UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BENJAMIN MICHAEL MERRYMAN, AMY WHITAKER MERRYMAN TRUST, AND B MERRYMAN AND A MERRYMAN 4TH GENERATION REMAINDER TRUST, individually and on behalf of all others similarly situated, Plaintiffs, v. CITIGROUP, INC., CITIBANK, N.A., and CITIGROUP GLOBAL MARKETS INC., Defendants.	Civil Action No. 1:15-cv-09185-CM-KNF

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

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Lead Counsel Kessler Topaz Meltzer & Check, LLP ("Kessler Topaz"), on behalf of Plaintiffs' Counsel,[1] respectfully submits this memorandum of law in support of its request for an award of attorneys' fees in the amount of 33⅓% of the Settlement Fund. Lead Counsel also seeks reimbursement of $703,434.41 in Litigation Expenses that were reasonably and necessarily incurred in prosecuting and resolving the Litigation, which amount *includes* proposed Service Awards to Plaintiffs in the aggregate amount of $25,000. These requests are supported by (1) the Nirmul Declaration, which details the extensive efforts that led to the successful prosecution of this Litigation and the pending Settlement, including Plaintiffs' contributions to the case; and (2) a declaration submitted on behalf of Kessler Topaz detailing the firm's lodestar and expenses.

I. PRELIMINARY STATEMENT

Plaintiffs, as a result of their efforts and through the work of Lead Counsel, have achieved a Settlement consisting of $14,750,000 in cash plus valuable injunctive relief for the benefit of the Class. Not only does the Settlement recover a significant percentage of Plaintiffs' expert's estimate of the Damages' Class's potential damages for the ADRs covered by the Settlement (*i.e.*, approximately $61.9 million to $68.8 million), but it secures additional injunctive relief in the form of a cap of twenty basis points on Citi's charges for conducting foreign exchange ("Conversions")

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[1] References herein to "Plaintiffs' Counsel" includes Kessler Topaz, along with additional counsel G. Chadd Mason, Esq. of Prevost, Shaff, Mason & Carns, PLLC (formerly of Mason Law Firm, PLC) and Amy C. Martin, Esq. of Amy C. Martin P.A. (formerly of Everett, Wales and Comstock). All other capitalized terms used herein have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated August 20, 2018 (ECF No. 131) ("Stipulation") or in the Declaration of Sharan Nirmul in Support of (I) Plaintiffs' Motion for Final Approval of Proposed Class Action Settlement and Plan of Allocation; and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Nirmul Declaration" or "Nirmul Decl."), filed herewith. Citations to "¶ __" herein refer to paragraphs in the Nirmul Declaration and citations to "Ex. __" herein refer to exhibits to the Nirmul Declaration. Unless otherwise noted, all internal quotation marks and citations are omitted.

from cash distributions issued by foreign companies, and owed to ADR holders. Notably, Citi's agreement to cap its foreign exchange ("FX") charges to twenty basis points applies to *all* Conversions, not just those in connection with the twenty-one ADRs covered by the Settlement, and is an outstanding benefit to the Class given the average spread of over thirty basis points charged for such Conversions by Citi during the Class Period. This cap will provide an incalculable ongoing monetary benefit to the Class and ADR investors as a whole.

This excellent result for the Class was achieved notwithstanding the significant risks Plaintiffs faced in prevailing on their claims, including overcoming Citi's anticipated challenges to liability and damages at summary judgment and trial, as well as obtaining a favorable decision from the Court on the Motion to Intervene that was pending when the Settlement was reached. Had the Court denied this motion, Plaintiffs' claims (and potential damages) would have been *limited to the three ADRs* personally owned by Named Plaintiffs and certified by the Court. Indeed, the prospect of recovering nothing for a substantial portion of the Class was far more tangible in this case than most.

Plaintiffs' Counsel have not received any compensation for their efforts on behalf of the Class. In prosecuting and ultimately resolving this Litigation, Lead Counsel dedicated substantial time and resources—over the course of more than three-and-one-half years—with no guarantee of recovery. As detailed in the Nirmul Declaration, Lead Counsel's efforts included, *inter alia*: (i) conducting a comprehensive pre-complaint investigation into the Conversions at issue in the Litigation which included extensive research of Citi's ADR agreements and analysis of FX pricing to uncover Citi's alleged contractual breaches to ADR holders; (ii) drafting the detailed Complaint; (iii) opposing a change of jurisdictional venue; (iv) opposing two motions to dismiss and Citi's subsequent motion seeking permission to file an interlocutory appeal of this Court's MTD Order;

(v) engaging in extensive discovery, including reviewing and analyzing over 81,000 pages of documents produced by Citi, participating in numerous meet and confers, deposing ten fact witnesses and defending the deposition of Named Plaintiffs; (vi) consulting with an expert to develop a class-wide damages methodology and engaging in expert discovery, including exchanging expert reports, opposing Citi's motion to exclude Plaintiffs' expert and participating in three expert depositions; (vii) moving for class certification; (viii) fully briefing a motion to intervene; (ix) preparing for summary judgment; and (x) participating in months of arm's-length negotiations with Defendant's Counsel, including formal mediation, in an attempt to resolve the Litigation. ¶¶ 15-119.[2] *See also* Section II.D.1 below.

