UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re GEROVA FINANCIAL GROUP, LTD. SECURITIES LITIGATION	No. 11 MD 2275-SAS ECF CASE
In re STILLWATER CAPITAL PARTNERS INC. LITIGATION	No.11-CV-2737-SAS ECF CASE
MARGIE GOLDBERG, ET AL., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. GEROVA FINANCIAL GROUP, LTD., ET AL., Defendants.	No. 11-CV-07107-SAS ECF CASE
ALI ARAR, ET AL., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. GEROVA FINANCIAL GROUP, LTD., ET AL., Defendants.	No. 11-CV-3081-SAS ECF CASE

MEMORANDUM IN SUPPORT OF THE STILLWATER PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND AWARDS TO CERTAIN PLAINTIFFS

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Lead Plaintiffs Maurice Hanan and Prudent Partners (the "*Goldberg* Plaintiffs"),[1] as well as Lead Plaintiffs Jack Hafif, Morris Missry, Valerie Misrahi, Linda Zonana, and Janet Dayan (the "*In re Stillwater* Plaintiffs", and with the *Goldberg* Plaintiffs, the "Stillwater Plaintiffs"),[2] individually and on behalf of all other members of the Stillwater Class (as defined below) respectfully move this Court for an Order: (1) awarding attorneys' fees of $700,000 of the $2,058,000 Settlement Consideration; (2) reimbursement of $212,039.73 in reasonable and necessary expenses that were incurred in prosecuting this Action and (3) awards of reasonable costs and expenses to the Stillwater Plaintiffs, in the amount of $2,500 each.

I. INTRODUCTION[3]

In 2008 and 2009, Stillwater investors made mounting requests to redeem their investments. At the same time, the Stillwater Funds did not have enough cash flows to fund all of their operations. The Stillwater Funds were also illiquid, and did not pay out investors' redemptions.

To try to resolve these problems, the Stillwater Defendants agreed to be acquired by Gerova, then a holding company with no assets except a cash bank account. The Stillwater Defendants provided the Stillwater Class a proxy, with an attached letter from certain of the Gerova Defendants (the "Proxy"), requesting that Stillwater investors approve the Stillwater Funds' acquisition by Gerova as part of a larger deal in which Gerova acquired more companies and funds (the "Business Combination").

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[1] The *Goldberg* Plaintiffs are the lead plaintiffs in the action styled *Goldberg v. Gerova Financial Group, Ltd.*, No. 11-CV-07107-SAS.

[2] The *In re Stillwater* Plaintiffs are the lead plaintiffs in the action styled *In re Stillwater Capital Partners*, No.11-CV-2737-SAS.

[3] For a more detailed chronology of the Action, the Stilwater Lead Plaintiffs refer the Court to their Memorandum in Support of Lead Plaintiffs' Motion for Final Approval of the Proposed Settlement, Class Certification and the Plan of Allocation (the "Final Approval Brief"), served and filed concurrently herewith.

Stillwater investors' consideration was to be Gerova registered stock. But they never got the stock, and instead were given unregistered stock which they could not lawfully resell on a public market before a year had passed. By that time, Gerova was collapsing amidst accusations of fraud. These actions followed:

- *Goldberg*, filed March 22, 2011, brought on behalf of all investors in Stillwater as of January 20, 2011;[4]
- *In re Stillwater*, two consolidated actions filed on April 21 and June 6, 2011;[5]
- *Arar*, filed on May 5, 2011, on behalf of certain open-market purchasers of Gerova stock.[6]

By way of background, the *Arar* Action alleges that the Open-Market Defendants issued materially false and misleading statements between January 8, 2010 and February 23, 2011 concerning the quality of Gerova's balance sheet and concealing that Gerova was a "pump-and-dump" market manipulation scheme. Specifically, the Open-Market Plaintiffs allege that Gerova failed to inform investors that, among other things, (i) the company was unprofitable and in poor financial condition; (ii) the Stillwater Funds were in poor financial condition at the time they

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[4] Defined as "All persons or entities who were investors in the Stillwater Funds, other than the Named Defendants or the officers and directors of Gerova or of any subsidiary of Gerova, and such excluded persons family members (only spouse and minor children), affiliates and entities controlled by them, who were promised the common stock of Gerova in exchange for their interests in the Stillwater Funds pursuant to a share exchange agreement dated on or about December 23, 2009, and that was completed on January 20, 2010."

[5] Defined as "all persons or entities, other than the Named Defendants or the officers and directors of Gerova or any subsidiary of Gerova, and such excluded persons' family members (only spouse and minor children), affiliates and entities controlled by them, who invested in any of the Stillwater Funds and whose interests in any of the Stillwater Funds were transferred in the transactions between Stillwater and Gerova consummated on January 20, 2010, and who (1) submitted a request for full or partial redemption of their accounts in the Stillwater Funds prior to December 23, 2009 and have not been paid in full on those redemption requests and/or (2) received Gerova Series A Preferred Stock, which was converted or was to be converted into restricted, unregistered Gerova ordinary shares."

