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

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

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Pursuant to Rule 23(h) of the Federal Rules of Civil Procedure, co-lead counsel, Bernstein Litowitz Berger & Grossmann LLP and Sullivan, Ward, Asher & Patton, P.C. (collectively, "Co-Lead Counsel"), respectfully submit this memorandum in support of their motion for an award of attorneys' fees and reimbursement of Litigation Expenses from the Settlement Fund obtained for the Class in the above-captioned action (the "Action").[1]

PRELIMINARY STATEMENT

The proposed Settlement, which provides for payment of $4,250,000 for the resolution of the Direct Lending claims asserted in the Action, is a very favorable result for the Class. The substantial monetary recovery obtained was achieved through the skill, tenacity and effective advocacy of Co-Lead Counsel, which have litigated the Direct Lending claims on a purely contingent fee basis against highly skilled defense counsel and faced numerous hurdles and risks, including the risk of no recovery or a substantially lesser recovery for the Class than will be achieved by the Settlement if approved by the Court.

As detailed below and in the accompanying Joint Declaration, Co-Lead Counsel vigorously pursued this litigation from its outset by, among other things, (i) conducting a thorough investigation of the Direct Lending claims; (ii) researching, drafting and filing the initial complaints and two amended complaints; (iii) conducting extensive research and briefing

[1] Unless otherwise defined herein, any capitalized terms shall have the meanings ascribed to them in the Stipulation and Agreement of Settlement of Class Action dated July 25, 2016 (the "Stipulation") (Doc. 573-1) or in the Joint Declaration of Avi Josefson and Matthew I. Henzi 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. 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 Direct Lending claims at issue in the Action; the negotiations leading to the proposed Settlement; the risks and uncertainties of continued litigation of the Direct Lending claims; and a description of the services Co-Lead Counsel have provided for the benefit of the Class.

the papers filed in opposition to Defendants' motion to dismiss and in response to third-party complaints and affirmative defenses asserted by Defendants; (iv) successfully moving for certification of the class; (v) engaging in extensive discovery, as detailed below and in the Joint Declaration; and (vi) engaging in extensive settlement negotiations, including an all-day mediation presided over by Judge Wayne R. Andersen (Ret.). *See* Joint Decl. ¶¶ 6, 9-38.

As compensation for their considerable efforts on behalf of the Class, Co-Lead Counsel seek an award equal to 18% of the Settlement Fund and reimbursement of Litigation Expenses in the amount of $330,611.92. As discussed below, other courts in the Northern District of Illinois and in the Seventh Circuit have regularly awarded significantly greater percentage fees in similar cases. In addition, the total value of the time that Co-Lead Counsel dedicated to the Direct Lending claims in the Action, 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 $765,000, plus interest, is only approximately 46% of counsel's total lodestar. Given that lodestar multipliers ranging from 2 to 4 are commonly awarded in complex class actions with substantial contingency risks, the "negative" multiplier of approximately 0.46 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.

Settling Plaintiffs, which are sophisticated institutional investors that actively supervised the Action from its inception, have reviewed the request for fees and expenses and endorsed it as fair and reasonable. *See* Exhibits 3-4 to the Joint Declaration. To date, no Class Member has

objected to the fee and expense request.[2] *See* Joint Decl. ¶¶ 70, 76.

ARGUMENT

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

A. Co-Lead Counsel Are Entitled to an Award of Attorneys' Fees from the $4.25 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….").

Here, having obtained a significant recovery for the Class, Co-Lead 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

[2] The deadline for the submission of objections is December 21, 2016. Should any objections be received, Co-Lead Counsel will address them in reply papers, which will be filed with the Court on or before January 4, 2016.

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 Co-Lead Counsel considering the risk of nonpayment that counsel faced in prosecuting the Direct Lending claims, the quality of the legal services provided to the Class, and the reaction of the 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,"[3] 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 damages in this country are handled on the plaintiff's side on a contingent-fee basis").[4] The Seventh Circuit also has recognized "that there are advantages to utilizing the percentage method

[3] *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").

