IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LORD ABBETT AFFILIATED FUND, INC., *et al.*, Individually and On Behalf of All Others Similarly Situated, Plaintiffs, v. NAVIENT CORPORATION, *et al.*, Defendants.	Case No. 1:16-cv-112-MN

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Court-appointed Lead Counsel, Bernstein Litowitz Berger & Grossmann LLP ("BLB&G"), respectfully submits this memorandum of law in support of its motion for: (i) an award of attorneys' fees for all Plaintiffs' Counsel[1] in the total amount of 20% of the Settlement Fund; and (ii) an award of $2,878,030.51 in litigation expenses reasonably and necessarily incurred by Plaintiffs' Counsel in prosecuting and resolving the Action.[2]

PRELIMINARY STATEMENT

Plaintiffs' Counsel have vigorously litigated this securities class action over the last five years on a fully contingent basis, without receiving any compensation to date. The litigation was hard-fought and faced material risks. As such, Plaintiffs' Counsel had to—and did—dedicate substantial effort to the Action from its outset. Indeed, Plaintiffs' Counsel fought two heavily contested pleading motions and, after the whole case was dismissed, prevailed in getting securities claims sustained. Next, Lead Counsel succeeded in getting the Classes certified and completed extensive and hard-fought fact and expert discovery, including the review and analysis of approximately six (6) million pages of documents and a total of thirty-three (33) depositions. Lead Counsel then fully briefed summary judgment and *Daubert* motions, which were pending before the Court at the time the Settlement was reached, and began preparing for trial.

Plaintiffs' Counsel's massive and sustained litigation effort led to the $35 million Settlement for the benefit of the Classes. If approved, the proposed Settlement would rank as the

[1] BLB&G is referred to herein as "Lead Counsel." The term "Plaintiffs' Counsel" refers to (i) Lead Counsel BLB&G, (ii) liaison counsel Friedlander & Gorris, P.A, (iii) prior lead counsel, Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser"), and (iv) prior liaison counsel Morris and Morris LLC.

[2] Unless otherwise defined, capitalized terms have the same meanings as set forth in the Stipulation and Agreement of Settlement dated November 16, 2021 (ECF No. 339-1) ("Stipulation") or in the Declaration of Jeremy P. Robinson ("Robinson Decl."), filed herewith. Citations to "¶__" refer to paragraphs in the Robinson Declaration and citations to "Ex. __" refer to its exhibits.

fifth largest PSLRA securities class action settlement in the history of this District. It represents an excellent result for the Classes because it provides substantial and prompt compensation to Class Members while avoiding the significant risks and delay of continued litigation, including the risk that there may be no recovery at all. Having achieved a significant monetary recovery after over five years of litigating this case without any payment, Plaintiffs' Counsel seek attorneys' fees in the amount of 20% of the Settlement Fund (plus interest), as well as payment for the litigation expenses that Plaintiffs' Counsel incurred in prosecuting the Action for the benefit of the Classes.

Lead Counsel respectfully submits that Plaintiffs' Counsel's hard work, skill, and persistence fully merit the requested 20% fee award here. First, the requested fee is well within the range of fees awarded on a percentage basis in securities class actions with comparable recoveries. The requested fee percentage is also reasonable under the relevant factors, including the quality of the result achieved, the extent and quality of Plaintiffs' Counsel's effort, the complexity and duration of the litigation and the risk of non-payment, and the lodestar cross-check. Plaintiffs' Counsel faced multiple risks inherent in the Action from the outset. Indeed, these substantial risks were manifested when the Action was initially dismissed in its entirety. Even after Plaintiffs prevailed in defeating a second motion to dismiss and obtained certification of the Classes, there was serious risk that Defendants might prevail at summary judgment, *Daubert* motions, at trial, or on appeal. To be sure, Defendants launched vigorous challenges to every single element of Plaintiffs' securities law claims. Through their diligence and efforts, Plaintiffs' Counsel overcame these obstacles to secure a meaningful recovery for the Classes.

Second, Plaintiffs' Counsel dedicated a total of over 52,896.25 hours of attorney and other professional staff time over more than five years of litigation to bring the Action to this favorable resolution for Class Members. ¶193. In class actions like this one, which are prosecuted on a

contingent-fee basis, courts often award fees representing a positive "multiplier" of counsel's lodestar (often one to four times the amount of their lodestar) to compensate counsel for taking the risks of non-recovery and other factors. Here, Plaintiffs' Counsel's requested fee is a "*negative*" lodestar multiplier of 0.28. ¶194. This means that, if awarded, the requested 20% fee will result in a discount—specifically a substantial 72% discount—on Plaintiffs' Counsel's total lodestar, which further supports the reasonableness of the requested fee.

