UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TIFFANY M. HUGHES, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. ACCRETIVE HEALTH, INC., *et al.*, Defendants.	Civil Action No. 13-cv-3688 Honorable Joan B. Gottschall

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S COUNSEL'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND REIMBURSEMENT OF LEAD PLAINTIFF'S COSTS

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PRELIMINARY STATEMENT

Plaintiff's Counsel[1] have succeeded in obtaining a cash settlement of $3,900,000 (the "Settlement") for the benefit of the Settlement Class in this consolidated class action (the "Action"). This is a favorable outcome in the face of substantial risks and is the result of Plaintiff's Counsel's vigorous, persistent, and skilled efforts. Plaintiff's Counsel now respectfully move this Court for an award of attorneys' fees in the amount of 30% of the Settlement Amount ($1,170,000), as well as reimbursement of the litigation expenses incurred in prosecuting the Action ($100,899.73). Further, Lead Plaintiff Pressure Controls, Inc. ("Plaintiff") respectfully requests reimbursement of the reasonable costs and expenses (including lost wages) it incurred in prosecuting this Action on behalf of the Settlement Class pursuant to 15 U.S.C. § 78u-4(a)(4).

As detailed below and in the accompanying Crowell Declaration,[2] the Settlement represents a good recovery for the Settlement Class under the circumstances. In the absence of a settlement, the Litigation would likely have continued for many years, through class certification, fact discovery, expert discovery, summary judgment, trial, and likely appeals. Plaintiff and its counsel faced substantial obstacles in proving liability and damages, yet nevertheless reached a timely and substantial resolution for the Class.

It was not easy. Defendants were represented by highly skilled litigators, and Plaintiff's Counsel faced numerous hurdles and risks, including the heightened pleading standards of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), the high cost of experts needed to

[1] Unless otherwise defined herein, all capitalized terms have the meanings ascribed to them in the Stipulation of Settlement (the "Stipulation"), dated February 19, 2016, and filed with the Court. Dkt. No. 104-1.

[2] The Declaration of Joshua L. Crowell in Support of Lead Plaintiff's Motion for Final Approval of Settlement, Class Certification, and Plan of Allocation, and Plaintiff's Counsel's Application for an Award of Attorneys' Fees and Expenses and Reimbursement of Lead Plaintiff's Costs (the "Crowell Decl.") is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action and the prosecution of the claims at issue in the Action; the negotiations leading to the proposed Settlement; the risks and uncertainties of continued litigation; and a description of the services Plaintiff's Counsel have provided for the benefit of the Settlement Class.

litigate a complex securities fraud case, and the high risk of non-payment. These are not idle risks. *See Maher v. Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983) (stating that securities litigation is "'notoriously difficult and unpredictable'") (citations omitted). "To be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action." *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009). As a result, a significant number of cases are dismissed at the outset.[3] Nor do the risks end at the pleading stage. Even when a plaintiff is successful at trial, payment is not guaranteed. *See Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 414, 433 (7th Cir. 2015) (vacating jury verdict in plaintiffs' favor and ordering new trial); *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, No. 07-61542-CIV., 2011 WL 1585605, at *6, *38 (S.D. Fla. Apr. 25, 2011) (granting judgment as a matter of law for defendants after jury returned verdict for plaintiffs).

Despite facing long odds, Plaintiff's Counsel vigorously pursued this case for three years. Among other things Plaintiff's Counsel: (1) conducted an extensive investigation into the facts underlying the alleged misconduct; (2) prepared three amended complaints; (3) consulted with accounting, hospital operations, and damages experts; (4) researched the law pertinent to Plaintiff's claims and the expected defenses to them; (5) reviewed and analyzed the many SEC filings, conference calls, analyst reports, articles, and other information regarding Accretive and hospital revenue management; (6) identified and interviewed numerous witnesses; (7) participated in an all-day mediation session before Jed D. Melnick, Esq., a highly experienced mediator; (8) engaged in substantive settlement negotiations facilitated by Mr. Melnick after the Parties were unable to reach an agreement to settle during the mediation; and (9) negotiated the final terms of the Settlement

[3] In a study of securities class actions resolved during 2015, approximately 47% were dismissed. *See* Crowell Decl. Exh. 6 (Svetlana Starykh & Stefan Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review, Record Number of Cases Being Filed Faster than Ever with the Shortest Alleged Class Period* at 21, Figure 19 (NERA Jan. 25, 2016)) (hereinafter "*NERA 2015 Review*"); *see also Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 WL 3148350, at *33 (N.D. Tex. Nov. 8, 2005) (finding that approximately 90% of Fifth Circuit decisions applying PSLRA pleading standards have upheld dismissal of complaints).

contained in the Stipulation. Plaintiff's Counsel undertook all of these investigative and litigation efforts on a fully contingent basis.

