

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

IN RE HORSEHEAD HOLDING
CORP. SECURITIES LITIGATION

Civil. Action No. 16-292-LPS-CJB
Consolidated
CLASS ACTION

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN
AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES**

Sidney S. Liebesman (DE #3702)
Wali Rushdan (DE#5796)
FOX ROTHSCHILD LLP
Citizens Bank Center
919 North Market Street, Suite 300
Wilmington, DE 19899-2323
(302) 442-7627 direct
(302) 656-8920 fax
sliebesman@foxrothschild.com
wrushdan@foxrothschild.com

Liaison Counsel for Lead Plaintiffs

GLANCY PRONGAY & MURRAY LLP
Brian P. Murray (admitted pro hac vice)
Gregory B. Linkh (admitted pro hac vice)
230 Park Avenue, Suite 358
New York, NY 10169
Telephone: (212) 682-5340
Facsimile: (212) 884-0988
bmurray@glancylaw.com
glinkh@glancylaw.com

Lead Counsel for Lead Plaintiffs

**(Additional Counsel Listed On Signature
Page)**

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

ARGUMENT 2

POINT I

PLAINTIFFS’ COUNSEL SHOULD BE AWARDED FEES OF 33 1/3% OF THE COMMON FUND 2

 A. The Standard Governing the Award of Attorneys’ Fees in Common Fund Cases 2

 1. Plaintiffs’ Counsel are Entitled to a Fee from the Common Fund
 They Created..... 2

 2. The Court Should Award Attorneys’ Fees Using the Percentage Approach..... 3

 B. The Requested Fee of 33 1/3% of the Settlement Fund is Fair and Reasonable
 Under the Third Circuit’s *Gunter* Factors..... 4

 1. The Size And Nature Of The Common Fund Created
 And The Number Of Persons Benefitted By The Settlement 4

 2. The Absence Of Objections By Class Members To The Fee Request 5

 3. The Skill And Efficiency Of Lead Counsel..... 5

 4. The Complexity And Duration Of The Litigation 6

 5. The Risk Of Non-Payment..... 8

 6. The Significant Time Devoted To This Case By Lead Counsel..... 9

 7. The Requested Fee Is Within The Range Of Fees
 Typically Awarded In Actions Of This Nature..... 11

 C. The Requested Fee Is Reasonable Under A Lodestar Cross-Check 12

POINT II

LEAD COUNSEL’S APPLICATION FOR REASONABLY-INCURRED
LITIGATION EXPENSES SHOULD BE APPROVED 14

POINT III

PLAINTIFFS SHOULD BE AWARDED THEIR REASONABLE COSTS
AND EXPENSES UNDER 15 U.S.C. § 78U-4(a)(4) 15

CONCLUSION..... 17

TABLES OF AUTHORITIES

Cases

Abrams v. Lightolier, Inc.,
50 F.3d 1204 (3d Cir. 1995)..... 18

Arbuthnot v. Pierson,
607 Fed. Appx. 73 (2d Cir. 2015)..... 15

Bateman Eichler, Hill Richards, Inc. v. Berner,
472 U.S. 299, 310 (1985)..... 3

Blofstein v. Michael’s Family Rest., Inc.,
2019 WL 3288048 (E.D. Pa. July 19, 2019)..... 17

Bodnar v. Bank of Amer., N.A.,
2016 WL 4582084 (E.D. Pa. 2016) 17

Boeing Co. v. Van Gemert,
444 U.S. 472 (1980)..... 2, 3

City of Providence v. Aeropostale, Inc.,
2014 WL 1883494 (S.D.N.Y. May 9, 2014) 15

Dickerson v. York Int’l Corp.,
2017 WL 3601948 (M.D. Pa. Aug. 22, 2017) 17

Elkin v. Walter Investment Mgmt. Corp.,
2018 WL 8951073 (E.D. Pa. Dec. 18, 2018)..... 14, 20

Goldberger v. Integrated Res., Inc.,
209 F.3d 43 (2d Cir. 2000)..... 2

Gunter v. Ridgewood Energy Corp.,
223 F.3d 190 (3d Cir. 2000)..... 1, 2, 4, 5

Hensley v. Eckerhart,
461 U.S. 424 (1983)..... 5

In re Aetna Inc. Sec. Litig.,
2001 WL 20928 (E.D. Pa. 2001) 17

In re Amer. Bus. Finan. Servs. Inc. Noteholders Litig.,
2008 WL 4974782 (E.D. Pa. Nov. 21, 2008) 18

In re AremisSoft Corp. Sec. Litig.,
210 F.R.D. 109 (D.N.J. 2002)..... 6, 18

In re AT&T Corp. Sec. Litig.,
455 F.3d 164 (3d Cir. 2006)..... 4

In re Cendant Corp. Litig. (“Cendant P”),
264 F.3d 201 (3d Cir. 2001)..... 4, 15

In re Cendant Corp. Sec. Litig. (“Cendant IP”),
404 F.3d 173 (3d Cir. 2005)..... 2, 4, 15