Third, the fee request has the full support of Plaintiffs. *See* Declaration of Lawrence B. Stoller, submitted on behalf of the Lord Abbett Funds (Ex. 1) ("Stoller Decl.") ¶10. The Lord Abbett Funds—sophisticated institutional investors that actively supervised the Action—have endorsed the fee request and believe that a 20% fee award is reasonable in light of the result achieved in the Action, the quality of the work counsel performed, and the risks of continued litigation. *Id.* Thus, the fee result is entitled to a "presumption of reasonableness." *In re ViroPharma Inc. Sec. Litig.*, 2016 WL 312108, at *15 (E.D. Pa. Jan. 25, 2016) ("Where the Lead Plaintiff approves the Lead Plaintiff's counsel's request[ed] fee award – as Lead Plaintiff does here – the Court should afford the fee requested a presumption of reasonableness.").

Fourth, Lead Counsel also seeks to recover the litigation expenses incurred by Plaintiffs' Counsel in prosecuting and resolving this litigation, which total $2,878,030.51 during the more than five years of litigation. As discussed below, these expenses were reasonable and necessary for the prosecution and resolution of this complex litigation and are of the type that are routinely charged to clients in non-contingent litigation. Indeed, the largest component, roughly 81%, of the expenses relate to expert costs, including accounting, student loan servicing, and loss causation/damages experts who each were essential to this securities class action involving

allegations of improper accounting for loan loss reserves, student loan servicing misconduct, and economic damages arising from securities investments.

For the reasons set forth herein, Lead Counsel respectfully requests that the Court award Plaintiffs' Counsel attorneys' fees in the amount of 20% of the Settlement Fund and payment of litigation expenses in the amount of $2,878,030.51.

ARGUMENT

I. THE STANDARD GOVERNING THE AWARD OF ATTORNEYS' FEES IN COMMON FUND CASES

A. Plaintiffs' Counsel Are Entitled To Compensation From The Common Fund

It is settled law that an attorney whose effort in a lawsuit creates a fund for the benefit of others is entitled to a reasonable fee from that common fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole"); *In re Cendant Corp. Sec. Litig.* ("*Cendant II*"), 404 F.3d 173, 205 (3d Cir. 2005) (attorneys "whose efforts create, discover, increase, or preserve a [common] fund" are entitled to attorneys' fees"); *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig.*, 582 F.3d 524, 540 (3d Cir. 2009); *In re Par Pharm. Sec. Litig.*, 2013 WL 3930091, at *9 (D.N.J. July 29, 2013).

Courts have recognized that, in addition to providing just compensation, awards of fair attorneys' fees from a common fund ensure that "competent counsel continue to be willing to undertake risky, complex, and novel litigation." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000) (citations omitted); *see also In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) ("In order to attract well-qualified plaintiffs' counsel … it is necessary to provide appropriate financial incentives."). Indeed, the Supreme Court has emphasized that

private securities actions, such as the instant action, provide "a most effective weapon in the enforcement" of the securities laws and are "necessary supplement to [SEC] action." *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 318-19 (2007).

Courts in this Circuit consistently endorse these principles. *See, e.g., Schuler v. Medicines Co.*, 2016 WL 3457218, at *8 (D.N.J. June 24, 2016) (stating that the common fund doctrine encourages the recovery of litigation costs and attorneys' fees); *In re Ikon Office Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 192 (E.D. Pa. 2000) ("[T]here is no doubt that attorneys may properly be given a portion of the settlement fund in recognition of the benefit they have bestowed on class members.").

B. The Requested Fee Enjoys A Presumption Of Reasonableness Because It Has Been Authorized By The Court-Appointed Plaintiffs

Plaintiffs, who took an active role in the litigation and closely supervised the work of Plaintiffs' Counsel, support the approval of the requested fee based on, among other things, the significant recovery obtained for the Classes, the work performed by Lead Counsel, and the risks of the Action. *See* Ex. 1 ¶¶6, 8. Plaintiffs' endorsement of the fee request further supports its approval. *See, e.g.*, *In re Lucent Techs., Inc. Sec. Litig.*, 327 F. Supp. 2d 426, 442 (D.N.J. 2004) ("Significantly, the Lead Plaintiffs, both of whom are institutional investors with great financial stakes in the outcome of the litigation, have reviewed and approved Lead Counsel's fees and expenses request.").

While approval of the fee is left to the sound discretion of the Court, the fact that the fee request is based on an *ex ante* fee agreement that the Lord Abbett Funds and BLB&G entered into at the outset of BLB&G's engagement in this matter supports the reasonableness of the request. *See, e.g.*, *In re Cendant Corp. Litig.* ("*Cendant I*"), 264 F.3d 201, 282 (3d Cir. 2001) (*ex ante* fee

agreements in securities class actions should be given "a presumption of reasonableness"); *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008) ("We expect . . . that district courts will give serious consideration to negotiated fees because PSLRA lead plaintiffs often have a significant financial stake in the settlement, providing a powerful incentive to ensure that any fees resulting from that settlement are reasonable.").