[6] The Open-Market Class is defined as "all persons or entities, other than the Named Defendants or the officers and directors of Gerova or of any subsidiary of Gerova, and such excluded persons defined as family members (only spouse and minor children), who purchased or otherwise acquired Gerova securities from January 8, 2010, through and including February 23, 2011."

were acquired; (iii) the company engaged in several transactions with related parties and entities controlled by Gerova insiders; and (iv) insiders were permitted to sell Gerova's securities at artificially inflated prices.

Here, the *Goldberg* action alleges that the Stillwater and Gerova Defendants both made false and misleading statements to Stillwater investors in connection with the Proxy, which omitted to disclose that every other transaction described in the Business Combination (other than transactions that did not close) was a related party transaction, and that in so doing they both violated the securities laws and breached their fiduciary duties. The *In re Stillwater* action alleges that the Stillwater Defendants and certain other defendants breached their fiduciary duties in not permitting investors to completely redeem their funds, in never providing investors with Gerova registered stock, in allowing Gerova's assets to deteriorate, and in transferring substantial assets to a third party.

Shortly after the actions were filed, the Stillwater Defendants reached an agreement with Gerova providing for the return of the assets the Stillwater Funds had provided to Gerova (the "Initial Unwind"). The Initial Unwind provided that the Stillwater Defendants would have a $23 million priority claim against the Stillwater Funds, and paid them $1.6 million a year to manage the funds after the Initial Unwind. Settlement negotiations between Plaintiffs and the Settling Defendants began in earnest almost immediately.

Between September and November, three amended complaints were filed in the three actions. All three survived, in part, the defendants' motions to dismiss in March to April of 2012. Discovery began, but was soon interrupted when Gerova filed for bankruptcy. From the September 2011 through September 2013, the parties negotiated extensively under the auspices of Michael Young, Esq., and nearly reached a settlement, but talks broke down because the

parties could not agree on the Unwind's terms. In the meantime, the case had become more complex, as certain creditors successfully petitioned to put a major Stillwater Fund, Stillwater Assed Backed Offshore Fund Ltd. ("SWAB"), into bankruptcy.

For the next year, Plaintiffs, the Stillwater Defendants, the Open-Market Defendants, Gerova's liquidator, SWAB's liquidator/Chapter 11 reorganizer, unsecured creditors of SWAB, the committee of unsecured SWAB creditors, the Fund that had pushed SWAB into bankruptcy, and both Stillwater and Gerova's insurers negotiated the Settlement's terms. The negotiations have led to the Settlement.

Despite these difficulties, through the efforts of the Stillwater Lead Plaintiffs and their undersigned counsel (the "Stillwater Counsel"), the Stillwater Lead Plaintiffs achieved a cash Settlement of $2,058,000 (the "Settlement Consideration"). The Settlement is a fair, reasonable, and adequate result, particularly when viewed in light of the considerable risks posed by further litigation, the continued uncertainty of proving liability and damages at trial, and the high likelihood that the remaining assets available for distribution would have been depleted by the time this Action was taken to judgment.

Stillwater Counsel seek an award of $700,000 of the Settlement Consideration as set forth in the Stipulation of Settlement. The Stillwater Counsel respectfully submit that the requested fee award is appropriate because the recovery obtained for the Stillwater Class is largely attributable to their vigorous prosecution of the Action, and was achieved only after: a thorough investigation; research and drafting the initial complaint and the amended complaint; extensive motion practice, including opposing the Stillwater Defendants' motion to dismiss; opening briefs supporting class certification; and extensive, arm's-length negotiations with the assistance of a nationally-regarded mediator, with substantial negotiations that included negotiations with the

Stillwater Defendants, the Stillwater Defendants, Gerova's liquidator, SWAB's liquidator/restructuring officer, unsecured creditors of SWAB, the committee of unsecured SWAB creditors, the Fund that had pushed SWAB into bankruptcy, and both Stillwater and Gerova's insurers. *See* Declaration of Laurence M. Rosen In Support of Motion for (1) Final Approval of Proposed Class Action Settlement; and (2) Award of Counsel Fees, Reimbursement of Expenses, and Award to Lead Plaintiffs ("Rosen Decl.") ¶ 22-23, 32.

Pursuant to the Court's February 5, 2014, Order (the "Preliminary Approval Order"), as of March 7, 2014, Stillwater Counsel has mailed or emailed 1002 Notice and Verification of Claim and Release Forms to potential Stillwater Settlement Class members. Hall Decl. Concerning Mailing ¶ 5. The Notice specifically advised Settlement Class members that the Stillwater Counsel intended to apply to the Court for an award of attorneys' fees of $700,000 and that the Stillwater Counsel would seek reimbursement of out-of-pocket expenses not to exceed $230,000. *Id*. ¶ 8. The deadline to request exclusion from the Settlement is May 19, 2014 and the deadline for objections is May 19, 2014. *Id. ¶* 7. As of the date of this filing (just one week before the deadline to opt-out), no exclusions have been received. Nor have any objections been filed with respect to any aspect of the Settlement, including the request for fees and reimbursement of expenses. *Id*. ¶ 9, 10.

