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 CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

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Court-appointed Class Counsel, Bernstein Litowitz Berger & Grossmann LLP ("BLB&G" or "Class Counsel"), respectfully submits this memorandum of law in support of its motion for (i) an award of attorneys' fees for Plaintiffs' Counsel[1] in the amount of 20% of the Apple Settlement Fund; (ii) reimbursement of $596,646.05 in expenses that Plaintiffs' Counsel reasonably and necessarily incurred in connection with the litigation; and (iii) awards of $6,937.50 to Lead Plaintiff Douglas Kurz and $24,713.75 to Securities Act Plaintiff Palisade Strategic Master Fund (Cayman) for their costs and expenses directly related to their representation of the Apple Class, as authorized by the Private Securities Litigation Reform Act of 1995 (the "PSLRA").[2]

PRELIMINARY STATEMENT

The proposed Apple Settlement resolves all claims asserted in this Action against the sole remaining Defendant, Apple, in exchange for a $3.5 million cash payment. If approved by the Court, the Apple Settlement, when combined with the two Earlier Settlements reached with the GTAT Individual Defendants ($27 million) and the Underwriter Defendants ($9.7 million), will result in an aggregate cash recovery of $40.2 million in this Action. As noted in the accompanying Settlement Memorandum, the $40.2 million aggregate recovery ranks as the third-

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[1] "Plaintiffs' Counsel" consist of Class Counsel, BLB&G; Counsel for the Securities Act Plaintiff, Berger Montague PC ("Berger Montague"); and Liaison Counsel, Orr & Reno, P.A. ("Orr & Reno"). Only BLB&G, Berger Montague, and Orr & Reno will be paid from the attorneys' fees awarded by the Court.

[2] Unless otherwise defined herein, all capitalized terms have the meanings set forth in the Stipulation and Agreement of Settlement with Defendant Apple Inc., filed with the Court on January 10, 2020 (the "Apple Settlement Stipulation") (Dkt. 252-1), or in the Declaration of Lauren A. Ormsbee in Support of: (I) Class Representatives' Motion for Final Approval of Settlement With Defendant Apple Inc.; and (II) Class Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Ormsbee Declaration" or "Ormsbee Decl."), filed herewith. Citations to "¶ __" refer to paragraphs in the Ormsbee Declaration and citations to "Ex. __" refer to exhibits to the Ormsbee Declaration.

largest securities class action recovery ever obtained in the District of New Hampshire. This is a considerable achievement given that GTAT—the issuer of the securities that form the basis for this Action—was an insolvent bankrupt entity, which prevented it from being a potential source of recovery for investors.[3]

In continuing to prosecute the claims against Apple, Class Counsel faced numerous challenges to proving primary liability, loss causation, damages, and control person liability that posed the very serious risk of a smaller additional recovery, or no additional recovery at all, for the Class. The additional $3.5 million obtained under the Apple Settlement was achieved through the skill, tenacity, and effective advocacy of Class Counsel, which continued to litigate against Apple on a fully contingent basis against highly skilled defense counsel. The Apple Settlement was reached only after five years of highly contested litigation, two of which was exclusively litigated against Apple, during which time Class Counsel expended significant efforts and resources on behalf of the Apple Class.

As detailed in the accompanying Ormsbee Declaration,[4] Class Counsel vigorously pursued the Action from its outset by, among other things, conducting an extensive investigation into the alleged fraud, which included a thorough review of the voluminous public record and interviews with multiple potential witnesses (including 132 former GTAT employees); researching, drafting, and filing the 131-page Consolidated Class Action Complaint (the

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

[4] The Ormsbee Declaration is an integral part of this submission and, for the sake of brevity, the Court is respectfully referred to it for detailed descriptions of, *inter alia*: the nature of the claims asserted against Apple in the Action (¶¶6-7, 25); the history and prosecution of the Action (¶¶22-71); the risks and uncertainties of continued litigation of the claims against Apple (¶¶72-97); and the services Plaintiffs' Counsel provided for the benefit of the Apple Class (¶¶4, 9-12, 20, 108-111, 113-118, 120).

