UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

LOUISIANA FIREFIGHTERS' RETIREMENT SYSTEM, THE BOARD OF TRUSTEES OF THE PUBLIC SCHOOL TEACHERS' PENSION AND RETIREMENT FUND OF CHICAGO, THE BOARD OF TRUSTEES OF THE CITY OF PONTIAC POLICE & FIRE RETIREMENT SYSTEM, and THE BOARD OF TRUSTEES OF THE CITY OF PONTIAC GENERAL EMPLOYEES RETIREMENT SYSTEM, on behalf of themselves and all others similarly situated, Plaintiffs, v. NORTHERN TRUST INVESTMENTS, N.A., and THE NORTHERN TRUST COMPANY, Defendants.	Case No. 09-7203 Hon. Jorge L. Alonso Magistrate Judge Susan E. Cox

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 3

I. CO-LEAD COUNSEL'S FEE APPLICATION SHOULD BE APPROVED 3

A. Settling Plaintiffs' Counsel Are Entitled to an Award of Attorneys' Fees from the $24 Million Common Fund 3

B. The Requested Fee Award Is Fair and Reasonable As a Percentage of the Fund 4

C. The Requested Fee Award Is Reasonable Under the Lodestar Method 6

D. The Contingent Nature of the Litigation and the Risk of Nonpayment Supports the Fee Request 8

E. The Quality of Legal Services Rendered Supports the Fee Request 12

F. The Approval of Settling Plaintiffs and the Reaction of the Settlement Class To Date Support the Requested Fee 13

II. THE REQUEST FOR REIMBURSEMENT OF LITIGATION EXPENSES SHOULD BE APPROVED 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

CASES

Americana Art China Co., Inc. v. Foxfire Printing & Packaging, Inc.,
743 F.3d 243 (7th Cir. 2014) 4, 7

Arenson v. Bd. of Trade,
372 F. Supp. 1349 (N.D. Ill. 1974) 12

Aspacher v. Rosenthal Collins Grp.,
No. 00 C 7520, 2001 U.S. Dist. LEXIS 19464 (N.D. Ill. Nov. 6, 2001) 6

Beane v. Bank of N.Y. Mellon,
No. 07 Civ. 09444 (RMB), 2009 U.S. Dist. LEXIS 27504 (S.D.N.Y. Mar. 31, 2009) 14

Beesley v. Int'l Paper Co.,
No. 3:06-cv-703-DRH-CJP, 2014 WL 375432 (S.D. Ill. Jan. 31, 2014).....5

Boeing Co. v. Van Gemert,
444 U.S. 472 (1980).....3

City of Detroit v. Grinnell Corp.,
495 F.2d 448 (2d Cir. 1974).....8, 9

City of Greenville v. Syngenta Crop Protection, Inc.,
904 F. Supp. 2d 902 (S.D. Ill. 2012).....6

City of Sterling Heights Gen. Emps. Ret. Sys. v. Hospira,
No. 11-cv-08332-AJS, slip. op. (N.D. Ill. Aug. 5, 2014), ECF No. 207 5

Dalton v. Jones, Bird & Howell,
No. 91-3730, 1993 U.S. App. LEXIS 11377 (7th Cir. May 13, 1993).....14

Florin v. Nationsbank of Ga., N.A. ("Florin I"),
34 F.3d 560 (7th Cir. 1994) 3, 4, 5

Florin v. Nationsbank of Ga., N.A. ("Florin II"),
60 F.3d 1245 (7th Cir. 1995) 10

Gaskill v. Gordon,
160 F.3d 361 (7th Cir. 1998) 4

Gastineau v. Wright,
592 F.3d 747 (7th Cir. 2010) 6

Goldsmith v. Tech. Solutions Co.,
No. 92 C 4374, 1995 U.S. Dist. LEXIS 15093 (N.D. Ill. Oct. 11, 1995) 5

Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.,
212 F.R.D. 400 (E.D. Wis. 2002) 11

Halverson v. Convenient Food Mart, Inc.,
458 F.2d 927 (7th Cir. 1972) 3

Harman v. Lyphomed, Inc.,
945 F.2d 969 (7th Cir. 1991) 7

Heder v. City of Two Rivers,
255 F. Supp. 2d 947 (E.D. Wis. 2003).....7

Heekin v. Anthem, Inc.,
No. 1:05-cv-01908-TWP-TAB, 2012 WL 5878032 (S.D. Ind. Nov. 20, 2012).....6

In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.,
No. 03 MDL 1529 LMM, 2006 WL 3378705 (S.D.N.Y. Nov. 16, 2006), *aff'd*,
272 F. App'x 9 (2d Cir. 2008) 12

In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.,
792 F. Supp. 2d 1028 (N.D. Ill. 2011) 11

In re Continental Ill. Sec. Litig.,
962 F.2d 566 (7th Cir. 1992) 5, 6, 9

In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.,
No. 09-cv-3690, 2015 WL 753946 (N.D. Ill. February 20, 2015).....5

