UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
BALTIMORE DIVISION

KIRAN KUMAR NALLAGONDA,	)	Case No.: 1:15-cv-03562-PX
Plaintiff,	)	
	)	Date: February 5, 2019
vs.	)	Time: 10:00 a.m.
	)	Dept.: Suite 400
OSIRIS THERAPEUTICS, INC., *et. al*.	)	Judge: Hon. Paula Xinis
Defendants.	)	
_____	)	Complaint filed November 23, 2015

MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND AN INCENTIVE AWARD FOR LEAD PLAINTIFF

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I. INTRODUCTION

Lead Counsel and Liaison Counsel (together "Class Counsel") in this securities class action respectfully submit this memorandum of law in support of their request for an award of attorneys' fees of 25% of the Settlement Fund, reimbursement of litigation expenses of $21,631.91, plus interest on both amounts, and an incentive award in the amount of $4,000 for Lead Plaintiff.

The substantial and certain recovery obtained for the Class – an all cash recovery of $18,500,000 – was achieved through the skill, experience, and effective advocacy of Class Counsel in the face of considerable risk and opposition from highly experienced and skilled defense counsel. Class Counsel's efforts to date have been without compensation of any kind and the fee has been wholly contingent upon the result achieved.[1]

The requested fee is consistent with the fees awarded in similar actions in this Circuit and decisions throughout the country and is the appropriate method of compensating counsel. The amount requested is especially warranted in light of the substantial recovery obtained for the Class, the efforts of counsel in obtaining this highly favorable result and the significant obstacles and risk presented in bringing and prosecuting this litigation against Defendants.

This action is subject to the provisions of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §78u-4, and, therefore, by its nature extremely risky. The effect of the PSLRA is to make it harder for investors to successfully resolve securities class actions. Lead

[1] Submitted herewith in support of approval of the proposed settlement is the Declaration of Reed R. Kathrein in Support of Lead Plaintiff's Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, And an Incentive Award for Lead Plaintiff (the "Kathrein Decl."). Also submitted herewith is the Declaration Wayne G. Travell, Liaison Counsel for the Class setting forth the time and expenses Hirschler Fleischer, PC (the "Travell Decl.") incurred in prosecuting this action.

Plaintiff and his counsel were mindful of the fact that in this post-PSLRA environment, a greater percentage of cases are being dismissed than ever before amid defendants' constant attempts to push the envelope and contours of the PSLRA. As former United States Supreme Court Justice Sandra Day O'Connor noted in *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009), "[t]o be successful, a securities class action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action." Indeed, over 50% of securities fraud class actions are dismissed.[2]

The parties reached a settlement of this action which was preliminary approved by the Court's Order of September 4, 2018, conditionally certifying a settlement class, preliminarily approving the settlement terms and directing distribution of class notice, preliminary approving Class Counsel's request for attorney's fees and costs and setting a hearing for February 4, 2019, for final approval of the settlement (the "Settlement Hearing").[3]

Class Counsel undertook the representation of the Class on a contingent fee basis and no payment has been made to Class Counsel to date for their services or for the litigation expenses they have incurred on behalf of the Class. Class Counsel firmly believe that the settlement is the result of their creative and diligent efforts, as well as their reputations as attorneys who are unwavering in their dedication to the interests of the Class and unafraid to zealously prosecute a meritorious case through trial and subsequent appeals. In a case asserting claims based on complex legal and factual issues which were opposed by highly skilled and experienced defense counsel, Class Counsel succeeded in securing a very good result for the Class under difficult and

[2] *See* Stefan Boettrich and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: Full-Year Review*, Nera Economic Consulting (Jan. 29, 2018), at 23, http://www.nera.com/content/dam/nera/publications/2018/PUB_Year_End_Trends_Report_0118_final.pdf.

[3] ECF No. 100.

challenging circumstances. As a result, Class Counsel submit that the requested fee is fair and reasonable and should be awarded by this Court.

For the reasons set forth herein as well as in the Kathrein Declaration, Class Counsel respectfully submit that the attorneys' fees and expenses requested are fair and reasonable under the applicable legal standards and in light of the contingency risk undertaken, the diligent efforts of counsel in prosecuting this Litigation on behalf of the Class and the substantial and certain benefits obtained, and therefore should be awarded by the Court. Moreover, the expenses requested are reasonable in amount and were necessarily incurred for the successful prosecution of this action.

II. THE WORK UNDERTAKEN BY CLASS COUNSEL

In addition to the significant risks and obstacles presented, the prosecution of this case required an extensive effort by Class Counsel. The settlement is the culmination of three years of investigation, hard fought litigation, and vigorous and protracted arm's-length settlement negotiations. During this time, Class Counsel marshaled firm resources and committed substantial amounts of time and expenses in the prosecution of this Litigation. Class Counsel, among other things, have (i) thoroughly reviewed and analyzed all publicly available information regarding Osiris, the Individual Defendants, and the claims asserted; (ii) drafted and filed a Motion to Appoint Lead Plaintiff and Approve His Selection of Lead and Liaison Counsel, and opposed competing motions; (iii) thoroughly investigated and analyzed class-wide damages, including the retention and comprehensive collaboration with an experienced economic expert and the utilization of the in-house expertise of a certified public accountant and fraud examiner; (iv) assessed the risks of prevailing on Lead Plaintiff's claims at trial and class certification; (v) prepared an extensive mediation statement; (vi) engaged in protracted and vigorous settlement negotiations, spanning a five-month period, including one formal mediation presided over by an

experienced mediator, as well as continued their arm's-length negotiations, and multiple follow-up conferences; (vii) investigated, researched, drafted and filed the Amended Complaint, and (viii) analyzed Osiris and the individual defendants financial situation and ability to contribute to the settlement in the near-term and risks of an uncollectible judgement in the long-term.