"Complaint"); and briefing in opposition to, and successfully defeating in large part, the multiple motions to dismiss the Complaint filed by Defendants (including Apple). ¶¶4, 24, 26, 28. After the Earlier Settlements were reached, Class Counsel engaged in additional significant litigation efforts on behalf of the Apple Class for which it now seeks compensation from the Apple Settlement Fund. These efforts include, among things: (i) successfully moving for certification of the Class, which required copious briefing, the taking and defending of multiple depositions, the filing of two substantial expert reports, and several hours of oral argument on the motion (¶¶4, 37-47); (ii) engaging in wide-ranging discovery, including the review and analysis of over 400,000 documents totaling over 2.3 million pages, and conducting, defending, or actively participating in 28 fact, class, and expert depositions, including the depositions of GTAT's former CEO, two CFOs and COO, and seven expert depositions related to class and expert discovery (¶¶4, 9-11, 40, 48-62; (iii) evaluating, and commencing the research and drafting of, oppositions to both Apple's motion for summary judgment and Apple's motion to exclude the opinion of Lead Plaintiff's damages and loss causation expert (¶¶63-67); (iv) engaging in arm's-length settlement negotiations with Apple's Counsel that resulted in the settlement agreement in principle; (v) negotiating the final terms of the Apple Settlement with Apple's Counsel (¶68); and (vi) drafting, finalizing, and filing the Apple Settlement Stipulation and related Settlement documents (¶¶70-71).

The Apple Settlement is a favorable result for the Apple Class considering the very significant litigation risks attendant to the continued prosecution of the Action, including the risks associated with proving both the underlying former Defendants' and Apple's liability under the federal securities laws, and establishing loss causation and damages. These risks are detailed in the Ormsbee Declaration at paragraphs 72 to 97 and are summarized in the Settlement

Memorandum and below. These risks posed a real possibility that Class Representatives and the Apple Class would not be able to recover or would have recovered a much lesser amount if the Action proceeded.

As compensation for their efforts on behalf of the Apple Class and the risks of non-payment they faced in bringing and continuing to prosecute the claims against Apple on a contingent basis, Class Counsel now seek a fee award for all Plaintiffs' Counsel in the amount of 20% of the Apple Settlement Fund and reimbursement of expenses in the amount of $596,646.05. The requested fee in connection with the Apple Settlement is lower than the 22% fee this Court awarded in connection with the Earlier Settlements approved by the Court in 2018, and is well within the range of fees awarded in comparable class action settlements, whether considered as a percentage of the Settlement or on a lodestar/multiplier basis. Indeed, the requested fee represents a substantial "negative" multiplier of approximately 0.17 on Plaintiffs' Counsel's total lodestar.

Moreover, each of the Class Representatives, who have been actively involved in overseeing the litigation on behalf of the Apple Class, have endorsed the requested fee and expenses as fair and reasonable. *See* Declaration of Lead Plaintiff Douglas Kurz ("Kurz Decl."), Ex. 1, at ¶¶6-7; Declaration of Bradley R. Goldman, on behalf of Securities Act Plaintiff Palisade ("Goldman Decl."), Ex. 2, at ¶¶7-8. Furthermore, the requested fee is consistent with the fee permitted under the retainer agreement entered into between Lead Plaintiff and Class Counsel at the outset of the litigation. *See* Kurz Decl. at ¶6. As a result, the fee request is entitled to a "presumption of reasonableness." *See In re Cendant Corp. Litig.*, 264 F.3d 201, 282 (3d Cir. 2001).

