

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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MILTON LILLY and DONALD GROGAN, on	)	
behalf of themselves and a class of persons	)	
similarly situated,	)	Case No. 6:07-cv-00340 (NPM/ATB)
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
ONEIDA LTD. EMPLOYEE BENEFITS	)	
ADMINISTRATIVE COMMITTEE, <i>et al.</i> ,	)	
	)	
Defendants.	)	
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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’  
MOTION FOR AWARD OF ATTORNEYS’ FEES, EXPENSES,  
AND CASE CONTRIBUTION AWARDS**

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## I. INTRODUCTION

In Plaintiffs' memorandum in support of preliminary approval of the settlement herein, Plaintiffs explained in detail why the Class Action Settlement Agreement<sup>1</sup> is an excellent result for the Settlement Class in this case. In sum, the Settlement Agreement provides for a cash payment of \$1,850,000 to be allocated among the Settlement Class members. This result was achieved through the dedicated efforts of Named Plaintiffs' Counsel, working with Named Plaintiffs representing the participants and beneficiaries of the Oneida Ltd. Employee Stock Ownership Plan ("Plan"), after analysis of the relevant facts and applicable law through discovery and motion practice and after arm's-length negotiations, including a mediation conducted by a 23-year veteran of the U.S. Department of Labor, Sherwin S. Kaplan. The Court preliminarily approved the Settlement Agreement on June 15, 2010. Order Preliminarily Approving Settlement, Certifying Settlement Class, Approving Notice Plan, and Setting Fairness Hearing Date (Dkt. No. 146) (June 15, 2010).

Herein, Named Plaintiffs' Counsel request an award of attorneys' fees in the amount of \$555,000 from the Settlement Fund, which represents 30% of the gross settlement amount (and represents less than 44% of the attorneys' fees that Named Plaintiffs' Counsel have actually incurred to date in pursuing claims on behalf of the Settlement Class), and reimbursement of out-of-pocket litigation expenses of \$55,484.89. In addition, Plaintiffs seek approval of \$2,500 case contribution awards to each of the Named Plaintiffs in recognition of their valuable service to the Settlement Class. Taken together, the requested fees, expenses, and case contribution awards represent less than 1/3 of the Settlement Fund.

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<sup>1</sup> Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Class Action Settlement Agreement ("Settlement Agreement") filed on June 4, 2010. See Affidavit of Lynn Lincoln Sarko in Support of Settlement Agreement, Ex. 1 (Dkt. No. 144-2) (June 4, 2010) (hereinafter "Sarko Settlement Aff.").

As demonstrated below, the record in this case and the case law in the Second Circuit fully support these requests for fees, expenses, and case contribution awards, based on the risks taken and results obtained in this litigation. The fees are addressed in Section II below, the expenses in Section III, and the case contribution awards in Section IV.

## **II. THE COURT SHOULD APPROVE PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES**

### **A. Brief History of this Litigation**

#### **1. The Complaint.**

Plaintiff Milton Lilly filed the original complaint in this action on March 29, 2007. Class Action Complaint for Violations of the Employee Retirement Income Security Act of 1974 (Dkt. No. 1) (Mar. 29, 2007). On July 11, 2007, Named Plaintiffs filed the operative Complaint. Named Plaintiffs alleged that Defendants knew or should have known that the Plan's investment in Oneida Ltd. ("Oneida" or the "Company") stock was not a prudent retirement investment between May 28, 2003 and March 20, 2006 (the "Class Period") and that Defendants acted imprudently by not preventing further investment in Oneida stock and not liquidating the Plan's existing holdings during the Class Period. Second Amended Class Action Complaint for Violations of the Employee Retirement Income Security Act of 1974 (Dkt. No. 40) (July 11, 2007) at ¶¶ 145-46.

#### **2. Defendants' Motion to Dismiss.**

Defendants moved to dismiss the Complaint on September 7, 2007. *See* Memorandum in Support of Defendants' Fed. R. Civ. Pro. 12(b)(1) Motion to Dismiss Plaintiffs' Second Amended Class Action Complaint (Dkt. No. 88-9) (Sept. 7, 2007) (hereinafter "Defs. MTD Memo"). Defendants' motion attacked all aspects of the case, including, but not limited to, an

