UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MINNEAPOLIS FIREFIGHTERS' RELIEF ASSOCIATION, *et al*., Plaintiffs, v. MEDTRONIC, INC., *et al*., Defendants.	Civil No. 0:08-cv-06324-PAM-AJB

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

Dated: October 4, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Having obtained a recovery of $85 million in cash (the "Settlement Amount") for the benefit of the Class, Lead Counsel now respectfully submit this memorandum of law in support of their motion, pursuant to Fed. R. Civ. P. 23(h), for an award of attorneys' fees in the amount of 25% of Settlement Fund (*i.e.,* 25% of the Settlement Amount with interest on such amount at the same rate as earned by the Settlement Fund).[1] Lead Counsel also seek reimbursement of $1,481,702.68 in litigation expenses that they reasonably and necessarily incurred in prosecuting and resolving the Action, and reimbursement of $45,989.00 in costs and expenses that certain Lead Plaintiffs and additional certified Class Representative Westmoreland County Employee Retirement System ("Westmoreland") incurred directly related to their representation of the Class.

Lead Plaintiffs, each of whom is a sophisticated institutional investor, have reviewed and endorsed the requested 25% fee as fair and reasonable. *See* Declarations of

[1] Lead Plaintiffs are simultaneously submitting herewith the Joint Declaration of Karl L. Cambronne, Salvatore J. Graziano, Ramzi Abadou, Jeff A. Almeida, and James M. Hughes in Support of (A) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation of Settlement Proceeds and (B) Lead Counsel's Motion For An Award of Attorneys' Fees and Reimbursement of Expenses (the "Joint Declaration" or "Joint Decl."). The Court is respectfully referred to the Joint Declaration for a detailed description of the history of the Action; the nature of the claims asserted; the negotiations leading to the Settlement; the value of the Settlement to the Class, as compared to the risks and uncertainties of continued litigation; and a description of the services Lead Counsel provided for the benefit of the Class.

Unless otherwise noted, capitalized terms have the meanings set out in the Joint Declaration or in the Stipulation and Agreement of Settlement dated July 20, 2012 (Dkt. 325) (the "Stipulation").

Lead Plaintiffs attached as Exs. 2, 3, 4, and 5 to the Joint Declaration This endorsement is a significant factor in assessing the fee and expense requests here.

PRELIMINARY STATEMENT

The $85 million proposed Settlement represents an excellent recovery for the Class and was achieved through the skill, tenacity, and advocacy of Lead Counsel, who litigated this Action on a purely contingent fee basis against competent defense counsel. The Settlement was achieved in the face of numerous hurdles and risks that posed the risk of no recovery (or a substantially lesser recovery) for the Class.

As detailed in the accompanying Joint Declaration, Lead Counsel Chestnut Cambronne PA ("Chestnut Cambronne"), Bernstein Litowitz Berger & Grossmann LLP ("BLB&G"), Kessler Topaz Meltzer & Check, LLP ("Kessler Topaz"), Grant & Eisenhofer P.A. ("G&E"), and Motley Rice LLC ("Motley Rice") vigorously pursued this litigation on behalf of the Class for over three years. Among other things, Lead Counsel (i) conducted an extensive factual investigation into the alleged fraud, including a thorough review of publicly available information and information obtained through FOIA requests, and investigative interviews with approximately 100 non-party witnesses, which included numerous former Medtronic employees; (ii) prepared a detailed consolidated complaint based on this investigation; (iii) consulted with several experts; (iv) successfully opposed Defendants' motion to dismiss; (v) successfully moved for certification of the Class; (vi) conducted extensive merits discovery, including obtaining production of over 15 million pages of documents from Defendants and third parties, reviewing and analyzing these documents, litigating numerous contentious discovery

disputes, and taking the deposition of a witness who had asserted a Fifth Amendment privilege; and (viii) engaged in extensive settlement negotiations including three distinct mediations, first with Professor Eric D. Green and then before Chief Magistrate Judge Arthur J. Boylan.

The Settlement is an excellent result for the Class when considered in light of the considerable risks confronted in this case from the outset. For example, Defendants argued that they did not make any actionable misstatements or omissions concerning off-label promotion of their INFUSE bone graft system, and that they were not required to disclose the amount of their off-label sales. These allegations were the gravamen of the Complaint. There would also have been real challenges in proving that any misstatements or omissions were material and that Defendants had acted with *scienter*. Finally, Lead Counsel would have faced significant hurdles in establishing that disclosures of the allegedly concealed facts concerning off-label promotion and sales of INFUSE caused the declines in the price of Medtronic common stock. In light of these risks, Lead Counsel respectfully submit that the Settlement is a testament to their hard work and the quality of their representation.

Given the recovery obtained for the benefit of the Class, the complexity of the litigation, the quantity of work involved, the skill and expertise required, and the substantial risks that counsel undertook in this Action, Lead Counsel submit that the requested award of 25% of the Settlement Fund and reimbursement of counsel's expenses in the amount of $1,481,702.68 is fair and reasonable. The requested fee is well within the range of percentage attorneys' fees awarded in securities class actions and other

comparable class actions within this District and throughout the nation. Moreover, the requested fee is substantially less than the total lodestar value of the time that Lead Counsel have dedicated to the Action. Indeed, the requested fee here represents a "negative" multiplier; it is only 74.23% of Lead Counsel's lodestar in contrast to the positive multipliers of two to five times counsel's lodestar that are typically awarded in class actions with substantial contingency risks such as this one.