II. THE REQUESTED FEE IS REASONABLE UNDER EITHER THE PERCENTAGE-OF-RECOVERY METHOD OR THE LODESTAR METHOD

In the Third Circuit, the percentage-of-recovery method is "generally favored" in cases like this one involving a settlement that creates a common fund. *See Sullivan v. DB Invs.*, 667 F.3d 273, 330 (3d Cir. 2011) (favoring percentage of recovery method "because it allows courts to award fees from the [common] fund 'in a manner that rewards counsel for success and penalizes it for failure'"); *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005); *Cendant II*, 404 F.3d at 188 n.7. This is because the percentage-of-recovery method most closely aligns the interests of counsel and the class. *See Rite Aid*, 396 F.3d at 300; *see In re Ocean Power Techs., Inc.*, 2016 WL 6778218, at *24 (D.N.J. Nov. 15, 2016). The Third Circuit also recommends that the percentage award be "cross-check[ed]" against the lodestar method to ensure its reasonableness. *See Sullivan*, 667 F.3d at 330. As explained below, the requested fee is reasonable under either method.

A. The Requested Fee Is Reasonable Under the Percentage-of-Recovery Method

The requested fee of 20% of the Settlement Fund is reasonable under the percentage-of-recovery method. Indeed, it is at the low end of the range of fees commonly awarded in the Third Circuit—where courts have observed that fee awards generally range from 19% to 45% of the settlement fund. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995); *Ikon*, 194 F.R.D at 196. In fact, fee awards most commonly range

from 25% to 33% of the recovery. *See In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 155 (D.N.J. 2013) ("Courts within the Third Circuit often award fees of 25% to 33% of the recovery"); *Louisiana Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*, 2009 WL 4730185, at *8 (D.N.J. Dec. 4, 2009) (same); *In re Datatec Sys., Inc. Sec. Litig.*, 2007 WL 4225828, at *8 (D.N.J. Nov. 28, 2007) (same); *see also In re Wilmington Trust Sec. Litig.*, 2018 WL 6046452, at *9 (D. Del. Nov. 19, 2018) (finding 28% to be a "typical fee percentage" in the Third Circuit).

Relatedly, a review of attorneys' fees awarded in securities class actions specifically with comparable sized settlements in this District and Circuit strongly supports the reasonableness of the requested 20% fee. *See, e.g., In re Heckmann Corp. Sec. Litig.*, No. 1:10-cv-00378-LPS-MPT, slip op. at 2 (D. Del. June 26, 2014) (D.I. 308) (awarding 33.3% of $27 million settlement) (Ex. 7); *In re Veritas Software Corp. Sec. Litig.*, No. 1:04-cv-00831-SLR, slip op. at 2 (D. Del. Aug. 5, 2008) (D.I. 143), *aff'd*, 396 Fed. App'x 815 (3d Cir. 2010) (awarding 30% of $21.5 million settlement) (Ex. 8); *W. Palm Beach Police Pension Fund v. DFC Glob. Corp.*, 2017 WL 4167440, at *9 (E.D. Pa. Sep. 20, 2017) (awarding 25% of $30 million settlement); *In re General Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 431-34 (E.D. Pa. 2001) (awarding one-third of $48 million settlement).[3] Indeed, percentage fees higher than the requested fee here are often awarded in this District and Circuit. *See, e.g., In re Wilmington Trust Sec. Litig.*, 2018 WL 6046452, at *9 (D. Del. Nov. 19, 2018) (awarding 28% of $210 million settlement); *In re Rite Aid Corp. Sec. Litig.*, 362

[3]The fee request is also consistent with fees awarded by courts in other Circuits in similarly sized securities class action settlements. *See, e.g., In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 415-18 (S.D.N.Y. 2018) (awarding 25% of $35 million settlement); *City of Austin Police Ret. Sys. v. Kinross Gold Corp.*, 2015 WL 13639234, at *4 (S.D.N.Y. Oct. 15, 2015) (awarding 30% of $33 million settlement); *In re BellSouth Corp. Sec. Litig.*, 2007 WL 9676400, at *2 (N.D. Ga. Apr. 9, 2007) (awarding 30% of $35 million settlement); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 2019 WL 2077847, at *4 (N.D. Cal. May 10, 2019) (awarding 25% of $48 million settlement); *In re Groupon, Inc. Sec. Litig.*, 2016 WL 3896839, at *4 (N.D. Ill. July 13, 2016) (awarding 30% of $45 million settlement).

F. Supp. 2d 587, 590-91 (E.D. Pa. 2005) (awarding 25% of $126.6 million settlement); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 130-31 (D.N.J. 2002) (awarding 28% of $194 million settlement); *In re Rite Aid Corp. Sec. Litig.* ("*Rite Aid II*"), 146 F. Supp. 2d 706, 734-36 (E.D. Pa. 2001) (awarding 25% of $193 million settlement); *Ikon*, 194 F.R.D. at 192-197 (awarding 30% of $111 million settlement net of expenses). Thus, the percentage-of-fund analysis supports approval.