As compensation for their considerable efforts on behalf of the Settlement Class, Plaintiff's Counsel seeks an award equal to 30% of the Settlement Amount and reimbursement of litigation expenses in the amount of $100,899.73. The requested fee is reasonable and consistent with fees regularly awarded in class action settlements within the Seventh Circuit. The reasonableness of the requested fee may also be confirmed by the use of a lodestar cross-check. Here, the requested fee would result in a multiplier of 1.25, which is a the low end of the range of multipliers that are commonly awarded in complex class actions with substantial contingency risks.

For these reasons, as well as those set forth below and in the Crowell Declaration, Plaintiff's Counsel respectfully submit that the requested attorneys' fees are fair and reasonable under the applicable standards and should therefore be awarded by the Court. The costs and expenses requested by Plaintiff and its counsel are likewise reasonable in amount, and they were necessarily incurred in the successful prosecution of the litigation. Accordingly, they too should be approved.

ARGUMENT

I. Plaintiff's Counsel's Fee Application Should Be Approved

A. Plaintiff's Counsel Are Entitled to an Award of Attorneys' Fees from the $3.9 Million Common Fund

It is well-settled that attorneys who represent a class and aid in the creation of a settlement fund are entitled to compensation for legal services from the settlement fund. Under the "equitable" or "common fund" doctrine long-established in *Trs. v. Greenough*, 105 U.S. 527, 529-30 (1881), attorneys who create a common fund to be shared by a class are entitled to an award of fees and expenses from that fund as compensation for their work. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Sutton v. Bernard*, 504 F.3d 688, 691-92 (7th Cir. 2007).

Besides providing just compensation, awards of attorneys' fees from a common fund attract skilled counsel to represent those who seek redress for damages inflicted on classes of persons. *See, e.g., Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) ("The greater the

risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel."); *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 720 ("*Synthroid I*") (7th Cir. 2001) ("[A]wards net of fees could rise with the level of fees if a higher payment attracts the best counsel."). Indeed, the Supreme Court emphasizes that private securities cases are "'an indispensable tool with which defrauded investors can recover their losses' – a matter crucial to the integrity of domestic capital markets." *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308, 320 n.4 (2007) (citation omitted). Accordingly, common fund fee awards encourage and support meritorious class actions and thereby promote compliance with the federal securities laws.

B. The Court Should Award the Fee Under the Percentage of the Fund Methodology

In *Blum v. Stenson*, 465 U.S. 886 (1984), the Supreme Court held that under the "common fund doctrine" a reasonable fee may be based "on a percentage of the fund bestowed on the class." *Id.* at 900 n.16. Although courts within this Circuit in "common fund cases have discretion to choose either the lodestar or the percentage method of calculating fees," *In re Trans Union Corp. Privacy Litig.*, No. 00 C 4729, 2009 WL 4799954, at *9 (N.D. Ill. Dec. 9, 2009), the Seventh Circuit has strongly endorsed the percentage of the fund method because it most closely approximates the manner in which attorneys are compensated in the marketplace for contingent work. *See Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998) ("When a class suit produces a fund for the class, it is commonplace to award the lawyers for the class a percentage of the fund . . . in recognition of the fact that most suits for damages in this country are handled on the plaintiff's side on a contingent-fee basis"); *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 80 F. Supp. 3d 838, 844 (N.D. Ill. 2015) (stating that the percentage method has "emerged as the favored method for calculating fees in common-fund cases in this district.").