In re FLAG Telecom Holdings, Ltd. Sec. Litig.,
No. 02-CV-3400 (CM)(PED), 2010 WL 4537550 (S.D.N.Y. Nov. 8, 2010).....3, 8

In re Initial Pub. Offering Sec. Litig.,
671 F. Supp. 2d 467 (S.D.N.Y. 2009).....8

In re Marsh & McLennan, Inc. Sec. Litig.,
No. 04 Civ. 8144 (CM), 2009 WL 5178546 (S.D.N.Y. Dec. 23, 2009).....13

In re Marsh ERISA Litig.,
265 F.R.D. 128 (S.D.N.Y. 2010) 8

In re Plasma-Derivative Protein Therapies Antitrust Litig.,
No. 09 C 7666, slip op. (N.D. Ill. Jan. 22, 2014), ECF No. 693.....5

In re Synthroid Mktg. Litig.,
264 F.3d 712 (7th Cir. 2001) 6, 8, 12, 14

In re Trans Union Corp. Privacy Litig.,
No. 00 C 4729, MDL No. 1350, 2009 U.S. Dist. LEXIS 116934 (N.D. Ill. Dec. 9, 2009).....4, 5, 6

In re Veeco Instruments Inc. Sec. Litig.,
No. 05 MDL 01695 (CM), 2007 WL 4115808 (S.D.N.Y. Nov. 7, 2007) 8

Kaplan v. Houlihan Smith & Co.,
No. 12 C 5134, 2014 U.S. Dist. LEXIS 83936 (N.D. Ill. June 20, 2014) 14

McKittrick v. Gardner,
378 F.2d 872 (4th Cir. 1967) 8

Mills v. Elec. Auto-Lite Co.,
396 U.S. 375 (1970).....14

Missouri v. Jenkins,
491 U.S. 274 (1989).....7

People Who Care v. Rockford Bd. of Educ.,
90 F.3d 1307 (7th Cir. 1996) 6

Retsky Family Ltd. P'ship v. Price Waterhouse LLP,
No. 97 C 7694, 2001 U.S. Dist. LEXIS 20397 (N.D. Ill. Dec. 10, 2001) 5

Schlacher v. Law Offices of Phillip J. Rotche & Assocs.,
574 F.3d 852 (7th Cir. 2009) 6, 7

Silverman v. Motorola Solutions, Inc.,
739 F.3d 956 (7th Cir. 2013) 5

Smith v. Vill. of Maywood,
17 F.3d 219 (7th Cir. 1994) 7

Standard Iron Works v. ArcelorMittal,
No. 08 C 5214, 2014 WL 7781572 (N.D. Ill. Oct. 22, 2014).....6

Swift v. Direct Buy, Inc.,
No. 2:11-CV-401-TLS, 2013 U.S. Dist. LEXIS 152618 (N.D. Ind. Oct. 24, 2013) 5

Taubenfeld v. AON Corp.,
415 F.3d. 597 (7th Cir. 2005) 12

OTHER AUTHORITIES

Fed. R. Civ. P. Rule 23(a)(2) 9

Fed. R. Civ. P. Rule 23(b)(3) 10

Fed. R. Civ. P. Rule 23(h).....1

Pursuant to Rule 23(h) of the Federal Rules of Civil Procedure, co-lead counsel, Bernstein Litowitz Berger & Grossmann LLP, Keller Rohrback, L.L.P, and Schneider Wallace Cottrell Konecky Wotkyns LLP (collectively, "Co-Lead Counsel"), respectfully submit this memorandum in support of their motion, on behalf of all Settling Plaintiffs' Counsel, for an award of attorneys' fees and reimbursement of Litigation Expenses from the Settlement Fund obtained for the Settlement Class in the above-captioned action (the "Action").[1]

PRELIMINARY STATEMENT

The proposed Settlement, which provides for payment of $24 million for the resolution of the Indirect Lending claims asserted in the Action, is a very favorable result for the Settlement Class. The substantial monetary recovery obtained was achieved through the skill, tenacity and effective advocacy of Settling Plaintiffs' Counsel, which have litigated the Action on a purely contingent fee basis since 2009 against highly skilled defense counsel and faced numerous hurdles and risks, including the risk of no recovery or a substantially lesser recovery for the Settlement Class than will be achieved by the Settlement if approved by the Court.

As detailed below and in the accompanying Joint Declaration,[2] Settling Plaintiffs' Counsel vigorously pursued this litigation from its outset by, among other things, (i) conducting

[1] Unless otherwise defined herein, any capitalized terms shall have the meanings ascribed to them in the Stipulation and Agreement of Partial Settlement of Class Action dated February 17, 2015 (the "Stipulation") (Doc. 425-1) or in the Joint Declaration of Avi Josefson, Derek W. Loeser and Mark T. Johnson in Support of (I) Settling Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation, and (II) Co-Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Joint Declaration" or "Joint Decl."), filed herewith.

