UNITED STATES DISTRICT COURT

DISTRICT OF RHODE ISLAND

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| RICHARD MEDOFF, Individually and On Behalf Of All Others Similarly Situated,<br><br>Plaintiff,<br><br>vs.<br><br>CVS CAREMARK CORPORATION, et al.,<br><br>Defendants. | No. 1:09-cv-00554-JNL-PAS<br><br>CLASS ACTION<br><br>MEMORANDUM OF LAW IN SUPPORT OF LEAD COUNSEL'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES |

**TABLE OF CONTENTS**

**Page**

## TABLE OF AUTHORITIES

**Page**

**CASES**

**Page**

**Page**

**Page**



**STATUTES, RULES AND REGULATIONS**



**SECONDARY AUTHORITIES**

**Page**

Court-appointed Lead Counsel Robbins Geller Rudman & Dowd LLP ("Robbins Geller") and Labaton Sucharow LLP ("Labaton Sucharow") (together, "Lead Counsel") submit this memorandum in support of their application for an award of attorneys' fees and expenses.

## I. INTRODUCTION

Having recovered $48 million on behalf of the Class, Lead Counsel respectfully apply for an award of attorneys' fees in the amount of 30% of the Settlement Amount.[1] Lead Counsel also seek an award of $857,631.86 in expenses that are reasonable and were necessary to prosecute the Litigation, plus interest on both amounts.

The result achieved here is significant when viewed against the myriad of risks Co-Lead Plaintiffs and Lead Counsel faced in establishing both liability and damages on their securities claims, particularly in the face of the unique hurdles generated by the Private Securities Litigation Reform Act of 1995 ("PSLRA"). On liability, for instance, Defendants vigorously disputed every element of Co-Lead Plaintiffs' claims, including falsity, scienter, and loss causation, and there was a significant risk that at summary judgment or trial (and on inevitable appeals) Defendants would prevail on one or more of their numerous defenses.

Even if Co-Lead Plaintiffs had succeeded in establishing liability on their claims, Defendants advanced powerful arguments under the federal securities laws that, if accepted, could have substantially reduced or eliminated the Class' damages altogether. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005); *see also Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse Sec. (USA) LLC*, 752 F.3d 82, 86 (1st Cir. 2014) (explaining that plaintiffs must prove that "the stock

[1] All capitalized terms used herein shall have the same meanings as set forth herein or in the Stipulation of Settlement, dated as of August 24, 2015, and filed with the Court on September 14, 2015 ("Stipulation") (Dkt. No. 122).

market must have reacted to the subsequent disclosure of the misconduct and not to a 'tangle of [other] factors'").[2]

Lead Counsel faced the risks of this Litigation head on. As detailed in the accompanying Joint Declaration,[3] Lead Counsel vigorously pursued this Litigation for some six years, including committing the necessary resources, since filing the initial complaint on November 17, 2009. Indeed, plaintiffs' counsel devoted over 32,400 hours and a total of $857,631.86 in expenses and charges to achieve this recovery.

Before even drafting the Complaint, Lead Counsel: conducted an exhaustive search of all public information available about CVS Caremark, the subject merger, and its senior management, including for example both its SEC filings and articles concerning the Company; complied with the lead plaintiff provisions of the PSLRA; reviewed analyst reports written about the Company before, during, and after the Class Period; and directed in-house investigators to interview over 100 potential witnesses. Following the dismissal of the Complaint in response to Defendants' motion to dismiss, Lead Counsel researched, briefed, and argued the appeal to the United States Court of Appeals for the First Circuit. Upon remand, the parties thereafter engaged in extensive formal discovery, including Lead Counsel subpoenaing 60 non-party witnesses, reviewing and analyzing over 1.3 million pages of documents, and taking or defending 15 depositions. Lead Counsel also retained experts in the fields of pharmacy benefit management, health information technology, and economic analysis. Before engaging in settlement discussions, Lead Counsel fully briefed Co-Lead Plaintiffs' motion for class certification, in which Lead Counsel submitted the expert report of Professor

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[2] Citations are omitted throughout unless otherwise indicated.

[3] The "Joint Declaration" or "Joint Decl." is the Joint Declaration of Robert M. Rothman and Jonathan Gardner in Support of: (1) Co-Lead Plaintiffs' Motion for Final Approval of Settlement and Plan of Allocation; and (2) Lead Counsel's Application for an Award of Attorneys' Fees and Expenses.

Steven P. Feinstein, Ph.D., CFA, opining on the efficiency of the market for CVS Caremark common stock. *See* Joint Decl., ¶¶6, 21-22, 42, 51-57, 59-61.

In conjunction with the proposed Settlement, Lead Counsel consulted their damages expert Dr. Feinstein, prepared a comprehensive brief, engaged in a full-day mediation session with Defendants, and negotiated the detailed terms and conditions of the settlement papers over a number of weeks. *See* Joint Decl., ¶¶63-64, 66, 71.