In addition, while the deadline set by the Court for Class Members to object to the requested attorneys' fees and expenses has not yet passed, to date, no objections to the requests for fees and expenses have been received. ¶¶102, 119, 129. The Apple Settlement Notice mailed to potential Class Members states that Class Counsel would apply for an award of attorneys' fees in an amount not to exceed 20% of the Apple Settlement Fund and for reimbursement of Litigation Expenses (including the reasonable costs and expenses of the Class Representatives) in an amount not to exceed $800,000. ¶¶119, 129. The fees and expenses sought by Class Counsel are within the amounts set forth in the Apple Settlement Notice.[5]

Class Counsel submits that, in light of the recovery; the time, effort, and work performed by Plaintiffs' Counsel; the skill and expertise required; and the risks that counsel undertook in continuing to pursue the claims against Apple, the requested fee award is reasonable. In addition, the Litigation Expenses for which Class Counsel seek reimbursement were reasonable and necessary for the successful prosecution of the Action.

ARGUMENT

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

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 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

[5] The deadline for submitting objections is May 25, 2020. As provided in the Court's Order Preliminarily Approving Apple Settlement (Dkt. 254), Class Counsel will file reply papers no later than June 8, 2020 addressing any objections to the fee and expense application that may be received.

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." (citation omitted). *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 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") (citation omitted).

As noted above, the requested fee of 20% of the Apple Settlement Fund is lower than the 22% fee that this Court awarded in 2018 as a percentage of the $36.7 million aggregate recovery achieved under the settlements with the GTAT Individual Defendants and the Underwriter Defendants (the "2018 Fee Award"). *See Levy v. Gutierrez*, No. 1:14-cv-00443-JL, Dkt. 196, slip op. at 3 (D.N.H. July 30, 2018) (Ex. 6). In addition, the requested fee of 20% is well within the typical range of percentage fees awarded by other courts in the First Circuit in class actions. *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 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.").

Indeed, a review of attorneys' fees awarded in securities class actions with comparably-sized settlements in the District of New Hampshire strongly supports the reasonableness of the 20% fee request. *See, e.g.*, *Braun v. GT Solar Int'l., Inc.*, No. 1:08-cv-00312-JL, Dkt. 139, slip op. at 7 (D.N.H. Sept. 27, 2011) (Laplante, J.) (awarding 25% of $10.5 million settlement) (Ex. 7);[6] *Sloman v. Presstek, Inc.*, No. 06-cv-377-JL, Dkt. 139, slip op. at 7 (D.N.H. July 20, 2009) (Laplante, J.) (awarding 30% of $1.25 million settlement) (Ex. 8); *In re StockerYale, Inc. Sec. Litig.*, No. 1:05cv00177–SM, 2007 WL 4589772, at *6-*7 (D.N.H. Dec. 18, 2007) (awarding 33% of $3.4 million settlement); *In re Cabletron Sys., Inc. Sec. Litig.*, 239 F.R.D. 30, 45(D.N.H. 2006) (awarding 21.5% of $10.5 million settlement).

B. <u>The Requested Attorneys' Fees Are Reasonable Under the Lodestar Method</u>

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*

[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.

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.").

Here, Plaintiffs' Counsel spent a total of 7,574.60 hours of attorney and other professional support time prosecuting and resolving the claims asserted against Apple from May 19, 2018 through and including April 30, 2020.[7] *See* ¶110. Based on Plaintiffs' Counsel's 2018 hourly rates that were approved by the Court in connection with the 2018 Fee Award, Plaintiffs' Counsel's collective lodestar for this time period is $4,035,034.25. *See id.* The requested 20% fee, which amounts to $700,000 (before interest), therefore represents a substantial "negative" multiplier of approximately 0.17 of the total lodestar, *i.e.*, it is only 17% of the value of Plaintiffs' Counsel's time.

This multiplier is significantly below 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

[7] Plaintiffs' Counsel are applying for reimbursement for hours and expenses incurred from May 19, 2018 through and including April 30, 2020, as this Court already approved reimbursement for hours and expenses incurred by Plaintiffs' Counsel through May 18, 2018 in connection with the 2018 Fee Award. The time submitted by Plaintiffs' Counsel in this application excludes: (a) all time incurred with respect to the litigation and settlement activities covered by the fee and expense declarations previously filed with the Court in connection with counsel's 2018 fee and expense application (*see* Dkt. 188-8, 188-9, 188-12); (b) the administration of the Earlier Settlements, including the preparation and filing of the motion for distribution of the settlement proceeds recovered from the Earlier Settlements (*see* Dkt. 248); and (c) this application for fees and reimbursement of expenses. *See* ¶109.

