SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

In re INFINITY Q DIVERSIFIED ALPHA FUND SECURITIES LITIGATION	:	Index No. 651295/2021
	:	CLASS ACTION
This Document Relates To:	:	Part 60: Justice Melissa A. Crane
The Consolidated Action.	:	
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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF RENEWED MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES TO PLAINTIFFS' COUNSEL

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Pursuant to the Court's December 21, 2023 Order (NYSCEF No. 438), Plaintiffs respectfully submit this memorandum of law in support of their renewed motion for an award of attorneys' fees and expenses.[1]

I. PRELIMINARY STATEMENT[2]

Plaintiffs litigated these complex securities actions for three years on an entirely contingent basis. Plaintiffs successfully navigated numerous complex legal and practical obstacles in three separate actions in two jurisdictions on behalf of two related – but distinct – classes of investors, as well as an exceptionally complicated set of ancillary proceedings. Along the way, Plaintiffs analyzed hundreds of thousands of documents produced in confirmatory discovery, engaged in motion practice in this Court and in the Eastern District of New York, participated in multiple hard-fought mediations, and obtained final approval of the settlement.

Through these efforts, Plaintiffs achieved an exceptional result for the Class: a $48 million settlement (including a $45 million guaranteed cash component), where the funds at issue were already in liquidation (severely limiting the available cash to fund a settlement), and against the backdrop of needing to fairly resolve these matters as quickly as possible to clear the way for the distribution of hundreds of millions of dollars in additional assets being held by the Funds. This result includes a contribution by Infinity Q's auditor of up to $22 million (a virtually unheard of accomplishment at this stage of litigation), a contribution of up to $18.65 million by the investment advisor defendants, and the ***entirety*** of the D&O insurance available to the TAP defendants.

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[1] The Court granted Plaintiffs' request to extend the time for filing this renewed application from January 8, 2024 to January 16, 2024.

[2] Capitalized terms not defined herein have the same meanings as in Section 1 of the Amended Stipulation of Settlement, dated September 7, 2022, filed as NYSCEF No. 177. For the Court's convenience, all docket citations are to entries in *In re Infinity Q Diversified Alpha Fund Sec. Litig.*, Index No. 651295/2021, which set of the filings relevant to deciding this motion.

This exceptional result could not have been achieved but for the skill, tenacity, and zealous advocacy of Plaintiffs' counsel, who took on the risk of complete non-payment and pushed hard for a favorable result in the best interests of Class members. Throughout the litigation, Plaintiffs' counsel litigated this complex matter as efficiently as possible to avoid duplication, including by, *inter alia*: (i) holding regular calls amongst Plaintiffs' Counsel to divide assignments and avoid overlap; (ii) assigning discrete tasks to various firms, including, for example, chief brief writing and pleading responsibilities; (iii) allocating document review amongst the plaintiffs' firms; and (iv) utilizing technology-assisted review to efficiently focus the document review.

Now that the Settlement has been approved, Plaintiffs make this renewed fee and expense application seeking a fee award of one-third of the guaranteed cash portion of the settlement, plus interest accrued thereon, and expenses. In support of this renewed application and at the Court's request, Plaintiffs have provided additional detail regarding the amount of work performed in this matter. *See* Joint Affidavit of Eric I. Niehaus, Jacob B. Lieberman, Philip Kim and Michael E. Criden, in Support of Motion for Award of Attorneys' Fees and Expenses to Plaintiffs' Counsel ("Plfs. Fee Aff."), Exs. A-D.

The Court stated that it plans to evaluate the renewed application under the factors set forth in *Gordon v. Verizon Commc'ns*, Inc., 148 A.D.3d 146, 165 (1st Dept. 2017). Plaintiffs' request is appropriate, reasonable and should be granted in full for the following reasons:

First, a fee of one-third of the recovery is routinely awarded in securities cases like this one. Consistent with federal practice, courts in the Commercial Division principally awards fees in class actions using a "percentage of the recovery" method, which properly incentivizes lawyers to achieve the best result possible for class members. In a dozen securities class actions, this Division has applied this method in awarding one-third of the recovery. This Court should follow

this well-established body of law and approve Plaintiffs' renewed motion because it seeks no more than the same customary fee awarded in similar cases.

Second, a so-called "lodestar crosscheck" supports approval of the fee. The requested fee would result in a 2.42 lodestar multiplier. This multiplier is on the low end of the accepted range of multipliers in class actions. *See e.g. In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) ("as noted by the Honorable Leonard B. Sand, [i]n recent years multipliers of between 3 and 4.5 have become common."). This reflects that Plaintiffs' Counsel seek a relatively modest enhancement on their fees due to the significant risk associated with litigating complex class actions on a contingency basis.