B. A Lodestar Cross-Check Confirms The Reasonableness of the Requested Fee

The Third Circuit recommends that district courts use counsel's lodestar as a "cross-check" to determine whether the fee that would be awarded under the percentage approach is reasonable. *See Sullivan*, 667 F.3d at 330; *AT&T*, 455 F.3d at 164.[4] "The lodestar cross-check serves the purpose of alerting the trial judge that when the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method." *Rite Aid*, 396 F.3d at 306. "Conversely, where the ratio . . . is relatively low, the cross-check can confirm the reasonableness of the potential award under the [percentage] method." *In re Schering-Plough Corp. ENHANCE Sec. Litig.*, 2013 WL 5505744, at *33 (D.N.J. Oct. 1, 2013).

Fee awards in class actions with contingency risks, such as this one, routinely represent *positive* multipliers of counsel's lodestar to account for the possibility of non-payment. *See Rihn v. Acadia Pharm. Inc.*, 2018 WL 513448, at *6 (S.D. Cal. Jan. 22, 2018), ("Courts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases" because, in doing so, it provides a "financial incentive to accept contingent-fee cases which may produce nothing."). Indeed, courts often approve fees in class cases that correspond to positive multiples of one to four

[4] Under the "lodestar method," a court multiplies the number of hours each timekeeper spent on the case by the hourly rate, then adjusts that lodestar figure by applying a multiplier to reflect such factors as the risk and contingent nature of the litigation, the result obtained and the quality of the attorneys' work. The multiplier is intended to "account for the contingent nature or risk involved in a particular case and the quality" of the work. *Rite Aid*, 396 F.3d at 305-06.

times the lodestar, and sometimes more. *See Prudential*, 148 F.3d at 341 ("[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied"); *Stevens v. SEI Invs. Co.*, 2020 WL 996418, at *13 (E.D. Pa. Feb. 28, 2020) (approving multiplier of 6.16 and noting that lodestar multipliers "ranging from 1 to 8 are often used in common fund cases" to "compensate counsel for the risk of assuming the representation on a contingency fee basis").

Here, the lodestar cross-check further demonstrates the reasonableness of the requested fee percentage because the fee request is ***substantially below*** Plaintiffs' Counsel's total lodestar. As detailed in the Robinson Declaration, Plaintiffs' Counsel spent 52,896.25 hours of attorney and other professional time prosecuting the Action for the benefit of the Classes through November 16, 2021 (the date Stipulation was executed). ¶193. Plaintiffs' Counsel's lodestar, derived by multiplying the hours spent on the litigation by each attorney or other professional by his or her current hourly rate,[5] is $24,725,945.75. *Id.*

Thus, the requested fee of 20% of the Settlement Fund, or $7 million (plus interest), represents a *negative* multiplier of 0.28 on Plaintiffs' Counsel's lodestar. In other words, Plaintiffs' Counsel will recover just 28% of the value of the time that they dedicated to the Action—or, in other words, they will be compensated at a 72% discount to their lodestar. ¶194. The fact that the requested fee is substantially less than the lodestar strongly supports its reasonableness. *See In re Lithium Ion Batteries Antitrust Litig.*, 2019 WL 3856413, at *8 (N.D. Cal. Aug. 16, 2019) (finding requested fee "particularly appropriate where the lodestar cross-check results in a negative multiplier"); *In re Bear Stearns Cos., Inc. Sec., Derivative & ERISA Litig.*, 909 F. Supp. 2d 259,

[5] The Supreme Court has approved the use of current hourly rates to calculate the base lodestar figure as a means of compensating for the delay in receiving payment, inflation, and the loss of interest. *See Missouri v. Jenkins*, 491 U.S. 274, 284 (1989).

271 (S.D.N.Y. 2012) (negative multiplier was a "strong indication of the reasonableness of the [requested] fee").

Accordingly, the 20% fee request here is reasonable under both the percentage-of-the-fund approach and the lodestar approach.

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

Under Third Circuit law, district courts have discretion in setting an appropriate percentage-based fee award in traditional common fund cases. *See, e.g., Gunter*, 223 F.3d at 195 ("We give [a] great deal of deference to a district court's decision to set fees."). Nonetheless, the Third Circuit has noted that a district court should consider the following factors in exercising its discretion to award fees:

> (1) the size of the fund created and the number of beneficiaries, (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel, (3) the skill and efficiency of the attorneys involved, (4) the complexity and duration of the litigation, (5) the risk of nonpayment, (6) the amount of time devoted to the case by plaintiffs' counsel, (7) the awards in similar cases, (8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations, (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained, and (10) any innovative terms of settlement.

Diet Drugs, 582 F.3d at 541; *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 336-40 (3d Cir. 1998). These fee award factors "need not be applied in a formulaic way . . . and in certain cases, one factor may outweigh the rest." *Diet Drugs*, 582 F.3d at 545; *Schuler*, 2016 WL 3457218, at *9. Here, each of these factors supports the award of the requested 20% fee.

A. The Size of the Common Fund Created and the Number of Persons Benefited Support Approval of the Fee Request

Courts have consistently recognized that the result achieved is the "most critical factor is the degree of success obtained." *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983); *In re Viropharma Inc. Sec. Litig.*, 2016 WL 312108, at *16 (E.D. Pa. Jan. 25, 2016).

