UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

ADAM S. LEVY on behalf of himself and all others similarly situated, Plaintiff, v. THOMAS GUTIERREZ, RICHARD J. GAYNOR, RAJA BAL, J. MICHAL CONAWAY, KATHLEEN A. COTE, ERNEST L. GODSHALK, MATTHEW E. MASSENGILL, MARY PETROVICH, ROBERT E. SWITZ, NOEL G. WATSON, THOMAS WROE, JR., MORGAN STANLEY & CO. LLC, GOLDMAN, SACHS & CO., CANACCORD GENUITY INC., AND APPLE, INC. Defendants.	No. 1:14-cv-00443-JL ECF CASE

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

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Court-appointed Lead Counsel, Bernstein Litowitz Berger & Grossmann LLP ("Lead Counsel"), respectfully submits this memorandum of law in support of its motion, on behalf of Plaintiffs' Counsel, for an award of attorneys' fees in the amount of 22% of the Settlement Funds. Lead Counsel also seeks reimbursement of $227,402.76 in Litigation Expenses that Plaintiffs' Counsel reasonably and necessarily incurred in connection with the litigation.[1]

PRELIMINARY STATEMENT

The proposed Settlements, if approved by the Court, will resolve all claims asserted in this Action against the Individual Defendants and the Underwriter Defendants (but not the claims against Defendant Apple Inc. ("Apple")) in exchange for a $36.7 million cash payment. The combined Settlements represent the fourth-largest securities class action recovery in New Hampshire history (with the claims against Apple continuing) and, under any measure, are a very favorable result for the Settlement Classes.[2]

The Settlements are particularly noteworthy when weighed against the risk that the Class might recover less (or nothing) against the Individual Defendants if the Action were litigated through summary judgment, trial and any appeals. Given GTAT's bankruptcy filing, there were only very limited resources available to recover even if Lead Plaintiff was successful in

[1] Lead Counsel are simultaneously submitting the Declaration of John C. Browne in Support of: (I) Lead Plaintiff's Motion for Final Approval of Individual Defendant and Underwriter Defendant Settlements and Plan of Allocation; and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Browne Declaration" or "Browne Decl.") (cited as "¶"). Capitalized terms have the meanings ascribed to them in the Browne Declaration, the Stipulation and Agreement of Settlement with Individual Defendants dated January 26, 2018 (ECF No. 178-1), or the Stipulation and Agreement of Settlement with Settling Underwriter Defendants dated August 18, 2017, and the supplement thereto dated January 26, 2018 (ECF No. 178-2).

[2] None of three larger securities class action settlements in New Hampshire history involved, as here, a bankrupt corporate defendant.

establishing the liability of the Individual Defendants. Faced with these circumstances, Lead Counsel was able to achieve a significant portion of remaining insurance proceeds – which, otherwise, would have been rapidly diminished in ongoing litigation. ¶¶12, 73-74.

The Settlement with the Individual Defendants eliminates this risk and, together with the substantial Settlement with the Underwriter Defendants, provides a large recovery to the Settlement Classes while the claims against Apple continue. The Settlements are also very favorable in light of the litigation risks faced by Lead Plaintiff. While this case is plainly meritorious, the Settling Defendants would mount substantial arguments against both liability and damages.

The Settling Defendants had strong defenses to Lead Plaintiff's claims and there was considerable uncertainty throughout the case as to whether Lead Plaintiff would be able to obtain any recovery. *See* ¶¶8-12, 73-83. Defendants would have argued that GTAT was engaged in an indisputably high-risk venture in attempting to be the first-ever company to manufacture artificial sapphire in sufficient quantities to be used as scratch-proof screens for advanced smartphones. It is a fact that no company had done that before and none have done it since. Defendants would have contended that the extremely risky nature of the Apple venture was fully disclosed in copious risk warnings contained in GTAT's public filings. ¶7.

Defendants would have argued that under these circumstances they made no false or misleading statements. They would have contended that they believed their statements were true, and were simply making forward looking statements regarding a known risky venture with Apple, while simultaneously warning investors that there was no guarantee of success. ¶¶8, 77, 80. Defendants would have revived arguments at summary judgment or trial that the statements were protected by the PSLRA's "safe harbor"—particularly in light of the many risk warnings.

¶¶8, 77, 80. Even if Lead Plaintiff succeeded in proving that the Individual Defendants made materially false or misleading statements, there would have been significant issues relating to whether they acted with the requisite scienter sufficient to establish a securities fraud claim. ¶¶10, 76.

The Underwriter Defendants would have had additional arguments because they are being sued solely with respect to statements made in the December 2013 offerings of debt and equity securities. ¶9. Those statements were made at the very beginning of the Class Period, before many of the issues with the Apple project had materialized. The Underwriter Defendants would also have raised a "due diligence" defense under the Securities Act. And even if Lead Plaintiff established liability against the Settling Defendants, there would have been hotly contested disputes over loss causation (or negative causation with respect to the Securities Act claims) and damages. ¶¶11, 78-80.