Through May 17, 2019, Lead Counsel has devoted over 8,000 hours to the investigation, prosecution, and resolution of the Litigation, resulting in a total lodestar of $3,738,965.75.[3] If awarded, the fee requested here would yield a modest multiplier of approximately 1.31 on Lead Counsel's lodestar, which falls on the lower end of the range of positive multipliers awarded in other complex cases by courts in this Circuit. *See, e.g., Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *18 (S.D.N.Y. Sept. 9, 2015) (McMahon, J.) ("Courts regularly award lodestar multipliers from 2 to 6 times lodestar in this Circuit, and have been known to award lodestar multipliers significantly greater than the 4.87 multiplier sought here."); *Velez v. Novartis Pharm. Corp.*, 2010 WL 4877852, at *21 (S.D.N.Y. Nov. 30, 2010) (McMahon, J.) (awarding "2.4

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[2] The Nirmul Declaration is an integral part of this submission and, for the sake of brevity, the Court is respectfully referred to it for a detailed description of: the procedural history of the Litigation (¶¶ 15-119); the nature of the claims asserted (¶¶ 11-14); the negotiations leading to the Settlement (¶¶ 135-142); the risks of continued litigation (¶¶ 124-134); and Lead Counsel's efforts on behalf of the Class (¶¶ 121-123).

[3] Since May 17, 2019, Lead Counsel has spent additional time working on its submission in support of final approval of the Settlement and will continue to devote resources to the Litigation through the completion of the Settlement's administration and distribution of the Net Settlement Fund to the Class.

multiplier, an enhancement routinely approved as part of the spectrum for multipliers in Second Circuit class fee cases"). In short, the requested fee is supported by Lead Counsel's vigorous efforts, the risks undertaken in prosecuting Plaintiffs' Claims and, in light of such risks, the results obtained for the Class.

Lead Counsel also respectfully submits that the expenses for which it seeks reimbursement were reasonable and necessary for the successful prosecution and resolution of the Litigation and that the request for Service Awards to Plaintiffs for the efforts they dedicated to the Litigation on behalf of the Class is likewise reasonable and appropriate.

Accordingly, Lead Counsel respectfully submits that its motion for attorneys' fees and expenses should be granted in full.

II. LEAD COUNSEL'S REQUEST FOR ATTORNEYS' FEES IS REASONABLE AND SHOULD BE APPROVED

A. Counsel Is Entitled to an Award of Attorneys' Fees from the Common Fund

The propriety of awarding attorneys' fees from a common fund is well established. *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"); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000) ("the attorneys whose efforts created the [common] fund are entitled to a reasonable fee – set by the court – to be taken from the fund"). The Second Circuit has noted that "[t]he rationale for the [common fund] doctrine is an equitable one: it prevents unjust enrichment of those benefitting from a lawsuit without contributing to its cost." *Id.*, 209 F.3d at 47. Further, courts recognize that awards of fair attorneys' fees from a common fund "serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons," and therefore "to discourage future misconduct of a similar nature." *City of Providence v.*

Aeropostale, Inc., 2014 WL 1883494, at *11 (S.D.N.Y. May 9, 2014) (McMahon, J.), *aff'd, Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015).

B. The Court Should Calculate Fees as a Percentage of the Common Fund

Where a settlement produces a common fund, courts in the Second Circuit have discretion to employ either the percentage of the fund method or the lodestar method in awarding attorney's fees. *Novartis*, 2010 WL 4877852, at *20. Notwithstanding that discretion, calculating fees using the percentage of the fund method has become the trend. *Fleisher*, 2015 WL 10847814, at *14 ("[T]he percentage method continues to be the trend of district courts in this Circuit and has been adopted in the vast majority of circuits.") (alteration in the original); *see also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) ("*Visa*"); *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 416 (S.D.N.Y. 2018); *In re Comverse Tech., Inc. Sec. Litig.*, 2010 WL 2653354, at *2 (E.D.N.Y. June 24, 2010).[4] Moreover, the rationale for compensating counsel in common fund cases on a percentage basis is sound. This method "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Visa*, 396 F.3d at 121. In addition, it decreases the

[4] Other circuits have similarly endorsed the percentage of the fund method. *See, e.g., In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821-22 (3d Cir. 1995); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Brown v. Phillips Petroleum Co*., 838 F.2d 451, 454-56 (10th Cir. 1988). The Eleventh and District of Columbia Circuits require the use of the percentage method in common fund cases. *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 773-74 (11th Cir. 1991); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269-71 (D.C. Cir. 1993). In *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), the Supreme Court recognized that under the "common fund doctrine" a reasonable fee may be "based on a percentage of the fund bestowed to the class . . . ."

burden imposed on courts by eliminating a detailed and time-consuming lodestar analysis,[5] and Court's employing the percentage method often utilize a less rigorous lodestar "crosscheck" on the reasonableness of the requested fee. *Grice v. Pepsi Beverages Co.*, 363 F. Supp. 3d 401, 406 (S.D.N.Y. 2019) (employing cross-check and noting "Second Circuit encourage[s] the practice of requiring documentation of hours as a cross check on the reasonableness of the requested percentage") (alteration in original).

C. The Requested Fee is Reasonable Under Either the Percentage of the Fund or Lodestar Method

Here, whether assessed under the percentage of the fund or lodestar method, Lead Counsel's 33⅓% fee request—representing a modest lodestar multiplier of approximately 1.31—is fair and reasonable.

1. The Fee Request is Reasonable Under the Percentage Method

Lead Counsel's fee request is eminently fair and reasonable under the percentage of the fund method. Indeed, as this Court has observed, "[t]he federal courts have established that a standard fee in complex class action cases like this one, where plaintiffs counsel have achieved a good recovery for the class, ranges from 20 to 50 percent of the gross settlement benefit." *Novartis*, 2010 WL 4877852, at *21; *see also In re Marsh ERISA Litig.*, 265 F.R.D. 128, 149 (S.D.N.Y. 2010) (McMahon, J.) (noting trend of awarding 20–50 percent of recovery and finding fee of one-third to be "fair and reasonable in relation to the recovery and compares favorably to fee awards in other risky common fund cases in this Circuit and elsewhere"); *Maywalt v. Parker & Parsley*

[5] The Second Circuit has expressly approved the percentage method, recognizing that "the lodestar method proved vexing" and had resulted in "an inevitable waste of judicial resources." *Goldberger*, 209 F.3d at 48-50.