The fairness and reasonableness of the Stillwater Counsel's fee and expense request is confirmed when cross-checked with the Stillwater Counsel's lodestar, and indeed amounts to a negative multiplier. The Stillwater Counsel spent 3,938.7 hours of professional time, having a market value of approximately $2,251,658.75, in prosecuting the Action. Rosen Decl. ¶ 65. The requested fee, which incorporates a fractional ("negative") lodestar multiplier of approximately 0.31, modestly compensates the Stillwater Counsel for this time and labor. *Id.* at ¶ 66.

For the reasons set forth more fully below, the Stillwater Lead Plaintiffs respectfully submit that the requested attorneys' fees and expenses are fair and reasonable under applicable legal standards, especially in light of the contingency risk undertaken, and should thus be awarded by the Court.

II. SPECIFIC EFFORTS OF STILLWATER COUNSEL

The Stillwater Counsel faced significant hurdles prosecuting this Action. Throughout the litigation, the Stillwater Defendants vehemently denied any allegation of wrongdoing associated with the claims asserted in the Action. Defendants contended that the disclosures concerning the Stillwater transactions in January 2010 were accurate and not misleading; that the Stillwater Defendants did not act with scienter in making or causing any alleged material misrepresentations or omissions; and that the Stillwater Plaintiffs and the Stillwater Settlement Class suffered no damages because the declines in Gerova's share price on February 23, 2011 and subsequently were not a result of any prior misstatement or omission by the Stillwater Defendants.

In addition to the substantive complexities mentioned above, the Stillwater Counsel overcame legal and procedural hurdles to achieve the current Settlement. As set forth in the Rosen Decl. at ¶ 33, the work performed by the Stillwater Counsel included:

- reviewing and analyzing Gerova's Class Period and pre-Class Period public filings, annual reports, press releases, quarterly earnings call and investment conference transcripts, and other public statements;
- reviewing and analyzing stock trading data relating to Gerova;
- researching, investigating, and drafting the initial class action complaint and the amended class action complaint in a manner that complied with the materiality, falsity, scienter, and loss causation requirements imposed by the Private Securities Litigation Reform Act of 1995 ("PSLRA");
- researching and drafting the motion to appoint lead plaintiffs;

- researching and drafting memorandum opposing defendant's motion to dismiss;
- researching and drafting memorandum seeking class certification;
- consulting with economic experts in the areas of loss causation, market efficiency, and damages;
- participating in extensive, arm's-length negotiations with the assistance of a nationally-regarded mediator, with substantial negotiations that included negotiations with the Stillwater Defendants, the Stillwater Defendants, Gerova's liquidator, SWAB's liquidator/Chapter 11 reorganizer, unsecured creditors of SWAB, the committee of unsecured SWAB creditors, the Fund that had pushed SWAB into bankruptcy, and both Stillwater and Gerova's insurers; and
- preparing the Stipulation of Settlement and motion papers and related documents necessary to provide notice of the Settlement to Class members and to obtain preliminary and final approval of the Settlement.

The Stillwater Counsel's efforts to successfully resolve the Action have been without compensation of any kind to date, and payment of attorneys' fees was and always has been wholly contingent upon the result achieved. As compensation for these efforts, the Stillwater Counsel respectfully requests this Court to award attorneys' fees of $700,000 (approximately 34% of the initial payment of $2,058,00 but less than 6.45% of the likely recovery)[7] of the Settlement Consideration, plus $212,039.73 in unreimbursed expenses. Supported by ample case law, both in this Circuit and across the country, the Stillwater Counsel's fee request is appropriate compensation for the favorable result the Stillwater Counsel have obtained for the Stillwater Class.

[7] The Settlement consist of an immediate cash payment of $2,058,000 and the return to the Stillwater Funds of all remaining assets that were transferred to Gerova in the Business Combination, which will be liquidated by the Manager and distributed first to pay certain fees and expenses as set forth in the Stillwater Agreement, with the remainder, if any, payable to Class Members (the "Unwind Settlement Amount") in the proportions described in the Stillwater Agreement and summarized in the Plan of Allocation included in the Notice. Those assest have been estimated by the Funds' administrators to fall within the range of $8.8 million and $50.5 million, equals a total recovery range of $10.858 million to $52.558 million.

III. ATTORNEYS' FEES REQUESTED FROM THE COMMON FUND ARE REASONABLE AND SHOULD BE AWARDED IN THIS CASE

A. The Common Fund Doctrine

Courts have long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemeri*, 444 U.S. 472, 478 (1980). "The court's authority to reimburse the parties stems from the fact that the class action [device] is a creature of equity and the allowance of attorney-related costs is considered part of the historic equity power of the federal courts." Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d §1803 (1986); *see also Hicks v. Stanley*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005).

