

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KEVIN L. DOUGHERTY, Individually)	
and On Behalf of All Others Similarly)	
Situated,)	Civ. No. 2:16-cv-10089-AJT-RSW
)	
Plaintiff,)	<u>CLASS ACTION</u>
)	
v.)	
)	
ESPERION THERAPEUTICS, INC., et)	
al.)	
Defendants)	
)	
)	
)	
)	
)	

**CLASS COUNSELS' AND CLASS REPRESENTATIVES' MOTION FOR
(1) AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND (2) CLASS
REPRESENTATIVES' REIMBURSEMENT OF COSTS AND EXPENSES
PURSUANT TO 15 U.S.C. § 78u-4(a)(4)**

Class Counsel and Class Representatives Ronald E. Wallace and Walter J. Minett respectfully move the Court to enter an Order awarding: (i) attorneys' fees and expenses and (ii) reimbursement of costs and expenses to Class Representatives pursuant to 15 U.S.C. § 78u-4(a)(4). In support of the motion, Class Counsel and Class Representatives rely on the accompanying Memorandum of Law; the Joint Declaration of Ramzi Abadou and Ryan Llorens in Support of: (A) Class Representatives' Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation; and (B) Class Counsel's Motion for an Award of Attorneys' Fees, Litigation Costs and Expenses and Awards to Class Representatives Pursuant to 15 U.S.C. § 78u-4(a)(4); and the additional declarations and exhibits submitted herewith. A proposed order will be submitted at the time that Class Counsel submits its reply brief.¹

Dated: July 19, 2021

Respectfully Submitted,

**ROBBINS GELLER RUDMAN &
DOWD, LLP**

By: s/ Ellen Gusikoff Stewart
Ellen Gusikoff Stewart
Ryan Llorens
Kevin Lavelle

¹ Class Counsel certifies pursuant to E.D. Mich. LR 7.1(a) that concurrence in this motion could not be obtained, because the identities of all persons with standing to object to the motion (*i.e.* absent Class Members) are unknown at this time. All objections received in accordance with the earlier Order Preliminarily Approving Settlement and Providing for Notice (ECF No. 212) and the Notice disseminated to the Class will be addressed on reply.

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DECLARATION OF SERVICE

I certify that on July 19, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below, if any).

s/ Ellen Gusikoff Stewart

Ellen Gusikoff Stewart

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KEVIN L. DOUGHERTY, Individually)	
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ESPERION THERAPEUTICS, INC., et)	
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**CLASS COUNSEL AND CLASS REPRESENTATIVES' MEMORANDUM
OF LAW IN SUPPORT OF THEIR MOTION FOR (1) AN AWARD OF
ATTORNEYS' FEES AND EXPENSES AND (2) CLASS
REPRESENTATIVES' REIMBURSEMENT OF COSTS AND EXPENSES
PURSUANT TO 15 U.S.C. § 78u-4(a)(4)**

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STATEMENT OF ISSUES TO BE PRESENTED

1. Whether the Court should grant Class Counsel's request for an award of attorneys' fees in the amount of 32.5% of the \$18.25 million Settlement, plus interest thereon.
2. Whether the Court should approve Class Counsel's request for litigation expenses in the amount of \$833,716.99.
3. Whether the Court should approve Class Representatives' request pursuant to 15 U.S.C. § 78u-4(a)(4) for \$7,500.00 each for their time and expenses incurred during their representation of the Class.

**CONTROLLING AND MOST APPROPRIATE
AUTHORITY FOR RELIEF SOUGHT**

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Ramey v. Cincinnati Enquirer, Inc., 508 F.2d 1188 (6th Cir. 1974)

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Statutes and Rules

FED. R. CIV. P. 23(h)

15 U.S.C. § 78u-4(a)(4)

15 U.S.C. § 78u-4(a)(6)

Kahn Swick & Foti, LLC and Robbins Geller Rudman & Dowd LLP (hereinafter “Class Counsel”), along with Class Representatives Ronald E. Wallace and Walter J. Minett (“Class Representatives”), respectfully submit this memorandum in support of their application for an award of attorneys’ fees and expenses, and Class Representatives’ request for an award of costs and expenses in representing the Class pursuant to 15 U.S.C. § 78u-4(a)(4) and FED. R. CIV. P. 23(h).²

I. INTRODUCTION

After five years of intense and protracted litigation, Class Counsel successfully obtained an \$18.25 million cash Settlement for the benefit of the Class, representing approximately 30% of maximum estimated recoverable damages. This certain recovery for the Class avoids the risks of trial and the almost invariable post-trial appeals that follow. It was achieved through Class Counsel’s skill and tenacity in both this Court through summary judgment briefing and in the United States Court of Appeals for the Sixth Circuit.