Petroleum Co., 963 F. Supp. 310, 313 (S.D.N.Y. 1997) (awarding 33.4% fee and noting "[t]his percentage falls within the normal range of fee awards in similar complex cases").

Ample precedent exists in this Circuit for granting fees in class actions and other complex litigation that are equal to the fee requested here and where the recovery obtained for the class is of comparable size. *See deMunecas v. Bold Food, LLC*, 2010 WL 3322580, at *9 (S.D.N.Y. Aug. 23, 2010) ("Class Counsel's request for 33% of the Fund is reasonable under the circumstances of this case and is consistent with the norms of class litigation in this circuit."); *see also, e.g.*, Ex. 4, Order, *Levin v. Resource Capital Corp. et al.*, No. 1:15-cv-07081-LLS (S.D.N.Y. Aug. 3, 2018), ECF No. 95 (awarding 33% of $9.5 million fund); Ex. 5, *In re Cnova N.V. Sec. Litig.*, Master File No. 1:16-cv-00444-LTS-OTW (S.D.N.Y. Mar. 20, 2018), ECF No. 148 at 5 (awarding 33.3% of $28.5 million fund); *In re China Media Express Holdings, Inc. S'holder Litig.*, 2015 WL 13639423, at *1 (S.D.N.Y. Sept. 18, 2015) (S.D.N.Y. Sept. 18, 2015) (awarding 33.3% of $12 million fund); *City of Providence*, 2014 WL 1883494, at *20 (awarding 33% of $15 million fund); *Id*. at * 12 (citing *In re Apac Teleservs., Inc. Sec. Litig*., No. 97-cv-9145 (S.D.N.Y. June 29, 2001) (awarding 33⅓% of $21 million fund); *Newman v. Caribiner Int'l Inc*., No. 99-cv-2271 (S.D.N.Y. Oct. 25, 2001) (awarding 33⅓% of $15 million fund)); Ex. 6, Order, *Gould, et al v. Winstar, Inc., et al.*, Master File No. 1:01-cv-03014-GBD, (S.D.N.Y. Nov. 13, 2013), ECF No. 363 at 2 (awarding 33.3% of $10 million fund); *In re Giant Interactive Grp., Inc. Sec. Litig*., 279 F.R.D. 151, 165 (S.D.N.Y. 2011) (awarding 33% of $13 million fund); *Khait v. Whirlpool Corp.*, 2010 WL 2025106, at *8 (E.D.N.Y. Jan. 20, 2010) (awarding 33% of $9.25 million fund); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 368 (S.D.N.Y. 2002) (awarding 33⅓% of $11.5 million fund).

2. The Fee Request is Reasonable Under the Lodestar Method

To ensure the reasonableness of a fee awarded under the percentage of the fund method, district courts may cross-check the proposed award against counsel's lodestar. *See Goldberger*, 209 F.3d at 50; *Novartis*, 2010 WL 4877852, at *20 (employing lodestar cross-check and noting "if a percentage of fund figure compares favorably with a lodestar that uses reasonable hourly rates and a reasonable multiplier, it tends to validate the percentage of funds figure").

The work undertaken by Lead Counsel wholly supports the Court's approval of Lead Counsel's fee request. As detailed herein and in the Nirmul Declaration, Lead Counsel exerted substantial efforts in advancing this Litigation in the face of aggressive and highly-skilled defense attorneys for more than three years. Through May 17, 2019, Lead Counsel spent over 8,000 hours of attorney and other professional support time prosecuting the Litigation for the benefit of the Class. Based on these hours, Lead Counsel's lodestar is $3,738,965.75.[6] ¶ 166; *see also* lodestar and expense submission of Sharan Nirmul, on behalf of Kessler Topaz ("Lodestar/Expense Decl.") attached to the Nirmul Declaration as Exhibit 3. Accordingly, the 33⅓% fee request represents a modest multiplier of approximately 1.31 on Lead Counsel's lodestar.

In cases of this nature, fees representing multiples above counsel's lodestar are regularly awarded to reflect the contingency fee risk and other relevant factors. *See In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, *26 (S.D.N.Y. Nov. 8, 2010) ("a positive multiplier is typically applied to the lodestar in recognition of the risk of the litigation, the complexity of the

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[6] The Supreme Court and courts in this Circuit have approved the use of current hourly rates to calculate the base lodestar figure as a means of compensating for the delay in receiving payment, inflation, and the loss of interest. *See Missouri v. Jenkins*, 491 U.S. 274, 284 (1989); *In re Hi-Crush Partners LP Sec. Litig.*, 2014 WL 7323417, at *15 (S.D.N.Y. Dec. 19, 2014) (McMahon, J.) ("the use of current rates to calculate the lodestar figure has been endorsed repeatedly by the Supreme Court, the Second Circuit and district courts within the Second Circuit as a means of accounting for the delay in payment inherent in class actions and for inflation").

