UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, THE CITY OF BRISTOL PENSION FUND, and THE CITY OF OMAHA POLICE AND FIRE RETIREMENT SYSTEM, on behalf of themselves and all others similarly situated, Plaintiffs, v. INSULET CORPORATION, DUANE DESISTO, PATRICK J. SULLIVAN, ALLISON DORVAL, and BRIAN ROBERTS Defendants.	Civ. A. No. 15-12345-MLW CLASS ACTION ECF CASE

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

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Court-appointed Lead Counsel, Bernstein Litowitz Berger & Grossmann LLP ("BLB&G") and Scott+Scott Attorneys at Law LLP ("Scott+Scott") (collectively, "Lead Counsel"), having achieved a Settlement of $19,500,000 in cash for the benefit of the Settlement Class, respectfully submit this memorandum of law in support of their motion for an award of attorneys' fees in the amount of 25% of the Settlement Fund, or $4,875,000, plus interest earned at the same rate as the Settlement Fund, on behalf of all Plaintiffs' Counsel.[1] Lead Counsel also seek (i) payment of $362,954.28 in expenses that were reasonably and necessarily incurred by Plaintiffs' Counsel in prosecuting and resolving the Litigation, and (ii) awards pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA") totaling $33,920.27 for Lead Plaintiffs' time and expenses incurred in representing the Settlement Class.

PRELIMINARY STATEMENT

The proposed Settlement, which provides for the payment of $19,500,000 in exchange for the resolution of the Litigation, represents an excellent result for the Settlement Class. As discussed below, Lead Plaintiffs faced major challenges to proving both liability and damages that posed serious risks of no recovery, or of a much smaller recovery, for the Settlement Class. Defendants had strong defenses to Lead Plaintiffs' claims and there was no assurance that Lead Plaintiffs would recover anything. *See* ¶¶ 58-68. Nonetheless, a superior Settlement was achieved through the skill, tenacity and hard work of Plaintiffs' Counsel, who vigorously

[1] "Plaintiffs' Counsel" consist of Lead Counsel; additional counsel for Lead Plaintiffs, Glancy Prongay & Murray LLP ("Glancy") and local counsel, Berman Tabacco. All capitalized terms not otherwise defined have the meanings set forth in the Stipulation and Agreement of Settlement, dated February 8, 2018 (ECF No. 110) (the "Stipulation") or in the Joint Declaration of James A. Harrod and William C. Fredericks in Support of (I) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation, and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses (the "Joint Declaration" or "Joint Decl."), filed herewith. Citations to "¶__" in this memorandum refer to paragraphs in the Joint Declaration.

litigated this case for over two years on an entirely contingent fee basis against top-tier defense counsel.

As summarized in the accompanying Joint Declaration and Final Approval Brief, the Settlement represents a decidedly superior recovery when compared to settlements in other securities cases involving comparable levels of damages. Plaintiffs' Counsel respectfully submit that a strong case could be made that the superior results obtained here should similarly merit an above-average fee. However, published data confirms that the 25% fee requested here is only equal to (and certainly does not exceed) the median percentage fee award for federal securities cases (as here) that have settled in the range of $10 to $25 million – and the requested 25% fee would result in a very modest "lodestar crosscheck" multiplier of only 1.1. *Cf. Mathein v. Pier 1 Imports (U.S.), Inc.,* No. 1:16-cv-00087-DAD-SAB, 2018 WL 1993727 at *10 (E.D. Cal. Apr. 27, 2018) (courts typically approve percentage awards based on lodestar cross-checks of 1.9 to 5.1 or even higher) (citing 4 NEWBERG ON CLASS ACTIONS §14.7).

As detailed in the accompanying Joint Declaration,[2] Plaintiffs' Counsel devoted a significant amount of time, effort and resources to pursuing this litigation and achieving the proposed Settlement. Among other things, Plaintiffs' Counsel: (i) conducted an extensive investigation into the claims asserted, which included reviewing and analyzing a large volume of publicly available documents and interviewing dozens of former Insulet employees; (ii) prepared the detailed Consolidated Complaint (the "Complaint") based on that investigation; (iii) successfully opposed Defendants' motion to dismiss through briefing and oral argument; (iv)

[2] The Joint Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, Plaintiffs' Counsel respectfully referred the Court to it for a detailed description of, *inter alia*, the history of the Litigation (¶¶ 15-42); the nature of the claims asserted (¶¶ 8-14); the negotiations leading to the Settlement (¶¶ 43-48); the risks and uncertainties of continued litigation (¶¶ 58-68); and a description of the work that Plaintiffs' Counsel performed for the benefit of the Settlement Class (¶¶ 8-54).

