**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

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| IN RE COMMVAULT SYSTEMS, INC. SECURITIES LITIGATION | Civil Action No. 14-5628 (PGS)(LHG) |

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

Dated: April 9, 2018

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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, pursuant to Rule 23(h) of the Federal Rules of Civil Procedure, for an award of attorneys' fees for all Plaintiffs; Counsel in the amount of 25% of Settlement Fund, or $3,125,000 plus interest at the same rate as earned by the Settlement Fund.[1] Lead Counsel also seeks reimbursement of $581,526.52 in litigation expenses reasonably and necessarily incurred by Plaintiffs' Counsel in prosecuting and resolving the Action, and Lead Plaintiff Arkansas Teacher Retirement System ("ATRS") seeks $7,290.60 in costs incurred directly related to its service on behalf of the Settlement Class.

## PRELIMINARY STATEMENT

The proposed Settlement, which provides for a $12,500,000 cash payment for the benefit of the Settlement Class, is a very favorable result in light of the substantial risks and significant costs of further litigation. The recovery obtained was achieved as a result of the skill, tenacity and effective advocacy of Lead Counsel, assisted by the other Plaintiffs' Counsel, who litigated this Action for three years against highly skilled defense counsel, including successfully surmounting Defendants' motions to dismiss and conducting extensive discovery. Plaintiffs' Counsel, who litigated this Action on a fully contingent fee basis, faced significant challenges to proving both

[1] All capitalized terms used herein that are not otherwise defined herein shall have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated November 30, 2017 (ECF No. 117-1) (the "Stipulation") or in the Declaration of James A. Harrod in Support of: (I) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation; and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Harrod Declaration" or "Harrod Decl."), filed herewith. Citations to "¶ __" herein refer to paragraphs in the Harrod Declaration. Plaintiffs' Counsel consists of Lead Counsel BLB&G; Labaton Sucharow LLP, additional counsel for Lead Plaintiff ATRS; and Local Counsel Carella, Byrne, Cecchi, Olstein, Brody and Agnello, P.C. ("Carella Byrne") and Calcagni & Kanefsky, LLP ("Calcagni & Kanefsky").

liability and damages that posed the serious risk that there might be no recovery whatsoever in the Action.

As detailed in the accompanying Harrod Declaration,[2] Lead Counsel vigorously pursued the claims in this Action for the benefit of the Settlement Class. Among other things, Lead Counsel, with the assistance of other Plaintiffs' Counsel: (i) conducted a wide-ranging investigation concerning the alleged misstatements made by Defendants, including numerous interviews with former Commvault employees and a thorough review of publicly available information; (ii) drafted the initial complaint filed in the Action on September 10, 2014 (ECF No. 1), the Amended Class Action Complaint (ECF No. 40) ("Amended Complaint"), filed on March 19, 2015, and Second Amended Class Action Complaint (ECF No. 70) (the "Second Amended Complaint" or "Complaint") filed on February 5, 2016; (iii) researched and drafted detailed briefing in opposition to Defendants' two motions to dismiss and motion to strike (ECF Nos. 54, 80, 81); (iv) participated in oral argument on both of the motions to dismiss (ECF Nos. 64, 86); (v) consulted extensively with experts in accounting, damages, loss causation and market efficiency; (vi) prepared and filed Lead Plaintiff's motion for class certification, including an accompanying expert declaration on market efficiency and class-wide damages (ECF No. 102); (vii) undertook extensive fact discovery efforts, which included obtaining and reviewing more than 1.8 million pages of documents, serving numerous subpoenas on third parties, serving and responding to interrogatories, and exchanging numerous letters; (viii) prepared a detailed

[2] The Harrod Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, among other things: the history of the Action and a description of the services Plaintiffs' Counsel provided for the benefit of the Settlement Class (¶¶ 5, 13-68); the nature of the claims asserted (¶¶ 10-12, 20, 32); the negotiations leading to the Settlement (¶¶ 60-66); the risks and uncertainties of the litigation (¶¶ 69-91); and facts and circumstances underlying Lead Counsel's Fee and Expense Application (¶¶ 107-134).

mediation statement that addressed both liability and damages; and (ix) engaged in extensive arm's-length settlement negotiations with Defendants both directly and through a mediator to resolve the Action. ¶¶ 13-68.

The Settlement achieved through Plaintiffs' Counsel's efforts is a favorable result when compared to the significant risks that Lead Plaintiff would have had to overcome in order to prevail in this complex securities fraud litigation. Indeed, in this litigation, as reflected in this Court's dismissal of the initial Amended Complaint for failure to state a claim, counsel faced very substantial challenges in demonstrating the falsity of the alleged misstatements, in proving that Defendants' acted with scienter, and in establishing loss causation and damages, all which are detailed in the Harrod Declaration at ¶¶ 69-91. The risk that there might be no recovery in the Action was a real one, and it was greatly enhanced by the fact that Lead Counsel was litigating against Defendants represented by highly skilled defense counsel under the exacting standards for proof of securities fraud under the Securities Exchange Act of 1934 ("Exchange Act"), as amended by the Private Securities Litigation Reform Act of 1995 ("PSLRA"). Despite these risks, Plaintiffs' Counsel collectively dedicated more than 13,100 hours of time to this litigation over the course of approximately three years, on a fully contingent basis.