Finally, as stated above, another significant risk that Lead Plaintiff faced was that the Individual Defendants would be unable, after protracted and expensive litigation, to satisfy any judgment in excess of the Individual Defendant Settlement. The fact that Lead Plaintiff secured a $27 million Settlement from the Individual Defendants in the face of these limitations on collecting any larger amount after trial (when the available insurance coverage could have been substantially or entirely depleted) demonstrates that this is a very favorable recovery for the Individual Defendant Settlement Class. ¶¶12, 73-74.

Despite these risks, Lead Counsel vigorously litigated this Action and achieved these substantial Settlements, and did so on an entirely contingent fee basis against highly skilled defense counsel. Lead Counsel had to devote substantial amounts of time and resources to the Action before the Settlements could be obtained.

As detailed in the accompanying Browne Declaration,[3] Lead Counsel devoted a significant amount of time, effort, and resources to pursuing this litigation and achieving the proposed Settlements. Among other things, Lead Counsel: (i) drafted and filed the first of at least 13 securities class actions filed against Defendants (¶¶5, 30); (ii) conducted a comprehensive investigation into the claims asserted in the Action, which included conducting interviews of potential witnesses (including 132 former GTAT employees) (¶¶5, 33-36); (iii) prepared and filed a detailed 131-page Consolidated Class Action Complaint (the "Complaint") (¶¶5, 37-38); (iv) opposed the Defendants' five motions to dismiss in briefing totaling more than **2,700 pages** (¶¶5, 41-48); (v) obtained a favorable opinion on the motion to dismiss filed by the Individual Defendants; (¶56); and (vi) obtained, reviewed and analyzed more than 70,000 pages of documents from the files of the Underwriter Defendants. ¶¶5, 52-53.

Lead Counsel also engaged in arms'-length settlement negotiations with Defendants, including a formal mediation overseen by an experienced and highly respected mediator, Judge Layn Phillips (ret.). ¶¶50, 58-60. During these negotiations, the parties had the opportunity to express their frank views regarding the value of the case, the ability-to-pay issues, and to obtain the benefit of hearing the mediators' independent assessment of each sides' arguments.

Against this backdrop, Lead Counsel respectfully submits that the Settlements are an excellent result and demonstrate the high quality of Plaintiffs' Counsel's representation.[4] As

[3] The Browne 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 (¶¶30-65); the nature of the claims asserted (¶¶17-29); the negotiations leading to the Settlements (¶¶50, 58-63); the risks and uncertainties of continued litigation (¶¶66-82); and a description of the services that Lead Counsel provided for the benefit of the Settlement Classes (¶¶5, 30-65).

[4] Plaintiffs in the Action are Lead Plaintiff Douglas Kurz ("Lead Plaintiff") and Additional Named Plaintiffs Palisade Strategic Master Fund (Cayman) Limited ("Palisade Fund"),

compensation for their significant efforts Lead Counsel requests a fee award in the amount of 22% of each Settlement Fund and payment of Litigation Expenses in the amount of $227,402.76. As discussed below, the requested fee is well within the range of fees awarded in comparable class action settlements, whether considered as a percentage of the Settlements or on a lodestar/multiplier basis. Indeed, the requested fee represents a modest 1.61 multiplier on Plaintiffs' Counsel's total lodestar – which is well within the range of multipliers routinely awarded in class actions with substantial contingency risks such as this one.

Lead Plaintiff and the Securities Act Plaintiffs have been actively involved in overseeing the litigation on behalf of the Settlement Classes, and have each endorsed the requested fee and expenses as fair and reasonable. *See* Declaration of Douglas Kurz ("Kurz Decl."), attached to the Browne Decl. as Exhibit 2, at ¶¶3-7; Declaration of Bradley R. Goldman ("Palisade Fund Decl."), attached to the Browne Decl. as Exhibit 3, at ¶¶4-7; Declaration of Robert C. Varnell ("Highmark Decl."), attached to the Browne Decl. as Exhibit 4, at ¶¶4-7.

ARGUMENT

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

The U.S. Supreme Court and the First Circuit have long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444

Highmark Limited, in respect of its Segregated Account Highmark Fixed Income 2 ("Highmark", and together with Palisade Fund, the "Securities Act Plaintiffs"), Vance K. Opperman, and Adam S. Levy. Additional counsel that did work under the direction Lead Counsel include Counsel for Securities Act Plaintiffs, Berger & Montague, P.C. ("Berger & Montague"), Counsel for Additional Named Plaintiff, Lockridge Grindal Nauen P.L.L.P. ("Lockridge"), Bankruptcy Counsel for Plaintiffs, Lowenstein Sandler LLP ("Lowenstein Sandler"), and Local Counsel for Plaintiffs, Orr & Reno, P.A. ("Orr & Reno" and together with Lead Counsel, Berger & Montague, Lockridge, and Lowenstein Sandler, "Plaintiffs' Counsel").