conducted significant fact discovery, which included serving multiple sets of document requests on Defendants and 32 document subpoenas on third parties, engaging in numerous meet-and-confers, obtaining over 162,000 pages of documents from Defendants and third parties, reviewing and analyzing the documents produced, and preparing witness kits in connection with expected depositions; (v) drafted and filed Lead Plaintiffs' motion for class certification, and worked with their expert to prepare an accompanying report on market efficiency and class-wide damages in support of the motion; (vi) engaged in substantial discovery related to class certification, including managing the production of more than 16,000 pages of documents from Lead Plaintiffs to Defendants, and defending or participating in seven depositions of representatives of Lead Plaintiffs, their financial advisors, and Lead Plaintiffs' expert; (vii) consulted extensively with Lead Plaintiffs' expert regarding damages, market efficiency and loss causation issues throughout the Litigation; and (viii) engaged in extensive settlement negotiations and mediation efforts, which included the preparation of mediation briefs, a full-day mediation session with a highly experienced mediator, and four months' of subsequent negotiations and exchanges of additional rounds of mediation briefing on specific contested issues. *See* ¶¶ 4, 15-54.

Lead Counsel undertook these significant efforts on a fully contingent basis. The Settlement achieved is all the more noteworthy when viewed against the significant risks that Lead Plaintiffs and Lead Counsel would have had to overcome to prevail on both liability and damages in this complex and challenging action. For example, Defendants had powerful arguments that they had made no materially false or misleading statements or material omissions regarding the Eros launch, its manufacturing and quality issues, or the underlying demand for the Eros because (i) they adequately informed investors about problems with the Eros launch, including certain manufacturing and quality issues that had caused lower production; (ii) the

Eros product defects were not material and Defendants were under no duty to publicly disclose them; (iii) Insulet's quality assurance policies and procedures were appropriately and fully complied with; (iv) the overall demand and sales for Eros actually increased during the Settlement Class Period; and (v) Insulet had informed investors that its "new patient starts" metric included both U.S. and non-U.S. numbers and that they had no duty to separately disclose aspects of sales or demand that were declining. ¶ 60. Lead Plaintiffs would also have faced significant hurdles in proving that the Defendants acted with the intent to commit fraud or with severe recklessness in light of Insulet's contemporaneous disclosures of some of the manufacturing and quality issues with the Eros and certain steps that Insulet personnel followed to enforce its quality assurance policies and procedures. ¶ 61.

Even if Lead Plaintiffs had succeeded in establishing liability, Defendants had additional substantial loss causation and damages arguments that, if accepted, could have substantially reduced or eliminated damages altogether. Lead Plaintiffs would have faced challenges in proving that statements made on each of the five corrective disclosures dates "corrected" the alleged misrepresentations, and that the price declines on the dates following those disclosures were due to the disclosure of the alleged misstatements, rather than to other factors. ¶¶ 63-64. Defendants would also have contended that the stock price reactions following certain of these disclosures were not statistically significant when compared with overall market movement on those days, and that accordingly no damages could be associated with those disclosures. ¶ 64.

Particularly given these significant risks, the $19,500,000 cash recovery is an excellent result that confirms the high quality of Plaintiffs' Counsel's representation. As compensation for their hard work and the results they achieved for the Settlement Class, Lead Counsel now request a fee award equal to 25% of the Settlement Fund, and reimbursement of $362,954.28 in litigation expenses that were reasonably incurred in the course of the Litigation. As discussed below, the

requested 25% fee is well within the range of fees awarded in class actions that have settled for comparable amounts, whether considered as a percentage of the Settlement or in relation to Plaintiffs' Counsel's lodestar. Indeed, as noted above, the requested fee represents a multiplier of just 1.1 on Plaintiffs' Counsel's lodestar in this highly challenging securities case, which is decidedly at the *bottom* of the range of multipliers typically awarded in such actions.

Lead Plaintiffs, Arkansas Teacher Retirement System ("ATRS"), the City of Bristol Pension Fund ("Bristol"), and the City of Omaha Police & Fire Retirement System ("Omaha P&F"), are each sophisticated institutional investors who have been actively involved in overseeing the Litigation on behalf of the class. *See* Declaration of Rod Graves on behalf of ATRS ("Graves Decl."), Joint Decl. Ex. 3, at ¶¶ 6-8; Declaration of Diane Waldron on behalf of Bristol ("Waldron Decl."), Joint Decl. Ex. 4, at ¶¶ 4-6; Declaration of James Sklenar on behalf of Omaha P&F ("Sklenar Decl."), Joint Decl. Ex. 5, at ¶¶ 4-6. Lead Counsel's 25% fee request is also consistent with ATRS's long-standing policy of capping attorneys' fees to securities counsel at 25% of any recovery, and is also below the "fee cap" in the other two Lead Plaintiffs' retainer agreements. Graves Decl. ¶ 5; Waldron Decl. ¶ 9; Sklenar Decl. ¶ 9. In addition, all three Lead Plaintiffs evaluated the fee request at the conclusion of the Litigation in light of the result obtained, the risks of the litigation, and their observations of the work performed by counsel, and each has endorsed the fee request as fair and reasonable. Graves Decl. ¶ 10; Waldron Decl. ¶ 9; Sklenar Decl. ¶ 9. In addition, the reaction of the Settlement Class to date also supports the request, as no objections to the requested fee and expense have been received. *See* Joint Decl. ¶ 106. (If any objections are ultimately received before the July 3 deadline, Lead Counsel will address them in a reply brief).