issues, the contingent nature of the engagement, the skill of the attorneys, and other factors"); *Comverse*, 2010 WL 2653354, at *5 ("Where, as here, counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar"). The requested 1.31 multiplier is on the lower end of the range of multipliers commonly awarded in complex class actions and other comparable litigation. *See In re BioScrip, Inc. Sec. Litig.*, 273 F. Supp. 3d 474, 497 (S.D.N.Y. 2017) ("There is no question that Lead Counsel's lodestar multiplier of 1.39 is at the lower range of comparable awards in common fund cases."); *In re Telik Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008) ("In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts . . . . Accordingly, a 1.6x multiplier is well within the range of reasonableness."). *See also, Pepsi*, 363 F. Supp. 3d at 411 (approving 1.94 multiplier "which closely aligns with the median multiplier in consumer cases of 1.82"); *Woburn Ret. Sys. v. Salix Pharm., Ltd.*, 2017 WL 3579892, at *6 (S.D.N.Y. Aug. 18, 2017) (approving 3.14 multiplier); *Bd. of Trs. of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, 2012 WL 2064907, at *3 (S.D.N.Y. June 7, 2012) (approving 2.86 multiplier); *Novartis*, 2010 WL 4877852, at *23 (approving 2.4 multiplier); *Comverse*, 2010 WL 2653354, at *6 (approving 2.78 multiplier); *In re Deutsche Telekom AG Sec. Litig.*, 2005 WL 7984326, at *4 (S.D.N.Y. June 14, 2005) (approving 3.96 multiplier).

Moreover, in conducting a lodestar analysis, the appropriate hourly rates to use are those rates that are "normally charged in the community where the counsel practices, *i.e.,* the market rate." *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, 2007 WL 2230177, at *17 n.6 (S.D.N.Y. July 27, 2007); *Luciano v. Olsten Corp.*, 109 F.3d 111, 115 (2d Cir. 1997) ("[t]he lodestar figure should be in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation") (second alteration in original). The

accompanying Lodestar/Expense Declaration sets forth the hourly rates utilized by Lead Counsel in calculating their lodestar. Lead Counsel's hourly rates range from: (i) $850 to $920 per hour for partners; (ii) $450 to $690 per hour for associates and counsel; (iii) $385 per hour for staff attorneys; (iv) $300 to $325 per hour for contract attorneys; (v) $85 to $295 per hour for paralegals/law clerks; and (vi) $275 to $450 per hour for in-house investigators. *See* Lodestar/Expense Decl., Ex. 1. Courts in this District have found similar rates to be fair and reasonable market rates for complex litigations. *See, e.g., Woburn Ret. Sys.*, 2017 WL 3579892, at *5 (approving hourly rates up to $995 for partners); *Rudman v. CHC Grp. Ltd.*, 2018 WL 3594828, at *3 (S.D.N.Y. July 24, 2018) (finding hourly rates ranging from $210 to $985 per hour to be appropriate for class counsel); *In re Platinum & Palladium Commodities Litig.*, 2015 WL 4560206, at *3-4 (S.D.N.Y. July 7, 2015) (finding hourly rates ranging from $250 to $950 were reasonable).[7]

In sum, Lead Counsel's requested fee award is reasonable, justified, and within the range of what courts in this Circuit regularly award in class actions such as this one, whether calculated as a percentage of the fund or as a cross-check on counsel's lodestar. As discussed below, each of the factors considered by courts in the Second Circuit also weighs in favor of finding that the requested fee is reasonable.

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[7] Lead Counsel's hourly rates are also reasonable when compared against prevailing rates of defense firms that specialize in complex litigation. *See Telik*, 576 F. Supp. 2d at 589 (explaining that "[p]erhaps the best indicator of the 'market rate' in the New York area for plaintiffs' counsel in securities class actions is to examine the rates charged by New York firms that defend class actions on a regular basis") (emphasis omitted). Indeed, Citi's counsel in this Litigation, Milbank LLP (formerly Milbank, Tweed, Hadley & McCloy LLP), reported hourly rates ranging from $210 per hour (legal assistant) to $1,465 per hour (partner) in a recent bankruptcy filing. *See In re Westinghouse Elec. Co., et al.*, Case No. 17-10751(MEW), ECF No. 2738 (Bankr. S.D.N.Y. Mar. 6, 2018), available for review at http://www.kccllc.net/westinghouse/document/17107511803060000000000004.

D. The *Goldberger* Factors Confirm that the Requested Fee is Reasonable

The Second Circuit has set forth the following criteria that courts should consider when reviewing a request for attorneys' fees in a common fund case:

> (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Goldberger, 209 F.3d at 50. As demonstrated below, each of these factors confirms the requested fee is fair and reasonable.

1. The Time and Labor Expended Support the Requested Fee

The substantial time and effort expended by Lead Counsel in prosecuting this Litigation and achieving the Settlement supports the requested fee. As set forth in greater detail in the Nirmul Declaration, Lead Counsel, among other things:

- conducted a significant legal and factual investigation into Plaintiffs' claims, including reviewing and analyzing voluminous publicly available information pertaining to Citi's practices relating to FX currency trading, dozens of Deposit Agreements to determine Citi's obligations to ADR holders, and the pricing of FX transactions by Citi during the relevant period (¶¶ 15-16);

- developed a theory of liability relating to Citi's Conversions and drafted the detailed operative Complaint (¶¶ 17, 21);

- opposed a change of jurisdictional venue (¶¶ 18-20);

- opposed two motions to dismiss and Citi's subsequent motion seeking permission to file an interlocutory appeal of this Court's MTD Order (¶¶ 18-20, 23-42);

- engaged in (and completed) extensive fact discovery, including reviewing and analyzing over 81,000 pages of documents produced by Citi, participating in numerous meet and confers to resolve discovery disputes, deposing ten fact witnesses and defending the deposition of Named Plaintiffs (¶¶ 47-91);

