UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

WILLIAM McGEE and LEE McGEE, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, vs. CONSTANT CONTACT, INC., et al., Defendants.	No. 1:15-cv-13114-MLW CLASS ACTION MEMORANDUM OF LAW IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND PAYMENT OF LITIGATION EXPENSES, CHARGES AND COSTS

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SECONDARY AUTHORITIES

Court-appointed Lead Counsel, Robbins Geller Rudman & Dowd LLP ("Robbins Geller" or "Lead Counsel"), respectfully submits this memorandum of law in support of this application, pursuant to Rules 23(h) and 54(d)(2) of the Federal Rules of Civil Procedure, for (i) an award of attorneys' fees of 25% of the $13,000,000.00 Settlement Amount; and (ii) an award of $60,773.99 for litigation expenses, costs and charges incurred in prosecuting this action.[1]

I. PRELIMINARY STATEMENT

Lead Counsel obtained a $13,000,000.00 recovery on behalf of the Class, which will be distributed to eligible Class Members after deduction of Court-approved fees and expenses. This substantial recovery obtained for the Class was achieved through the efforts, skill, experience, and effective advocacy of Lead Counsel over the last four years. As explained in contemporaneously filed submissions,[2] the efforts of counsel included:

- Conducting a comprehensive investigation of the events underlying the claims alleged in the Litigation, including, *inter alia*, a review of publicly available information regarding the Defendants and interviews with witnesses with knowledge regarding those allegations;

[1] This motion is also made on behalf of Sugarman & Susskind, P.A. and the Law Offices of Alan L. Kovacs (with Robbins Geller, "Lead Plaintiff's Counsel").

[2] Submitted herewith in support of approval of the requested fees and expenses are: (i) the Memorandum of Law in Support of Lead Plaintiff's Motion for Final Approval of Class Action Settlement, Approval of the Plan of Allocation, and Final Certification of the Class for Settlement Purposes ("Final Approval Brief"); (ii) the Declaration of Stephen R. Astley in Support of: (A) Lead Plaintiff's Motion for Final Approval of Settlement and Approval of Plan of Allocation, and (B) Lead Counsel's Motion for Attorneys' Fees and Litigation Expenses, Costs and Charges ("Astley Decl."); (iii) Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Litigation Expenses, along with its exhibits thereto; (iii) the Declarations of Lead Plaintiff's Counsel in Support of Application for Award of Attorneys' Fees and Expenses ("Robbins Geller Decl.," "Sugarman Decl.," and "Kovacs Decl.," together the "Fee Declarations"); and (v) the Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Murray Decl."), on behalf of the Court-appointed Claims Administrator for the Settlement, Gilardi & Co. LLC ("Gilardi"). Unless otherwise defined herein, all capitalized terms are defined in the Stipulation of Settlement dated May 18, 2018 (the "Stipulation") (ECF No. 69) or in the Astley Decl.

- Researching the applicable law concerning Lead Plaintiff's claims and Defendants' anticipated defenses;
- Drafting a complaint for violation of the federal securities laws;
- Opposing Defendants' motion to dismiss;
- Reviewing non-public documents concerning the U.S. Securities and Exchange Commission's ("SEC") investigation of Constant Contact, Inc. ("Constant Contact" or the "Company") produced by Defendants in advance of the mediation;
- Consulting with a loss causation and damages consultant;
- Preparing detailed mediation statements, participating in a formal arm's-length mediation process before a highly experienced mediator, Michelle Yoshida; and
- Negotiating and documenting the Settlement.

Astley Decl., ¶5.

Lead Plaintiff's Counsel's efforts to date have been without compensation of any kind for their successful prosecution of this case, which required them to devote over 2,100 hours of billable time, and risk more than $60,700.00 in litigation expenses. Counsel's recovery of any fees or expenses, charges and costs has been wholly contingent upon the result achieved. Thus, in accordance with fees awarded in similar actions in this Circuit and throughout the country, Lead Plaintiff's Counsel seeks a percentage fee of 25% of the Settlement Fund. As discussed herein and in the Astley Decl., the method of compensating counsel and the amount requested are justified in light of the substantial time and labor expended by Lead Plaintiff's Counsel; the recovery obtained for the Class; the quality of the representation; the significant risks presented in the prosecution and settlement of this securities class action under the Private Securities Litigation Reform Act of 1995 ("PSLRA") on a contingent basis; the magnitude and complexity of the Litigation; and the professional standing of both Lead Plaintiff's Counsel and Defendants' Counsel.