The Supreme Court has recognized that under the common fund doctrine, a "reasonable" fee may be based "on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). The Second Circuit has observed that "Courts may award attorneys' fees in common fund cases under either the 'lodestar' or the 'percentage of the fund' method. The lodestar method multiplies hours reasonably expended against a reasonable hourly rate. Courts in their discretion may increase the lodestar by applying a multiplier based on factors such as the riskiness of the litigation and the quality of the attorneys." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (internal citation omitted). Nonetheless, "[t]he trend in this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Id.* (internal quotation marks, alterations, and citations omitted); *see also*

Hicks, 2005 WL 2757792, at *9 (citing *Wal-Mart Stores*, 396 F.3d at 121 and *In re Global Crossing Secs. and ERISA Litig*., 225 F.R.D. 436, 465 (S.D.N.Y. 2004)).[8]

There are compelling reasons why so many courts have opted for the percentage approach in common fund cases. First, it is consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated by a percentage of the recovery.[9] Second, it more closely aligns the lawyers' interest in being paid a fair fee with the interest of the class in achieving the maximum possible recovery in the shortest amount of time required under the circumstances.[10] Third, use of the percentage-of-recovery method decreases the burden imposed on the court (by avoiding a detailed and time-consuming lodestar analysis), and assures that class members do not experience undue delay in receiving their share of the settlement.[11] Finally, the PSLRA expressly provides that class counsel is entitled to attorneys' fees that represent a "reasonable percentage" of the damages recovered by the class. *See* 15 U.S.C. § 78u-4(a)(6); *Hicks*, 2005 WL 2757792, at *9 (citing same); *see also In re Cendant*

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[8] *See also Maley v. Del Global Technologies Corp*., 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) (citing *Gwozdzinnsky v. Sandler Assocs*., 159 F.3d 1346 (2d Cir. 1998); *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 432 (S.D.N.Y. 2001); *Chatelain v. Prudential–Bache Secs., Inc.*, 805 F. Supp. 209, 215 (S.D.N.Y. 1992); *In re Presidential Life Secs*., 857 F. Supp. 331, 337 (S.D.N.Y. 1994); *In re Sumitomo Copper Litig*., 74 F. Supp. 2d 393, 400 (S.D.N.Y. 1999); *Adair v. Bristol Tech. Sys., Inc*., No. 97 Civ. 5874 (RWS), 1999 WL 1037878, at *3–4 (S.D.N.Y. Nov. 16, 1999); *In re Blech Sec. Litig*., 2000 WL 661680, at *1 (S.D.N.Y. May 19, 2000); and *In re NASDAQ Market–Makers Antitrust Litig*., 187 F.R.D. 465, 484 (S.D.N.Y. 1998)). The court in *Maley* also noted that "in recent years a majority of Circuits have approved the percentage-of-recovery method." 186 F. Supp. 2d at 370, n.8 (citing *In re Am. Bank Note*, 127 F. Supp. 2d at 430–31, "and cases cited therein").

[9] *See In re Cont'l Illinois Sec. Litig*., 962 F.2d 566, 572 (7th Cir. 1992) ("The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client.").

[10] *See Kirchoff v. Flynn*, 786 F.2d 320, 325-26 (7th Cir. 1986) ("The lawyer gains only to the extent his client gains[,]…ensur[ing] a reasonable proportion between the recovery and the fees . . . reward[ing] exceptional success . . . penaliz[ing] failure . . . [and] automatically handl[ing] compensation for the uncertainty of litigation.") (Easterbrook, J.).

[11] *See Hicks*, 2005 WL 2757792, at *9 (citing as a benefit of the percentage-of-the-fund approach that "fewer judicial resources will be spent in evaluating the fairness of the fee petition.").

Corp. Sec. Litig., 404 F.3d 173, 188 n.7 (3d Cir. 2005) ("the PSLRA has made percentage-of-recovery the standard for determining whether attorneys' fees are reasonable").

B. The Requested Fee is Reasonable, as Supported by the *Goldberger* Factors

Regardless of the base percentage adopted by this Court, the guiding principle remains that a fee award should be reasonable under the circumstances, as guided by the "*Goldberger* factors." The factors considered to determine the reasonableness of a common fund fee include: "(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." *Wal-Mart Stores*, 396 F.3d at 121 (quoting *Goldberger v. Integrated Res.*, 209 F.3d 43, 50 (2d Cir. 2000); see also *McDaniel v. County of Schenectady*, 595 F.3d 411, 417, 422-26 (2d Cir. 2010) (confirming the continued availability of both lodestar and percentage-of-the-fund methods and the applicability of the "*Goldberger* factors").