[2] The Joint 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 history of the Action and the prosecution of the Indirect Lending claims at issue in the Action; the negotiations leading to the proposed Settlement; the risks and uncertainties of continued litigation of the Indirect Lending claims; and a description of the services Settling Plaintiffs' Counsel have provided for the benefit of the Settlement Class.

a thorough investigation of the claims in the Action; (ii) researching, drafting and filing the initial complaints and two amended complaints; (iii) conducting extensive research and briefing the papers filed in opposition to Defendants' motion to dismiss and in response to third-party complaints and affirmative defenses asserted by Defendants; (iv) engaging in extensive discovery, as detailed below and in the Joint Declaration; and (v) conducting extensive settlement negotiations, which included a formal mediation followed by additional lengthy and arduous negotiations concerning the final terms of the Settlement.

As compensation for Settling Plaintiffs' Counsel's considerable efforts on behalf of the Settlement Class, Co-Lead Counsel seek an award equal to 22% of the Settlement Fund and reimbursement of Litigation Expenses to Settling Plaintiffs' Counsel in the amount of $440,263.42. As discussed below, other courts in the Northern District of Illinois and in the Seventh Circuit have regularly awarded significantly greater percentage fees in class actions with comparable recoveries.[3] In addition, the total value of the time that Settling Plaintiffs' Counsel dedicated to the Action through May 15, 2015, based on total hours worked and their regular hourly rates, is significantly greater than the amount of the requested fee. Indeed, the requested percentage fee, which amounts to $5,280,000, plus interest, is only approximately 35% of counsel's lodestar. Given that lodestar multipliers ranging from 1 to 4 are commonly awarded in complex class actions with substantial contingency risks, the "negative" multiplier of approximately 0.35 requested here strongly confirms the reasonableness of the requested fee. In addition, the expenses for which Co-Lead Counsel seek reimbursement were reasonable and necessary for the successful prosecution of the case.

[3] Despite the fact that the law supports an award of greater than 22% of the Settlement Fund, Settling Plaintiffs' Counsel agreed with Settling Plaintiffs to limit their request to 22%. *See* Joint Decl. ¶ 54.

Settling Plaintiffs, which are sophisticated institutional investors that actively supervised the Action, have reviewed the request for fees and expenses and endorsed it as fair and reasonable. *See* Exhibits 2-4 to the Joint Declaration. Also, to date, no Settlement Class Member has objected to the fee and expense request.[4] *See* Joint Decl. ¶ 67, 74.

ARGUMENT

I. CO-LEAD COUNSEL'S FEE APPLICATION SHOULD BE APPROVED

A. Settling Plaintiffs' Counsel Are Entitled to an Award of Attorneys' Fees from the $24 Million Common Fund

It is well-settled that attorneys who by their efforts create a common fund for the benefit of a class are entitled to reasonable compensation for their services. *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"); *Florin v. Nationsbank of Ga., N.A. ("Florin I")*, 34 F.3d 560, 563 (7th Cir. 1994) ("When a case results in the creation of a common fund for the benefit of the plaintiff class, the common fund doctrine allows plaintiffs' attorneys to petition the court to recover its fees out of the fund."). Courts recognize that awards of fair attorneys' fees from a common fund "serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons," and therefore "to discourage future [alleged] misconduct of a similar nature." *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *23 (S.D.N.Y. Nov. 8, 2010) (internal quotation marks omitted); *see also Halverson v. Convenient Food Mart, Inc.*, 458 F.2d 927, 931 n.5 (7th Cir. 1972) ("Substantial counsel fees may even be an acceptable incentive to encourage forceful prosecution of cases….").

[4] The deadline for the submission of objections is July 15, 2015. Should any objections be received, Co-Lead Counsel will address them in reply papers, which will be filed with the Court on or before July 29, 2015.

Here, having obtained a significant recovery for the Settlement Class, Settling Plaintiffs' Counsel are entitled to a reasonable share of that recovery as a fee. As discussed below, Co-Lead Counsel's requested fee award is entirely consistent with – and indeed significantly below – awards made by courts in similar cases, and represents a "negative" multiplier on counsel's time. As also discussed below, the requested fee is fair and reasonable compensation for Settling Plaintiffs' Counsel considering the risk of nonpayment that counsel faced in prosecuting the Indirect Lending claims, the quality of the legal services provided to the Settlement Class, and the reaction of the Settlement Class to the fee request to date. In addition, the requested fee has the full support of the Settling Plaintiffs.