Lead Counsel undertook these significant efforts without any compensation and in the face of substantial litigation risks in a very challenging case. As discussed in the Joint Declaration and Memorandum of Law in Support of Co-Lead Plaintiffs' Motion for Final Approval of Settlement and Plan of Allocation ("Settlement Memorandum"), the factual and legal considerations in this securities class action are particularly complex. *See* Joint Decl., ¶¶81-105.

In light of all of these significant risks, the recovery is a favorable result and demonstrates the high quality of Lead Counsel's representation. As compensation for their significant efforts and achievements on behalf of the Class – and with the express endorsement of Co-Lead Plaintiffs City of Brockton Retirement System, Plymouth County Retirement System, and Norfolk County Retirement System[4] – Lead Counsel request a fee award in the amount of 30% of the Settlement Amount and an award of litigation expenses in the amount of $857,631.86, plus interest on both amounts. As discussed below, the requested fee is comfortably within the range of fees awarded in comparable class action settlements, whether considered as a percentage of the Settlement or on a lodestar/multiplier basis.

[4] *See* Declaration of Norfolk County Retirement System in Support of Approval of Proposed Class Action Settlement and Request for Attorneys' Fees and Expenses ("Norfolk County Decl."), ¶6; Declaration of Plymouth County Retirement System and City of Brockton Retirement System in Support of Approval of Proposed Class Action Settlement and Request for Attorneys' Fees and Expenses ("Plymouth County and City of Brockton Decl."), ¶6, submitted herewith.

For all the reasons set forth below, Lead Counsel respectfully request that the Court approve their application for an award of attorneys' fees and litigation expenses.

## II. LEAD COUNSEL'S FEE REQUEST IS REASONABLE AND FAIR

### A. Attorneys' Fees Should Be Awarded from the Settlement's Common Fund

Following the Supreme Court, which "has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole," *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980), courts in this Circuit apply the "common fund" doctrine. *See Bezdek v. Vibram USA Inc.*, No. 12-10513, 2015 WL 223786, at *19 (D. Mass. Jan. 16, 2015) ("Under the common fund doctrine, where attorneys succeed in obtaining a fund that benefits the class, they are entitled to 'a reasonable attorney's fee from the [settlement] fund as a whole.'") (quoting *Boeing*, 444 U.S. at 478); *In re Tyco Int'l, Ltd.*, 535 F. Supp. 2d 249, 265 (D.N.H. 2007) (same).

"This is rooted in 'the equitable principle that those who have profited from litigation should share its costs.'" *Bezdek*, 2015 WL 223786, at *19 (quoting *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 n.6 (1st Cir. 1995)); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000) (same); *Tyco*, 535 F. Supp. 2d at 265 ("By assessing attorneys' fees and litigation expenses against a common fund, the court spreads these costs proportionately among those benefitted by the suit."). "Moreover, providing adequate compensation encourages capable plaintiffs' attorneys to aggressively litigate complex, risky cases like this one rather than settling lower and earlier than would be in the best interests of the class members they represent." *Id.*

In addition to providing just compensation, awards of fair attorneys' fees from a common fund encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future misconduct of a similar nature. *See, e.g., Jenkins v.*

*Trustmark Nat'l Bank*, 300 F.R.D. 291, 307 (S.D. Miss. 2014); *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000). Indeed, the Supreme Court has "long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought . . . by the Department of Justice and the Securities and Exchange Commission." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). Accordingly, common fund fee awards encourage and support meritorious class actions and thereby promote private enforcement of, and compliance with, the federal securities laws.

### B. The Court Should Award Attorneys' Fees Using the Percentage of Recovery Method

The Supreme Court has endorsed the percentage method, 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 has approved of the use of the percentage method in common fund cases, noting that it 'offers significant structural advantages . . . including ease of administration, efficiency, and a close approximation of the marketplace.'" *Hill v. State St. Corp.*, No. 09-12146-GAO, 2015 WL 127728, at *16-*17 (D. Mass. Jan. 8, 2015) (quoting *Thirteen Appeals*, 56 F.3d at 307-08). Specifically, courts in this Circuit often "use the percentage of fund ('POF') method with a lodestar cross-check to evaluate the fee request." *Tyco*, 535 F. Supp. 2d at 265 (footnote omitted); *see United States v. 8.0 Acres of Land*, 197 F.3d 24, 33 (1st Cir. 1999); *Thirteen Appeals*, 56 F.3d at 307-08; *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 78 (D. Mass. 2005) ("The First Circuit and several district courts in this circuit have approved the use of the percentage of fund method in common fund cases where a pool of money is to be divided among class members."). This method "is appropriate in common fund cases because it 'rewards counsel for success and penalizes it [counsel] for failure.'" *Tyco*, 535 F. Supp. 2d at 265.