A. Pre-Filing Investigation and Lead Plaintiff Proceedings

On November 23, 2015, the action entitled *Nallagonda v. Osiris Therapeutics, Inc. et al.*, Case No. 1:15-cv-03562-PX, was filed in the United States District Court for the District of Maryland, Baltimore Division. The action alleged violations of the federal securities laws and sought remedy under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated thereunder. Named as defendants were Osiris, Lode Debrabandere, Gregory I. Law and Philip R. Jacoby, Jr. Motions asking the Court to appoint Lead Plaintiff and to approve Lead Plaintiff's selection of lead counsel were filed on January 22, 2016, and a hearing on those motions was held on March 21, 2016 before the Honorable J. Frederick Motz. The Court entered an order granting investor Raffy Mirzayan's motion and denying the competing motion. Accordingly, on March 21, 2016, Raffy Mirzayan was appointed as the Lead Plaintiff and the Court approved Lead Plaintiff's selection of Hagens Berman Sobol Shapiro LLP ("Hagens Berman") as Lead Counsel and Hirschler Fleischer, P.C. ("Hirschler Fleischer") as Liaison Counsel.[4]

Lead Plaintiff conducted an extensive investigation prior to filing the Amended Complaint on April 6, 2018.[5] This investigation included a thorough and detailed review of Osiris's public filings before, during and after the Class Period (including SEC filings, publicly

[4] *See* ECF No. 42.

[5] *See* ECF No. 89.

available annual reports, press releases, news articles, and other media reports), review of interim financial reporting produced confidentially as part of the mediation process, research into the opinions of analysts that followed the stock and ratings agencies, and the retention of a consulting economist. The PSLRA bars any formal discovery until after the Court decides a motion to dismiss.[6]

B. Mediation and Settlement

On December 19, 2017, Lead Counsel and counsel for Osiris participated in a full-day mediation with Jed Melnick ("Mr. Melnick") of J.A.M.S. in New York, New York.[7] The parties were nowhere near resolution at the end of that daylong mediation. To further the mediation's progress, Osiris shared confidential interim financial results. Mr. Melnick continued to mediate between the parties, speaking to both sides on numerous occasions over the coming months.[8] Although these discussions were helpful in considerably narrowing the gap between the Settling Parties, they were unable to agree on settlement amounts. Ultimately, the Settling Parties continued their arm's-length negotiations and after several additional efforts, were able to reach a resolution in early March, which is now documented in the Stipulation.[9]

This Settlement provides between 36% and 86% recovery of estimated maximum damages to the Class, which consists of Osiris investors who purchased Osiris common stock within the Class Period. This substantial recovery reduced the need to continue litigating the case and engage in formal discovery beyond the extensive informal discovery already undertaken. Instead, the Class will receive immediate and substantial compensation for the

[6] 15 U.S.C. § 78u-4(b)(3)(B).

[7] Kathrein Decl. ¶¶ 16-18.

[8] *Id.*

[9] *Id.*

claims. In other words, the size of the settlement, in combination with risks of continuing to litigate reduces the need for Lead Plaintiff to continue litigating the case and engaging in formal discovery, which would only delay any benefits achieved through litigation. The Settlement[10] was nevertheless entered into only after thorough investigation and analysis by Lead Plaintiff's Counsel,[11] and was preliminarily approved through the Court's September 4, 2018 Order.[12]

C. Providing Notice to Class Members

Class Counsel continues to lead and oversee the settlement and claims administration process by working with Epiq Class Action & Claims Solutions, Inc. ("Settlement Administrator"), a company selected to provide formal settlement administration services for the Class. Class Counsel has spent and continues many lawyer hours and resources working with the Settlement Administrator and assisting with the communication and guidance provided to class members regarding the settlement, including working with the Settlement Administrator, Defendants, and Lead Plaintiff's own experts to establish a website that allows class members to see expected payout amounts, specific to each class member. Class Counsel anticipates about five hours weekly working with the Settlement Administrator and class members until settlement distribution is completed, which is estimated to be in August 2019, assuming no appeals.[13]

[10] *See* Stipulation and Settlement Agreement dated June 11, 2018 (ECF No. 94-7).

[11] *See, e.g.*, *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991) (supporting inference of fairness when parties had only conducted informal discovery); *Whitaker v. Navy Fed. Credit Union*, No. RDB 09-cv-2288, 2010 WL 3928616, at *2-3 (D. Md. Oct. 4, 2010) (extensive internal investigations prior to formal discovery, coupled with briefings on motions to dismiss, sufficient to demonstrate fairness).

[12] ECF No. 100.

[13] Kathrein Decl. ¶ 25.

III. ARGUMENT

A. The Court should award attorneys' fees based on the percentage-of-the-recovery method

The Supreme Court "has recognized consistently 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."[14] The percentage method of awarding fees has become an accepted, if not the prevailing method, for awarding fees in common fund cases throughout the United States. A percentage fee award is appropriate because it encourages counsel to obtain the maximum recovery for the class at the earliest possible stage of the litigation and, hence, most fairly correlates Class Counsel's compensation to the benefit achieved for the class.