The Seventh Circuit has recognized "that there are advantages to utilizing the percentage method in common fund cases because of its relative simplicity of administration." *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 566 (7th Cir. 1994); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572-73 (7th Cir. 1992) (noting that it is easier to award a percentage "than it would be to hassle

over every item or category of hours and expenses and what multiple to fix and so forth"). Moreover, the Seventh Circuit has recognized the disadvantages of the lodestar method. *See In re Synthroaid Mktg. Litig.*, 325 F.3d 974, 979-80 ("*Synthroid II*") (7th Cir. 2003) (noting that the lodestar method may create a conflict of interest between the attorney and client); *Will v. Gen. Dynamics Corp.*, No. 06-698-GPM, 2010 WL 4818174, at *3 (S.D. Ill. Nov. 22, 2010) ("The use of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive."); *Silverman v. Motorola, Inc.*, No. 07 C 4507, 2012 WL 1597388, at *4 (N.D. Ill. May 7, 2012) (same).[4]

In *Taubenfeld v. Aon Corp.*, 415 F.3d 597 (7th Cir. 2005), the Seventh Circuit provided guidance for the award of attorneys' fees in a securities class action:

> [W]hen deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time… Although it is [sic] impossible to know *ex post* exactly what terms would have resulted from arm's length bargaining *ex ante*, courts must do their best to recreate the market by considering factors such as actual fee contracts that were privately negotiated for similar litigation, information from other cases, and data from class-counsel auctions.

Id. at 599. In affirming an award of fees equaling 30% of a $7.5 million settlement fund plus expenses, the court considered, *inter alia*, the following factors: (1) "awards made by courts in other class actions" which "amount[ed] to 30-39% of the settlement fund"; (2) "the quality of legal services rendered"; and (3) "the contingent nature of the case." *Id.* at 600.

As discussed below, an award of 30% of the Settlement Amount plus expenses in this case is the most appropriate method to "recreate the market" given the nature and scope of the Litigation,

[4] Here, even under a lodestar analysis, the fee request would equate to multiplier of 1.25, which is at the low end of the range of reasonableness. *See Harman v. Lyphomed, Inc.*, 945 F.2d 976 (7th Cir. 1991) (stating that multipliers of up to 4.0 have been approved); *In re Superior Beverage/Glass Container Consol. Pretrials*, 133 F.R.D. 119, 132 (N.D. Ill. 1990) (noting that "[w]e have awarded multipliers between 1.5 and 2.2 depending on the relative contribution of the various class counsel."); *see also In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999) ("'In recent years multipliers of between 3 and 4.5 have been common' in federal securities cases.") (citation omitted); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 n.6 (9th Cir. 2002) (finding multipliers ranged as high as 19.6, though most run from 1.0 to 4.0).

awards in similar cases, the contingent nature of the representation, and the substantial result achieved for the Settlement Class.

C. The Requested Fee Is Reasonable and Appropriate as a Percentage of the Common Fund

1. Under the *Redman* Standard, the Requested Fee Is Reasonable

As the Seventh Circuit has held, and as this Court has recognized, "the ratio that is relevant to assessing the reasonableness of attorneys' fees is the ratio of (1) the fee to (2) the fee plus what the class members receive." *Kaufman v. Am. Express Travel Related Servs., Co.*, No. 07-CV-1707, 2016 WL 806546, at *12 (N.D. Ill. Mar. 2, 2016) (citing *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014)). Accordingly, the ratio should exclude the cost of administering the settlement and the value of any *cy pres* award. *Redman*, 768 F.3d at 630; *Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014). Here, the Settlement Amount is $3,900,000; the requested attorneys' fee is $1,170,000; claims administration costs are estimated to be $103,000 (of which $67,000 has been incurred to date); and the *cy pres* award is expected to be negligible.[5] Crowell Decl. at ¶¶ 64, 67. The relevant ratio, then, is (1) $1,170,000 to (2) $3,797,000,[6] or 30.8%. Although "there is not much authority, post-*Redman*, to guide the court as to what contingency fee percentage is reasonable," this Court recognizes that "attorneys' fees of 25 – 33 1/3% of a settlement value are reasonable and typical." *Kaufman*, 2016 WL 806546, at *12. Thus, even after adjusting the value of the Settlement pursuant to *Redman*, Plaintiff's Counsel's requested fee is still in the middle of the range that this Court has deemed reasonable under pre-*Redman* standards.

[5] Paragraph 6.5(d) of the Stipulation provides that if there are any funds left over after the first distribution (due to uncashed checks, for example), then the remaining amount would be redistributed to the Settlement Class if economically feasible. If a redistribution were not economically feasible, only then would the remaining amount be donated to a secular nonprofit organization. *See In re Paracelsus Corp. Sec. Litig.*, No. CIV.A. H-96-3464, 2007 WL 433281, at *2 (S.D. Tex. Feb. 6, 2007) (stating that *cy pres* award is warranted when second distribution is "economically impracticable"). Plaintiff has selected The Chicago Bar Foundation as the recipient of any *cy pres* award. Crowell Decl. at ¶ 67.