argument that because a floor-offset plan was involved,<sup>2</sup> the Plan's participants suffered no loss. This is because to the extent a Class members' Plan account fell below the value of his/her promised benefit, the difference would be made up by the Oneida Ltd. Retirement Plan ("Retirement Plan"). Defs. MTD Memo at 7-10. Plaintiffs opposed that motion and argued that the Plan offered the Settlement Class various tangible retirement benefits other than the monthly retirement benefit provided by the Retirement Plan. *See* Plaintiffs' Memorandum in Opposition to Defendants' Fed. R. Civ. P. 12(b)(1) Motion to Dismiss Plaintiffs' Second Amended Complaint (Dkt. No. 95) (Oct. 22, 2007). Plaintiffs argued that those tangible benefits were lost when the Plan's value was all but destroyed by the alleged actions (or inactions) of Defendants. These tangible retirement benefits included: (i) loss of the right to have benefits from the Plan paid in the form of a lump sum upon retirement or employment termination; (ii) loss of the right of married participants to make a unilateral election to take a lump sum distribution from the Plan; (iii) loss of the right to use a lump sum distribution to purchase an annuity on the open market which was higher than the annuity offered by the Retirement Plan; (iv) loss of the ability to exceed the minimum monthly Retirement Plan benefit if the Plan's annuity amount exceeded the guaranteed Retirement Plan benefit; and (v) loss of the right of non-vested participants to receive any recovery because non-vested participants did not receive any benefits when the Retirement Plan was terminated. *Id.* at 9-10. The Court denied the motion by Order dated May 8, 2008. *Lilly v. Oneida Ltd. Emp. Benefits Admin. Comm.*, No. 07-0340, 2008 WL 2019728 (N.D.N.Y. May 8, 2008). Thereafter, on May 28, 2008, Defendants filed their Answer

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<sup>2</sup> A floor-offset plan consists of two plans, a defined benefit plan and a defined contribution plan, such as the Plan here. A participant is entitled to the greater of his/her account balance in the defined contribution plan or the benefit promised by the defined benefit plan. If the participant's defined contribution plan account balance is lower than the benefit promised by the defined benefit plan, the participant receives that account balance and the defined benefit plan pays the difference between that amount and the benefit promised by the defined benefit plan.

to the Complaint. Defendants' Answer to Plaintiffs' Second Amended Class Action Complaint (Dkt. No. 107) (May 28, 2008).

**3. Discovery.**

Named Plaintiffs' Counsel conducted discovery to prepare this case for trial against Defendants. Sarko Settlement Aff. at ¶ 2. Named Plaintiffs' Counsel engaged in detailed negotiations regarding production of relevant information, established an electronic document depository for the litigation, and implemented a system of coding and categorizing documents relevant to the claims and defenses. Based on this system, Named Plaintiffs' Counsel reviewed thousands of pages of documents produced by Defendants. Named Plaintiffs' Counsel also issued subpoenas to numerous third-parties requesting additional documents. *Id.*

**4. Plaintiffs' Motion for Class Certification**

While discovery was ongoing, on September 30, 2008, Plaintiffs filed a class certification motion pursuant to the Stipulation and Order agreed upon between the Parties and entered by the Court on June 13, 2008. *See* Plaintiffs' Motion for Class Certification (Dkt. No. 113) (Sept. 30, 2008).

**5. Settlement Negotiations.**

The Settlement was achieved as a result of hard-fought, arm's-length negotiations that were mediated by Mr. Sherwin Kaplan. Sarko Settlement Aff. at ¶ 3. The Parties met at a formal mediation on July 23, 2008 in Washington, DC. In advance of the mediation, the Parties submitted detailed mediation statements to Mr. Kaplan that assessed: (1) the factual background of this case; (2) the law as applicable to the action; and (3) the respective Parties' estimation of settlement value. The Parties also had numerous pre- and post-mediation telephone conferences with and without Mr. Kaplan in which Named Plaintiffs' Counsel, counsel for Defendants and a representative of Defendants' insurance carrier participated. *Id.*

Following an agreement in principle on a settlement, the Parties engaged in extensive negotiations over the specific terms of a settlement agreement. Sarko Settlement Aff. at ¶ 4. On June 4, 2010, the Settlement Agreement was fully executed. *Id.*; *see also* Sarko Settlement Aff., Ex. 1.