The "common fund" doctrine entitles "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client . . . to a reasonable attorneys' fee *from the fund as a whole*."[15] The common fund doctrine "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense."[16] Even in the absence of a specific monetary fund, where the litigation has conferred a substantial benefit on the members of an ascertainable class, an award of fees will be made to spread the cost of counsel proportionally among such members.[17]

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[14] *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). *See also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 393 (1970). All internal citations and quotations herein are omitted and all emphasis added, unless otherwise indicated.

[15] *Jernigan v. Protas, Spivok & Collins, LLC*, No. ELH-16-03058, 2017 WL 4176217, at *2 (D. Md. Sept. 20, 2017) (*citing US Airways, Inc. v. McCutchen*, 569 U.S. 88, 96, 133 S. Ct. 1537, 1545 (2013); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)).

[16] *Boeing Co.*, 444 U.S. at 478.

[17] *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392 (1970).

Plaintiff and Class Counsel have clearly bestowed a substantial common benefit upon the Class Members here. Through their efforts, Class Members will share substantial monetary relief, which satisfies the requirements of the common fund doctrine and entitles Class Counsel to an award of attorneys' fees from the Settlement Fund.

The Supreme Court has consistently calculated attorneys' fees in common fund cases on a percentage-of-the-fund basis.[18] Since *Blum*, virtually every Circuit Court of Appeals has joined the Supreme Court in affirmatively endorsing the percentage of recovery method as an appropriate method for determining an amount of attorneys' fees in common fund cases.[19] In addition, the *Manual for Complex Litigation* also endorses the use of the percentage-of-the-fund method in awarding attorneys' fees in common fund cases.[20]

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[18] *See Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165-67 (1939); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (1980); *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (recognizing that under the "common fund doctrine" a reasonable fee may be based "on a percentage of the fund bestowed on the class.").

[19] *See e.g., O'Connor v. Oakhurst Dairy*, No. 2:14-00192-NT, 2018 WL 3041388, at *4 (D. Me. June 19, 2018) ("The First Circuit has approved of the [percentage of fund] method as the prevailing approach used in common fund cases.") (c*iting In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995)); *Cassese v. Williams*, 503 F. App'x 55, 59 (2d Cir. 2012) (affirming the district court's decision to employ a "'percentage of the recovery' approach as a starting point in calculating the fee award.") (*citing Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 45 (2d Cir. 2000)); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig*., 55 F.3d 768, 821-22 (3d Cir. 1995); *Rawlings v. Prudential-Bache Props., Inc*., 9 F.3d 513, 515-16 (6th Cir. 1993); *Resnick v. Frank (In re Online DVD-Rental Antitrust Litig.)*, 779 F.3d 934, 949 (9th Cir. 2015) ("Under the percentage-of-recovery method, the attorneys' fees equal some percentage of the common settlement fund; in this circuit, the benchmark percentage is 25%.") (citations omitted); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994); *Muransky v. Godiva Chocolatier, Inc*., 905 F.3d 1200 (11th Cir. 2018); *In re VA Data Theft Litig.*, 653 F. Supp. 2d 58, 60 (D.D.C. 2009) (*citing Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1268-70 (D.C. Cir. 1993)).

[20] *See Manual for Complex Litigation* §14.121, at 187 (4th ed. 2004) (stating that "the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases") (footnotes omitted); *see also* 32 *Moore's Federal Practice* - Civil 14.1 (2018).

Likewise, district courts within the Fourth Circuit have uniformly held that the percentage of the fund method is the preferred method for calculating attorneys' fees in common fund cases.[21]

Compared to the "lodestar" method, the percentage-of-recovery fees also conserve judicial resources, are simple to calculate, are not subject to manipulation, and do not require the court to "second guess" each and every decision made by counsel during the course of a complex case. Moreover, multiple district courts within this Circuit have noted the comparative efficiency and reasonableness of the percentage method.[22] In addition, the PSLRA also

[21] *See, e.g., Jones v. Dominion Res. Servs.*, 601 F. Supp. 2d 756, 758 (S.D. W. Va. 2009) ("The percentage method has overwhelmingly become the preferred method for calculating attorneys' fees in common fund cases") (citations omitted); *Goldenberg v. Marriott PLP Corp.*, 33 F. Supp. 2d 434, 438 (D. Md. 1998) (noting endorsement of percentage-of-recovery method by several courts in the Fourth Circuit); *Smith v. Krispy Kreme Doughnut Corp*., No. 1:05CV00187, 2007 WL 119157, *1 (M.D.N.C. Jan. 10, 2007) ("On the question of attorneys' fees, the Court finds that in a common fund case such as this, a reasonable fee is normally a percentage of the Class recovery"); *In re Microstrategy, Inc*., 172 F. Supp. 2d 778, 787 (E.D. Va. 2001) ("Understandably, the trend in securities class actions and other common fund cases has been toward use of the percentage method. Indeed, in recent years, two circuits have mandated, and seven circuits have explicitly approved, the use of the percentage-of-recovery approach in common fund cases"); *Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 502-503 (E.D. Va. 1995) (noting that "the current trend among the courts of appeal favors the use of a percentage method to calculate an award of attorneys' fees in common fund cases") (citations omitted).