Third, all of the other factors set forth in *Gordon* favor approval of the renewed motion. The result for the Class was excellent. Plaintiffs were also represented by high-quality counsel—three national securities class action firms that rank among the most accomplished firms in the United States in securities law. By contrast, the 16 Defendants were represented by eight law firms, including some of the most prominent firms in the country. The contingent risk of the case was extremely high due to the complexity of the issues and the uncertainty of recovery. All these factors further support the amount of fees sought.

In sum, the Court should approve Plaintiffs' renewed application for an award of attorneys' fees and expenses.

II. FACTUAL AND PROCEDURAL BACKGROUND

1. Plaintiffs Prosecute This Highly Complex Action Across Multiple Jurisdictions

On February 24, 2021, two days after the SEC suspended the right of redemptions due to Infinity Q's inability to calculate the Diversified Fund's NAV, Plaintiff Andrea Hunter commenced an action by filing the Complaint for Violations of the Securities Act of 1933. *Hunter v. Infinity Q Diversified Alpha Fund, et al.*, Index No. 651295/2021 (N.Y. Sup. Ct.). This case

was consolidated on April 15, 2021, under the caption *In re Infinity Q Diversified Alpha Fund Securities Litigation*, Index No. 651295/2021 (N.Y. Sup. Ct.) (the "State Action").[3]

Separately, Plaintiff Liang Yang commenced the Federal Action by filing the Class Action Complaint for Violation of the Federal Securities Laws on February 26, 2021. *Yang v. Trust for Advised Portfolios, et al.*, Case No. 1:21-cv-01047-FB-MMH (E.D.N.Y). On February 17, 2022, plaintiffs Schiavi and Dattani and Dominus filed a putative class action complaint on behalf of purchasers in the Diversified Fund and the Volatility Fund. *Schiavi + Company LLC DBA Schiavi + Dattani, et al. v. Trust for Advised Portfolios, et al.*, Case No. 1:22-cv-00896 (E.D.N.Y.). On March 31, 2022, Schiavi and Dattani was appointed lead plaintiff in the federal cases and Robbins Geller Rudman & Dowd LLP ("Robbins Geller") and Boies Schiller Flexner LLP were appointed co-lead counsel of the newly consolidated and re-captioned Federal Action.

On August 12, 2022, Plaintiff Dominus filed a complaint in New York Supreme Court asserting common law claims on behalf of investors in the Volatility Fund. *Dominus Multimanager Fund Ltd. v. Infinity Q Capital Management LLC, et al.*, Index No. 652906/2022.

In addition to the State Action and the Federal Action, Plaintiffs' counsel had to maneuver a complex set of ancillary proceedings with implications for the prosecution of this matter and Plaintiffs' ability to achieve a favorable recovery, including: (i) a CFTC action; (ii) an SEC action; (iii) a DOJ action; (iv) a related derivative action, *Rowan v. Infinity Q Capital Management LLC*, et al., C.A. No. 2022-0176-MTZ (Del. Ch.); (v) a duplicate securities class action pending in Wisconsin state court, *Sherck v. U.S. Bancorp Fund Services, LLC*, Case No. 2022CV000846 (Wis. Cir. Ct.); (vi) the appointment of a special litigation committee by TAP; (vii) insurance litigation between the IQCM defendants and their carriers; (viii) the ongoing liquidation of the

[3] A full procedural history of this case can be found in the December 23, 2022 Affirmation of Phillip Kim ¶¶61-69 (NYSCEF No. 51).

funds; and (ix) the appointment of a special master to oversee the dissolution of the Diversified Fund.

2. The Extensive Work Done Before the Settlement

Starting in late February 2021, Plaintiffs' Counsel independently began investigating the facts and circumstances of this case. Doing so required robust factual investigation with respect to the collapse of the Fund. Plf. Fee Aff. §III.F. These investigations led to the filing of two detailed complaints, one in the State Action and the other in the Federal Action.

Between June 1, 2021, and June 30, 2021, defendants in the State Action filed seven motions to dismiss. Plaintiffs in the State Action opposed those motions on July 30, 2021, making sure to divvy up assignments amongst plaintiffs' firms to avoid duplication. NYSCEF Nos. 40-105. Those seven different briefs were the product of a collaborative division of labor across the three firms representing plaintiffs in the State Action. Plf. Fee Aff. §III.F. This process helped ensure that Plaintiffs efficiently and effectively responded to the 900 pages of briefing and exhibits filed by Defendants.

At around this time, Defendants in the Federal Action filed a pre-motion to dismiss letter brief in the Federal Action, which counsel in the Federal Action opposed. *Id.*

3. Plaintiffs Participate in Arm's-Length Mediation

While the motions to dismiss were pending in the State Action, the parties in both the State Action and the Federal Action agreed to participate in mediation. *See* NYSCEF No. 128. The parties exchanged detailed mediation statements in advance of the first mediation, highlighting the factual and legal issues in dispute. On December 17, 2021, the parties attended a virtual mediation session with the highly experienced mediator, Robert A. Meyer, Esq., of JAMS. At the end of the full-day session, the parties did not reach a settlement; however, substantial progress was made.