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

ARGUMENT

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

The Supreme Court and First Circuit have long recognized that "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." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995). An award of reasonable attorneys' fees from a common fund "encourages capable plaintiffs' attorneys to aggressively litigate complex, risky cases like this one" and spread the costs of the litigation "proportionately among those benefitted by the suit." *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 265 (D.N.H. 2007).

II. THE REQUESTED 25% FEE IS REASONABLE UNDER EITHER THE PERCENTAGE-OF-THE-FUND METHOD OR THE LODESTAR METHOD

Fees awarded to counsel from a common fund can be determined under either the percentage-of-the-fund method or the lodestar method. *See Thirteen Appeals*, 56 F.3d at 307. Under either the percentage or the lodestar method, the requested fee is fair and reasonable.

A. The Requested Fee Is Reasonable Under the Percentage Method

The First Circuit has approved of the percentage method in common fund cases, noting that it is the prevailing method and "offers significant structural advantages in common fund cases, including ease of administration, efficiency, and a close approximation of the marketplace." *Thirteen Appeals*, 56 F.3d at 308. As one court in this District has also noted, the percentage method "appropriately aligns the interests of the class with the interests of the class counsel[,] . . . is 'less burdensome to administer than the lodestar method,' . . . 'enhances efficiency' and does not create a 'disincentive for the early settlement of cases.'" *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 377 (D. Mass. 1997) (citations omitted).

The requested fee of 25% is well within the range of percentage fees awarded in this Circuit in comparable class actions. *See In re Neurontin Mktg. & Sales Practices Litig.*, No. 04-cv-10981, 2014 WL 5810625, at *3 (D. Mass. Nov. 10, 2014) (noting that "nearly two-thirds of class action fee awards based on the percentage method were between 25% and 35% of the common fund."); *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 349 (D. Mass.), *aff'd*, 809 F.3d 78 (1st Cir. 2015) ("Within the First Circuit, courts generally award fees in the range of 20-30%, with 25% as 'the benchmark.'"); *Medoff v. CVS Caremark Corp.*, No. 09-cv-554-JNL, 2016 WL 632238, at *9 (D.R.I. Feb. 17, 2016) ("30% is not out of proportion with recovery percentages in large class action litigations"); *Bacchi v. Mass. Mut. Life Ins. Co.,* No. 12-11280-DJC, 2017 WL 5177610, at *5 (D. Mass. Nov. 8, 2017) (awarding 25% of $37.5 million settlement, representing 1.31 multiplier on counsel's lodestar); *CVS Caremark*, 2016 WL 632238, at *9 (awarding 30% of $48 million settlement fund; 0.89 multiplier); *Hoff v. Popular Inc.*, No. 3:09-cv-01428-GAG, 2011 WL 13209610, at *1 (D.P.R. Nov. 2, 2011) (awarding 27% of $37.5 million settlement; 3.13 multiplier); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 80-82 (D. Mass. Sept. 28, 2005) (awarding 33.3% of $75 million settlement; 2.02 multiplier); *In re CVS Corp. Sec. Litig.*, No. 01-11464 (JLT), slip op. at 7 (D. Mass. Sept. 7, 2005), ECF No. 195 (awarding 25% of $110 million settlement; 3.27 multiplier) (Joint Decl. Ex. 7).[3]

[3] The requested 25% fee is also well within the range of percentage fee awards that have been granted in comparable securities class actions in other Circuits. *See, e.g.*, *In re Galena Biopharma, Inc. Sec. Litig.*, No. 3:14-cv-00367-SI, 2016 WL 3457165, at *13 (D. Or. June 24, 2016) (awarding attorneys' fees of 32% of combined settlements valued at $28 million, representing 3.0 multiplier); *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, No. MDL 12-2389, 2015 WL 6971424, at *9-*10 (S.D.N.Y. Nov. 9, 2015) (awarding 33% of $26.5 million settlement fund; 1.02 multiplier); *Public Pension Fund Grp. v. KV Pharm. Co.*, No. 4:08-cv-1859 (CEJ), slip op. at 2 (E.D. Mo. Apr. 23, 2014), ECF No. 199 (awarding 30% of $12.8 million settlement; 1.6 multiplier) (Joint Decl. Ex. 8); *Citiline Holdings, Inc. v. iStar Fin., Inc.*, No. 1:08-cv-03612-RJS, slip op. at 1 (S.D.N.Y. Apr. 5, 2013), ECF No. 127 (awarding 30% of $29 million settlement; 1.4 multiplier) (Joint Decl. Ex. 9); *Esslinger v. HSBC Bank Nev., N.A.*, No. 10-3213, 2012 WL 5866074, at *12, *16 (E.D. Pa. Nov. 20, 2012), ECF No. 139 (awarding