**6. Named Plaintiffs' Counsel's Investment of Time and Money in the Case.**

The amount of time and money Named Plaintiffs' Counsel have expended on a contingent basis in the foregoing activities was substantial. Through August 31, 2010, Named Plaintiffs' Counsel had devoted 2,616 professional hours to this case, representing \$1,260,594.50 in dollars-times-hours "lodestar," and had advanced \$55,484.89 in out-of-pocket expenses. *See* accompanying Affidavit of Lynn Lincoln Sarko in Support of Motion for Attorneys' Fees, Expenses, and Case Contribution Awards ("Sarko Award Aff.") at ¶ 3 (September 7, 2010). In addition, local counsel for Named Plaintiffs have devoted more than 46 professional hours to this case, representing \$11,132.50 in lodestar. *See* accompanying Affidavit of George J. Szary ("Szary Aff.") at ¶ 5 (Aug. 20, 2010).

And of course, work on the case has not ended, nor will it end anytime soon. Sarko Award Aff. at ¶ 5. Named Plaintiffs' Counsel will continue to incur additional hours and expenses in connection with the Settlement approval in general, including in connection with the final approval hearing. Beyond that, past experience teaches that a substantial amount of additional time will be spent over the next year or more following final approval responding to inquiries from Class members, interacting with bank personnel with respect to technical matters concerning the Qualified Settlement Fund, and generally shepherding implementation of a settlement affecting the Plan and approximately 1,417 participants.<sup>3</sup> It is Plaintiffs' intent to

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<sup>3</sup> Defendants have identified 1,417 participants in or beneficiaries of the Plan during the Class Period whose Plan accounts included investments in Oneida stock. Sarko Award Aff. at ¶5 n.1.

submit to the Court in advance of the October 4, 2010 Fairness Hearing a supplemental affidavit providing updated fee and expense information in further support of the award requested herein.

*Id.*

**B. The Legal Standard Governing Awards of Attorneys' Fees in ERISA Fiduciary Breach Class Actions**

Just as in other class actions, attorneys who create a settlement fund for the common benefit of class members are entitled to “a reasonable fee – set by the court – to be taken from the fund.” *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). “The rationale for the doctrine is an equitable one: it prevents unjust enrichment of those benefitting from a lawsuit without contributing to its cost.” *Id.* Here, Named Plaintiffs’ Counsel successfully created a common fund of \$1.85 million plus interest, and accordingly are entitled to a reasonable share of that fund as a fee.

The Second Circuit has sanctioned two methods to determine a reasonable attorneys’ fee in common fund cases: the “percentage of the recovery” method and the “lodestar” method. *Goldberger*, 209 F.3d at 47. Under the percentage-of-recovery method, the fee is calculated as a percentage of the fund created by the litigation. *Id.* Under the “lodestar” method, the number of hours reasonably expended are multiplied by an appropriate hourly rate. Once the lodestar is calculated, the court “may, in its discretion, increase the lodestar by applying a multiplier based on ‘other less objective factors,’ such as the risk of the litigation and the performance of the attorneys.” *Id.* (internal quotation omitted). “The trend in this Circuit is toward the percentage method[.]” *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005). So long as the percentage of recovery methodology does not produce an “unwarranted windfall” to counsel, there is “no need to compel district courts to undertake the cumbersome, enervating, and often surrealistic process of lodestar computation.” *Goldberger*, 209 F.3d at 49-50 (internal

quotation and citation omitted). When lodestar is used as a mere cross-check of the percentage of recovery methodology for windfall, “the hours documented by counsel need not be exhaustively scrutinized by the district court” and can instead be “tested by the court’s familiarity with the case (as well as encouraged by the strictures of Rule 11)” *Id.* at 50. Regardless of the method used, the factors identified in *Goldberger* ultimately determine the reasonable fee in a particular case. *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 188 (W.D.N.Y. 2005).

**C. The Requested Fees Are Reasonable Under the *Goldberger* Factors**

*Goldberger* requires courts to consider the following factors in determining a reasonable fee for a particular case:

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

*Goldberger*, 209 F.3d at 50 (citation omitted). Each of the factors militates strongly in favor of the requested fee.

**1. Time and Labor**

Named Plaintiffs’ Counsel dedicated enormous efforts to this Action. That work is summarized above and the details are described in the Sarko Settlement Affidavit. Having served in leadership positions in similar cases, Named Plaintiffs’ Counsel were aware at the outset of the case that considerable time and resources would likely be necessary to prosecute it, and that proved to be so. Sarko Award Aff. at ¶ 6. As set forth above, in all, as of August 31,

2010, Named Plaintiffs' Counsel and their local counsel had devoted more than 2,662 hours to the successful prosecution of the Action, resulting in a lodestar of \$1,271,727.00 and had advanced expenses in the amount of \$55,484.89. *Id.* ¶ 3; *see also* Szary Aff. at ¶ 5.