Importantly, because the Funds were winding down, consuming the Defendants' insurance proceeds, and holding hundreds of millions of dollars of the Funds' remaining assets as reserves until the Actions could be resolved, Plaintiffs' counsel realized that an early settlement on favorable terms was likely in the best interests of the Class. Such a settlement (if it could be achieved) could potentially maximize the compensation for the victims of this fraud by (i) ensuring the dwindling insurance proceeds were used to compensate investors rather than paying litigation costs; and (ii) facilitating the return of the money being held by the Funds as litigation reserves to investors. At the same time, though, several major issues stood in the way of a global settlement. For instance, different parties had very different defenses to Plaintiffs' allegations and overlapping insurance coverage among Defendants limited certain Defendants' ability to preserve their insurance for defense costs and settlement. In addition, the complicated indemnification agreements among the Defendants made anything but a global resolution of this matter all but untenable because it would require the Funds to still retain a significant portion, if not all, of their remaining respective reserves, rather than returning that money to investors. The existence of numerous ancillary proceedings (detailed above) also complicated a global resolution of the matter. Finally, there were very few sources of readily available cash to fund a settlement because the Funds were in liquidation, TAP had limited insurance coverage, and the IQCM defendants were embroiled in an insurance dispute with their carriers, such that the carriers were denying coverage for the claims at issue.

The parties attended additional mediation sessions with Mr. Meyer on December 28, 2021, January 17, 2022, and March 17, 2022. The parties continued to communicate through Mr. Meyer and otherwise to attempt to reach a resolution of the case. The parties made further progress at the additional mediation sessions and through these negotiations, but did not reach a settlement given the complex legal, factual and practical issues discussed above.

4. Plaintiffs Press Forward With Both Litigation and Settlement Negotiations

On March 25, 2022, the parties wrote to the Court an update on the settlement negotiations and informed Judge Borrok that Plaintiffs intended to file a Consolidated Amended Complaint in the State Action, which would moot the then-pending motions to dismiss.[4] State Plaintiffs filed their Consolidated Amended Complaint on May 2, 2022. NYSCEF Nos. 138, 139.

State Plaintiffs' Consolidated Amended Complaint made three major additions to the Consolidated Complaint, which reflected key factual developments since the original Consolidated Complaint was filed, as well as facts Plaintiffs developed through their own, ongoing investigation. First, the amendment added allegations related to the enforcement actions, which were only filed against Defendant Velissaris after State Plaintiffs had filed their Consolidated Complaint. Not only did the enforcement actions corroborate State Plaintiffs' allegations and strengthen their theory of the case, but they contained a wide range of additional facts that Plaintiffs could not previously have known, as Plaintiffs did not have access to the documents and witnesses that the SEC, DOJ, and CFTC had used to build their cases. Plfs. Fee Aff. §II.D. Second, Plaintiffs' new allegations focused on a key document known as the Investment Advisory Agreement (or "IAA") that had been entered into between the Trust and IQCM on behalf of the Diversified Fund, and in which IQCM agreed to assume liability for statements in the Fund's Prospectuses. *See id.* Plaintiffs believe this was a significant factual development (uncovered entirely by Plaintiffs' own investigation) because it bolstered the strict-liability, Section 11 claims against IQCM and its related parties. Third, State Plaintiffs' new complaint added factual allegations establishing that the auditor, EisnerAmper, ignored numerous red flags and failed to audit the Diversified Fund's financial statements with the appropriate professional care. *Id.*

[4] This was the State Action Plaintiffs' Third Complaint.

On June 6, 2022, the Federal Plaintiffs filed the Consolidated Complaint, which included U.S. Bancorp as a defendant and the claims of Volatility Fund investors, as well as the new allegations from the earlier complaint filed by plaintiffs Schiavi and Dattani and Dominus and Plaintiffs' Counsel's ongoing investigation.

On August 15, 2022, the State Plaintiffs filed a motion for leave to file a second Consolidated Amended Complaint, for the purpose of including Federal Lead Plaintiff Schiavi and Dattani as a class representative for investors in the Diversified Fund. *See* NYSCEF Nos. 155, 156, 157.[5]

At the same time Plaintiffs were working diligently to build their case, the parties continued mediation, including several more bilateral mediation sessions, all while Mr. Meyer was engaged in extensive "shuttle diplomacy" between Plaintiffs and various Defendants.

5. Plaintiffs First Reach a Partial Settlement, and Then a Global Settlement

After months of negotiation, on August 17, 2022, Plaintiffs filed for preliminary approval of a settlement with certain defendants. *See* NYSCEF Nos. 158, 159, 160. To do so the parties had to negotiate formal settlement documentation, including the Stipulation, Class and Summary Notices, Proof of Claim Form, and proposed Orders, which were primarily drafted by Plaintiffs' Counsel. *See id.* After further work involving the mediator, Plaintiffs were able to reach a settlement with the remaining holdout defendants. *See* NYSCEF No. 161. On September 7, 2022, Plaintiffs filed for preliminary approval of the proposed global Settlement. *See* NYSCEF Nos. 175, 176, 177. Again, the parties filed formal settlement documentation, which was primarily drafted by Plaintiffs' Counsel.