Significantly, independent research furthers confirm that 25% is the median percentage fee awarded by courts nationally in federal securities actions that have settled for comparable amounts. *See* S. Starykh & S. Boettrich, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2017 FULL YEAR REVIEW, at 42 (NERA Economic Consulting, Jan. 29, 2018), available at www.nera.com (finding that, for the period 2012-17, the median percentage fee awarded in securities cases that (as here) settled for between $10 and $25 million was 25%). The same report found that the median fee was also 25% for cases recovering between $25 and $100 million (and was 30% for cases settling for between $5 and $10 million). *Id.* That 25% is a such a commonly awarded fee strongly confirms the reasonableness of the requested fee.

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

If fees are awarded on a percentage basis, the lodestar approach may be used as a check on the appropriateness of the percentage fee, but is not required. *See Thirteen Appeals*, 56 F.3d at 307; *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. 05-11148-PBS, 2009 WL 2408560, at *1 (D. Mass. Aug. 3, 2009); *In re Lupron Mktg. & Sales Practices Litig.*, MDL No. 1430, 2005 WL 2006833, at *3 (D. Mass. Aug. 17, 2005); *Relafen*, 231 F.R.D. at 81.

When the lodestar is used as a cross-check, "the focus is not on the 'necessity and reasonableness of every hour' of the lodestar, but on the broader question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys." *Tyco*, 535 F. Supp. 2d at 270 (quoting *Thirteen Appeals*, 56 F.3d at 307); *see also In re WorldCom Inc. Sec.*

30% of $23.5 million settlement; 1.7 multiplier); *In re Sadia S.A. Sec. Litig.,* No. 08 Civ. 9528 (SAS), 2011 WL 6825235, at *3 (S.D.N.Y. Dec. 28, 2011) (awarding 30% of $27 million settlement; 1.04 multiplier); *In re L.G. Philips LCD Co. Sec. Litig.*, No. 1:07-cv-00909-RJS, slip op. at 1 (S.D.N.Y. Mar. 17, 2011), ECF No. 82 (awarding 30% of $18 million settlement; 3.17 multiplier) (Joint Decl. Ex. 10); *McGuire v. Dendreon Corp.*, Case No. C07-800 MJP, slip op. at 3-4 (W.D. Wash. Dec. 20, 2010), ECF No. 235 (awarding 25% of $16.5 million settlement; 2.55 multiplier) (Joint Decl. Ex. 11).

Litig., 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005) (when the lodestar is used as a cross-check on the percentage method of determining reasonable attorneys' fees, "the hours documented by counsel need not be exhaustively scrutinized by the district court") (internal citation omitted). In this case, the lodestar method – whether used directly or as a "cross-check" on the percentage method – strongly confirms the reasonableness of the requested fee.

Here, Plaintiffs' Counsel spent a total of 7,612.1 hours of attorney and para-professional support time prosecuting the Litigation from its inception through May 18, 2018. ¶ 81. Based on the Plaintiffs' Counsel's current rates, their collective lodestar for this period is $4,404,069.75.[4] *Id*. The requested 25% fee, which amounts to $4,875,000 (before interest), therefore represents a multiplier of 1.1 on Plaintiffs' Counsel's lodestar.[5]

The requested 1.1 multiplier on Plaintiffs' Counsel's lodestar is plainly at the low end of the range of multipliers commonly awarded in securities and other complex class actions. Indeed, in class actions with significant contingency risks, fees representing a material multiple on the base lodestar are typically awarded to reflect those risks and meritorious work. *See, e.g.*, *New England Carpenters*, 2009 WL 2408560, at *2 (awarding fee representing 8.3 multiplier);

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

[5] Plaintiffs' Counsel's lodestar is based on their standard hourly rates, which range from $625 to $995 for partners and senior counsel (with one exception), from $395 to $650 for associates, and from $340 to $400 for staff attorneys. These rates have been approved in other securities class actions and shareholder litigation, and are consistent with rates charged by other law firms practicing in the area of securities class action litigation, including defense firms that Plaintiffs' Counsel routinely litigate against. *See* S. Randazzo & J. Palank, "Legal Fees Cross New Mark: $1,500 an Hour," *The Wall Street Journal*, Feb. 9, 2016 (noting that hourly rates for partners at Boston-area firm Ropes & Gray, in 2016, ranged from $895 to $1,450).

