³

As detailed in the Nirmul Declaration, Class Counsel—as the sole Court-appointed counsel for the Class—vigorously pursued this Action from its outset. Among its efforts, Class Counsel directed a far-ranging investigation, including interviews with scores of former AAP employees, resulting in a detailed amended complaint which was able to withstand Defendants' motions to dismiss in large part. Thereafter, Class Counsel pursued myriad sources for document discovery under tight deadlines, including propounding document subpoenas on numerous third parties and moving to compel additional discovery on five separate occasions. ¶¶ 43-83. As a result of these efforts, Class Counsel obtained and analyzed more than 1.3 million pages of documents. ¶ 53-54, 63-64. Class Counsel also steered the depositions of twenty-one fact witnesses—including the depositions of the individual Defendants and other key AAP employees, the Chairman of AAP's Board of Directors during the Class Period (and Starboard CEO), Jeffrey Smith, and the managing director of a global consulting firm that advised AAP on its strategic initiatives and acquisition—and prepared for and defended the depositions of two MPERS representatives. ¶¶ 73, 89. Additionally, Class Counsel consulted extensively with experts in the areas of loss causation, damages, financial modeling, and economics, and the automotive parts retail sector, assisted in preparing eight expert reports, and took or defended eight expert depositions. ¶¶ 102, 125, 133.

³ Class Representative's damages expert estimates the Class's maximum aggregate damages to be \$669 million, assuming a total victory at trial on all aspects of liability and damages. ¶ 10. Accordingly, the \$49,250,000 Settlement represents approximately 7.4% of the Class's maximum aggregate damages which exceeds the median recovery in securities class actions in this Circuit. *See generally In re Wilmington Tr. Sec. Litig.*, 2018 WL 6046452, at *8 (D. Del. Nov. 19, 2018) (noting "Third Circuit median recovery of 5% of damages in class action securities litigation").

In addition to obtaining certification of the Class and defending that certification against Defendants' Rule 23(f) Petition, Class Counsel briefed an opposition to Defendants' Renewed Motion for Reconsideration and had substantially prepared an opposition to Defendants' Summary Judgment Motion, which was due to be filed on November 15, 2021. In the midst of these efforts, Class Counsel simultaneously engaged in settlement discussions with Defendants' Counsel in an attempt to resolve the Action and participated in formal mediation with David M. Murphy of Phillips ADR Enterprises, P.C. on September 9, 2021. ¶¶ 145-47. Following the mediation, the Parties continued their negotiations over the next seven weeks with Mr. Murphy's assistance and ultimately accepted a mediator's recommendation to settle the Action for \$49,250,000.

As fully set forth in the Nirmul Declaration, the litigation risks in this complex case were substantial, including with respect to liability, damages, and loss causation. Class Counsel assumed all of these risks by taking this case on a fully contingent basis and devoted substantial resources to prosecuting the Action against highly-skilled opposing counsel. To succeed in the Action, Class Counsel deployed a large, extremely dedicated group of professionals to develop, support, and aggressively pursue the Action, including not only litigators skilled in the area of securities litigation, but also highly experienced investigators, paralegals, administrative staff, and others.

As compensation for these efforts and its commitment to bringing the Action to a successful conclusion with a cash recovery for the Class, Class Counsel, on behalf of Plaintiff's Counsel, requests a fee of 25% of the Settlement Fund. The amount of quality legal work Class Counsel dedicated to the prosecution of this Action—and the significant risk it took on by prosecuting and funding this Action with no guarantee of recovery—justifies the request. As discussed below, Class Counsel's fee request is consistent with percentage fees awarded in other securities class actions. Further, if approved, a 25% fee would result in a *negative* multiplier of

0.73 on Plaintiff's Counsel's lodestar. Thus, despite the substantial contingency risks Plaintiff's Counsel faced (which would otherwise justify a substantial positive multiplier),⁴ Class Counsel is requesting a fee that represents a discount on the value of the time Plaintiff's Counsel devoted to the case. Class Counsel also requests payment from the Settlement Fund of \$2,387,545.01 in Litigation Expenses (which amount *includes* the amount requested by Class Representative). After its diligent involvement in the Action, Class Representative—a sophisticated, institutional investor and precisely the type of fiduciary envisioned by Congress when enacting the PSLRA—has reviewed and approved Class Counsel's requests for attorneys' fees and Litigation Expenses.⁵