Named Plaintiffs' Counsel undertook this effort on a contingent fee basis despite the significant risk that Plaintiffs would not prevail in this litigation (and would therefore receive no compensation). Sarko Award Aff. at ¶ 7. This ensured that the tasks performed by Named Plaintiffs' Counsel were necessary in order to achieve the Settlement Agreement. *Id.*

Pursuing a case on a contingent fee basis where there is a significant risk of no recovery can warrant the application of a multiplier to the lodestar to arrive at a fair contingent fee. *In re Prudential Sec. Inc. Ltd. P'ships. Litig.*, 985 F. Supp. 410, 414 (S.D.N.Y. 1997) ("Because counsel who rendered services were not being compensated for their work as it was being performed and because of the significant risk that they might never receive any compensation if the action was unsuccessful, courts have, when warranted, applied a multiplier to the lodestar to arrive at a fair contingent fee.").

Here, however, not only is Named Plaintiffs' Counsel not seeking a positive multiplier on their lodestar to compensate them for their significant contingent risk factor, their fee request amounts to a 56.35% discount from their lodestar (i.e., a negative multiplier) and they will receive no compensation for much of their time spent litigating this case. Sarko Award Aff. at ¶ 8. Based upon this *Goldberger* factor – the time and labor expended by counsel – the requested fee award of \$555,000, which is only 43.65% of the actual fees incurred,<sup>4</sup> is modest. *See In re Veeco Instruments Inc. Sec. Litig.*, No. 05-1695, 2007 WL 4115808, at \*10, \*1 (S.D.N.Y. Nov. 7, 2007) (in contingent fee cases, "the lodestar 'cross-check' unquestionably supports a

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<sup>4</sup> Again, it is 43.65% of fees incurred as of August 31, 2010. The percentage will decrease as Named Plaintiffs' Counsel expend the additional time that will be required to complete the Settlement.

percentage fee award” when “[t]he lodestar crosscheck shows that the fee requested in fact represents a fractional multiplier” and “reveals that counsel will not be compensated for a substantial portion of the time they devoted to litigating the Action”); *see also Eastman Kodak Co.*, 228 F.R.D. at 188-89 (approving requested \$50,000 fee award of a \$125,000 settlement (38.26% of the recovery) when counsel’s lodestar was \$60,959, such that the fee award equated to a 18% discount from the lodestar).

## 2. Magnitude and Complexities

In addition to involving scores of potential witnesses, more than 1,400 Plan participants, and thousands of pages of documents received in discovery, this case also presented complex factual issues against the backdrop of a fast-developing and hotly disputed area of the law.

Sarko Award Aff. ¶ 9. Such challenging issues include:

- **Complex and innovative legal theories.** ERISA is a highly-specialized and complex area of the law, and the type of claims brought here – involving alleged breaches of duty by the Plan’s fiduciaries – are especially so. *Id.* at ¶ 10. The law is developing, and there are significant conflicts between the approaches adopted by different trial and appellate courts. Plaintiffs believe the claims in this case are solidly grounded in ERISA law, but it is beyond debate that the issues are complex. *Id.*
- **Complex liability:** A finding of liability would require careful presentation and analysis of lengthy and detailed Plan documents, complex corporate financial and accounting matters, and sophisticated judgments about the investment decisions Defendants made. *Id.* at ¶ 11.
- **Complex damages:** Damage assessments by the finder of fact often result in a battle of experts. *Id.* at ¶ 12. Generally, defendants in such cases argue that even if plaintiffs can show that company stock was imprudent, it did not occur until so late in the proposed class period that plaintiffs’ damages would be minimal. *Id.* In this case, however, a further layer of complexity affects the determination of damages. *Id.* at ¶ 13. Defendants moved to dismiss the Action and argued that because a floor-offset plan was involved, the Class members suffered no loss. This is because to the extent a Class members’ Plan account fell below the value of his/her promised benefit, the difference would be made up by the Retirement Plan. While the Court found that Plaintiffs adequately pled an injury in fact, *Lilly*, 2008 WL 2019728 at \*7, the measure of such injury is yet to be established, and

would likely be limited to a reasonable return on the Plan's loss between the end of the Class Period and the time any judgment would become final. *Id.*

Despite the complexity of the facts and uncertainty in the law, Named Plaintiffs' Counsel navigated this case to a successful conclusion. *Id.* at ¶ 14. Thus, this *Goldberger* factor also supports the requested fee award.