Here, Lead Counsel, on behalf of Plaintiffs, secured a Settlement that provides for a substantial and certain payment of $35,000,000 in cash. If approved, the Settlement would rank as the fifth largest PSLRA securities class action settlement in the history of the District of Delaware. As set forth at length in the Robinson Declaration, this recovery also represents 5% to 9.58% of the maximum reasonably likely damages calculated by Plaintiffs' damages expert. ¶¶168-69. Further, while insisting that recoverable damages were zero, Defendants' damages expert opined that—even assuming liability, but excluding the Spin Shares (as Defendants argued would be required)—aggregate maximum recoverable damages were at most $39.54 million (based on Plaintiffs' expert's calculations using Defendants' expert's figures and conclusions). ¶170. Under this scenario, the Settlement represents approximately ***88.5%*** of the maximum possible damages. Either way, the percentage recovery is significant here and well above the percentages in settlements approved by courts within the Third Circuit. *See, e.g.*, *Cendant I*, 264 F.3d at 241 (noting "a range of recoveries . . . for securities class action settlements," including as low as 1.6%).

The Settlement also benefits a large number of investors. To date, the Claims Administrator has mailed 102,900 copies of the Settlement Notice to potential Class Members and their nominees. *See* Ex. 3 ¶4. Accordingly, while the claim-submission deadline is not until April 13, 2022, many Class Members can be expected to benefit from the Settlement Fund. *See In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *5 (E.D. Pa. June 2, 2004) *amended*, 2004 WL

1240775 (E.D. Pa. June 4, 2004) (size of benefitted population "is best estimated by the number of entities that were sent the notice describing the [Settlement]").

B. The Reaction of the Classes To Date Supports Approval

The Settlement Notice, which has been subject to a robust Court-approved notice program, provided a summary of the terms of the Settlement and stated expressly that Lead Counsel would apply for an award of attorneys' fees in an amount not to exceed 20% of the Settlement Fund. *See* "Settlement Notice," attached as Exhibit 1 to Ex. 3 ¶¶ 5, 59. The Settlement Notice also advised Class Members that they could object to the Settlement or fee request and explained the procedure for doing so. *See id.* ¶¶ 63-64. While the February 24, 2022 objection deadline set by the Court has not yet passed, as noted above, no objections have been received to date. Plaintiffs will address any objections that come in subsequently in their reply papers.

C. The Skill and Efficiency of Counsel Support Approval of the Fee Request

Plaintiffs' Counsel's substantial effort resulted in a favorable outcome for the benefit of the Classes. *See AremisSoft*, 210 F.R.D. at 132 ("the single clearest factor reflecting the quality of class counsels' services to the class are the results obtained") (quoting *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 149 (E.D. Pa. 2000)). The substantial and certain recovery obtained for the Classes is the direct result of the significant efforts of highly-skilled attorneys with substantial experience in the prosecution of complex securities class actions.[6] Plaintiffs' Counsel overcame Defendants' motions to dismiss and Defendants' opposition to aspects of class certification in a case with very substantial risks. Plaintiffs' Counsel also pushed the litigation through the completion of extensive fact discovery, expert discovery, and substantial summary judgment and

[6] The experience of BLB&G and the other Plaintiffs' Counsel firms is set forth in their firm resumes, which are attached to the Robinson Declaration as Exhibits 4A, 4B, 4C, and 4D.

Daubert motions. In addition, Lead Counsel's reputation as attorneys who will zealously carry a meritorious case through trial and appeal further enabled them to negotiate the very favorable recovery for the benefit of the Classes. The success of Plaintiffs' Counsel at each stage, against formidable defense counsel, led directly to the $35 million Settlement for the benefit of the Classes.

The quality and vigor of opposing counsel is also relevant in evaluating the quality of the services rendered by Plaintiffs' Counsel. *See, e.g., Ikon*, 194 F.R.D. at 194; *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) ("The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work."). Here, Defendants were zealously represented by Latham & Watkins LLP and Shearman & Sterling LLP, both top-notch defense firms with extensive experience and skill. The ability of Plaintiffs' Counsel to obtain a favorable outcome for the Classes in the face of this formidable legal opposition further confirms the quality of Plaintiffs' Counsel's representation.

D. The Complexity and Duration of the Litigation Support Approval

Securities litigation is regularly acknowledged to be particularly complex and expensive litigation. *See, e.g., Fogarazzo v. Lehman Bros., Inc.*, 2011 WL 671745, at *3 (S.D.N.Y. Feb. 23, 2011) ("securities actions are highly complex"); *In re Genta Sec. Litig.*, 2008 WL 2229843, at *3 (D.N.J. May 28, 2008) ("This [securities fraud] action involves complex legal and factual issues, and pursuing them would be costly and expensive."). The $35,000,000 recovery is substantial in light of the complexity of this case and the significant risks and expense that the Classes would have faced by litigating through trial and the inevitable appeals.