In re CIGNA Corp. Sec. Litig.,
2007 WL 2071898 (E.D. Pa. July 13, 2007)..... 3

In re Corel Corp. Inc. Sec. Litig.,
293 F. Supp. 2d 484 (E.D. Pa. 2003) 14

In re Datatec Sys., Inc. Sec. Litig.,
2007 WL 4225828 (D.N.J. Nov. 28, 2007) 8, 13

In re Facebook, Inc. IPO Sec. & Deriv. Litig.,
2015 WL 6971424 (S.D.N.Y. Nov. 9, 2015)..... 15

In re Genta Sec. Litig.,
2008 WL 2229843 (D.N.J. May 28, 2008)..... 7

In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.,
55 F.3d 768 (3d Cir. 1995)..... 13

In re Ikon Office Solutions, Inc., Sec. Litig.,
194 F.R.D. 166 (E.D. Pa. May 9, 2000) 7, 10

In re Lucent Techs., Inc., Sec. Litig.,
327 F. Supp. 2d 426 (D.N.J. 2004) 22

In re Merck & Co., Inc., Vytorin Erisa Litig.,
2010 WL 547613 (D.N.J. Feb. 9, 2010) 13

In re NYSE Specialists Sec. Litig., No. 03-cv-8264
(S.D.N.Y. June 10, 2013)..... 15

In re Par Pharm. Sec. Litig.,
2013 WL 3930091 (D.N.J. July 29, 2013)..... 21

In re Prudential Ins. Co.,
148 F.3d 283 (3d Cir. 1998)..... 3

In re Ravisent Techs., Inc. Sec. Litig.,
2005 WL 906361 (E.D. Pa. Apr. 18, 2005)..... 14

In re Rite Aid Corp. Sec. Litig.,
362 F. Supp. 2d 587 (E.D. Pa. 2005)..... 17

In re Rite Aid Corp. Sec. Litig.,
396 F.3d 294 (3d Cir. 2005)..... 3

In re Royal Dutch/Shell Transp. Sec. Litig.,
2008 WL 9447623 (D.N.J. Dec. 9, 2008)..... 20

In re Schering-Plough Corp. Enhance Sec. Litig.,
2013 WL 5505744 (D.N.J. Oct. 1, 2013)..... 19, 20

In re Valeant Pharm. Intl., Inc. Sec. Litig.,
2020 WL 3166456 (D.N.J. June 15, 2020)..... 20

In re Veritas Software Corp.. Sec. Litig., No. 1:04-cv-00831-SLR
(D. Del. Aug. 5, 2008) 21

In re Viropharma Inc. Sec. Litig.,
2016 WL 312108 (E.D. Pa. Jan. 25, 2016)..... 5, 18

In re Xcel Energy, Inc., Sec., Deriv. & “ERISA” Litig.,
364 F. Supp. 2d 980 (D. Minn. 2005)..... 10

In Re: Unisys Corp. Sec. Litig.,
2001 WL 1563721 (E.D. Pa. Dec. 6, 2001)..... 15

J.I. Case Co. v. Borak,
377 U.S. 426 (1964)..... 3

Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp.,
487 F.2d 161 (3d Cir. 1973)..... 16

Maley v. Del Global Techs. Corp.,
186 F. Supp. 2d 358 (S.D.N.Y. 2002)..... 15

McIntire v. China Media Express Holdings, Inc., No. 1:11- cv-00804-VM-GWG,
 (S.D.N.Y. Sep. 18, 2015)..... 15

Rossini v. PNC Fin. Servs. Grp., Inc.,
 2020 WL 3481458 (W.D. Pa. June. 26, 2020)..... 13

Rowe v. E.I. DuPont de Nemours and Co.,
 2011 WL 3837106 (D.N.J. Aug. 26, 2011) 14

Schuler v. Medicines Co.,
 2016 WL 3457218 (D.N.J. June 23, 2016)..... 16, 17, 21

Vista Healthplan, Inc. v. Cephalon Inc.,
 2020 WL 1922902 (E.D. Pa. Apr. 21, 2020)..... 14

Miscellaneous

Cornerstone Research, *Securities Class Action Settlements: 2017 Review and Analysis*, at 19-20
 (2018) <https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2017-Review-and-Analysis.pdf>.
 5

H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 35 (1995) 15

Court-appointed Lead Counsel Glancy Prongay & Murray LLP (“GPM” or “Lead Counsel”) and additional counsel the Wagner Firm, Kranenburg, and Court-appointed liaison counsel Fox Rothchild LLP (collectively, “Plaintiffs’ Counsel”) respectfully submit this memorandum of law in support of their motion for (1) an award of attorneys’ fees, (2) reimbursement of litigation expenses, and (3) service awards to Paul Dyson/Dyson Capital Management, Raymond Cook, and Ross Swimmer.