Counsel also seek payment of $60,773.99 in expenses, costs and charges incurred in prosecuting the action. As discussed herein, the expenses requested are reasonable in amount and were necessarily incurred for the successful litigation of the case.

The requested amounts were disclosed in the Court-approved Notice that was provided to the Class. To date, no Class Member has objected to any of these requests.[3]

II. ARGUMENT

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

The U.S. Supreme Court and the First Circuit have long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995); *In re Tyco Int'l, Ltd.*, 535 F. Supp. 2d 249, 265 (D.N.H. 2007). Awards of reasonable attorneys' fees from a "common fund" provide compensation that "encourages capable plaintiffs' attorneys to aggressively litigate complex, risky cases like this one" and spread the costs of the litigation "proportionately among those benefitted by the suit." *Tyco*, 535 F. Supp. 2d at 265.

The Supreme Court also has emphasized that private securities actions, such as the instant action, are "an essential supplement to criminal prosecutions and civil enforcement actions" brought by the SEC. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *accord Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (noting private securities actions "provide 'a most effective weapon in the enforcement' of the securities laws and are a

[3] The objection deadline is April 24, 2020. If any timely objections are received, Lead Counsel will address them in a reply memorandum due no later than May 13, 2020.

'necessary supplement to [SEC] action'").[4] Compensating plaintiffs' counsel for the risks they take in bringing these actions is essential: "[s]uch actions could not be sustained if plaintiffs' counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class." *Hicks v. Morgan Stanley*, No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005). Accordingly, Lead Plaintiff's Counsel are entitled to an award of attorneys' fees from the Settlement Fund.

B. The Requested Attorneys' Fees Are Reasonable Under Both the Percentage-of-the Fund Method and the Lodestar Method

Fees awarded from a common fund can be determined under either the percentage-of-the fund method or the lodestar method. *See Thirteen Appeals*, 56 F.3d at 307. As set forth below, the requested fee is fair and reasonable under either method.

1. The Requested Attorneys' Fees Are Reasonable Under the Percentage-of-the Fund Method

The Supreme Court has endorsed the percentage method of awarding fees, stating that "under the 'common fund doctrine' . . . a reasonable fee is based on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). The First Circuit also has endorsed this method in common fund cases, noting that it is the prevailing method and that it "offers significant structural advantages in common fund cases, including ease of administration, efficiency, and a close approximation of the marketplace." *Thirteen Appeals*, 56 F.3d at 308. Indeed, the percentage method "appropriately aligns the interests of the class with the interests of the class counsel[,] . . . is 'less burdensome to administer than the lodestar method,' . . . 'enhances efficiency' and does not create a 'disincentive for the early settlement of cases.'" *Duhaime v. John Hancock Mut. Life Ins.*

[4] Citations are omitted and emphasis is added throughout unless otherwise indicated.

Co., 989 F. Supp. 375, 377 (D. Mass. 1997) (quoting *Thirteen Appeals*, 56 F.3d at 307).[5] For these reasons, courts assessing fee awards in securities fraud class actions generally apply the percentage method, with or without consideration of lodestar as a "cross-check." *See, e.g.*, *Hill v. State St. Corp.*, No. 09-12146-GAO, 2015 WL 127728, at *17 (D. Mass. Jan. 8, 2015) (noting that lodestar cross-check is sometimes used but would not be "particularly helpful or appropriate" to assess fees in that securities fraud action).