For example, this Action concerned complex issues of accounting for loan loss provisions, specialized student loan servicing practices (like granting forbearance), and technical issues of damages and loss causation—all of which required detailed expert analysis. And, if the litigation had continued, Plaintiffs and Lead Counsel would have been required to advance the case through

a ruling on Defendants' summary judgment motion and the Parties' respective *Daubert* motions. Plaintiffs and Lead Counsel would have also expended substantial time and resources in litigating pretrial issues and preparing for trial, and the trial itself would have been lengthy, expensive, and uncertain.

Moreover, even if the jury returned a favorable verdict after trial, it is likely that any verdict would be the subject of numerous post-trial motions and a complex multi-year appellate process. Indeed, in complex securities cases, "[e]ven a victory at trial is not a guarantee of ultimate success." *See Warner Commc'ns*, 618 F. Supp. at 747-48 ("If Lead Plaintiffs were successful at trial and obtained a judgment for substantially more than the amount of the proposed settlement, the defendants would appeal such judgment. An appeal could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself."). Considering the magnitude, expense, and complexity of this securities case—especially when compared against the significant and certain recovery achieved by the Settlement—Plaintiffs' Counsel's fee request is reasonable. Accordingly, this factor weighs in favor of approval of the requested fee.

E. The Risk of Non-Payment Supports Approval of the Fee Request

Plaintiffs' Counsel undertook this Action on an entirely contingent fee basis, taking the risk that the litigation would yield no or very little recovery and leave them uncompensated for their time, as well as for their out-of-pocket expenses. As explained in detail in the Robinson Declaration, Plaintiffs' Counsel faced numerous significant risks in this case that could have resulted in no recovery at all or a recovery significantly smaller than the Settlement amount. *See In re Schering-Plough Corp. Enhance ERISA Litig.*, 2012 WL 1964451, at *7 (D.N.J. May 31, 2012) (recognizing that the risks created by undertaking an action on a contingency fee basis militates in favor of approval). Courts across the country have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. *See,*

e.g., Warner Commc'ns, 618 F. Supp. at 747-49 (citing cases). This is particularly true in securities litigation like here, which are regarded as "notably difficult and notoriously uncertain" cases. *See Trief v. Dun & Bradstreet Corp*., 840 F. Supp. 277, 281 (S.D.N.Y. 1993).

Because the fee in this matter was entirely contingent, the only certainty was that there would be no fee without a successful result, and that such a result would be realized only after considerable and difficult effort. Thus, this factor strongly favors approval of the requested fee.

F. The Significant Time Devoted to this Case by Plaintiffs' Counsel Supports Approval of the Fee Request

As set forth above, Plaintiffs' Counsel have expended 52,896.25 hours and incurred $2,878,030.51 in expenses prosecuting this Action for the benefit of the Classes. As more fully discussed above and in the Robinson Declaration, Plaintiffs' Counsel vigorously litigated this Action, including by:

- expending considerable time in the initial investigation of the case;
- working extensively with experts;
- seeking out and interviewing confidential witnesses/former employees with key information that would be used to support the allegations in the amended complaints;
- preparing and filing two amended complaints;
- researching and briefing complex legal issues in connection with Defendants' two motions to dismiss;
- preparing, undertaking, and defending discovery, including through multiple contested hearings regarding the scope of fact and expert discovery;
- fully briefing Plaintiffs' motion for class certification, including preparing and submitting an accompanying report from a market efficiency economist expert;
- reviewing and analyzing over six (6) million pages of documents produced by Defendants, Plaintiffs, and non-parties;
- taking or actively participating in the depositions of nineteen (19) fact witnesses,
- submitting and analyzing twenty-two (22) expert reports, and taking or defending fourteen (14) expert depositions;
- fully briefing a response to Defendants' summary judgment motion and affirmative and defensive Daubert motions;

- preparing detailed submissions in advance of participating in a full-day mediation and engaging in extensive settlement negotiations; and
- beginning trial preparations.

At all times, Plaintiffs' Counsel conducted their work with skill and efficiency, while conserving resources and avoiding any duplication of efforts. The foregoing represents a very significant commitment of time, personnel, and expenses by Plaintiffs' Counsel firms, while taking on the substantial risk of recovering nothing for their efforts. This factor supports approval.

G. The Requested Fee of 20% of the Settlement Fund is within the Range of Fees Typically Awarded in Actions of this Nature

As discussed above in Part III, the requested fee of 20% of the Settlement Fund is well within the range of fees awarded in comparable cases, when considered as a percentage of the fund or on a lodestar basis. Accordingly, this factor strongly supports approval of the requested fee.

H. The Settlement Is Attributable to the Efforts of Plaintiffs' Counsel

Third Circuit courts also consider whether class counsel benefited from a governmental investigation or enforcement action concerning the alleged wrongdoing. *See Prudential*, 148 F.3d at 338. Here, while Navient faced separate lawsuits brought by States Attorneys General (the "State AG Actions") and the Consumer Financial Protection Bureau (the "CFPB Action" and, together with the State AG Actions, the "Government Actions"), those actions did not confer any financial benefit on the Classes—nor any meaningful litigation benefit.