In light of the recovery obtained, the time and effort devoted by Plaintiffs' Counsel, the work performed, the skill and expertise required, and the risks that counsel undertook, Lead Counsel submits that the requested fee award and the reimbursement of incurred expenses are fair and reasonable. As discussed below, the 25% fee requested is well within the range of percentage fees that courts in this Circuit have awarded in securities class actions with comparable recoveries. Moreover, the requested fee represents a negative multiplier of 0.47 on Plaintiffs' Counsel's lodestar, which means that even if the full amount of the requested fee is granted, Plaintiffs'

Counsel will receive a payment of less than one half (approximately 47%) of the value of time they spent pursuing the claims in this Action based on their normal billing rates. In addition, the expenses for which Lead Counsel seeks reimbursement were reasonable and necessary for the successful prosecution of the Action.

Furthermore, Lead Plaintiff ATRS, which is a sophisticated institutional investor that actively supervised the Action, has evaluated the request for fees and expenses and has authorized it as reasonable. *See* Declaration of George Hopkins, Executive Director of Arkansas Teachers Retirement System (Ex. 2 to the Harrod Decl.) ("Hopkins Decl."), at ¶¶ 8-9

Finally, pursuant to the Preliminary Approval Order, 35,978 copies of the Notice have been mailed to potential Settlement Class Members and their nominees through April 6, 2018, and the Summary Notice was published in the national edition of the *Investor's Business Daily* and transmitted over the *PR Newswire*. *See* Declaration of Jose C. Fraga Regarding (A) Mailing of Notice and Claim Form; (B) Publication of Summary Notice; and (C) Report on Requests for Exclusion Received to Date (Ex. 1 to the Harrod Decl.) ("Fraga Decl."), at ¶¶ 7-8. The Notice advised potential Settlement Class Members that Lead Counsel would apply for an award of attorneys' fees in an amount not to exceed 25% of the Settlement Fund and for reimbursement of litigation expenses, including reimbursement of the reasonable costs and expenses of Lead Plaintiff, in an amount not to exceed $700,000. *See* Notice, attached as Exhibit A to Fraga Decl., at ¶¶ 5, 71. The fees and expenses sought by Lead Counsel do not exceed the amounts set forth in the Notice. While the deadline set by the Court for Settlement Class Members to object to the requested attorneys' fees and expenses has not yet passed, to date, no objections to the requests for fees and expenses have been received.

For all the reasons set forth herein and in the Harrod Declaration, Lead Counsel respectfully submits that the requested attorneys' fees and expenses are fair and reasonable under applicable legal standards and, therefore, should be awarded by the Court.

## ARGUMENT

### I. PLAINTIFFS' COUNSEL ARE ENTITLED TO COMPENSATION FROM THE COMMON FUND

It is well settled that an attorney who maintains a lawsuit that results in the creation of a fund or benefit in which others have a common interest may obtain fees from that common fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("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"); *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 197 (3d Cir. 2005) ("attorneys whose efforts create, discover, increase, or preserve a common fund are entitled to compensation"); *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig.*, 582 F.3d 524, 540 (3d Cir 2009); *In re Par Pharm. Sec. Litig.*, No. 06-3226 (ES), 2013 WL 3930091, at *9 (D.N.J. July 29, 2013).

Courts have recognized that, in addition to providing just compensation, awards of fair attorneys' fees from a common fund ensure that "competent counsel continues to be willing to undertake risky, complex, and novel litigation." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000) (citations omitted); *see also In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) ("In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives."). Indeed, the Supreme Court has emphasized that private securities actions, such as the instant action, provide "'a most effective weapon in the enforcement' of the securities laws and are 'necessary supplement to [SEC] action.'" *Bateman*

*Eichler, Hill Richards, Inc. v. Berner,* 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak,* 377 U.S. 426, 432 (1964)); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).

Courts in this Circuit have consistently adhered to these teachings. *See, e.g., Schuler v. Medicines Co.*, No. CV 14-1149 (CCC), 2016 WL 3457218, at *8 (D.N.J. June 24, 2016) ("Under the common fund doctrine, 'a private plaintiff, or plaintiff's attorney, whose efforts create, discover, increase, or preserve a fund to which others also have a claim, is entitled to recover from the fund the costs of his litigation, including attorneys' fees.'") (quoting *Diet Drugs*, 582 F.3d at 540); *In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 192 (E.D. Pa. 2000) ("[T]here is no doubt that attorneys may properly be given a portion of the settlement fund in recognition of the benefits they have bestowed on class members.").

## 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 for the Settlement Class, and utilize a lodestar cross-check to confirm that the fee is reasonable. In the Third Circuit, the percentage-of-recovery method is "generally favored" in cases involving a settlement that creates a common fund. *See Sullivan v. DB Investments*, 667 F.3d 273, 330 (3d Cir. 2011) (favoring percentage of recovery method "because it allows courts to award fees from the [common] fund 'in a manner that rewards counsel for success and penalizes it for failure.'"); *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005). The percentage-of-recovery method is almost universally preferred in common fund cases because it most closely aligns the interests of counsel and the class. *See Rite Aid*, 396 F.3d at 300; *see In re Ocean Power Techs., Inc.*, No. 3:14-CV-3799, 2016 WL 6778218, at *24 (D.N.J. Nov. 15, 2016). The Third

Circuit also recommends that the percentage award be "cross-checked" against the lodestar method to ensure its reasonableness. *See Sullivan*, 667 F.3d at 330.