[22] *See Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 681 (D. Md. 2013) ("the percentage method is more efficient and less burdensome than the traditional lodestar method, and offers a more reasonable measure of compensation for common fund cases.") (*quoting Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 503 (E.D. Va. 1995)); *Jones v. Dominion Res. Servs*., 601 F. Supp. 2d 756, 761 (S.D. W. Va. 2009) ("One of the primary benefits of the percentage method over the lodestar method is its allowance for rewards to attorneys for efficient work and these attorneys should be rewarded accordingly.") (*citing In re Cardinal Health Inc. Sec. Litig*., 528 F. Supp. 2d 752, 762 (S.D. Ohio 2007)).

recognizes appropriateness of the use of the percentage method of fee awards by acknowledging that attorneys' fees should not exceed a "reasonable percentage."[23]

Accordingly, Class Counsel respectfully requests that this Court calculate the attorneys' fees in this case under the percentage of recovery method.

B. Class Counsel's fee request is reasonable under Fourth Circuit criteria

For their efforts in creating a common fund for the benefit of the Class, Class Counsel seek a reasonable percentage of the fund recovered as attorneys' fees. Class Counsel requests fees representing 25% of the Settlement Fund, plus $21,631.91 for expenses incurred in the prosecution of this action, plus interest on both accounts. These requests are fair and reasonable under the relevant standards.

Courts in this Circuit assessing the reasonableness of the percentage fee award have considered the following factors: (1) the results obtained for the class, (2) the quality, skill, and efficiency of the attorneys involved, (3) the complexity and duration of the case, (4) the risk of nonpayment, (5) awards in similar cases, (6) objections, and (7) public policy.[24]

1. The results obtained for the Class supports the fee request

Courts have consistently recognized that the result achieved is one of the most important factors to be considered in making a fee award.[25] Here, a substantial and certain recovery of

[23] *See* 15 U.S.C. § 78u-4(a)(6) ("Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.").

[24] *See Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 682 (D. Md. 2013); *Jones v. Dominion Res. Servs.*, 601 F. Supp. 2d 756, 760 (S.D. W. Va. 2009)); *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. at 261; *Kay Co. v. Equitable Prod. Co.*, 749 F. Supp. 2d 455, 464 (S.D. W. Va. 2010); *Helmick v. Columbia Gas Transmission*, No. 2:07-cv-00743, 2010 WL 2671506, at *5 (S.D. W. Va. July 1, 2010).

[25] *See Lilly v. Harris-Teeter Supermarket*, 842 F.2d 1496, 1511 (4th Cir. 1988); *Dameron v. Sinai Hosp. of Balt., Inc.*, 644 F. Supp. 551, 555 (D. Md. 1986).

$18.5 million in cash (an estimated recovery of between 36% and 86% of maximum damages compared to a 5.2% median settlement in securities fraud class actions[26]) has been obtained through the efforts of Class Counsel at a relatively early stage of the litigation without the substantial expense, delay, and uncertainty of continued litigation. And although the SEC and United States Attorneys' Office later brought their own cases against Defendants, this action was initially and overwhelmingly pursued without the assistance of any regulatory or governmental agency. In addition, early settlements are consistent with the purposes of the Federal Rules of Civil Procedure which are intended "to secure the just, speedy, and inexpensive determination of every action and proceeding."[27]

Here, Lead Plaintiff and his counsel stepped forward to represent the Class. But for Lead Plaintiff and his counsel's efforts, it is unlikely that a $18.5 million settlement would have been obtained for the benefit of the Class.

The $18.5 million cash settlement is a highly favorable result for the Class that was achieved as a direct result of the skill and tenacity of Class Counsel's prosecution of this Litigation on behalf of the Class. There is no question that Class Counsel overcame difficult obstacles and took significant risks in obtaining this favorable result for the Class. As a result of this settlement, Class Members will now receive compensation for their losses in for each share of Osiris common stock they purchased or otherwise acquired during the Class Period, and will avoid the substantial expense, delay, and uncertainty of continued litigation.

[26] Kathrein Decl. ¶¶19.

[27] *Grayson v. Anderson*, 816 F.3d 262, 269 (4th Cir. 2016) (quoting Fed. R. Civ. P. 1).

2. The quality, skill, and efficiency of class counsel supports the requested fee

This settlement was achieved by Class Counsel – who include some of the preeminent class action attorneys in the country – with decades of experience in prosecuting and trying complex class actions, and counsel with a well-respected reputation for practice in this Court.[28] As the court recognized in *Edmonds v. United States*, 658 F. Supp. 1126, 1137 (D.S.C. 1987), the "prosecution and management of a complex national class action requires unique legal skills and abilities." Moreover, "[t]he opinion of experienced class action counsel, with substantial experience in litigation of similar size and scope, is an important consideration."[29] These unique skills and experiences were called upon here and support the requested fee. From the outset, Class Counsel engaged in a concerted effort to obtain the maximum recovery for the Class. The substantial recovery obtained for the Class is the direct result of the significant efforts of highly skilled and specialized attorneys who possess substantial experience in the prosecution of complex securities class actions.

Class Counsel's efforts in efficiently bringing this Litigation against Defendants to a successful conclusion are the best indicator of the experience and ability of the attorneys involved. That Class Counsel have managed this action in a disciplined and pragmatic fashion confirms that this Litigation was ably prosecuted for the benefit of the Class. As discussed above, Class Counsel are well regarded nationally for their successful representation of clients

[28] *See* Hagens Berman's Firm Resume, previously submitted at Exhibit D to Peter Borkon's Declaration In Support of Unopposed Motion for Preliminary Approval (ECF No. 94-10). *See also* Memorandum in Support of Motion to Appoint Lead Plaintiff and to Approve Proposed Lead Plaintiff's Choice of Lead and Liaison Counsel Application to Appoint Hagens Berman Interim Lead Counsel, at 8-9 (ECF No. 20-1).