- consulted with a damages expert in developing a class-wide damages methodology, which entailed analyzing internal Citi information regarding FX conversion rates, volumes and payable dates for cash distributions for the

eligible ADRs, as well as the amount (if any) Citi retained for certain ADRs during the relevant period (¶¶ 92-95);

- engaged in (and completed) expert discovery, including exchanging expert reports, opposing Citi's motion to exclude Plaintiffs' expert, briefing a motion to preclude the declaration of a member of Citi's ADR department attempting to correct information produced in discovery related to Conversions, and participating in three expert depositions (¶¶ 96-98, 107-114);

- moved for class certification (¶¶ 99-106);

- fully briefed a motion to intervene in the Litigation under Federal Rule of Civil Procedure 24 for the purposes of renewing class certification (¶¶ 115-118);

- undertook substantial work in preparation for summary judgment (¶ 120);

- prepared for and participated in arm's-length settlement negotiations with Defendant's Counsel, including formal mediation with a JAMS neutral, to resolve the Litigation (¶¶ 135-136);

- negotiated the specific terms of the Settlement over the course of two months and coordinated with Citi's transfer agent, Computershare, Inc., to identify Registered Holder Damages Class Members for purposes of calculating mailing notice and calculating claims (¶¶ 137-138);

- developed a plan for allocating the cash portion of the Settlement with the assistance of Plaintiffs' damages expert (¶¶ 143-147); and

- consulted with a notice expert, HF Media, LLC, in modifying the initially proposed (and approved) notice plan in light of certain developments, including potentially incomplete and inaccurate responses provided by banks, brokers and other nominees ("Nominees"), in order to more effectively and efficiently target the Class, and moved for approval of such modifications to the notice plan (¶¶ 140-142).

As noted above, Lead Counsel expended over 8,000 hours prosecuting this Litigation with a lodestar value of $3,738,965.75. ¶ 166. This time and effort was critical in obtaining the favorable result achieved by the Settlement.

2. The Magnitude and Complexity of the Litigation Support Requested Fee

"[C]lass action suits in general have a well-deserved reputation as being most complex." *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999). This case was no exception.

As an initial matter, the scope of the Litigation was sprawling—the alleged misconduct, as pled in the Complaint, dated back to at least January 1, 2000, concerned hundreds of Conversions (covering twenty-two different currencies), and involved eighty-three unique ADRs. *See* Complaint (ECF No. 1), at 2. Moreover, the alleged misconduct involved an opaque and technically complex corner of the financial-services world which required Lead Counsel, in developing and articulating a cogent theory of liability relating to Citi's Conversions, to become familiar with the array of systems and protocols Citi used in handling FX at various times. In crafting their allegations, Lead Counsel also had to analyze dozens of publicly-available Deposit Agreements in order to determine Citi's obligations to ADR holders, as well as whether such Deposit Agreements were substantially similar to one another such that Citi's alleged conduct would constitute a breach of each agreement. ¶¶ 15-16, 95.

The Litigation also raised a number of complex questions concerning liability and damages. As such, Named Plaintiffs knew that many aspects of their claims, and in particular, Citi's defenses, would be the subject of expert testimony. Specifically with respect to damages, Named Plaintiffs retained G. William Brown, Jr., Esq., principal of 8 Rivers Capital, to prepare a class-wide damages methodology—an analysis that, unlike the commonly accepted damages methodologies typically used in securities cases, had no roadmap. Without a doubt, the issue of damages would have come down to a battle of the experts had the Litigation continued. ¶¶ 93-99, 131-132.

Accordingly, to build Plaintiffs' case, Lead Counsel had to dedicate a substantial amount of time to understanding these complex matters, conducting an extensive factual investigation, obtaining discovery, and working extensively with an expert to analyze the claims and the evidence obtained. *See City of Providence*, 2014 WL 1883494, at *16 (finding the second *Goldberger* factor to favor settlement where case involved "difficult, complex, hotly-disputed and expert-intensive issues"). The magnitude and complexity of this Litigation clearly supports the fee request.

3. The Risk of the Litigation Support the Fee Request

"Courts have repeatedly recognized that 'the risk of litigation' is a pivotal factor in assessing the appropriate attorneys' fees to award plaintiffs' counsel in class actions." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 592 (S.D.N.Y. 2008) (McMahon, J.). For this reason, the Second Circuit has found "[t]he level of risk associated with litigation . . . is 'perhaps the foremost factor' to be considered in assessing the propriety of the multiplier." *McDaniel v. Cty. of Schenectady,* 595 F.3d 411, 424 (2d Cir. 2010); *In re MetLife Demutualization Litig.,* 689 F. Supp. 2d 297, 361 (E.D.N.Y. 2010) (recognizing that "[t]he risk of the litigation is often cited as the first, and most important, *Goldberger* factor"). While Lead Counsel believes that Plaintiffs' claims are meritorious, Lead Counsel recognized that there were a number of substantial risks in the litigation from the outset and that Plaintiffs' ability to succeed at trial and obtain a substantial judgment was far from certain.

As discussed in detail in the Nirmul Declaration and summarized below, there were substantial challenges to succeeding in the Litigation. ¶¶ 123-133. For example, Defendant vigorously asserted that Plaintiffs would be unable to establish fraudulent concealment,[8] arguing

[8] To establish their fraudulent concealment claims, Plaintiffs would have needed to show: "(1) that the defendant concealed from him the existence of his cause of action, (2) that he remained in ignorance of that cause of action until some point within [the applicable limitations period] of

that all of the information Plaintiffs needed to discern the rates at which Citi converted foreign currency to U.S. dollars was publicly available.[9] ¶ 127. If this argument prevailed, the applicable statute of limitations would not be tolled and the class period in this Litigation would have been dramatically reduced from more than fifteen years to at most six years. ¶ 128.

