UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE: SYNCHRONY FINANCIAL SECURITIES LITIGATION	No. 3:18-cv-1818-VAB CLASS ACTION

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

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Court-appointed Lead Counsel, Bernstein Litowitz Berger & Grossmann LLP ("BLB&G"), respectfully submits this memorandum of law in support of its motion, on behalf of all Plaintiffs' Counsel,[1] for (1) attorneys' fees in the amount of 13% of the Settlement Fund, net of Litigation Expenses awarded; (2) payment of $566,401.13 in Litigation Expenses that were reasonably incurred by Plaintiffs' Counsel in prosecuting and resolving the Action; and (3) payment of an award of $48,700 for costs incurred by Plaintiffs directly related to their representation of the Class, as authorized by the Private Securities Litigation Reform Act of 1995 ("PSLRA").[2]

PRELIMINARY STATEMENT

The efforts of Plaintiffs' Counsel have allowed Plaintiffs to achieve a Settlement of the Action for $34 million for the benefit of the Class. The proposed Settlement is a favorable result considering the significant challenges that Plaintiffs faced in prevailing in this litigation, including challenges in proving that Defendants' statements were materially false or misleading and made with scienter, and in establishing loss causation and damages. The Settlement provides a substantial and certain recovery to Class Members and eliminates these significant risks. It also eliminates the substantial delays and expenses that would result from the continued litigation that would be needed to secure a litigated recovery for Plaintiffs and the Class.

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[1] "Plaintiffs' Counsel" are: Lead Counsel BLB&G and Liaison Counsel Motley Rice LLC.

[2] All capitalized terms not otherwise defined have the meanings set forth in the Stipulation and Agreement of Settlement, dated April 3, 2023 (ECF No. 232-2) (the "Stipulation") or in the Declaration of Adam H. Wierzbowski in Support of (I) Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation, and (II) Lead Counsel's Motion for Attorneys' Fees and Litigation Expenses (the "Wierzbowski Declaration" or "Wierzbowski Decl."), filed herewith. Citations to "¶ __" in this memorandum refer to paragraphs in the Wierzbowski Declaration. Unless otherwise noted, citations and internal punctuation are omitted, and all emphasis is added.

Plaintiffs' Counsel dedicated a total of more than 10,000 hours of attorney and other professional staff time over the past four years to bring the Action to this conclusion and have not yet received any compensation for these efforts. ¶¶ 122, 127-128. As detailed in the accompanying Wierzbowski Declaration,[3] Plaintiffs' Counsel's efforts included (i) conducting a comprehensive investigation of the alleged fraud through the review of public information such as SEC filings, analyst reports, conference call transcripts, and news articles, and interviews with dozens of former Synchrony employees; (ii) researching and drafting a detailed Complaint based on Lead Counsel's investigation; (iii) briefing and arguing Plaintiffs' opposition to Defendants' motion to dismiss the Complaint; (iv) conducting auxiliary litigation in the Western District of Arkansas and the U.S. Court of Appeals for the Eighth Circuit in an effort to obtain relevant information from a lawsuit between Synchrony and Walmart; (v) briefing and arguing Plaintiffs' appeal to the U.S. Court of Appeals for the Second Circuit from this Court's dismissal of the Action; (vi) successfully opposing Defendants' renewed motion to dismiss after remand from the Second Circuit; (vii) conducting extensive fact discovery, which included requests for the production of documents and interrogatories, litigating several discovery disputes, and obtaining and analyzing nearly 300,000 pages of documents produced by Defendants and non-parties; (viii) drafting and filing Plaintiffs' motion for class certification; and (ix) participating in extended arm's-length settlement negotiations, including two mediation sessions before an experienced

[3] The Wierzbowski Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to that Declaration for a fuller description of, *inter alia:* the history of the Action (¶¶ 14-69); the nature of the claims asserted (¶¶ 22-24); the negotiations leading to the Settlement (¶¶ 61-67); the risks and uncertainties of continued litigation (¶¶ 70-98); and a description of the services Lead Counsel provided for the benefit of the Class (¶¶ 4, 14-69).

mediator, which included the preparation and exchange of detailed mediation statements. ¶¶ 5, 19-67.

From the outset of this litigation, Plaintiffs' Counsel faced numerous challenges to proving liability and damages that posed a serious risk of no recovery for the Class—and, thus, no compensation to counsel for their substantial efforts. ¶¶ 70-98. From the outset, Plaintiffs faced substantial challenges in establishing that Defendants' statements during the Class Period were materially false or misleading and made with scienter. Those risks were realized when the Court dismissed the Action with prejudice in March 2020, finding that Plaintiffs had failed to plausibly allege that any statement would be misleading to a reasonable investor given the "total mix" of available information. ¶ 32. Even after Lead Counsel's efforts on appeal revived the case (as to one alleged misstatement), there were still many substantial challenges ahead for Plaintiffs and Lead Counsel. To prevail through litigation, Plaintiffs would have been required to prove (i) that Defendant Keane's January 19, 2018 statement that Synchrony was "not getting any pushback on credit" was materially false and misleading when made; (ii) that Defendants knew or recklessly disregarded that this statement was false when made (*i.e.*, Defendants acted with "scienter"); (iii) that the revelation of the truth concerning Keane's alleged misstatement caused the loss suffered by Plaintiffs and the Class (*i.e.*, loss causation); and (iv) the amount of class-wide damages. As discussed below and in the Wierzbowski Declaration, Defendants would have had substantial arguments concerning each of these issues. ¶¶ 77-93.