[6] $3,900,00 - $103,000 = $3,797,000.

2. The 30% Attorneys' Fee Request Is Entirely Consistent with Seventh Circuit Authority and Authority Nationwide

The Seventh Circuit has "held repeatedly that, when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Synthroid I*, 264 F.3d at 718; *see also Synthroid II*, 325 F.3d at 975 ("A court must give counsel the market rate for legal services."). A district court must factor into its assessment of the appropriateness of the percentage to award attorneys in a securities class action "the value that the market would have placed on [Plaintiff's] Counsel's legal services had its fee been arranged at the outset" to "avoid[ ] assigning a value 'based on nothing more than a subjective judgment regarding [Plaintiff's Counsel's] work.'" *Sutton*, 504 F.3d at 693-94 (citation omitted). *Synthroid I* further explained that the "market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case." 264 F.3d at 721.

Here, as one court within this District has observed, a 30% fee is the established "benchmark for an award of fees in class actions." *In re Mexico Money Transfer Litig. (W. Union & Orlandi Valuta)*, 164 F. Supp. 2d 1002, 1033 (N.D. Ill. 2000). *See, e.g.*, *McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 816 (E.D. Wis. 2009) ("An award of 30% falls within the normal percentage range of common fund attorney fee awards approved by courts."); *Swift v. Direct Buy, Inc.*, No. 2:11-CV-401-TLS, 2013 WL 5770633, at *8 (N.D. Ind. Oct. 24, 2013) ("[P]ayment of 33% of the common fund is widely accepted by the Seventh Circuit as a reasonable fee in a class action."); *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97 C 7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) ("A customary contingency fee would range from 33 1/3 % to 40% of the amount recovered."); *Meyenburg v. Exxon Mobil Corp.*, No. 3:05-cv-15-DGW, 2006 WL 2191422, at *2 (S.D. Ill. July 31, 2006) ("33 1/3% to 40% (plus the cost of litigation) is the standard contingent fee percentages in this legal marketplace for comparable commercial litigation."); *Berger v. Xerox Corp. Ret. Income Guar. Plan*, No. 00-584-DRH, 2004 WL 287902, at *2 (S.D. Ill. Jan. 22,

2004) (awarding 29% of the settlement fund, plus expenses, and finding that "an auction for legal services in this litigation would have produced a percentage at or higher than the 29% fee awarded").

While the fee in any case can vary based on the particular facts and likelihood of recovery in that case, it is noteworthy that a 30% fee is consistent with many prior fee awards in similar class action cases in this District and Circuit. *See, e.g.*, *Wong v. Accretive Health, Inc*., No. 1:12-cv-03102, 2014 WL 7717579, at *1 (N.D. Ill. Apr. 30, 2014) (awarding fees of 30% of $14 million); *Beesley v. Int'l Paper Co.*, 2014 WL 375432, at *1, *4 (S.D. Ill. Jan. 31, 2014) (awarding one-third of $30 million class recovery); *Heekin v. Anthem, Inc.*, No. 1:05-cv-01908-TWP-TAB, 2012 WL 5878032, at *1, *4-*5 (S.D. Ind. Nov. 20, 2012) (approving 33% fee for $90 million settlement); *Retsky*, 2001 WL 1568856, at *3-*4 (awarding one-third of $14 million); *In re Ready-Mixed Concrete Antitrust Litig.*, No. 05-00979-SEB, 2010 WL 3282591, at *3 (S.D. Ind. Aug. 17, 2010) (awarding 33 1/3% of $5,515,000 settlement fund, plus expenses, in antitrust class action settlement).

The requested fee is also consistent with the median fee award for securities cases based on a recent analysis of fee awards conducted in 2016 by National Economic Research Associates ("NERA"). Using data from securities class actions from 1996-2015, the study found that for settlements less than $5 million, where this Settlement falls, the median fee award was 33.3% of the settlement amount for settlements between 1996-2010, and for settlements between 2011-2015 in the same range of recovery, the median fee award was 30.0% of the settlement amount. *See NERA 2015 Review* at 36, Figure 32. *See also In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294 (3d Cir. 2005) (noting "one study of securities class action settlements over $10 million that found an average percentage fee recovery of 31%").