[4] *See also In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 2015 WL 753946, at *3 (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.").

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).[5]

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 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.").[6] 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 was not excessive.[7] Accordingly, the fee award requested here, amounting to 18% of the $4,250,000 recovery, is plainly consistent with – and significantly below – fee awards made by courts in the Seventh Circuit in similar cases.

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[5] *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").

[6] *See also Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, 2001 U.S. Dist. LEXIS 20397, at *10 (N.D. Ill. Dec. 10, 2001) (awarding one-third of $14 million fund and finding that "[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) (awarding 33 1/3% of $4.6 million fund and finding that "courts in this District commonly award attorneys' fees equal to approximately one-third or more of the recovery" in common fund cases;); *Taubenfeld v. AON Corp.*, 415 F.3d 597 (7th Cir. 2005) (affirming fee award of 30% of $7.25 million securities class action settlement fund); *Long v. Trans World Airlines, Inc.*, No. 86-CV-7521, 1993 U.S. Dist. LEXIS 5063, at *1 (N.D. Ill. Apr. 15, 1993) (awarding 32% of $4.075 million settlement or $1.3 million); *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); *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).

[7] *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).

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.[8] *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 advanced by the litigation." *Id.* at 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 regularly apply risk multipliers between 2.0 and 4.0. *See, e.g., Harman v. Lyphomed, Inc.*, 945 F.2d 969 (7th Cir. 1991) (stating that multipliers of up to 4.0 have been approved); *In re Cenco, Inc. Sec.*

[8] 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").[8] "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 Co-Lead 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 actions. *See* Exhibits 5A and 5B to the Joint Decl.

Litig., 519 F. Supp. 322, 327 (N.D. Ill. 1981) (awarding 4 multiplier); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 103, 123 (2d Cir. 2005) (approving multiplier of 3.5).

Here, the lodestar cross-check strongly supports the requested percentage fee because the total value of time Co-Lead Counsel have devoted to the Action is significantly greater than the amount of the fee sought. The declarations submitted by Co-Lead Counsel show that they have collectively spent over 3,100 hours of attorney and other professional support time prosecuting the Direct Lending claims in the Action from January 14, 2014 through and including July 25, 2016.[9] *See* Joint Decl. ¶ 61. Co-Lead Counsel's total lodestar, derived by multiplying the hours spent by each attorney and paraprofessional by their current hourly rates,[10] is $1,665,418.75. *Id.* The requested 18% fee, which amounts to $765,000 (before interest), represents only approximately 46% of Co-Lead Counsel's total lodestar amount or, in other words, a "negative" multiplier of approximately 0.46 on the lodestar.[11]

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[9] As set forth in Joint Declaration and the accompanying declarations submitted by Co-Lead 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 January 14, 2014 through and including July 25, 2016 (the date of execution of the Stipulation), billed ten or more hours to the prosecution of the Direct Lending claims. *See* Joint Decl. ¶ 60. Time billed to the prosecution of the Action prior to January 14, 2014—the day after the date of the agreement-in-principle to settle the previous, partial settlement of the Indirect Lending claims asserted in this Action—as well as time expended after that date in connection with the settlement of the Indirect Lending claims, was submitted to the Court in connection with counsel's July 2015 application for an award of attorneys' fees in connection with the Indirect Lending settlement. No time previously submitted to the Court in connection with counsel's prior application is duplicated in this Fee Application. *Id.* In addition, since the date of execution of the Stipulation (July 25, 2016), Co-Lead Counsel have expended nearly 200 additional hours on this matter, with a resulting lodestar of approximately $100,000, which are not included in this Fee Application. *Id.* ¶ 61, n. 9.

[10] 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").