First, Defendants would continue to argue that Defendant Keane's January 19, 2018 statement was not false or misleading and, in any event, even if false, that it was as an offhand, unscripted remark that was not material to investors. ¶ 79. In addition, Defendants would contend that the alleged misstatement was not made with "scienter," as required under the Exchange Act.

¶¶ 81-84. Defendants would have argued that Defendant Keane did not have any fraudulent intent to mislead investors and that, even if her statement was false or misleading (which they denied), she believed it to be true, or it was, at most, a misunderstanding about its true meaning. ¶ 81. Defendants would also continue to argue that Plaintiffs cannot establish a motive to commit fraud. ¶ 82.

Plaintiffs also faced substantial risks to establishing loss causation and proving damages in the Action. Defendants would continue to argue that Plaintiffs cannot establish loss causation because the sole remaining corrective disclosure was not corrective of the sole remaining alleged misstatement, and thus Defendants' alleged fraud did not cause the losses suffered by the Class. ¶¶ 86-89. Moreover, proving what portion (if any) of the subsequent price declines resulted from the revelation of the alleged misstatement (rather than other, confounding information) would have been a challenge and subject to continued dispute through trial. ¶¶ 90, 92.

Lead Counsel brought this Action on a fully contingent basis. Accordingly, all these litigation risks meant a substantial possibility that Plaintiffs' Counsel might receive no compensation for the time they spent pursuing the Action. In the face of these risks, Lead Counsel devoted substantial time and resources to protecting the interests of the Class, and successfully obtained a favorable result for the benefit of Class Members.

As compensation for their efforts and for the risks of non-payment they faced in bringing the Action on a contingent basis, Lead Counsel seeks an award of 13% of the Settlement Fund, net of litigation expenses awarded by the Court, for all Plaintiff's Counsel. As discussed below, the 13% fee request is below the range of percentage fees that are typically awarded in securities class actions in the Second Circuit with recoveries of comparable size. In addition, the lodestar cross-

check also strongly supports the reasonableness of the fee, as the requested fee represents a "negative" multiplier of 0.7 of Plaintiffs' Counsel's lodestar.

Plaintiffs support the fee request, based on their active supervision of the work of counsel. *See* Declaration of Albert H. van Lidth de Jeude, Senior Legal Counsel of APG Asset Management NV (Ex. 1) at ¶ 7. In addition, the deadline set by the Court for Class Members to object to the requested attorneys' fees and expenses has not yet passed, but to date, no objections to the requests for fees and expenses have been received. ¶¶ 132, 144.[4]

In light of the substantial recovery obtained for the Class, the time and effort devoted by Plaintiffs' Counsel, the quality of Plaintiffs' Counsel's work, the wholly contingent nature of the representation, and the considerable risks that counsel undertook, Lead Counsel respectfully submits that the requested fee award is reasonable and should be approved by the Court. In addition, as further discussed below, the Litigation Expenses for which Lead Counsel seeks payment were reasonably necessary to the successful prosecution of the actions, and should also be awarded in full.

ARGUMENT

I. PLAINTIFFS' COUNSEL IS 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); *accord Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000); *In re Priceline.com, Inc. Sec. Litig.*, 2007 WL 2115592, at *4 (D. Conn. July 20, 2007). Courts recognize that awards of fair

[4] The deadline for the submission of objections is July 10, 2023. Should any objections be received, Lead Counsel will address them in its reply papers, which are due on July 24, 2023.

attorneys' fees from a common fund "serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons," and therefore "to discourage future misconduct of a similar nature." *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *23 (S.D.N.Y. Nov. 8, 2010).

The Supreme Court has repeatedly 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'"). Compensating plaintiffs' counsel for bringing these 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*, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005); *see also In re Frontier Commc'ns Corp.*, 2022 WL 4080324, at *16 (D. Conn. May 20, 2022) ("public policy favors [award of 25% fee in securities class action] because it will continue to encourage attorneys to take these types of cases on a contingency basis and further encourage enforcement of securities laws."); *In re Sturm, Ruger & Co., Inc. Sec. Litig.*, 2012 WL 3589610, at *13 (D. Conn. Aug. 20, 2012) ("Courts have recognized the importance that fair and reasonable fee awards have in encouraging private attorneys to prosecute class actions on a contingent basis pursuant to the federal securities laws on behalf of those who otherwise could not afford to prosecute."); *Priceline.com*, 2007 WL 2115592, at *5 ("The fee fairly compensates competent counsel in a complex securities case and helps to perpetuate the availability of skilled counsel for future cases of this nature.").

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

Lead Counsel respectfully submits that the Court should award a fee based on a percentage of the common fund obtained. The Second Circuit has expressly approved the percentage method, recognizing that "the lodestar method proved vexing" and had resulted in "an inevitable waste of judicial resources." *Goldberger*, 209 F.3d at 48-50 (holding that either the percentage of fund method or lodestar method may be used to determine appropriate attorneys' fees); *Savoie v. Merchants Bank*, 166 F.3d 456, 460 (2d Cir. 1999) (stating that the "percentage-of-the-fund method has been deemed a solution to certain problems that may arise when the lodestar method is used in common fund cases").