With respect to establishing liability, Citi—along with its fact witnesses and industry expert—steadfastly maintained that the spread retained by Citi with respect to Conversions was an acceptable (and commercially reasonable) means of compensating it for conducting such Conversions. ¶ 129. Although the Court sustained Plaintiffs' breach of contract claims at the pleading stage, the MTD Order left several open questions that could serve as leverage for Defendant as the Litigation continued. Specifically, the MTD Order noted that:

> it might be industry custom to use an FX rate spread as a proxy for recovering expenses that are actually incurred but cannot be precisely determined . . . . Of course, it is far from clear whether using the spread as a proxy for expenses is permissible under the terms of this particular contract, even if doing so conforms to industry practice," and "[i]ndeed, it is not altogether plain whether the contract is sufficiently clear so that it can be construed by the court.

Id. Relatedly, Citi also claimed that it was insulated from liability in those cases where a third party performed FX on Citi's behalf. ¶ 130.

In addition, proving damages is always a risky endeavor; but here, this risk was underscored by the fact that there was no commonly accepted damages methodology on which to base an analysis. ¶ 131. Rather, Professor Brown's damages methodology identified and quantified spreads for Conversions where the requisite data was produced by Citi and WorldLink and

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his action, and (3) that his continuing ignorance was not attributable to lack of diligence on his part." *State of N.Y. v. Hendrickson Bros.*, 840 F.2d 1065, 1083 (2d Cir. 1988).

[9] Notably, Judge Caproni accepted a nearly identical argument in connection with the motion to dismiss in the analogous case *Merryman v. JPMorgan Chase Bank, N.A.*, 2016 WL 5477776, at *11 (S.D.N.Y. Sept. 29, 2016). In its MTD Order, this Court suggested that this issue was more appropriately decided later, at summary judgment or trial.

approximated spreads for Conversions where the data was missing. *Id*. While this methodology was designed to account for the factual record and was grounded in sound economic theory (in Plaintiffs' view), it was unique to this Litigation and would (and did already) bring significant challenges by Defendant. ¶ 132. Clearly, the issue of damages here would be hotly contested and the issue would ultimately come down to a battle of the experts. *See City of Providence*, 2014 WL 1883494, at *9 ("Undoubtedly, the Parties' competing expert testimony on damages would inevitably reduce the trial of these issues to a risky "battle of the experts" and the "jury's verdict with respect to damages would depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable."); *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 665 (S.D.N.Y. 2015) ("On the issue of damages, a trial would likely have turned heavily on a 'battle of the experts' between the parties' respective economists. It is impossible to predict which party's model of damages—if either—the jury would credit.").

Finally, Plaintiffs faced risks to obtaining certification of a broader class—an outcome that depended, in large part, on the Court's ruling on Proposed Intervenor's Motion to Intervene pending at the time of settlement. As currently certified, the class consisted of the three ADRs personally owned by Named Plaintiffs, and no injunctive relief. ¶ 133.

In addition to the litigation risks unique to this case, courts also consider the risks associated with attorneys undertaking a case on a contingency fee basis in determining a fee award. *Comverse*, 2010 WL 2653354, at *5 ("Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation."); *see also In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (it is "appropriate to take [contingent-fee]

risk into account in determining the appropriate fee.").[10] Here, Plaintiffs' Counsel have received no compensation during the more than three years this Litigation has been ongoing. During this time, Lead Counsel, alone, has invested over 8,000 hours for a total lodestar of $3,738,965.75, and incurred out-of-pocket expenses of $678,434.41. ¶¶ 164-166, 169. Additional work in connection with the Settlement and administration will still be required. Further, any fee award to Plaintiffs' Counsel has always been at risk, and completely contingent on the result achieved and on this Court's discretion in awarding fees and expenses. And, unlike defense counsel—who typically receive payment on a timely basis whether they win or lose—Lead Counsel sustained the entire risk that it would have to fund the expenses of this Litigation and that, unless Lead Counsel succeeded, it would not be entitled to any compensation whatsoever.[11]

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[10] "No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended." *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 470 (2d Cir. 1974).

[11] The commencement of a class action is no guarantee of success; these cases are not always settled, nor are a plaintiff's lawyers always successful. "Indeed, the risk of non-payment in complex cases, such as this one, is very real. There are numerous class actions in which counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise. There is no guarantee of reaching trial, and even a victory at trial does not guarantee recovery." *Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *22 (S.D.N.Y. Mar. 24, 2014) (McMahon, J.). *See e.g., In re Oracle Corp. Sec. Litig.*, 2009 WL 1709050 (N.D. Cal. June 19, 2009); *aff'd*, 627 F.3d 376 (9th Cir. 2010) (granting summary judgment to defendants after eight years of litigation, and after plaintiffs' counsel had incurred over $6 million in expenses and a lodestar of approximately $48 million (based on over 100,000 hours of time)); *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 504 (2d Cir. 2010) (affirming summary judgment in favor of defendants on loss causation grounds); *In re BankAtlantic Bancorp, Inc.*, 2011 WL 1585605, at *1 (S.D. Fla. Apr. 25, 2011) (granting defendants' judgment as a matter of law following plaintiff verdict); *In re JDS Uniphase Corp. Sec. Litig.*, No. 4:02-cv-01486-CW (N.D. Cal. Nov. 27, 2007), ECF No. 1883 (verdict for defendants); *Robbins v. Koger Props. Inc.*, 116 F.3d 1441 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against an accounting firm reversed on appeal).