[5] The Federal Plaintiffs also prepared a second Consolidated Complaint that included even more detailed allegations for certain defendants, which was developed through their own, ongoing expansive investigation – but this complaint was never filed due to the fact that Plaintiffs were ultimately able to reach a settlement with the remaining holdout defendants.

6. Plaintiffs Secure Preliminary Approval and Provide Notice of the Settlement

On October 17, 2022, following the fairness hearing, the Court preliminarily approved the Settlement and ordered that Notice be disseminated to potential Class Members ahead of the final approval hearing. *See* NYSCEF No. 439 at 7. In accordance with the Preliminary Approval Order, on November 7, 2022, Plaintiffs' Counsel, through the Claims Administrator, implemented a comprehensive Court-approved notice program whereby notice was given to the members of the Class by mail and by publication. *See* NYSCEF No. 218, ¶¶4-12. **Error! Hyperlink reference not valid.**

7. Throughout the Litigation, Plaintiffs' Counsel Employed Numerous Safeguards to Limit Duplication of Efforts and to Maximize Efficiency

Throughout the litigation, Plaintiffs' Counsel worked diligently and harmoniously to ensure that there was no duplication of effort and to maximize efficiency, notwithstanding the complex nature of the various proceedings and claims at issue. From the beginning, State and Federal Plaintiffs' counsel coordinated efforts, holding regular calls and engaging in correspondence to minimize overlap. Specific tasks were assigned to specific firms, such as splitting up briefing on defendants' seven motions to dismiss and coordinating Plaintiffs' ongoing investigation efforts. Firms were also given specific areas of focus, such as Federal Plaintiffs' counsel's focus on federal proceedings and, later, the state court hedge fund proceedings. Firm representatives were assigned to participate in various collective tasks, such as attending mediations and participating in phone calls with Defendants. Likewise, document discovery was divvyed up amongst the firms and software was employed to maximize review efficiency.

8. Plaintiffs Receive and Review Significant Amounts of Document Discovery

In connection with the proposed Settlement, Plaintiffs received and reviewed the following voluminous discovery from Defendants:

a. 159,281 documents from TAP, consisting of all non-privileged documents and information TAP had produced in response to a subpoena from the Regulators related in any way to the facts and circumstances alleged in the Actions;

b. 149,495 documents from IQCM and BFLP, consisting of all non-privileged documents and information that IQCM and/or BFLP had produced in response to a subpoena from the Regulators related in any way to the Regulators' investigations of the facts and circumstances alleged in the Actions;

c. 19,700 documents from U.S. Bancorp, consisting of all non-privileged documents and information U.S. Bancorp had produced in response to a subpoena from the Regulators related in any way to the Regulators' investigations of the facts and circumstances alleged in the Actions; and

d. 1,410 documents from EisnerAmper, consisting of its non-privileged audit workpapers relating to its audits of the financial statements of the Funds.

Plaintiffs worked together on all aspects of this review, ensuring that there was no duplication of efforts. In total, Plaintiffs' Counsel spent nearly 3,020 hours, approximately 35% of the total time worked in this litigation on reviewing and analyzing these 329,886 documents. This work was necessary to ensure the Settlement was a good deal for the Class.

9. Plaintiffs Secure Final Approval, and Provide the Court with Additional Information Concerning Their Application for Attorneys' Fees

The response from the Court-approved notice program was overwhelmingly positive. Over 46,700 copies of the Notice were sent to potential class members, and as of June 7, 2023, the Claims Administrator had received over 52,000 claims seeking to participate in the Settlement. *See* NYSCEF Doc. 432 at 2. Against this, only two objections were filed, one 57-page by a group of eight objectors represented by attorney Aaron T. Morris (the "Morris objectors"),[6] and one by

[6] As the Court noted in its Order granting final approval of the Settlement, the eight Morris objectors represent only about 0.48% of the 135 million shares of the Diversified Fund outstanding on February 18, 2021. *See* NYSCEF No. 439 at 15 n.3. On the subject of Aaron Morris, Plaintiffs filed two other briefs in response to motions that he made on behalf of objector Charles Sherck, first in response to his motion to intervene and then in opposition to his prolix, 50-page objection to the Settlement. NYSCEF Doc. Nos. 170, 270. Morris's involvement in these proceedings has unnecessarily and extensively prolonged them, causing Plaintiffs' Counsel to devote significant time to responding to his meritless objections.