PRELIMINARY STATEMENT

The \$14.75 million Settlement is the result of Plaintiffs’ Counsel’s vigorous, persistent, and skilled efforts. It is an excellent result for the Settlement Class, especially in the face of significant litigation risks and hurdles. For their efforts on behalf of the Settlement Class, Plaintiffs’ Counsel seek a collective award of attorneys’ fees in the amount of 33 1/3% of the Settlement Fund, or \$4,916,667, which is less than their cumulative lodestar of \$5,335,469.

As demonstrated below, the requested attorneys’ fee is plainly reasonable based on an application of the Third Circuit’s factors for determining appropriate fee awards in common fund cases, such as the instant Action. *See Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000). It is also well within the range of fees awarded in similar complex, contingency cases. Finally, the reasonableness of the fee award is further supported by a “cross-check” of the requested attorneys’ fees against Plaintiff’s Counsel’s lodestar, which results in a *negative* multiplier of 0.92.

Plaintiffs’ Counsel also seek reimbursement of Litigation Expenses in the total amount of \$2,83,413.35, consisting of combined out-of-pocket expenses reasonably and necessarily expended by Plaintiffs’ Counsel in prosecuting this Action.

Finally, Plaintiffs' Counsel requests \$10,000 each in costs to plaintiffs Dyson, Cook, and Swimmer, to compensate them for their significant time and effort associated with their very active roles in the prosecution of the litigation.

ARGUMENT

POINT I

PLAINTIFFS' COUNSEL SHOULD BE AWARDED FEES OF 33 1/3% OF THE COMMON FUND

A. **The Standard Governing the Award of Attorneys' Fees in Common Fund Cases**

1. **Plaintiffs' Counsel are Entitled to a Fee from the Common Fund They Created**

It is well-settled that an attorney who maintains a lawsuit that results in the creation of a fund or benefit in which others have a common interest may obtain fees from that common fund. *See, e.g., 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, 197 (3d Cir. 2005) (“attorneys ‘whose efforts create, discover, increase, or preserve’” a common fund are entitled to compensation).

As courts recognize, in addition to providing just compensation, awards of fair attorneys’ fees from a common fund ensure that “competent counsel continue[s] to be willing to undertake risky, complex, and novel litigation.” *Gunter*, 223 F.3d at 198; *see also Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 51 (2d Cir. 2000) (“There is also commendable sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest.”). 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

‘a necessary supplement to [SEC] action’.” *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).

2. The Court Should Award Attorneys’ Fees Using the Percentage Approach

“For many years both the Supreme Court and Third Circuit have favored calculating attorneys’ fees as a percentage of the class recovery.” *In re CIGNA Corp. Sec. Litig.*, No. 02-8088, 2007 WL 2071898, at *4 (E.D. Pa. July 13, 2007) (citing *Boeing*, 444 U.S. at 478-79). The Third Circuit and the district courts within it have repeatedly approved the percentage-of-recovery method of awarding fees in common fund securities fraud cases “because it allows courts to award fees from the fund ‘in a manner that rewards counsel for success and penalizes it for failure’.” *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005) (quoting *In re Prudential Ins. Co.*, 148 F.3d 283, 333 (3d Cir. 1998)); see also *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006) (“In common fund cases such as this one, the percentage-of-recovery method is generally favored.”); *In re Cendant Corp. Litig.* (“*Cendant I*”), 264 F.3d 201, 220 (3d Cir. 2001) (“For the past decade, counsel fees in securities litigation have generally been fixed on a percentage basis rather than by the so-called lodestar method.”).

The use of the percentage-of-recovery method also comports with the PSLRA’s language, which states that “[t]otal attorneys’ fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class,” 15 U.S.C. § 78u-4(a)(6). Thus, “the PSLRA has made percentage-of-recovery the standard for determining whether attorneys’ fees are reasonable.” *Cendant II*, 404 F.3d at 188 n.7.

B. The Requested Fee of 33 1/3% of the Settlement Fund is Fair and Reasonable Under the Third Circuit’s *Gunter* Factors

Under Third Circuit law, district courts have considerable discretion in setting an appropriate percentage-based fee award in traditional common-fund cases. *See Gunter*, 223 F.3d at 195 (“We give [a] great deal of deference to a district court’s decision to set fees.”). In exercising that broad discretion, the Third Circuit has noted that a district court should consider, “among other things,” the following factors in determining a fee award: “(1) the size of the fund created and the number of persons benefitted; (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; and (7) the awards in similar cases.” *Id.* at 195 n.1. These fee-award factors “need not be applied in a formulaic way . . . and in certain cases, one factor may outweigh the rest.” *Id.* Each one of these factors supports the award of the reasonable fee that Lead Counsel requests here.