awarded to reflect contingency risks and other relevant factors. *See In re FLAG Telecom Holdings, Inc.*, No. 02-CV-3400 (CM)(PED) 2010 WL 4537550, at *26 (S.D.N.Y. Nov. 8. 2010) ("a positive multiplier is typically applied to the lodestar in recognition of the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors"); *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-CV-1825 (NGG), 2010 WL 2653354, at *5 (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") (citation omitted); *see also New England Carpenters Health Benefits Fund*, 2009 WL 2408560, at *2 (awarding 8.3 multiplier); *Tyco*, 535 F. Supp. 2d at 271 (awarding 2.7 multiplier); *StockerYale*, 2007 WL 4589772, at *6-*7 (awarding 2.15 multiplier).

The fact the requested fee here is equal to only 17% of the value of the time by expended by Plaintiffs' Counsel using its 2018 hourly rates strongly supports the reasonableness of the requested fee. *See, e.g., In re Bear Stearns Cos. Sec., Deriv., & ERISA Litig.*, 909 F. Supp. 2d 259, 271 (S.D.N.Y. 2012) (approving fee with negative multiplier and noting that the negative multiplier was a "strong indication of the reasonableness of the [requested] fee"); *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 sum, the requested fee award is well within the range of what courts regularly award in class actions such as this one when calculated as a percentage of the fund and substantially lower when calculated using Plaintiffs' Counsel's lodestar.

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 (D. Mass. Jan 8, 2015) (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.[8] Consideration of all of these factors provides further confirmation that the fee requested here is reasonable.

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[8] When a fee is awarded on a lodestar basis, courts consider the 12 factors set forth in *Johnson v. Ga. 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.

A. <u>The Amount of the Recovery Supports the Requested Fee</u>

Under the Settlement reached with Apple, Class Counsel have achieved an additional cash recovery of $3.5 million for the benefit of the Class. As noted above, the Apple Settlement provides financial recovery in addition to the two earlier settlements in the Action previously approved by the Court on July 27, 2018—the settlement with the GTAT Individual Defendants for $27 million in cash and the settlement with the Underwriter Defendants for $9.7 million in cash—resulting in an aggregate cash recovery in this Action of $40.2 million. The additional recovery achieved under the Apple Settlement, when added to earlier recoveries in the Action, represents an excellent recovery for Class Members, particularly in light of the substantial risks and obstacles posed in the Action from the outset, including GTAT's immunity from suit as a result of its filing for bankruptcy. ¶14. Class Counsel submits that its ability to achieve an additional recovery from Apple in the face of the substantial litigation risks related to the prosecution to the claims against this Defendant (as described below), is a testament to the quality of Class Counsel's representation and supports the reasonableness of the requested fee.

B. <u>The Skill and Experience of Counsel Support the Requested Fee</u>

Considerable litigation skills were required for Class Counsel to achieve the additional recovery from Apple in this Action. The claims asserted in the Action against Apple were complex and involved a number of distinct factual and legal issues. Given the many contested issues, it took highly skilled counsel to represent the Class and bring about the additional recovery obtained in this case. *See* ¶111.

As demonstrated by its firm resume (attached as Exhibit 3 to Exhibit 4A of the Ormsbee Declaration), BLB&G is among the nation's leading securities class action firms. Class Counsel submits that the skill of its attorneys, the quality of its efforts in prosecuting the claims against Apple, its substantial experience in securities class actions, and its commitment to the litigation

were key elements in enabling Class Counsel to negotiate the Apple Settlement. *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, Apple was represented by Latham & Watkins, a highly experienced and well-respected defense firm. Counsel for Apple spared no effort in the defense of their client and launched a vigorous defense against Plaintiffs' claims for more than five years. *See* ¶112. Notwithstanding this knowledgeable, formidable, and well-financed opposition, Class Counsel was nonetheless able to persuade Apple and its counsel to settle on terms that will significantly benefit the Apple Class. 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") (citation omitted); *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004) ("[t]he quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work") (citation omitted).