The use of the percentage of recovery method also comports with the language of the PSLRA, which states that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a ***reasonable percentage*** of the amount of any damages and prejudgment interest actually paid to the class ...." 15 U.S.C. § 78u-4(a)(6) (emphasis added); *Maley v. Del Global Technologies Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) (when drafting the PSRLA, Congress "indicated a preference for the use of the percentage method"). Thus, "the PSLRA has made percentage-of-recovery the standard for determining whether attorneys' fees are reasonable." *Cendant*, 404 F.3d at 188 n.7.

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

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

The requested fee of 25% of the Settlement Fund is reasonable under the percentage-of-recovery method. While there is no absolute rule, courts in the Third Circuit have observed that fee awards generally range from 19% to 45% of the settlement fund. *See In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995); *Ikon*, 194 F.R.D at 19. Fees most commonly range from 25% to one-third of the recovery. *See In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 155 (D.N.J. 2013) ("Courts within the Third Circuit often award fees of 25% to 33% of the recovery"); *Louisiana Mun. v. Sealed Air Corp.*, No. 03-CV-4372 (DMC), 2009 WL 4730185, at *8 (D.N.J. 2009) (same); *see also Rite Aid*, 396 F.3d at 298 (taking note of statistical studies showing that the average fee award in securities class actions with settlements over $10 million was 31% and that median fee award rates in several federal district courts ranged from 27% to 30%).

A review of attorneys' fees awarded in class actions with comparably sized settlements in this Circuit strongly supports the reasonableness of the requested 25% fee. *See W. Pa. Elec. Emps.' Pension Fund v. Alter*, No. 2:09-cv-04730-CMR, 2014 WL 12618202, at *1 (E.D. Pa. Aug. 4, 2014) (awarding 30% of $13.25 million settlement); *In re Heckmann Corp. Sec. Litig.*, No. 1:10-cv-00378-LPS-MPT, slip op. at 2 (D. Del. June 26, 2014), ECF No. 308 (awarding 33.3% of $27 million settlement) (Harrod Decl. Ex. 5); *Ins. Brokerage Antitrust Litig.*, 297 F.R.D. at 154-56 (awarding 33% of $10.5 million settlement); *Par Pharm.*, 2013 WL 3930091, at *11 (awarding 30% of $8.1 million settlement); *Esslinger v. HSBC Bank Nev., N.A.*, No. 10-3213, 2012 WL 5866074, at *14 (E.D. Pa. Nov. 20, 2012), ECF No. 139 ("a fee award of 30% of the [$23.5 million] settlement here is reasonable and in keeping with similar precedent"); *In re Schering-Plough Corp. ENHANCE ERISA Litig.*, No. 08-1432 (DMC) (JAD), 2012 WL 1964451, at *6-*7 (D.N.J. May 31, 2012) (awarding 33.3% of $12.25 million settlement); *Bauer v. Prudential Fin., Inc.*, No. 09-1120-LL, slip op. at 2 (D.N.J. Dec. 7, 2011), ECF No. 126 (awarding 25% of $16.5 million settlement) (Harrod Decl. Ex. 6); *Milliron v. T-Mobile USA, Inc.*, No. 08-4149, 2009 WL 3345762 (D.N.J. Sept. 14, 2009) (awarding 33% of $13.5 million settlement); *In re Veritas Software Corp. Sec. Litig.*, No. 1:04-cv-00831-SLR, slip op. at 2 (D. Del. Aug. 5, 2008), ECF No. 143 (awarding 30% of $21.5 million settlement) (Harrod Decl. Ex. 7), *aff'd*, 396 F. App'x 815 (3d Cir. 2010); *Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455, 464-66 (E.D. Pa. 2008) (awarding 30% of $14 million settlement); *In re Genta Sec. Litig.,* No. 04-2123*,* 2008 WL 2229843, at *9-*11 (D.N.J. May 28, 2008) (awarding 25% of $18 million settlement); *In re Vicuron Pharms, Inc. Sec. Litig.,* 512 F. Supp. 2d 279, 288 (E.D. Pa. 2007) (awarding 25% of $12.75 million settlement); *In re Amerada Hess Corp. Sec. Litig.*, No. 2:02cv03359, slip op. at 1 (D.N.J. Apr. 16, 2007), ECF No. 107 (awarding 25% of $9 million settlement) (Harrod Decl. Ex. 8); *In re Computron Software,*

*Inc. Sec. Litig.*, 6 F. Supp. 2d 313, 322 (D.N.J. 1998) (awarding 25% of $15 million settlement).[3]

Awards of 25% or more are also common in cases with much larger settlement amounts. *See, e.g., In re PNC Fin. Servs. Group, Inc. Sec. Litig.*, 440 F. Supp. 2d 421, 455 n.6 (W.D. Pa. 2006) (awarding 28% of $36.6 million settlement); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 590-91 (E.D. Pa. 2005) (awarding 25% of $126.6 million settlement); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 103-31 (D.N.J. 2002) (awarding fee of 28% on settlement valued at $194 million); *In re Rite Aid Corp. Sec. Litig.* ("*Rite Aid II*"), 146 F. Supp. 2d 706, 734-36 (E.D. Pa. 2001) (awarding 25% of $193 million settlement); *In re Aetna Inc. Sec. Litig.*, No. CIV. A. MDL 1219, 2001 WL 20928, at *14 (E.D. Pa. Jan. 4, 2001) (awarding 30% of $82.5 million settlement net of expenses); *Ikon*, 194 F.R.D. at 192-197 (awarding 30% of $111 million settlement net of expenses).