U.S. 472, 478 (1980); *see In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995); *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 265 (D.N.H. 2007). Awards of reasonable attorneys' fees from a "common fund" provide compensation that "encourages capable plaintiffs' attorneys to aggressively litigate complex, risky cases like this one" and spread the costs of the litigation "proportionately among those benefitted by the suit." *Tyco*, 535 F. Supp. 2d at 265.

The Supreme Court has also emphasized that private securities actions, such as the instant Action, are "an essential supplement to criminal prosecutions and civil enforcement actions" brought by the SEC. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *accord Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (private securities actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'") (citation omitted)). Compensating plaintiffs' counsel for the risks they take in bringing these actions is essential, because "[s]uch actions could not be sustained if plaintiffs' counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class." *Hicks v. Morgan Stanley*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005). Accordingly, Plaintiffs' Counsel are entitled to an award of attorneys' fees from the Settlement Funds created by the Settlements.

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

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

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

The Supreme Court has endorsed the percentage method, stating that "under the 'common fund doctrine'. . . a reasonable fee is based on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). The First Circuit has also approved of the percentage method in common fund cases, noting that it is the prevailing method and that it "offers significant structural advantages in common fund cases, including ease of administration, efficiency, and a close approximation of the marketplace." *Thirteen Appeals*, 56 F.3d at 308. Indeed, Courts have noted that the percentage method "appropriately aligns the interests of the class with the interests of the class counsel[,] . . . is 'less burdensome to administer than the lodestar method,' . . . 'enhances efficiency' and does not create a 'disincentive for the early settlement of cases.'" *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 377 (D. Mass. 1997) (O'Toole, J.) (quoting *Thirteen Appeals*, 56 F.3d at 307); *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (the percentage method "directly aligns the interests of the class and its counsel").[5]

The requested fee of 22% is well within the typical range of percentage fees awarded in the First Circuit in comparable cases. *See In re Neurontin Mktg. & Sales Prac. Litig.*, No. 04-cv-10981, 2014 WL 5810625, at *3 (D. Mass. Nov. 10, 2014) (noting that "nearly two-thirds of class action fee awards based on the percentage method were between 25% and 35% of the common fund."); *In re Lupron Mktg. & Sales Practices Litig.*, MDL No. 1430, 2005 WL

[5] Courts regularly award attorneys' fees and expenses, even when claims against remaining defendants continue to be litigated, as they are here against Defendant Apple. *See, e.g., In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 464-68 (S.D.N.Y. 2004) (approving partial settlement and requested attorneys' fees and incurred expenses); *In re MF Global Holdings Ltd. Sec. Litig.*, No. 1:11-CV-07866-VM, slip op. at 2-3 (S.D.N.Y. Nov. 25, 2015), ECF No. 1026 (same) (Ex. 9).

2006833, at *5 (D. Mass. Aug. 17, 2005) ("Courts in the First Circuit have recognized that fee awards in common fund cases typically range from 20 to 30 percent."); *Medoff v. CVS Caremark Corp.*, No. 09-cv-554-JNL, 2016 WL 632238, at *9 (D.R.I. Feb. 17, 2016) ("30% is not out of proportion with recovery percentages in large class action litigations.").

A review of attorneys' fees awarded in class actions with comparably sized settlements in this Circuit strongly supports the reasonableness of the 22% fee request. *See Braun v. GT Solar Int'l., Inc.*, No. 1:08-CV-00312-JL, slip op. at 7 (D.N.H. Sept. 27, 2011), ECF No. 139 (awarding 25% on $10.5 million settlement) (Ex. 10);[6] *Hoff v. Popular Inc.*, No. 3:09-cv-01428-GAG, slip op. at 2-3 (D.P.R. Nov. 2, 2011), ECF No. 225 (awarding 27% of $37.5 million settlement) (Ex. 11); *CVS*, 2016 WL 632238, at *8-*9 (awarding 30% of $48 million settlement); *In re Evergreen Ultra Short Opportunities Fund Sec. Litig.*, No. 08-11064-NMG, 2012 WL 6184269, at *1 (D. Mass. Dec. 10, 2012) (awarding 24% of $25 million settlement); *In re Sepracor Inc. Sec. Litig.*, No. 02-12235-MEL, slip op. at 7 (D. Mass. Sept. 6, 2007), ECF No. 174 (awarding fees of 30% and 27.5% for two class recoveries totaling $52.5 million) (Ex. 12); *In re Sonus Networks, Inc. Sec. Litig.*, No. 04-10294-DPW, slip op. at 6 (D. Mass. March 31, 2008), ECF No. 233 (awarding 25% of $40 million settlement) (Ex. 13); *In re Transkaryotic Therapies, Inc. Sec. Litig.*, No. 03-10165-RWZ, slip op. at 6 (D. Mass. June 3, 2008), ECF No. 184 (awarding 24% of $50 million settlement) (Ex. 14)[7].