Ilaan Maazel – both of which were primarily focused on merits-issues related to the Settlement that were ultimately rejected by the Court. Plaintiffs addressed the two objections in their 39-page reply brief in support of final approval of the settlement. NYSCEF No. 432. Following a fairness hearing on June 14, 2023, this Court granted final approval to the Settlement on December 21, 2023. NYSCEF No. 439. The Court invited Plaintiffs to submit additional explanation concerning their request for attorneys' fees, costs and expenses by January 16, 2024. *See* NYSCEF No. 439 at 18-19.

III. ARGUMENT

Plaintiff's Counsel respectfully requests an award of attorneys' fees of one-third of the Settlement's non-contingent cash payment, or $15 million, plus interest accrued thereon, and an award of expenses incurred in the amount $130,686.39. Such a request can be evaluated pursuant to the factors set forth in *Gordon*, which are: (1) the customary fee charged for similar services; (2) the time and labor required; (3) the difficulty of the questions involved; (4) the skill required to handle the issues presented; (5) the experience, ability and reputation of counsel; (6) the proposed amount of fees; (7) the benefit resulting to the putative class from the services; (8) the contingency or certainty of compensation; (9) and the responsibility involved. *Id.* 148 A.D.3d at 165; *see also* NYSCEF No. 439 at 18. For the reasons detailed below, Plaintiffs' Counsel respectfully submits that the full amount of the fee and expenses should be granted.

A. The Reasonable and Customary Fee Award Is One-Third

Plaintiffs' fee application follows a well-trodden path. Courts in this Division apply a "percentage of the recovery" method when evaluating fee requests in class actions and customarily award one-third of the recovery as attorneys' fees, including in at least a dozen securities class actions, like those cited below. The Court should follow this well-established body of law, which appropriately incentives plaintiffs' counsel to achieve the best possible result for the Class.

"Where a settlement establishes a common fund, the percentage method is often preferable because the lodestar method has the potential to lead to inefficiency and resistance to expeditious settlement because it gives attorneys an incentive to raise their fees by billing more hours." *Fernandez v. Hospitality*, 2015 N.Y. Misc. Lexis 2193, *12 (N.Y. Sup. June 20, 2015) (quoting *Ryan v. Servs. Am.*, 2013 N.Y. Misc LEXIS 932, **11-12 (N.Y. Sup. March 7, 2013). "The percentage of the recovery approach determines the reasonableness of the fee." *Id.* (quoting *Peck v. AT&T Corp.*, No. 601587/2000, 2002 N.Y. Misc. LEXIS 2026, at *26 (Sup. Ct. N.Y. County July 26, 2002)). The use of the percentage of the recovery method mirrors "the trend in [the Second] Circuit [] toward the percentage method" and "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of the litigation." *Id.* (collecting cases).

New York courts have further recognized that an award of one-third of the recovery is "consistent with the norms of class litigation in this circuit." *Id.* at *12-13 (collecting numerous decisions for the proposition that a fee award of one-third of the recovery is "well within the range of reasonableness"). Indeed, Plaintiffs are aware of twelve recent securities class action settlements in New York Supreme Court, dating back to January 1, 2021, where the court awarded attorneys' fees of one-third of the gross settlement amount. *See In re Luckin Coffee Inc. Sec. Litig.*, Index No. 651939/2020, NYSCEF No. 229 (Sup. Ct. N.Y. Cnty. Apr. 28, 2023) (Borrok, J.) (order approving one-third attorney fee award); *France v. Jiayin Grp. Inc.*, Index No. 654398/2020, NYSCEF No. 127 (Sup. Ct. N.Y. Cnty. Dec. 2, 2022) (Borrok, J.) (same); *City of Pittsburgh Comprehensive Mun. Pension Tr. Fund v. Benefitfocus, Inc.*, Index No. 651425/2021, NYSCEF No. 228 (Sup. Ct. N.Y. Cnty. Dec. 1, 2022) (Borrok, J.) (same); *Erie Cnty. Emps.' Ret. Sys. v. NN, Inc.*, Index No. 656462/2019, NYSCEF No. 138 (Sup. Ct. N.Y. Cnty. Dec. 1, 2022) (Borrok, J.) (same); *In re DouYu Int'l Holdings Ltd. Sec. Litig.*, Index No. 651703/2020, NYSCEF No. 217