The reaction of the Class to date also supports Class Counsel's requests. Pursuant to the Court's Preliminary Approval Order (D.I. 356), 92,267 Postcard Notices and 323 Notices have been mailed to potential Class Members and nominees.⁶ These notices advised recipients that Class Counsel would be applying to the Court for attorneys' fees in an amount not to exceed 25% of the Settlement Fund, plus Litigation Expenses in an amount not to exceed \$2.4 million, plus interest. Cavallo Decl., Ex. A. While the May 23, 2022 deadline to object has not yet passed, to date, there have been no objections to the attorneys' fees and expense amounts set forth in the notices. ¶ 184.⁷

For the reasons discussed herein, Class Counsel respectfully submits that its requested fee is fair and reasonable under the applicable legal standards. Class Counsel also respectfully submits

⁴ *Stevens v. SEI Invs. Co.*, 2020 WL 996418, at *13 (E.D. Pa. Feb. 28, 2020) (noting multipliers "ranging from 1 to 8 are often used in common fund cases" to "compensate counsel for the risk of assuming the representation on a contingency fee basis").

⁵ *See* Declaration of Tricia L. Beale submitted on behalf of MPERS (Ex. 1), ¶ 7. *See also In re Lucent Techs. Inc. Sec. Litig.*, 327 F. Supp. 2d 426, 442 (D.N.J. 2004) ("Significantly, the Lead Plaintiffs, both of whom are institutional investors with great financial stakes in the outcome of the litigation, have reviewed and approved Lead Counsel's fees and expenses request.").

⁶ *See* Declaration of Lance Cavallo submitted on behalf of the Court-authorized Claims Administrator Kurtzman Carson Consultants LLC ("KCC") ("Cavallo Decl.") (Ex. 2), ¶ 8.

⁷ Class Counsel will address any objections received in its reply to be filed on June 6, 2022.

that the Litigation Expenses for which it seeks payment were reasonable and necessary for the successful prosecution of the Action and that the request for reimbursement to Class Representative pursuant to the PSLRA for the time it dedicated to the Action on behalf of the Class is likewise reasonable and appropriate. Accordingly, Class Counsel requests that its Motion for an Award of Attorneys' Fees and Litigation Expenses be granted in full.

II. CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES IS REASONABLE AND SHOULD BE APPROVED

A. Class Counsel Is Entitled to a Reasonable Fee from the Common Fund

The propriety of awarding attorneys' fees from a common fund is well established. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (“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”); *In re Par Pharm. Sec. Litig.*, 2013 WL 3930091, at *9 (D.N.J. July 29, 2013) (“[W]e agree with the long line of common fund cases that hold that attorneys whose efforts create, discover, increase, or preserve a common fund are entitled to compensation.”) (alteration in original).

Further, as courts recognize, in addition to providing just compensation, awards of fair attorneys' fees from a common fund ensure that “competent counsel continue[s] to be willing to undertake risky, complex, and novel litigation.” *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000); *see also In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) (“In order to attract well-qualified plaintiffs’ counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives.”). Indeed, the Supreme Court has emphasized that private securities actions, such as the instant action, 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); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).

B. The Court Should Award a Reasonable Percentage of the Common Fund

An award of attorneys' fees and the method used to determine that award are "within the discretion of the court." *In re Merck & Co., Inc. Vytarin ERISA Litig.*, 2010 WL 547613, at *6 (D.N.J. Feb. 9, 2010). The Third Circuit has consistently held, however, that in common fund cases such as this one, the percentage-of-recovery method is the preferred approach in calculating an award of fees. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 330 (3d Cir. 2011) (the percentage-of-recovery method "is generally favored in common fund cases because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure"); *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006). The percentage-of-recovery method is almost universally preferred in common fund cases because it most closely aligns the interests of counsel and the class. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005); *In re Ocean Power Techs., Inc.*, 2016 WL 6778218, at *24 (D.N.J. Nov. 15, 2016).⁸ The Third Circuit recommends that the percentage award be "cross-check[ed]" against the lodestar method to ensure its reasonableness. *See Sullivan*, 667 F.3d at 330.

C. A Fee of 25% of the Settlement Fund Is Reasonable Under Either the Percentage-of-Recovery Method or Lodestar Method

1. The Requested Fee Is Reasonable Under the Percentage-of-Recovery Method

⁸ The use of the percentage-of-recovery method also comports with the language of the PSLRA, which states that "[t]otal 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" 15 U.S.C. § 78u-4(a)(6); *see also In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 188 n.7 (3d Cir. 2005) ("[T]he PSLRA has made percentage-of-recovery the standard for determining whether attorney's fees are reasonable.").