More recently, the Second Circuit has reiterated its approval of the percentage method, stating that it 'directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation," and has noted that the "trend in this Circuit is toward the percentage method." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005); *see also Collins v. Olin Corp.*, 2010 WL 1677764, at *6 (D. Conn. Apr. 21, 2010) ("The Second Circuit has expressed a preference for the percentage method of calculating attorneys' fees, noting that such an approach 'aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation'"); *Frontier*, 2022 WL 4080324, at *14 (" The general trend in this Circuit favors using the percentage method in common fund cases."); *Menkes v. Stolt-Nielsen S.A.*, 2011 WL 13234815, at *4 (D. Conn. Jan. 25, 2011) (same).

III. THE REQUESTED FEE IS REASONABLE UNDER EITHER THE PERCENTAGE-OF-THE-FUND METHOD OR THE LODESTAR METHOD

Here, the requested fee award of 13% of the Settlement Fund, net of expenses, which is made pursuant to an *ex ante* fee agreement with Lead Plaintiff and which will result in a negative

lodestar multiplier of 0.7 on Plaintiffs' Counsel's lodestar, is extremely reasonable under either the "percentage" and "lodestar" methods for determining attorneys' fees.

A. The Requested Fee Is Reasonable Under the Percentage-of-the-Fund Method

The 13% attorney fee requested by Lead Counsel is well below the range of percentage fees that Courts in the Second Circuit have typically awarded in comparable securities class actions. *See, e.g.*, *Cen. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 249 (2d Cir. 2007) (affirming district court's award of 30% of $42.5 million settlement fund); *Baum v. Harman Int'l Indus., Inc.*, No. 3:17-cv-246-RNC, slip op. at 1 (D. Conn. Nov. 10, 2022), ECF No. 215 (Ex. 5) (awarding 31% of $28 million settlement); *In re Henry Schein, Inc. Sec. Litig.*, Master File No. 1:18-cv-01428-MKBVMS, slip op. at 15-16 (E.D.N.Y. Sept. 16, 2020), ECF No. 89 (Ex. 6) (awarding 25% of $35 million settlement); *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 415-18 (S.D.N.Y. 2018) (awarding 25% of $35 million settlement); *In re OSG Sec. Litig.*, No. 12-cv-07948-SAS, slip op. at 1 (S.D.N.Y. Dec. 2, 2015), ECF No. 261 (awarding 30% of $31.6 million settlement) (Ex. 7); *In re Facebook, Inc. IPO Sec. & Derivative Litig. (NASDAQ Actions)*, 2015 WL 6971424, at *12 (S.D.N.Y. Nov. 9, 2015) (awarding 33% of $26.5 million settlement); *City of Austin Police Ret. Sys. v. Kinross Gold Corp.*, 2015 WL 13639234, at *4 (S.D.N.Y. Oct. 15, 2015) (awarding 30% of $33 million settlement); *In re Celestica Inc. Sec. Litig.*, No. 07-cv-00312-GBD, slip op. at 2 (S.D.N.Y. July 28, 2015), ECF No. 267 (awarding 30% of $30 million settlement) (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) (Ex. 9); *In re Sadia S.A. Sec. Litig.*, 2011 WL 6825235, at *3 (S.D.N.Y. Dec. 28, 2011) (awarding 30% of $27 million settlement); *In re United Rentals, Inc. Sec. Litig.*, Master File No. 3:04-cv-1615 (CFD), slip op. at 2 (D. Conn. May 26, 2009), ECF Nos. 141, 150 (awarding 25% of $27.5 million settlement) (Ex. 10); *In re Xerox*

Corp. ERISA Litig., No. 02-CV-1138 (AWT), slip op. at 3 (D. Conn. Apr. 14, 2009), ECF No. 354 (awarding 29.9% of $51 million settlement) (Ex. 11).

Courts also award percentage fees of this amount and higher in much larger settlements in the Second Circuit. *See, e.g., In re Teva Sec. Litig.*, 2022 WL 16702791, at *1 (D. Conn. June 2, 2022) (awarding 23.7% of $420 million settlement); *In re Signet Jewelers Ltd. Secs. Litig.*, 2020 WL 4196468, at *24 (S.D.N.Y. July 21, 2020) (awarding 25% of $240 million settlement, net of expenses); *Amara v. Cigna Corp.*, 2018 WL 6242496, at *2 (D. Conn. Nov. 29, 2018) (awarding 17.5% of $184.5 million settlement in ERISA class action); *In re Bank of New York Mellon Corp. Forex Transactions Litig.*, 148 F. Supp. 3d 303, 305 (S.D.N.Y. 2015) (awarding 25% of $180 million settlement); *Bd. of Trustees of the AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, 2012 WL 2064907, at *3 (S.D.N.Y. June 7, 2012) (awarding 25% of $150 million settlement); *Cornwell v. Credit Suisse Grp.*, 2011 WL 13263367, at *1-2 (S.D.N.Y. July 18, 2011) (awarding 27.5% of $70 million settlement); *In re Comverse Tech., Inc. Sec. Litig.*, 2010 WL 2653354, at *6 (E.D.N.Y. June 24, 2010) (awarding 25% of $225 million settlement); *Priceline.com, Inc.*, 2007 WL 2115592, at *4-6 (awarding 30% of $80 million settlement).