### 3. Risk

"The Second Circuit [in *Goldberger*] has identified the risk of success as perhaps the foremost factor to be considered in determining a reasonable award of attorneys' fees." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004) (internal quotation marks and citation omitted).

The tangible risks faced by plaintiffs' counsel in ERISA fiduciary breach class actions, including this one, are substantial. *Sarko Award Aff.* at ¶15. ERISA company stock litigation is relatively undeveloped.<sup>5</sup> *Id.* at ¶ 16. The first pioneering cases in this area were filed in the late 1990s. The case law is exceptionally thin in comparison with securities and antitrust jurisprudence, with only a few appellate decisions on most issues. Only a handful of ERISA company stock cases have gone to trial, and in each case, defendants prevailed.<sup>6</sup> There have been some substantial settlements, but nothing to rival the larger ones in the securities field

<sup>5</sup> ERISA was enacted in 1974 and 401(k) plans were first provided for in 1981. Employee Retirement Income Security Act of 1974, 88 Stat. 829 (Sept. 2, 1974); Revenue Act of 1978, 92 Stat. 2763 (Nov. 6, 1978) (creating deferral arrangements that ultimately led to 401(k) plans); Certain Cash or Deferred Arrangements Under Employee Plans, 46 Fed. Reg. 55,544 (Nov. 10, 1981) (first proposed regulations to authorize 401(k) plans). *Sarko Award Aff.* ¶ 17. The securities laws, by contrast, have been a central part of federal law for over 75 years, Securities Act of 1933, 48 Stat. 74 (May 27, 1933); Securities Exchange Act of 1934, 48 Stat. 881 (June 6, 1934); Investment Company Act of 1940, 54 Stat. 789 (Aug. 22, 1940), and securities fraud class actions have been litigated at least since the early 1940s, e.g., *Deckert v. Independence Shares Corp.*, 39 F. Supp. 592 (E.D. Pa. 1941), *rev'd sub nom. Pa. Co. for Ins. on Lives & Granting Annuities v. Deckert*, 123 F.2d 979 (3d Cir. 1941). *Id.* at ¶ 18. The securities fraud "infrastructure," so to speak, is enormous. *Id.* The same can be said of antitrust litigation, where the price fixing statute and the case law date back over a hundred years. Sherman Anti-Trust Act, 26 Stat. 209 (July 2, 1890). *Id.* at ¶ 19.

<sup>6</sup> See *Landgraff v. Columbia/HCA Healthcare Corp.*, No. 98-0090, 2000 WL 33726564, at\*2 (M.D. Tenn. May 24, 2000), *aff'd* 30 Fed. Appx. 366 (6th Cir. 2002); *DiFelice v. U.S. Airways, Inc.*, 436 F. Supp. 2d 756, 790 (E.D. Va. 2006), *aff'd*, 497 F.3d 410 (4th Cir. 2007); *Nelson v. Hodowal*, 512 F.3d 347, 349 (7th Cir. 2008); *Brieger v. Tellabs, Inc.*, 659 F. Supp. 2d 967, 988 (N.D. Ill. 2009).

(where the classes are much larger). The lack of a mature body of law and practice in this field, and the resulting potential for significant changes as the law evolves, greatly enhances the risk associated with litigating a complex case such as this one. *Id.*

In addition to the foregoing risks pertaining to ERISA cases in general and company stock cases in particular, there were a host of what might be termed the “usual” risks inherent in any contingent litigation. *Sarko Award Aff.* at ¶ 20. There are risks that witnesses will testify in unexpected ways or that documents may turn out not to mean what they appear to say, which pose risks at summary judgment and trial. There are also risks associated with post-trial motions, appeals, and even a petition for a writ of certiorari, as well as risks inherent in the delays such proceedings occasion. *Id.*

The Second Circuit has held that when recovery is contingent, a higher fee award is warranted than when counsel undertake no risk of non-payment:

No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success.

*City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974); *but cf. Goldberger*, 209 F.3d at 52 (noting that there may not be “a substantial contingency risk in every common fund case”).

Here, Named Plaintiffs’ Counsel accepted this matter on a contingent basis, with the attendant substantial risk that they would receive no fee or expense reimbursement given the complex factual issues to be applied to a fast-developing and hotly disputed area of ERISA law. Because Named Plaintiffs’ Counsel have borne this risk, which has resulted in a fee application for substantially less than the fee based on time actually expended, this factor more than supports Named Plaintiffs’ Counsel’s requested fee.