In addition, pursuant to the Court's Order Preliminarily Approving Proposed Settlement and Providing for Notice dated July 23, 2012 (Dkt. 326) (the "Preliminary Approval Order"), more than 581,000 copies of the Notice have been mailed to potential Class Members and their nominees and a Summary Notice was published in *The Wall Street Journal* and *Investor's Business Daily* and transmitted over the *PR Newswire*. *See* Affidavit of Eric J. Miller Regarding (A) Mailing of the Notice and Proof of Claim and Release Form; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusions Received to Date, Ex. 1 to the Joint Declaration ("Miller Aff.") ¶¶ 3-10. The Notice advised Class Members that Lead Counsel would seek attorneys' fees of up to 25% of the Settlement Fund and would seek reimbursement of litigation expenses (including reimbursement of the reasonable costs and expenses of Lead Plaintiffs directly related to their representation of the Class) in an amount not to exceed $2,000,000. *See* Miller Aff. Ex. A ¶¶ 5, 66. While the deadline set by the Court for Class Members to object to the requested attorneys' fees and expenses has not yet passed, to date, no

objections to Lead Counsel's application for fees and expenses or Lead Plaintiffs' request for reimbursement of expenses have been received. *See* Joint Decl. ¶¶ 92, 112.[2]

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

ARGUMENT

I. LEAD COUNSEL ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES FROM THE COMMON FUND

The Supreme Court has long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1970). The purpose of the common fund doctrine is to fairly and adequately compensate class counsel for services rendered and to prevent unjust enrichment of persons who benefit from a lawsuit without bearing its cost. *See Boeing*, 444 U.S. at 478; *Mills*, 396 U.S. at 392; *In re Charter Commc'ns, Inc. Sec. Litig.*, No. MDL 1506, 4:02-CV-1186 CAS, 2005 WL 4045741, at *13 (E.D. Mo. June 30, 2005).

Courts have recognized that, in addition to providing fair compensation, awards of attorneys' fees in successful cases should serve to encourage skilled counsel to represent

[2] The deadline for the submission of objections is October 18, 2012. Should any objections be received, Lead Counsel will address them in reply papers, which will be filed with the Court on November 1, 2012.

those who seek redress for damages inflicted on entire classes of persons, and to discourage future alleged misconduct of a similar nature. *See Charter Commc'ns*, 2005 WL 4045741, at *18-19; *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400, 2010 WL 4537550, at *23 (S.D.N.Y. Nov. 8, 2010). Indeed, the Supreme Court has emphasized that private securities actions are "an essential supplement to criminal prosecutions and civil enforcement actions" brought by the SEC. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *accord Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (private securities actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action") (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).

Compensating plaintiffs' counsel for the risks they take in bringing these actions is essential, because "[a] large segment of the public might be denied a remedy for violations of the securities laws if contingent fees awarded by the courts did not fairly compensate counsel for the services provided and the risks undertaken." *In re Sturm, Ruger & Co., Inc. Sec. Litig.*, No. 3:09cv1293 (VLB), 2012 WL 3589610, at *13 (D. Conn. Aug. 20, 2012).

II. THE COURT SHOULD AWARD A REASONABLE PERCENTAGE OF THE COMMON FUND

The determination of the amount of a reasonable attorney fee to be awarded from the common fund is committed to the sound discretion of the district court. *See Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1156 (8th Cir. 1999); *Yarrington v. Solvay Pharm., Inc.*, 697 F. Supp. 2d 1057, 1061 (D. Minn. 2010); *In re Monosodium Glutamate*

Antitrust Litig., No. 00-MDL-1328-PAM, 2003 WL 297276, at *1 (D. Minn. Feb. 6, 2003).

Lead Counsel respectfully submit that this Court should award a fee based on a percentage of the common fund obtained for the Class. The Eighth Circuit has expressly approved the percentage method in common fund cases and described its use as "well established." *See In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) ("[w]e have approved the percentage-of-recovery methodology to evaluate attorneys' fees in a common-fund settlement such as this"); *Petrovic*, 200 F.3d at 1157 ("It is well established in this circuit that a district court may use the 'percentage of the fund' methodology to evaluate attorney fees in a common-fund settlement"); *Yarrington*, 697 F. Supp. 2d at 1061; *In re Xcel Energy, Inc. Sec., Derivative & ERISA Litig.*, 364 F. Supp. 2d 980, 991 (D. Minn. 2005).

Courts have repeatedly recognized the advantages of the percentage-of-the-fund method, over the alternative lodestar approach, because it aligns the interests of counsel and the class in achieving the maximum recovery possible and encourages class counsel to litigate the case in as efficient a manner as possible. *See, e.g.*, *Xcel*, 364 F. Supp. 2d at 991-92 ("There are strong policy reasons behind the judicial and legislative preference for the percentage of recovery method"); *Charter Commc'ns*, 2005 WL 4045741, at *13 (the percentage "approach most closely aligns the interests of the lawyers with the class"). In addition, the percentage method is consistent with arrangements in the private marketplace for contingency cases, in which individual clients typically agree to a fee

based on the amount recovered. *See id*.; *see also Blum v. Stenson*, 465 U.S. 886, 903 (1984).

III. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE UNDER EITHER THE PERCENTAGE-OF-THE-FUND METHOD OR THE LODESTAR METHOD

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

The Supreme Court has recognized that an appropriate court-awarded fee is intended to approximate what counsel would receive if they were bargaining for the services in the marketplace. *See Missouri v. Jenkins*, 491 U.S. 274, 285-86 (1989). If this were a non-representative action, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 33% of the recovery. *See Blum*, 465 U.S. at 903.

The fee requested here was carefully considered and is endorsed by Lead Plaintiffs and, at 25%, is well within the range of the percentage fees awarded in this Circuit and around the country in comparable cases. First, courts in this District have observed that the range of percentage awards in common fund cases most typically ranges from 25% to 36%. *See Yarrington*, 697 F. Supp. 2d at 1061 ("courts have routinely awarded attorney fees ranging from 25% to 36% of the common fund under the percentage-of-the-fund method"); *Xcel*, 364 F. Supp. at 998 ("courts in this circuit and this district have frequently awarded attorney fees between twenty-five and thirty-six percent"); *see also id*. at 998-99 (citing professor's study showing that the average percentage fee in

securities class action settlements over $10 million was 31% and that awards of 25% to 30% were "fairly standard" in settlements between $100 and $200 million).