C. <u>The Complexity and Duration of the Litigation Support the Requested Fee</u>

There can be no dispute that this litigation was extremely complex and vigorously litigated by both Class Representatives and Apple. 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 Ormsbee Declaration, the claims asserted against Apple in this securities action were extremely complex. The gravamen of the Action is that non-party GTAT and the Individual Defendants issued materially false and misleading statements to investors regarding GTAT's agreement with Apple to manufacture sapphire for the screens of Apple iPhones and GTAT's performance pursuant to the Apple Agreement. While Apple did not make any of the alleged materially false and misleading statements to investors, Class Representatives alleged that Apple, through its relationship with Apple, exerted control over the Individual Defendants' statements and conduct.

However, proving Class Representatives' claims against Apple was very difficult. First, before even addressing whether Apple controlled the Individual Defendants, Class Representatives had to prove the primary liability of the Individual Defendants. Apple vehemently denied that the Individual Defendants' statements were false, that their conduct was in any way wrongful and, ultimately, that investors were entitled to any recovery at all. Moreover, Apple argued that, even if Class Representatives could prove primary liability claims against the Individual Defendants, Apple was not a "control" person under the securities laws and, therefore, the Class was entitled to no additional recovery than that already recovered. Indeed, the Court, in sustaining the control person claims at the outset of the Action, found: "To be sure, plaintiffs' allegations of Apple's control are thin. However, they are barely sufficient to withstand Apple's motion to dismiss." Dkt. 150 at 74. Further, Apple vigorously argued throughout the litigation, including in its oppositions to class certification and its motion for

summary judgment, that investors knew at virtually all relevant times the risks of GTAT not fulfilling the terms of the Apple Agreement.

As a consequence, Class Representatives and Class Counsel faced substantial challenges in developing the factual record necessary to overcome Apple's many defenses to the Class Representatives' claims. If Apple succeeded on any one of the multitude of its defenses, the additional recovery to the Class could have been eliminated. Class Counsel confronted these myriad difficulties and was able to achieve an additional, immediate recovery from Apple for the benefit of the Class. Thus, this factor fully supports the fee requested.

D. The Risks of Continued Litigation of the Claims Against Apple Support the Requested Fee

The fully contingent nature of Class 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) (citation 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).

While Class Counsel believes that the claims against Apple are meritorious, Class Counsel recognized that there were several substantial risks in the litigation from the outset and that Plaintiffs' ability to succeed at trial and obtain a substantial judgment from Apple was far from certain. As discussed in greater detail in the Ormsbee Declaration and in Settlement Memorandum, there were substantial risks here with respect to liability, loss causation, and damages.

First, as discussed above, in order to prove the control person claims asserted against Apple, Class Representatives needed to establish the underlying liability claims alleged in the Action. To do so, Class Representatives need to prove that the alleged misstatements by the GTAT Individual Defendants during the Class Period were materially false and misleading. However, Apple has argued that many, if not all, of the allegedly false statements made by the Individual Defendants during the Class Period were immunized from liability because they were protected by the PSLRA's "safe harbor" provision or were otherwise immaterial as a matter of law. ¶79. Apple has also argued that GTAT's sapphire venture with Apple was extremely risky—the Company was trying manufacture sapphire of sufficient quality to be used as the screens for smartphones, which had never been done before (or since)—and the Individual Defendants and the Company provided many risk warnings in GTAT's SEC filings such that investors were well aware that the project could fail. *Id.*

Second, even if Class Representatives succeeded in proving that the Individual Defendants made materially false and misleading statements and omissions, Apple would have continued to advance substantial arguments that the Individual Defendants did not act with the requisite scienter to commit securities fraud. Apple would continue to argue that both Mr. Gutierrez and Mr. Squiller, GTAT's former CEO and COO, respectively, genuinely believed that the Company could fulfill the terms of the Apple Agreement, and that GTAT was on a path to fulfilling the terms of the Apple Agreement during the Class Period. ¶80. Apple would also continue to argue that, because the Individual Defendants' stock sales were not unusual in amount in comparison to their holdings of GTAT stock options and their pattern of selling during the Class Period was consistent with their sales before the Class Period, the Class

Representatives could not adequately prove scienter through motive and intent by way of the Individual Defendants' stock sales. ¶81.