The requested 25% fee is reasonable under the percentage-of-recovery method. While there is no absolute rule, courts in this Circuit have observed that fee awards generally range from 19% to 45% of the settlement fund, *see In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995), and most commonly range from 25% to 33% of the recovery. *See In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 155 (D.N.J. 2013) (“Courts within the Third Circuit often award fees of 25% to 33% of the recovery”); *La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*, 2009 WL 4730185, at *8 (D.N.J. Dec. 4, 2009) (same); *see also Wilmington Tr.*, 2018 WL 6046452, at *9 (finding 28% to be a “typical fee percentage” in the Third Circuit).

A review of attorneys’ fees awarded in securities class actions in this Circuit strongly supports the reasonableness of the requested 25% fee. *See, e.g.*, Order, *Pelletier v. Endo Int’l PLC*, No. 2:17-cv-05114, at 1 (E.D. Pa. Apr. 8, 2022), D.I. 417 (awarding 25% of \$63.4 million settlement); *In re Horsehead Holding Corp. Sec. Litig.*, 2021 WL 2309689, at *3 (D. Del. June 4, 2021) (awarding 33 1/3% of \$14.75 million settlement); *Wilmington Tr.*, 2018 WL 6046452, at *9 (awarding 28% of \$210 million settlement); *Alaska Elec. Pension Fund v. Pharmacia Corp.*, 2013 WL 12153597, at *1 (D.N.J. Jan. 30, 2013) (awarding 27.5% of \$164 million settlement); *see also In re Veritas Software Corp. Sec. Litig.*, 396 F. App’x 815, 818-19 (3d Cir. 2010) (affirming attorney’s fees of 30% on \$21.5 million recovery). The requested fee is also consistent with (or lower than) recent fee awards in similarly sized securities class actions in other circuits. *See, e.g.*, *In re Perrigo Co. PLC Sec. Litig.*, 2022 WL 500913, at *1 (S.D.N.Y. Feb. 18, 2022) (D.I. 330-1) (awarding 33 1/3% of \$31.9 million settlement); *Grae v. Corr. Corp. of Am.*, 2021 WL 5234966, at *1 (M.D. Tenn. Nov. 8, 2021) (awarding 33 1/3% of \$56 million settlement); *Shah v. Zimmer Biomet Holdings, Inc.*, 2020 WL 5627171, at *13 (N. D. Ill. Sept. 18, 2020) (awarding 30% of \$50

million settlement); Order, *In re Henry Schein, Inc. Sec. Litig.*, No. 1:18-cv-01428 (E.D.N.Y. Sept. 16, 2020), D.I. 89 (awarding 25% of \$35 million settlement); Order, *City of Sunrise Gen. Emps.’ Ret. Plan v. FleetCor Techs., Inc.*, 1:17-cv-02207 (N.D. Ga. Apr. 15, 2020), D.I. 111 (awarding 25% of \$50 million settlement).

2. The Reasonableness of the Requested Fee Is Confirmed by a Lodestar Cross-Check

As noted above, the Third Circuit recommends that district courts use counsel’s lodestar as a “cross-check” to determine whether the requested fee is reasonable. *See Sullivan*, 667 F.3d at 330; *AT&T*, 455 F.3d at 164. “The lodestar cross-check serves the purpose of alerting the trial judge that when the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method.” *Rite Aid*, 396 F.3d at 306. “Conversely, where the ratio of the [percentage-of-recovery] to the lodestar is relatively low, the cross-check can confirm the reasonableness of the potential award under the [percentage] method.” *In re Schering-Plough Corp. ENHANCE Sec. Litig.*, 2013 WL 5505744, at *33 (D.N.J. Oct. 1, 2013).

Here, through April 30, 2022, Plaintiff’s Counsel have devoted 36,416.50 hours to the prosecution and resolution of this Action. ¶ 196. Plaintiff’s Counsel’s lodestar—which is derived by multiplying the hours spent on the litigation by each firm’s hourly rates for attorneys, paralegals, and other professional support staff—is \$16,982,276.00. *Id.*⁹ Accordingly, the