B. The Requested Fee Award Is Fair and Reasonable As a Percentage of the Fund

Although courts within this Circuit in "common fund cases have discretion to choose either the lodestar or percentage method of calculating fees,"[5] the Seventh Circuit has strongly endorsed the percentage method, pursuant to which fees are awarded as a percentage of the common fund, because it most closely approximates the manner in which attorneys are compensated in the marketplace for contingent work. *See Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998) ("When a class suit produces a fund for the class, it is commonplace to award the lawyers for the class a percentage of the fund … in recognition of the fact that most suits for

[5] *In re Trans Union Corp. Privacy Litig.*, 2009 U.S. Dist. LEXIS 116934, at *13 (N.D. Ill. Dec. 9, 2009); *see also Americana Art China Co., Inc. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 247 (7th Cir. 2014) ("in our circuit, it is legally correct for a district court to choose either" the percentage method or the lodestar method in determining fee awards); *see also Florin I*, 34 F.3d at 566 ("both the lodestar approach and the percentage approach may be appropriate in determining attorney's fee awards, depending on the circumstances").

damages in this country are handled on the plaintiff's side on a contingent-fee basis").[6] The Seventh Circuit also has recognized "that there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration." *Florin I*, 34 F.3d at 566; *In re Trans Union*, 2009 U.S. Dist. LEXIS 116934, at *13 (same).[7]

In complex class action cases like this one, percentages in the range of 33 1/3% to 40% of the recovery have been held appropriate by courts within the Seventh Circuit. *See Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, 2001 U.S. Dist. LEXIS 20397, at *10 (N.D. Ill. Dec. 10, 2001) ("A customary contingency fee would range from 33 1/3% to 40% of the amount recovered."); *Goldsmith v. Tech. Solutions Co.*, 1995 U.S. Dist. LEXIS 15093, at *27 (N.D. Ill. Oct. 11, 1995) ("Thus, where the percentage method is utilized, courts in this District commonly award attorneys' fees equal to approximately one-third or more of the recovery."); *Swift v. Direct Buy, Inc.*, 2013 U.S. Dist. LEXIS 152618, at *30 (N.D. Ind. Oct. 24, 2013); ("[P]ayment of 33% of the common fund is widely accepted by the Seventh Circuit as a reasonable fee in a class action.").[8] Likewise, in *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 959 (7th Cir. 2013), the Seventh Circuit held that an attorney fee award of 27.5% of a $200 million settlement

[6] *See also In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 2015 WL 753946, at *8 (N.D. Ill. February 20, 2015) (finding that the percentage method has "emerged as the favored method for calculating fees in common-fund cases in this district.")

[7] *See also In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992) (noting it is easier to award a percentage "than it would be to hassle over every item or category of hours and expenses and what multiple to fix and so forth").

[8] *See, e.g., In re Plasma-Derivative Protein Therapies Antitrust Litig.*, No. 09 C 7666, slip op. at 2 (N.D. Ill. Jan. 22, 2014), ECF No. 693 (awarding 33 1/3% of $64 million settlement fund); *In re Dairy Farmers of America*, 2015 WL 753946 at *16 (awarding one-third of $46 million common fund); *City of Sterling Heights Gen. Emps. Ret. Sys. v. Hospira*, No. 11-cv-08332-AJS, slip. op. at 1 (N.D. Ill. Aug. 5, 2014), ECF No. 207 (awarding 30% of $60 million settlement fund); *Retsky*, 2001 U.S. Dist. LEXIS 20397, at *10 (awarding one-third of $14 million); *Beesley v. Int'l Paper Co.*, 2014 WL 375432, at *1, *4 (S.D. Ill. Jan. 31, 2014) (awarding one-third of $30 million class recovery).

was not excessive.[9] Accordingly, the fee award requested here, amounting to 22% of the $24 million recovery, is plainly consistent with – if not significantly below – fee awards made by courts in the Seventh Circuit in similar cases.

C. The Requested Fee Award Is Reasonable Under the Lodestar Method

Using the lodestar/multiplier method as a cross-check confirms the appropriateness of the requested fees. *See, e.g., In re Trans Union*, 2009 U.S. Dist. LEXIS 116934, at *6. The lodestar/multiplier method entails multiplying the number of hours each attorney or other professional expended on the case by his or her hourly rate to derive the lodestar figure.[10] *Gastineau v. Wright*, 592 F.3d 747, 748 (7th Cir. 2010) (citing *Schlacher v. Law Offices of Phillip J. Rotche & Assocs.*, 574 F.3d 852, 857 (7th Cir. 2009)). Courts then typically adjust the lodestar, by applying a multiplier, to take into account the various factors in the litigation that affect the reasonableness of the requested fees, including "the complexity of the legal issues involved, the degree of success obtained, and the public interest advance by the litigation. *Id.* at

[9] *See also Standard Iron Works v. ArcelorMittal*, 2014 WL 7781572, at *1, *3 (N.D. Ill. Oct. 22, 2014) (awarding 33% of $163.9 million total common fund, finding the amount "a fair and reasonable attorneys' fee"); *City of Greenville v. Syngenta Crop Protection, Inc.*, 904 F. Supp. 2d 902, 908-909 (S.D. Ill. 2012) (awarding one-third of $105 million common fund); *Heekin v. Anthem, Inc.*, 2012 WL 5878032, at *1 (S.D. Ind. Nov. 20, 2012) (awarding 33.3% of $90 million common fund).