The requested fee of 25% is both reasonable under the circumstances and well within the typical range of percentage fees awarded in comparably-sized settlements in the First Circuit. *See, e.g.*, *Gerneth v. Chiasma, Inc.*, No. 1:16-cv-11082-DJC, slip op. at 1 (D. Mass. June 27, 2019) (awarding 30% of $18,750,000 settlement); *Godinez v. Alere, Inc.*, No. 1:16-cv-10755-PBS, slip op. at 1 (D. Mass. June 6, 2019) (awarding 28% of $20 million settlement); *In re AVEO Pharm., Inc. Sec. Litig.*, No. 1:13-cv-11157-DJC, slip op. at 7 (D. Mass. May 30, 2018) (awarding 30% of $15 million settlement, plus expenses); *Crandall v. PTC Inc.*, No. 16-cv-10471-WGY, 2017 U.S. Dist. LEXIS 217581, at *16 (D. Mass. July 14, 2017) (awarding 33-1/3%); *Roberts v. TJX Cos.*, No. 13-cv-13142-ADB, 2016 U.S. Dist. LEXIS 136987, at *44-*45 (D. Mass. Sept. 30, 2016) (awarding 33-1/3%); *Medoff v. CVS Caremark Corp.*, No. 09-cv-554-JNL, 2016 U.S. Dist. LEXIS 19135, at *18 (D.R.I. Feb. 17, 2016) (addressing fee award and stating "30% is not out of proportion . . . in large class action litigations"); *Courtney v. Avid Tech., Inc.*, No. 1:13-cv-10686-WGY, 2015 WL 2359270, at *1 (D. Mass. May 12, 2015) (awarding 30%); *Zametkin v. Fidelity Mgmt. & Research Co.*, No. 1:08-cv-10960-MLW, slip op. at 6 (D. Mass. May 11, 2012) (awarding 30%); *Plumbers'*

[5] Likewise, the PSLRA provides 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." *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 188 n.7 (3d Cir. 2005).

Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp., No. 08-cv-10446, slip op. (D. Mass. Dec. 19, 2013) (awarding fees of 25% of $21.2 million recovery, plus expenses).

C. The Requested Attorneys' Fees Are Reasonable Under the Lodestar Method

"In the First Circuit, '[t]he lodestar approach (reasonable hours spent times reasonable hourly rates, subject to a multiplier or discount for special circumstances, plus reasonable disbursements) can be a check or validation of the appropriateness of the percentage of funds fee, but is not required.'" *New Eng. Carpenters Health Benefits Fund v. First Databank, Inc.*, No. 05-11148-PBS, 2009 WL 2408560, at *1 (D. Mass. Aug. 3, 2009); *see also Manual for Complex Litigation* §14.122, at 193 (4th ed. 2004) ("The lodestar is . . . useful as a cross-check on the percentage method by estimating the number of hours spent on the litigation and the hourly rate, using affidavits and other information provided by the fee applicant. The total lodestar estimate is then divided into the proposed fee calculated under the percentage method. The resulting figure represents the lodestar multiplier to compare to multipliers in other cases.").

When the lodestar is used as a cross-check, "the focus is not on the 'necessity and reasonableness of every hour' of the lodestar, but on the broader question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys." *Tyco*, 535 F. Supp. 2d at 270 (quoting *Thirteen Appeals*, 56 F.3d at 307); *see also In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005) ("Where the lodestar fee is used as 'a mere cross-check' to the percentage method of determining reasonable attorneys' fees, 'the hours documented by counsel need not be exhaustively scrutinized by the district court.'"). In this case, the lodestar method, whether used directly or as a cross-check on the percentage method, strongly demonstrates the reasonableness of the requested fee.

Here, Lead Plaintiff's Counsel spent over 2,100 hours of attorney and other professional support staff prosecuting the Litigation. *See* Fee Declarations. Based on counsel's rates, their collective lodestar is $1,523,533.50.[6] A $3,250,000 fee therefore represents a modest multiplier of 2.1 counsel's lodestar. Such a multiplier is well within the parameters accepted by district courts within the First Circuit and elsewhere and is additional evidence that the requested fee is reasonable. *See, e.g.*, *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-CV-1825 (NGG)(RER), 2010 WL 2653354, at *5 (E.D.N.Y. June 24, 2010) (awarding 2.78 multiplier and noting that "[w]here, as here, counsel has litigated a complex case under a contingent fee arrangement, they are entitled to a fee in excess of the lodestar"); *Tyco*, 535 F. Supp. 2d at 271 (awarding fees representing 2.697 multiplier); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 82 (D. Mass. 2005) (approving multiplier of 2.02 and collecting cases that approved multipliers of up to 8.9 times lodestar).

As detailed in its lodestar declaration, the hourly rates for Robbins Geller attorneys who worked on this litigation in 2019 ranged from $900 to $1,250 for partners and from $580 to $690 for associates. Robbins Geller Decl., Ex. A. While Robbins Geller is a plaintiff-side contingent fee law firm and the rates are not represented to be the rates paid by hourly clients, the foregoing hourly billing rates were submitted to district courts around the country in support of attorneys' fee awards in class action cases. (*See* Astley Decl., Exs. E, J, M and O) and compare favorably to those used by other sophisticated plaintiff class action law firms (*see* Astley Decl., Exs. F - H) as well as to those charged by Latham & Watkins LLP ("Latham & Watkins"), defense counsel in this action.