1. The Stillwater Counsel Have Devoted Significant Time and Labor to this Action

The Stillwater Counsel have devoted 3,938.7 hours to this matter (excluding time devoted to preparing this submission and the accompanying filings), yielding a "lodestar" amount of $2,251,658.75 at counsel's regular current billing rates. *See* Rosen Decl. at ¶ 65; *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998) ("current rates, rather than historical rates, should be applied in order to compensate for the delay in payment").

a. The Stillwater Counsel's Hours are Reasonable

Where the lodestar is used as a cross-check, "the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50. The Stillwater Counsel submit that the substantial time devoted to this Litigation over three years reflects the

intensive effort they exerted to bring this case to a favorable resolution, and that the time expended was reasonable. The Stillwater Counsel directly supervised and controlled the day-to-day litigation work and coordinated all efforts to ensure efficiency and minimize unnecessary duplication of work. The extensive history of this litigation, the nature of the services performed, and the time expended by each attorney or other professional who worked on this case is described in depth in the accompanying Rosen Declaration and Exhibits attached thereto. Rosen Decl., Exhibit 1 (Declaration of Laurence M. Rosen Concerning Attorneys' Fees and Expenses; Declaration of Marvin L. Frank Concerning Attorneys' Fees and Expenses for Both Murray Frank LLP and Frank & Bianco LLP; and Declaration of Donald R. Hall Concerning Attorneys' Fees and Expenses).

b. The Stillwater Counsel's Hourly Rates are Reasonable

In a lodestar analysis, the appropriate hourly rates are those rates that are "normally charged in the community where the counsel practices, *i.e.*, the 'market rate.'" *In re EVCI Career Colleges Holding Corp. See. Litig.*, 05 Civ. 10240 (CM), 2007 WL 2230177, at *17 n. 6 (S.D.N.Y. July 27, 2007); *Luciano v. Olsten Corp.*, 109 F.3d 111, 115-16 (2d Cir. 1997) ("[t]he lodestar figure should be in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation") (internal quotations omitted). Awards in comparable cases are an appropriate measure of the market value of counsel's time. *Jones v. Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881, 885 (2d Cir. 1983).

The rates billed by the Stillwater Counsel here are comparable to peer plaintiffs and defense-side law firms litigating matters of similar magnitude. Similar billing rates have been approved by other courts in this Circuit. *See In re Merrill Lynch & Co., Inc. Research Reports*

Sec. Litig., No. 02 MDL 1484 (JFK), 2007 WL 313474, at *22 (S.D.N.Y. Feb. 1, 2007); *In re Priceline.com, Inc. Sec. Litig*., Master File No. 3:00-CV-IS84 (AVC), 2007 WL 2115592, at *5 (D. Conn. July 20, 2007).

Accordingly, the Stillwater Counsel submit that their calculated lodestar multiplied by the fractional ("negative") multiplier of 0.31 in this case represents a more than fair and reasonable attorney fee award in this case.

2. The Complexity and Duration of the Litigation Weigh in Favor of the Requested Fees

The relative magnitude and complexity of a case must be evaluated in comparison to similarly complex cases. *See In re Bristol-Meyers Squibb Sec. Litig*., 361 F. Supp. 2d 229, 234 (S.D.N.Y. 2005). Due to the inherent complexity of securities litigation, and particularly the stringent requirements imposed by the PSLRA amendments to the Exchange Act, as well as supervening case law developments, a securities class action is an inherently complex and lengthy litigation to prosecute. Indeed, courts have recognized the "notorious complexity" of securities class action litigation. *In re AOL Time Warner, Inc., Sec. & ERISA Litig*., MDL 1500, 2006 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006).

Emblematic of the uncertain and lengthy nature of these cases, the Action took nearly one year to move past the pleading stage alone. Moreover, even though the Stillwater Defendants have answered the second amended complaint, they have asserted a myriad of affirmative defenses, including lack of standing, improper service, failure to state a claim, failure to mitigate damages, waiver, unclean hands and estoppel, and statute of limitations defenses. *See*, *e.g.*, Dkt. Nos. 77, 78. The Stillwater Defendants also continued to vigorously deny liability. *Id.* If the parties did not agree to settle this case, further litigation—particularly a trial—would be complex, risky, lengthy, and expensive. Moreover, with Gerova now insolvent and certain

creditors having successfully petitioned to put a major Stillwater Fund in bankruptcy, any additional passage of time would all but ensure the depletion of assets available for distribution to the Stillwater Class.

3. The Risks of the Litigation Warrant Approval of the Requested Fees

Numerous cases have recognized that the risks of litigation are important factors in determining a fee award. *See, e.g.*, *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299-1300 (9th Cir. 1994); *Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974), *abrogated by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117 (3d Cir. 1976).