[10] Courts have held the hourly rates to be applied in calculating the lodestar are those normally charged for similar work by attorneys of comparable skill and experience in the community where the attorney practices. *See In re Synthroid Mktg. Litig.*, ("Synthroid I"), 264 F.3d 712, 718 (7th Cir. 2001) ("when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time").[10] "The attorney's actual billing rate for comparable work is 'presumptively appropriate' to use as the market rate." *Aspacher v. Rosenthal Collins Grp.*, 2001 U.S. Dist. LEXIS 19464, at *5 (N.D. Ill. Nov. 6, 2001) (quoting *People Who Care v. Rockford Bd. of Educ.*, 90 F.3d 1307, 1310 (7th Cir. 1996)). *See also In re Continental*, 962 F.2d at 569 ("lawyers…are entitled to be compensated at market rates"). As shown in Settling Plaintiffs' Counsel's individual firm declarations, the hourly fee rates claimed by counsel are the same as the regular current rates charged for their services in non-contingent matters and which have been approved in other complex class action litigation. *See* Exhibits 5A-5H to the Joint Decl.

748 (citing *Schlacher*, 574 F.3d at 856-57). Courts must also consider the risk taken by class counsel that they will recover nothing for their time and expenses. *See Americana Art China Co.*, 743 F.3d at 248. In complex contingent litigation such as the instant action, courts in the Seventh Circuit regularly apply risk multipliers between 1.0 and 4.0. *See Harman v. Lyphomed, Inc.*, 945 F.2d 969 (7th Cir. 1991) (noting that multipliers between 1.0 and 4.0 have been approved).

Here, the lodestar cross-check strongly supports the requested percentage fee because the total value of time Settling Plaintiffs' Counsel have devoted to the Action is significantly greater than the amount of the fee sought. The declarations submitted by Settling Plaintiffs' Counsel show that they have collectively spent over 32,700 hours of attorney and other professional support time prosecuting the Action through May 15, 2015.[11] *See* Joint Decl. ¶ 58. Settling Plaintiffs' Counsel's total lodestar, derived by multiplying the hours spent by each attorney and paraprofessional by their current hourly rates,[12] is $14,882,632.90. *Id.* The requested 22% fee, which amounts to $5,280,000 (before interest), represents only approximately 35% of Settling Plaintiffs' Counsel's total lodestar amount or, in other words, a "negative" multiplier of approximately 0.35 on the lodestar.

[11] As set forth in the declarations submitted by Settling Plaintiffs' Counsel, the total hours submitted by each law firm includes the time spent by each attorney and professional support staff employee of the firm who, from inception of the Action through and including May 15, 2015, billed ten or more hours to the case. *See* Joint Decl. ¶ 57.

[12] The Supreme Court and courts in this Circuit have approved the use of current hourly rates to calculate the base lodestar figure as a means of compensating for the delay in receiving payment, inflationary losses, and the loss of interest. *See Missouri v. Jenkins*, 491 U.S. 274, 284 (1989); *Smith v. Vill. of Maywood*, 17 F.3d 219, 221 (7th Cir. 1994) ("A court may elect to use … current rates … as acceptable compensation for the delay in payment of fees."); *Heder v. City of Two Rivers*, 255 F. Supp. 2d 947, 958 (E.D. Wis. 2003) ("awarding fees at the current rate …. is an accepted method").

Courts have recognized that where a request for attorneys' fees is below the amount of class counsel's lodestar, that fact provides strong support for the reasonableness of the requested fee. *See FLAG Telecom*, 2010 WL 4537550, at *26 ("Lead Counsel's request for a percentage fee representing a significant discount from their lodestar provides additional support for the reasonableness of the fee request."); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 146 (S.D.N.Y. 2010) (that counsel only sought 87.6% of their lodestar "strongly suggests that the requested fee is reasonable").[13]

In sum, Co-Lead Counsel's requested fee award is well within the range of what courts in this Circuit commonly award in class actions such as this one, whether calculated as a percentage of the fund or in relation to Settling Plaintiffs' Counsel's lodestar.

D. The Contingent Nature of the Litigation and the Risk of Nonpayment Supports the Fee Request

As noted by the Seventh Circuit in *Synthroid I*, "[t]he market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear." 264 F.3d at 721. The Seventh Circuit has also recognized "[t]he effective lawyer will not win all of his cases, and any determination of the reasonableness of his fees in those cases in which his client prevails must take account of the lawyer's risk of receiving nothing for his services." *McKittrick v. Gardner*, 378 F.2d 872, 875 (4th Cir. 1967). In *City of Detroit v. Grinnell Corp.*, the Second Circuit explained:

> No 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. Nor, particularly in

[13] *See also In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 515 (S.D.N.Y. 2009) (noting that there was "no real danger of overcompensation" given that the requested fee represented a 4% discount to counsel's lodestar); *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *10 (S.D.N.Y. Nov. 7, 2007) ("Not only is Plaintiffs' Counsel not receiving a premium on their lodestar to compensate them for the contingent risk factor, their fee request amounts to a deep discount from their lodestar. Thus, the lodestar 'cross-check' unquestionably supports" the fee award).

> complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

495 F.2d 448, 470 (2d Cir. 1974). *See also In re Continental*, 962 F.2d at 569 (holding it was reversible error not to compensate for risk of nonpayment).

While Settling Plaintiffs' Counsel believed that the Indirect Lending claims had merit, they also recognized that there were a number of substantial risks in the litigation from the outset and Settling Plaintiffs' ability to succeed at trial and obtain a substantial judgment with respect to the Indirect Lending claims was far from certain. As discussed in greater detail in the Joint Declaration, there were substantial risks here with respect to liability and damages related to the Indirect Lending claims. For example, with respect to the central question of Northern Trust's liability, *i.e.*, whether Northern Trust failed to prudently invest and manage the Collateral Pools, Northern Trust argued that it maintained written investment guidelines and that it had never violated those guidelines, and Defendants also claimed that an unforeseeable financial crisis was the cause of any losses suffered by Settlement Class Members. *Id.* ¶ 37. Defendants also asserted numerous affirmative defenses which blamed Settling Plaintiffs for their securities lending losses (*e.g.*, Defendants argued that Settling Plaintiffs understood how the cash collateral was being invested yet decided to maintain their investments). *Id.* ¶ 36. Also, Defendants would continue to raise several arguments that might potentially defeat Settling Plaintiffs' motion to certify a litigation class under Rule 23. Joint Decl. ¶ 38.[14] Finally, with respect to damages,

[14] Among other things, Defendants argued that (i) Settling Plaintiffs were participants in only a subset of the Lending Funds at issue, and, therefore, they could represent only their retirement plans and only investors in those same, few Lending Funds; (ii) with respect to the "commonality" prong of Rule 23(a)(2), common proof of the liability claims at issue was not present here for the litigation class because there was no one right way to invest securities lending cash collateral, and there is no such thing as an investment that is *per se* imprudent; and (c) because the actual impact of securities lending cash collateral investment on the Lending Funds (and therefore on the plans) varied by Lending Fund, by plan, and by participant, determining the existence of injury and calculating damages for the litigation class required

Defendants claimed that because most of the Lending Funds were index funds, there could be no damages if the funds met their objectives of adequately tracking their indices, notwithstanding specific losses from securities lending by the funds. *Id.* ¶ 39. Additionally, Northern Trust argued that certain of its actions, including purported contributions of $150 million in cash to certain securities lending clients, reduced or eliminated damages. *Id.*

In light of these uncertainties regarding the outcome of the case, it is clear that Settling Plaintiffs' Counsel were never "assured of a paycheck." *See Florin v. Nationsbank of Ga., N.A. ("Florin II")*, 60 F.3d 1245, 1247 (7th Cir. 1995). Nonetheless, they risked significant amounts of time and money to achieve a recovery for the Settlement Class. As noted above, Settling Plaintiffs' Counsel have collectively expended more than 32,700 hours prosecuting this Action through May 15, 2015. Settling Plaintiffs' Counsel's efforts have included a thorough investigation of the factual and legal issues raised in the Action, which included an in-depth analysis of Northern Trust's securities lending program, documents filed in related actions, and public statements by Northern Trust employees regarding the subprime mortgage crisis. Joint Decl. ¶ 19. Settling Plaintiffs' Counsel also spent substantial time and effort preparing the initial complaints and two amended complaints, and researching and preparing briefing in opposition to the motion to dismiss filed by Defendants and in opposition to the third-party complaints and affirmative defenses asserted by Defendants. *Id.* ¶¶ 16-24. Additionally, Settling Plaintiffs' Counsel engaged in wide-ranging discovery, which has included (i) numerous discovery conferences, hearings and motions (including multiple motions to compel); (ii) the exchange of voluminous document product requests; (iii) the review and analysis of over 346,000 pages of documents produced by Defendants; (iv) the coordination of plaintiffs' production of over

---

an individualized injury, and therefore, the "predominance" requirement of Rule 23(b)(3) could not be met for the litigation class. Joint Decl. ¶ 38.

168,000 pages of documents to Defendants; and (v) the issuance of four third-party subpoenas. *Id*. ¶¶ 25-28. Finally, a substantial amount of time was required to negotiate the Settlement. Co-Lead Counsel engaged in a formal mediation session presided over by Judge Morton Denlow (Ret.), a former United States Magistrate Judge for the United States District Court, Northern District of Illinois, and then conducted additional extensive settlement negotiations over the course of several months leading to parties' agreement-in-principle to settle the Indirect Lending claims. *Id*. ¶¶ 29-30. After the agreement-in-principle was reached, the parties engaged in extensive and arduous negotiations of the specific terms of the Settlement, including the notice program to Settlement Class Members, which culminated in the execution of the Stipulation. *Id*. ¶ 32.