[6] Although the Supreme Court and courts in this Circuit have approved the use of current hourly rates in calculating the base lodestar figure as a means of compensating for the delay in receiving payment and the loss of interest, *see, e.g.*, *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989); *Cohen v. Brown Univ.*, No. 99-485-B, 2001 WL 1609383, at *1 (D.N.H. Dec. 5, 2001); *Souss v. Banco Santander S.A. & Santander Bancorp.*, No. 09-2305 (FAB), 2011 WL 13350165, at *12 (D.P.R. June 9, 2011), here, Lead Counsel submits its time at its 2019 rates.

According to the Valeo 2018 Attorney Hourly Rate Report, Latham & Watkins' average hourly billing rates for 2019 range from $1,179 to $1,351 for partners, and range from $606 to $1,182 for associates. Astley Decl., Ex. D. Likewise, in the city of Boston, partner rates for AMLaw top 10 firms (with Latham & Watkins ranking at number two), partner rate average between $1,188 to $1,677 per hour, and associate rates average between $700 and $713 per hour. *Id.*

In sum, a lodestar cross-check further supports the requested fee.

D. Factors Considered by Courts in the First Circuit Confirm that the Requested Fee Is Fair and Reasonable

While "[t]he First Circuit has not endorsed a specified set of factors to be used in determining whether a fee request is reasonable," *Relafen*, 231 F.R.D. at 79, courts in this Circuit consider several factors when considering an award of attorneys' fees (under either the percentage method or lodestar method), including:

> (1) the size of the fund and the number of persons benefitted; (2) the skill, experience, and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risks of the litigation; (5) the amount of time devoted to the case by counsel; (6) awards in similar cases; and (7) public policy considerations, if any.

Hill, 2015 WL 127728, at *17 (quoting *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 458 (D.P.R. 2011)); *CVS*, 2016 WL 632238, at *8-*9 (same). Courts also have considered whether lead plaintiffs support the requested fee and the reaction of the class. *See Hill*, 2015 WL 127728, at *19-*20; *In re TJX Cos. Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 401 (D. Mass. 2008) (considering "the reaction of the class members to the settlement and proposed attorneys' fees" as one of the relevant factors). As set forth below, all of these factors weigh strongly in favor of finding that the requested fee is reasonable.

1. The Amount of the Recovery and the Number of Class Members Who Will Benefit From the Settlement Support the Requested Fee

Courts consistently have recognized that the result achieved is one of the most important factors to be considered in making a fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("[T]he most critical factor is the degree of success obtained."); *see also Puerto Rican Cabotage*, 815 F. Supp. 2d at 458 ("[T]he net dollars and cents results achieved by counsel for their clients is often the most influential factor in assessing the reasonableness of any attorneys' fee award."). The Settlement Fund of $13 million has been obtained through the diligent efforts of Lead Plaintiff's Counsel without the necessity and risk of prolonged litigation, trial, and appeals.

Indeed, one of the distinct advantages of the percentage-of-the-fund method is that it directly incorporates the value of the recovery obtained into the calculation of the fee. *See Duhaime*, 989 F. Supp. at 377 (noting advantage of percentage method is that "it focuses 'on result, rather than process, which better approximates the workings of the marketplace'" and "the greater the value secured for the class, the greater the fee earned by class counsel"). The favorable nature of this Settlement is supported by recent empirical evidence regarding securities class action settlements. Between 2010 and 2018, the median recovery in securities cases with estimated "simplified tiered damages" damages of between $75 million and $149 million was 4.9%.[7] Measured against that yardstick, the Settlement, if approved, will compensate the Class for approximately 14% of its maximum estimated damages – a substantial recovery that significantly exceeds that median, and which was obtained in light of the Defendants' countervailing legal arguments. Astley Decl., ¶¶6-7; *see also CVS*, 2016 WL 632238, at *6 (finding that settlement amounting to 5.33% of estimated

[7] *See* Laarnie T. Bulan & Laura E. Simmons, *Securities Class Action Settlement: 2019 Review and Analysis*, at 6 (Cornerstone Research 2020) ("Cornerstone Study") (attached as Ex. B to the Astley Decl.).

recoverable damages was "well above the median percentage of settlement recoveries in comparable securities class action cases"). Here, the Settlement is all cash, not dependent upon the number of claims made, there is no reversion to Defendants, and hundreds – if not thousands – of members of the Class will now receive compensation that was otherwise uncertain when the case began.