⁹ The Supreme Court has approved the use of current hourly rates to calculate the base lodestar figure as a means of compensating for the delay in receiving payment, inflation, and the loss of interest. *See Missouri v. Jenkins*, 491 U.S. 274, 284 (1989). Given the timing of the Settlement and its preliminary approval by the Court, Plaintiff’s Counsel have used their 2021 hourly rates to calculate their lodestar for this matter. The fee and expense declarations submitted on behalf of Plaintiff’s Counsel (*see* Exs. 3-5) include a description of the legal background and experience of Plaintiff’s Counsel, which support the hourly rates submitted. Plaintiff’s Counsel’s hourly rates are fair and reasonable for this legal market. *See, e.g., Wilmington Tr.*, 2018 WL 6046452, at *10 n.4 (finding attorney hourly rates from \$295 to \$1,250 reasonable).

requested 25% fee (i.e., \$12,312,500 plus interest), represents a multiplier of approximately 0.73 on Plaintiff's Counsel's lodestar. *Id.* In other words, the requested fee represents less than the lodestar value of the time that Plaintiff's Counsel dedicated to the Action. This "negative" multiplier is below the range of multipliers regularly awarded in complex contingent litigation to reflect the contingency-fee risk and other relevant factors. Indeed, lodestar multipliers "ranging from 1 to 8 are often used in common fund cases" to "compensate counsel for the risk of assuming the representation on a contingency fee basis." *Stevens*, 2020 WL 996418, at *13 (approving 6.16 multiplier); *see also Bodnar v. Bank of Am. N.A.*, 2016 WL 4582084, at *6 (E.D. Pa. Aug. 4, 2016) (finding 4.69 multiplier with respect to \$9,075,000 fee award "appropriate and reasonable"); *In re Ikon Office Sols., Inc. Sec. Litig.*, 194 F.R.D. 166, 195 (E.D. Pa. 2000) (approving 2.7 multiplier and noting it was "well within the range of those awarded in similar cases").¹⁰

Accordingly, the 25% fee request here is reasonable under both the percentage-of-recovery method and lodestar cross-check.

D. The Factors Considered by Courts in the Third Circuit Confirm that the Requested Fee Is Fair and Reasonable

Under Third Circuit law, district courts have considerable discretion in setting an appropriate percentage-based fee award in traditional common fund cases. *See, e.g., Gunter*, 223 F.3d at 195 ("We give [a] great deal of deference to a district court's decision to set fees."). Nonetheless, in exercising that broad discretion, the Third Circuit has noted that a district court should consider the following factors in determining a fee award:

¹⁰ *See also In re Amgen Inc. Sec. Litig.*, 2016 WL 10571773, at *9 (C.D. Cal. Oct. 25, 2016) ("Courts have recognized that a percentage fee that falls below counsel's lodestar strongly supports the reasonableness of the award."); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 515 (S.D.N.Y. 2009) (finding "no real danger of overcompensation" given that the requested fee represented a discount to counsel's lodestar).

(1) the size of the fund created and the number of beneficiaries, (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel, (3) the skill and efficiency of the attorneys involved, (4) the complexity and duration of the litigation, (5) the risk of nonpayment, (6) the amount of time devoted to the case by plaintiffs' counsel, (7) the awards in similar cases, (8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations, (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained, and (10) any innovative terms of settlement.

In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig., 582 F.3d 524, 541 (3d Cir. 2009) (citing *Gunter*, 223 F.3d. at 195 n.1; *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 336-40 (3d Cir. 1998)). These fee award factors “need not be applied in a formulaic way. . . and in certain cases, one factor may outweigh the rest.” *Id.* at 545; *Schuler v. Meds. Co.*, 2016 WL 3457218, at *9 (D.N.J. 2016). Here, each of these factors supports the 25% fee request.

1. The Size of the Common Fund Created and the Number of Persons Benefited

Courts have consistently recognized that the result achieved is a major factor to be considered in making a fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (“most critical factor is the degree of success obtained”); *In re Viropharma Inc. Sec. Litig.*, 2016 WL 312108, at *16 (E.D. Pa. Jan. 25, 2016).

Here, Class Counsel, on behalf of Class Representative, secured a Settlement that provides for a substantial and certain payment of \$49,250,000. This recovery will benefit a large number of investors. To date, KCC has mailed 92,267 Postcard Notices and 323 Notices to potential Class Members and nominees. *See Ex. 2, ¶ 8.* Accordingly, while the claim-submission deadline is not until June 9, 2022, a large number of Class Members are expected to submit Claims in order to be eligible to receive a payment from the Net Settlement Fund. *See In re Linerboard Antitrust Litig.*,

2004 WL 1221350, at *5 (E.D. Pa. June 2, 2004) *amended*, 2004 WL 1240775 (E.D. Pa. June 4, 2004) (size of benefitted population “is best estimated by the number of entities that were sent the notice describing the [Settlement]”).