Additionally, 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).

Given the fact that this securities class action settlement is a "'paradigmatic common fund' case," *In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 852, 860 (W.D. Pa. 1995), Lead Counsel respectfully submit that the Court should apply the percentage-of-the-fund method, cross-checked against the lodestar, the common practice in this Circuit. *See Relafen*, 231 F.R.D. at 79 ("Courts have used the lodestar as a cross check to the percentage of fund.").

**C. An Award of 30% of the Gross Settlement Amount Is Appropriate**

Using the percentage of recovery method, the court "shapes the counsel fee based on what it determines is a reasonable percentage of the fund recovered for those benefitted by the litigation." *Thirteen Appeals*, 56 F.3d at 305. The requested 30% fee is within the typical range of percentage fees awarded in the First Circuit. *See Latorraca v. Centennial Techs., Inc.*, 834 F. Supp. 2d 25, 27 (D. Mass. 2011) ("Courts in this circuit generally award attorneys' fees in the range of 20-30% . . . ."); *In re Lupron Mktg. & Sales Practices Litig.*, No. MDL 1430, 2005 WL 2006833, at *5 (D. Mass. Aug. 17, 2005) ("Courts in the First Circuit have recognized that fee awards in common fund cases typically range from 20 to 30 percent."); *Manual for Complex Litigation* §14.121, at 188 (4th ed. 2004) ("Attorney fees awarded under the percentage method are often between 25% and 30% of the fund.").

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 in considering an award of attorneys' fees, 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.

Each of these factors supports the award requested here.

**1. The Size of the Fund and the Number of Persons Benefitted**

Here, Lead Counsel achieved a sizeable recovery of $48 million for the benefit of the Class. The Settlement is all cash and Class Members[5] will receive compensation that was otherwise uncertain when the case began. The Settlement achieved represents a favorable recovery for members of the Class, particularly in light of the substantial risks posed in the Litigation. Lead Counsel submit that the size of the recovery obtained is also a testament to the quality of their representation and supports the reasonableness of the requested fee. 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 Tyco*, 535 F. Supp. 2d at 265 ("The POF method is appropriate in common fund cases because it 'rewards counsel for success and penalizes it [counsel] for failure.'"); *Duhaime v. John Hancock Mutual Life Ins. Co.*, 989 F. Supp. 375, 377 (D. Mass. 1997) (noting that an advantage of the percentage method is that it "focuses 'on result, rather than process, which better approximates the workings of the marketplace'" and provides that "the greater the value secured for the class, the greater the fee earned by class counsel").

First, the $48 million Settlement Amount compares favorably to settlements in other securities class actions. As reported by NERA Economic Consulting, the median settlement amount in securities cases in 2014 was $6.5 million. Dr. Renzo Comolli & Svetlana Starykh, *Recent Trends*

[5] The number of Class Members who will submit valid claims and will receive a portion of the Net Settlement Fund cannot be determined at this stage, as the due date for Proof of Claim and Release forms ("Proof of Claim") is not until March 23, 2016. However, because Notice Packets have thus far been mailed to over 500,000 potential Class Members, Lead Counsel believe that numerous Proofs of Claim will be submitted and that thousands of Class Members will benefit from the Settlement. *See* accompanying Declaration of Adam D. Walter on Behalf of A.B. Data, Ltd. Regarding Mailing of Notice to Potential Class Members and Publication of Summary Notice ("Walter Decl."), ¶10.

*in Securities Class Action Litigation: 2014 Full-Year Review*, at 28 (NERA Jan. 20, 2015). Second, the Settlement achieves a recovery of approximately 5.33% of likely maximum recoverable damages. *See* Joint Decl., ¶67. This is well above the average recovery in securities class actions of 2.2% with similar recoverable damages. *See* Laarni T. Bulan, Ellen M. Ryan, and Laura E. Simmons, *Securities Class Action Settlements 2014 Review and Analysis*, at 8-9 (Cornerstone Research 2014) (noting that in 2014, securities settlements overall and settlements with estimated damages between $500 and $999 million both returned a median of 2.2% of damages); *see, e.g.*, *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (court approved $40.3 million settlement representing approximately 6.25% of estimated damages and noted that this is at the "higher end of the range of reasonableness of recovery in class actions securities litigations").

Accordingly, the size of the common fund created and number of people who will benefit support the fee request.

**2. The Skill, Experience, and Efficiency of the Attorneys Involved**

Considerable litigation skills were required in order for Lead Counsel to achieve the Settlement in this Litigation. This was a complex case involving a number of unusual factual and legal issues. Given the complex facts and many contested issues, including the issue of loss causation, it took highly skilled counsel to represent the Class and bring about the substantial recovery that has been obtained.