[29] A*rchbold v. Wells Fargo Bank, N.A.*, No. 3:13-cv-24599, 2015 WL 4276295, at *2 (S.D. W. Va. July 13, 2015).

in complex class action matters as well as their reputation for practice in this Court. This factor supports Class Counsel's fee application.

3. The complexity and duration of the case support the requested fee

Another important factor is the complexity and duration of the litigation. Courts recognize that securities fraud cases can be "highly complex" because "[e]lements such as scienter, reliance, and materiality of misrepresentation are notoriously difficult to establish" and that "[p]roving damages [would] further implicate complex economic modeling at the hands of sophisticated experts."[30] The complexity and duration of the case, and the novelty and difficulty of the legal issues raised, all support an award of attorneys' fees.

The complexity of the issues is a significant factor to be considered in making a fee award. While securities cases have always been complex and difficult to prosecute, the PSLRA has only increased the difficulty in successfully prosecuting a securities class action. From the outset, this post-PSLRA action was an especially difficult and highly uncertain securities case, with no assurance whatsoever that the case would survive Defendants' attacks on the pleadings, motion(s) for summary judgment, trial and appeal. Courts have recognized that "[l]ittle about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation."[31] Moreover, it is "appropriate to take this risk into account in determining the appropriate fee to award."[32] In particular, "securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA. The Act imposes

30 *Mills*, 265 F.R.D. at 263.

31 *Teachers' Ret. Sys. v. A.C.L.N., Ltd.*, No. 01-CV-11814(MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004).

32 *In re Am. Bank Note Holographics*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001).

many new procedural hurdles . . . . It also substantially alters the legal standards applied to securities fraud claims in ways that generally benefit defendants rather than plaintiffs."[33]

In order to succeed on the §10(b) claim, Lead Plaintiff would have the substantial burden of proving, *inter alia*, that each Defendant was responsible for an omission or a misstatement that was material, that the omission or misstatement impacted the market price of Osiris common stock and caused damage to the Class, and that each Defendant acted with scienter.[34] In cases of this complexity, success at summary judgment or at trial is never certain. Even if Lead Plaintiff was ultimately successful at trial, the case would likely continue through one or more levels of appellate review. In complex and substantial cases such as this, it must be recognized that even a victory at the trial stage does not guarantee ultimate success. Both trial and judicial review are unpredictable and could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself.

Despite the complexity of the issues raised, the skill and acumen of Class Counsel secured an excellent result and significant benefits for the Class. Together with the complexity of the case, the duration of the case – three years of investigation, litigation, and extensive settlement negotiations – also strongly supports approval of the requested fee.

4. The Risks entailed in undertaking the litigation, including the risk of nonpayment support the requested fee

The 25% fee request is also reasonable in light of the contingent nature of class counsel's representation. Class Counsel assumed a risk that the case would yield no recovery and leave them uncompensated. Unlike counsel for Defendants who are paid an hourly rate and

33 *Karcich v. Stuart (In re Ikon Office Sols., Inc., Sec. Litig.)*, 194 F.R.D. 166, 194-195 (E.D. Pa. 2000).

34 *See generally In re PEC Solutions, Inc. Sec. Litig*., 418 F.3d 379, 387 (4th Cir. 2005).

paid for their expenses on a regular basis, Class Counsel have not been compensated for their time or expense in representing the Class. "Courts have long recognized that the public interest is served by rewarding attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing at all for their work."[35] "This mirrors the established practice in the private legal market of rewarding attorneys for taking the risk of nonpayment by paying them a ***premium*** over their normal hourly rates for winning contingency cases."[36] And "[c]ontingent fees that may ***far exceed*** the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose."[37]

A determination of a fair fee must include consideration of the contingent nature of the fee and the difficulties which were overcome in obtaining the settlement. Here, counsel for the classes have spent more than three years investigating and litigating this case, without receiving any compensation to do so. Such burdens are significant, even for law firms of the stature of Class Counsel. For instance, the fact that no money was coming in did not relieve Class Counsel from having to pay the salaries of the associates and staff working on this case, or from having to cover non-reimbursable overhead expenses like rent. Class counsel floated these expenses while assuming the risk that there might never be ***any*** repayment.[38] They also

[35] *Ching v. Siemens Indus.*, No. 11-cv-04838-MEJ, 2014 WL 2926210, at *8 (N.D. Cal. June 27, 2014) (emphasis added).

[36] *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1051 (9th Cir. 2002).

[37] *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994) (emphasis added).

[38] *See Kirven v. Cent. States Health & Life Co*., No. 3:11-2149-MBS, 2015 WL 1314086, at *13 (D.S.C. Mar. 23, 2015) ("Class counsel were retained on a contingency basis, not an hourly basis, and to date have received no reimbursement for fees or expenses from Plaintiff."); *see also*

advanced over $21,631.91 in expenses, interest-free, prosecuting this action, including all expert fees and expenses, which are a substantial but necessary burden in any securities action. "This substantial outlay, when there is a risk that none of it will be recovered, further supports the award of the requested fees."[39] So a 25% award would reasonably compensate Class Counsel for carrying the financial burdens of this risky case.[40]

The risk of no recovery in complex cases of this type is very real. There are numerous class actions in which plaintiffs' counsel expended hundreds of hours and yet received no remuneration whatsoever despite their diligence and expertise.[41] Even plaintiffs who get past summary judgment and succeed at trial may find their judgment overturned on appeal or on a post-trial motion.[42]

Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1376-77 (9th Cir. 1993) ("Class counsel, however, have the case on a contingency. Moreover, it is a double contingency; first, they must prevail on the class claims, and then they must find some way to collect what they win.").