Cornwell v. Credit Suisse Grp., No. 08-cv-03758 (VM), slip op. at 2, 4 (S.D.N.Y. July 18, 2011), ECF No. 117 (4.7 multiplier) (Joint Decl. Ex. 12); *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-CV-1825 (NGG), 2010 WL 2653354, at *5 (E.D.N.Y. June 24, 2010) (2.78 multiplier, and noting that "[w]here, as here, counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar"); *Tyco*, 535 F. Supp. 2d at 271 (2.7 multiplier); *Relafen*, 231 F.R.D. at 82 (2.02 multiplier); *Roberts v. TJX Companies, Inc.*, No. 13-cv-13142-ADB, 2016 WL 8677312, at *13 (D. Mass. Sept. 30, 2016) (1.96 multiplier); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (awarding fee representing a 4.65 multiplier, which was "well within the range awarded by . . . courts throughout the country"). In addition, Lead Counsel will continue to expend additional hours following the approval of the Settlement, overseeing the Claims Administrator's processing of claims received and the distribution to eligible claimants, but will not seek any further fees – which will only further reduce Plaintiffs' Counsel's effective multiplier.

In sum, if calculated as a percentage of the recovery, the requested fee is squarely in the middle of the range of fees awarded by courts in securities class actions – and if calculated under the lodestar method the fee is at the bottom of what is normally considered fair and reasonable.

III. FACTORS CONSIDERED BY COURTS IN THE FIRST CIRCUIT CONFIRM THAT THE REQUESTED FEE IS FAIR AND REASONABLE

Although the First Circuit has not set forth a definitive list of factors to be considered in evaluating a fee request under the percentage-of-the-fund method, District Courts within this Circuit have assessed the reasonableness of proposed fees by considering the following factors:

> (1) the size of the fund and the number of persons benefitted; (2) the skill, experience, and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risks of the litigation; (5) the amount of time devoted to the case by counsel; (6) awards in similar cases; and (7) public policy considerations, if any.

See Hill v. State St. Corp., No. 09-12146-GAO, 2015 WL 127728, at *17 (D. Mass. Jan. 8, 2015); *Lupron*, 2005 WL 2006833, at *3; *Relafen*, 231 F.R.D. at 79. Consideration of these factors further confirms that the fee requested here is reasonable.

A. The Amount of the Recovery

As set forth in the Joint Declaration at ¶¶ 55-56, the $19.5 million Settlement represents a decidedly superior recovery based on available empirical data. For example, the recovery here is ***3.25 times higher*** than the median recovery ($6.0 million) for all securities class actions in 2017 based on data published by NERA,[6] and roughly ***3.9 times higher*** than the median recovery ($5.0 million) for such actions in 2017 based on a published report by Cornerstone Research.[7]

In addition, Lead Counsel and their expert estimate that the $19.5 million Settlement represents roughly 8.6% to 13% of the Settlement Class's maximum recoverable damages of roughly $151 to $226 million – and based on Defendants' experts' estimate that the maximum recoverable damages were $106 million, the Settlement is even better, a roughly 18.4% recovery. By contrast, NERA found that the median settlement for cases involving investor losses of $200 million to $399 million in 2017 recovered only about ***2.6%*** of those losses. NERA Report at 37. The recovery here of 8.6% to 18.4% of maximum classwide damages also compares favorably to Cornerstone's data, which finds that from 2011 to 2017 the median settlement in ***all*** securities cases recovered roughly 2% to 5% of class damages (depending on the methodology used, *see* Cornerstone Report at 6) – and was ***2.9%*** in 2017 for cases involving $150 to $249 million in estimated damages. *Id.* at 8; *accord CVS Caremark*, 2016 WL 632238, at *6 (approving settlement representing 5.33% of estimated recoverable damages as "well above the median

[6] *See* S. Starykh & S. Boettrich, *Recent Trends in Securities Class Action Litigation* at 30, NERA Economic Consulting (Jan. 29, 2018) ("NERA Report"), available at www.nera.com.

[7] *See* L. Bulan, E. Ryan & L. Simmons, *Securities Class Action Settlements: 2017 Review and Analysis* at 3, Cornerstone Research (2018), available at www.cornerstone.com.

percentage of settlement recoveries in comparable securities class action cases"). In other words, on a percentage recovery basis, and using (a) Plaintiffs' recoverable damages estimates and (b) the average of the NERA and Cornerstone data showing that the median settlement in 2017 recovered roughly 2.75% of losses or damages in cases involving comparable classwide totals, ***the recovery here is roughly three to five times larger than the median*** – and the comparison would be even more favorable using Defendants' estimate that the Settlement reflects 18% of recoverable damages.

In sum – and particularly in light of the substantial litigation risks discussed below – the Settlement achieved by Lead Counsel here represents an excellent recovery for the Settlement Class, and ***strongly*** supports the reasonableness of the requested 25% fee.

B. The Skill and Experience of Counsel

This was a complex case involving a number of distinct factual and legal issues. Given the many contested issues, the Court can appropriately infer that it took highly skilled counsel to represent the class and achieve such a substantial recovery. ¶¶ 58-68. Lead Counsel also respectfully submit that their firm resumes (Joint Decl. Exs. 2A-5 and 2B-4) confirm that BLB&G and Scott+Scott are among the nation's leading securities class action firms – and that their skill, experience, and commitment to the litigation were critical to obtaining the Settlement.