Unlike Defendants' counsel, who are paid currently and whether they win or lose, Settling Plaintiffs' Counsel have thus far received no compensation for their considerable efforts on behalf of the Settlement Class, and any award of fees or expenses to counsel has always been entirely dependent on their success in obtaining a common fund for the Settlement Class. Yet, like Defendants' Counsel, Settling Plaintiffs' Counsel have had to meet a payroll and pay their rent and other bills on a current basis.

In sum, the only certainties regarding the prosecution of the Indirect Lending claims were that each element of those claims would have continued to been vigorously disputed by Defendants at trial and on appeal, and there was a significant risk of non-recovery. Clearly, the litigation risk here is a circumstance that supports the reasonableness of the requested fees. *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1032 (N.D. Ill. 2011) ("AT&T Mobility II"); *Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 411 (E.D. Wis. 2002).

E. The Quality of Legal Services Rendered Supports the Fee Request

In evaluating a fee request, the Seventh Circuit has held that the trial court may consider the "quality of legal services rendered" by plaintiffs' counsel. *Taubenfeld v. AON Corp.*, 415 F.3d. 597, 600 (7th Cir. 2005); *Synthroid I*, 264 F.3d at 721. Co-Lead Counsel practice extensively in the highly challenging field of complex class action litigation and have skillfully litigated these types of actions in courts across the country. *See* Joint Decl. ¶ 59, and Ex. 3 to Exs. 5A-5C. Here, the Settlement provides an excellent result for the Settlement Class particularly in light of the risks of continued litigation of the Indirect Lending claims. Co-Lead Counsel respectfully submit that the quality of counsel's efforts in the litigation to date, together with their substantial experience in complex class actions and their commitment to the litigation, provided them with the leverage necessary to negotiate the Settlement.

The quality of opposing counsel is also an important factor in evaluating the work performed by Settling Plaintiffs' Counsel. *Arenson v. Bd. of Trade*, 372 F. Supp. 1349, 1354 (N.D. Ill. 1974); *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006) ("The fact that the settlements were obtained from defendants represented by 'formidable opposing counsel from some of the best defense firms in the country' also evidences the high quality of lead counsels' work"), *aff'd*, 272 F. App'x 9 (2d Cir. 2008). Settling Plaintiffs' Counsel were opposed in this case by the nationally known and highly capable law firms of Winston & Strawn LLP and Mayer Brown LLP, who have spared no effort in their zealous defense of the Action. Notwithstanding this formidable opposition, Settling Plaintiffs' Counsel presented a strong case and demonstrated their willingness to continue to vigorously prosecute the Indirect Lending claims asserted in the Action. The ability of Settling Plaintiffs' Counsel to obtain a favorable result for the Settlement Class while litigating against

these powerful defense firms further evidences the quality of counsel's work and weighs in favor of the Court granting the attorneys' fees sought here.

F. The Approval of Settling Plaintiffs and the Reaction of the Settlement Class To Date Support the Requested Fee

Settling Plaintiffs, which were actively involved in the prosecution and settlement of the Indirect Lending claims and have actively supervised the work of counsel, have approved the requested fee.[15] This endorsement of the fee by Settling Plaintiffs as fair and reasonable supports approval of the fee. *See In re Marsh & McLennan, Inc. Sec. Litig.*, 2009 WL 5178546, at *16 (S.D.N.Y. Dec. 23, 2009) ("public policy considerations support fee awards where, as here, large public pension funds, serving as lead plaintiffs, conscientiously supervised the work of lead counsel, and gave their endorsement to lead counsel's fee request").

The reaction of the Settlement Class to date also supports the requested fee. Pursuant to the Preliminary Approval Order, the Settlement Notice has been mailed to Settlement Class Member identified by Defendants and a Summary Notice was published in *The Wall Street Journal* and transmitted over the *PR Newswire*.[16] Among other things, the Settlement Notice informs Settlement Class Members that Co-Lead Counsel intended to apply to the Court for an award of attorneys' fees in an amount not to exceed 33.3% of the Settlement Fund, which is significantly more than the total fee award sought by Co-Lead Counsel by this application. Joint Decl. ¶ 67. While the time to object to the fee and expense application does not expire until July 15, 2015, to date, not a single objection has been received. *Id.* Should any objections be received, Co-Lead Counsel will address them in reply papers.

---

[15] *See* Declarations of Settling Plaintiffs, attached as Exhibits 2-4 to the Joint Declaration, at ¶ 5.

[16] *See* Declaration of Gerard Hanshe, submitted on behalf of the Court-approved Settlement Administrator, GCG, attached as Exhibit 1 to the Joint Decl., ¶¶ 4, 6.

II. THE REQUEST FOR REIMBURSEMENT OF LITIGATION EXPENSES SHOULD BE APPROVED

In addition to attorneys' fees, Co-Lead Counsel also seek reimbursement of the Litigation Expenses incurred by Settlement Plaintiffs' Counsel through May 15, 2015. It is well-settled that attorneys who have created a common fund for the benefit of a class are entitled to reimbursement for their expenses incurred in creating the fund. *See, e.g., Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 389-90 (1970); *Dalton v. Jones, Bird & Howell*, 1993 U.S. App. LEXIS 11377, at *4 (7th Cir. May 13, 1993) ("Attorneys in a class action in which a common fund is created are entitled to compensation for their services and reimbursement of their out-of-pocket expenses."). As set forth in the Joint Declaration, Settling Plaintiffs' Counsel collectively incurred a total of $440,263.42 in Litigation Expenses through May 15, 2015. Joint Decl. ¶ 71.