[6] Some of the unpublished orders cited herein state only the percentage fee award and do not provide the amount of the settlement. In those cases, short excerpts from the fee briefs filed in those cases, stating the amount of the settlement have been included in the attached exhibits.

[7] The requested 22% fee is also well within the range of percentage fee awards that have been granted in comparable securities class actions in other Circuits. *See, e.g.*, *In re Altisource Portfolio Solutions, S.A. Sec. Litig.*, No. 14-81156-CIV-WPD, slip op. at 2-3 (S.D. Fla. May 31, 2017), ECF No. 263 (awarding 22% of $32 million settlement) (Ex. 15); *In re DFC Global Corp. Sec. Litig.*, No. 2:13-cv-06731-BMS, slip op. at 2-3 (E.D. Pa. Sept. 20, 2017), ECF No. 141

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

In the First Circuit, "[t]he lodestar approach (reasonable hours spent times reasonable hourly rates, subject to a multiplier or discount for special circumstances, plus reasonable disbursements) can be a check or validation of the appropriateness of the percentage of funds fee, but is not required." *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. 05-11148-PBS, 2009 WL 2408560, at *1 (D. Mass. Aug. 3, 2009) (citation omitted); *accord Thirteen Appeals*, 56 F.3d at 307; *Lupron*, 2005 WL 2006833, at *3; *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 81 (D. Mass. 2005); *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.122, at 193 (2004) ("the lodestar is . . . useful as a cross-check on the percentage method by estimating the number of hours spent on the litigation and the hourly rate, using affidavits and other information provided by the fee applicant. The total lodestar estimate is then divided into the proposed fee calculated under the percentage method. The resulting figure represents the lodestar multiplier to compare to multipliers in other cases.").

When the lodestar is used as a cross-check, "the focus is not on the 'necessity and reasonableness of every hour' of the lodestar, but on the broader question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys." *Tyco*, 535 F. Supp. 2d at 270 (quoting *Thirteen Appeals*, 56 F.3d at 307); *see also In re WorldCom Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005) ("Where the lodestar fee is used as 'a mere

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(awarding 25% of $30 million settlement) (Ex. 16); *In re Lumber Liquidators Holdings, Inc. Sec. Litig.*, No. 4:13-cv-00157-AWA, slip op. at 2-3 (E.D. Va. Nov. 17, 2016), ECF No. 206 (awarding 23.75% of settlement consisting of $26 million in cash and 1 million shares of settlement stock) (Ex. 17); *In re NII Holdings, Inc. Sec. Litig.*, No. 1:14-cv-00227-LMB-JFA, slip op. at 2 (E.D. Va. Sept. 16, 2016), ECF No. 266 (awarding 25% of $41.5 million settlement) (Ex. 18); *In re Tronox, Inc. Sec. Litig.*, No. 09-CV-06220-SAS, slip op. at 2-3 (S.D.N.Y. Nov. 26, 2012), ECF No. 202 (awarding 25% of $37 million settlement) (Ex. 19); *In re BellSouth Corp. Sec. Litig.*, No. 1:02-cv-2142-WSD, 2007 U.S. Dist LEXIS 98429, at *10 (N.D. Ga. Apr. 9, 2007) (awarding 30% of $35 million settlement).

cross-check' to the percentage method of determining reasonable attorneys' fees, 'the hours documented by counsel need not be exhaustively scrutinized by the district court.'"). In this case, the lodestar method – whether used directly or as a "cross-check" on the percentage method – strongly demonstrates the reasonableness of the requested fee.

Here, Plaintiffs' Counsel spent a total of 8,794.95 hours of attorney and other professional support time prosecuting and resolving the claims asserted against the Settling Defendants from inception of the Action through May 18, 2018. *See* ¶104. Based on Plaintiffs' Counsel's current rates, their collective lodestar for this time period is $5,011,848.25.[8] *See id*. The requested 22% fee, which amounts to $8,074,000 (before interest), therefore represents a modest multiplier of approximately 1.61 on Plaintiffs' Counsel's lodestar.