Courts recognize that the quality of the opposing counsel is also a factor in assessing the quality of plaintiffs' counsel's performance. Here, Defendants were represented by Goodwin Procter LLP, a top-tier defense firm, which vigorously defended the Litigation from the outset. Despite this formidable opposition, Lead Counsel's thorough investigation, successful opposition to Defendants' motion to dismiss, and diligent discovery efforts positioned them to achieve an excellent recovery for the Settlement Class. Thus, this factor also strongly supports the requested fee. *See, e.g.*, *Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 WL 3148350, at

*30 (N.D. Tex. Jan. 13, 2006) (plaintiffs' counsel's success in obtaining favorable settlement in the case of "formidable opposition" confirmed the superior quality of their representation).

C. The Complexity and Duration of the Litigation

There can be no dispute that this litigation was complex and vigorously litigated by both Lead Plaintiffs and Defendants. Courts have long recognized that securities class actions are generally complex and difficult. *See City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM) (GWG), 2014 WL 1883494, at *16 (S.D.N.Y. May 9, 2014) ("the complex and multifaceted subject matter involved in a securities class action such as this supports the fee request"); *Fogarazzo v. Lehman Bros.*, No. 03 Civ. 5194 (SAS), 2011 WL 671745, at *3 (S.D.N.Y. Feb. 23, 2011) ("in general, securities actions are highly complex"). This case was certainly no exception. Thus, this factor also supports the fee requested.

D. The Fully Contingent Nature of the Representation

The fully contingent nature of Plaintiff's Counsel's fees and the litigation's substantial risks are also important factors supporting the requested fee. "Many cases recognize that the risk [of non-payment] assumed by an attorney is perhaps the foremost factor in determining an appropriate fee award." *Lupron*, 2005 WL 2006833, at *4. Indeed, "[n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974).

As noted above and in the Joint Declaration (¶¶ 58-68), from the outset it was apparent that Lead Counsel faced major challenges to establishing liability and damages. Nonetheless, Lead Counsel devoted an enormous amount of resources to the vigorous and effective prosecution of the case on a *wholly* contingent basis, knowing that the litigation could last for years and would require them to advance a significant litigation costs – all with no assurance of

any compensation. Lead Counsel's assumption of this contingency fee risk strongly supports the reasonableness of the requested fee. *See CVS Caremark*, 2016 WL 632238, at *9 ("Where, as here, lead counsel undertook this action on a contingency basis and faced a significant risk of non-payment, this factor weighs more heavily in favor of rewarding litigation counsel."); *TJX*, 2016 WL 8677312, at *13 (fact that "Class Counsel took the case on a contingency fee basis, assuming significant risk in litigating the case" strongly supported the fee award).

Courts typically award a substantial multiplier on counsel's lodestar to compensate them for the risk of ultimately obtaining little or nothing, but here a 25% fee equates to only a modest 1.1 multiple. In sum, the contingent risk factor also strongly supports the requested fee.

E. The Amount of Time Devoted to the Litigation by Plaintiffs' Counsel

The extensive time and effort expended by Plaintiffs' Counsel on this case also supports the requested fee. *See Hill*, 2015 WL 127728, at *19. The Joint Declaration details how Plaintiff's Counsel, among other things:

- conducted an extensive factual investigation into the allegedly fraudulent misrepresentations made by Defendants, including (i) a thorough review of publicly available information such as SEC filings, press releases, news articles, analyst reports, and news articles, and (ii) identifying, locating and interviewing dozens of former Insulet employees with possible knowledge as to the claims asserted (¶¶ 17-19);
- drafted the highly detailed, 90-page Consolidated Complaint (¶ 20);
- researched, drafted briefing and argued in opposition to Defendants' motion to dismiss (¶¶ 21-24);
- engaged in substantial fact discovery, which included: drafting and propounding multiple sets of document requests and interrogatories; conducting numerous meet-and-confers and protracted negotiations over the scope of discovery and use of search terms to identify responsive documents; and preparing 32 document subpoenas on third parties (¶¶ 26-32);
- obtained over 160,000 pages of documents, plus thousands of pages worth of additional spreadsheets and other materials produced in native format, from Defendants and third parties, and reviewed and analyzed that production (¶¶ 33);

- prepared and filed a motion for class certification, together with an accompanying expert report from Prof. Steven Feinstein, Lead Plaintiffs' expert on damages and market efficiency issues (¶¶ 35, 39-40);
- participated in substantial discovery related to Lead Plaintiffs' motion for class certification, including: responding to Defendants' document requests and interrogatories; identifying and producing over 16,000 pages of documents in response to those requests; defending the depositions of representatives of each of the three Lead Plaintiffs; participating in three additional depositions of Lead Plaintiffs' investment advisors; and defending Prof. Feinstein's deposition (¶¶ 36-38); and
- engaged in extensive arm's-length settlement negotiations and mediation efforts, which involved the preparation of opening and reply mediation briefs, a full-day mediation session with the Mediator, and over four months of additional hard-fought negotiations and the exchange of multiple rounds of additional briefing on specific disputed issues (¶¶ 43-48).