First, none of the financial benefits of the settlement in the State AGs Action inured to Navient's shareholders. *Prudential*, 148 F.3d at 330. The Government Actions—including the recent settlement of the State AG Actions—only conferred a financial benefit on *consumers*, including Navient's borrowers. None of them conferred any financial benefits on Navient investors—as does this Action. To be sure, Plaintiffs here asserted entirely separate claims (securities fraud, not violations of consumer protection laws) and sought independent theories of

recovery for which Plaintiffs could not rely on any Government Action. Thus, the "entire value of the benefits accruing to class members" in this separate securities suit "is properly attributable to class counsel." *AT&T*, 455 F.3d at 173.

Second, the Government Actions did not yield any meaningful litigation benefits in this Action. For example, none of the Government Actions resulted in a final judgment on the merits that Plaintiffs could use affirmatively against any Defendant in this Action. *In re Mullarkey*, 536 F.3d 215, 225 (3d Cir. 2008) (listing requirement of a final judgment for application of *res judicata*). Nor were there any "finally determined issues" in the Government Actions that Plaintiffs could use to bar Navient's re-litigation of those issues on grounds of collateral estoppel. *Id.* Indeed, the Government Actions did not yield any material factual admissions that Plaintiffs could use against any Defendant here. To the contrary, Navient has at all times continued to aggressively deny any wrongdoing related to the Government Actions. *See* ¶¶127-129. Even in connection with Navient's recent settlement with several state Attorneys General (concerning a far broader range of conduct over nearly two decades and primarily involving Navient's predecessor—not Defendants), Navient expressly denied any wrongdoing and issued a press release maintaining the claims were "unfounded" and that Navient agreed to settle the "baseless allegations" solely "to avoid the burden, expense, time and distraction it would take to resolve these claims through state-by-state litigation and investigations." *See* Ex. 6 at 4-5. Navient also filed a vigorous summary judgment motion in the CFPB Action. Even as recent as January 26, 2022, Defendant Remondi declared on an earnings call that Navient disputed "all of the theories and claims made" by the State AGs, asserted that there was "no evidence" to support those claims, and reiterated that the Company "remain committed to a vigorous defense" of the ongoing CFPB Action. ¶129. Thus, if

anything, Navient's continuing denials of wrongdoing in the Government Actions only heightened the risk faced by Plaintiffs here.

Although Plaintiffs obtained certain limited discovery that Navient had also produced to the State AGs and in the CFPB Action—which happened only due to Lead Counsel's zealous advocacy, including in part a motion to compel—ultimately Lead Counsel developed the record that enabled the Settlement to be reached through their own efforts. Indeed, Lead Counsel here had to litigate the issues in this Action without any help from the Government Actions. For example, Plaintiffs and Lead Counsel negotiated their own discovery protocols, hired their own experts, and took their own fact and expert depositions. ¶132. None of these litigation events was consolidated or even coordinated with the Government Actions. Accordingly, the entire value of the Settlement achieved is attributable to the efforts by Plaintiffs' Counsel in this litigation. This fact supports a finding of reasonableness regarding the requested fee award. *See, e.g., AT&T*, 455 F.3d at 173.

I. The Percentage Fee That Would Have Been Negotiated Had the Case Been Subject to a Private Contingent Fee Arrangement Supports Approval of the Fee Request

A 20% fee is also consistent with typical attorneys' fees in non-class cases. *See Ocean Power*, 2016 WL 6778218, at *29. If this were an individual action, the customary contingent fee would likely range between 30 and 40 percent of the recovery. *See, e.g., id.*; *Ikon*, 194 F.R.D. at 194 ("[I]n private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery."); *Blum v. Stenson*, 465 U.S. 886, 902 n.19 (1984) (Brennan, J., concurring) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers."). Lead Counsel's requested fee of 20% of the Settlement Fund is lower than these private standards, which also supports a finding of reasonableness regarding the proposed fee.

* * *

Accordingly, the application of the Third Circuit's factors makes clear that Plaintiffs' Counsel's requested fee of 20% of the Settlement Fund (plus interest) is fair and reasonable.[7] Lead Counsel respectfully request that the Court approve the requested fee in full.

IV. LEAD COUNSEL'S APPLICATION FOR REASONABLY INCURRED LITIGATION EXPENSES SHOULD BE APPROVED

Counsel in a class action are also entitled to recover expenses that were "'adequately documented and reasonable and appropriately incurred in the prosecution of the class action.'" *ViroPharma*, 2016 WL 312108, at *18; *accord In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 108 (D.N.J. 2001). Accordingly, Lead Counsel respectfully request that this Court approve payment of $2,878,030.51 for litigation expenses that Plaintiffs' Counsel incurred in connection with this Action through February 9, 2022. A complete breakdown by category of the expenses incurred by Plaintiffs' Counsel is set forth in Exhibit 5 to the Robinson Declaration. These expense items are billed separately by Plaintiffs' Counsel, and such charges are not duplicated in the firm's hourly billing rates. All these expenses, which are set forth in declarations submitted by Plaintiffs' Counsel (Exs. 4A-4D), were reasonably necessary for the prosecution and settlement of this Action.