As demonstrated by their firm resumes, Robbins Geller and Labaton Sucharow [6] are among the nation's leading securities class action firms. Lead Counsel submit that their skill, the quality of their efforts in the Litigation, their substantial experience in securities class actions, and their

[6] *See* Declaration of Robert M. Rothman Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Rothman Decl."); Declaration of Jonathan Gardner Filed on Behalf of Labaton Sucharow LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Gardner Decl.").

commitment to the Litigation were key elements in enabling Lead Counsel to negotiate this Settlement. In addition, Lead Counsel were ably assisted by Liaison Counsel Barry J. Kusinitz as well as the firms of Orr & Reno, P.A. in New Hampshire and the Law Offices of Bernard M. Gross, P.C.[7]

Importantly, Defendants were represented by highly-experienced lawyers from a prominent national law firm, Williams & Connolly LLP, and well-respected liaison counsel, Hinckley, Allen & Snyder LLP. The ability of Lead Counsel to obtain such a favorable settlement for Co-Lead Plaintiffs and the Class in the face of formidable legal opposition confirms the quality of their representation. *See, e.g.*, *Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 WL 3148350, at *30 (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."); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004) ("'The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work.'"). This factor further supports the requested percentage.

**3. The Complexity and Duration of the Litigation**

This Litigation was complex and litigated by counsel to Co-Lead Plaintiffs and Defendants for some six years. Even in more straightforward cases litigated for a shorter duration, courts have recognized that securities class actions are generally complex and difficult. *See City of Providence v. Aéropostale, Inc.*, No. 11 Civ. 7132(CM)(GWG), 2014 WL 1883494, at *16 (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."); *Fogarazzo v. Lehman Bros., Inc.*, No. 03 Civ. 5194(SAS), 2011 WL

[7] *See* Declaration of Barry J. Kusinitz Filed in Support of His Application for an Award of Attorneys' Fees and Expenses ("Kusinitz Decl."); Declaration of William L. Chapman Filed on Behalf of Orr & Reno, P.A. in Support of Application for Award of Attorneys' Fees and Expenses ("Chapman Decl."); Declaration of Bernard M. Gross Filed on Behalf of Law Offices Bernard M. Gross, P.C. in Support of Application for Award of Attorneys' Fees and Expenses ("Gross Decl.").

671745, at *3 (S.D.N.Y. Feb. 23, 2011) ("[C]ourts have recognized that, in general, securities actions are highly complex."). In fact, this case was substantially more complex and multi-faceted than a typical securities action.

As described in greater detail below and in the Joint Declaration, the claims asserted in the Litigation were broad and complex: Co-Lead Plaintiffs sought to recover for investors who purchased CVS Caremark common stock during a 12-month period. As to the key issue, the cause of the drop in CVS Caremark's stock price on November 5, 2009, the parties vehemently disagreed. Lead Counsel asserted that the price decline was in reaction to disappointing disclosures regarding the degree of success of the merger and integration of CVS Caremark systems. Defendants argued just as strenuously that the decline was in response to the Company's announcement of its failure to meet previous earnings projections, which projections were inactionable "forward looking statements." *See* Joint Decl., ¶86.

Lead Counsel had to develop substantial expertise in the pharmacy benefit management industry in general and, in particular, the merger and integration of CVS Caremark systems in order to marshal evidence on these matters. This expertise was honed through their investigation in which they interviewed 119 potential witnesses and conducted extensive formal fact discovery – including subpoenaing 60 non-party witnesses, engaging in complicated and voluminous electronic discovery in which Lead Counsel reviewed and analyzed approximately 1.3 million pages of documents, taking or defending 15 depositions, and working with multiple experts in the fields of pharmacy benefit management, health information technology, economic analysis, damages, and price impact. Joint Decl., ¶6. Moreover, the discovery process in this Litigation was hotly disputed and resulted in multiple discovery conferences and motions. *See id.*, ¶58. Lead Counsel successfully confronted these difficulties and achieved a very favorable recovery for the Class. Thus, this factor fully supports the fee requested.

**4. The Extremely High Risk of Non-Payment**

The fully contingent nature of Lead Counsel's fee and the substantial risks posed by the Litigation are also very important factors supporting the requested fee. "Many cases recognize that the risk [of non-payment] assumed by an attorney is '"perhaps the foremost" factor' in determining an appropriate fee award." *Lupron*, 2005 WL 2006833, at *4; *see also Hill*, 2015 WL 127728, at *18. Moreover, "'[n]o 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.'" *Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974).

Indeed, the Court initially granted Defendants' motion to dismiss in its entirety for, among other reasons, failure to plead loss causation. While Lead Counsel appealed that ruling to the First Circuit, which vacated the dismissal, the First Circuit cautioned that "it will be up to the Retirement Systems to prove how much of [the November 5, 2009] drop resulted from revelations about CVS Caremark's integration, which are actionable, and how much resulted from disappointment in CVS Caremark's projected earnings, which is not actionable." *Mass. Ret. Sys. v. CVS Caremark Corp.*, 716 F.3d 229, 241 n.7 (1st Cir. 2013).