The obstacles to recovery faced by the Stillwater Class in this case were significant, particularly given the strict pleading requirements of the PSLRA and applicable proof requirements during the later stages of the case (and on appeal). For example, Stillwater's Counsel acknowledge that Plaintiffs faced substantial risks in establishing the type of conscious misbehavior and/or recklessness necessary to prove scienter. Moreover, in addition to establishing the elements of falsity, materiality and scienter, the Stillwater Lead Plaintiffs would have encountered potentially fatal loss causation defenses. While the Court found the allegations sufficient to survive the motion to dismiss at the pleading stage, it is far from certain that the Stillwater Lead Plaintiffs would have been similarly successful at the summary judgment stage, let alone at trial.

In fact, Plaintiffs may face a significant roadblock to class certification in light of the upcoming Supreme Court decision in *Halliburton Co.* v. *Erica P. John Fund, Inc.*, No. 13-317 (on writ of certiorari to the U.S. Court of Appeals for the Fifth Circuit). An unfavorable decision could severely hamstring plaintiffs' ability to certify a securities class action. There, the high court will address and decide the viability of the fraud-on-the-market presumption of reliance, an

essential element of a 10(b) claim. Absent a presumption of reliance, class treatment of a securities class action is virtually impossible, as individual issues would overwhelm common ones, precluding certification under Federal Rule of Civil Procedure 23(b)(3).

In sum, securities class actions are complex and laden with risk. The Stillwater Counsel accepted this risk and expended thousands of hours vigorously litigating this Action despite the very real possibility that if they did not achieve a favorable result for the Stillwater Class they could receive no compensation whatsoever. This Action has been hard-fought at every turn. From the beginning, the Stillwater Lead Plaintiffs have been faced with determined adversaries represented by experienced and equally-determined defense counsel. Without any assurance of victory, the Stillwater Lead Plaintiffs and their Counsel pursued this Action to a successful conclusion.

4. The Quality of Representation Favors Approval of the Stillwater Counsel's Fees

The standing and prior experience of the Stillwater Counsel are relevant in determining fair compensation, and here, the Stillwater Counsel submit that the quality of their representation supports the reasonableness of the requested fee. *See, e.g., Eltman v. Grandma Lee's, Inc.*, No. 82 Civ. 1912, 1986 WL 53400, at *9 (E.D.N.Y. May 28, 1986). Given the number and complexity of the factual and legal issues presented by this Action, this case required the expertise and capacity that the Stillwater Counsel brought to bear. Indeed, the Stillwater Counsel have many years of experience in complex federal civil litigation, particularly the litigation of securities and other class actions. *See* Rosen Decl., Exhibit 1 (Firm resumes of The Rosen Law Firm; Frank & Bianco LLP; and Kaplan Fox & Kilsheimer LLP). The quality of opposing counsel is also important in evaluating the quality of the work done by the Stillwater Counsel. *See Maley v. Del Globals Techs. Corp.*, 186 F.Supp.2d 358, 373 (S.D.N.Y. 2002). The

Stillwater Defendants were represented by prominent national law firms with much expertise in class action defense, and specifically in the area of securities litigation defense. Rosen Decl. at ¶¶ 62-63. Indeed, both plaintiffs and defendants in the Action had first-rate representation.

In sum, the Stillwater Counsel were required to perform with a high level of skill, efficiency, and professionalism to assemble a case that was strong enough to encourage Gerova to compensate the Stillwater Settlement Class members for their losses. The Stillwater Counsel evaluated the merits and risks presented, negotiated a very favorable payment, and settled the Action on excellent terms for the Stillwater Class. Counsel's efforts, efficiency and dedication should be rewarded.

5. The Requested Fee in Relation to the Settlement is Reasonable

As set forth above, regardless of which method a court uses to award attorneys' fees, the award must be reasonable under the circumstances of the particular case. *Goldberger*, 209 F.3d at 47. The Supreme Court has held that an appropriate fee is intended to approximate what counsel would receive if they were bargaining for the services in the marketplace. *See Missouri v Jenkins by Agyei*, 491 U.S. 274, 285 (1989). If this were not a class action, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery. *E.g., Blum*, 465 U.S. at 903 n.19 ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery."); *In re M.D.C. Holdings Sec. Litig.*, No. CV89-0090 E (M), 1990 WL 454747, at *7 (S.D. Cal. Aug. 30, 1990) ("In private contingent litigation, fee contracts have traditionally ranged between 30% and 40% of the total recovery"); *Kirchoff*, 786 F.2d at 323 (40% contractual award if case had gone to trial). Thus, as the customary contingent fee in the private

marketplace—30% to 40% of the fund recovered—is commensurate with the percentage-of-recovery fee requested in this case, the Stillwater Counsel's request is reasonable.

Moreover, the $700,000 fee requested by the Stillwater Counsel in this Action is within the range of percentage fees awarded in this Circuit. *See In re Medical X-Ray Film Antitrust Litig.*, No. CV-93-5904, 1998 WL 661515, at *7 (E.D.N.Y. Aug. 7, 1998) (finding a fee of 33.33% "well within the range accepted by courts in this circuit"); *Maley*, 186 F. Supp. 2d at 374 (awarding 33.3%); *In re Warnaco Group, Inc. Sec. Litig.*, No. 00 Civ. 6266 (LMM), 2004 WL 1574690, at *3 (S.D.N.Y. July 13, 2004) (awarding 30%); *Maywalt v. Parker Parsley Petroleum, Co.*, 963 F. Supp. 310, 313 (SD.N.Y. 1997) (approving a fee of approximately 33.4% of the settlement fund of $8.25 million, and recognizing 50% as the upper limit in federal courts for fees and expenses).