#### **4. Quality of Representation**

Named Plaintiffs' Counsel, national leaders in pursuing this type of litigation, employed the expertise they have garnered from many years of spearheading company stock and other ERISA and class action cases to the particular complex factual scenario presented in this case, and have provided excellent service to the Class. *See Sarko Award Aff.* at ¶ 26.

The extraordinarily high quality of the defense counsel opposing Plaintiffs' efforts bears further witness to the caliber of representation that was necessary to achieve a \$1.85 million settlement under the particular facts of this case. *See Global Crossing*, 225 F.R.D. at 467 (recognizing the quality of opposing counsel in evaluating the quality of plaintiffs' counsels' work). Defendants were represented by Proskauer Rose LLP, nationally recognized for their ERISA litigation expertise. *Sarko Award Aff.* at ¶ 27.

Named Plaintiffs' Counsel's ability to obtain a favorable settlement for the Class in the face of such formidable legal opposition confirms the quality of their representation. Thus, this *Goldberger* factor also supports the fee award requested.

#### **5. Fee in Relation to the Settlement**

The requested fee of \$555,000 – which includes a fractional multiplier representing a discount of 56.35% of Named Plaintiffs' Counsel's lodestar – is fair and reasonable in relation to the recovery and compares favorably to fee awards in other risky common fund cases in the Second Circuit.

**Lodestar/Multiplier Analysis.** In the Second Circuit, lodestar may be an independent method of fee calculation or used as a “cross check” on percentage of fund method. *Goldberger*, 209 F.3d at 50. Under the “lodestar” method, the number of hours reasonably expended are multiplied by an appropriate hourly rate. *Id.* at 47.

Where counsel have specialized experience in a field, it can be presumed that they will “perform the various tasks necessary to advance Plaintiffs’ and the Class’s interests in a more efficient manner than would have counsel with a lesser degree of specialization in [the] field.” *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 588-89 (S.D.N.Y. 2008). Moreover, bearing all the risks and out-of-pocket expenses in pursuing this action on a contingent fee basis for years ensures that counsel’s hours are reasonably expended, and may be a basis for awarding a multiplier on counsel’s lodestar. *See, e.g., Prudential*, 985 F. Supp. at 414.

The propriety of hourly rates is viewed in the context of the rate charged in the community where the services were performed for the type of service performed by counsel. *See Luciano v. Olsten Corp.*, 109 F.3d 111, 115 (2d Cir. 1997). A district court may use an out-of-district hourly rate in calculating a reasonable fee where a reasonable paying client would have paid those higher rates. *McDaniel v. Cnty. of Schenectady*, 595 F.3d 411, 416, 420-21 (2d Cir. 2010) (affirming an opinion of this District, which used a higher out-of-district hourly rate to calculate reasonable attorney fees pursuant to the lodestar method in a common fund case). A reasonable paying client would have paid higher out-of-district hourly rates when the attorneys are experienced and the use of in-district counsel would have produced a substantially inferior result. *Id.* at 421 n.6. Notably, current rates should be used to calculate the lodestar figure to account for the delay in payment inherent in class actions and for inflation. *See, e.g., LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998).

Named Plaintiffs’ Counsel are highly experienced in prosecuting this newly developing highly-specialized and complex area of ERISA law involving alleged breaches of duty by a plan’s fiduciaries in relation to the plan’s purchase and holding of company stock. *Sarko Award Aff.* at ¶¶ 21-25. Only a select few firms across the nation have occupied leadership positions

representing plaintiffs in this area of ERISA law. *Id.* at ¶ 29. Due to this specialized experience, Named Plaintiffs' Counsel were able to efficiently perform the various tasks necessary to advance Named Plaintiffs' and the Settlement Class's interests, and bearing all the risks and out-of-pocket expenses in pursuing this action against an able opponent on a contingent fee basis for more than three years ensured that counsel's hours were reasonably expended. *Id.* at ¶ 30. This specialized experience also enabled Named Plaintiffs' Counsel to produce a significant cash recovery for the Plan under the particular complex factual circumstances of this case relating to the floor-offset provision between the Plan at issue in this case and the Retirement Plan. *Id.* at ¶ 31.