The requested 1.61 multiplier is well within the range of multipliers commonly awarded in securities class actions and other comparable litigation. Indeed, in securities class actions and other class actions with significant contingency risks, fees representing multiples above the lodestar are typically awarded to reflect contingency risks and other relevant factors. *See, e.g.*, *New England Carpenters Health Benefits Fund*, 2009 WL 2408560, at *2 (8.3 multiplier); *Hoff*, No. 3:09-cv-01428-GAG, slip op. at 2-3 (3.13 multiplier); *Cornwell v. Credit Suisse Grp.*, No. 08-cv-03758 (VM), slip op. at 2, 4 (S.D.N.Y. July 18, 2011), ECF No. 117 (4.7 multiplier) (Ex. 20); *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-CV-1825 (NGG), 2010 WL 2653354, at *5

[8] The Supreme Court and courts in this Circuit have approved the use of current hourly rates in calculating the base lodestar figure as a means of compensating for the delay in receiving payment and the loss of the interest. *See Missouri v. Jenkins*, 491 U.S. 274, 284 (1989); *Cohen v. Brown Univ.*, No. 99-485-B, 2001 WL 1609383, at *1 (D.N.H. Dec. 5, 2001); *accord In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115808, at *9 (S.D.N.Y. Nov. 7, 2007) ("The use of current rates to calculate the lodestar figure has been repeatedly endorsed by courts as a means of accounting for the delay in payment inherent in class actions and for inflation.")

(E.D.N.Y. June 24, 2010) (awarding fee representing a 2.78 multiplier and noting that, "[w]here, as here, counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar"); *Tyco*, 535 F. Supp. 2d at 271 (2.7 multiplier); *Relafen*, 231 F.R.D. at 82 (2.02 multiplier); *In re StockerYale, Inc. Sec. Litig.*, 2007 WL 4589772, at *6-*7 (2.15 multiplier); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 369, 370 (S.D.N.Y. 2002) (awarding fee representing a 4.65 multiplier, which was "well within the range awarded by courts . . . throughout the country").

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

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

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

> (1) the size of the fund and the number of persons benefitted; (2) the skill, experience, and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risks of the litigation; (5) the amount of time devoted to the case by counsel; (6) awards in similar cases; and (7) public policy considerations, if any.

See Hill v. State St. Corp., No. 09-12146-GAO, 2015 WL 127728, at *17 (quoting *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 458 (D.P.R. 2011)); *Lupron*, 2005 WL

2006833, at *3; *Relafen*, 231 F.R.D. at 79; *see also Tyco*, 535 F. Supp. 2d at 266.[9] Consideration of all of these factors provides further confirmation that the fee requested here is reasonable.

A. The Amount of the Recovery Supports the Requested Fee

Here, Lead Counsel has achieved a substantial recovery of $36.7 million for the benefit of the Settlement Classes. The Settlements are all cash and Settlement Class Members will now receive compensation that was otherwise uncertain when the case began. The Settlements represent excellent recoveries for the Settlement Class Members, particularly in light of the substantial risks and obstacles posed in the Action, including the risk that the Individual Defendants would be unable, at the conclusion of protracted and expensive litigation, to fund a judgment or settlement in excess of the proposed Individual Defendant Settlement, as well as GTAT's immunity from suit as a result of its filing for bankruptcy. ¶¶4, 73. Lead Counsel submits that the size and quality of the recoveries obtained is a testament to the quality of Lead Counsel's representation and supports the reasonableness of the requested fee.

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

Considerable litigation skills were required for Lead Counsel to achieve the Settlements in this Action. The claims asserted in the Action against the Settling Defendants were complex and involved a number of distinct factual and legal issues. Given the many contested issues, it

[9] When a fee is awarded on a lodestar basis, courts consider the 12 factors set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974) and *Hensley v. Eckerhart*, 461 U.S. 424, 430 n.3 (1983). *See Diaz v. Jiten Hotel Mgmt*., 741 F.3d 170, 177 n.7 (1st Cir. 2013). These factors, which substantially overlap with the factors listed above, are: "(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." *See Diaz*, 741 F.3d at 177 n.7.

took highly skilled counsel to represent the classes and bring about the substantial recoveries that have been obtained. *See* ¶105.

As demonstrated by its firm resume (attached as Exhibit 3 to Exhibit 7A of the Browne Declaration), BLB&G is among the nation's leading securities class action firms. Lead Counsel submits that the skill of its attorneys, the quality of its efforts in the litigation, its substantial experience in securities class actions, and its commitment to the litigation were key elements in enabling Lead Counsel to negotiate these Settlements. *See Hill*, 2015 WL 127728, at *17 (noting plaintiffs' counsel's "experience and expertise contributed to the achievement of the Settlement.").

Courts have recognized that the quality of the opposition faced by plaintiffs' counsel should also be taken into consideration in assessing the quality of plaintiffs' counsel's performance. Here, the Individual Defendants were represented by Ropes & Gray LLP, Morgan, Lewis & Bockius LLP, Nutter McClennen & Fish LLP, and Wachtell, Lipton, Rosen & Katz, and the Underwriter Defendants were represented by Paul, Weiss, Rifkind, Wharton & Garrison LLP, all highly experienced and well-respected defense firms. Defense counsel vigorously and ably defended the claims against the Settling Defendants for more than three years. *See* ¶106. Notwithstanding this formidable opposition, Lead Counsel's thorough investigation and their resulting ability to present a strong case enabled them to achieve favorable recoveries for the benefit of the Settlement Classes. Thus, this factor supports the reasonableness of the requested fee. *See, e.g.*, *Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 WL 3148350, at *30 (N.D. Tex. Jan. 13, 2006) ("The ability of plaintiffs' counsel to obtain such a favorable settlement for the Class in the face of such formidable legal opposition confirms the superior quality of their

representation"); *Global Crossing*, 225 F.R.D. at 467 ("[t]he quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work").