The reasonableness of the requested 25% fee is fully supported by a review of percentage fee awards in securities class actions and other comparable class actions in this Circuit. *See, e.g.*, *Xcel*, 364 F. Supp. 2d at 998-99 (awarding 25% of $80 million settlement fund); *In re MoneyGram Int'l, Inc. Sec. Litig.*, Civ. No. 08-883 (DSD/JJG), slip op. at 18 (D. Minn. June 18, 2010), ECF No. 184 (awarding 23.75% of $80 million settlement fund) (attached hereto as Ex. 1); *Monosodium Glutamate*, 2003 WL 297276, at *3 (awarding 30% of $81.4 million settlement fund); *In re Airline Ticket Comm'n Antitrust Litig.*, 953 F. Supp. 280, 286 (D. Minn. 1997) (awarding 33.3% of $86 million settlement fund).[3]

[3] *See also, e.g.*, *U.S. Bancorp Litig.*, 291 F.3d at 1038 (affirming 36% award); *Petrovic*, 200 F.3d at 1157 (affirming 24% award); *In re Iowa Ready-Mix Concrete Antitrust Litig.*, No. C 10-4038-MWB, 2011 WL 5547159, at *3 (N.D. Iowa Nov. 9, 2011) (awarding 36% of $18.5 million settlement); *Yarrington*, 697 F. Supp. 2d at 1061 (awarding 33% of $16.5 million settlement); *Carlson v. C.H. Robinson Worldwide, Inc.*, No. CIV 02-3780 JNE/JJG, 2006 WL 2671105, at *8 (D. Minn. Sept. 18, 2006) (awarding 35.5% of $15 million settlement); *In re Pemstar, Inc. Sec. Litig.*, No. 02-1821 (DWF/SRN), slip op. at 2 (D. Minn. May 27, 2005), ECF No. 149 (awarding 25% of $12 million settlement) (attached hereto as Ex. 2); *In re IBP, Inc. Sec. Litig.*, 328 F. Supp. 2d 1056, 1065 (D.S.D. 2004) (awarding 28% of $8 million settlement); *KK Motors v. Brunswick Corp.*, No. 98-2307, slip op. at 5 (D. Minn. Mar. 6, 2000), ECF No. 67 (awarding 33.3% of $30 million settlement) (attached hereto as Ex. 3); *In re SciMed Life Sec. Litig.*, No. 3-91-0575 (D. Minn. July 17, 1995) (awarding 33.3% of $5 million settlement) (cited in *Xcel*, 364 F. Supp. 2d at 998).

Likewise, a review of comparable securities class action settlements in other Circuits also strongly supports the reasonableness of the 25% request. *See, e.g.*, *Billitteri v. Securities Am., Inc.*, No. 3:09-cv-1568, 2011 WL 3585983, at *9 (N.D. Tex. Aug. 4, 2011) (awarding 25% of $80 million settlement fund); *Cornwell v. Credit Suisse Group*,

A more detailed analysis of a recent fee award in this District further reinforces the reasonableness of the requested fee. In the *Xcel* securities class action – which, like this Action, involved Exchange Act claims under Section 10(b) and Rule 10b-5 – the district court awarded 25% of an $80 million settlement. *See Xcel*, 364 F. Supp. 2d at 998-99. While the stage of the litigation at which *Xcel* settled was roughly comparable to this Action – after the completion of substantial document discovery but before deposition discovery had begun in earnest – the amount of time and effort Lead Counsel were required to devote to this Action and the extent of document discovery conducted before settlement could be reached is much more substantial here than in *Xcel*.

For example, Lead Counsel have received more than 15 million pages of documents in this Action and reviewed millions of pages, as compared to "several hundred thousand pages" in *Xcel*. *See id*. at 989. In addition, Lead Counsel in this Action achieved class certification before reaching settlement, whereas *Xcel* settled before that milestone was reached. Finally, the 25% fee awarded in *Xcel* was 4.7 times

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No. 08-cv-03758 (VM), slip op. at 2 (S.D.N.Y. July 18, 2011) (awarding 27.5% of a $70 million settlement fund) (attached hereto as Ex. 4); *In re Priceline.com, Inc. Sec. Litig.*, No. 3:00-CV-1884 (AVC), 2007 WL 2115592, at *5 (D. Conn. 2007) (awarding 30% of $80 million settlement fund); *In re Philip Servs. Corp. Sec. Litig.*, No. 98 Civ. 835 (AKH), 2007 WL 959299, at *3 (S.D.N.Y. March 28, 2007) (awarding 26% of $79.75 million settlement fund); *In re Am. Express Fin. Advisors Sec. Litig.*, No. 04 Civ. 1773 (DAB), slip op. at 8 (S.D.N.Y. July 18, 2007) (awarding 27% of $100 million settlement fund) (attached hereto as Ex. 5); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 590-91 (E.D. Pa. 2005) (awarding 25% of $126.6 million settlement fund); *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1337 (S.D. Fla. 2001) (awarding 25% of $110 million settlement fund).

the amount of counsel's lodestar (*id*.), in stark contrast with the present case, in which Lead Counsel are requesting a fee that is 25% ***less*** than the total value of time that Lead Counsel devoted to this Action. Accordingly, a comparison with the fee award in *Xcel* strongly supports the reasonableness of the requested fee.[4]

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

The Eighth Circuit has held that the lodestar method may be used to cross-check the reasonableness of a fee awarded under the percentage-of-the-fund method. *See Petrovic*, 200 F.3d at 1157; *Yarrington*, 697 F. Supp. 2d at 1061; *Xcel*, 364 F. Supp. 2d at 999.[5] While in cases of this nature fees representing multiples above the lodestar are regularly awarded to reflect the contingency fee risk and other relevant factors, the fact that the percentage fee requested here is ***substantially less*** than Lead Counsel's total lodestar strongly supports the requested fee.