Thus, from a relatively early stage in this case, it was apparent that Lead Counsel faced significant challenges to establishing liability and damages, and there was a significant risk that the case could be litigated for many years but result in no recovery for the Class and no payment for Lead Counsel. Nonetheless, Lead Counsel devoted enormous resources to the vigorous and effective prosecution of the Litigation and made every effort to maximize the recovery achieved here for the benefit of the Class.

The significant litigation risks present in this case are set forth in more detail in the Joint Declaration and the Settlement Memorandum, but are summarized briefly here: Defendants disputed the falsity, scienter, loss causation, and damages elements of Co-Lead Plaintiffs' securities claims,

and there was a significant risk that at summary judgment or trial (or on appeal) Defendants would prevail on either liability or damages. *See* Joint Decl., ¶¶81-105. Defendants' primary defense on loss causation and damages was that the entirety of the November 5, 2009 stock decline was attributable to Defendants' statements on a conference call in which they revised downward their prior earnings projections, which the First Circuit ruled to be inactionable. Accordingly, Defendants argued that there were no recoverable damages. *Id.*, ¶¶84-91, 102-105. With respect to falsity, Defendants argued that there were no integration issues that caused the Company to lose business. As a result, Defendants argued that their statements concerning the Company's post-merger integration, which were held to be actionable, were nevertheless not false. *Id.*, ¶¶92-99. Defendants further argued that because their merger integration statements were not false, they could not have been made with the requisite scienter. *Id.*, ¶100. Finally, Defendants argued that certain Defendants' stock sales could not support scienter. *Id.*, ¶101. In short, Defendants vigorously contested every element of Co-Lead Plaintiffs' claims.

In the face of these significant risks, Lead Counsel prosecuted this action on a wholly contingent basis, knowing that the Litigation could last for years and would require the devotion of a substantial amount of attorney time and the advance of significant litigation expenses with no guarantee of any compensation. Lead Counsel's assumption of this contingency fee risk, and its extensive litigation in the face of these risks, strongly supports the reasonableness of the fee. *See Hill*, 2015 WL 127728, at *18 (considering the contingency risk in awarding attorneys' fees where 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"); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("There was significant risk of non-payment in this case, and Plaintiffs' Counsel should be rewarded for having borne and successfully overcome that risk."); *In re OCA, Inc. Sec. & Derivative Litig.*, No. 05-2165, 2009 WL 512081, at *22 (E.D. La. Mar. 2, 2009)

(Where counsel faced challenges in establishing *scienter* and loss causation and in proving liability and damages at trial, "the risk plaintiffs' counsel undertook in litigating this case on a contingency basis must be considered in its award of attorneys' fees, and thus an upward adjustment is warranted."); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 372 (S.D.N.Y. 2002) ("'Class counsel undertook a substantial risk of absolute non-payment in prosecuting this action, for which they should be adequately compensated.'").

Accordingly, this factor strongly supports the reasonableness of the requested fee.

**5. The Amount of Time Devoted to the Case by Counsel**

The time and effort expended by Lead Counsel in prosecuting this Litigation and achieving the Settlement also establish that the requested fee is justified and reasonable. *See Hill*, 2015 WL 127728, at *19. The Joint Declaration details the substantial efforts of Lead Counsel in prosecuting Co-Lead Plaintiffs' claims over the course of some six years of litigation, including, among other things:

- reviewing and analyzing CVS Caremark's Class Period and pre-Class Period public filings, annual reports, press releases, quarterly earnings call and investment conference transcripts, and other public statements;
- utilizing the services of its in-house investigators, who located and interviewed approximately 119 confidential witnesses, including former employees of CVS Caremark;
- researching, investigating, and drafting the initial complaints and the operative Complaint;
- researching and drafting the motion to appoint the Co-Lead Plaintiffs;
- fully briefing Defendants' two rounds of motions to dismiss;
- fully briefing Co-Lead Plaintiffs' First Circuit appeal;
- fully briefing Co-Lead Plaintiffs' motion for class certification;
- serving numerous discovery requests on Defendants, including:
    - seven requests for production seeking 83 categories of documents;

  - two sets of interrogatories containing 22 separate interrogatories; and
  - 22 Requests for Admission;
- frequently meeting and conferring with Defendants regarding the scope of production and on several occasions litigating discovery disputes;
- subpoenaing 60 non-party witnesses;
- obtaining, reviewing, and analyzing over 1.3 million pages of documents;
- taking or defending 15 depositions of party and non-party witnesses;
- retaining experts in the fields of economic analysis, pharmacy benefit management, healthcare information technology, damages, and price impact; and
- engaging in a comprehensive mediation with the Honorable Layn R. Phillips (Ret.), in which the parties exchanged mediation reports.