The total lodestar required by this case from Named Plaintiffs' Counsel and their local counsel as of August 31, 2010 was \$1,271,727.00. Sarko Award Aff. at ¶ 3; Szary Aff. at ¶ 5. This figure was calculated using contemporaneous, daily time records, regularly prepared and maintained by Named Plaintiffs' Counsel in the ordinary course of business. Sarko Award Aff. at ¶ 32. The current hourly rates of the attorneys and other timekeepers who have worked on this case are prevailing rates in each of their communities and have been approved in many judicial settlement hearings. *Id.* at ¶ 33. They are also consistent with rates approved in this Circuit. *See, e.g., In re Gilat Satellite Networks, Ltd.*, No. 02-1510, 2007 WL 2743675, at \*17-18 (E.D.N.Y. Sept. 18, 2007) (approving, three years ago, rates ranging from \$325 per hour for associates up to \$725 per hour for certain partners); *In Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02-1484, 2007 WL 313474, at \*22 (S.D.N.Y. Feb. 1, 2007) (approving billing rates ranging from \$550 per hour for associates to \$850 per hour for certain partners).

The requested fee here not only includes no positive multiplier, it discounts Named Plaintiffs' Counsel's lodestar by more than 56%. In sum, a lodestar analysis confirms the reasonableness of the fee requested here.

**Percentage of Fund Analysis.** The trend in this Circuit is to compute fee awards in common fund cases as a percentage of the recovered fund. *Wal-Mart*, 396 F.3d at 121. As the size of the settlement fund increases, the percentage of the fund awarded as fees often decreases so as to prevent a windfall to plaintiffs' attorneys. *Hicks v. Morgan Stanley & Co.*, No. 01-10071, 2005 U.S. Dist. LEXIS 24890, at \*\*24-25 (S.D.N.Y. Oct. 19, 2005). "A settlement amount of \$10 million does not raise the windfall issue in the same way as would a \$100 million settlement, and a 30% fee does not produce such a windfall." *Id.*

A 30% award is well within the range of awards made by district courts in the Second Circuit for common fund settlements of this size. *See, e.g., Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) (awarding 33 1/3% of settlement valued at \$11.5 million); *Silverberg v. People's Bank*, No. 00-9548, 23 Fed. Appx. 46, 48 (2d Cir. 2001) (affirming district court decision to award approximately 32.6% of a \$7.7 million settlement fund in fees); *Eastman Kodak Co.*, 228 F.R.D. at 189 (approving attorneys' fees of 38.26% of a \$125,000 settlement).

The requested amount of attorneys' fees, \$555,000 – representing 30% of the total all-cash recovery to the Class of \$1.85 million – is also within the range of awards made by district courts in the Second Circuit for ERISA cases. *See, e.g., Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 249 (2d Cir. 2007) (approving 30% fee in an ERISA common fund case); *In re AIG ERISA Litig.*, No. 04-9387 (S.D.N.Y. filed Oct. 8, 2008) (awarding 30% fee).

Thus, whatever the rubric — lodestar multiplier or fee as percentage of recovery — the fee requested here is reasonable.

## **6. Public Policy**

This nation has a public policy of encouraging skilled attorneys to bring meritorious ERISA suits such as this one. Congress passed ERISA to promote the important goal of protecting and preserving the retirement savings of American workers. ERISA’s “most important purpose” was to “assure American workers that they may look forward with anticipation to a retirement with financial security and dignity, without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society.” *Stewart v. Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d 1143, 1148 (9th Cir. 2000) (citation omitted).

ERISA itself specifically encourages private enforcement. *See, e.g.*, ERISA § 502(a), 29 U.S.C. § 1132(a). The Supreme Court has noted that private actions provide “a most effective weapon in the enforcement” of federal statutes that provide for both governmental and private rights of action. *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964), *abrogated on other grounds by Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979)) (discussing private actions in the context of securities class actions).

“To make certain that the public [interest] is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding.” *Eltman v. Grandma Lee’s, Inc.*, No. 82-1912, 1986 WL 53400, at \*9 (E.D.N.Y. May 28, 1986) (citation and internal quotation marks omitted); *see also Maley*, 186 F. Supp. 2d at 373 (“Courts have recognized the importance that fair and reasonable fee awards have in encouraging private attorneys to prosecute class actions on a contingent basis . . . on behalf of those who otherwise could not afford to

prosecute.”); *Spann v. AOL Time Warner, Inc.*, No. 02-8238, 2005 WL 1330937, at \*8 (S.D.N.Y. June 7, 2005) (awarding 33-1/3% fee, noting that lawsuits such as this create incentives for fiduciaries to comply with ERISA).