1. The Size And Nature Of The Common Fund Created And The Number Of Persons Benefitted By The Settlement

Courts have consistently recognized that the result achieved is a major factor to be considered in awarding fees. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (“the most critical factor is the degree of success obtained”); *In re Viropharma Inc. Sec. Litig.*, No., 12-2714, 2016 WL 312108, at *16 (E.D. Pa. Jan. 25, 2016). Here, Plaintiffs’ Counsel has secured a recovery that provides for a substantial and certain payment of \$14.75 million, which accounts for nearly 29% of the Class’s maximum likely recoverable damages. *See Linkh Decl.*, ¶ 81. This 29% recovery is substantially above the average recovery in securities class actions, which is 5%. Cornerstone Research, *Securities Class Action Settlements: 2017 Review and Analysis*, at 19-20

(2018) (median recovery of damages in Third Circuit from 2008-2017 was 5%).¹

Furthermore, as of April 30, 2021, 1,476 claimants have submitted claims. This demonstrates that there will be significant benefit to large numbers of Settlement Class Members. *See* Bravata Decl., at ¶ 16.

2. The Absence Of Objections By Class Members To The Fee Request

The Notices, which were sent to potential Settlement Class Members and their nominees and posted on the Settlement's publicly accessible website and Lead Counsel's firm website, stated that Lead Counsel would apply for an award of attorneys' fees in an amount not to exceed 33 1/3% of the Settlement Fund. *See* Linkh Decl. ¶ 85. The Notices also advised Settlement Class Members that they could object to the fee request and explained the procedure for doing so. *Id.* To date², there have been no objections.

3. The Skill And Efficiency Of Lead Counsel

The Settlement, which provides a substantial benefit to the Class, required significant skill and demonstrates the ability of Lead Counsel. *In re AramisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 132 (D.N.J. 2002) (“[t]he single clearest factor reflecting the quality of class counsels’ services to the class are the results obtained”). The substantial and certain recovery obtained for the Settlement Class is the direct result of the efforts of highly skilled and specialized attorneys who possess substantial experience in the prosecution of complex securities class actions. *See* Linkh Decl. Ex. 8 (Plaintiffs’ Counsel’s firm résumés). Indeed, Lead Counsel’s reputation as attorneys who will zealously prosecute a meritorious case through trial and appeals helped them to negotiate

¹ <https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2017-Review-and-Analysis.pdf>.

² The time to object has not expired yet. Class Members have until May 28, 2021 to object.

the outstanding recovery for the benefit of the Settlement Class.³

The quality of opposing counsel is also relevant to evaluating the quality of Lead Counsel's services. *See, e.g., In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. May 9, 2000). Here, Defendants were represented by the firm Buchanan Ingersoll & Rooney LLP, a national, full-service firm with significant experience in complex commercial litigation, including jury trials, whose experience and skill is beyond dispute. Lead Counsel's ability to obtain a favorable settlement for the Settlement Class in the face of this formidable legal opposition further confirms the quality of Lead Counsel's representation and supports the requested fee award.

4. The Complexity And Duration Of The Litigation

Securities fraud class actions are regularly acknowledged to be particularly complex and expensive to litigate, usually requiring expert testimony on several issues, including loss causation and damages. *See, e.g., In re Genta Sec. Litig.*, No. 04-2123, 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."); *In re Datatec Sys., Inc. Sec. Litig.*, No. 04-525, 2007 WL 4225828, at *3 (D.N.J. Nov. 28, 2007) ("[R]esolution of [accounting and damages issues] would likely require extensive and conceptually difficult expert economic analysis. . . . Trial on [scienter and loss causation] issues would [be] lengthy and costly to the parties."). This case was no exception. In addition to complex liability issues concerning engineering specifications, there were loss causation, damages, and class certification issues requiring expert testimony.

³ Within the last 3 years GPM has taken two complex cases through trial: *In re Korean Ramen Antitrust Litig.*, 13-cv-4115-WHO (N.D. Cal.); and *Hoffman v. City of Los Angeles*, BC672326 (Sup. Ct. L.A.).

i. Complex Factual Issues Concerning The Merits

The \$14.75 million recovery here is substantial in light of the complexity of this case and the significant risks and expenses that the Settlement Class would have faced had this litigation continued. *See* Linkh Decl. ¶¶ 69-76. The Settlement Class would have faced significant risk exposure, including by way of summary judgment and motions in limine, possible pitfalls at trial, risk of appeal, and risks associated with the continued delay of a case that has already been pending for four-and-a-half years. While Plaintiffs believe that they would have survived a motion for summary judgment, there is a significant risk that they would not be able to prove causation and damages before a jury. This action involves issues of engineering defects in an ore-processing facility and accompanying public false statements concerning the same. It also involves issues of financial liquidity and credit terms. It is a far cry from a slip and fall.