[4] The 2010 23.75% fee award in the *MoneyGram* securities class action, a case that settled for $80 million, similarly supports the reasonableness of the requested fee here. *See MoneyGram*, slip op. at 18 (attached hereto as Ex. 1). As in *Xcel*, the quantity of work performed by counsel in *MoneyGram* prior to settlement, while extensive, pales in comparison to what was required to achieve the Settlement here. For example, counsel in *MoneyGram* reviewed less than a million pages of documents and did not obtain class certification prior to settlement, and the fee awarded there represented a multiplier of 3.96 of the lodestar, as compared to the 0.7423 multiplier sought here.

[5] Under the lodestar method, the court multiplies the number of hours each attorney spent on the case by each attorney's reasonable hourly rate, and then adjusts that lodestar figure (by applying a multiplier) to reflect such factors as the risk and contingent nature of the litigation, the result obtained, and the quality of the attorneys' work. *See Jorstad v. IDS Realty Trust*, 643 F.2d 1305, 1312-14 (8th Cir. 1981).

In complex contingent litigation such as this Action, lodestar multipliers between 2 and 5 are commonly awarded. *See, e.g.*, *Yarrington*, 697 F. Supp. 2d at 1065 (awarding fee representing a 2.26 multiplier); *Xcel*, 364 F. Supp. 2d at 999 (awarding fee representing a 4.7 multiplier); *Charter Commc'ns*, 2005 WL 4045741, at *22 (finding 5.61 multiplier to be "within the range of multipliers awarded in comparable complex cases"); *Cohn v. Nelson*, 375 F. Supp. 2d 844, 862 (E.D. Mo. 2005) ("In shareholder litigation, courts typically apply a multiplier of 3 to 5 to compensate counsel for the risk of contingent representation.").

The lodestar cross-check here fully supports the requested percentage fee. Lead Counsel have spent a total of 71,722 hours of attorney and other professional support time prosecuting the Action.[6] *See* Joint Decl. ¶ 103. Lead Counsel's lodestar, derived by multiplying the hours spent by each attorney and paraprofessional by their current hourly rates, is approximately $28,627,000.[7] *See id*. The requested 25% fee, which amounts to

[6] Additional counsel also performed work for the benefit of the Class and, pursuant to the provisions of the Stipulation, Lead Counsel will allocate attorneys' fees awarded in a manner that they believe reflects the contributions of such counsel to the prosecution and settlement of the Action. For purposes of demonstrating the reasonableness of the fee request, the cumulative lodestar of Lead Counsel, which alone results in a significant negative multiplier, is sufficient.

[7] The Supreme Court and courts in this Circuit have approved the use of current hourly rates to calculate the base lodestar figure as a means of compensating for the delay in receiving payment, inflationary losses, and the loss of interest. *See Missouri v. Jenkins*, 491 U.S. at 284; *Charter Commc'ns*, 2005 WL 4045741, at *17 ("use of current rates is proper, since such rates compensate for inflation and the loss of use of funds"); *Hughes v. Furniture on Consignment, Inc.*, No. 4:04-CV-3368, 2005 WL 3132345, at *1 (D. Neb. Nov. 22, 2005) (courts may "compensate for any delay in payment (time value of money)

$21,250,000 (without interest), represents a "negative" multiplier of about 0.7423 times Lead Counsel's lodestar amount. Thus, the 25% fee requested is below the range of multipliers routinely awarded.

Indeed, courts have noted that a percentage fee that falls below counsel's lodestar further supports the reasonableness of the award. *See, e.g.*, *FLAG Telecom*, 2010 WL 4537550, at *26 ("Lead Counsel's request for a percentage fee representing a significant discount from their lodestar provides additional support for the reasonableness of the fee request"); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 146 (S.D.N.Y. 2010) (that counsel sought only 87% of their lodestar "strongly suggests that the requested fee is reasonable"); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 515 (S.D.N.Y. 2009) (there was "no real danger of overcompensation" where requested fee was below counsel's lodestar).

In sum, Lead Counsel's requested fee award is well within the range of what courts in this Circuit and throughout the country commonly award in complex class actions such as this one, whether calculated as a percentage of the fund or in relation to Lead Counsel's lodestar. Moreover, as discussed below, Lead Plaintiffs have reviewed and approved the requested fee and the factors established for the review of attorneys' fee awards by courts in the Eighth Circuit also strongly support a finding that the requested fee is reasonable.

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by calculating the lodestar in current dollars (the current hourly rate rather than the historical rate)").

IV. OTHER FACTORS CONSIDERED BY COURTS IN THIS CIRCUIT CONFIRM THAT THE REQUESTED 25% FEE IS FAIR AND REASONABLE

Courts in the District of Minnesota generally consider the following factors when reviewing the reasonableness of a request for attorneys' fees as a percentage of a common fund:

> (1) the benefit conferred on the class, (2) the risk to which plaintiffs' counsel were exposed, (3) the difficulty and novelty of the legal and factual issues in the case, (4) the skill of the lawyers, both plaintiffs' and defendants', (5) the time and labor involved, (6) the reaction of the class, and (7) the comparison between the requested attorney fee percentage and percentages awarded in similar cases.

Yarrington, 697 F. Supp. 2d at 1062; *accord Xcel*, 364 F. Supp. 2d at 993; *see also Monosodium Glutamate*, 2003 WL 297276, at *1-2 (applying essentially same factors in different order and citing MANUAL FOR COMPLEX LITIGATION (THIRD) § 24.121 at 190). Courts also consider the public policy considerations in support of payment of reasonable attorneys' fees. *See, e.g.*, *Charter Commc'ns*, 2005 WL 4045741, at *18. Each of these factors, together with the analyses above, supports the reasonableness of the requested fee.