Third, Class Representatives would have confronted significant challenges in establishing loss causation with respect to one or both of the alleged corrective disclosures, even if they were able to establish the liability of the Individual Defendants. In rebutting loss causation, Apple has argued, among other things, that (i) the September 9, 2014 announcement revealing the new iPhone (which did not include sapphire cover glass) did not correct any prior misstatement by GTAT; and (ii) the October 6, 2014 announcement of GTAT's bankruptcy announcement was also not a corrective disclosure because the Company's bankruptcy was a business decision by GTAT that was made despite the fact that GTAT could perform under the Apple Agreement. ¶¶84-86.

Fourth, Apple would have continued to argue that, even if Class Representatives could prove primary liability claims against the Individual Defendants, Apple was not a "control" person under the securities laws and, therefore, the Class was not entitled to any additional recovery beyond the amounts already recovered in the Action. On this point, Apple has argued, among other things, that: (i) there is a dearth of cases supporting control liability in both this Circuit and the federal courts in general, and there have been few, if any, cases sustaining control person claims against a company unrelated to the issuer who is the primary subject of the Complaint; (ii) Class Representatives were foreclosed from asserting control liability claims against Apple because Apple did not have general power to control GTAT; and (iii) the elements Class Representatives would point to as evidence of Apple's control over GTAT, including the Apple Agreement and negotiation terms, GTAT's sapphire operations, GTAT's public

statements, and Apple's position as GTAT's lender, were aspects of a normal business relationship. ¶¶87-93.

While Class Counsel believe that they had responses to and evidence to rebut each of Apple's arguments, it recognized that the outcome was far from certain. In the face of the many uncertainties regarding the outcome of the case, Class Counsel continued to prosecute the claims against Apple 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.

Class Counsel's assumption of this contingency fee risk, and its extensive litigation of the claims against Apple 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 v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 372 (S.D.N.Y. 2002) ("Class counsel undertook a substantial risk of absolute non-payment in prosecuting this action, for which they should be adequately compensated") (internal quotes and citation omitted). Accordingly, this factor strongly supports the reasonableness of the requested fee.

E. The Amount of Time Devoted to the Prosecution and Settlement of the Claims Against Apple by Plaintiffs' Counsel Supports the Requested Fee

The extensive time and effort expended by Plaintiffs' Counsel in prosecuting the claims against Apple and achieving the Apple Settlement also establish that the requested fee is fair and reasonable. *See Hill*, 2015 WL 127728, at *19. The Ormsbee Declaration details the substantial efforts of Plaintiffs' Counsel in prosecuting the claims against Apple following the settlements reached with the GTAT Individual Defendants and the Underwriter Defendants. As set forth in greater detail in the Ormsbee Declaration, in connection with the prosecution and settlement of the claims against Apple, Plaintiffs' Counsel, among other things:

- successfully moved for certification of the Apple Class, which involved extensive briefing, the taking and defending of multiple depositions, the filing of two substantial expert reports, and several hours of oral argument on the motion (¶¶4, 37-47);
- obtained, reviewed, and analyzed nearly half a million documents totaling over two million pages produced in discovery by Apple and multiple non-parties subpoenaed by Class Counsel, including GTAT, in order to educate themselves regarding the details of the Apple Agreement and GTAT's sapphire crystal technology (¶¶4, 9-10, 54-56);
- conducted, defended, or actively participated in 28 fact, class, and expert depositions, including depositions of the Lead Plaintiff and three employees of the Securities Act Plaintiff, numerous Apple executives, former GTAT employees, directors, and executives, and expert witnesses (¶¶4, 11, 40, 42, 57-58);
- evaluated and began the research and drafting of oppositions to both Apple's motion for summary judgment and Apple's motion to exclude the opinion of Lead Plaintiff's damages and loss causation expert (¶¶63-67);
- engaged in arms'-length negotiations Apple's Counsel to resolve the Action against Apple (¶68);
- negotiated the final terms of the Apple Settlement with Apple's Counsel (¶70); and
- drafted, finalized, and filed the Apple Settlement Stipulation and related Settlement documents (¶¶70-71).