(Sup. Ct. N.Y. Cnty. Dec. 1, 2022) (Borrok, J.) (same); *Chester Cnty. Emps. Ret. Fund v. Alnylam Pharms., Inc.*, 2022 WL 1117878 (N.Y. Sup. Ct. Apr. 12, 2022) (Reed, J.) (same); *Kirkland v. WideOpenWest, Inc.*, Index No. 653248/2018, NYSCEF No. 150 (Sup. Ct. N.Y. Cnty. Mar. 1, 2022) (Masley, J.) (same); *In re Altice USA, Inc. Sec. Litig.*, Index No. 711788/2018, NYSCEF No. 161 (Sup. Ct. Queens Cnty. Feb. 28, 2022) (Risi, J.) (same); *In re SciPlay Corp. Sec. Litig.*, Index No. 655984/2019, NYSCEF No. 152 (Sup. Ct. N.Y. Cnty. May 28, 2021) (Masley, J.) (same); *In re Saks Inc. S'holder Litig.*, Index No. 652724/2013, NYSCEF No. 279 (Sup. Ct. N.Y. Cnty. May 28, 2021) (Borrok, J.) (same); *Convery v. Jumia Techs. AG*, Index No. 656021/2019, NYSCEF No. 93 (Sup. Ct. N.Y. Cnty. Apr. 13, 2021) (Masley, J.) (same); *Plutte v. Sea Limited, et al.*, Index No. 655436/2018, NYSCEF No. 120 (Sup. Ct. N.Y. Cnty. Apr. 13, 2021) (Schecter, J.) (same). Notably, the present case involved greater risk and achieved a numerically superior result as compared to these cases and securities class actions in general.[7]

B. The Time And Labor Required

The time and labor required to prosecute this complex matter against 16 defendants, in three cases, across two forums, and on behalf of two different classes of investors, while navigating the numerous ancillary proceedings detailed above, supports awarding the full amount of fees and expenses requested. While fee awards in a securities case are based on percentage of the recovery analysis, courts sometime perform a lodestar "cross check" to assess the reasonableness of the fee yielded by the percentage of the recovery analysis. *See Fernandez*, 2015 N.Y. Misc. Lexis 2193 at *14 (applying a lodestar "cross check").

[7] The Morris objectors included a chart in their objection that misleadingly suggested that some of the fees in these cases were calculated based on lodestar. See Morris Objection at page 47. That is incorrect. These fee awards were based on the percentage of the recovery, not lodestar.

In performing the "cross check" courts recognize that a percentage of the recovery method is the principal method for awarding fees and that a fee is generally reasonable if it is no more than 4.5 times the lodestar. *Nasdaq,* 187 F.R.D. at 489 (holding that lodestar multipliers of 3 to 4.5 are reasonable and common); *In re Interpublic Sec. Litig.*, 2004 WL 2397190, at *12 (S.D.N.Y. Oct. 26, 2004) ("In recent years multipliers of between 3 and 4.5 have been common in federal securities cases."); *see also Fernandez,* 2015 N.Y. Misc. Lexis 2193 at *14 ("In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts"); *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 353 (S.D.N.Y. 2014) (awarding fee representing a multiplier of 5.2, which was "large, but not unreasonable."). These multipliers reflect that the lodestar cross check is only that: a cross check that assesses reasonableness. *Fernandez*, 2015 N.Y. Misc. Lexis 2193 at *12. It bears emphasis that the lodestar is a "mere cross-check, the hours documented by counsel need not be exhaustively scrutinized" when the court has "familiarity with the case." *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000).

Plaintiffs' Counsel's fee request passes the lodestar cross check. In total, Plaintiffs' Counsel have spent over 8,696.75 hours in prosecuting the Actions, producing a total lodestar amount of $6,189,188.75 when multiplied by Plaintiffs' Counsel's 2022 billing rates. *See* Plfs. Fee Aff. §I. The amount of attorneys' fees requested by Plaintiffs' Counsel herein, $15 million, represents a modest multiplier of 2.42 to Plaintiffs' Counsel's aggregate lodestar, well below the 4.5 multiplier that courts have recognized is reasonable.

Plaintiffs have provided extensive evidence detailing the work performed in this matter. *See* Plfs. Fee Aff. §II.A-G. A plaintiff need not submit "contemporaneously-maintained time records" in order to support a fee request. *Klein v. Robert's American Gourmet Food, Inc*. 28 A.D. 3d 63, 75 (N.Y. App. 2006). Rather, a plaintiff should submit information explaining "the way in which the time was spent (discovery, oral argument, negotiation, etc.)," and indicating the

experience and standing of lawyers who worked on the case. *Id.* Here, Plaintiffs' documentation exceeds the level of detail required for approval. Plaintiffs have submitted an extensive joint declaration that describes in detail the work done in this matter at each stage of the case. *See* Plfs. Fee Aff. §III.F. Plaintiffs have submitted supplemental time and hour details that are far greater than the detail ordinarily submitted in this Division and that are modeled on the sample forms required by the rigorous standards of the Northern District of California, which is one of the only jurisdictions to require such detail in connection with the approval of fees in securities class actions. The supplemental charts break down the work performed into specific categories and list the lawyer who performed the work. *See* Plfs. Fee Aff. Exs. A-D. Finally, Plaintiffs have provided the Court with firm resumes that include information regarding the "experience and standing" of the partners and associates who worked on this matter. *See* NYSCEF Nos. 228, 232, 236, 240.