4. The Quality of Lead Counsel's Representation Supports the Fee Request

The quality of Lead Counsel's representation is another important factor that supports the reasonableness of the requested fee. This factor "is best measured by results," which "may be calculated by comparing the extent of possible recovery with the amount of actual verdict or settlement." *Goldberger*, 209 F.3d at 55. Here, the Settlement provides a very favorable result for the Class in light of serious risks to continued litigation. At the time the Parties agreed to settle, Proposed Intervenors' Motion to Intervene was *sub judice* which, if denied, would limit the case to claims (and damages) for the three ADRs personally owned by Named Plaintiffs and certified by the Court. In contrast, by the Settlement, Lead Counsel has obtained a substantial portion (between roughly 21%-24%) of potential damages for the *twenty-one ADRs* held by Plaintiffs—a recovery which exceeds the median settlement for securities cases with comparable investor losses by *approximately 5 times*[12]—as well as important injunctive relief related to Citi's charges for Conversions. Moreover, Kessler Topaz has substantial experience in complex federal civil litigation, particularly the litigation of securities and consumer class actions (*see* Ex. 3-C), and this experience translated into an immediate benefit for the Class in this Litigation.

"The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsel's work." *Seijas v. Republic of Argentina*, 2017 WL 1511352, at *13 (S.D.N.Y. Apr. 27, 2017); *see also Marsh ERISA Litig.*, 265 F.R.D. at 148 ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement."). In this Litigation, Citi was vigorously represented by able counsel from

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[12] *See* Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review, available athttps://www.nera.com/content/dam/nera/publications/2019/PUB_Year_End_Trends_012819_Final.pdf, at 35 (finding median settlement between 1996 and 2018 in securities cases with investor losses between $50 million and $99 million recovered 4.7% of investor losses).

the prominent defense firm Milbank LLP. In the face of this formidable opposition, Lead Counsel was able to persuade Citi to settle the case at both a point in the Litigation and on terms that were highly favorable to the Class.

5. The Requested Fee in Relation to the Settlement

"When determining whether a fee request is reasonable in relation to a settlement amount, the court compares the fee application to fees awarded in similar securities class-action settlements of comparable value." *Comverse*, 2010 WL 2653354, at *3. As discussed in detail in Section II.C.1 above, the requested fee is in line with fee percentages awarded by courts in the Second Circuit in comparable cases.

6. Public Policy Considerations Support the Requested Fee

The requested fee furthers the policy goal of "providing lawyers with sufficient incentive to bring common fund cases that serve the public interest." *Goldberger*, 209 F.3d at 51. The public interest is well served by this Litigation, which sought to hold Citi accountable for allegedly violating its agreements with investors and fraudulently concealing those violations. A necessary component of encouraging attorneys to undertake the risk of bringing actions (like this Litigation) however, is adequate compensation. *See Fliesher*, 2015 WL 10847814, at *22 ("Public policy considerations strongly favor incentivizing skilled private attorneys to undertake this type of litigation, especially since the action is on behalf of small claimants who lack the financial incentive to obtain a recovery on their own behalf."); *Hicks v. Morgan Stanley*, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding.").

Accordingly, a 33⅓% fee would compensate Plaintiffs' Counsel at a level commensurate with the benefits the Settlement has conferred on the Class, the substantial investment of time and money Lead Counsel devoted to litigating this case and securing the Settlement, as well as the

risks they undertook in prosecuting the Litigation, including the contingent nature of their representation.

7. The Reaction of the Class

In accordance with the Court's September 4, 2018 Preliminary Approval Order (ECF No. 134) and subsequent February 14, 2019 Notice Modification Order (ECF No. 145), Postcard Notices were mailed to 209,815 Registered Holder Damages Class Members and a comprehensive multimedia campaign was conducted by an experienced notice administrator.[13]

The Postcard Notices as well as the publications and banner ads utilized in the multimedia campaign directed recipients to the long-form Notice for additional information, including that Lead Counsel, on behalf of Plaintiffs' Counsel, would be applying to the Court for an award of attorneys' fees in an amount not to exceed 33⅓% of the Settlement Amount and reimbursement of Litigation Expenses in an amount not to exceed $800,000, plus interest earned on these amounts. Hughes Decl., Ex. B. The fees and expenses sought by Lead Counsel do not exceed the amounts set forth in the Notice. While the deadline set by the Court for Class Members to object has not yet passed, to date, no objections to the amounts of attorneys' fees and expenses set forth in the Notice have been received. ¶ 158.[14] Additionally, all Plaintiffs have approved the fees and expenses requested herein.

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[13] *See* Declaration of Justin R. Hughes Regarding (A) Receipt of Registered Holder Data; (B) Mailing of the Postcard Notice; (C) Establishment of the Telephone Hotline; (D) Establishment of the Settlement Website; and (E) Report on Requests for Exclusion Received to Date ("Hughes Declaration" or "Hughes Decl.") attached to the Nirmul Declaration as Exhibit 1, at ¶ 4 and Declaration of Jeanne C. Finegan, APR Concerning Implementation of Notice to Class Members Through Multi-Media Notice Program ("Finegan Declaration" or "Finegan Decl.") attached to the Nirmul Declaration as Exhibit 2, at ¶¶ 15-44.

[14] The deadline for the submission of objecting is June 7, 2019. Should any objections be received, Lead Counsel will address them in its reply papers to be filed with the Court on or before July 5, 2019.