[11] As set forth in the Joint Declaration, in connection with the prior settlement, counsel were awarded 22% of the $24,000,000 settlement fund, or $5,280,000 (plus interest), which represented a negative

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").[12]

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 Co-Lead 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:

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multiplier of approximately 0.35 on counsel's total lodestar of $14,882,632.90. *See* Joint Decl. ¶ 61, n. 10. When combined with this Fee Application, which seeks an award of $765,000 (plus interest) based on counsel's $1,665,418.75 total lodestar, the total award of $6,045,000 (plus interest) on the combined $16,548,051.65 total lodestar represents an overall negative multiplier of approximately 0.37. *Id.*

[12] *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).

> 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 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 Co-Lead Counsel believed that the Direct 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 these claims was far from certain. As discussed in greater detail in the Joint Declaration, there were substantial risks here with respect to establishing Defendants' liability with respect to the Direct Lending claims. For example, regarding the central question of Northern Trust's liability, *i.e.*, whether Northern Trust failed to prudently invest and manage the Core 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 Class Members. Joint Decl. ¶ 41. Specifically, with respect to the Direct Lending claims, Defendants argued that the Core Pools' loss—which in the aggregate comprised 0.01% of the Core Pools—was principally a result of the default of Lehman Brothers' securities following an unanticipated and unprecedented September 15, 2008 bankruptcy of Lehman Brothers. *Id.* 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.* ¶ 40.

With respect to damages, the Class—comprised of non-ERISA investors in the Core Pools—faced a unique risk that even if they established liability, they would be unable to

establish any losses with respect to their participation in Northern Trust's direct lending program. Northern Trust had argued from the outset of this case that it had taken extraordinary steps to compensate the participants in the Core Pools for their losses; treated investors in the Core Pools differently than other investors in the securities lending program, including investors in STEP; and taken numerous actions to compensate investors in the Core Pools for any losses or make them whole. Joint Decl. ¶ 42. For instance, Northern Trust argued that it contributed support payments totaling $150 million to investors in the Core Pools and provided those investors with substantial fee reductions, including $12 million of value in fee reductions to the Class. *Id.* Moreover, Settling Plaintiffs and the other members of the Class faced a significant and unique risk that certain of the realized losses in the Core Pools were not recoverable at all because such losses were "unallocated," meaning that Class Members were not required to make out-of-pocket payments to cover such losses, and which losses were ultimately offset by increases in the market value of the Core Pools' remaining assets and thus did not constitute compensable damages. *Id.*

In light of these uncertainties regarding the outcome of the case, it is clear that Co-Lead 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 Class. Co-Lead 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. ¶ 18. Co-Lead 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.* ¶¶ 15-23. Additionally, Co-Lead Counsel engaged in wide-ranging discovery, which has included (i) numerous discovery conferences, hearings and motions; (ii) the exchange of voluminous document product requests; (iii) the review and analysis of over 387,000 pages of documents produced by Defendants; and (iv) the coordination of plaintiffs' production of over 10,000 pages of documents to Defendants. *Id.* ¶¶ 32-34. Furthermore, Co-Lead Counsel successfully moved for certification of the Class, which involved the development of an extensive documentary record and included the testimony of two plaintiff expert witness and the deposition of Defendants' expert witness. *Id.* ¶¶ 27, 31, 32. Finally, a significant amount of time was required to negotiate the Settlement. Co-Lead Counsel engaged in a formal mediation session presided over by Judge Wayne R. Andersen (Ret.), a retired United States District Judge for the Northern District of Illinois and a former state court trial judge. In connection with the mediation, the parties made extensive submissions to the mediator, which were exchanged with each other, and then conducted additional settlement negotiations leading to the parties' agreement-in-principle to settle the Direct Lending claims. *Id.* ¶ 37.[13]

Unlike Defendants' counsel, who are paid currently and whether they win or lose, Co-Lead Counsel have not been compensated for the significant recovery achieved for the Class as a result of Co-Lead Counsel's considerable efforts, and the award of fees (and reimbursement of expenses) to counsel has always been entirely dependent on their success in obtaining a common

[13] As explained above (*see* p. 7, fn. 9), time expended by Co-Lead Counsel for work performed prior to January 14, 2016 was included in counsel's July 2015 fee application submitted in connection with the Indirect Lending settlement. Time expended with respect to counsel's prior application has not been duplicated here.

fund for the Class. Yet, like Defendants' counsel, Co-Lead 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 Direct Lending claims were that each element of those claims would have continued to be 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").