The Stillwater Counsel received no compensation over the three years that this Action has been pending, and incurred significant litigation expenses for the benefit of the Stillwater Class. Any fee award or expense reimbursement to the Stillwater Counsel has always been at risk and completely contingent on the result achieved, and on this Court's exercise of its discretion in making any award. Thus, this factor militates in favor of the Court granting the Stillwater Counsel's request for attorneys' fees and expenses.

6. Public Policy Considerations Support Approval of the Requested Fees

Courts long have recognized that, in addition to providing just compensation, awards of attorneys' fees from a common fund also serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons and to discourage future similar misconduct. Indeed, the Supreme Court has emphasized that private securities actions, such as the instant action, provide an effective weapon in the enforcement of the securities laws.

See generally, *Bateman Eichler, Hill Richards, Inc., v. Berner*, 472 U.S. 299, 310 (1985); *see also Tellabs, Inc., v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) ("This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the [SEC]"); *Hicks*, 2005 WL 2757792, at *9; *Priceline.com*, 2007 WL 2115592, at *5 (finding award percentage encourages enforcement of securities laws and supports "attorneys' decisions to take these types of cases on a contingent fee basis"). Particularly because it is unlikely that a class representative would be able to pursue this type of protracted, high-cost litigation at his, her or its own expense, the Stillwater Counsel respectfully submit that this Court should find that public policy favors granting the fee and expense request in full.

C. The Reaction of the Class

In addition to the criteria set forth in *Goldberger*, courts consider the reaction of the Class to the fee request in deciding how large a fee to award. *See Maley*, 186 F. Supp. 2d al 374; *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) ("The class's reaction to the fee request supports approval of the requested fees").

As of March 12, 2014, Notice had been furnished to 1002 potential members of the Stillwater Class. Rosen Decl. ¶¶ 44, 47 and Ex. 2, Declaration of Donald R. Hall Concerning Mailing of Notice of Pendency and Proposed Settlement of Class Action and Verification of Claim and Release (Hall Decl. Concerning Mailing) at ¶ 5. Additionally, the Notice was published electronically once on the *Globe Newswire* on April 14, 2014 and the *Investor's Business Daily* on April 16, 2014. Rosen Decl. ¶ 47 and Ex. 2 (Hall Decl. Concerning Mailing) at ¶ 6. The Stillwater Settlement Class members were informed in the Notice that the Stillwater Counsel could apply for attorneys' fees of up to $700,000, plus reimbursement of litigation costs

and expenses (not to exceed $230,000), and were advised of their right to object to the Stillwater Counsel's fee and expense request.

Under the schedule provided in the Preliminary Approval Order and Stillwater Class Notice, objections are due May 19, 2014. As of the date of filing of these papers, no objections have been received from Stillwater Class members. Rosen Decl. ¶ 45. The Stillwater Plaintiffs will file a supplemental brief promptly after May 19, reporting to the Court on objections, if any.

D. The Lodestar Multiplier is Fair and Reasonable and the Cross-Check Supports Approval of the Requested Attorneys' Fees

Significantly, in securities class actions it is common for lodestar figures to be adjusted upward by a multiplier to reflect a variety of factors, including the complexity of the case and the risks assumed by counsel. Indeed, courts in this Circuit recognize that, in instances where a lodestar analysis is employed to calculate attorneys' fees or used as a "cross check" for a percentage of recovery analysis, "counsel may be entitled to a 'multiplier' of their lodestar rate to compensate them for the risk they assumed, the quality of their work and the result achieved for the class." *See In re Telik, Inc. Sec. Litig*., 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008) (finding a multiplier of 1.6 "well within range awarded by courts in this Circuit"); *Maley*, 186 F. Supp. 2d at 369 (awarding fee equal to a 4.65 multiplier); *In re EVCI*, 2007 WL 2230177, at *17 (finding a multiplier of 2.43 in a lodestar cross-check to confirm the reasonableness of the requested attorneys' fees); *In re Nortel Networks Corp. Sec. Litig*., 539 F.3d 129, 134 (2d Cir. 2008) (holding that a $34 million fee, representing a 2.04 multiplier was "toward the lower end of reasonable fee awards"); *Vizcaino* at 1051-52 (the *Vizcaino* court approved a fee representing a multiple of 3.65 times counsel's lodestar and listed twenty-three shareholder settlements and the multipliers for each, in which the average multiplier is 3.28).