Class Counsel now respectfully move this Court for an award of attorneys’ fees in the amount of 32.5% of the Settlement Amount, plus interest, and expenses incurred in prosecuting this litigation of \$833,716.99. The sole objection made to the Settlement to date does not specifically contest these requests. *See, e.g., In re*

² Unless otherwise noted: (i) all capitalized terms used herein shall have the meanings provided in the Stipulation of Settlement dated April 26, 2021 (ECF No. 211, the “Stipulation”); and (ii) all emphasis added and internal citations omitted.

Cardizem CD Antitrust Litig., 218 F.R.D. 508, 527 (E.D. Mich. 2003) (“[A] small number of objections are received . . . [is] indicative of the adequacy of the settlement.”); *see also* ECF No. 213.

Awarding Class Counsel’s fee on a percentage basis is the appropriate method of compensating counsel in a case such as this, and the requested fee is well within the range of percentages awarded in class actions in this District, the Sixth Circuit, and across the country—and is entirely reasonable here, particularly given the negative lodestar multiplier in this case. *See, e.g., In re Caraco Pharm. Labs., Ltd. Sec. Litig.*, No. 2:09-cv-12830-AJT-DAS, slip op., PageID.2477 (E.D. Mich. 2013) (awarding 33%) (Tarnow, J.); *Rikos v. P&G*, 2018 U.S. Dist. LEXIS 72722, at *26 (S.D. Ohio 2018) (though the lodestar cross-check is “unnecessary,” “a negative multiplier . . . demonstrates that the fee sought is reasonable.”). Here, the amount requested is warranted, given the extremely favorable recovery obtained for the Class, the extensive efforts of Class Counsel in obtaining this result over the last five-plus years, and the significant risks in bringing and prosecuting this action on behalf of the Class. Class Representatives, who oversaw Class Counsel’s efforts firsthand, fully support Class Counsel’s request for this award of attorneys’ fees. *See* Wallace Decl., at ¶ 11; Minett Decl., at ¶ 11 (submitted herewith).

The risks of prosecution were prevalent throughout this litigation and would have only escalated had this matter proceeded to trial. At the inception of this matter,

Class Representatives' Complaint was dismissed with prejudice and their motion for leave to amend was denied. While Class Representatives and their counsel prevailed on their efforts to overturn those decisions in the Sixth Circuit, a favorable outcome at trial was far from certain. *See Dougherty v. Esperion Therapeutics, Inc.*, 905 F.3d 971 (6th Cir. 2018) (ECF No. 46).

Class Representatives aggressively pursued discovery from Defendants and non-parties alike, and: (i) received and reviewed more than 150,000 pages of documents from Defendants alone; (ii) issued more than 40 subpoenas to third parties, resulting more than 67,000 pages of documents produced; and (iii) deposed (or defended the depositions of) more than 25 fact and expert witnesses. Said witness included current and former Esperion employees, members of its Board of Directors, the Company's external media consultants, two securities analysts, and a representative of the United States Food and Drug Administration ("FDA") who was present at the End of Phase 2 Meeting central to this Action's allegations.

Additionally, Class Counsel successfully litigated key discovery disputes. *See, e.g., Dougherty v. Esperion Therapeutics, Inc.*, 2020 U.S. Dist. LEXIS 158429 (E.D. Mich. 2020) (ECF No. 165) (striking Defendants' confidentiality designations from certain documents); *Dougherty v. Esperion Therapeutics, Inc.*, 2020 U.S. Dist. LEXIS 222811 (E.D. Mich. 2020) (ECF No. 197) (granting Lead Plaintiffs' motion to compel production of materials withheld under claims of attorney-client privilege;

see also ECF No. 203, staying order pending resolution of objections).

Class Representatives also prevailed on their motion for class certification, defeating highly technical and aggressive attacks on, *inter alia*, market efficiency, class-wide damages, and the adequacy of the Class Representatives. *See Dougherty v. Esperion Therapeutics, Inc.*, 2020 U.S. Dist. LEXIS 108072 (E.D. Mich. 2020) (ECF No. 152). It is hardly surprising, then, that Magistrate Judge Whalen specifically noted that Class Representatives “have diligently and aggressively pursued this action from its inception.” *Id.* at *13 (PageID.7469). Magistrate Judge Whalen further noted:

Esperion apparently does not question the competence of class counsel, nor do I. Apart from counsel’s diligent prosecution of this case to date, including a win in the Sixth Circuit, the attorneys for lead Plaintiffs have significant collective experience in class litigation.

Id. at *14 (PageID.7469). Indeed, when this Court later adopted Magistrate Judge Whalen’s recommendations and certified the Class, it likewise noted Class Representatives’ “vigorous [prosecution of] the interests of the class through qualified counsel,” further writing that “since 2016, Lead Plaintiffs, through Class Counsel, have filed an amended complaint, prevailed at the Sixth Circuit, prepared and filed numerous pleadings, and pursued discovery.” *Dougherty v. Esperion Therapeutics*, 2020 U.S. Dist. LEXIS 216515, at *22-23 (E.D. Mich. 2020) (ECF No. 193, PageID.13872).