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

There can be no dispute that this litigation was extremely complex and vigorously litigated by both Plaintiffs and the Settling Defendants. Courts have long recognized that securities class actions are generally complex and difficult. *See City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM) (GWG), 2014 WL 1883494, at *16 (S.D.N.Y. May 9, 2014) ("the complex and multifaceted subject matter involved in a securities class action such as this supports the fee request"); *Fogarazzo v. Lehman Bros. Inc.*, No. 03 Civ. 5194 (SAS), 2011 WL 671745, at *3 (S.D.N.Y. Feb. 23, 2011) ("courts have recognized that, in general, securities actions are highly complex").

As described in greater detail in the Browne Declaration, the claims asserted in the Action are broad and complex. They involved the Defendants' alleged false and misleading statements and omissions regarding the commercial prospects of GTAT, and in particular its sapphire division, the most important segment of its business, in connection with an agreement GTAT entered into with Apple. *See* ¶¶17-29. The claims involved complicated issues and were vigorously contested by Defendants' counsel. And Lead Counsel faced heightened pleading and proof challenges under the PSLRA and relevant "loss causation" jurisprudence. ¶¶41-47.

Lead Counsel confronted these myriad difficulties and was able to achieve very favorable recoveries for the benefit of the Settlement Classes. Thus, this factor fully supports the fee requested.

D. The Risk of Non-Payment Was Extremely High In This Case

The fully contingent nature of Lead Counsel's fee and the substantial risks posed by the litigation are also very important factors supporting the requested fee. "Many cases recognize

that the risk [of non-payment] assumed by an attorney is perhaps the foremost factor in determining an appropriate fee award." *Lupron*, 2005 WL 2006833, at *4 (internal quotation marks omitted). Furthermore, "[n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974).

As noted above and in the Browne Declaration (¶¶73-80), from the outset of this case, it was apparent that Lead Plaintiff faced very significant challenges to establishing liability and damages in this Action with respect to the claims against the Settling Defendants, and there was a significant risk that the case could be litigated for many years but result in no recovery for the classes and no payment for Plaintiffs' Counsel. Nonetheless, Lead Counsel devoted an enormous amount of resources to the vigorous and effective prosecution of the case and made every effort to obtain the recoveries achieved here for the benefit of the classes.

In the face of these uncertainties regarding the outcome of the case, Lead Counsel prosecuted this Action on a wholly contingent basis, knowing that the litigation could last for years and would require the devotion of a substantial amount of attorney time and a significant advance of Litigation Expenses with no guarantee of any compensation. Lead Counsel's assumption of this contingency fee risk, and its extensive litigation of the Action in the face of these risks, strongly supports the reasonableness of the requested fee. *See CVS*, 2016 WL 632238, at *9 ("Where, as here, lead counsel undertook this action on a contingency basis and faced a significant risk of non-payment, this factor weighs more heavily in favor of rewarding litigation counsel."); *see also In re OCA, Inc. Sec. & Derivative Litig.*, No. 05-2165, 2009 WL 512081, at *22 (E.D. La. Mar. 2, 2009) (where counsel faced challenges in establishing *scienter*

and loss causation and in proving liability and damages at trial, "the risk plaintiffs' counsel undertook in litigating this case on a contingency basis must be considered in its award of attorneys' fees, and thus an upward adjustment is warranted"); *Maley*, 186 F. Supp. 2d at 372 ("Class counsel undertook a substantial risk of absolute non-payment in prosecuting this action, for which they should be adequately compensated"). Accordingly, this factor strongly supports the reasonableness of the requested fee.

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

The extensive time and effort expended by Plaintiffs' Counsel in prosecuting this Action against the Settling Defendants and achieving the Settlements also establish that the requested fee is fair and reasonable. *See Hill*, 2015 WL 127728, at *19. The Browne Declaration details the substantial efforts of Plaintiffs' Counsel in prosecuting Lead Plaintiff's claims against the Settling Defendants over the course of more than three years of litigation. As set forth in greater detail in the Browne Declaration, Lead Counsel, among other things:

- Drafted and filed the first of at least 13 securities class actions against Defendants (¶¶5, 30);
- conducted a detailed investigation into claims against Defendants, including a thorough review of publicly available information such as SEC filings, news articles, and analyst reports, as well as interviews with numerous potential witnesses (including 132 former GTAT employees) and consultation with highly-regarded experts (¶¶5, 33-36);
- drafted and filed a detailed Complaint (¶¶37-39);
- researched and drafted oppositions to Defendants' five motions to dismiss totaling 2,700 pages (¶¶5, 41-48);
- consulted with an expert on the issue of damages (¶¶5, 36);
- prepared a detailed mediation statement in connection with a mediation involving the Individual Defendants that addressed both liability and damages; (¶¶5, 58)
- engaged in arms'-length negotiations with the Settling Defendants, both directly and through the Mediator, to resolve the Action against the Settling Defendants (¶¶5, 50, 58-61); and

- conducted due diligence discovery related to the Underwriter Defendant Settlement, which included the review of 13,500 documents totaling approximately 70,000 pages produced by the Underwriter Defendants concerning the December 2013 offering of GTAT Senior Notes and secondary offering of GTAT Common Stock (¶¶51-55).