As noted above, from May 19, 2018 through and including April 30, 2020, Plaintiffs' Counsel expended a total of more than 7,500 hours prosecuting and resolving the claims asserted against Apple, with a total lodestar value of over $4,035,000. ¶110. The substantial time and

effort devoted to this case and Class Counsel's efficient and effective management of the litigation was critical in obtaining the favorable result achieved by the Apple Settlement, 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, Class Counsel's requested fee of 20% of the Apple 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 substantial negative multiplier of 0.17 on Plaintiffs' Counsel's total lodestar. *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 Class 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 In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 463 (D.P.R. 2011); *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 Class Counsel for the value of their efforts, taking into account the enormous risks they undertook").

H. Class Representatives Have Approved the Requested Fee

As set forth in their respective declarations, the Class Representatives oversaw the prosecution and resolution of the claims against Apple, and had a sound basis for assessing the reasonableness of the fee request. *See* Kurz Decl. at ¶¶3-4; Goldman Decl. at ¶¶4-5. Each of the Class Representatives fully supports and approves the fee request. *See* Kurz Decl. at ¶¶6-7; Goldman Decl. at ¶¶7-8. 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).

Furthermore, as noted above, the requested fee is consistent with the amount of fees allowed under the retainer agreement entered into between Lead Plaintiff and Class Counsel at the outset of the litigation. *See* Kurz Decl. at ¶6. As a result, the fee request is entitled to a "presumption of reasonableness." *See Cendant*, 264 F.3d at 282.

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

The reaction of the Apple Class to date also supports the requested fee. Through May 8, 2020, the Claims Administrator disseminated 211,148 copies of the Apple Settlement Notice to potential Class Members and their nominees informing them of, among other things, Class Counsel's intention to apply to the Court for an award of attorneys' fees in an amount not to exceed 20% of the Apple Settlement Fund and reimbursement of up to $800,000 in Litigation Expenses. ¶¶119, 129. While the time to object to the fee and expense application does not expire until May 25, 2020, to date, no objections to the amount of attorneys' fees and expenses set forth in the Apple Settlement Notice have been received. *Id.* Class Counsel will address any objections received in their reply papers to be filed with the Court on or before June 8, 2020. Accordingly, the lack of objections from Class Members to date weighs in favor of the requested

award. *See Roberts v. TJX Cos., 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 BENEFIT OBTAINED

Class Counsel's fee application includes a request for reimbursement of Litigation Expenses incurred from May 19, 2018 through and including April 30, 2020 that were not previously applied for in connection with the Earlier Settlement. These expenses were reasonably incurred and necessary achieve the additional cash recovery obtained under the Apple Settlement, and 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.") (citation omitted); *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 Ormsbee Declaration, Plaintiffs' Counsel incurred $596,646.05 in expenses in connection with this Action from May 19, 2018 through and including April 30, 2020. ¶123. Reimbursement of these expenses is fair and reasonable.

The expenses for which Class 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, court reporting, on-line legal and factual research, photocopying, court filings, out-of-town travel, work-related local

transportation, and working meals. ¶¶123-125. A complete categorical breakdown of the expenses incurred by Plaintiffs' Counsel is included in Exhibit 5 to the Ormsbee Declaration. These expense items are incurred separately by Plaintiffs' Counsel, and these charges are not duplicated in the firms' hourly rates.