[39] *In re Omnivision Techs.*, 559 F. Supp. 2d at 1047.

[40] *See Kirven*, , 2015 WL 1314086, at *3 ("A contingency fee arrangement placed a substantial risk of loss on class counsel, who would have received no payment for their representation had they not been successful in pressing the legal issue before the South Carolina Supreme court.").

[41] *See e.g., In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 994 (D. Minn. 2005) ("[p]recedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy.").

[42] *See, e.g., Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012) (affirming judgment as a matter of law on the basis of loss causation following a jury verdict partially in plaintiffs' favor); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1233 (10th Cir. 1996) (Tenth Circuit overturned securities fraud class action jury verdict for plaintiffs in case filed in 1973 and tried in 1988 on the basis of 1994 Supreme Court opinion); *In re Apple Computer Sec. Litig.*, No. C-84-20148(A)-JW, 1991 WL 238298, at *1 (N.D. Cal. Sept. 6, 1991) (verdict against two individual defendants, but court vacated judgment on motion for judgment notwithstanding the verdict); *Backman v. Polaroid Corp*., 910 F.2d 10, 18 (1st Cir. 1990) (where the class won a substantial jury verdict and motion for J.N.O.V. was denied, on appeal the judgment was reversed and the case was dismissed – after 11 years of litigation); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 309 (2d Cir. 1979) (multimillion dollar judgment reversed after lengthy trial).

Because the fee in this matter was entirely contingent, the only certainties were that there would be no fee without a successful result and that such a result would be realized only after considerable and difficult effort. Class Counsel committed significant resources of both time and money to the vigorous and successful prosecution of this action for the benefit of the Class. The contingent nature of counsel's representation strongly favors approval of the requested fee.

5. Awards in Similar Cases

Courts often look at fees awarded in comparable cases to determine if the fee requested is reasonable. If this were a non-representative litigation, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery. As Supreme Court Justices Brennan and Marshall observed in their concurring opinion in *Blum*: "In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery." *Blum*, 465 U.S. at 903*; *see also Ikon*, 194 F.R.D. at 194 (in private contingent litigation, fee contracts have traditionally ranged between 30% and 40% of the total recovery). Thus, the requested fee is below the customary contingent fee in the private marketplace and supports a fee award of 25%.

The requested fee is also in accordance with the median fee awards for class actions in the Fourth Circuit based on an empirical study of attorneys' fees, known as the EMG Study.[43] The study looked at awards in over 450 class actions between 2009 and 2013, and found that "[o]n average, fees were 27% of gross recovery during the 2009-2013 period, which is higher than the average fee percentage of 23% that we reported in our analyses of the 1993-2008

[43] Kathrein Decl., Ex. C (Eisenberg, Miller & Germano, *Attorneys' Fees in Class Actions: 2009-2013*) ("EMG Study").

period."[44] And of the 22 settlements in the Fourth Circuit, the mean and median awards were 26% and 25%, respectively.[45]

The requested fee is also supported by fee awards from district courts within the Fourth Circuit and courts nationwide in securities and other class actions. For example, in *Deem*, the Court noted that "the one- third requested by counsel is very much in line with fee awards in similar common-fund cases." *Deem v. Ames True Temper, Inc.*, No. 6:10-cv-01339, 2013 WL 2285972, at *6 (S.D. W. Va. May 23, 2013).

- *Deem*, 2013 WL 2285972, at *3 (awarding 33% of settlement fund, plus expenses);
- *Jernigan v. Protas, Spivok & Collins, LLC* (D.Md. Sep. 20, 2017, Civil Action No. ELH-16-03058) 2017 WL 4176217, at *7 (awarding 40% of settlement fund).
- *Helmick v. Columbia Gas Transmission*, No. 2:07-cv-00743, 2010 WL 2671506, at *5 (S.D. W. Va. July 1, 2010) (awarding one-third of settlement fund in fees);
- *Menkes v. Stolt-Nielsen S.A.*, 270 F.R.D. 80 (D. Conn. 2010) (awarding fees of 33-1/3% of recovery, plus expenses);
- *In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, No. 02-ML-1475-DT(RCx), 2005 WL 1594389, at *19 (C.D. Cal. June 10, 2005) (awarding one-third of settlement fund);
- *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (upheld fee award of 33.3% of settlement); and
- *In re Old CCA Sec. Litig.*, No. 3:99-0458, 2001 U.S. Dist. LEXIS 21942 (M.D. Tenn. Feb. 9, 2001) (30% fee awarded in $104 million settlement).

The requested fee is also in line with percentage fee and expense awards in the top five 2017 securities class action awards in settlements $100 million or less (25% - 40%).[46]

[44] *Id*. at 947.

[45] *Id*. at 951.