As noted above, Plaintiffs' Counsel expended a total of more than 8,700 hours investigating, prosecuting and resolving the claims asserted against the Settling Defendants with a total lodestar value of over $5 million. ¶104. The substantial time and effort devoted to this case and Lead Counsel's efficient and effective management of the litigation, was critical in obtaining the favorable results achieved by the Settlements, and confirms that the fee request here is reasonable.

F. Awards in Similar Cases Support the Requested Fee

As discussed above in Section II.A, Lead Counsel's requested fee of 22% of each Settlement Fund is well within the range of fee awards in class action cases in this Circuit and across the country. *See* Section II.A, *supra*. Moreover, the reasonable percentage fee award represents a modest multiplier of 1.61 on Plaintiffs' Counsel's lodestar, which is well within the range of multipliers awarded in class action cases with substantial contingency risks. *See* Section II.B, *supra*. Thus, this factor strongly supports the reasonableness of the requested fee.

G. Public Policy Considerations Support the Requested Fee

A strong public policy concern exists for rewarding firms for bringing successful securities litigation. The Supreme Court has emphasized that private securities actions such as this provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'" *Bateman*, 472 U.S. at 310 (citation omitted); *see also Tellabs*, 551 U.S. at 313. Accordingly, public policy favors granting Lead Counsel's fee and expense application here. *See CVS*, 2016 WL 632238, at *9 ("public policy supports rewarding counsel for prosecuting securities class actions, especially where counsel's dogged efforts—

undertaken on a wholly contingent basis—result in satisfactory resolution for the class." (citing *Tyco*, 535 F. Supp. 2d at 270)); *see also Puerto Rican Cabotage*, 815 F. Supp. 2d at 463; *FLAG Telecom*, 2010 WL 4537550, at *29 (if the "important public policy [of enforcing the securities laws] is to be carried out, the courts should award fees which will adequately compensate Lead Counsel for the value of their efforts, taking into account the enormous risks they undertook").

H. Plaintiffs Have Approved the Requested Fee

As set forth in their respective declarations, Lead Plaintiff and the Securities Act Plaintiffs oversaw the prosecution and resolution of this Action with respect to the Settling Defendants, and had a sound basis for assessing the reasonableness of the fee request. *See* Kurz Decl. ¶¶3-4; Palisade Fund Decl. ¶4; Highmark Decl. ¶4. Each of these Plaintiffs fully supports and approves the fee request. *See* Kurz Decl. ¶¶6-7; Palisade Fund Decl. ¶¶6-7; Highmark Decl. ¶¶6-7. Accordingly, their endorsement of the fee request supports its approval as fair and reasonable. *See, e.g.*, *CVS*, 2016 WL 632238, at *9 (co-lead plaintiffs' consent to the fee request weighed in favor of concluding that the request was reasonable); *Hill*, 2015 WL 127728, at *19 (endorsement of Lead Plaintiffs supported approval of the requested fees).

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

The reaction of the Settlement Classes to-date also supports the requested fee. As of May 23, 2018, the Claims Administrator disseminated 179,435 copies of the Notice to potential Settlement Class Members and their nominees informing them of, among other things, Lead Counsel's intention to apply to the Court for an award of attorneys' fees in an amount not to exceed 22% of each Settlement Fund and payment of up to $450,000 in expenses. ¶¶113, 124. While the time to object to the fee and expense application does not expire until June 7, 2018, to-date, no objections to the amount of attorneys' fees and expenses set forth in the Notice have been received. ¶¶113, 124. Lead Counsel will address any objections received in their reply

papers to be filed with the Court on June 21, 2018. Accordingly, the lack of objections from Settlement Class Members weighs in favor of the requested award. *See Roberts v. TJX Companies, Inc.*, No. 13-cv-13142-ADB, 2016 WL 8677312, at *11 (D. Mass. Sept. 30, 2016); *CVS*, 2016 WL 632238, at *9; *Tyco*, 535 F. Supp. 2d at 261.