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 actions and have skillfully litigated these types of actions in courts across the country. *See* Joint Decl. ¶ 62. Here, the Settlement provides an excellent result for the Class particularly in light of the risks of continued litigation of the Direct 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 Co-Lead Counsel. *Arenson v. Bd. of Trade Of the City of Chi.*, 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). Co-Lead Counsel were opposed in this case by three nationally known and highly capable law firms: Jenner & Block LLP, Winston & Strawn LLP and Mayer Brown LLP. Defendants have spared no effort in their zealous defense of the Action. Notwithstanding this formidable opposition, Co-Lead Counsel presented a strong case and demonstrated their willingness to continue to vigorously prosecute the Direct Lending claims asserted in the Action. The ability of Co-Lead Counsel to obtain a favorable result for the Class while litigating against these elite 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 Class To Date Support the Requested Fee

Settling Plaintiffs, which were actively involved in the prosecution and settlement of the Direct Lending claims and have actively supervised the work of counsel, have approved the requested fee.[14] 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"). This is particularly true here, where Settling Plaintiffs are sophisticated institutions with experience serving as plaintiffs in complex class actions.

The reaction of the Class to date also supports the requested fee. Pursuant to the Preliminary Approval Order, the Settlement Notice has been mailed to Class Members identified

[14] *See* Declarations of Settling Plaintiffs, attached as Exhibits 3-4 to the Joint Declaration, at ¶ 5.

by Defendants and a Summary Notice was published in *The Wall Street Journal* and transmitted over the *PR Newswire*.[15] Among other things, the Settlement Notice informs Class Members that Co-Lead Counsel intended to apply to the Court for an award of attorneys' fees in an amount not to exceed 18% of the Settlement Fund. Joint Decl. ¶ 70. While the time to object to the fee and expense application does not expire until December 21, 2016, to date, not a single objection has been received. *Id*. Should any objections be received, Co-Lead Counsel will address them in reply papers.

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 Co-Lead Counsel in connection with the prosecution of the Direct Lending claims from January 14, 2014 through and including November 30, 2016. 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, Co-Lead Counsel incurred a total of $330,611.92 in Litigation Expenses in connection with the prosecution of the Direct Lending claims from January 14, 2014 through and including November 30, 2016. Joint Decl. ¶ 74.

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

[15] *See* Declaration of Jose Fraga, submitted on behalf of the Court-approved Settlement Administrator, GCG, attached as Exhibit 2 to the Joint Decl., ¶¶ 4, 6.

others, charges for on-line legal and factual research, electronic document management costs, costs of out-of-town travel, copying costs, long distance telephone charges, and postage and delivery expenses. Joint Decl. ¶ 75. These expenses in this case also include the two experts whose work supported the motion for Class certification, and the services of Judge Andersen in connection with the mediation. *Id.* 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.[16] These expense items are billed separately by Co-Lead Counsel, and such charges are not duplicated in the firms' hourly billing rates. Reimbursement of these expenses is fair and reasonable.

Finally, the Settlement Notice informed Class Members that Co-Lead Counsel would apply for reimbursement of Litigation Expenses in an amount not to exceed $400,000. The total amount of expenses requested by Co-Lead Counsel, $330,611.92, is less than 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 18% of the Settlement Fund and reimbursement of Litigation Expenses from the Settlement Fund totaling $330,611.92.

[16] *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 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).

Dated: December 7, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Avi Josefson, an attorney, hereby certify that a copy of the foregoing "**Memorandum of Law in Support of Co-Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses**" was served on counsel for all parties electronically via the CM/ECF system on December 7, 2016.

Dated: December 7, 2016

By: */s/ Avi Josefson*
Avi Josefson