2. The Absence of Objections from Class Members to Date

The Postcard Notice, which was mailed to potential Class Members, and the Notice, which was mailed to nominees and posted on the Settlement Website, provide that Class Counsel would apply for an award of attorneys’ fees in an amount not to exceed 25% of the Settlement Fund. Ex. 2. The notices also advise Class Members that they can object to the fee request and explain the procedures for doing so. *Id.* While the deadline for objecting has not yet passed, to date, no objections have been received. *See Cendant*, 264 F.3d at 235 (“[t]he vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement”).

3. The Skill and Efficiency of the Attorneys Involved

Class Counsel, including the other Plaintiff’s Counsel firms working under its direction, has achieved a highly favorable outcome for the benefit of the Class. *See In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 132 (D.N.J. 2002) (“the single clearest factor reflecting the quality of class counsels’ services to the class are the results obtained”). The recovery obtained is the direct result of the significant efforts of highly skilled attorneys and their staff working under their direction who possess substantial experience in the prosecution of complex securities class actions.¹¹ Class Counsel’s success in identifying key confidential witnesses through its investigation, in overcoming Defendants’ motion to dismiss in a case with very substantial risks,

¹¹ The experience of Kessler Topaz, deLeuw Law, and Gadow Tyler are set forth in their firm resumes. *See* Ex. 3-C, Ex.4-C, and Ex. 5-B.

in obtaining certification of the Class, and in pushing the litigation through the completion of fact and expert discovery, created the circumstances in which Class Representative was able to negotiate a \$49.25 million Settlement. In addition, the evident preparedness, experience, and skill of Class Counsel to litigate the case through trial and appellate levels provided the leverage to secure the very favorable recovery for the benefit of the Class.

The quality and vigor of opposing counsel is also relevant in evaluating the quality of the services rendered by Plaintiff's Counsel. *See, e.g., Ikon*, 194 F.R.D. at 194; *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) ("The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work."). Here, Defendants were represented ably by White & Case LLP and then Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. and Richards, Layton & Finger, PA, prominent firms with undeniable experience and skill. The ability of Class Counsel to obtain a favorable outcome for the Class in the face of this formidable opposition further confirms the quality of their representation. *See Wilmington Tr.*, 2018 WL 6046452, at *8 ("Plaintiffs' Counsel's ability to successfully litigate against and negotiate with [Defendants' Counsel] further shows Plaintiffs' Counsel's legal prowess.").

4. The Complexity and Duration of the Litigation

Securities litigation is regularly acknowledged to be particularly complex and expensive litigation, usually requiring expert testimony on several issues, including loss causation and damages. *See, e.g., Fogarazzo v. Lehman Bros., Inc.*, 2011 WL 671745, at *3 (S.D.N.Y. Feb. 23, 2011) ("securities actions are highly complex"); *In re Genta Sec. Litig.*, 2008 WL 2229843, *3 (D.N.J. May 28, 2008) ("This [securities fraud] action involves complex legal and factual issues, and pursuing them would be costly and expensive."); *In re Datatec Sys., Inc. Sec. Litig.*, 2007 WL 4225828, *3 (D.N.J. Nov. 28, 2007) ("[R]esolution of [damages issues] would likely require

extensive and conceptually difficult expert economic analysis. . . . Trial on [scienter and loss causation] issues would [be] lengthy and costly to the parties.”). Here, Class Counsel addressed numerous difficult issues in opposing Defendants’ Motion to Dismiss and Renewed Motion for Reconsideration as well as in its Class Certification Motion, many of which necessitated extensive consultation with experts. Class Counsel also had to engage an expert in the automotive parts retail industry in order to navigate and fully understand the different issues that could impact, among other things, a company’s forecasting process and sales. ¶ 118.¹²

The \$49,250,000 recovery is substantial in light of the complexity of this case and the significant risks and expenses that the Class would have faced at trial. At the time the Settlement was reached, Class Counsel, on behalf Class Representative, had, *inter alia*: (i) conducted an extensive investigation into Defendants’ allegedly fraudulent misrepresentations, including interviews with former AAP employees and a thorough review of publicly available information (¶¶ 24-25); (ii) drafted a detailed amended complaint (¶ 27); (iii) researched and drafted oppositions to motions to dismiss (¶¶ 31-32); (iv) successfully moved for class certification and defended that certification against Defendants’ Rule 23(f) Appeal (¶¶ 98, 110); (v) undertaken and completed extensive fact discovery, including participating in numerous meet and confers, obtaining and analyzing more than 1.3 million pages of documents, serving subpoenas on third parties, and deposing twenty-one fact witnesses (¶¶ 73-74); (vi) undertaken extensive expert discovery (¶¶ 118-33); (vii) researched and drafted an opposition to Defendants’ Renewed Motion for Reconsideration (¶ 96); and (viii) engaged in an extensive arm’s-length mediation process, including a full day, remote mediation session and the preparation of detailed mediation statements

¹² The specific litigation risks faced in the Action are addressed in the Nirmul Declaration (¶¶ 154-70) and in the accompanying Settlement Brief (§ II.C.2).