[46] *See* Stefan Boettrich and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: Full-Year Review*, Nera Economic Consulting (Jan. 29, 2018), at 34, http://www.nera.com/content/dam/nera/publications/2018/PUB_Year_End_Trends_Report_0118_final.pdf.

6. The Lack of Objections Support the Requested Fee Award

The mailing and distribution of the Notice of Pendency and Proposed Settlement of Class Action (the "Notice") and the publishing of the Summary Notice was deemed appropriate by the Court in its September 4, 2018 Order. To date, no objection to the Settlement has been received. A "lack of objections . . . weighs heavily in favor of [the settlement's] adequacy."[47] As the Fourth Circuit has instructed, the "attitude of the members of the class, as expressed directly or by failure to object, after notice, to the settlement, is a proper consideration for the trial court, though a settlement is not unfair or unreasonable simply because a large number of class members oppose it."[48]

Here, as of the date of this filing there were no objections received. As such, there is no opposition from any Class member, thus confirming the Settlement's reasonableness and adequacy.

7. Important Public Policy Considerations Support the Requested Fee Award

The federal securities laws are remedial in nature and, in order to effectuate their purpose of protecting investors' private lawsuits, are to be encouraged.[49] The Supreme Court has emphasized that private securities actions such as this provide "provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC]

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[47] *Decohen v. Abbasi*, LLC, 299 F.R.D. 469, 480 (D. Md. 2014), *citing In re Mills Corp. Sec. Litig*., 265 F.R.D. 246, 257 (E.D. Va. 2009).

[48] *Flinn v. FMC Corp*., 528 F.2d 1169, 1173 (4th Cir. 1975).

[49] *See Basic Inc. v. Levinson*, 485 U.S. 224 (1988); *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985); *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983).

action.'"[50] Indeed, the ultimate effectiveness of these remedies may largely depend on the efficacy of the class action device.

Moreover, only a small number of firms have the expertise, resources, and inclination to lead the prosecution of cases such as this one, as the overwhelming majority of firms with the expertise and resources lack the inclination due to their defense orientation. And the number of those plaintiffs' firms who have proven their willingness and ability to carry such a case through trial is even smaller yet.[51] As this Court has recognized in other cases, undertaking representation on a fully contingent basis is a risk and effort that deserves to be awarded appropriately.[52]

Contingent fees are good for clients and the public alike. In exchange for increased predictability, decreased bean counting, and unlimited protection against downside risks—including the risk of a zero dollar recovery—a client agrees to pay its attorneys an enhanced fee if and only if the client recovers. And because contingent fees are almost always determined as a percentage of the client's recovery, such fees are necessarily aligned with and proportional to the results achieved for that client—in short, the client only pays for what it gets.[53] Lest contingent fees disappear altogether, the law must recognize both sides of the

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[50] *Bateman*, 472 U.S. at 310 (citation omitted); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (noting that the Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions).

[51] *See In re WorldCom, Inc. Secs. Litig*., 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) ("*In re WorldCom I*") ("[i]n order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives").

[52] *In re WorldCom, Inc. Secs. Litig*., No. 02 Civ. 3288, 2004 WL 2591402, at *20 (S.D.N.Y. Nov. 12, 2004).

[53] *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 887 (1987) ("[E]ven

bargain—namely, a significant upside fee for successful contingent representations. If it instead becomes that lawyers must not only bear all of the downside risk but must also do so only for the prospect of being paid what they would have been paid by the hour, the law will discourage sophisticated counsel from pursuing risky representations on behalf of non-wealthy clients.[54]

Private attorneys should be encouraged to take the risks required to represent those who would not otherwise be protected from securities fraud. Accordingly, an award of the fee requested herein would be fully consistent with important public policy considerations.

8. Class Counsel's Fee Request is Reasonable Using a Lodestar Cross-Check

As discussed above, Class Counsel have requested an award of attorneys' fees and expenses in the amount of 25% of the Settlement Fund of $18,500,000.00, specifically $4,625,000.00.

Some courts use a lodestar cross-check to determine the reasonability of the percentage award. "The purpose of a lodestar cross-check is to determine whether a proposed fee award is excessive relative to the hours reportedly worked by counsel, or whether the fee is within some reasonable multiplier of the lodestar."[55] "Importantly, 'where the lodestar fee is used as a mere cross-check to the percentage method of determining reasonable attorneys' fees, the hours

uninformed clients can align their attorney's interests with their own by compensating them through a percentage-of-recovery fee formula.").

[54] *See Vizcaino II*, 290 F.3d at 1051 ("In common fund cases, 'attorneys whose compensation depends on their winning the case must make up in compensation in the cases they win for the lack of compensation in the cases they lose.'" (citation omitted)).

[55] *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 688 (D. Md. 2013) (citing *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294 at 306 (3rd Cir. 2005).

documented by counsel need not be exhaustively scrutinized by the district court.'"[56] "Courts have generally held that lodestar multipliers falling between 2 and 4.5 demonstrate a reasonable attorneys' fee."[57] During the period November 23, 2015 through October 31, 2018, Hagens Berman performed more than 1,400.20 hours of relevant work in connection with this litigation, corresponding to a lodestar amount of $1,008,218.50 based on the comparable rates to law firms specializing in this area of practice as of October 31, 2018.[58] During the period November 23, 2015 through October 31, 2018, Hirshler Fleischer, PC performed 21.90 hours of relevant work in connection with this litigation, corresponding to a lodestar amount of $12,610.50 based on its usual and customary hourly rates as of October 31, 2018.[59]

In total Class Counsel's lodestar through October 31, 2018 was over $1,020,829.