In total, Plaintiffs' Counsel have expended more than 7,600 hours, with a total lodestar value of over $4.4 million, on the investigation, litigation and resolution of this action. ¶ 81. This undeniably significant effort, which culminated in the excellent result embodied in the Settlement, further confirms that the requested fee is air and reasonable.

F. Awards in Similar Cases

As discussed above in Part II.A, a 25% fee is well within the range of fee awards in class actions in this Circuit and across the country, and equates to a lodestar multiplier of 1.1 that is decidedly *below* the norm (particularly for cases where superior results have been achieved). *See* Part II.B, *supra*. Thus, this factor also strongly supports the reasonableness of the requested fee.

G. Public Policy Considerations

Public policy also supports rewarding firms that bring successful securities class actions. For example, the Supreme Court has repeatedly stated that such actions are "an essential supplement to criminal prosecutions and civil enforcement actions" brought by the SEC. *See 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) (such actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC]

action.'"). Compensating plaintiffs' counsel for the risks they take in bringing such actions is essential, because "[s]uch actions could not be sustained if plaintiffs' counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class." *Hicks v. Morgan Stanley*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005).

Accordingly, public policy also favors granting the requested fee here. *See CVS Caremark*, 2016 WL 632238, at *9 ("public policy supports rewarding counsel for prosecuting securities class actions, especially where counsel's dogged efforts [were] undertaken on a wholly contingent basis); *Hill*, 2015 WL 127728, at *19 ("public policy favors granting reasonable attorneys' fees . . . that will adequately compensate [counsel] for their efforts and the risks they undertook"); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM) (PED), 2010 WL 4537550, at *29 (S.D.N.Y. Nov. 8, 2010) (to carry out the "important public policy" of enforcing the securities laws, "courts should award fees which will adequately compensate Lead Counsel for the value of their efforts, taking into account the enormous risks they undertook").

H. Lead Plaintiffs Have Approved the Requested Fee

Lead Plaintiffs ATRS, Bristol, and Omaha P&F are all institutional investors that were actively involved in supervising this action. *See* Graves Decl. ¶¶ 6-8; Waldron Decl. ¶¶ 4-6; Sklenar Decl. ¶¶ 4-6. All reviewed the 25% fee request at the end of the case, and support it as fair and reasonable based on the results obtained despite significant litigation risk. *See* Graves Decl. ¶ 10; Waldron Decl. ¶ 8; Sklenar Decl. ¶ 8.

Lead Plaintiffs' approval of the fee request further confirms the fairness and reasonableness of the requested fee.[8] The PSLRA sought to encourage institutional investors, as

[8] The 25% fee request is also consistent with ATRS's policy requiring that counsel request no more than 25% in any case in which ATRS serves as Lead Plaintiff, *see* Graves Decl. ¶ 5, and is also below the fee cap contained in Scott+Scott's pre-litigation retainers with Bristol and Omaha P&F. *See* Waldron Decl. ¶ 9; Sklenar Decl. ¶ 9.

here, to become active as lead plaintiffs 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, which have a substantial financial stake in the action, would be in a strong position to monitor the ongoing prosecution of the litigation and to assess the reasonableness of counsel's fee request. *See In re Lernout & Hauspie Sec. Litig.*, 138 F. Supp. 2d 39, 43 (D. Mass. 2001). Accordingly, Lead Plaintiffs' approval further supports the requested fee. *See CVS Caremark*, 2016 WL 632238, at *9 (lead plaintiffs' approval supported finding that fee request was reasonable); *Hill*, 2015 WL 127728, at *19 (same).

I. The Reaction of the Settlement Class

The reaction of the Settlement Class to date also supports the fee request. As of May 31, 2018, the Claims Administrator (Analytics Consulting) has disseminated the Notice to 25,774 potential Settlement Class Members and nominees informing them of Lead Counsel's intention to apply to the Court for an award of attorneys' fees of 25% of the Settlement Fund, reimbursement of litigation expenses up to $550,000, and awards to Lead Plaintiffs for their time and expenses in representing the Settlement Class of up to $40,000 in the aggregate. *See* Declaration of Michelle Kopperud Regarding: (A) Mailing of the Notice and Claim Form; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion Received to Date, Joint Decl. Ex. 1, at ¶ 7 and Ex. A at 1, 4, 9. In addition, on May 14, 2018, Analytics caused the Summary Notice to be published in *Investor's Business Daily* and transmitted over the *PR Newswire*. *See id*. ¶ 8. Although the time to object does not expire until July 3, 2018, to date no objections to the request for attorneys' fees and expenses have been received. Joint Decl.

¶ 106. Lead Counsel will address any objections that may be received in their reply papers to be filed with the Court on July 19, 2018.