In its order approving settlement, the Court observed that Plaintiffs' lodestar seemed high given the procedural stage of this case. However, Plaintiffs believe that the lodestar is reasonable and reflects the unusually sprawling nature of the case, which involved multiple groups of defendants presenting different factual and legal issues and two sets of overlapping but distinct claims that were ultimately consolidated in this Court for settlement. Moreover, Plaintiffs reviewed over 300,000 documents in connection with the settlement and so performed a large portion of the work that normally occurs in discovery. *See supra* §II.8. Indeed, as the Court held in approving the Settlement, "Counsel clearly understood this cases' strengths and weaknesses throughout litigation as they reviewed Infinity Q press releases, SEC filings, analyst and media reports, regulatory filings, related proceedings and other publicly disclosed information regarding defendants and their actions. Lead counsel reached its conclusion after extensive work evaluating the case and its merits. This included conducting a robust investigation, reviewing thousands of documents, consulting with experts on negative causation and accounting, participating in

extensive mediations, and conferring with defendants' counsel, the objectors, other relevant nonparties, major class members and regulatory agencies." Settlement Order at 12-13.[8]

And, while Plaintiffs' Counsel believe that they largely controlled for duplication of effort, it is important to note that even if Plaintiffs' lodestar were substantially reduced, the requested fee would still be reasonable under the lodestar cross-check. For example, even if the lodestar were arbitrarily reduced by forty percent, the lodestar multiplier would be less than 4.5. Plaintiffs further note that the lodestar submitted did not reflect any time spent dealing with the Morris objection or obtaining final approval of the Settlement, or administering the Settlement now that it has been approved. *See* Plfs. Fee Aff. §III.F. These facts further support the fee request. *Fernandez v. Hospitality*, 2015 N.Y. Misc. Lexis 2193, *16 ("The fact that Class Counsel's fee award will not only compensate them for time and effort already expended, but for time that they will be required to spend administering the settlement going forward also supports their fee request.").

C. The Difficulty of the Questions and Risks and Responsibilities Involved

Plaintiffs' Counsel faced all the "multi-faceted and complex legal questions endemic" to cases based on alleged violations of federal securities law. *Ressler v. Jacobson*, 149 F.R.D. 651, 654 (M.D. Fla. 1992); *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1334 (S.D. Fla. 2001) (same). Moreover, "securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA." *In re Sterling Fin. Corp. Sec. Class Action*, No. CIV.A. 07-2171, 2009 WL 2914363, at *4 (E.D. Pa. Sept. 10, 2009). The Actions were no exception. As this Court held, "the complexity and risks plaintiffs faced in this case were much greater than most."

[8] For example, as noted in the Morris Objection, the lodestar in the Douyu securities litigation was $5,896,888, comparable to the $6.1 million here. Morris Objection at 47. Moreover, the Douyu case was a more limited litigation arising out of a company's initial public offering. As discussed above, this matter was significantly larger and more complicated than the typical IPO case.

Settlement Order at 14. For example, the Actions involved complex factual issues, such as valuation of swaps when calculating fund NAVs, and alleged multiple claims against 16 defendants, in three different actions, across two jurisdictions, and on behalf of two distinct classes of investors. Plaintiffs also had to navigate potential Defendant cross-claims and indemnification, the impact of numerous ancillary proceedings (including an insurance dispute), a special litigation committee, dwindling insurance, retained Fund assets, an objector's counsel bent on derailing the Settlement, and the fact that the Funds were in liquidation proceedings.

D. The Skill Required and the Experience, Ability, and Reputation of Counsel

Another factor relevant to determining the fee award is the skill required to litigate the case and the quality of work performed. *See Gustafson v. Valley Ins. Co.*, No. CV 01-1575-BR, 2004 WL 2260605, at *2 (D. Or. Oct. 6, 2004). "The difficulty of securities litigation generally – particularly the challenges presented by the PSLRA's pleading requirements – requires skilled counsel familiar with the relevant statutes and case law." *In re American Apparel, Inc. S'holder Litig.*, No. CV 10-06352 MMM (JCGx), 2014 WL 10212865, at *22 (C.D. Cal. 2014); *see also In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008); ("The prosecution and management of a complex national class action requires unique legal skills and abilities"). Plaintiffs' Counsel are experienced and skilled practitioners in the securities litigation field, with a long and successful track record of prosecuting securities class actions, having developed a reputation as experienced and competent counsel in complex class action cases. Plaintiffs' Counsel respectfully submit that the quality of their efforts in this litigation, together with their substantial experience in securities class actions and commitment to this litigation, provided Plaintiffs' Counsel with the necessary leverage to negotiate a very favorable result for the Class in light of the serious risks of continued litigation.

"[T]he quality of opposing counsel is [also] important in evaluating the quality of Plaintiff's counsel's work." *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *20 (C.D. Cal. June 10, 2005). Defendants are represented by lawyers from well-regarded law firms in the securities bar, including, among others: Morgan, Lewis & Bockius LLP, Milbank Tweed LLP, Faegre Drinker Biddle & Reath LLP, Vedder Price P.C., Duane Morris LLP, and Davis Wright Tremaine LLP, who presented a very skilled defense and spared no effort or expense in representing their clients. Notwithstanding this formidable opposition, Plaintiffs' Counsel's ability to present a strong case and their willingness to vigorously prosecute the Actions through trial and the inevitable appeals enabled them to achieve the very favorable result for the Class.