Indeed, the 13% percentage fee sought in this case is ***roughly one half*** of the median percentage fee (25%) awarded in securities class actions from 2013 through 2022 with a settlement value between $25 million and $100 million. *See* NERA Economic Consulting, Recent Trends in Securities Class Action Litigation: 2022 Full-Year Review, at 21 (Jan. 24, 2023).

Further, 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 typically in the range of 30% to 33% of the recovery. *See Blum v. Stenson*, 465 U.S. 886, 903 (1984) ("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.") (Brennan, J., concurring).

In sum, the 13% fee requested here is well below the typical range of fees awarded on a percentage basis in comparable actions. This strongly supports the reasonableness of the requested fee.

B. The Requested Fee Is Reasonable Under the Lodestar Method

To ensure the reasonableness of a fee awarded under the percentage-of-the-fund method, district courts may cross-check the proposed award against counsel's lodestar. *See Goldberger*, 209 F.3d at 50.

Here, Plaintiffs' Counsel spent a total of 10,112.75 hours of attorney and other professional support time prosecuting the Action for the benefit of the Class. ¶ 122. Plaintiffs' Counsel's collective lodestar, derived by multiplying the hours spent by each attorney and paraprofessional by their current hourly rates, is $6,242,476.25.[5] *See id.* Assuming that Lead Counsel's expense request is granted, the requested fee equates to $4,340,036 (plus interest on that amount at the same rate as earned by the Settlement Fund).[6] The requested fee therefore represents a "negative"

[5] 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, inflation, and the loss of interest. *See Jenkins*, 491 U.S. at 284; *In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at *15 (S.D.N.Y. Dec. 19, 2014) ("[T]he use of current rates to calculate the lodestar figure has been endorsed repeatedly by the Supreme Court, the Second Circuit and district courts within the Second Circuit as a means of accounting for the delay in payment inherent in class actions and for inflation.").

[6] The Settlement Amount, net of the requested $615,101.13 in Litigation Expenses (which includes Plaintiffs' Counsel's expenses and the PSLRA cost award sought for Plaintiffs), would be $33,384,898.87. The fee request of 13% of that amount is $4,340,036.85.

multiplier of 0.7 of the total lodestar—in other words, the fee requested is only 70% of Plaintiffs' Counsel's time at their normal hourly rates.

This "multiplier" is significantly below the range of multipliers commonly awarded in securities class actions and other comparable litigations. Indeed, in cases of this nature, fees representing ***positive multipliers*** of the attorneys' lodestar are regularly awarded to reflect the contingency fee risk and other relevant factors. *See FLAG Telecom*, 2010 WL 4537550, at *26 ("a positive multiplier is typically applied to the lodestar in recognition of the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors"); *Comverse*, 2010 WL 2653354, at *5 ("Where, as here, counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar."). Indeed, in complex contingent litigation, positive lodestar multipliers between two and five are commonly awarded. *See, e.g.*, *Wal-Mart*, 396 F.3d at 123 (upholding multiplier of 3.5 as reasonable on appeal); *In re United Rentals, Inc. Sec. Litig.*, No. 3:04-cv-1615, slip op. at 1 (D. Conn. May 26, 2009), ECF Nos. 141, 150 (awarding fee representing a 4.5 multiplier) (Ex. 10); *Woburn Ret. Sys. v. Salix Pharm., Ltd.*, 2017 WL 3579892, at *6 (S.D.N.Y. Aug. 18, 2017) (awarding fee representing a 3.14 multiplier); *Comverse*, 2010 WL 2653354, at *5 (2.78 multiplier); *In re Deutsche Telekom AG Sec. Litig.*, 2005 WL 7984326, at *4 (S.D.N.Y. June 14, 2005) (3.96 multiplier); *Cornwell*, 2011 WL 13263367, at *2 (4.7 multiplier); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (awarding fee equal to a 4.65 multiplier, which was "well within the range awarded by courts in this Circuit and courts throughout the country").

In contrast, here, despite the significant contingency-fee risk in the Action, counsel do not seek a multiplier of their time, but instead request a fee that is less than their collective lodestar.

This provides further strong support for the reasonableness of the fee request. *See, e.g., In re Bear Stearns Cos. Sec., Deriv., & ERISA Litig.*, 909 F. Supp. 2d 259, 271 (S.D.N.Y. 2012) (approving fee with negative multiplier and noting that the negative multiplier was a "strong indication of the reasonableness of the [requested] fee"); *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.").

Lead Counsel's hourly rates on which the lodestar is based have been approved in numerous cases throughout the country, including cases in this Circuit. *See, e.g.*, *In re Luckin Coffee Inc. Sec. Litig.*, No. 20 Civ. 1293 (JPC) (S.D.N.Y. July 22, 2022), ECF No. 338; *Frontier*, 2022 WL 4080324, at *15 (approving fee based on lodestar cross-check using similar rates); *see also, e.g.*, *Nykredit Portefølje Admin. A/S v. ProPetro Holding Corp.*, No. MO:19-CV-217-DC (W.D. Tex. May 11, 2023), ECF No. 178; *In re Oracle Corp. Sec. Litig.*, No. 5:18-cv-04844-BLF (N.D. Cal. Jan. 13, 2023), ECF No. 146; *In re Venator Materials PLC Sec. Litig.*, No. 4:19-cv-03464 (S.D. Tex. Sept. 15, 2022), ECF No. 129; *In re Merit Med. Sys., Inc. Sec. Litig.*, 8:19-cv-02326-DOC-ADS (C.D. Cal. Apr. 15, 2022), ECF No. 118.