While the requested fee is a 4.53 multiplier of Class Counsel's current lodestar, under the circumstances, that multiplier still falls within the reasonable range. First, as noted above, more hours will be expended over the next 10 months, at a minimum. Second, in this case, Class Counsel specifically held off building up hours to save the Company's cash and insurance coverage, and spare needless motion practice and amendments.[60] It could have engaged in extensive motion practice, forced ant taken extensive discovery, but that would have worked to the detriment of the Class and any resulting recovery. Instead, with efficiency Plaintiffs have recovered as much as 86% of maximum damages, from a company whose financial situation was

[56] *Id.* (quoting I*n re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d 383, 385 (D. Md. 2006)).

[57] *Singleton*, 976 F. Supp. 2d at 689 (citing *Goldenberg v. Marriott PLP Corp.*, 33 F. Supp. 2d 434, 439 (D. Md. 1998)).

[58] Kathrein Decl. ¶¶ 27.

[59] Travell Decl. ¶¶ 9.

[60] See ECF 61, 62, 65, 68, 69, 73.

in question. Accordingly, under the circumstances, a 25% recovery with a 4.53 multiplier on current lodestar is reasonable.

C. Class Counsel's Expenses Are Reasonable and Were Necessarily Incurred.

Class Counsel requests reimbursement for $21,631.91 in expenses incurred in the prosecution of this complex case.[61] These expenses reflect reasonable costs expended for purposes of prosecuting this action and thus should be paid. Class Counsel maintained substantial incentives to control out-of-pocket expenses in this case due to the high risk they would not be reimbursed and the near certainty that many years would pass before Class Counsel could recoup the expenses.

Courts in routinely grant expense requests in common fund cases as a matter of course.[62] All of the expenses for which Class Counsel requests reimbursement here are of the type normally incurred in a complex action (expert-witness costs, travel, research, and court filings, etc.) and are appropriate for reimbursement here.[63]

D. An Incentive Award Should Be Granted to Lead Plaintiff.

Class Counsel requests that the Court approve an incentive award in the amount of $4,000 for Lead Plaintiff and Class Representative Dr. Raffy Mirzayan, to be deducted from the

[61] Kathrein Decl. Ex. B; Travell Decl. Ex. 2

[62] *Synthroid Mktg.*, 264 F.3d at 722; *Strang*, 890 F. Supp. at 503; *see also Kabore v. Anchor Staffing, Inc.*, No. L-10-3204, 2012 WL 5077636, at *10 (D. Md. Oct. 17, 2012) ("It is well-established that plaintiffs who are entitled to recover attorneys' fees are also entitled to recover reasonable litigation-related expenses as part of their overall award.").

[63] *See Spell v. McDaniel*, 852 F.2d 762, 771 (4th Cir. 1988) (stating that that such costs may include "those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services.") (internal quotations omitted); *see also Almendarez v. J.T.T. Enters. Corp.*, No. JKS 06-68, 2010 WL 3385362, at *7 (D. Md. Aug. 25, 2010) (listing "necessary travel, depositions and transcripts, computer research, postage, court costs, and photocopying" as examples of costs that have been charged) (*citing Vaughns v. Bd. of Educ. of Prince George's Cnty.*, 598 F.Supp. 1262, 1289-90 (D. Md. 1984)).

Settlement Fund. An incentive award "compensates the Plaintiffs and class members for their contribution to the process of the litigation."[64] Here, the Lead Plaintiff spent a significant amount of time contributing to the litigation and benefiting the class by reviewing the relevant documents; staying apprised of developments in the case and making himself available to Class Counsel; providing Class Counsel with extensive information and materials regarding his investments; and conferring with counsel throughout the litigation. An award of $4,000 is also consistent with (and even less than) incentive awards in other cases.[65]

IV. CONCLUSION

For all the above-stated reasons, Class Counsel respectfully request that the Court award attorneys' fees of 25% of the Settlement Fund, expenses in the amount of $21,631.91 plus interest on both at the same rate as earned by the Settlement Fund, and an incentive award in the amount of $4,000 for Lead Plaintiff.

Dated: November 19, 2018

Respectfully Submitted,

/s/ Wayne G. Travell

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[64] *In re Tyson Foods Inc*., No. RDB-08-1982, 2010 WL 1924012, at *4 (D. Md. May 11, 2010). *See also Smith v. Toyota Motor Credit Corp*., No. WDQ-12-2029, 2014 WL 4953751, at *2 n.5 (D. Md. Oct. 2, 2014) *citing Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) ("Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit.").

[65] *See e.g., Boyd v. Coventry Health Care, Inc*., 299 F.R.D. 451, 469 (D. Md. 2014) (approving a "relatively modest" incentive payment of $5,000 to each Named Plaintiff); *McDaniels v. Westlake Servs., LLC*, No. ELH-11-1837, 2014 WL 556288, at *12 (D. Md. Feb. 7, 2014) (approving the requested incentive award of $5,000 as "both reasonable and within the range approved by this and other courts.").

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Lead Counsel for the Class

CERTIFICATE OF SERVICE

I hereby certify that I am the ECF User whose ID and password are being used to electronically file the foregoing with the Clerk of the Court using the CM/ECF system on November 19, 2018, which will send notification of such filing to the e-mail addresses registered, as denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

/s/ Wayne G. Travell
Wayne G. Travell