(¶ 145). In addition, at the time of settlement, Class Counsel was in the process of preparing oppositions to Defendant’ Summary Judgment Motion and *Daubert* motions (¶¶ 136, 144).

Nonetheless, had this litigation continued, Class Representative, through Class Counsel, would have been required to advance its case through further briefing on Defendants’ Summary Judgment Motion and *Daubert* motions, as well as rulings on these motions and Defendants’ Renewed Motion for Reconsideration which was fully briefed and pending at the time of settlement. The Parties then would have to expend substantial time and expense preparing this case for trial, and the trial itself would be expensive and the outcome uncertain.

Moreover, even if the jury returned a favorable verdict after trial, it is likely that any verdict would be the subject of post-trial motions and a complex appellate process. Indeed, in complex securities cases, even a victory at the trial stage does not guarantee a successful outcome.¹³ Considering the magnitude, expense, and complexity of this securities case—especially when compared against the significant and certain recovery achieved by the Settlement—Class Counsel’s fee request is reasonable and this factor weighs in Class Counsel’s favor.

5. The Risk of Non-Payment

Class Counsel undertook this Action on an entirely contingent fee basis, taking the risk that the litigation would yield no or very little recovery and leave it uncompensated for its time, as well as for its out-of-pocket expenses. As detailed in the Nirmul Declaration, Class Counsel faced numerous significant risks in this case that could have resulted in no recovery or a recovery smaller than the Settlement Amount. “Courts routinely recognize that the risks created by undertaking an

¹³ See *Warner Commc’ns*, 618 F. Supp. at 747-48 (“Even a victory at trial is not a guarantee of ultimate success. If [Class Representative was] successful at trial and obtained a judgment for substantially more than the amount of the proposed settlement, the defendants would appeal such judgment. An appeal could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself.”).

action on a contingency fee basis militates in favor of approval.” *In re Schering-Plough Corp. Enhance ERISA Litig.*, 2012 WL 1964451, at *7 (D.N.J. May 31, 2012).

Plaintiff’s Counsel have not been compensated for any of their time or expenses since the case began in February 2018. Since that time, Plaintiff’s Counsel have expended 36,416.50 hours in the prosecution of this litigation with a resulting lodestar of \$16,982,276.00 and incurred \$2,373,807.51 in expenses.¹⁴ Any fee award has always been at risk, and completely contingent on the result achieved and on this Court’s discretion in awarding fees and expenses. Unlike defense counsel—who typically receive payment on a timely and regular basis throughout a case, whether they win or lose—Class Counsel carried the significant risk of not only funding the expenses of this Action, but also the risk that they would receive no compensation whatsoever unless they prevailed at trial. This factor strongly favors approval of the requested fee.

6. The Significant Time Devoted to this Case by Plaintiff’s Counsel

As set forth above, since the inception of the case, Plaintiff’s Counsel have expended substantial resources towards the prosecution of this Action on behalf of the Class. As detailed at length in the Nirmul Declaration, this Action was vigorously litigated and defended. ¶¶ 18-144. This includes, *inter alia*, the considerable time spent in the initial investigation of the case; working extensively with experts; seeking out and interviewing former AAP employees with information to support the allegations; researching complex issues of law; preparing and filing an amended complaint; researching and briefing Defendants’ motions to dismiss; engaging in substantial fact discovery; preparing Class Representative’s motion for class certification, including an

¹⁴ Class Counsel will continue to perform legal work on behalf of the Class should the Court approve the Settlement. Additional resources will be expended assisting Class Members with their Claim Forms and related inquiries and working with the KCC to ensure the smooth progression of claims processing.

accompanying report from a market efficiency and damages expert; reviewing and analyzing more than 1.3 million pages of documents produced by Defendants and non-parties, deposing twenty-one fact witnesses, preparing for the mediation, drafting a detail mediation statement, and engaging in extensive settlement negotiations. At all times, Class Counsel conducted its work with skill and efficiency. The foregoing unquestionably represents a very significant commitment of time, personnel, and out-of-pocket expenses by Class Counsel (and the other Plaintiff's Counsel firms), while taking on the risk of recovering nothing for these efforts.