The expenses for which Co-Lead Counsel seek reimbursement are all reasonable, necessary, and directly related to the prosecution of the Action. These expenses include, among others, charges for on-line legal research, court fees, expert fees, mediation fees, electronic document management costs, costs of out-of-town travel, copying costs, long distance telephone and facsimile charges, and postage and delivery expenses. Joint Decl. ¶ 72. All of these expenses were reasonably and necessarily incurred, and are of the sort that would typically be billed to paying clients in the marketplace.[17] These expense items were billed separately by

[17] *See Synthroid I*, 264 F.3d at 722 (explaining the appropriateness of considering what the private market would bear in determining the reasonableness of litigation expenses); *Kaplan v. Houlihan Smith & Co.*, 2014 U.S. Dist. LEXIS 83936, at *12-13 (N.D. Ill. June 20, 2014) (awarding expenses in class action including copying costs, *pro hac vice* admission fees, overnight shipping fees, travel and meal expenses, and mediation fees); *see also Beane v. Bank of N.Y. Mellon*, 2009 U.S. Dist. LEXIS 27504, at *25-26 (S.D.N.Y. Mar. 31, 2009) (awarding as "properly chargeable to the Settlement Fund," because they "are the type for which 'the paying, arms' length market' reimburses attorneys," reimbursement for court fees, photocopying and reproduction, deposition transcripts, postage and messenger services, transportation and lodging, telephone bills, and expert and electronic litigation database support).

Settling Plaintiffs' Counsel, and such charges were not duplicated in the firms' hourly billing rates. Reimbursement of these expenses is fair and reasonable.

Co-Lead Counsel also seek approval of costs and expenses incurred by Chicago Teachers in connection with its representation of the Settlement Class in the Action. Here, Chicago Teachers incurred expenses of $4,924.50 to pay its outside counsel, the law firm of Jacobs, Burns, Orlove & Hernandez ("Jacobs Burns"), to assist Chicago Teachers in overseeing the Action. *See* Exhibit 2 to Joint Decl., ¶ 6. As these expenses are directly related to Chicago Teacher's representation of the Settlement Class in this Action, Co-Lead Counsel respectfully request that the Court approve payment of those expenses from the Settlement Fund.

Finally, the Settlement Notice informed Settlement Class Members that Co-Lead Counsel would apply for reimbursement of Litigation Expenses in an amount not to exceed $600,000.00, which may include the reasonable costs and expenses of Settling Plaintiffs directly related to their representation of the Settlement Class. The amount of expenses requested by Co-Lead Counsel, which includes $440,263.42 in reimbursement of Litigation Expenses incurred by Settling Plaintiffs' Counsel and $4,924.50 in costs incurred by Chicago Teachers, for a total of $445,187.92, is well below the amount listed in the Settlement Notice. To date, there has been no objection to the request for expenses.

CONCLUSION

Co-Lead Counsel respectfully request that the Court approve their motion for an award of attorneys' fees equal to 22% of the Settlement Fund and reimbursement of Litigation Expenses from the Settlement Fund totaling $445,187.92.

Dated: July 1, 2015

Respectfully submitted,

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

By */s/ Avi Josefson*
Avi Josefson
875 North Michigan Avenue, Suite 3100
Chicago, IL 60611
Tel: (312) 373-3880
Fax: (312) 794-7801
Illinois Bar No. 6272453
avi@blbglaw.com

- and –

Katherine M. Sinderson
Rebecca E. Boon
1285 Avenue of the Americas, 38th Floor
New York, New York 10019
Tel: (212) 554-1400
Fax: (212) 554-1444
katherinem@blbglaw.com
rebecca.boon@blbglaw.com

KELLER ROHRBACK L.L.P.
Lynn L. Sarko
Derek W. Loeser
Raymond J. Farrow
Laura R. Gerber
1201 Third Avenue, Suite 3200
Seattle, Washington 98101
Tel: (206) 623-1900
Fax: (206) 623-3384
lsarko@kellerrohrback.com
dloeser@kellerrohrback.com
rfarrow@kellerrohrback.com
lgerber@kellerrohrback.com

SCHNEIDER WALLACE COTTRELL KONECKY WOTKYNS LLP
Todd M. Schneider
Mark T. Johnson
180 Montgomery Street, Suite 2000
San Francisco, California 94104
Tel: (415) 421-7100
Fax: (415) 421-7105
tschneider@schneiderwallace.com
mjohnson@schneiderwallace.com

Co-Lead Counsel for Settling Plaintiffs

#906284