As demonstrated above, the fee request is fully supported by academic research of the "legal marketplace" as reflected by Court awarded fees. While not dispositive, this is strong evidence of the reasonableness of Plaintiff's Counsel's request.

3. Plaintiff's Counsel Provided the Class with Quality Legal Services that Produced Excellent Benefits

In evaluating Plaintiff's Counsel's fee request, the Seventh Circuit holds that courts may consider the "quality of legal services rendered." *Taubenfeld*, 415 F.3d at 600; *see also Synthroid I*, 264 F.3d at 721. As a general matter, securities litigation is '"notoriously difficult and unpredictable.'" *Maher*, 714 F.2d at 455 (citations omitted); *see also In re Suprema Specialties, Inc. Sec. Litig.*, No. 02-168(WHW), 2008 WL 906254, at *11 (D.N.J. Mar. 31, 2008) ("[T]his case's complexity is undeniable, given its facts and area of law, securities law."). Moreover, "prosecution and management of a complex national class action requires unique legal skills and abilities." *Edmonds v. U.S.*, 658 F. Supp. 1126, 1137 (D.S.C. 1987).

From the inception of the Litigation, Plaintiff's Counsel engaged in a concerted effort to obtain the maximum recovery for the Settlement Class. This case required a thorough, in-depth investigation, and extensive litigation efforts and the skill to respond to a host of legal and factual issues raised by Defendants at every step of the litigation.[7] During settlement negotiations, Plaintiff's Counsel demonstrated a willingness to continue to litigate rather than accept a settlement that was not in the best interest of the Settlement Class, as evidenced by the fact that the Parties could not reach a settlement until more than three months after the mediation, during which time the Court could have issued its decision on the motion to dismiss. Crowell Decl. at ¶¶ 55-57. As a result of Plaintiff's Counsel's diligent efforts on behalf of the Class and their skill and expertise, Plaintiff's Counsel negotiated a favorable result for the Settlement Class approximately three years after the Litigation was commenced.

4. The Attorneys' Fees Are Fair and Reasonable in Light of the Contingent-Fee Nature of the Representation

Plaintiff's Counsel undertook the Litigation on a contingent fee basis, assuming significant risk that the litigation would yield no recovery, and thus, leave them uncompensated. Unlike counsel

[7] The history of the Litigation, the nature of the services performed, and the time expended by each attorney and other professionals is described in depth in the accompanying Crowell Declaration at paragraphs 25-51, 61 and Exhibit 1 attached thereto.

for Defendants, who are typically paid an hourly rate and regularly reimbursed for their expenses, Plaintiff's Counsel have not been compensated for any time or expense since this case began approximately three years ago. Courts have consistently held that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. *Synthroid I*, 264 F.3d at 721 ("The market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear."); *Taubenfeld*, 415 F.3d at 600 (noting that a court should consider "the contingent nature of the case" and that "lead counsel was taking on a significant degree of risk of nonpayment with the case.").

At the outset of the Litigation, Plaintiff's Counsel assumed significant risk that Defendants would successfully defend this case at any, and every, stage of litigation, including at class certification, summary judgment, pre-trial *Daubert* and motion *in limine* proceedings, trial, and any post-trial proceedings. Hence, the risk that the Settlement Class and Plaintiff's Counsel would recover nothing was considerable.

If the Litigation proceeded, Plaintiff's Counsel would have to contend with complex factual and legal issues at the pleading stage and beyond, concerning, among others: (i) whether each Defendant acted intentionally or recklessly; (ii) whether Defendants reasonably relied on Accretive's outside auditors' review and approval of its revenue accounting; and (iii) whether Plaintiff had standing to assert claims based on Defendants' statements made after April 25, 2012—the date of Plaintiff's last purchase of Accretive stock. *See* Crowell Decl. at ¶¶ 50-51, 99 (addressing in detail the weaknesses of Plaintiff's claims recognized by Plaintiff's Counsel).

Assuming that Plaintiff's claims survived Defendants' pending motion to dismiss, the Litigation would proceed into an extensive merits discovery phase. Evidence of liability would be primarily within Defendants' control, to be obtained only through a time-consuming and expensive process. Discovery would have entailed the production of millions of pages of documents, both by Defendants and third parties, followed by the depositions of numerous Accretive's employees and other witnesses. Plaintiff would also have to move for class certification. Not only are certification motions hotly contested in securities class actions, but the law in this area is ever-changing.