7. The Fee Requested is In Line With Fees Awarded in Similar Cases

As discussed above in Section II.C.1, the requested fee of 25% of the Settlement Fund is well within the range of fees awarded in similar cases, when considered as a percentage of the fund or on a lodestar basis. Accordingly, this factor strongly supports approval of the requested fee.

8. Impact of Governmental Investigations

The Third Circuit has advised district courts to examine whether class counsel benefited from governmental investigations or enforcement actions concerning the alleged wrongdoing, because this can indicate whether or not counsel should be given full credit for obtaining the value of the settlement fund for the class. *See Prudential*, 148 F.3d at 338. Here, Class Counsel obtained a substantial recovery for the Class without the aid of any related governmental investigations. Accordingly, the entire value of the Settlement achieved is attributable to the efforts undertaken by Plaintiff's Counsel in this litigation. This fact thus supports the reasonableness of the requested fee award. *See, e.g., AT&T*, 455 F.3d at 173.

9. The Requested Fee Is In-Line with Contingent Fee Arrangements Negotiated in Non-Class Litigation

A 25% fee is also consistent with typical attorneys' fees in non-class cases. *See Ocean Power*, 2016 WL 6778218, at *29. If this were an individual action, the customary contingent fee

would likely range between 30 and 40 percent of the recovery. *See, e.g., id.; Ikon*, 194 F.R.D. at 194 (“[I]n private contingency fee cases, particularly in tort matters, plaintiffs’ counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery.”); *Blum v. Stenson*, 465 U.S. 886, 903 n.* (1984) (Brennan, J., concurring) (“In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers.”). Class Counsel’s requested fee of 25% is fully consistent with these private standards.

Accordingly, the application of the Third Circuit’s factors makes clear that Class Counsel’s fee request is fair and reasonable.¹⁵

III. PLAINTIFF’S COUNSEL’S LITIGATION EXPENSES ARE REASONABLE AND SHOULD BE APPROVED

Class Counsel also respectfully requests that this Court approve payment of \$2,373,807.51 for Litigation Expenses that Plaintiff’s Counsel incurred in connection with this Action. All of these expenses, which are set forth in declarations submitted by Plaintiff’s Counsel, were reasonably necessary for the prosecution and settlement of this Action. Counsel in a class action are entitled to recover expenses that were “adequately documented and reasonable and appropriately incurred in the prosecution of the class action.” *ViroPharma*, 2016 WL 312108, at *18; *accord In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 108 (D.N.J. 2001).

The expenses for which Class Counsel seek payment are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the hour. These expenses include, among others, document management costs, expert/consultant fees, on-line research,

¹⁵ Another factor the Third Circuit asks district courts to consider is whether the settlement contains “any innovative terms.” *Diet Drugs*, 582 F.3d at 541; *Prudential*, 148 F.3d at 339-40. This Settlement does not, because Class Counsel believes that an all cash recovery is the best remedy for the injury suffered by the Class. In these circumstances, the lack of innovative terms “neither weighs in favor nor detracts from a decision to award attorneys’ fees.” *In re Processed Egg Prods. Antitrust Litig.*, 2012 WL 5467530, at *6 (E.D. Pa. Nov. 9, 2012).

court reporting and transcripts, photocopying, postage expenses, and mediation. These expense items are not duplicated in Plaintiff's Counsel's hourly rates.

The largest category of expenses was for the retention of Class Representative's experts and consultants, which total \$1,939,376.25, or approximately 82% of Plaintiff's Counsel total Litigation Expenses. ¶ 203. As detailed in the Nirmul Declaration, Class Counsel worked extensively with Class Representative's experts and consultants at different stages of the Action. These experts and consultants were critical to the prosecution and resolution of the Action as their expertise allowed Class Counsel to fully frame the issues, gather relevant evidence, make a realistic assessment of provable damages, structure resolution of the claims, and develop a fair and reasonable plan for allocating the Settlement proceeds to the Class. ¶ 204. Notably, in defending this Action, Defendants utilized the services of four different testifying experts, which necessitated substantial efforts on the part of Class Representative and its two testifying experts to counter Defendants' experts' opinions through both rebuttal and reply expert testimony. ¶¶ 118-33.