[3] The requested 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.*, *City of Providence v. Aeropostale, Inc.,* No. 11 Civ. 7132 (CM)(GWG), 2014 WL 1883494, at *12-*13 (S.D.N.Y. May 9, 2014) (awarding 33% of $15 million settlement fund); *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) (Harrod Decl. Ex. 9); *City of St. Clair Shores Gen. Employees' Ret. Sys. v. Lender Processing Servs.*, Inc., No. 3:10-cv-01073-TJC-JBT, slip op. at 3-4 (M.D. Fla. Mar. 4, 2014), ECF No. 120 (awarding 25% of $13.1 million settlement) (Harrod Decl. Ex. 10); *Pension Trust Fund for Operating Engineers v. Assisted Living Concepts, Inc.*, No. 12-CV-884-JPS, slip op. at 2 (E.D. Wis. Dec. 19, 2013), ECF No. 81 (awarding 25% of $12 million settlement) (Harrod Decl. Ex. 11); *City of Pontiac Gen. Emps' Ret. Sys. v. Lockheed Martin Corp.*, No. 1:11-cv-05026-JSR, slip op. at 2 (S.D.N.Y. Aug. 5, 2013), ECF No. 149 (awarding 25% of $19.5 million settlement) (Harrod Decl. Ex. 12); *Klugmann v. Am. Capital Ltd.*, No. 8:09-CV-00005-PJM, slip op. at 9 (D. Md. June 12, 2012), ECF No. 87 (awarding 33.3% of $18 million settlement) (Harrod Decl. Ex. 13); *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); *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) (Harrod Decl. Ex. 14).

### B. The Reasonableness of the Requested Attorneys' Fees Is Confirmed by a Lodestar Cross-Check

The Third Circuit recommends that district courts use counsel's lodestar as a "cross-check" to determine whether the fee that would be awarded under the percentage approach is reasonable. *See Sullivan*, 667 F.3d at 330; *AT&T*, 455 F.3d at 164.[4] "The lodestar cross-check serves the purpose of alerting the trial judge that when the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method." *Rite Aid*, 396 F.3d at 306. "Conversely, where the ratio of the [percentage-of-recovery] to the lodestar is relatively low, the cross-check can confirm the reasonableness of the potential award under the [percentage] method." *In re Schering-Plough Corp. ENHANCE Sec. Litig.*, No. 08-397 (DMC) (JAD), 2013 WL 5505744, at *33 (D.N.J. Oct. 1, 2013).

Here, Plaintiffs' Counsel devoted an aggregate total of 13,169 hours on the prosecution and resolution of this Action. ¶ 112. Plaintiffs' Counsel's lodestar – which is derived by multiplying their hours spent on the litigation by each firm's current hourly rates for attorneys, paralegals and other professional support staff – is $6,637,773.00. *Id.* Accordingly, the requested 25% fee, which equates to $3,125,000 (plus interest on that amount at the same rate as earned by the Settlement Fund), represents a "negative" multiplier of approximately 0.47 on counsel's lodestar. In other words, the requested fee only 47% of the lodestar value of the time Plaintiffs' Counsel dedicated to the Action.

[4] Under the full "lodestar method," a court multiplies the number of hours each timekeeper spent on the case by the hourly rate, then adjusts that lodestar figure by applying a multiplier to reflect such factors as the risk and contingent nature of the litigation, the result obtained and the quality of the attorneys' work. The multiplier is intended to "account for the contingent nature or risk involved in a particular case and the quality" of the work. *Rite Aid*, 396 F.3d at 305-06.

This multiplier is well below the range of multipliers frequently awarded throughout the Third Circuit and is additional evidence that the requested attorneys' fee is reasonable. Indeed, lodestar multipliers as high as four are often approved in common fund cases. *See In re Prudential Co. Am. Sales Practice Litig.,* 148 F.3d 283, 341 (3d. Cir. 1998); *Schering-Plough*, 2013 WL 5505744, at *34 ("lodestar multipliers well above 1.3 and up to four are often used in common fund cases"); *see also Ikon*, 194 F.R.D. at 195 (approving a 2.7 multiplier, noting it was "well within the range of those awarded in similar cases").

Courts have noted that a percentage fee that falls below counsel's lodestar strongly supports the reasonableness of the award. *See Stagi v. Nat'l R.R. Passenger Corp*., 880 F. Supp. 2d 564, 572 (E.D. Pa. 2012) (where fee resulted in a 0.89 lodestar multiplier it was "well under the generally acceptable range and provides strong additional support for approving the attorneys' fee request"); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *26 (S.D.N.Y. Nov. 8, 2010) ("Lead Counsel's request for a percentage fee representing a significant discount from their lodestar provides additional support for the reasonableness of the fee request."); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 515 (S.D.N.Y. 2009) (finding "no real danger of overcompensation" given that the requested fee represented a discount to counsel's lodestar).