In connection with its request for reimbursement of Litigation Expenses, Class Counsel also seeks reimbursement of a combined total of $31,651.25 in costs and expenses incurred by Class Representatives Kurz and Palisade directly related to their representation of the Class. The PSLRA specifically provides that an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be made to "any representative party serving on behalf of a class." 15 U.S.C. §§ 77z-1(a)(4), 78u-4(a)(4). Here, each of the Class Representatives seek an award based on their time dedicated to this Action since May 2018.[9] In addition, Palisade seeks reimbursement for a small amount of out-of-pocket expenses incurred in connection with the litigation. Specifically, Mr. Kurz seeks an award of $6,937.50 and Palisade seeks an award of $24,713.75. *See* Kurz Decl. at ¶¶8-10; Goldman Decl. at ¶¶9-12.

Each of the Class Representatives took an active role in the litigation and has been fully committed to pursuing the claims on behalf of the Class since they became involved in the case. During the course of the litigation, Class Representatives, *inter alia*: communicated with their counsel regarding case strategy and developments, reviewed pleadings and briefs filed in the Action, responded to discovery requests, consulted with counsel regarding settlement negotiations, and evaluated and approved the proposed Apple Settlement. *See* Kurz Decl. at ¶¶3-

[9] While Mr. Kurz and representatives of Palisade spent a substantial amount of time on this litigation prior to May 2018, the Class Representatives did not seek reimbursement of any of that time in connection with the Earlier Settlements reached with the Individual Defendants and Underwriter Defendants.

4, 9; Goldman Decl. at ¶¶4-5, 10. In addition, Mr. Kurz and three representatives of Palisade were deposed in connection the motion for class certification, and a Palisade representative was deposed for a second time during merits discovery. *See* Kurz Decl. at ¶¶4, 9; Goldman Decl. at ¶¶5, 10. These efforts required Mr. Kurz and representatives of Palisade to dedicate considerable time and resources to the Action that they would have otherwise devoted to their regular duties.

Numerous courts, including this one, have reimbursed plaintiffs for similar time and effort. *See Levy v. Gutierrez*, No. 1:14-cv-00443-JL, slip op. at 6 (D.N.H. July 30, 2018) (awarding named plaintiff Adam S. Levy $3,990.00 from the settlement funds recovered in connection with the Earlier Settlements as reimbursement for his reasonable costs and expenses directly related to his representation of the settlement classes), Dkt. 196 (Ex. 6); *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. 7); *Sloman v. Presstek, Inc.*, No. 06-cv-377-JL, slip op. at 7 (D.N.H. July 20, 2009) (awarding individual lead plaintiff $15,000 from $1.25 million settlement) (Ex. 8); *In re Doral Fin. 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); *In re Bank of Am. Corp. Sec., Derivative, & Emp. Ret. Income Sec. Act (ERISA) Litig*., 772 F.3d 125, 133 (2d Cir. 2014) (affirming award of over $450,000 to representative plaintiffs for time spent by their employees on the action); *FLAG Telecom*, 2010 WL 4537550, at *31 (approving award of $100,000 to Lead Plaintiff for time spent on the litigation).

The Apple Settlement Notice informed potential Class Members that Class Counsel would apply for reimbursement of Litigation Expenses in an amount not to exceed $800,000,

including the costs and expenses of the Class Representatives related to their representation of the Apple Class. The total amount of expenses requested by Class Counsel is $628,297.30, which includes $596,646.05 in reimbursement of expense incurred by Plaintiffs' Counsel from May 19, 2018 through and including April 30, 2020 and a combined $31,651.25 in reimbursement of costs and expenses incurred by the Class Representatives, 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, Class Counsel respectfully requests that the Court (i) award attorneys' fees in the amount of 20% of the Apple Settlement Fund, or $700,000 plus interest accrued at the same rate as earned by the fund; (ii) award $596,646.05 in reimbursement of expenses incurred by Plaintiffs' Counsel; and (iii) and award a combined $31,651.25 for the Class Representatives' costs and expenses related to their representation of the Class.

Dated: May 11, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the above Memorandum of Law in Support of Class 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 11, 2020.

/s/ Jennifer Eber
Jennifer Eber