In addition to complex liability issues, causation and damages were also complex. Defendants have argued that Plaintiffs' damages theory is flawed. While Plaintiffs have identified seven corrective disclosure dates, Defendants have argued that (1) the price drops for several of those dates were not statistically significant, and (2) some or all of the drops on those dates were due to confounding issues other than Defendants' alleged fraud. Accordingly, there is a significant risk that, even if Plaintiffs prevailed on liability, it would be a pyrrhic victory, because the jury would find that the misstatements resulted in minimal or no damage to the Class. *See* Linkh Decl. ¶ 74.

ii. Complex Issues Concerning Class Certification

Defendants have argued throughout this litigation that Horsehead notes should be excluded from the class in their entirety because they were thinly traded and there is a lack of data demonstrating causation. Precedent concerning the efficiency of noteholder markets is not as

common as it is in stockholder cases. This was a hotly contested issue involving expert witnesses. Not only is noteholder market efficiency a complex issue, there was a chance that the jury would not award any damages to noteholders, as material misstatements and omissions which affect stockholder markets sometimes affect noteholder markets differently.

5. The Risk Of Non-Payment

Courts have consistently recognized that contingency fee risk is an important factor in determining a proper fee award. *See, e.g., Ikon*, 194 F.R.D. at 194 (“there are inherent, substantial risks entailed in undertaking any contingency fee action . . . The court also acknowledges that securities actions have become more difficult from a plaintiff’s perspective in the wake of the PSLRA.”). Lead Counsel undertook this action on an entirely contingent basis, for four-and-a-half years, taking the risk that the litigation would yield little or no recovery, and leave them uncompensated for their time and out-of-pocket expenses. By contrast, Defendants’ counsel has been paid for their time in this case on a regular basis.

In addition, “[p]recedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy.” *See In re Xcel Energy, Inc., Sec., Deriv. & “ERISA” Litig.*, 364 F. Supp. 2d 980, 994 (D. Minn. 2005) (citing cases). For example, in 2018, in *In re Korean Ramen Antitrust Litigation*, 13cv4115 (N.D. Cal.), several attorneys from GPM, including Greg Linkh, represented direct purchaser plaintiffs pursuing federal antitrust claims. For six weeks, the case was tried to verdict, but the jury found against the plaintiffs. The attorneys had prosecuted that case for over five years, but received no fee award in that case. Linkh Decl. ¶ 115.

Further, as stated above, and as detailed in the Linkh Declaration, from the start, Lead Counsel faced numerous significant risks in this case that easily could have resulted in a smaller recovery or no recovery at all.

6. The Significant Time Devoted To This Case By Lead Counsel

Since the inception of the case, Plaintiffs' Counsel have expended 7,806.6 hours in the prosecution of this litigation with a resulting lodestar of \$5,335,469 and incurred \$283,413.35 in litigation expenses for the benefit of the Settlement Class.

Over nearly four-and-a-half years, Plaintiffs' Counsel investigated and prosecuted this Action vigorously, and only settled after fact discovery had been completed, class certification briefing was complete, and the parties were preparing for summary judgment briefing. In fact, by the time the Stipulation and accompanying papers were filed, there were over 184 entries on the docket for this case. The Linkh Declaration describes Lead Counsel's exhaustive efforts more fully, including:

- briefing the lead plaintiff motion, response, and reply papers, as well as a response to objections to Magistrate Judge Burke's report and recommendation appointing Lead Plaintiffs and Lead Counsel;
- preparing a Consolidated Amended Complaint, which relied upon both an exhaustive analysis of bankruptcy filings and the use of information provided by multiple confidential witnesses, who were interviewed both by counsel and private investigators;
- opposing Defendants' motion to dismiss, as well as responding to Defendants' objections to Magistrate Judge Burke's report and recommendation denying Defendants' motion to dismiss;
- exchanging initial disclosures and commencing fact discovery;

- subpoenaing several dozen third parties;
- preparing and responding to multiple sets of written discovery;
- reviewing well over half a million pages of documents that were produced by the Parties and third parties;
- taking or attending over 30 depositions, at which over 400 exhibits were introduced;
- preparing Mr. Dyson (Dyson Capital Management's principal), Mr. Cook, and Mr. Swimmer for their depositions over several preparation sessions, and defending those depositions;
- commencing and prosecuting an action for issuance of Letters Rogatory upon three additional witnesses domiciled in Spain and associated with Tecnicas Reunidas, an engineering firm retained by Horsehead;
- filing a motion for class certification, as well as opening and reply memoranda in support;
- coordinating the preparation of an expert report by Dr. Adam Werner;
- filing an opposition memorandum to Defendants' motion to strike portions of the expert testimony of Dr. Werner;
- preparing multiple mediation briefs, and engaging in two separate mediation sessions with Robert Meyer of JAMS;
- preparing the Stipulation and Agreement of Settlement and exhibits, and motion for preliminary approval; and
- coordinating the administration of the Settlement with claims administrator Strategic Claims Solutions.

Linkh Decl. ¶¶ 11-51.

At all times, Plaintiffs' Counsel conducted their work with skill and efficiency, conserving resources and avoiding any duplication of efforts. The foregoing represents a very significant commitment of time and resources, while taking on the substantial risk of recovering nothing for their efforts. Accordingly, this factor favors granting the requested award of fees and expenses.