In sum, Lead Counsel's requested 13% fee award is significantly below the range of what courts in this Circuit regularly award in class actions such as this one when calculated as a percentage of the fund, and below what is customary in relation to Lead Counsel's lodestar. Moreover, as discussed below, each of the factors established for the review of attorneys' fee awards by the Second Circuit in *Goldberger* also strongly supports a finding that the requested fee is reasonable.

IV. APPROVAL OF THE FEE REQUEST IS SUPPORTED BY THE FACT THAT IT IS BASED ON A FEE AGREEMENT ENTERED INTO WITH LEAD PLAINTIFF AT THE OUTSET OF THE LITIGATION

Because the requested fee is based on a written agreement that Lead Counsel entered into with Lead Plaintiff at the outset of the litigation, the fee should be afforded a presumption of reasonableness. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 282 (3d Cir. 2001). Even if a formal presumption of reasonableness is not afforded to the fee based on the pre-litigation *ex ante* agreement, the existence of the agreement and the approval of the requested fee at the conclusion of the Action by Plaintiffs, which were actively involved in the prosecution and settlement of the Action, strongly support approval of the fee. *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133-34 (2d Cir. 2008).

The PSLRA was intended to encourage institutional investors with significant financial stakes, like Lead Plaintiff APG, 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 assess the reasonableness of counsel's fee request.

A number of courts have treated fee arrangements between PSLRA lead plaintiffs and their counsel established at the outset of the litigation to be presumptively reasonable in light of Congress's intent to empower lead plaintiffs under the PSLRA to select and supervise attorneys on behalf of the class. *See Cendant*, 264 F.3d at 282 (*ex ante* fee agreements in securities class actions enjoy "a presumption of reasonableness"); *Signet*, 2020 WL 4196468, at *17 ("Because the requested fee is based on an agreement that Lead Counsel entered into with the sophisticated

institutional Lead Plaintiff at the outset of the litigation, the fee is presumptively reasonable."); *In re Marsh & McLennan Cos. Sec. Litig.*, 2009 WL 5178546, at *15 (S.D.N.Y. Dec. 23, 2009) ("Since the passage of the PSLRA, courts have found such an agreement between fully informed lead plaintiffs and their counsel to be presumptively reasonable").

The Second Circuit has found that the Court should, at least, give "serious consideration" to such agreements, *see Nortel*, 539 F.3d at 133-34. For example, the Second Circuit has stated that:

> We expect . . . that district courts will give serious consideration to negotiated fees because PSLRA lead plaintiffs often have a significant financial stake in the settlement, providing a powerful incentive to ensure that any fees resulting from that settlement are reasonable. In many cases, the agreed-upon fee will offer the best indication of a market rate, thus providing a good starting position for a district court's fee analysis.

Id.; *see also Comverse*, 2010 WL 2653354, at *4 ("an *ex ante* fee agreement is the best indication of the actual market value of counsel's services").

Here, Lead Plaintiff APG is a classic example of the type of sophisticated and financially interested investor that Congress envisioned serving as a fiduciary for the class when it enacted the PSLRA. Lead Plaintiff took an active role in the litigation and closely supervised the work of Lead Counsel. *See* van Lidth de Jeude Decl. (Ex. 1), at ¶ 5. Accordingly, Plaintiffs' support of the requested 13% fee supports the reasonableness of that fee. *See Signet*, 2020 WL 4196468, at *17 ("The existence of the agreement and the approval of the requested fee by Lead Plaintiff, which was actively involved in the prosecution and settlement of the Action, supports approval of the fee."); *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *8 (S.D.N.Y. Nov. 7, 2007) ("[P]ublic 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.").

V. THE *GOLDBERGER* FACTORS CONFIRM THAT THE REQUESTED FEE IS FAIR AND REASONABLE

The Second Circuit has set forth the following criteria that courts should consider when reviewing a request for attorneys' fees in a common fund case:

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

Goldberger, 209 F.3d at 50. Consideration of these factors, together with the analyses above, further demonstrates that the fee requested by Lead Counsel is reasonable.

A. The Time and Labor Expended by Plaintiffs' Counsel Support the Requested Fee

The substantial time and effort expended by Plaintiffs' Counsel in prosecuting the Action and achieving the Settlement plainly support the requested fee. The accompanying Wierzbowski Declaration details the efforts of Plaintiffs' Counsel in prosecuting Plaintiffs' claims over the course of more than four years of vigorous litigation. As set forth in greater detail in the Wierzbowski Declaration, Plaintiffs' Counsel, among other things:

- conducted an extensive factual and legal investigation that included, among other things, review and analysis of: (i) Synchrony's public filings with the SEC; (ii) research reports by securities and financial analysts; (iii) transcripts of Synchrony's conference calls with analysts and investors; (iv) Synchrony's presentations, press releases, and reports; (v) news and media reports concerning Synchrony and other facts related to this action; (vi) price and volume data for Synchrony common stock; and (vii) information from consultations with experts (¶¶ 19, 21);