Accordingly, the 25% fee request here is reasonable under both the percentage-of-the-fund approach and the lodestar approach.

## IV. THE FACTORS CONSIDERED BY COURTS IN THE THIRD CIRCUIT CONFIRM THAT THE REQUESTED FEE IS FAIR AND REASONABLE

Under Third Circuit law, district courts have considerable discretion in setting an appropriate percentage-based fee award in traditional common fund cases. *See, e.g., Gunter,* 223 F.3d at 195 ("We give [a] great deal of deference to a district court's decision to set fees.").

Nonetheless, in exercising that broad discretion, the Third Circuit has noted that a district court should consider the following factors in determining a fee award:

> (1) the size of the fund created and the number of beneficiaries, (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel, (3) the skill and efficiency of the attorneys involved, (4) the complexity and duration of the litigation, (5) the risk of nonpayment, (6) the amount of time devoted to the case by plaintiffs' counsel, (7) the awards in similar cases, (8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government agencies conducting investigations, (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained, and (10) any innovative terms of settlement.

*Diet Drugs*, 582 F.3d at 541 (citing *Gunter,* 223 F.3d. at 195 n.1; *Prudential*, 148 F.3d at 336-40). These fee award factors "need not be applied in a formulaic way . . . and in certain cases, one factor may outweigh the rest." *Id*. at 545; *Schuler,* 2016 WL 3457218, at *9. Each of these factors supports the award of the reasonable 25% fee requested by Lead Counsel here.

### A. The Size of the Common Fund Created and the Number of Persons Benefited Support Approval of the Fee Request

Courts have consistently recognized that the result achieved is a major factor to be considered in making a fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"); *In re Viropharma Inc. Sec. Litig.,* No. 12-2714, 2016 WL 312108, at *16 (E.D. Pa. Jan. 25, 2016).

Here, Lead Counsel, on behalf of Lead Plaintiff, secured a Settlement that provides for a substantial and certain payment of $12,500,000. The Settlement also benefits a large number of investors. To date, the Claims Administrator has mailed the Notice to 35,978 potential Settlement Class Members and their nominees. *See* Fraga Decl. ¶ 7. Accordingly, while the deadline for submission of Claim Forms is not until June 20, 2018, a large number of Settlement Class Members can be expected to benefit from the Settlement Fund. *See In re Linerboard Antitrust Litig.*, MDL 1261, 2004 WL 1221350, at *5 (E.D. Pa. June 2, 2004) *amended*, MDL 1261, 2004 WL 1240775

(E.D. Pa. June 4, 2004) (size of benefitted population "is best estimated by the number of entities that were sent the notice describing the [Settlement].").

### B. The Absence of Objections by Settlement Class Members to the Settlement and Fee Request Supports Approval of the Fee Request

The Notice, which was sent to almost 36,000 potential Settlement Class Members and their nominees and posted on a publicly accessible website, provided a summary of the terms of the Settlement and stated that Lead Counsel would apply for an award of attorneys' fees in an amount not to exceed 25% of the Settlement Fund. *See* Notice, attached as Exhibit A to Fraga Decl., at ¶¶ 5, 71. The Notice also advised Settlement Class Members that they could object to Settlement or fee request and explained the procedure for doing so. *See id.* at ¶¶ 78-79. While the deadline set by the Court for Settlement Class Members to object has not yet passed, to date, no objections have been received.[5]

### C. The Skill and Efficiency of Plaintiffs' Counsel Support Approval of the Fee Request

It required considerable skill to achieve the proposed Settlement for the benefit of the Settlement Class. Lead Counsel's efforts in bringing this action to a successful conclusion are the best indicator of the experience and ability of the attorneys involved. *See AremisSoft,* 210 F.R.D. at 131 ("the single clearest factor reflecting the quality of class services to the class are the results obtained.") (quoting *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 149 (E.D. Pa. 2000)).

Lead Counsel's efforts, assisted by the other Plaintiffs' Counsel, have resulted in a favorable outcome for the benefit of the Settlement Class. The substantial and certain recovery

[5] The deadline for submitting objections is April 23, 2018. As provided in the Preliminary Approval Order, Lead Plaintiff and Lead Counsel will file reply papers no later than May 7, 2018, addressing any objections that may be received.

obtained is the direct result of the significant efforts of highly skilled attorneys who possess substantial experience in the prosecution of complex securities class actions.[6] Lead Counsel's success in identifying key confidential witnesses through its investigation, in overcoming Defendants' motions to dismiss in a case with very substantial risks and in pushing the litigation through substantial discovery created the circumstances in which Lead Plaintiff was able to obtain the $12.5 million Settlement. In addition, Lead Counsel's reputation as attorneys who will zealously carry a meritorious case through trial and appellate levels further enabled them to negotiate the very favorable recovery for the benefit of the Settlement Class.

The quality and vigor of opposing counsel is also relevant in evaluating the quality of the services rendered by Lead Counsel. *See, e.g., Ikon,* 194 F.R.D. at 194; *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) ("The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work."). Here, Defendants were represented ably by Mayer Brown LLP, a prominent firm with undeniable experience and skill. The ability of Lead Counsel to obtain a favorable outcome for the Settlement Class in the face of this formidable legal opposition further confirms the quality of Lead Counsel's representation.