The expenses for which Lead Counsel seeks payment 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, document management costs, expert/consultant fees, online research, court

[7] Another factor courts consider is whether the settlement contains "any innovative terms." *Diet Drugs*, 582 F.3d at 541; *Prudential*, 148 F.3d at 340. This Settlement does not because Lead Counsel believes that an all-cash recovery is the best remedy for the injury allegedly suffered by the Classes—namely, losses on their investments in Navient's securities. As such, the lack of innovative terms "neither weighs in favor nor detracts from a decision to award attorneys' fees." *In re Processed Egg Prods. Antitrust Litig.*, 2012 WL 5467530, at *6 (E.D. Pa. Nov. 9, 2012).

reporting and transcripts, photocopying, postage expenses, and mediation. The largest category of expenses, which totaled $2,345,006.34—or approximately 81% of the total expenses—was for the retention of Plaintiffs' testifying experts in financial economics, accounting, statistics, underwriter due diligence, and the student loan industry; as well as for the retention of non-testifying consulting experts, such as a specialized data-consulting firm to assist Plaintiffs and their student loan industry testifying expert in analyzing the massive tranche of loan data produced by Navient. These expenses were essential to prosecuting the Action effectively. As discussed above, the main issues in dispute concerned Navient's loan loss provision accounting, forbearance practices, and the damages suffered by Class Members. Each of these issues required expert testimony. Indeed, Defendants put forward two experts on accounting issues and two experts on forbearances—totaling four experts for Plaintiffs' two. This underscores both how essential expert evidence was to the litigation—and also how economical Plaintiffs and Lead Counsel were regarding expert fees.

The Settlement Notice informed potential Class Members that Lead Counsel would apply for payment of litigation expenses in an amount not to exceed $3,000,000. *See* Ex. 1 to Ex. 3 ¶¶5, 59. The total amount of expenses requested by Plaintiffs' Counsel is $2,878,030.51, an amount below the amount listed in the Settlement Notice. To date, there have been no objections related to the expense application, which has been addressed above.

V. CONCLUSION

For all the foregoing reasons, Lead Counsel respectfully requests that the Court award attorneys' fees in the amount of 20% of the Settlement Fund and $2,878,030.51 in payment of the reasonable litigation expenses that Plaintiffs' Counsel incurred in connection with the prosecution and resolution of the Action.

Dated: February 10, 2022

Respectfully submitted,

/s/ *Christopher M. Foulds*
Joel Friedlander (#3163)
Christopher M. Foulds (#5169)
FRIEDLANDER & GORRIS, P.A.
1201 N. Market Street, Suite 2200
Wilmington, DE 19801
(302) 573-3500
jfriedlander@friedlandergorris.com
cfoulds@friedlandergorris.com

Liaison Counsel for Plaintiffs and the Classes

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Salvatore Graziano (Admitted *pro hac vice*)
Jeremy P. Robinson (Admitted *pro hac vice*)
Jesse L. Jensen (Admitted *pro hac vice*)
Robert F. Kravetz (Admitted *pro hac vice*)
R. Ryan Dykhouse (Admitted *pro hac vice*)
1251 Avenue of the Americas
New York, New York 10020
(212) 554-1400
salvatore@blbglaw.com
jeremy@blbglaw.com
jesse.jensen@blbglaw.com
robert.kravetz@blbglaw.com
ryan.dykhouse@blbglaw.com

Lead Counsel for Plaintiffs and the Classes

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on February 10, 2022, I caused the Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorney's Fees and Litigation Expenses to be served upon the following counsel by CM/ECF and e-mail:

Kelly E. Farnan
farnan@rlf.com
Richards Layton & Finger, P.A.
One Rodney Square
920 N. King Street
Wilmington, DE 19801

Kevin G. Abrams
abrams@abramsbayliss.com
John M. Seaman
seaman@abramsbayliss.com
Abrams & Bayliss LLP
20 Montchanin Road, Suite 200
Wilmington, DE 19807

Peter A. Wald
peter.wald@lw.com
Abid R. Qureshi
abid.qureshi@lw.com
Christopher S. Turner
christopher.turner@lw.com
555 Eleventh Street, NW
Suite 1000
Washington, D.C. 20004

Attorneys for the Navient Defendants

Adam S. Hakki
ahakki@shearman.com
Daniel C. Lewis
daniel.lewis@shearman.com
Daniel Kahn
daniel.kahn@shearman.com
Shearman & Sterling LLP
599 Lexington Avenue
New York, NY 10022-6069

Attorneys for the Underwriter Defendants

/s/ *Christopher M. Foulds*
Christopher M. Foulds (#5169)