- identified, located, and interviewed dozens of former Synchrony employees believed to potentially have information about the claims at issue in the Action (¶ 20);

- researched and drafted a detailed Complaint based on this investigation (¶¶ 22-24);

- opposed Defendants' motion to dismiss the Complaint through extensive briefing and oral argument (¶¶ 25-27, 31);

- sought relevant documents from a lawsuit between Synchrony and Walmart in the Western District of Arkansas and filed a related motion for partial relief from the PSLRA discovery stay (¶¶ 28-30);

- briefed and argued Plaintiffs' appeal to the Second Circuit from the Court's dismissal of the Action, which resulted in one of Plaintiffs' alleged misstatements being sustained (¶¶ 34-36);

- opposed Defendants' renewed motion to dismiss after remand from the Second Circuit Court of Appeals (¶¶ 37-39);

- negotiated a case schedule, joint discovery plan, and ESI protocol, and prepared and responded to discovery requests, including requests for the production of documents and interrogatories, and litigated several discovery disputes (¶¶ 41-50);

- reviewed and analyzed nearly 300,000 pages of documents obtained from Defendants and relevant third parties through discovery (¶¶ 51-56);

- drafted and filed a motion for class certification, which was supported by an expert report on the efficiency of the market for Synchrony common stock (¶ 57); and

- engaged in extended arm's-length settlement negotiations, which included two formal mediation sessions and the exchange of detailed mediation statements (¶¶ 61-67).

As discussed above, Plaintiffs' Counsel expended 10,112.75 hours prosecuting this Action with a collective total lodestar value of $6,242,476.75. ¶ 122. Throughout the litigation, Plaintiffs' Counsel staffed the matter efficiently to avoid unnecessary duplication of effort. The time and effort devoted to this case by Plaintiffs' Counsel was critical in obtaining the favorable result achieved by the Settlement, and the significant amount of time spent (as well as the "negative" lodestar multiplier discussed above) confirms that the 13% fee request here is reasonable in relation to the time spent and work performed.

B. The Risks of the Litigation Support the Requested Fee

The Second Circuit has recognized that the risks associated with a case undertaken on a contingent fee basis is another important factor in determining an appropriate fee award:

> 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. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 470 (2d Cir. 1974). "Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *Comverse*, 2010 WL 2653354, at *5; *see also In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (it is "appropriate to take this [contingent-fee] risk into account in determining the appropriate fee to award").

Plaintiffs' Counsel have not received any compensation to date, assuming entirely the risk of no recovery while expending significant attorney time and advancing considerable costs. At every stage of prosecuting this case, Plaintiffs' Counsel faced substantial litigation risks. Indeed, the Court had initially dismissed the Action with prejudice in its entirety and the Court of Appeals only reversed the Court's dismissal as to one alleged misstatement and only under the Exchange Act. Even after the Second Circuit's ruling, on Defendants' renewed motion to dismiss, the Court sustained Plaintiffs' Exchange Act claims only as to that single misstatement and then still *further* narrowed Plaintiffs' claims to just the first corrective disclosure, shortening the scope of the alleged class period nearly in half. Given the narrowness of Plaintiffs' remaining case, each stage in the litigation would pose increased risk because any failure to prove any of the required elements of the securities fraud claim for the January 19, 2018 statement would result in a complete dismissal of the Action.

To prevail through litigation, Plaintiffs would have been required to prove (i) that Defendant Keane's January 19, 2018 statement that Synchrony was "not getting any pushback on credit" was materially false and misleading when made; (ii) that Defendants knew or recklessly disregarded that this statement was false when made (*i.e.*, Defendants acted with "scienter"); (iii) that the revelation of the truth concerning Keane's alleged misstatement caused the loss

suffered by Plaintiffs and the Class (i.e., loss causation); and (iv) the amount of class-wide damages. Defendants had substantial arguments concerning each of these issues.

First, Defendants have argued, and would continue to argue, that Keane's January 19, 2018 statement concerning pushback on credit was not false or misleading—and, in any event, that it was merely an offhand, unscripted remark that could not have been material to investors. ¶ 79. In addition, Defendants would contend that Ms. Keane's alleged misstatement was not made with "scienter" because she did not have any intent to mislead investors and that, even if her statement was false or misleading, she believed it to be true. ¶ 81. Defendants would also continue to argue that Keane and the other Defendants had no motive to commit fraud. ¶ 82.

In addition, Defendants would continue to argue that Plaintiffs cannot establish loss causation. Defendants would argue that the remaining corrective disclosure on July 12, 2018 was not corrective of the only sustained alleged misstatement, and so Defendants' alleged fraud could not have caused the losses suffered by the Class. ¶ 86. Specifically, Defendants would argue that Synchrony's July 12, 2018 stock price drop was caused by other news disclosed that day, and not allegedly misstated or omitted information in Keane's January 2018 statement. ¶¶ 88-90. Defendants would argue that, even to the extent the stock drop that day related to news of Synchrony's worsening relationship with Walmart, the reasons for that deteriorating relationship were unrelated to Synchrony's tightening of its underwriting standards (or any other information allegedly misstated or omitted by Keane), and thus Defendants' alleged fraud did not cause any losses. Further, Defendants would also argue that any potential mismatch between the alleged misstatement and its purported corrective disclosure disproves loss causation both at summary judgment and trial.