### D. The Complexity and Duration of the Litigation Support Approval of the Fee Request

Securities litigation is regularly acknowledged to be particularly complex and expensive litigation, usually requiring expert testimony on several issues, including loss causation and damages. *See, e.g., Fogarazzo v. Lehman Bros., Inc.*, No. 03-5194(SAS), 2011 WL 671745, at *3 (S.D.N.Y. Feb. 23, 2011) ("securities actions are highly complex"); *In re Genta Secs. Litig.*, No.

[6] The experience of Lead Counsel and the other Plaintiffs' Counsel is set forth in their firm resumes, which are attached to the Harrod Declaration as Exhibit 3A-4, 3B-3, 3C-3 and 3D-3.

04-2123(JAG), 2008 WL 2229843, *3 (D.N.J. May 28, 2008) ("This [securities fraud] action involves complex legal and factual issues, and pursuing them would be costly and expensive."); *In re Datatec Sys. Sec. Litig.*, No. 04-525(GEB), 2007 WL 4225828, *3 (D.N.J. Nov. 28, 2007) ("[R]esolution of [accounting and damages issues] would likely require extensive and conceptually difficult expert economic analysis. . . . Trial on [scienter and loss causation] issues would be lengthy and costly to the parties.").

The $12,500,000 recovery is substantial in light of the complexity of this case and the significant risks and expenses that the Settlement Class would have faced by litigating to trial. At the time the Settlement was reached, Lead Counsel, assisted by other Plaintiffs' Counsel and on behalf of Lead Plaintiff, had (i) conducted a wide-ranging investigation concerning the allegedly fraudulent misrepresentations made by Defendants, including interviews with former Commvault employees and a thorough review of publicly available information; (ii) drafted and filed the initial complaint and two detailed amended complaints; (iii) researched and drafted extensive papers in opposition to Defendants' motions to dismiss the Complaint; (iv) moved for class certification; (v) undertook extensive fact discovery efforts, which included numerous meet and confers, obtaining and reviewing over 1.8 million pages of documents produced by Defendants and third parties; (vi) consulted with experts in accounting, loss causation and damages; and (vii) engaged in an extensive arm's-length mediation process, including multiple in-person mediation sessions and the preparation of detailed mediation statements that addressed both liability and damages. *See* ¶¶ 13-68.

Nonetheless, had this litigation continued, Lead Plaintiff, through Plaintiffs' Counsel, would have been required to conduct additional fact witness document and deposition discovery and substantial expert discovery (including preparation of expert reports and expert depositions).

After the close of discovery, it would be highly likely that Defendants would move for summary judgment, which would have to be briefed and argued, a pre-trial order would have to be prepared, proposed jury instructions would have to be submitted, and motions *in limine* would have to be filed and argued. Substantial time and expense would need to be expended in preparing the case for trial, and the trial itself would be expensive and uncertain.

Moreover, even if the jury returned a favorable verdict after trial, it is likely that any verdict would be the subject of numerous post-trial motions and a complex multi-year appellate process. Indeed, in complex securities cases, even a victory at the trial stage does not guarantee a successful outcome. *See Warner Commc'ns*, 618 F. Supp. at 747-48 ("Even a victory at trial is not a guarantee of ultimate success. If Lead Plaintiff were successful at trial and obtained a judgment for substantially more than the amount of the proposed settlement, Defendants would appeal such judgment. An appeal could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself."). Considering the magnitude, expense, and complexity of this securities case – especially when compared against the significant and certain recovery achieved by the Settlement – Lead Counsel's fee request is reasonable. Accordingly, this factor weighs in Lead Counsel's favor.

**E. The Risk of Non-Payment Supports Approval of the Fee Request**

Lead Counsel undertook this action on an entirely contingent fee basis, taking the risk that the litigation would yield no or very little recovery and leave them uncompensated for their time, as well as for their out-of-pocket expenses. That is clearly true here, where the first amended complaint was dismissed and Plaintiff's Counsel were only able to move the case past the pleading stage by re-pleading, and briefing a second motion to dismiss. As explained in detail in the Harrod Declaration, Lead Counsel faced numerous significant risks in this case that could have resulted in no recovery or a recovery smaller than the Settlement Amount. Courts across the country have

consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. *See, e.g., Warner Commc'ns*, 618 F. Supp. at 747-49 (citing cases). This is particularly true in securities litigation, such as this Action, because securities litigation has long been regarded as "notably difficult and notoriously uncertain." *See Trief v. Dun & Bradstreet Corp*., 840 F. Supp. 277, 281 (S.D.N.Y. 1993).

Here, Lead Counsel, with the assistance of Plaintiffs' Counsel, undertook this litigation on a fully contingent basis and with no guarantee of their time or expenses being reimbursed – all in the face of the substantial litigation risks set forth in the Harrod Declaration. Plaintiffs' Counsel have not been compensated for any time or expenses since the case began in 2014. Since that time, Plaintiffs' Counsel have expended 13,169 hours in the prosecution of this litigation with a resulting lodestar of $6,637,773.00 and incurred $581,526.52 in litigation expenses. "Courts routinely recognize that the risks created by undertaking an action on a contingency fee basis militates in favor of approval." *Schering-Plough ERISA*, 2012 WL 1964451, at *6.