A. The Benefit Conferred on the Class Supports the Requested Fee

The benefit conferred on the Class and the quality of the result achieved are important factors in evaluating the reasonableness of requested attorneys' fees. *See Xcel*, 364 F. Supp. 2d at 994. The advantage of the percentage-of-the-fund method is that it uses the amount of the benefit to the Class as the starting point for the analysis of attorneys' fees and, thus, directly incorporates this factor into its calculation of the fees.

See Fed. R. Civ. P. 23(h) advisory committee note to 2003 Amendment (in a "percentage approach to fee measurement, results achieved is the basic starting point").

The benefit conferred on the Class here is the substantial cash settlement in the amount of $85 million, which is the second largest securities class action recovery ever achieved in the District of Minnesota and the fifth largest in the Eighth Circuit. This Settlement confers a substantial immediate benefit on the Class in contrast to the additional delays, costs, and uncertainty of continued litigation. Moreover, as discussed below, the $85 million settlement is particularly remarkable in light of the significant risks in establishing liability and damages in this Action.

B. The Risks of the Litigation Support the Requested Fee

In a case undertaken on a contingent fee basis, the risk of the litigation is a key factor in determining an appropriate fee award. *See Xcel*, 364 F. Supp. 2d at 994 ("the risk of receiving little or no recovery is a major factor in awarding attorney fees"). It is appropriate to take this contingent fee risk into account when determining the appropriate fee award. *See FLAG Telecom*, 2010 WL 4537550, at *27. "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).

For purposes of analyzing attorneys' fees, the risks of the litigation must be considered as they existed at the commencement of the Action. *See Xcel*, 364 F. Supp. 2d at 994. Courts have recognized that "[s]ecurities fraud class actions are by their nature, complex and difficult to prove." *Charter Commc'ns*, 2005 WL 4045741, at *15;

see also Teachers' Ret. Sys. v. A.C.L.N., Ltd., No. 01-CV-11814, 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) ("Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation.").

While Lead Counsel believed that the claims of Lead Plaintiffs and the Class had merit, Lead Counsel recognized that this case presented substantial risks and uncertainties from the time it was filed, which made it far from certain that any recovery would ultimately be obtained for the Class. If Defendants were to have prevailed, the Class – and therefore Lead Counsel – would receive nothing. As discussed in greater detail in the Joint Declaration and in the memorandum of law in support of the Settlement, these substantial risks were borne out during the course of the litigation.

First, Lead Plaintiffs faced challenges in establishing that the alleged misstatements and omissions that they had identified in the Complaint were actionably false or misleading. Joint Decl. ¶ 72. For example, in their motion to dismiss, Defendants contended that their accurate statements of past earnings on sales of INFUSE were not misleading, that they had no duty to disclose how much of these sales related to off-label uses, and that statements they made about Medtronic's compliance with the law were not actionable. *Id*. Defendants vigorously contested the existence of any improper off-label marketing of INFUSE at all. Lead Counsel recognized that there would be real challenges in establishing that Defendants engaged in the alleged misconduct, particularly in light of changes in off-label marketing regulations and FDA interpretations of those regulations over time. *Id*.

There were also substantial risks associated with proving the materiality of the alleged misstatements and omissions. Joint Decl. ¶ 73. For example, Lead Plaintiffs may have had difficulty proving the extent of any improper off-label promotion and to what extent off-label sales of INFUSE resulted from any improper promotion. *Id*. In addition, Defendants contended that the alleged omissions about the extent of off-label sales were not material because the decline in sales that resulted from the FDA Notification cautioning against certain off-label uses of INFUSE represented only a minor revenue difference to Medtronic. *Id*. Defendants also had substantial arguments that the market already was aware of the significant off-label sales of INFUSE and corresponding safety issues with the off-label use of the product, making the information allegedly omitted by Defendants immaterial. *Id*.

Lead Counsel also had to consider the substantial risks of establishing Defendants' *scienter*. Joint Decl. ¶¶ 74-76. Proving Defendants' intent to mislead is often challenging, and here it would have been particularly so because Defendants aggressively argued that, to the extent there was any off-label promotion, it was limited to rogue employees without approval or awareness of Medtronic or the other Defendants. *Id*. ¶ 74. The risks of establishing *scienter* were highlighted by the fact that the DOJ and the U.S. Attorney for the District of Massachusetts, who had announced an investigation into off-label marketing of INFUSE, later dropped the investigation and did not pursue any charges against Defendants. *Id*.

Lead Counsel recognized that establishing liability at trial would likely have required proof that Medtronic engaged in widespread wrongdoing; that Medtronic's sales

force carried out an established policy and practice of providing unsolicited information concerning off-label uses of INFUSE to doctors; and that these and/or other illegal marketing practices materially contributed to the sales of INFUSE that were reported by the Company during the Class Period. Joint Decl. ¶ 75. Lead Counsel understood that establishing these elements would be highly fact-intensive and would require strong statistical or documentary evidence or testimony, admissions by Company employees, and/or other evidence, and would have involved significant challenges and risks. *Id*.

Finally, Lead Counsel also knew that there would be substantial challenges in establishing loss causation in this Action. *Id*. ¶ 77-78. Defendants contended that Lead Plaintiffs could not demonstrate loss causation because the information Lead Plaintiffs alleged was revealed by the November 2008 disclosures was already known by the market, and prior disclosure of this information had not impacted the price of Medtronic stock. While Lead Plaintiffs had responses to these loss causation arguments, Lead Counsel recognized the substantial risk that Lead Plaintiffs and the Class could recover limited or no damages at all if the Court or a jury agreed with Defendants' arguments.

In the face of these uncertainties regarding the outcome of the case, Lead Counsel undertook this case 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 a significant expenditure of litigation expenses with no guarantee of compensation. "There are numerous class actions in which plaintiffs' counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise." *Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 WL 3148350, at *32 (N.D. Tex. Nov. 8,

2005). Lead Counsel's assumption of this contingency fee risk supports the reasonableness of the requested fee.