2. The Skill and Experience of Counsel Support the Requested Fee

The prosecution and management of a complex national securities class action requires unique legal skills and abilities. As demonstrated by its firm résumé, attorneys at Robbins Geller are among the most experienced and skilled practitioners in the securities class action field, and the firm has a long and successful track record in such cases. *See* Robbins Geller Decl., Ex. F. Their willingness and ability to undertake complex and difficult cases such as this and their commitment to the Litigation added valuable leverage to the settlement negotiations. *See Hill*, 2015 WL 127728, at *17 (noting plaintiffs' counsel's "*experience* and expertise contributed to the achievement of the Settlement"); *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 350 (D. Mass. 2015) (finding skill of lawyers "nationally known for and greatly experienced in representing plaintiffs" in class action lawsuits weighed in favor of fee award), *aff'd*, 809 F.3d 78 (1st Cir. 2015).

The quality of the work performed by Lead Counsel in attaining the Settlement should also be evaluated in light of the quality of the opposition. *See In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 995 (D. Minn. 2005) ("Defendants' attorneys . . . consistently put plaintiffs' counsel through the paces. All counsel consistently demonstrated considerable skill and cooperation to bring this matter to an amicable conclusion."). Here, Defendants have been represented by highly experienced lawyers throughout the Litigation from Latham & Watkins, a well-respected law firm known for its vigorous defense in cases such as this.

Notwithstanding this formidable opposition, Lead Counsel developed a case that was sufficiently strong to persuade Defendants to settle the action on terms highly favorable to the Class. *See Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 U.S. Dist. LEXIS 27077, at *100 (N.D. Tex. Nov. 8, 2005) ("The ability of plaintiffs' counsel to obtain such a favorable settlement for the Class in the face of such formidable legal opposition confirms the superior quality of their representation."). Accordingly, this factor further supports the requested attorneys' fees.

3. The Complexity and Duration of the Litigation Support the Requested Fee

Courts have long recognized that securities class actions are notoriously complex and difficult to prove, and this case was no exception. *See, e.g.*, *Redwen v. Sino Clean Energy, Inc.*, No. CV 11-3936 PA (SSx), 2013 WL 12303367, at *6 (C.D. Cal. July 9, 2013) ("Courts experienced with securities fraud litigation '"routinely recognize that securities class actions present hurdles to proving liability that are difficult for plaintiffs to clear."'"); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM)(PED), 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (recognizing securities class litigation is "'"notably difficult and notoriously uncertain"'"); *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM) (GWG), 2014 U.S. Dist. LEXIS 64517, at *46 (S.D.N.Y. May 9, 2014) ("[T]he complex and multifaceted subject matter involved in a securities class action such as this supports the fee request."), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015).

Many complex issues were raised in the Litigation. Among other things, Lead Counsel needed to develop an understanding of the digital marketing industry in which Constant Contact operates. A comprehensive factual investigation was undertaken by Lead Counsel who drafted a detailed Amended Complaint. Defendants likewise made potentially compelling arguments in connection with their motion to dismiss and the mediation that they made no material omissions or

misrepresentations, did not act with scienter, and that Lead Plaintiff could not establish loss causation in connection with the decline in Constant Contact's stock price. More specifically, Defendants argued that Lead Plaintiff had not pleaded facts supporting a strong inference of scienter with respect to Defendants' statements regarding Toolkit. They also argued that their statements regarding Toolkit were corporate puffery, or vague predictions about the prospects for a new product, neither of which are actionable under the Securities Exchange Act of 1934. Defendants also argued that Constant Contact frequently and specifically warned investors that Toolkit was not a fully developed product.

Defendants maintained that Lead Plaintiff could not establish loss causation because there was no corrective disclosure that can be tied to either stock price decline, which occurred after earnings releases. Moreover, because a number of negative announcements were made to the market at the end of the Class Period, Defendants argued that Lead Plaintiff would be unable to disaggregate the decline attributable to the Save Program, which in itself was not material to Constant Contact's overall operations.