Because the fee in this matter was entirely contingent, the only certainty was that there would be no fee without a successful result, and that such a result would be realized only after considerable and difficult effort. This strongly favors approval of the requested fee.

**F. The Significant Time Devoted to this Case by Plaintiffs' Counsel Supports Approval of the Fee Request**

As set forth above, since the inception of the case, Plaintiffs' Counsel have expended 13,169 hours and incurred $581,526.52 in expenses prosecuting this Action for the benefit of the Settlement Class. As more fully discussed above and in the Harrod Declaration, this Action, while settling before the conclusion of fact discovery, was vigorously litigated and defended. This includes, *inter alia,* the considerable time spent in the initial investigation of the case; working extensively with experts; seeking out and interviewing confidential witnesses/former employees

with key information that would be used to support the Complaint's allegations; researching complex issues of law; preparing and filing the two amended complaints; researching and briefing the issues in connection with Defendants' two motions to dismiss; preparing, undertaking and defending discovery; preparing Lead Plaintiff's motion for class certification, including an accompanying report from a market efficiency and damages expert; reviewing and analyzing over 1.8 million pages of documents produced by Defendants and certain non-parties, preparing for the mediation, drafting a detail mediation statement, and engaging in extensive settlement negotiations. At all times, Lead Counsel conducted its work with skill and efficiency, conserving resources and avoiding any duplication of efforts. The foregoing unquestionably represents a very significant commitment of time, personnel and out-of-pocket expenses by Lead Counsel, assisted by other Plaintiffs' Counsel, while taking on the substantial risk of recovering nothing for their efforts.

### G. The Requested Fee of 25% of the Settlement Fund is within the Range of Fees Typically Awarded in Actions of this Nature

As discussed above in Part III, the requested fee of 25% of the Settlement Fund is well within the range of fees awarded in comparable cases, when considered as a percentage of the fud or on a lodestar basis. Accordingly, this factor strongly supports approval of the requested fee.

### H. The Lack of Any Government Investigation and the Fact that All Benefits of the Settlement Are Attributable to the Efforts of Class Counsel Support Approval of the Fee Request

The Third Circuit has advised district courts to examine whether class counsel benefited from a governmental investigation or enforcement actions concerning the alleged wrongdoing, because this can indicate whether or not counsel should be given full credit for obtaining the value of the settlement fund for the class. *See Prudential*, 148 F.3d at 338. Here, there was no such government investigation or prosecution that produced helpful evidence or generated a fine,

penalty or other punishment and, accordingly, the entire value of the Settlement achieved is attributable to the efforts undertaken by Plaintiffs' Counsel in this Litigation. This fact increases the reasonableness of the requested fee award. *See, e.g., AT&T*, 455 F.3d at 173; *In re Cigna Corp. Sec. Litig.*, No. 02-8088, 2007 WL 2071898, at *6 (E.D. Pa. July 13, 2007); *Vicuron Pharms.*, 512 F. Supp. 2d at 287.

### I. The Percentage Fee That Would Have Been Negotiated Had the Case Been Subject to a Private Contingent Fee Arrangement Supports Approval of the Fee Request

A 25% fee is also consistent with typical attorneys' fees in non-class cases. *See Ocean Power*, 2016 WL 6778218, at *29. If this were an individual action, the customary contingent fee would likely range between 30 and 40 percent of the recovery. *See, e.g., id.*; *Ikon*, 194 F.R.D. at 194 ("[I]n private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery."); *Blum v. Stenson*, 465 U.S. 886, 903 (1984) (Brennan, J., concurring) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers."). Lead Counsel's requested fee of 25% of the Settlement Fund is fully consistent with these private standards.

* * *

Accordingly, the application of the Third Circuit's factors makes clear that Lead Counsel's requested fee of 25% of the Settlement Fund is fair and reasonable.[7]

[7] Another factor the Third Circuit asks district courts to consider is whether the settlement contains "any innovative terms." *Diet Drugs*, 582 F.3d at 541; *Prudential*, 148 F.3d at 340. This Settlement does not, because Lead Counsel believe that an all cash recovery is the best remedy for the injury suffered by the Settlement Class. In these circumstances, the lack of innovative terms "neither weighs in favor nor detracts from a decision to award attorneys' fees." *In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-2002, 2012 WL 5467530, at *6 (E.D. Pa. Nov. 9, 2012).

## V. LEAD COUNSEL'S APPLICATION FOR REASONABLY INCURRED LITIGATION EXPENSES SHOULD BE APPROVED

Lead Counsel also respectfully request that this Court reimburse $581,526.52 in litigation expenses that Plaintiffs' Counsel advanced in connection with this Action. All of these expenses, which are set forth in declarations submitted by Plaintiffs' Counsel, were reasonably necessary for the prosecution of this litigation. Counsel in a class action are entitled to recover expenses that were "'adequately documented and reasonable and appropriately incurred in the prosecution of the class action.'" *ViroPharma*, 2016 WL 312108, at *18; *accord In re Safety Components.*, 166 F. Supp. 2d 72, 108 (D.N.J. 2001).