See Crowell Decl. at ¶ 79. Obtaining class certification would have involved expensive expert discovery on the issue of the efficiency of the market for Accretive securities.

Further, Plaintiff would have to prove damages. Because proof of damages is primarily obtained through expert testimony, it is complex, expensive, and fraught with risk. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 239 (3d Cir. 2001) ("[E]stablishing damages at trial would lead to a 'battle of experts' with each side presenting its figures to the jury and with no guarantee whom the jury would believe."); *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 506 (W.D. Pa. 2003) ("A jury would therefore be faced with competing expert opinions representing very different damage estimates, thus adding further uncertainty as to how much money–if any–the Class might recover at trial."); *see also* Crowell Decl. at ¶ 80.

Should the case survive summary judgment, prior to trial, Plaintiff's Counsel would have to file and oppose motions *in limine*, designate transcripts, prepare the pre-trial order and trial memorandum, create jury charges and interrogatories, prepare for *voir dire*, and prepare witnesses (after facing potential difficulty securing them for trial), examinations, and exhibits. At trial, Plaintiff would have to convince a jury that, among other things, Defendants acted with scienter. Crowell Decl. at ¶¶ 81, 99. Any jury verdict in favor of the class likely would have been subjected to post-trial motions and appeal. *Id.* at ¶ 83. These motions and appeals could ultimately result in no recovery at all. *See id.* at ¶¶ 83-84; *see also, e.g., Glickenhaus*, 787 F.3d at 413-14, 433; *BankAtlantic*, 2011 WL 1585605, at *6, *38; *Robbins v. Koger Prop., Inc.*, 116 F.3d 1441, 1446, 1449 (11th Cir. 1997) (reversing judgment in plaintiffs' favor and entering judgment in favor of defendant); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1221, 1233 (10th Cir. 1996) (overturning plaintiffs' verdict obtained after two decades of litigation).

Because the fee in this matter was entirely contingent, the only certainty was that Plaintiff's Counsel would receive no compensation without a successful result and that such a result would only be realized after considerable time and effort. Plaintiff's Counsel committed significant quantities of both time and money to the vigorous and successful prosecution of this litigation for the benefit of the Settlement Class. In view of the skill of Defendants' counsel and the legal and factual difficulties

of the Litigation, the risk of never being compensated was real and should be considered when determining whether the requested fee is reasonable under Seventh Circuit authority. *See, e.g.*, *Sutton*, 504 F.3d at 694 (reversing district court's fee award and stating "[b]ecause the district court failed to provide for the risk of loss, the possibility exists that Counsel, whose only source of a fee was a contingent one, was undercompensated"). The contingent nature of Plaintiff's Counsel's representation strongly favors approval of the requested fee.

5. The Reaction of the Class Supports the Requested Award

The Claims Administrator has mailed the Notice to 23,869 potential Settlement Class Members and nominees. Sylvester Decl. at ¶ 11. The Notice informed Settlement Class Members that Plaintiff's Counsel would apply for attorneys' fees of no more than 33% of the Settlement Amount, plus expenses not to exceed $150,000, and that they had the right to object to this fee and expense request. *Id.* at Exh. A. So far, no objections to the fee and expense request have been received. Further, Lead Counsel's filed application for attorneys' fees and expenses will be posted to the Litigation's website so that Settlement Class Members will know the specific amount of fees and expenses being sought before the June 7, 2016 deadline for objections, as required by this Court. *See Kaufman*, 2016 WL 806546, at *6.

II. Plaintiff's Counsel's Expenses Are Reasonable and Were Necessarily Incurred to Achieve the Benefit Obtained for the Class

Attorneys who generate a common fund for a plaintiff class are entitled to the reimbursement of reasonable litigation expenses from that fund. *Great Neck Capital Appreciation Inv. P'Ship, L.P. v. PriceWaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 412 (E.D. Wis. 2002) (citing *Synthroid I*, 264 F.3d at 722). To prosecute the Litigation to resolution, Plaintiff's Counsel incurred reasonable and necessary costs and expenses in the amount of $100,899.73. *See* Crowell Decl. at ¶¶ 107-08 & Exh. 2.[8] Because the expenses at issue are the types reimbursed by individual clients in the marketplace, they should be reimbursed from the common fund. A significant component of

[8] The Crowell Declaration describes the particulars of Plaintiff's Counsel's expenses in "a level of detail that paying clients find satisfactory." *Synthroid I*, 264 F.3d at 722.