IV. THE EXPENSES INCURRED ARE REASONABLE AND WERE NECESSARY TO ACHIEVE THE BENEFIT OBTAINED

Lead Counsel's fee application includes a request for reimbursement of expenses that were reasonably incurred and necessary to the prosecution of the Litigation. *See* ¶¶ 93-100. These expenses are properly recoverable. *See In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999) ("lawyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover from the fund . . . expenses, reasonable in amount, that were necessary to bring the action to a climax"); *Hill*, 2015 WL 127728, at *20 ("Lawyers who recover a common fund for a class are entitled to reimbursement of litigation expenses that were reasonably and necessarily incurred in connection with the litigation."). As further detailed in the Joint Declaration, Plaintiffs' Counsel incurred $362,954.28 in litigation expenses on behalf of the Settlement Class. ¶ 93.

The types of expenses for which Lead Counsel seek reimbursement are routinely charged to classes in contingent litigation and clients billed by the hour. These expenses include, among others, costs and fees for experts and counsel, on-line legal and factual research, photocopying, filing fees, court-reporting services, costs related to the production and storage of electronic discovery, travel costs, working meals, and mediation fees. ¶ 95. Moreover, from the outset, Lead Counsel knew that they might not recover any of these expenses or, at the very least, would not recover anything until the Litigation was successfully resolved. Thus, Lead Counsel were motivated to, and did, take significant steps to minimize these expenses wherever practicable without jeopardizing the vigorous and efficient prosecution of the action. ¶ 94.

The Notice informed potential Settlement Class Members that Lead Counsel would apply for reimbursement of litigation expenses for all Plaintiffs' Counsel in an amount not to exceed

$550,000. The amount of expenses requested, $362,954.28, is below the amount listed in the Notice and, to date, there has also been no objection to the request for expenses. ¶ 106.

V. LEAD PLAINTIFFS SHOULD BE AWARDED THEIR REASONABLE COSTS AND EXPENSES PURSUANT TO §78U-4(A)(4) OF THE PSLRA

Lead Plaintiffs also seek a total of $33,920.27 in PSLRA awards to reimburse costs and expenses incurred by them directly relating to their representation of the Settlement Class. *See* Joint Decl. ¶¶ 101-103 and Exs. 3, 4 and 5 thereto. 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). *See In re Evergreen Ultra Short Opportunities Fund Sec. Litig.*, No. 08-11064 (NMG), 2012 WL 6184269, at *2 (D. Mass. Dec. 10, 2012) (reimbursing institutional lead plaintiffs a total of $54,626 for time their employees spent on the case); *Hill*, 2015 WL 127728, at *21 (awarding total of $40,436 to three lead plaintiffs); *Ahearn v. Credit Suisse First Boston LLC*, No. 03-CV-10956 (JLT), slip op. at 5-6 (D. Mass. June 7, 2006), ECF No. 82 (awarding total of $35,000 to two lead plaintiffs) (Joint Decl. Ex. 13).

As set forth in their respective declarations, Lead Plaintiffs have actively and effectively fulfilled their duties as class representatives. Among other things, Lead Plaintiffs: (i) participated in numerous discussions with Lead Counsel about the prosecution of the case and the strengths of the claims; (ii) reviewed significant pleadings and briefs; (iii) participated in discovery, including time-consuming efforts to locate and produce documents responsive to Defendants' discovery requests; and (iv) were closely involved in mediation efforts and approving settlement strategies. In addition, representatives of each Lead Plaintiff devoted significant time to preparing for, traveling to and sitting for their depositions. *See* Graves Decl. ¶¶ 6-8,13; Waldron Decl. ¶¶ 4-6; Sklenar Decl. ¶¶ 4-6. Such efforts are the very types of activities that courts routinely find to support PSLRA §78u-4(a)(4) awards to class

representatives. *See, e.g.*, *Evergreen Ultra*, 2012 WL 6184269, at *2; *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *21 (S.D.N.Y. Dec. 23, 2009) (awarding over $200,000 to lead plaintiffs to compensate them for time spent supervising the litigation, as their efforts reflected "precisely the types of activities" that merited §78u-4(a)(4) awards).

The Notice (at 4) advised that Lead Plaintiffs would "apply for awards for their reasonable time and expenses in representing the Settlement Class in an amount not to exceed $40,000 in the aggregate." To date, there has been no objection to this request. The Court should therefore award $4,995.27 to ATRS, $14,950 to Bristol, and $13,975 to Omaha P&F for their time and expense incurred in representing the Settlement Class.

CONCLUSION

For the foregoing reasons, Lead Counsel respectfully request that the Court award (i) attorneys' fees to Plaintiffs' Counsel of 25% of the Settlement Fund, or $4,875,000, plus interest accrued at the same rate as earned by the Settlement Fund; (ii) reimbursement of $362,954.28 in Plaintiffs' Counsel's litigation expenses; and (iii) a total of $33,920.27 to Lead Plaintiffs pursuant to §78u-4(a)(4).

Dated: June 1, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the above Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing on June 1, 2018.

By: */s/ James A. Harrod*
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