The expenses for which Lead Counsel seek reimbursement are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the hour. These expenses include, among others, document management costs, expert fees, on-line research, court reporting and transcripts, photocopying, travel and postage expenses. The largest category of expenses was for document management expenses, including the costs incurred for the creation and maintenance of an electronic database that enabled Plaintiffs' Counsel to efficiently and effectively manage and review the more than 1.8 million pages of documents produced in the Action, as well as costs paid to the SEC for production of documents and to a third party for expenses incurred in responding to Lead Plaintiff's subpoena, which came to $280,817.79, or approximately 48% of the total litigation expenses incurred by Plaintiffs' Counsel. Expenses for the retention of Lead Plaintiff's experts in the fields of accounting; market efficiency, loss causation and damages totaled $174,458.90, or 30% of the total litigation expenses incurred by Plaintiffs' Counsel. Plaintiffs' Counsel also incurred expenses of $12,025.10 for mediation costs, and $64,157.52 for the combined costs of on-line legal and factual research, among others.

A complete breakdown by category of the expenses incurred by Plaintiffs' Counsel is set forth in Exhibit 4 to the Harrod Declaration. These expense items are billed separately by Plaintiffs' Counsel, and such charges are not duplicated in the firm's hourly billing rates.

The Notice informed potential Settlement Class Members that Lead Counsel would apply for reimbursement of litigation expenses in an amount not to exceed $700,000, which may include the reasonable costs and expenses of Lead Plaintiff directly related to its representation of the Settlement Class. *See* Fraga Decl. Ex. A at ¶¶ 5, 71. The total amount of expenses requested by Lead Counsel is $588,817.12, which includes $581,526.52 in reimbursement of litigation expenses incurred by Plaintiffs' Counsel and, as further described below, $7,290.60 in reimbursement for expenses incurred by Lead Plaintiff ATRS – an amount well below the amount listed in the Notice. To date, there has been no objection to the request for expenses.

## VI. LEAD PLAINTIFF SHOULD BE AWARDED ITS REASONABLE COSTS AND EXPENSES UNDER 15 U.S.C. §78U-4(A)(4)

In connection with the request for reimbursement of litigation expenses, Lead Counsel also seek reimbursement of the costs and expenses incurred directly by Lead Plaintiff ATRS directly related to its representation of the Settlement Class. 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). Here, ATRS seek an award of $7,290.60 for time dedicated by its employees in furthering and supervising the Action and for certain unreimbursed expenses they incurred in this matter. *See* Hopkins Decl. ¶¶ 11-12.

Employees of ATRS took an active role in supervising the litigation, including authorizing its filing, reviewing significant pleadings and briefs in the Action, regularly receiving updates from BLB&G regarding developments in the Action, providing document discovery and preparing for

and providing deposition testimony in support of the class motion, participating directly in settlement negotiations, and approving the Settlement. *See* Hopkins Decl. ¶¶ 4-6. The requested reimbursement amount is based on the number of hours that the ATRS employees committed to these activities, multiplied by a reasonable hourly rate for their time, which is determined according to their annual compensation. *See* Hopkins Decl. ¶ 12.

Numerous courts have approved reasonable awards to compensate lead plaintiffs for the time and effort they spent on behalf of a class. In *In re Marsh & McLennan Companies, Inc. Sec. Litig.*, No. 04-8144(CM), 2009 WL 5178546 (S.D.N.Y. Dec. 23, 2009), 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." *Id.* at *21. As the court noted, their efforts were "precisely the types of activities that support awarding reimbursement of expenses to class representatives." *Id.*; *see also In re Royal Dutch/Shell Transp. Sec. Litig.*, No. 04-374(JAP), 2008 WL 9447623, at *29 (D.N.J. Dec. 9, 2008) (awarding "$150,000 to Lead Plaintiffs [Pennsylvania State Employees' Retirement System and the Pennsylvania Public School Employees' Retirement System] to compensate them for their reasonable costs and expenses directly relating to their representation of the Class pursuant to 15 U.S.C. § 78u–4(a)(4)"); *In re Veritas Software Corp.. Sec. Litig.*, No. 1:04-cv-00831-SLR, slip op. at 1 (D. Del. Aug. 5, 2008) (ECF No. 144) (awarding each lead plaintiff $15,000 in PSLRA case); *Par Pharm.*, 2013 WL 3930091, at *11 (awarding $18,000 to lead plaintiff in PSLRA case based on time and effort devoted to the case); *W. Palm Beach Police Pension Fund v. DFC Glob. Corp.*, No. CV 13-6731, 2017 WL 4167440, at *10 (E.D. Pa. Sept. 20, 2017) (approving PSLRA award reimbursing ATRS for the cost of time spent by its employees

calculated in the same manner as here); *Schering-Plough Corp. ENHANCE*, 2013 WL 5505744, at *3, *37-*38 (same).

The award sought by Lead Plaintiff ATRS is reasonable and justified under the PSLRA based on the time its employees devoted to the Action on behalf of the Settlement Class, and should be granted.

## VII. CONCLUSION

For all the foregoing reasons, Lead Counsel respectfully requests that the Court award attorneys' fees in the amount of 25% of the Settlement Fund, or $3,125,000 plus interest at the same rate as earned by the Settlement Fund; $581,526.52 in reimbursement of the reasonable litigation expenses that Plaintiffs' Counsel incurred in connection with the prosecution of the Action; and $7,290.60 in reimbursement of Lead Plaintiff's costs and expenses.

Dated: April 9, 2018

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