Plaintiff's Counsel's expenses is the cost of experts and investigators. Plaintiff's Counsel consulted experts in the fields of accounting, hospital operations, and damages. These experts were instrumental in assisting Plaintiff's Counsel in achieving the result obtained for the Class. In addition, Plaintiff's Counsel hired an investigator to identify and interview witnesses to assist in the development of the facts involved in the Action.

Plaintiff's Counsel were also required to travel in connection with the Litigation and incurred the related costs of meals, lodging, and transportation. Counsel in this case have traveled to Chicago to attend hearings before the Court and to New York to attend the mediation. Plaintiff's Counsel also incurred the costs of computerized research. These are the charges for computerized factual and legal research services including Lexis Nexis, Westlaw, Bloomberg, and Pacer. It is standard practice for attorneys to use these services to assist them in researching legal and factual issues. These services allowed Plaintiff's Counsel to perform media and related litigation searches on Accretive, obtain analysts' reports on Accretive, and assist in developing Plaintiff's damage analyses. They also assisted the investigators in locating and obtaining information on witnesses and Defendants.

It is important to recognize that, so far, no Settlement Class Member has objected to the request for reimbursement of expenses, and, because the expenses were incurred with no guarantee of recovery, Plaintiff's Counsel had a strong incentive to keep them as low as reasonably possible. Plaintiff's Counsel respectfully requests the Court approve the expense reimbursement request.

III. Plaintiff Is Entitled to Reimbursement of Costs And Expenses Under the PSLRA

Pursuant to 15 U.S.C. §78u-4(a)(4), Plaintiff is permitted to recoup unreimbursed litigation costs (including lost wages) incurred as a result of serving as lead plaintiff. Reimbursement of such costs should be allowed because it "encourages participation of plaintiffs in the active supervision of their counsel." *Varljen v. H.J. Meyers & Co., Inc.*, No. 97 Civ. 6742 (DLC), 2000 WL 1683656, at *5 n.2 (S.D.N.Y. Nov. 8, 2000). Courts "routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur

such expenses in the first place." *Hicks v. Morgan Stanley*, No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *10 (S.D.N.Y. Oct. 24 2005).

Plaintiff respectfully requests a reimbursement of $7,000. As set forth in the Declaration of Paul Emmarco attached as Exhibit 3 to Crowell Declaration ("Emmarco Decl."), Plaintiff devoted substantial time to overseeing and participating in the Litigation, including, among other things, stepping forward to represent the Settlement Class, reviewing pleadings, providing details of its transactions in Accretive securities, and monitoring case developments, procedural status, and settlement negotiations. Reimbursement for these costs, including lost wages, is appropriate under the PSLRA and is also considered appropriate within the Seventh Circuit. *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1041 (N.D. Ill. 2011).

CONCLUSION

For the foregoing reasons, Plaintiff's Counsel respectfully request that the Court enter an Order awarding: (1) attorneys' fees in the amount of 30% of the Settlement Amount ($1,170,000), plus interest thereon; (2) the reimbursement of Plaintiff's Counsel's out-of-pocket litigation expenses in the amount of $100,899.73; and (3) the reimbursement of Plaintiff's costs and expenses of $7,000.

Dated: May 24, 2016

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By: *s/ Joshua L. Crowell*

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PROOF OF SERVICE BY ELECTRONIC POSTING PURSUANT TO NORTHERN DISTRICT OF ILLINOIS ECF AND LOCAL RULES

I, the undersigned say:

I am not a party to the above case, and am over eighteen years old.

On May 24, 2016, I served true and correct copies of the foregoing document, by posting the document electronically to the ECF website of the United States District Court for the Northern District of Illinois, for receipt electronically by the parties listed on the Court's Service List.

I affirm under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 24th day of May, 2016, at Los Angeles, California.

s/ Joshua L. Crowell
Joshua L. Crowell

Mailing Information for a Case 1:13-cv-03688 Hughes v. Accretive Health, Inc. et al

Electronic Mail Notice List

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Manual Notice List

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Tiffany M Hughes
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