In addition, the other potential explanations for the non-renewal of Walmart's relationship with Synchrony created the risk that any losses associated with the stock price decline would need to be allocated among the various causes. ¶90. Accordingly, Defendants would have challenged Plaintiffs' alleged damages and argued that all, or nearly all, of Synchrony's stock price decline is not recoverable. Proving what portion (if any) of the price declines at issue resulted from the revelation of alleged misstatement (rather than other, confounding information) would have been a challenge and subject to continued dispute through trial.

In the face of the many 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 time and a significant expenditure of litigation expenses with no guarantee of compensation.

Lead Counsel's assumption of this risk on a contingent basis strongly supports the reasonableness of the requested fee. *See FLAG Telecom*, 2010 WL 4537550, at *27 ("Courts in the Second Circuit have recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award."); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("There was significant risk of non-payment in this case, and Plaintiffs' Counsel should be rewarded for having borne and successfully overcome that risk."); *Sturm, Ruger & Co.*, 2012 WL 3589610, at *12 (finding that litigation risk supported approval of attorneys' fees because attorneys took on securities class action on a contingent basis and there were risks for establishing liability and proving damages, such as challenges to falsity, materiality, and scienter).

C. The Magnitude and Complexity of the Action Support the Requested Fee

The magnitude and complexity of the Action also support the requested fee. Courts have recognized that securities class action litigation is "notably difficult and notoriously uncertain."

FLAG Telecom, 2010 WL 4537550, at *27; *see also City of Providence v. Aeropostale, Inc.*, 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.*, 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 Quality of Plaintiffs' Counsel's Representation Supports the Requested Fee

Lead Counsel submits that the quality of Plaintiffs' Counsel's representation is evidenced by the quality of the result achieved. *See, e.g.*, *Veeco*, 2007 WL 4115808, at *7; *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004). Here, the Settlement provides a favorable result for the Class in light of the serious risks of continued litigation, and represents a significant portion of likely recoverable damages. *See* ¶¶ 95-98. Lead Counsel respectfully submits that the quality of counsel's efforts in the litigation to date, together with their substantial experience in securities class actions and their commitment to this litigation, provided it with the leverage necessary to negotiate the Settlement.

Courts recognize that the quality of the opposing counsel is also a factor in assessing the quality of plaintiffs' counsel's performance. *See, e.g.*, *Veeco*, 2007 WL 4115808, at *7 (among factors supporting 30% award of attorneys' fees was that defendants were represented by "one of the country's largest law firms"); *In re Adelphia Commc'ns Corp. Sec. & Deriv. Litig.*, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006) ("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 counsels' work"), *aff'd*, 272 F. App'x 9 (2d Cir. 2008). Here, Defendants were represented by Cleary Gottlieb Steen & Hamilton LLP—a highly experienced law firm which zealously represented its clients. ¶ 126. Despite this

formidable opposition, Plaintiffs' Counsel's thorough investigation, successful appeal, robust pursuit of discovery, and settlement negotiation efforts positioned Plaintiffs to achieve a favorable recovery for the Class. Thus, this factor also strongly supports the requested fee.

E. The Requested Fee in Relation to the Settlement

Courts have interpreted this factor as requiring the review of the fee requested in terms of the percentage it represents of the total recovery. "When determining whether a fee request is reasonable in relation to a settlement amount, 'the court compares the fee application to fees awarded in similar securities class-action settlements of comparable value.'" *Comverse*, 2010 WL 2653354, at *3. As discussed in detail in Part III, *supra*, the requested 13% fee is well within (if not below) the range of percentage fees that courts in the Second Circuit have awarded in comparable cases. Accordingly, this factor strongly supports award of the requested fee.

F. Public Policy Considerations Support the Requested Fee

A strong public policy concern exists for rewarding firms for bringing successful securities litigation. 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. *Tellabs*, 551 U.S. at 313; *see also Bateman Eichler*, 472 U.S. at 310 (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*, 2005 WL 2757792, at *9.

Accordingly, public policy also favors granting the requested fee here. *See Frontier*, 2022 WL 4080324, at *16 ("public policy favors the award because it will continue to encourage attorneys to take these cases on a contingency basis and further encourage enforcement of

securities laws"); *Sturm, Ruger & Co.*, 2012 WL 3589610, at *13 ("In considering an award of attorney's fees, the public policy of vigorously enforcing the federal securities laws must be considered."); *Priceline.com*, 2007 WL 2115592, at *5 ("public policy considerations . . . support the requested fee [when it] will encourage enforcement of the securities laws and support attorneys' decisions to take these types of cases on a contingent fee basis").

G. The Reaction of the Class to Date Supports the Requested Fee

The reaction of the Class to date also supports the requested fee. Through June 23, 2023, Epiq has disseminated more than 156,000 copies of the Notice to potential Class Members and nominees informing them, among other things, that Lead Counsel intended to apply to the Court for an award of attorneys' fees in an amount not to exceed 13% of the Settlement Fund and up to $750,000 in Litigation Expenses. *See* Villanova Decl. (Ex. 2), at ¶ 7; and Ex. A, at ¶¶ 5, 63. The time to object to the Fee and Expense Application does not expire until July 10, 2023, but to date, no objections have been received. Should any objections be received, Lead Counsel will address them in its reply papers, to be filed on July 24, 2023.