7. The Requested Fee Is Within The Range Of Fees Typically Awarded In Actions Of This Nature

While there is no benchmark for the percentage of fees to be awarded in common fund cases, the Third Circuit has observed that fee awards generally range from 19% to 45% of the settlement fund. *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.* (“*In re GMC*”), 55 F.3d 768, 822 (3d Cir. 1995). Here, Lead Counsel is requesting a fee of 33 1/3%, which is fair and reasonable. A review of 289 settlements demonstrates that the “median value [of fees]. . . turns out to be one-third.” *In re Merck & Co., Inc., Vytarin Erisa Litig.*, No. 08-285, 2010 WL 547613, at *11 (D.N.J. Feb. 9, 2010) (citing *In re GMC*, 55 F.3d at 822); *Datatec*, 2007 WL 4225828, at *8 (“[c]ourts within the Third Circuit often award fees of 25% to 33 1/3% of the recovery”).

Courts in the Third Circuit routinely award fees of approximately one-third of the settlement fund. *Rossini v. PNC Fin. Servs. Grp., Inc.*, No. 18-1370, 2020 WL 3481458, at *19 (W.D. Pa. June. 26, 2020) (“a percentage award of 33.3% falls squarely within the range of awards found to be reasonable by the courts.”); *Vista Healthplan, Inc. v. Cephalon Inc.*, No. 06-1833, 2020 WL 1922902, at *28 (E.D. Pa. Apr. 21, 2020) (“33 1/3 % of the total recovery, [] is well within the range of reasonable fees, on a percentage basis, in the Third Circuit”); *Elkin v. Walter Investment Mgmt. Corp.*, No. 17-02025, 2018 WL 8951073, at *1 (E.D. Pa. Dec. 18, 2018) (in securities class action, plaintiffs' counsel were awarded 33 1/3% of the settlement fund plus expenses); *Rowe v. E.I. DuPont de Nemours and Co.*, Nos. 06-1810, 06-3080, 2011 WL 3837106,

at *19 (D.N.J. Aug. 26, 2011) (awarding one-third of \$8.3 million settlement); *In re Corel Corp. Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 495-98 (E.D. Pa. 2003) (awarding one-third of \$7 million settlement); *In re Ravisent Techs., Inc. Sec. Litig.*, No. 00-1014, 2005 WL 906361, at *10-12 (E.D. Pa. Apr. 18, 2005) (awarding one-third of \$7 million settlement); *In Re: Unisys Corp. Sec. Litig.*, No. 99-5333, 2001 WL 1563721, at *3 (E.D. Pa. Dec. 6, 2001) (awarding one-third of \$5.75 million settlement).⁴

C. The Requested Fee Is Reasonable Under A Lodestar Cross-Check

Although courts in this Circuit almost uniformly apply the percentage approach to determine attorneys' fees in common fund cases like this one, a court may, but is not required to, use a lodestar "cross-check" to confirm the reasonableness of the requested fee. A lodestar cross-check is a tool to "ensure that the percentage approach does not lead to a fee that represents an extraordinary lodestar multiple." *Cendant II*, 404 F.3d at 188. "The goal of this practice is to ensure that the proposed fee award does not result in counsel being paid a rate vastly in excess of what any lawyer could reasonably charge per hour, thus avoiding a 'windfall' to lead counsel." *Cendant I*, 264 F.3d at 285.

The lodestar method, set forth in *Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), involves a two-step process. First, the court ascertains the "lodestar" figure by multiplying the number of hours reasonably worked by the

⁴ Similarly federal courts in other circuits have awarded similar fees of approximately one-third or more. *See In re Facebook, Inc. IPO Sec. & Deriv. Litig.*, No. 12-2389, 2015 WL 6971424, at *9, *11-*12 (S.D.N.Y. Nov. 9, 2015) (awarding 33% of \$26.5 million); *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132(CM)(GWG), 2014 WL 1883494, at *12 (S.D.N.Y. May 9, 2014) (awarding 33% of \$15 million), *aff'd sub nom. Arbuthnot v. Pierson*, 607 Fed. Appx. 73 (2d Cir. 2015); *Maley v. Del Global Techs. Corp.* 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) (awarding 33.3% of \$11.5 million settlement); *McIntire v. China Media Express Holdings, Inc.*, No. 1:11-cv-00804-VM-GWG, slip op. at 2 (S.D.N.Y. Sep. 18, 2015) (awarding 33.33% of \$12 million settlement) (Linkh Decl., Ex. 13); *In re NYSE Specialists Sec. Litig.*, No. 03-cv-8264, slip op. at ¶ 19 (S.D.N.Y. June 10, 2013) (awarding approximately 41% of \$18.5 million settlement) (Linkh Decl., Ex. 14).

reasonable, normal hourly rate of counsel. Second, the court may adjust the lodestar to account for the contingent nature and risks of the litigation, the results obtained, and the quality of the services counsel has rendered. *See id.* at 167-68. A multiplier “need not fall within any pre-defined range, provided that the [d]istrict [c]ourt’s analysis justifies the award.” *Schuler v. Medicines Co.*, No. 14-1149, 2016 WL 3457218, at *10 (D.N.J. June 23, 2016).