C. The Difficulty, Novelty and Complexity of the Action Support the Requested Fee

The magnitude and complexity of the Action and the difficulty and novelty of the legal and factual issues involved also support the requested fee. Courts have long recognized that securities class action litigation is "notably difficult and notoriously uncertain." *Flag Telecom*, 2010 WL 4537550, at *27. This case was no exception. Indeed, here, the interaction between the securities law standards governing Lead Plaintiffs' claims and the complex and evolving FDA rules and regulations pertaining to off-label marketing made this case particularly complex. Joint Decl. ¶ 72.

As noted above and in the Joint Declaration, the litigation raised a number of complex factual and legal questions that would have required extensive efforts by Lead Counsel and consultation with experts to resolve. To build the case, Lead Counsel had to engage in extensive discovery, including reviewing millions of pages of documents and issuing subpoenas to over 100 non-parties. Joint Decl. ¶¶ 31-35. In light of the technical subject matter of Lead Plaintiffs' claims, Lead Counsel had to consult with medical experts throughout the case to understand the science of INFUSE, the complex issues relating to INFUSE safety, and medical industry customs, as well as with experts in the economics of the healthcare industry and in damages and loss causation, and would have continued to need to rely on these experts as the case progressed. *Id.* ¶¶ 66-69. The

numerous arguments raised in Defendants' motion to dismiss the Complaint are also indicative of the many issues that the Action would present. *Id*. ¶¶ 22-24.

Although Lead Plaintiffs had defeated Defendants' motion to dismiss, the Action still presented many difficult legal and factual questions that would have been tested in dispositive motions or at trial. This case was made more difficult because it was not based on any restatement of financials by the Company and, although the DOJ had conducted an investigation into Medtronic's alleged off-label marketing of INFUSE (the investigation was terminated with no action brought), the SEC had never even formally investigated the allegations of securities fraud raised in this case. Finally, the extremely aggressive defense that Defendants' Counsel had mounted throughout this litigation – leading to repeated disputes between the parties over the scope of document production and assertions of privilege, among other issues – contributed significantly to the cost and time required to resolve the Action and could be expected to continue throughout the course of the litigation in the absence of the Settlement.

Accordingly, the complexity of this Action and the novelty and difficulty of issues raised support the conclusion that the requested fee is reasonable and fair.

D. The Skills of the Lawyers Involved and the Quality of Lead Counsel's Representation Support the Requested Fee

The quality of the representation provided by Lead Counsel is also an important factor that supports the reasonableness of the requested fee. As demonstrated in their respective firm resumes (attached to the Joint Declaration as Exhibits 7A-4 to 7E-4), each of the Lead Counsel firms is highly experienced in the specialized field of securities class

actions. Lead Counsel have had substantial success litigating such actions and other complex litigation both in this District and around the country. The skill and extensive experience of counsel in securities litigation is relevant in determining fair compensation. *See Xcel*, 364 F. Supp. 2d at 995; *Teachers' Ret. Sys.*, 2004 WL 1087261, at *7. Lead Counsel prosecuted this Action with great persistence, skill, and creativity and believe that the quality of the result obtained for the Class provides strong evidence of the quality of Lead Counsel's representation.

Courts have repeatedly recognized that the quality of the opposition faced by plaintiffs' counsel should also be taken into consideration. *See, e.g.*, *Yarrington*, 697 F. Supp. 2d at 1063 (fact that defendant's attorneys "consist of multiple well-respected and capable defense firms" which "consistently challenged Plaintiffs' throughout the litigation" supported class counsel's request for fees); *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, No. 03 MDL 1529, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 26, 206) ("The fact that the settlements were obtained from defendants represented by 'formidable opposing counsel from some of the best defense firms in the country' also evidences the high quality of lead counsel's work"); *Teachers' Ret. Sys.*, 2004 WL 1087261, at *7 ("The quality of opposing counsel is also relevant in evaluating the quality of services rendered by Plaintiffs' Counsel.").

Here, Defendants were represented first by Wilmer Cutler Pickering Hale and Dorr; subsequently by Kirkland & Ellis LLP; and currently by Dorsey & Whitney LLP in addition to Kirkland & Ellis LLP. Joint Decl. ¶ 105. There can be no doubt that they represented their clients skillfully and zealously throughout this litigation. *Id.*

Notwithstanding this formidable and well-financed opposition, Lead Counsel's ability to present a strong case and demonstrate their willingness to continue to vigorously prosecute the Action enabled them to achieve a favorable settlement for the benefit of the Class.

E. Time and Labor Expended by Lead Counsel Support the Requested Fee

As noted above, Lead Counsel have expended more than 71,700 hours prosecuting this Action. Lead Counsel's efforts included a thorough investigation of the factual and legal issues raised in the Action, which entailed: (i) contacting over 150 potential non-party witnesses and conducting interviews with approximately 100 of these witnesses, including numerous former Medtronic employees; (ii) retaining and consulting with experts on the healthcare industry, medical and scientific issues, and damages and loss causation; (iii) reviewing a large volume of publicly available information concerning Medtronic, including the Company's SEC filings, transcripts of conference calls and analyst research reports, as well numerous articles from medical journals and other scientific and research materials; (iv) issuing numerous Freedom of Information Act ("FOIA") requests and analyzing the materials received in response; (v) obtaining and reviewing documents and discovery from other litigation relating to INFUSE; and (vi) researching relevant FDA rules and regulations concerning off-label marketing. Joint Decl. ¶ 20. Lead Counsel also spent substantial time and effort preparing the Complaint, and in preparing their briefing in response to Defendants' comprehensive motion to dismiss. *Id.* ¶¶ 19-26.