*See* Joint Decl., ¶¶6, 16-61.

Lead Counsel, Liaison Counsel, Orr & Reno, P.A., and the Law Offices Bernard M. Gross, P.C. together expended a total of more than 32,400 hours investigating, prosecuting, and resolving this Litigation through December 15, 2015 with a total lodestar value of $16,146,146.00. *See* Rothman Decl., ¶4; Gardner Decl., ¶4; Kusinitz Decl., ¶4; Chapman Decl., ¶6; Gross Decl., ¶4; Joint Decl., ¶34. The substantial time and effort devoted to this case and Lead Counsel's efficient and effective management of the Litigation were critical in obtaining the favorable result achieved by the Settlement, and confirm that the fee request is reasonable.

**6. Awards in Similar Cases**

According to one court, "nearly two-thirds of class action fee awards based on the percentage method were between 25% and 35% of the common fund." *In re Neurontin Mktg. & Sales Practices Litig.*, No. 04-cv-10981-PBS, 2014 WL 5810625, at *3 (D. Mass. Nov. 10, 2014); *see also Shaw v. Toshiba Am. Info. Sys.*, 91 F. Supp. 2d 942, 972 (E.D. Tex. 2000) ("[B]ased on the opinions of other courts and the available studies of class action attorneys' fees awards (such as the NERA study), this Court concludes that attorneys' fees in the range from twenty-five percent (25%) to thirty-three and

thirty-four one-hundredths percent (33.34%) have been routinely awarded in class actions. Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.").

Lead Counsel's fee request of 30% of the recovery is consistent with fee awards in securities and antitrust class actions in district courts within the First Circuit. *See, e.g.*, *Relafen*, 231 F.R.D. at 80-82 (awarding 33.3% of $75 million settlement fund); *In re StockerYale, Inc. Sec. Litig.*, No. 05 CV 177-SM, 2007 WL 4589772, at *6 (D.N.H. Dec. 18, 2007) (awarding 33% of $3.4 million settlement). Furthermore, several courts within the First Circuit have issued unpublished orders awarding attorneys' fees of 30% or more in securities class actions. *See, e.g.*, *Deckler v. Ionics, Inc.*, No. 03-CV-10393-WGY, slip op. (D. Mass. Apr. 4, 2005) (30%); *In re Segue Software, Inc.*, No. 99-10891-RGS, slip op. (D. Mass July 31, 2001) (33%); *Wilensky v. Digital Equip. Corp.*, No. 94-10752-JLT, slip op. (D. Mass. July 11, 2001) (33-1/3% fee awarded); *Chalverus v. Pegasystems, Inc.*, No. 97-12570-WGY, slip op. (D. Mass. Dec. 19, 2000) (33%); *In re Picturetel Corp. Sec. Litig.*, No. 97-12135-DPW, slip op. (D. Mass. Nov. 4, 1999) (33.3%); *Zeid v. Open Env't Corp.*, No. 96-12466-EFH, slip op. (D. Mass. June 24, 1999) (33.3%); *Morton v. Kurzweil Applied Intelligence, Inc.*, No. 10829-REK, slip op. (D. Mass. Feb. 4, 1998) (33.3%); *In re Zoll Med. Corp. Sec. Litig.*, No. 94-11579-NG, slip op. (D. Mass. Oct. 5, 1998) (33-1/3% ); *In re Bay Fin. Corp. Sec. Litig.*, No. 89-2377-WD, slip op. (D. Mass. Nov. 4, 1996) (35%).

The requested 30% fee is also within the range of percentage fee awards that have been granted in comparable securities class actions in other Circuits. *See, e.g.*, *In re Regions Morgan Keegan Sec., Derivative & ERISA Litig.*, No. 07-cv-02830 SHM dkv, slip op. at 21 (W.D. Tenn. Aug. 5, 2013) (awarding 30% of $62 million settlement); *In re Bisys Sec. Litig.*, No. 04 Civ. 3840(JSR), 2007 WL 2049726, at *3 (S.D.N.Y. July 16, 2007) (awarding 30% of $65.8 million settlement); *In re BellSouth Corp. Sec. Litig.*, No. 1:02-cv-2142-WSD, 2007 U.S. Dist. LEXIS

98429, at *14 (N.D. Ga. Apr. 9, 2007) (awarding 30% of $34.5 million settlement); *In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 433-35 (E.D. Pa. 2001) (awarding 33-1/3% of $48 million settlement); *see also Providence*, 2014 WL 1883494, at *15, *19 (awarding fees of 33% of $15 million settlement where maximum damages were $163 million); *Maley*, 186 F. Supp. 2d at 374 (awarding 33.3% of settlement fund valued at over $11.5 million).