Finally, to perform the lodestar cross-check, the court should determine what the effective multiplier is, and then determine whether the resulting fee would be so unreasonable as to warrant a downward adjustment. As noted, the cumulative lodestar of the services performed by Plaintiffs’ Counsel in this litigation is \$5,335,469. Lead Counsel seek an award of 33 1/3% of the \$14.75 million Settlement Fund, which equals \$4,916,667 (before interest). Therefore, the requested fee represents a ***negative multiplier*** to counsel’s time of 0.92. Rather than receiving a multiple of their lodestar, as is common, *see Bodnar v. Bank of Amer., N.A.*, No. 14-3224, 2016 WL 4582084, at *6 (E.D. Pa. 2016) (holding that a positive 4.69 multiplier with respect to a \$9,075,000 attorney fee award was “appropriate and reasonable”), *Schuler*, 2016 WL 3457218, at *9 (approving 3.57 multiplier); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589-90 (E.D. Pa. 2005) (6.96 multiplier); *In re Aetna Inc. Sec. Litig.*, MDL No. 1219, 2001 WL 20928, at *15 (E.D. Pa. 2001) (3.6 multiplier), counsel here is receiving *less* than their lodestar. “A negative multiplier reflects that counsel is requesting only a fraction of the billed fee; negative multipliers thus ‘favor[] approval.’” *Dickerson v. York Int’l Corp.*, No. 15-1105, 2017 WL 3601948, at *11 (M.D. Pa. Aug. 22, 2017); *see also Blofstein v. Michael’s Family Rest., Inc.*, No. 17-5578, 2019 WL 3288048, at *11 (E.D. Pa. July 19, 2019) (a negative multiplier “provides additional support for the requested attorneys’ fees”).

POINT II

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

Lead Counsel also request that this Court reimburse \$283,413.35 in litigation expenses that Plaintiffs' Counsel advanced in the prosecution of this Action. All of those expenses, which are set forth in declarations submitted by Plaintiffs' Counsel, were reasonably necessary for the prosecution of this litigation. *See* Linkh Decl. ¶ 135. Counsel in a class action are 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 (quoting *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995)). The expenses for which Plaintiffs' Counsel seek reimbursement are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed hourly, including, among others, filing fees, expert fees, on-line research, court reporting and transcripts, photocopying, and postage expenses. *See In re Amer. Bus. Finan. Servs. Inc. Noteholders Litig.*, No. 05-232, 2008 WL 4974782, at *18 (E.D. Pa. Nov. 21, 2008) (online legal research is a reimbursable cost); *In re AremisSoft.*, 210 F.R.D. at 135 (photocopies, postage, messenger, and expert witnesses are all reimbursable expenses). These expense items are billed separately by Plaintiffs' Counsel, and such charges are not duplicated in the firm's hourly rates. All of these expenses are billed at actual cost and do not contain any markup or profit. Linkh Decl. ¶ 122.

The largest expense is for retention of Lead Plaintiffs' expert, Dr. Adam Werner and his staff, which totals \$136,407. Dr. Adam Werner prepared an expert report, sat for deposition, and provided additional consulting work. Dr. Werner's report, testimony, and assistance were required to, among other things, (1) show that Horsehead securities traded in an efficient market, (2) show

the statistical significance of stock price drops caused by corrective disclosures, (3) demonstrate that a class of Horsehead securities holders could be certified, and (4) counter Defendants' expert opposing class certification. Linkh Decl. ¶ 125.

The Notice informed potential Settlement Class Members that Lead Counsel would apply for reimbursement of litigation expenses in an amount not to exceed \$400,000, which may include the reasonable costs and expenses of Lead Plaintiffs directly related to their representation of the Settlement. The requested amount of \$283,413.35 (plus \$30,000 for Class Plaintiffs, discussed below) is an amount significantly below the amount listed in the Notice. To date, there has been no objection to the request for expenses.

POINT III

PLAINTIFFS SHOULD BE AWARDED THEIR REASONABLE COSTS AND EXPENSES UNDER 15 U.S.C. § 78u-4(a)(4)

In connection with their request for reimbursement of litigation expenses, Lead Counsel also seeks reimbursement of the costs and expenses incurred directly by Plaintiffs. Numerous courts have approved reasonable awards, under 15 U.S.C. § 78u-4(a)(4), to compensate named plaintiffs for the time and effort they spent on behalf of a class. "Reasonable payments to compensate class representatives for the time and effort devoted by them have been approved." *In re Schering-Plough Corp. Enhance Sec. Litig.*, Nos. 08-397, 08-2177, 2013 WL 5505744, at *37 (D.N.J. Oct. 1, 2013). "Indeed, Congress explicitly acknowledged the importance of awarding appropriate reimbursement to class representatives." *Id.* (citing H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 35 (1995), which stated "[t]he Conference Committee recognizes that lead plaintiffs should be reimbursed for reasonable costs and expenses associated with service as lead plaintiff, including lost wages, and grants the courts discretion to award fees accordingly").