Without the efforts of Named Plaintiffs’ Counsel, the participants in the Plan would likely not have obtained any relief. Sarko Award Aff. at ¶ 34. Named Plaintiffs’ Counsel have promoted the public interest by vindicating the rights of the aggrieved Plan participants, and it is in the public interest for them to be paid a reasonable attorney’s fee. *Id.* In short, the *Goldberger* analysis strongly supports the fee requested here.

### **III. THE COURT SHOULD ALLOW NAMED PLAINTIFFS’ COUNSEL’S REQUEST FOR REIMBURSEMENT OF EXPENSES**

Litigating complex contingent cases such as this one requires counsel to incur significant expenses. Named Plaintiffs’ Counsel advanced \$55,484.89, and they are entitled to reimbursement of these expenses. *See In re Veeco*, 2007 WL 4115808 at \*10 (“It is well established that counsel who create a common fund are entitled to the reimbursement of expenses that they advance to a class.”); *Reichman v. Bonsignore, Brignati & Mazzotta P.C.*, 818 F.2d 278, 283 (2d Cir. 1987) (courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course). The expenses that may be reimbursed from the common fund are not limited to those taxed in a judgment against an opponent but, instead, encompass “all reasonable” litigation-related expenses. *Trustees v. Greenough*, 105 U.S. 527, 532-33 (1881), *abrogated on other grounds by Goldberger*, 209 F.3d 43.

Because the expenses incurred here were incurred with no guarantee of recovery, Named Plaintiffs’ Counsel had a strong incentive to keep them at a reasonable level, and did so. Sarko Award Aff. at ¶ 37. They made a concerted effort to avoid unnecessary expenditures and economized whenever possible. These expenses were largely attributable to ordinary and

necessary items such as computer-assisted document organization, mediation expenses, travel, and copying. They were essential to the successful development and prosecution of the case, and then the settlement process, and amount to 3% of the recovery for the Settlement Class. *Id.*

#### **IV. CASE CONTRIBUTION AWARDS FOR THE NAMED PLAINTIFFS ARE WELL DESERVED**

The notice sent to Class members disclosed that Named Plaintiffs Milton Lilly and Donald Grogan would seek awards of \$2,500 each for their initiative and efforts in the litigation.

In calculating incentive fees, courts consider:

the existence of special circumstances including the personal risk (if any) incurred by the plaintiff-applicant in becoming and continuing as a litigant, the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise), any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claim, and of course, the ultimate recovery.

*Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 200 (S.D.N.Y. 1997). “[S]uch awards are particularly appropriate in the employment context” as “the plaintiff is often a former or current employee of the defendant, and thus, by lending his name to the litigation, he has, for the benefit of the class as a whole, undertaken the risk of adverse actions by the employer or co-workers.” *Eastman Kodak Co.*, 228 F.R.D. at 187 (citing *Texaco*, 979 F. Supp. at 201).

The Named Plaintiffs in this case have been active, hands-on participants in this litigation, expending significant amounts of their own time to benefit the Settlement Class. *Sarko Award Aff.* at ¶ 38. They came forward to initiate this action, and thereafter remained in contact with Named Plaintiffs’ Counsel. They provided documents and information; agreed to respond to document requests and interrogatories and sit for their depositions; reviewed and approved pleadings; and participated in the settlement process by consulting with Named Plaintiffs’ Counsel on the adequacy of Defendants’ settlement proposals. *Id.* These individuals should be rewarded for their willingness to step forward, and then participate in this case, to

ensure that the interests of the Class were vindicated. *See Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118, 124-25 (S.D.N.Y. 2001) (noting that awards ranged from \$2,500 - \$85,000).

## V. CONCLUSION

The attorneys' fees and reimbursement of expenses that Plaintiffs request will reasonably compensate Named Plaintiffs' Counsel for the risks they assumed, and the time and resources they committed over three years, to obtain the successful result achieved here. Plaintiffs respectfully request that the Court: (1) award attorneys' fees in the amount of \$555,000 from the Settlement Fund; (2) order reimbursement of expenses advanced by Named Plaintiffs' Counsel; and (3) award \$2,500 each to Named Plaintiffs Milton Lilly and Donald Grogan in recognition of their efforts on behalf of the Settlement Class in this case. A proposed order and final judgment that grants this relief will be filed with Plaintiffs' motion for final approval of the Settlement.

DATED: September 9, 2010.

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