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

Lead Counsel's fee application includes a request for reimbursement of Litigation Expenses that were reasonably incurred and necessary to the prosecution of this Action. *See* ¶115. These expenses are properly recoverable. *See In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999) ("lawyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover from the fund . . . expenses, reasonable in amount, that were necessary to bring the action to a climax"); *Latorraca v. Centennial Techs. Inc.*, 834 F. Supp. 2d 25, 28 (D. Mass. 2011) ("In addition to attorneys' fees, lawyers who recover a common fund for a class are entitled to reimbursement of out-of-pocket expenses incurred during the litigation."); *Hill*, 2015 WL 127728, at *20 ("Lawyers who recover a common fund for a class are entitled to reimbursement of Litigation Expenses that were reasonably and necessarily incurred in connection with the litigation."). As set forth in detail in the Browne Declaration, Plaintiffs' Counsel incurred $227,402.76 in Litigation Expenses in connection with the Action through May 18, 2018. ¶117. Reimbursement of these expenses is fair and reasonable.

The expenses for which Lead Counsel seek reimbursement 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, costs and fees for consulting experts, on-line legal and factual research, photocopying, filing fees, work-related transportation, working meals, and mediation

fees. ¶¶118-21. A complete categorical breakdown of the expenses incurred by Plaintiffs' Counsel is included in Exhibit 8 to the Browne Declaration. These expense items are billed separately by Plaintiffs' Counsel, and these charges are not duplicated in the firms' hourly billing rates.

In connection with Lead Counsel's request for payment of Litigation Expenses, initial named plaintiff Adam S. Levy ("Levy") seeks a total of $3,990.00 pursuant to the PSLRA to reimburse costs and expenses he incurred directly relating to his representation of the Settlement Classes. *See* Declaration of Initial Plaintiff Adam S. Levy in Support of: (A) Lead Plaintiff's Motion for Final Approval of Individual Defendant and Underwriter Defendant Settlements and Plan of Allocation; and (B) Lead Counsel's Motion for and Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Levy Decl."), attached to the Browne Decl. as Exhibit 5, at ¶7. The PSLRA specifically provides that an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be made to "any representative party serving on behalf of a class." 15 U.S.C. §§ 77z-1(a)(4), 78u-4(a)(4). As set forth in his declaration, initial named plaintiff Levy provided valuable assistance to Lead Counsel in connection with the filing of the initial complaint in the Action and his continued monitoring of progress of the litigation and settlement negotiations. *See* Levy Decl. ¶2. These efforts required Levy to dedicate time and resources that he otherwise would have devoted to other work related to his law practice. The requested reimbursement amount is based on the number of hours that Levy committed to his work in this litigation.[10]

[10] *See GT Solar*, slip op. at 7 (awarding state action individual plaintiff $3,654 from $10.5 million settlement fund "in recognition of her efforts on behalf of the Class and as an 'award of reasonable costs and *expenses* (including lost wages) directly relating to the representation of the [Settlement Class]'") (Ex. 10); *see also Sloman v. Presstek, Inc.*, No. 06-cv-377-JL, slip op. at 7

The Notice informed potential Settlement Class Members that Lead Counsel would apply for reimbursement of Litigation Expenses for all Plaintiffs' Counsel in an amount not to exceed $450,000, including the costs and expenses of plaintiffs related to their representation of the Settlement Classes. The total amount of expenses requested by Lead Counsel is $231,392.76, which includes $227,402.76 in reimbursement of Litigation Expenses incurred by Plaintiffs' Counsel and $3,990.00 in reimbursement of costs and expenses incurred by initial named plaintiff Adam S. Levy, an amount well below the amount listed in the Notice. To date, there has been no objection to the request for expenses. ¶124.

CONCLUSION

For the foregoing reasons, Lead Counsel respectfully requests that the Court award (i) attorneys' fees in the amount of 22% of each Settlement Fund, or $8,074,000 plus interest accrued at the same rate as earned by the Settlement Funds; (ii) $227,402.76 in reimbursement of Litigation Expenses incurred by Plaintiffs' Counsel; and (iii) $3,990.00 in reimbursement of initial named plaintiff Levy's costs and expenses.

Dated: May 24, 2018

Respectfully submitted,

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

/s/ John C. Browne
John C. Browne (Admitted *Pro Hac Vice*)
Lauren Ormsbee (Admitted *Pro Hac Vice*)
Ross Shikowitz (Admitted *Pro Hac Vice*)

(D.N.H. July 20, 2009) (awarding individual lead plaintiff $15,000 from $1.25 million settlement) (Ex. 21); *In re StockerYale*, 2007 WL 4589772, at *6 (awarding five individual lead plaintiffs $1,500 each from $3.4 million settlement fund); *In re Doral Financial Corp. Sec. Litig.*, No. 3:14-cv-01393-GAG, 2016 WL 10516658, at *1 (D.P.R. Aug. 8, 2016) (awarding 2 co-lead individual plaintiffs $10,000 each from $7 million settlement fund).

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CERTIFICATE OF SERVICE

I hereby certify that the above Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing on May 24, 2018.

/s/ Jennifer Eber
Jennifer Eber