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

Lead Counsel's application also includes a request for payment of the Litigation Expenses incurred by Plaintiffs' Counsel, which were reasonable in amount and necessary to the prosecution of the Action. *See* ¶¶ 134-142. These expenses are properly recovered by counsel. *See Facebook IPO*, 343 F. Supp. 3d at 418 (in a class action, attorneys should 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"); *In re China Sunergy Sec. Litig.*, 2011 WL 1899715, at *6 (S.D.N.Y. May 13, 2011) (same); *FLAG Telecom*, 2010 WL 4537550, at *30 ("It is well accepted that counsel who create a common fund are entitled to the reimbursement of

expenses that they advanced to a class."); *Kiefer v. Moran Foods, LLC*, 2014 WL 3882504, at *10 (D. Conn. Aug. 5, 2014) (awarding reimbursement of litigation expenses that included court and process server fees, postage and courier fees, transportation, working meals, photocopies, electronic research, and expert fees). As set forth in detail in the Wierzbowski Declaration, Plaintiffs' Counsel incurred $566,401.13 in unreimbursed Litigation Expenses in the prosecution of the Action. ¶ 134.

The types of expenses for which Lead Counsel seeks payment are routinely charged to classes in contingent litigation and clients billed by the hour. These expenses include, among others, costs and fees for Plaintiffs' experts, on-line legal and factual research charges, photocopying charges, and filing fees. ¶¶ 136-142.

Moreover, from the outset, Plaintiffs' 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, Plaintiffs' 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. ¶ 136.

The Notice informed potential Class Members that Lead Counsel would apply for Litigation Expenses in an amount not to exceed $750,000. The amount of expenses requested, $615,101.13, which includes $566,401.13 for Plaintiffs' Counsel's expenses and $48,700 sought for Plaintiffs' costs, is substantially below the amount listed in the Notice. To date, there has also been no objection to the request for expenses. ¶ 144.

VII. PLAINTIFFS SHOULD BE AWARDED THEIR REASONABLE COSTS AND EXPENSES UNDER THE PSLRA

In connection with their request for Litigation Expenses, Lead Counsel also seeks an award of $48,700 for reimbursement of costs and expenses incurred by APG Asset Management NV

("APG Management"), the legally authorized representative of Plaintiffs, directly related to Plaintiffs' representation of the Class, as permitted by the PSLRA.

The PSLRA 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). "Courts in this Circuit routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." *Christine Asia Co.*, 2019 WL 5257534, at *20 (citations and internal quotations omitted).

Numerous courts have approved reasonable awards to compensate lead plaintiffs for the time their employees have spent supervising and participating in the litigation on behalf of the class. In *Marsh & McLennan*, the court awarded $144,657 to the New Jersey Attorney General's Office and $70,000 to certain Ohio pension funds, to compensate them "for their reasonable costs and expenses incurred in managing this litigation and representing the Class." 2009 WL 5178546, at *21. As the court found, their efforts in communicating with lead counsel, reviewing submissions to the court, responding to discovery requests, providing deposition testimony and participating in settlement discussions were "precisely the types of activities that support awarding reimbursement of expenses to class representatives." *Id.*; *see also In re Bank of Am. Corp. Sec., Derivative, & Emp. Ret. Income Sec. Act (ERISA) Litig.*, 772 F.3d 125, 132-33 (2d Cir. 2014) (affirming award of over $450,000 to representative plaintiffs for time spent by their employees on the action); *FLAG Telecom*, 2010 WL 4537550, at *31 (approving award of $100,000 to Lead Plaintiff for time spent on the litigation); *Christine Asia Co.*, 2019 WL 5257534, at *8, *20 (granting PSLRA awards totaling $62,500 to lead plaintiffs for their "substantial time and effort

[devoted] to prosecuting [the] action, including preparing for and being deposed by Defendants, reviewing pleadings and briefs, assisting with discovery responses, collecting documents for production, and evaluating and approving the settlement").

Here, Plaintiffs request reimbursement in the amount of $48,700 based on the value of time devoted to the Action by employees of APG Management on behalf of Plaintiffs, including time spent communicating and strategizing with Plaintiffs' Counsel, reviewing pleadings and briefs, collecting documents for production, discussing the action with its investment managers from whom Defendant requested documents, and consulting with counsel during the course of settlement negotiations. *See* van Lidth de Jeude Decl. (Ex. 1), at ¶¶ 5, 9-11. These efforts required employees of APG Management to dedicate time and effort to the Action that they would have otherwise devoted to their regular duties and thus represented a cost to APG Management. *Id.* ¶ 11. The award sought is reasonable and justified under the PSLRA based on the active involvement of Plaintiffs throughout the course of the Action, and should be granted.

CONCLUSION

For the foregoing reasons, Lead Counsel respectfully requests that the Court award (i) total attorneys' fees to Plaintiffs' Counsel of 13% of the Settlement Fund; (ii) $566,401.13 for Plaintiffs' Counsel's Litigation Expenses, and (iii) a PSLRA award of $48,700 for Plaintiffs.

Dated: June 26, 2023

Respectfully submitted,

/s/ Adam H. Wierzbowski

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CERTIFICATE OF SERVICE

I certify that on June 26, 2023, a copy of the foregoing Memorandum of Law in Support of Lead Counsel's Motion for Attorneys' Fees and Litigation Expenses was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Adam H. Wierzbowski
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