III. LEAD COUNSEL'S LITIGATION EXPENSES ARE REASONABLE AND SHOULD BE APPROVED

Lead Counsel also request reimbursement of the expenses that it reasonably incurred in prosecuting and resolving the Litigation in the total amount of $678,434.41. "Courts routinely note that counsel is entitled to reimbursement from the common fund for reasonable litigation expenses." *See Fleisher*, 2015 WL 10847814, at *23. The expenses for which Lead Counsel seek reimbursement are set forth by category in the Lodestar/Expense Declaration, *see* Ex. 3-B, and are of the type typically approved by courts. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004) ("The expenses incurred – which include investigative and expert witnesses, filing fees, service of process, travel, legal research and document production and review – are the type for which 'the paying, arms' length market' reimburses attorneys . . . [and] [f]or this reason, they are properly chargeable to the Settlement fund."); *In re China Sunergy Sec. Litig.*, 2011 WL 1899715, at *6 (S.D.N.Y. May 13, 2011) (in a class action, attorneys should be compensated "for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were 'incidental and necessary to the representation"). Because the expenses here were incurred with no guarantee of recovery, Lead Counsel had a strong incentive to closely monitor and keep expenses at a reasonable level, and did so.

The largest component of Lead Counsel's expenses was the cost of Plaintiffs' damages expert, Professor Brown of 8 Rivers Capital, in the amount of $525,914.80, or approximately 78% of total expenses). The next largest component of Lead Counsel's expenses was research charges (*i.e.*, $40,287.27). This amount represents charges for computerized research services such as Lexis Advance, Westlaw, and PACER. It is standard practice for attorneys to use online services to assist them in researching legal and factual issues, and indeed, courts recognize that these tools create efficiencies in litigation and ultimately save money for clients and the class. ¶172.

In addition, Lead Counsel incurred $29,006.93 for document hosting—specifically for the maintenance of an electronic database enabling Lead Counsel to effectively (and efficiently) analyze and review the documents produced in the Litigation. Lead Counsel also incurred the cost of formal mediation with Michael D. Young, Esq. of JAMS ($15,981.37), and the cost of travel—airline tickets, meals, and lodging—required to prosecute this Litigation ($23,384.14). ¶ 173. The other expenses for which Lead Counsel seek reimbursement include, among others, court fees, court reporters and transcripts, document-reproduction costs, and delivery expenses. ¶ 171. Accordingly, reimbursement of the requested expenses is reasonable and appropriate.

In addition, the amount of expenses requested for reimbursement to Lead Counsel, a total of $678,434.41, combined with the $25,000 being requested for Plaintiffs discussed below, is less than the $800,000 maximum amount stated in the Notice. Hughes Decl.., Ex. B. As set forth above, to date, there have been no objections to the maximum expense amount set forth in the Notice. ¶¶ 158, 169.

IV. SERVICE AWARDS TO PLAINTIFFS ARE WARRANTED

Courts within this Circuit "have, with some frequency, held that a successful Class action plaintiff, may, in addition to his or her allocable share of the ultimate recovery, apply for and, in the discretion of the Court, receive an additional award, termed an incentive award." *Bellifemine v. Sanofi-Aventis U.S. LLC*, 2010 WL 3119374, at *7 (S.D.N.Y. Aug. 6, 2010). Incentive awards are completely within the discretion of the Court, and have been approved as an important means of "reimbursing class representatives who take on a variety of risks and tasks when they commence representative actions, such as complying with discovery requests and often must appear as witnesses in the action." *Marsh ERISA Litig.*, 265 F.R.D. at 150. Accordingly, Lead Counsel request a Service Award of $20,000 for Named Plaintiffs Benjamin Michael Merryman, Amy Whitaker Merryman Trust, and B Merryman and A Merryman 4th Generation Remainder Trust,

as well as Service Awards of $2,500 each for additional Plaintiffs Chester County Employees Retirement Fund and Stephen Hildreth.[15]

Lead Counsel respectfully submit that these Service Awards are justified in light of the exceptional circumstances of this case, in which Plaintiffs exemplified what it means to serve as representatives of a class. Named Plaintiffs responded to Citi's discovery requests and produced over 2,500 pages of documents to the Defendant. Additionally, Benjamin Michael Merryman sat for a deposition. Named Plaintiffs communicated regularly with Lead Counsel regarding the status of the Litigation, and all Plaintiffs approved the Settlement. ¶¶ 120, 174-176.

Further, the Notice informed Class Members that Lead Counsel might seek Service Awards of up to $25,000 in the aggregate from the Settlement Fund, and no objection to this request has been received. The $25,000 total award to Plaintiffs represents 0.169% of the $14.75 million Settlement Amount, and is well-justified. *See, e.g., AFTRA*, 2012 WL 2064907, at *3 (approving $50,000 service award to each of the named plaintiffs, who "diligently performed the tasks expected of them and reasonably incurred costs and expenses in responding to document requests and interrogatories, producing responsive documents, reviewing filings, attending depositions, and communicating regularly with plaintiffs' counsel").

V. CONCLUSION

Lead Counsel respectfully requests that the Court award attorneys' fees in the amount of 33⅓% of the Settlement Fund and approve reimbursement of Lead Counsel's expenses in the

[15] The lower service awards requested for Chester County Employees Retirement Fund and Stephen Hildreth reflect that while both served the Class's interests, their participation in the case was relatively recent (i.e., in connection with the Motion to Intervene), and they did not produce documents or sit for a deposition.

amount of $678,434.41, as well as the proposed Service Awards to Plaintiffs in the aggregate amount of $25,000.

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Respectfully Submitted,

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