Here, the lodestar cross-check confirms that the fee requested by the Stillwater Counsel, which represents a *fractional* multiplier of 0.31, is fair and reasonable. The requested fee is substantially less than the Stillwater Counsel's lodestar in this matter—a 69% discount to the value of the time that the Stillwater Counsel has devoted to this matter over the last three years. Given that courts frequently award fees equal to a multiple of class counsel's lodestar in complex class actions, it is respectfully submitted that a fee representing a discount from counsel's lodestar, especially the significant discount requested here, is clearly reasonable. *In re Marsh ERISA Litig*., 265 F.R.D. 128, 146 (S.D.N.Y. 2010) (fact that counsel sought only 87.6% of their lodestar "strongly suggests that the requested fee is reasonable"). Accordingly, the Stillwater Plaintiffs submit that the Stillwater Counsel's request, particularly in light of the substantial risks associated with this Action, is well within the range of reasonableness.

IV. THE STILLWATER COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARY TO ACHIEVE THE BENEFIT OBTAINED

The Stillwater Counsel also requests reimbursement in the amount of $212,039.73 for out-of-pocket expenses reasonably and necessarily incurred in conjunction with the prosecution of this Action. The Rosen Declaration attests to the accuracy of the Stillwater Counsel's expenses, and it is well established that expenses are properly recovered by counsel. *See, e.g., In re Indep. Energy Holdings PLC Sec. Litig*., 302 F. Supp. 2d 180, 183 n.3 (S.D.N.Y. 2003) (citations omitted); *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they 'were incidental and necessary to the representation' of those clients") (citation omitted).

Because the expenses were incurred with no guarantee of recovery, the Stillwater Counsel had a strong incentive to keep them at a reasonable level—and did so. The Stillwater

Counsel made a concerted effort to avoid unnecessary expenditures and economized wherever possible. The largest single expense, over $106,000.00, was for mediator's fees incurred by Michael Young and his colleagues at JAMS. This expense is reflective of the extensive efforts devoted to achieving a negotiated resolution of an extremely complex and challenging matter. Most of the other expenses arose out of professional services rendered by experts, along with the costs of legal research, and other expenses directly related to the prosecution and settlement of this Action. Rosen Decl. at ¶ 67; Exhibit 1 (Declaration of Laurence M. Rosen Concerning Attorneys' Fees and Expenses; Declaration of Marvin L. Frank Concerning Attorneys' Fees and Expenses for Both Murray Frank LLP and Frank & Bianco LLP; and Declaration of Donald R. Hall Concerning Attorneys' Fees and Expenses). These expenses were all necessarily incurred in connection with this litigation and, we submit, are reasonable.

Because the expenses were all necessarily incurred and directly related to the prosecution of the case, the total amount of expenses should be reimbursed in full from the common fund following payment of attorneys' fees.[12]

V. THE REQUESTED AWARDS OF COSTS AND EXPENSES TO THE STILLWATER PLAINTIFFS ARE REASONABLE AND SHOULD BE PERMITTED

The PSLRA permits lead and named plaintiffs to seek an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class . . ." 15 U.S.C. 78u-4(a)(4). In accordance with the PSLRA, and the inherent powers of the Court, courts routinely grant reimbursement of substantial sums to lead plaintiffs and class representatives. *See Hicks*, 2005 WL 2757792, at *10 ("Courts in [the Second] Circuit routinely award such costs and expenses both to reimburse the named Plaintiffs for expenses incurred through their

[12] If expenses are paid from the Settlement fund prior to the payment of attorneys' fees, that order of payment has the unintended effect of requiring counsel to foot the bill for a portion of the legally recoverable expenses.

involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place").

Here, Lead Plaintiffs Maurice Hanan and Prudent Partners, as well as Lead Plaintiffs Jack Hafif, Morris Missry, Valerie Misrahi, Linda Zonana, and Janet Dayan, spent a significant amount of time related to their representation of the Stillwater Class, and made a significant contribution to the prosecution of the Action. This included time spent: reviewing pleadings, motions, and other documents; searching for and producing documents; and communicating with counsel concerning the status of the case and staying apprised of all developments in the case, including discussions about the Settlement. In particular, Lead Plaintiff Maurice Hanan attended a full-day mediation session. Rosen Decl. ¶ 32. We submit that the relatively modest request of two awards in the amount of $2,500 each to compensate them for their time and service to the Stillwater Class in this case, is reasonable.

VI. CONCLUSION

In light of all of the foregoing considerations, it is respectfully requested that the Court approve the fee and expense application and enter the Order submitted herewith awarding the Stillwater Counsel $700,000 of the Settlement Fund plus reimbursement of $212,039.73 for expenses; awards to Stillwater Lead Plaintiffs Maurice Hanan and Prudent Partners, Jack Hafif, Morris Missry, Valerie Misrahi, Linda Zonana, and Janet Dayan in the amount of $2,500 each; and interest earned thereon at the same rate and for the same period as that earned on the settlement fund until paid in full.

Dated: May 12, 2014

Respectfully submitted,

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