Courts in this Circuit have regularly awarded service awards to plaintiffs in securities class actions. *See Elkin*, 2018 WL 8951073, at *2 (in securities class action, lead plaintiff awarded \$10,000 service award); *In re Valeant Pharm. Intl., Inc. Sec. Litig.*, No. 15-07658, 2020 WL 3166456, at *4 (D.N.J. June 15, 2020) (awarding service award of as much as \$66,495); *In re Royal Dutch/Shell Transp. Sec. Litig.*, No. 04-374 (JAP), 2008 WL 9447623, at *29 (D.N.J. Dec. 9, 2008) (awarding “\$150,000 to Lead Plaintiffs [Pennsylvania State Employees’ Retirement System and the Pennsylvania Public School Employees’ Retirement System] to compensate them for their reasonable costs and expenses directly relating to their representation of the Class pursuant to 15 U.S.C. § 78u-4(a)(4)”); *In re Veritas Software Corp.. Sec. Litig.*, No. 1:04-cv-00831-SLR, slip op. at 1 (D. Del. Aug. 5, 2008) (D.I. 144) (awarding each lead plaintiff \$15,000 in PSLRA case) (attached as Ex. 15 to the Linkh Decl.); *In re Par Pharm. Sec. Litig.*, No. 06-3226 (ES), 2013 WL 3930091, at *11 (D.N.J. July 29, 2013) (\$18,000 award to lead plaintiff in PSLRA case based on time and effort devoted to the case).

Here, Plaintiffs Dyson Capital Management, Cook, and Swimmer have been consistently involved throughout the course of the litigation. Each of them has, among other things:

- met personally with Plaintiffs’ Counsel;
- engaged in numerous calls with attorneys updating the status of the case;
- reviewed and commented on pleadings and briefs that were filed with the Court;
- searched for and provided documents for discovery;
- attended multiple deposition preparation sessions,
- sat for a deposition via Zoom; and

- attended or monitored by phone two full-day mediation sessions before mediator Robert Meyer of JAMS.

See Dyson Decl. at ¶ 7; Cook Decl. at ¶ 8; Swimmer Decl. at ¶ 6 (attached as Exhibits 10-12 to the Linkh Declaration). These duties are exactly what is expected of a lead plaintiff or class representative. *See Schuler*, 2016 WL 3457218, at *11 (“Lead Plaintiff reviewed filings, gathered transaction records, conferred with Lead Counsel about the litigation, and remained apprised about the progress of the case and the Company generally. . . . These are the types of activities courts have found to support reimbursement to class representatives”).

Furthermore, it should be noted that no one has objected to the proposed service award for the three named plaintiffs. *In re Lucent Techs., Inc., Sec. Litig.*, 327 F. Supp. 2d 426, 450 (D.N.J. 2004) (granting motion for compensatory award where notice was provided to all potential class members and no party objected).

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs’ requests in their entirety: (1) \$4,916,667 in attorneys’ fees (representing 1/3 of the Settlement Fund); (2) \$283,413.35 for expenses incurred in the prosecution of the litigation; (3) an award of \$10,000 each to Paul Dyson/Dyson Capital Management, Raymond Cook, and Ross Swimmer in connection with the time and effort spent representing the Class in this action.

Dated: April 30, 2021

FOX ROTHSCHILD LLP

By: s/Sidney S. Liebsman
Sidney S. Liebesman (DE #3702)
Wali Rushdan (DE # 5796)
Citizens Bank Center
919 North Market Street, Suite 300
Wilmington, DE 19899-2323
Telephone: (302) 442-7627
sliebesman@foxrothschild.com

Liaison Counsel for Lead Plaintiffs

GLANCY PRONGAY & MURRAY LLP
Brian P. Murray (admitted *pro hac vice*)
Gregory B. Linkh (admitted *pro hac vice*)
230 Park Avenue, Suite 358
New York, NY 10169
Telephone: (212) 682-5340
Facsimile: (212) 884-0988
bmurray@glancylaw.com
glinkh@glancylaw.com

Lead Counsel for Lead Plaintiffs

KRANENBURG
Werner R. Kranenburg (admitted *pro hac vice*)
80-83 Long Lane
London EC1A9ET
United Kingdom
Telephone: +44-20-3174-0365
werner@kranenburgesq.com

THE WAGNER FIRM
Avi Wagner
1925 Century Park East, Suite 2100
Los Angeles, CA 90067
Telephone: (310) 491-7949
Facsimile: (310) 694-3967
avi@thewagnerfirm.com

Counsel for Lead Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

IN RE HORSEHEAD HOLDING
CORP. SECURITIES LITIGATION

Civil. Action No. 16-292-LPS-CJB
Consolidated
CLASS ACTION

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2021, I caused true and accurate copies of the foregoing papers to be served upon all counsel of record via CM/ECF.

/s/ Sidney S. Liebesman
Sidney S. Liebesman (DE #3702)