The parties also disagreed on the import and relevance of Constant Contact's settlement with the SEC, the pending announcement of which precipitated the early mediation in this case. Lead Plaintiff believes that the SEC settlement confirms its allegations regarding the Save Program. On the other hand, Defendants argued that the SEC's investigation resulted in no findings of fraud or other wrongdoing related to the rollout of Toolkit or Defendants' attribution of customer cancellations to issues pertaining to credit cards. And they continued to argue the immateriality of

the Save Program to the Company as a whole.[8] *See* Astley Decl., ¶65. These risks were carefully weighed by Lead Counsel in agreeing to resolve the case for $13 million.

Accordingly, the magnitude and complexity of this Litigation support the conclusion that the requested fee is fair and reasonable.

4. The Risk of Non-Payment Was High in This Case

In a case undertaken on a contingent fee basis, the risk of the litigation is a key factor in determining an appropriate fee award. *See Roberts*, 2016 U.S. Dist. LEXIS 136987, at *44-*45 ("[M]ost importantly, Class Counsel took the case on a contingency fee basis, assuming significant risk in litigating the case."); *Hill*, 2015 WL 127728, at *18 ("consider[ing] . . . contingency risk in awarding attorneys' fees" when counsel "litigated the Action on a fully contingent basis and were exposed to the risk that they might obtain no compensation for their efforts on behalf of the class"). Where, as here, Lead Counsel "undertook this action on a contingency basis and faced a significant risk of non-payment, this factor weighs more heavily in favor of rewarding litigation counsel." *CVS*, 2016 WL 632238, at *9.

As noted in the Astley Decl. and herein, from the outset of this case in 2015 it was apparent that Lead Counsel faced challenges to establishing liability and damages. Thus, there was a significant risk that the case could be litigated for many years but result in little to no recovery for the Class. Specifically, Lead Counsel faced substantial risks and uncertainties in, among other things, alleging and then proving that Defendants' alleged misstatements were materially false and misleading and made with scienter as required by the federal securities laws. There is also a risk that Defendants could raise substantial doubt that the decline in Constant Contact stock was caused by

[8] The SEC's settlement with both Endurance and Constant Contact, announced in June 2018 totaled only $8 million for ***both*** companies. Astley Decl., ¶34.

something other than the alleged false and misleading statements and omissions. Lead Counsel also faced the risk that the Class would not be certified. And, in the absence of a settlement, the Class faced a substantial litigation risk with no guarantee of a greater recovery. Despite these very real risks, Lead Counsel worked vigorously to achieve a significant result for the Class. Under these circumstances, the requested fee is fully appropriate.

5. The Amount of Time Devoted to the Litigation by Lead Counsel Supports the Requested Fee

The extensive time and effort expended by Lead Counsel in prosecuting the Litigation and achieving the Settlement for over four years also establish that the requested fee is justified and reasonable. *See Hill*, 2015 WL 127728, at *19. The Astley Decl. details the substantial efforts of Lead Counsel in prosecuting Lead Plaintiff's claims. Among other things, Lead Counsel: conducted a comprehensive investigation into the Class' claims; researched and prepared the detailed amended complaint; fully briefed Defendants' motion to dismiss; reviewed documents produced by Defendants in advance of the mediation; prepared thorough mediation materials; and engaged in an arm's-length mediation process. Here, Lead Plaintiff's Counsel devoted more than 2,100 hours to the prosecution of this action.[9] The substantial time and effort devoted to this case, and the efficient and effective management of the Litigation, was critical in obtaining the favorable result achieved by the Settlement, and confirms that the fee request here is reasonable.

6. Awards in Similar Cases Support the Requested Fee

As discussed above, Lead Counsel's requested fee of 25% of the Settlement Fund is well within the range of fee awards in class action cases in this Circuit and elsewhere. *See* §II.B.1.

[9] Moreover, the legal work on this action will not end with the Court's approval of the proposed Settlement. Additional hours and resources already have been, and necessarily will continue to be, expended assisting members of the Class with their Proof of Claim and Release forms, overseeing the claims process, and responding to Class Member inquiries.

Moreover, the reasonable percentage fee award represents a modest multiplier of 2.1, which is well within the range awarded in class action cases with substantial contingency risks. *See* §II.C.; Astley Decl., ¶99 herein. Thus, this factor strongly supports the reasonableness of the requested fee.