Following the Court's decision on the motion to dismiss, Lead Counsel began an extensive discovery process. Joint Decl. ¶¶ 28-62. As detailed in the Joint Declaration, this process was prolonged by Defendants' resistance to producing many of the documents requested and repeated disputes requiring meet and confers, letter writing, and motion practice concerning issues such as production of documents that Defendants' previously provided to the government about INFUSE (and concerning Defendants' communications with the government); production of documents relating to safety issues with INFUSE; the selection of custodians whose files would be searched and search terms that would be used; and issues of confidentiality and privilege. *Id*. ¶¶ 36-58. Through Lead Counsel's sustained effort, Lead Plaintiffs ultimately obtained production of over 15 million pages of documents from Defendants. *Id*. ¶ 33. Lead Counsel also sought documents by subpoena from more than 100 non-parties including (i) third-party surgeons who were consultants to Medtronic; (ii) Wall Street analysts who covered Medtronic; (iii) marketing and medical education companies that Medtronic used in carrying out marketing efforts; and (iv) distributors who were responsible for a very significant portion of Medtronic's INFUSE sales. *Id*. ¶ 35.

Lead Counsel successfully moved for class certification and refuted the attack on Lead Counsel's integrity that formed the basis for Defendants' opposition to class certification. *Id*. ¶ 63-64. Lead Counsel also spent substantial time preparing for depositions. *Id*. ¶ 62. By the time the Settlement was reached, Lead Counsel had of necessity spent a very significant amount of time and effort in prosecuting the litigation.

A substantial amount of time was also required to negotiate the Settlement. Lead Counsel engaged in three mediation sessions, each lasting at least two days, prepared several detailed mediation statements, and conducted additional negotiations with Defendants' Counsel between and following the mediation sessions. Joint Decl. ¶¶ 81-85. These prolonged negotiation efforts were first conducted under the auspices of Professor Eric D. Green, a well-respected and experienced mediator, at mediations occurring in June 2010 and January 2012, and later by Judge Boylan, who was closely familiar with the Action. *Id*. ¶¶ 81-84. On March 28, 2012, following the mediation with Judge Boylan and additional settlement negotiations assisted by Judge Boylan, Lead Plaintiffs reached the agreement in principle to settle with Defendants. *Id*. ¶ 85. The negotiation of the final settlement documents also required significant time and effort. *Id*.

Throughout the litigation, Lead Counsel staffed the matter efficiently and took steps to avoid duplication of effort. Joint Decl. ¶ 104. Lead Counsel sought to prosecute this Action in the most cost-efficient manner possible, consistent with their obligation to vigorously represent the interests of the Class. Lead Counsel have had an economic incentive to litigate efficiently because they understood that their time and expenditures would only be reimbursed, if at all, at the conclusion of the Action by verdict or settlement. To that end, Lead Counsel divided work among the firms, as well as individual attorneys at those firms, to minimize duplication, including assigning specific responsibility for particular tasks and/or subject areas. *Id*.

Lead Counsel each prepared a detailed analysis of the time devoted to the Action, subdividing all work performed by Lead Counsel into 16 discrete events or activities, listing the names of the attorneys or other professionals who participated in each event or activity, the hours spent by each person on that event/activity, and their current hourly rates. The analysis by firm is attached to Lead Counsel's respective declarations, which are appended to the Joint Declaration as Exhibits 7A – 7E. A summary of the hours and lodestar devoted by Lead Counsel, as well as the summary of hours and lodestar by each event or activity appears at the beginning of Exhibit 7 to the Joint Declaration.

The significant amount of time and effort devoted to this case by Lead Counsel and the efficient and effective management of the litigation confirm that the fee request here is reasonable, particularly in light of the fact that Lead Counsel are seeking less than the lodestar value of the time they devoted to the Action.

F. The Approval of Lead Plaintiffs and the Reaction of the Class to Date Support the Requested Fee

Lead Plaintiffs, who were actively involved in the prosecution, mediation, and settlement of this Action, have carefully considered and approved the requested fee. *See* Lead Plaintiffs' Declarations, attached as Exs. 2, 3, 4, and 5 to the Joint Declaration. Lead Plaintiffs are paradigmatic examples of the type of sophisticated and financially interested investors that Congress envisioned serving as a fiduciaries for the class when it enacted the PSLRA. The PSLRA was intended to encourage institutional investors like Lead Plaintiffs to assume control of securities class actions in order to "increase the likelihood that parties with significant holdings in issuers, whose interests are more

strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel." H.R. Conf. Rep. No. 104-369, at *32 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 731. Congress believed that these institutions would be in the best position to monitor the ongoing prosecution of the litigation and to assess the reasonableness of counsel's fee request.

Lead Plaintiffs have played an active role in the Action and closely supervised the work of Lead Counsel. *See* Lead Plaintiffs' Declarations. Accordingly, the endorsement of the fee by Lead Plaintiffs as fair and reasonable supports approval of the fee. *See In re Comverse Tech., Inc. Sec. Litig.*, No. 06-cv-1825, 2010 WL 2653354, at *4 (E.D.N.Y. June 24, 2010) ("The fact that this fee request is the product of arm's-length negotiation between Lead Counsel and the lead plaintiff is significant."); *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115808, at *8 (S.D.N.Y. Nov. 7, 2007) ("public policy considerations support the award in this case because the Lead Plaintiff . . . – a large public pension fund – conscientiously supervised the work of lead counsel and has approved the fee request").

The reaction of the Class to date also supports the requested fee. Through September 28, 2012, the Claims Administrator has disseminated the Notice to more than 581,000 potential Class Members or nominees informing them, among other things, that Lead Counsel intended to apply to the Court for an award of attorneys' fees of up to 25% of the Settlement Fund and up to $2,000,000 in expenses. *See* Miller Aff. ¶ 9 and Ex. A ¶ 5, 66. While the time to object to the fee and expense application does not expire until

October 18, 2012, to date, not a single objection has been received. Joint Decl. ¶ 112. Should any objections be received, Lead Counsel will address them in their reply papers.