**7. Public Policy Considerations**

Public policy also supports rewarding firms for bringing successful securities litigation. The Supreme Court has emphasized that 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 Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985); *see also Tellabs*, 551 U.S. at 313. Accordingly, public policy favors granting Lead Counsel's fee and expense application here. *See Tyco*, 535 F. Supp. 2d at 270; *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400(CM)(PED), 2010 WL 4537550, at *29 (S.D.N.Y. Nov. 8, 2010) (If the "important public policy [of enforcing the securities laws] is to be carried out, the courts should award fees which will adequately compensate Lead Counsel for the value of their efforts, taking into account the enormous risks they undertook.").

**8. The Reaction of the Class to Date Supports the Requested Fee**

The reaction of the Class to date also supports the requested fee. As of December 11, 2015, the Claims Administrator had disseminated the Notice to over 500,000 potential Class Members and nominees informing them of, among other things, Lead Counsel's intention to apply to the Court for an award of attorneys' fees in an amount not to exceed 30% of the Settlement Amount and up to $1,050,000.00 in litigation expenses, plus interest on both amounts. *See* Walter Decl., ¶10; Joint Decl., ¶130. While the time to object to the fee and expense application does not expire until January 6, 2016, to date, no objections to the amount of attorneys' fees and expenses set forth in the

Notice have been received. *See* Joint Decl., ¶130. Moreover, the fact that no institutional investors have objected is particularly significant. *See Tyco*, 535 F. Supp. 2d at 261 (finding that "[t]he reaction of the class to the settlement has been almost entirely positive," where "[n]one of the institutional investors have objected to the size of the settlement").[8]

**D. Co-Lead Plaintiffs Approve the Requested Fee**

The Co-Lead Plaintiffs appointed by the Court pursuant to the PSLRA – City of Brockton Retirement System, Plymouth County Retirement System, and Norfolk County Retirement System – are sophisticated institutional investors. As set forth in their respective declarations, Co-Lead Plaintiffs were closely involved throughout the prosecution and resolution of the Litigation and had a sound basis for assessing the reasonableness of the fee request. *See* Norfolk County Decl., ¶6; Plymouth County and City of Brockton Decl., ¶6. In approving the fee request, Co-Lead Plaintiffs considered factors such as the substantial amount of work performed, the size of the recovery obtained, and the considerable risks of proceeding with trial. *Id.*

"[P]ublic policy considerations support fee awards where, as here, large public pension funds, serving as lead plaintiffs, conscientiously supervised the work of lead counsel, and gave their endorsement to lead counsel's fee request." *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *16 (S.D.N.Y. Dec. 23, 2009); *In re Lucent Techs., Inc. Sec. Litig.*, 327 F. Supp. 2d 426, 442 (D.N.J. 2004) ("[s]ignificantly, the Lead Plaintiffs, both of whom are institutional investors with great financial stakes in the outcome of the litigation, have reviewed and approved Lead Counsel's fees and expenses request"). Accordingly, Co-Lead Plaintiffs' endorsement of the fee and expense request supports its approval.

[8] Lead Counsel will address any objections received in their reply papers, which will be filed with the Court on or before January 12, 2016.

**E. A Lodestar Cross-Check Confirms the Reasonableness of the Fee**

In the First Circuit, "'[t]he lodestar approach (reasonable hours spent times reasonable hourly rates . . .) can be a check or validation of the appropriateness of the percentage of funds fee, but is not required.'" *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. 05-11148-PBS, 2009 WL 2408560, at *1 (D. Mass. Aug. 3, 2009); *accord Thirteen Appeals*, 56 F.3d at 307; *Lupron*, 2005 WL 2006833, at *3; *Relafen*, 231 F.R.D. at 81; *see also Manual for Complex Litigation* §14.122, at 193 (4th ed. 2004) ("[T]he 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 strongly demonstrates the reasonableness of the requested fee.

As of December 15, 2015, Lead Counsel, Liaison Counsel Barry J. Kusinitz, and additional counsel for Co-Lead Plaintiffs Orr & Reno P.A. and the Law Offices Bernard M. Gross, P.C. altogether reasonably expended more than 32,400 total hours in prosecuting this case, with a total lodestar value of $16,146,146.00 at current billing rates normally charged for comparable litigation

work.[9] Rothman Decl., ¶4; Gardner Decl., ¶4; Kusinitz Decl., ¶4; Chapman Decl., ¶6; Gross Decl., ¶4; Joint Decl., ¶121. These lodestar figures are based on records created and maintained in the ordinary course of business of each of the respective law firms.

Lead Counsel's fee request amounts to a ***negative multiplier*** of 0.89, which is below the range of lodestar multipliers awarded by other courts. Indeed, in securities class actions and other class actions with significant contingency risks, fees representing multiples above the lodestar are typically awarded to reflect contingency risks and other relevant factors. *See New England Carpenters Health Benefits Fund*, 2009 WL 2408560, at *2 (awarding fee representing an 8.3 multiplier); *Tyco*, 535 F. Supp. 2d at 271 (awarding fee representing a 2.7 multiplier); *Relafen*, 231 F.R.D. at 82 (awarding fee representing a 2.02 multiplier).