The second largest component of Plaintiff's Counsel's expenses (i.e., \$221,830.60) reflects the costs for an outside vendor to host the document database that enabled Class Counsel to effectively and efficiently search and review more than 1.3 million pages of documents produced by Defendants and third parties in the Action. ¶ 206. The ability to code, search, and pull documents to be utilized as exhibits at depositions or at trial was of the utmost importance to the development of the record of evidence in this Action.

In addition to the foregoing expenses, Plaintiff's Counsel also incurred: (i) \$37,884.54 for on-line research; (ii) \$59,712.14 for court reporters, videographers, and transcripts in connection with the many depositions Class Counsel took or defended in the Action; (iii) \$28,975.00 for the

Parties' formal mediation session and ongoing settlement negotiations conducted by Mr. Murphy; and (iv) \$18,769.05 for document-reproduction costs. ¶¶ 206-09, Ex. 3-B.

The Postcard Notice and Notice informed recipients that Class Counsel would seek reimbursement of Litigation Expenses (which might include reimbursement of the reasonable costs incurred by Class Representative as discussed below) in an amount not to exceed \$2.4 million, plus interest. The total amount of expenses requested is below the amount set forth in the notices and, to date, no objections to the maximum expense request set forth in the notices have been received. ¶ 184. As such, Class Counsel's request for Litigation Expenses should be approved.

IV. CLASS REPRESENTATIVE SHOULD BE AWARDED ITS REASONABLE COSTS UNDER THE PSLRA

Class Counsel also seeks an award of \$13,737.50 in costs incurred by Class Representative directly related to its representation of the Class. 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. § 78u-4(a)(4). Here, Class Representative seeks an award based on the time dedicated by its employees in furthering and supervising the Action.

Specifically, Class Representative took an active role in the Action and has been fully committed to pursuing the claims on behalf of the proposed class since the inception of this case. During the course of the litigation, Class Representative, *inter alia*: communicated with Class Counsel regarding case strategy and developments, reviewed and commented on pleadings and briefs filed in the Action, worked with counsel to respond to discovery requests, consulted with Class Counsel regarding settlement negotiations, and evaluated and approved the proposed Settlement. *See* Ex. 1, ¶¶ 5, 9. In addition, two representatives from MPERS prepared for and testified at depositions in connection with the Class Certification Motion, and a representative of

MPERS participated virtually in the September 2021 mediation session that preceded the Settlement. Ex. 1, ¶ 5. These efforts required representatives of MPERS to dedicate considerable time and resources to the Action that they would have otherwise devoted to their regular duties.¹⁶

Numerous courts have approved reasonable awards to compensate lead plaintiffs for the time and effort they spent on behalf of a class. *See, e.g., Wilmington Tr.*, 2018 WL 6046452, at *10 (awarding institutional lead plaintiffs \$55,456.06 in costs and expenses related to time spent on the case where, like here, “their employees took an active role in the litigation, including reviewing significant pleadings and briefs, communicating regularly with Lead Counsel, authorizing settlement discussions, monitoring the progress of settlement negotiations, and approving the settlements”); *DFC Glob.*, 2017 WL 4167440, at * 10 (awarding \$21,640 in the aggregate to institutional lead plaintiffs in PSLRA case); *Par Pharm.*, 2013 WL 3930091, at *11 (awarding \$18,000 to institutional lead plaintiff in PSLRA case); *In re Royal Dutch/Shell Transp. Sec. Litig.*, 2008 WL 9447623, at *29 (D.N.J. Dec. 9, 2008) (awarding \$150,000 to lead plaintiffs in PSLRA case). Accordingly, the award sought by Class Representative is reasonable and justified based on its prosecution of the Action and should be granted.

V. CONCLUSION

For the reasons stated herein and in the Nirmul Declaration, Class Counsel respectfully requests that the Court award attorneys’ fees in the amount of 25% of the Settlement Fund and approve payment of Plaintiff’s Counsel’s Litigation Expenses in the amount of \$2,373,807.51, plus interest, as well as the proposed award in the amount of \$13,737.50 to Class Representative.

¹⁶ *See In re Gilat Satellite Networks, Ltd.*, 2007 WL 2743675, at *19 (E.D.N.Y. Sept. 18, 2007) (granting PSLRA awards where, as here, “the tasks undertaken by employees of Lead Plaintiffs reduced the amount of time those employees would have spent on other work and these tasks and rates appear reasonable to the furtherance of the litigation”).

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Respectfully submitted,

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