G. A Comparison of Similar Cases Supports the Requested Fee

As discussed in detail in Part III above, the requested 25% fee is well within the range of percentage fees that courts in this Circuit and around the country have awarded in comparable cases.

H. Public Policy Considerations Support the Requested Fee

A strong public policy concern exists for rewarding firms for bringing successful securities litigation, in order to provide talented counsel with incentive to bring these actions and help deter future wrongdoing. *See Charter Commc'ns*, 2005 WL 4045741, at *19 ("public policy favors the granting of [attorneys'] fees sufficient to reward counsel for bringing these actions and to encourage them to bring additional such actions"); *FLAG Telecom*, 2010 WL 4537550, at *29 (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"); *see also Basic Inc. v. Levinson*, 485 U.S. 224, 230-31 (1988) (the federal securities laws are remedial in nature, and the courts must encourage private lawsuits to effectuate their purpose of protecting investors). Accordingly, public policy favors granting Lead Counsel's fee and expense application here.

V. LEAD COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED

Lead Counsel's fee application includes a request for reimbursement of litigation expenses that were reasonably incurred and necessary to the prosecution of this Action. *See* Joint Decl. ¶¶ 113-21. These expenses are properly recovered by counsel. *See Yarrington*, 697 F. Supp. 2d at 1067 ("Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed . . . . The requested costs must be relevant to the litigation and reasonable in amount."). As set forth in detail in the Joint Declaration, Lead Counsel incurred $1,481,702.68 in litigation expenses on behalf of the Class in the prosecution of the Action. Joint Decl. ¶ 115. The expenses for which Lead Counsel seek reimbursement are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the hour. These expenses include, among others, court fees, service of process fees, expert fees, costs of maintaining a database for the millions of documents produced in discovery, computerized legal and factual research, mediation costs, travel expenses, photocopying, long distance telephone and facsimile charges, postage and delivery expenses, and filing fees. *Id*. These expense items are billed separately by Lead Counsel, and such charges are not duplicated in the firms' hourly billing rates. *Id*. Reimbursement of these expenses is fair and reasonable. *See, e.g.*, *Yarrington*, 697 F. Supp. 2d at 1067; *Xcel*, 364 F. Supp. 2d at 999-1000; *Charter Commc'ns*, 2005 WL 4045741, at *24.

The Notice informed potential Class Members that Lead Counsel would apply for reimbursement of litigation expenses in an amount not to exceed $2,000,000, which may

include the reasonable costs and expenses of Lead Plaintiffs directly related to their representation of the Class. The total amount of expenses requested (including the amount requested for reimbursement on behalf of certain of the Lead Plaintiffs and Westmoreland (see Section VI below)) is well below the amount listed in the Notice and, to date, there has been no objection to the request for expenses.

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

In connection with the request for reimbursement of litigation expenses, reimbursement of a total of $45,989.00 in costs and expenses incurred directly by Lead Plaintiffs Oklahoma Teachers' Retirement System ("OTRS"), Oklahoma Firefighters' Pension and Retirement System ("OKFF Pension Fund"), and Danske Invest Management A/S ("Danske"), and additional certified Class Representative Westmoreland relating to their representation of the Class is also sought. The PSLRA specifically provides that an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be made to "any representative party serving on behalf of a class." 15 U.S.C. §78u-4(a)(4).

Lead Plaintiffs and Westmoreland have been actively involved in supervising the work of Lead Counsel in this Action. Pursuant to the PSLRA, OTRS, OKFF Pension Fund, Danske, and Westmoreland request awards totaling $45,989.00 to compensate them for their reasonable costs and expenses incurred in managing this litigation and

representing the Class. *See* Lead Plaintiff Declarations and Balzer Declaration, Exs. 2, 3, 5 and 6 to the Joint Declaration.[8]

Lead Plaintiffs have been fully committed to pursuing their claims against the Defendants since the Action's inception. These institutions have actively and effectively fulfilled their obligations as representatives of the Class. As detailed in the supporting declarations submitted herewith, Lead Plaintiffs: (i) reviewed and commented on the Complaint and other significant pleadings and briefs filed in this Action; (ii) received periodic status reports and participated in regular discussions with Lead Counsel firms regarding strategy and developments in the Action; (iii) devoted time to the production of documents and responses to written document requests; and (iv) participated in or conferred with Lead Counsel concerning the mediation sessions and settlement discussions on behalf of the Class.

These are precisely the types of activities courts have found to support reimbursement to class representatives. *See Xcel*, 364 F. Supp. 2d at 1000 (awarding $100,000 to lead plaintiffs who were "actively involved throughout the litigation," including "communicat[ing] with counsel throughout the litigation and review[ing] counsels' submissions"); *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04-cv-8144 (CM), 2009 WL 5178546, at *21 (S.D.N.Y. Dec. 23, 2009) (awarding over $200,000 to lead plaintiffs for their time spent supervising lead counsel's work).

[8] OTRS, OKFF Pension Fund, Danske, and Westmoreland are requesting $19,039, $5,200, $13,000, and $8,750, respectively. *See* Joint Decl. ¶ 122.

The awards sought by Lead Plaintiffs and additional certified Class Representative Westmoreland here are reasonable and fully justified under the PSLRA based on their extensive involvement in the Action and the amount of time they devoted for the benefit of the Class.

CONCLUSION

For the foregoing reasons, Lead Counsel respectfully request that the Court award attorneys' fees of 25% of the Settlement Fund, $1,481,702.68 in reimbursement of the reasonable litigation expenses Lead Counsel incurred in connection with the prosecution of this Action, and $45,989.00 in reimbursement of Lead Plaintiffs' and Westmoreland's costs and expenses.

Dated: October 4, 2012

Respectfully submitted,

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