7. Public Policy Considerations Support the Requested Fee

Public policy supports rewarding counsel for prosecuting securities class actions, especially where, as here, "counsel's dogged efforts – undertaken on a wholly contingent basis – result in satisfactory resolution for the class." *CVS*, 2016 WL 632238, at *9 (quoting *Tyco*, 535 F. Supp. 2d at 270). As the Supreme Court has emphasized, private securities actions such as this provide "'a most effective weapon in the enforcement' of the securities laws and are a 'necessary supplement to [SEC] action.'" *Bateman*, 472 U.S. at 310.

8. The Endorsement of Lead Plaintiff and the Reaction of the Class Support the Requested Fee

Lead Plaintiff was appointed pursuant to the relevant provisions of the PSLRA. As set forth in Lead Plaintiff's declaration,[10] and as Ms. Delaney testified under oath during the preliminary approval hearing, North Collier carefully oversaw the prosecution and resolution of this Litigation, and had a sound basis for assessing the reasonableness of the fee request. Lead Plaintiff North Collier fully supports and approves that request. *See* Delaney Aff., ¶15.

Furthermore, the reasonableness of the requested fee is supported by the reaction of the Class. *See, e.g.*, *Hill*, 2015 WL 127728, at *19 ("The endorsement of the Lead Plaintiffs and the favorable reaction of the class both support approval of the requested fees."). As of March 25, 2020, the Claims Administrator disseminated in excess of 20,800 Notice Packages. *See* Murray Decl., ¶¶4-11. To date, no Class Members have objected to any portion of the Settlement or Lead Counsel's

[10] *See* Affidavit of Michelle Delaney ("Delaney Aff.") (ECF No. 86-1).

requested fee.[11] *See, e.g.*, *Bezdek*, 79 F. Supp. 3d at 351 (finding "overwhelmingly positive" reaction of class to settlement and "quite low number of opt-outs" weighed in favor of requested fee).

In sum, Lead Plaintiff's Counsel respectfully submit that the 25% fee is reasonable here, and should be awarded.

E. The Expenses, Costs and Charges Incurred Are Reasonable and Were Necessary to Achieve the Benefit Obtained

Lead Counsel's fee application includes a request for payment of litigation expenses, costs and charges that were reasonable and necessary to the prosecution of the Litigation. Attorneys who create a common fund for the benefit of a class are entitled to payment of reasonable litigation expenses from the fund. *See, e.g.*, *In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999) ("[L]aw firms are not eleemosynary institutions, and lawyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover from the fund, as a general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax."). In the Notice, the Class was advised that Lead Counsel would ask the Court for an award of litigation expenses not to exceed $120,000.

Lead Plaintiff's Counsel's expense request of $60,773.99 is reasonable and should be approved. The individual declarations of Robbins Geller, Sugarman & Susskind and the Law Office of Alan L. Kovacs, submitted herewith, provide itemized schedules of the expenses, costs and charges incurred by each firm. The expenses listed on those schedules are ones that are necessarily incurred in litigation to achieve a successful outcome.

Lead Counsel respectfully submit that these amounts were reasonably and necessarily incurred in prosecuting this action and should be awarded from the Settlement Fund. *See, e.g.*, *In re*

[11] Lead Counsel will address any fee-related objections that are received in their reply papers, to be filed with the Court on May 13, 2020.

Glob. 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. For this reason, they are properly chargeable to the Settlement fund."); *see also Anwar v. Fairfield Greenwich Ltd.*, No. 09-CV-118 (VM), 2012 WL 1981505, at *3 (S.D.N.Y. June 1, 2012) ("Here, Plaintiffs' Counsel seek reimbursement for expenses such as mediation fees, expert witness fees, electronic legal research, photocopying, postage, and travel expenses, each of which is the type the paying, arms' length market reimburses attorneys. . . . As such, these expenses shall be reimbursed."); *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 454 (E.D. Cal. 2013) (noting "travel, mediation fees, photocopying, . . . delivery and mail charges" are "routinely reimbursed").

III. CONCLUSION

For the reasons set forth above, Lead Plaintiff's Counsel respectfully request that the Court enter an Order awarding fees of $3,250,000, plus accrued interest; and $60,773.99 in litigation expenses, costs and charges plus accrued interest.

DATED: March 30, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 30, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Court's Electronic Mail Notice List, and I hereby certify that I have caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the Court's Manual Notice List.

/s/ Ellen Gusikoff Stewart
ELLEN GUSIKOFF STEWART