E. The Proposed Amount of Fees

The proposed amount of fees here is reasonable and well within the norm for similar settlements. Not only did the courts in all twelve securities class actions in New York State Supreme Court from the past several years, cited above, award a one-third fee, but this case presented above-average risks and uncertainties that rendered the result achieved all the more remarkable. *See* §3.A.

F. The Benefits Resulting to the Putative Class from the Settlement

The $48 million Settlement, which provides $45 million in guaranteed cash to the Class, is an exceptional result. It represents at least 4.6% of the maximum recoverable damages based on an aggressive loss causation and damages analysis including strict liability and securities fraud claims for both Funds, and approximately 10% of maximum recoverable damages based on the analysis of just the strict liability mutual fund claims. This range of recovery is several times

higher than the 1.8% median percentage recovery in securities class action settlements in 2021 and 2022 according to NERA.[9]

The Settlement Fund of up to $48 million is also an exceptional recovery in light of the reality that both the Diversified Fund and the Volatility Fund are currently in liquidation, which significantly limits the available assets that could be used to fund any settlement. The Settlement is also significantly more than the amount recovered in many other comparable cases involving investment fund collapses. *See, e.g.*, *Emerson, et al. v. Mutual Fund Series Trust, et al.*, No. 2:17-cv-02565-SJFSIL (E.D.N.Y) ($3.325 million); *Sokolow v. LJM Funds Mgmt., Ltd., et al.*, No. 1:18-cv-01039 (N.D. Ill.) ($12.85 million); *In re Third Avenue Mgmt. LLC Sec. Litig.*, No. 1:16-cv-758-PKC (S.D.N.Y.) ($14.25 million). Finally, while Plaintiffs are not seeking attorneys' fees based on the release of the over $1 billion that the Funds were holding in reserve pending the resolution of this lawsuit, removing the major impediment to the distribution of these reserves is part of the excellent result the Settlement achieves.

G. Contingency or Certainty of Compensation

In addition, "[t]he Second Circuit has recognized that risk is inherently associated with a case undertaken on a contingent fee basis." *Lea v. Tal Educ. Grp.*, No. 18-CV-5480 (KHP), 2021 WL 5578665, at *12 (S.D.N.Y. Nov. 30, 2021). Here, Plaintiffs' Counsel took this case on 100% contingency and zealously prosecuted it for three years without payment. As discussed in Section 3.A, the requested fee is in line with the substantial risks incurred, particularly considering that contingency work is entitled to greater compensation than non-contingency work; indeed, "Plaintiffs may find it difficult to obtain representation if attorneys know their reward for accepting

[9] *See* J. McIntosh & S. Starykh, Recent Trends in Securities Class Action Litigation: 2021 Full-Year Review (NERA Economic Consulting Jan. 25, 2022), 24 at Figure 22; J. McIntosh & S. Starykh, Recent Trends in Securities Class Action Litigation: 2022 Full-Year Review (NERA Economic Consulting Jan. 24, 2023), 18 at Figure 19.

a contingency case is merely payment at the same rate they could obtain risk-free for hourly work, while their downside is no payment whatsoever." *In re Abrams & Abrams, P.A.*, 605 F.3d 238, 246 (4th Cir. 2010); *Adams v. Rose*, No. 03-7011, 2003 WL 21982207 (2d Cir. Aug. 20, 2003) ("[C]ontingent fee risk is the single most important factor in awarding a multiplier[.]"); *see also City of Providence v. Aeropostale, Inc.*, No. 11 CIV. 7132 CM GWG, 2014 WL 1883494, at *14 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015) ("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.").

IV. Plaintiffs' Counsel's Expenses Were Reasonably Incurred and Necessary

Plaintiffs' Counsel also respectfully request an award of $130,686.39 in expenses incurred while prosecuting the Actions. Plaintiffs' Counsel have submitted affirmations regarding these expenses, which include, among other things, the costs of hiring investigators and a damages consultant and mediating the Class's claims – all of which were critical to Plaintiffs' success in achieving the Settlement. Plfs. Fee Aff. §IV. "It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class." *In re Flag Telecom Holdings*, 2010 U.S. Dist. LEXIS 119702, at *86 (S.D.N.Y. Nov. 8, 2010). Accordingly, Plaintiffs' Counsel respectfully request $130,686.39 in expenses, plus interest earned on such amount at the same rate as that earned by the Settlement Fund.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant in full the requested fees and expenses.

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PRINTING SPECIFICATIONS STATEMENT

1. Pursuant to 22 N.Y.C.R.R. §202.70(g), Rule 17, the undersigned counsel certifies that the foregoing affidavit was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used as follows:

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