In sum, the requested percentage fee, cross-checked under the lodestar multiplier method, is well within the range of fees routinely awarded by courts in securities class actions.

## III. CO-LEAD PLAINTIFFS' COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARY TO ACHIEVE THE BENEFIT OBTAINED

Lead Counsel also request the payment of expenses in the amount of $857,631.86 for expenses reasonably and necessarily incurred and charged in conjunction with the prosecution of this Litigation. Co-Lead Plaintiffs' Counsel's Declarations attest to the accuracy of counsel's expenses. *See* Rothman Decl., ¶¶5-6; Gardner Decl., ¶¶5-6; Kusinitz Decl., ¶5; Chapman Decl., ¶7; Gross Decl., ¶¶5-6. It is well established that expenses are properly recovered by counsel. *See, e.g.*, *Hill*, 2015 WL 127728, at *20 ("Lawyers who recover a common fund for a class are entitled to

[9] 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 the interest. *See Missouri v. Jenkins*, 491 U.S. 274, 284 (1989); *Cohen v. Brown Univ.*, No. 99-485-B, 2001 WL 1609383, at *1 (D.N.H. Dec. 5, 2001); *accord In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695(CM), 2007 WL 4115808, at *9 (S.D.N.Y. Nov. 7, 2007) ("The use of current rates to calculate the lodestar figure has been repeatedly endorsed by courts as a means of accounting for the delay in payment inherent in class actions and for inflation.").

reimbursement of litigation expenses that were reasonably and necessarily incurred in connection with the litigation."); *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."); *Latorraca*, 834 F. Supp. 2d at 28 ("In addition to attorneys' fees, lawyers who recover a common fund for a class are entitled to reimbursement of out-of-pocket expenses incurred during litigation.").

The largest component of expenses relates to experts. Specifically, $365,938.86, or more than 42% of the total expenses, was expended on experts and consultants. Lead Counsel retained an expert to opine on market efficiency in support of Co-Lead Plaintiffs' motion for class certification and retained other experts in the areas of pharmacy benefit management and health information technology to assist in the prosecution and resolution of the Litigation. In addition, Co-Lead Plaintiffs' damages expert Dr. Feinstein was consulted during the settlement negotiations with the Defendants and in the development of the proposed Plan of Allocation.

A smaller but still substantial component of the expenses, $36,955.54, was for the expense related to the 15 depositions taken in this case, including both reporting and transcription services. These expenses were necessary to effectively litigate the case, garner evidence for Co-Lead Plaintiffs' claims, and respond to defenses Defendants would have raised at summary judgment and trial.

Another substantial litigation expense was online legal and factual research. The online research conducted by Lead Counsel was necessary to their factual investigation of the claims, the preparation of the Complaint, responding to Defendants' motions to dismiss, briefing class certification, and litigating the various contested discovery motions. The charges for online legal and factual research together amounted to $66,276.03.

Another component of Lead Counsel's litigation expenses is database hosting and management in the amount of $58,368.66. This is a charge for the storage, analysis, and review of electronic discovery through the use of Relativity – an interactive platform for the review and analysis of such information.

The other expenses for which Lead Counsel seek payment are the types of expenses that are necessarily incurred or charged in litigation and routinely charged to clients billed by the hour. These expenses include, among others, court fees, out-of-town travel, and copying costs.

Because the expenses were incurred with no guarantee of recovery, Lead Counsel had a strong incentive to keep them at a reasonable level, and did so. Lead Counsel made a concerted effort to avoid unnecessary expenditures and economize wherever possible. The expenses were incurred for items necessary to the prosecution of the Litigation and, Lead Counsel submit, are reasonable. *See* Joint Decl., ¶132. In addition, because the expenses were incurred for the benefit of the Class and are of a type generally charged in the marketplace, they should be paid from the common fund in the same manner as an individual client would pay counsel's expenses.

## IV. CONCLUSION

Based on the foregoing, and for the reasons set forth in the Settlement Memorandum submitted herewith, Lead Counsel respectfully request that the Court: (i) award attorneys' fees in the amount of 30% of the Settlement Amount, *i.e.*, $14,400,000.00; and (ii) approve payment of $857,631.86 in litigation expenses, plus interest thereon at the same rate and for the same period as earned on the Settlement Fund.

DATED: December 15, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Barry J. Kusinitz, hereby certify that on December 15, 2015, I caused a true and correct copy of the attached:

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

to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such public filing to all counsel registered to receive such notice.

*/s/ Barry J. Kusinitz*
BARRY J. KUSINITZ

# Mailing Information for a Case 1:09-cv-00554-JNL-PAS Medoff v. CVS Caremark Corporation et al

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