Finally, only after detailed cross-motions for summary judgment had been

fully briefed and engaging in several months of mediation, Class Counsel secured an extraordinary \$18.25 million cash recovery for the benefit of the Class.³ This sum represents approximately 30% of maximum estimated recoverable damages. By contrast, during 2020 the median settlement percentage for similarly sized cases was only 5.3%.⁴

But for Class Counsel's skill, tenacity, and effective advocacy in prosecuting this Action on a wholly contingent basis, the Settlement would not have been possible. Class Counsel now respectfully move this Court for an award of attorneys' fees in the amount of 32.5% of the Settlement Amount, plus interest, and expenses of \$833,716.99 incurred in prosecuting this litigation. Similarly, an award of

³ Submitted herewith in support of approval of the proposed Settlement is the Memorandum of Law in Support of Class Representatives' Motion for Final Approval of Class Action Settlement and Plan of Allocation ("Final Approval Brief.")

The Court is respectfully referred to the accompanying Joint Declaration of Ramzi Abadou and Ryan Llorens in Support of: (A) Class Representatives' Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation; and (B) Class Counsel's Motion for an Award of Attorneys' Fees, Litigation Costs and Expenses and Awards to Class Representatives Pursuant to 15 U.S.C. § 78u-4(a)(4) ("Joint Decl.") for a detailed history of the Action, the extensive efforts of Class Counsel and the factors bearing on the reasonableness of the requested award of attorneys' fees and expenses.

⁴ Laarni T. Bulan & Laura E. Simmons, *Cornerstone Research: Securities Class Action Settlements: 2020 Review and Analysis*, at 6 (2021), <https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2020-Review-and-Analysis>, (last accessed June 18, 2021).

reasonable expenses to Class Representatives should also be granted.

II. AWARD OF ATTORNEYS' FEES

A. Legal Standards

1. Class Counsel Are Entitled to a Fee from the Common Fund

This Settlement has created a common fund. In such cases, the Supreme Court has long recognized that a reasonable attorney's fee should be drawn from the fund, because those who have benefited from the common recovery should share proportionately in the costs of its prosecution:

[T]his Court has recognized consistently 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. . . . The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. . . . Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980); *see also N.Y. State Teachers' Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 226, 243 (E.D. Mich. 2016) (applying common fund approach); *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 502 (E.D. Mich. 2008) (same). By bringing this action to enforce antifraud securities laws, Class Counsel have provided "an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission[.]" *Tellabs, Inc.*

v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313 (2007).

2. The Court Should Award Attorneys’ Fees Using the Percentage Approach

In common fund cases such as this, courts generally favor awarding fees using a “percentage-of-the-fund” method, rather than a lodestar-based approach. *See Cardizem*, 218 F.R.D. at 532 (“[C]ourts in the Sixth Circuit have indicated their preference for the percentage-of-the-fund method in common fund cases.”) (collecting cases); *In re Prandin Direct Purchaser Antitrust Litig.*, 2015 U.S. Dist. LEXIS 5964, at *11-12 (E.D. Mich. 2015) (recognizing a “trend in ‘common fund cases [toward] the percentage method.’”); *In re Southeastern Milk Antitrust Litig.*, 2013 U.S. Dist. LEXIS 70167, at *13 (E.D. Tenn. 2013) (same).

Likewise, the percentage approach is endorsed by the Private Securities Litigation Reform Act (“PSLRA”), which provides 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); *see also N.Y. State Teachers’ Ret. Sys.*, 315 F.R.D. at 243 (noting PLSRA’s reference to a “reasonable percentage” as one of many reasons “that the percentage-of-the-fund approach is the better method for calculating Lead Counsel’s fee award.”).

Accordingly, Class Representatives and Class Counsel respectfully suggest that this Court adopt that approach here.

3. The Requested Fee Award Is Well Within the Applicable Range of Percentage Awards

As a preliminary matter, Class Representatives and Class Counsel note that their request for an award of attorneys' fees equal to 32.5% of the Settlement Amount is within the range of percentage awards recently made by courts in this District, as well as district courts within this Circuit:

- *Schuh v. HCA Holdings, Inc.*, 2016 U.S. Dist. LEXIS 140387, at *31-32 (M.D. Tenn. 2016) (awarding 30% of \$215 million settlement in securities fraud case);
- *Garden City Emples. Ret. Sys. v. Psychiatric Sols., Inc.*, 2015 U.S. Dist. LEXIS 181943, at *6 (M.D. Tenn. 2015) (awarding 29% of \$65 million settlement in §10b-5 case);
- *North Port Firefighters' Pension Local Option Plan v. Fushi Copperweld, Inc.*, No. 3:11-cv-00595, slip op., PageID.5246 (M.D. Tenn. 2014) (awarding 33-1/3% of \$3.25 million settlement in §10b-5 case);
- *In re Caraco Pharm. Labs., Ltd. Sec. Litig.*, No. 2:09-cv-12830-AJT-DAS, slip op., PageID.2477 (E.D. Mich. 2013) (Tarnow, J.) (awarding 33% attorneys' fee);
- *In re Chemed Corp. Sec. Litig.*, 2014 U.S. Dist. LEXIS 190228, at *3 (S.D. Ohio 2014) (awarding 33% attorneys' fee);
- *Indiana State District Council of Laborers and Hod Carriers Pension and Welfare Fund v. Omnicare, Inc., et al.*, No. 2:06-cv-00026, slip op., PageID.16147 (E.D. Ky. 2019) (awarding 33% of a \$20 million recovery);
- *Burges v. Bancorp South, Inc.*, No. 3:14-cv-01564, slip op., PageID.8728 (M.D. Tenn. 2018) (awarding 33% of a \$13 million recovery);
- *Winslow v. Bancorpsouth, Inc.*, No. 3:10-cv-00463, slip op., PageID.5246 (M.D. Tenn. 2012) (awarding 30% of \$29,250,000 settlement in §10b-5 case);

- *Beach v. Healthways Inc.*, No. 3:08-cv-00569, slip op., PageID.7118 (M.D. Tenn. 2010) (awarding 30% of \$23.6 million settlement in §10b-5 case);
- *Morse v. McWhorter*, No. 3:97-cv-0370, slip op. (M.D. Tenn. 2004) (awarding a 33-1/3% fee of \$49.5 million settlement);
- *In re Sirrom Capital Corp. Sec. Litig.*, No. 3:98-cv-0643, slip op. (M.D. Tenn. 2000) (awarding 33-1/3% of \$15 million settlement);
- *In re Skelaxin Antitrust Litig.*, 2014 U.S. Dist. LEXIS 91661, at *5 (E.D. Tenn. 2014) (“The Court finds that the requested counsel fee of one third is fair and reasonable and fully justified. The Court finds it is within the range of fees ordinarily awarded.”);
- *Se. Milk*, 2013 U.S. Dist. LEXIS 70167, at *16 (“the percentage requested [33%] is certainly within the range of fees often awarded in common fund cases, both nationwide and in the Sixth Circuit.”);
- *Prandin Direct*, 2015 U.S. Dist. LEXIS 5964, at *11-12 (awarding one-third of \$19 million settlement); and
- *In re Arm Fin. Grp., Inc.*, 2006 U.S. Dist. LEXIS 63528, at *20-21 (W.D. Ky. 2006) (awarding 40% of \$4.1 million settlement in §10b-5 case).⁵

B. The *Ramey* Factors Demonstrate that Requested Fee Award Is Reasonable

District courts within the Sixth Circuit are directed to consider six factors

⁵ Courts throughout the country are in accord. *See, e.g., In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 445-47 (E.D.N.Y. 2014) (adopting a graduated schedule dictating fee awards of 33% for settlements up to \$10 million and 30% for settlements between \$10 million and \$50 million); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001) (citing compilation of 289 settlements “ranging from under \$ 1 million to \$ 50 million. The average attorney’s fees percentage is shown as 31.71%, and the median turns out to be one-third.”); *In re Med. X-Ray Film Antitrust Litig.*, 1998 U.S. Dist. LEXIS 14888, at *20-24 (E.D.N.Y. 1998) (awarding fee of 33.33% of \$39.36 million settlement).

when setting a reasonable attorneys' fee. *See Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974). More specifically, the Court should consider:

1) the value of the benefit rendered to the corporation or its stockholders, 2) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others, 3) whether the services were undertaken on a contingent fee basis, 4) the value of the services on an hourly basis, 5) the complexity of the litigation, and 6) the professional skill and standing of counsel involved on both sides.

Id.; *see also Shane Grp., Inc. v. Blue Cross Blue Shield*, 2019 U.S. Dist. LEXIS 168191, at *30 (E.D. Mich. 2019) (same). Here, as set forth below, "each of these factors weighs in favor of awarding the requested attorneys' fees." *Id.*

1. The Value of the Benefits Achieved Support the Requested Fee Award

"The first *Ramey* factor requires the Court to evaluate the benefit of the settlement to the Class. District courts in this Circuit widely regard the first *Ramey* factor as the most important." *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 764 (S.D. Ohio 2007); *see also In re DPL, Inc. Sec. Litig.*, 307 F. Supp. 2d 947, 951 (S.D. Ohio 2004) ("[T]he award of attorneys' fee must be driven by the results obtained by Plaintiffs' counsel.").

Here, the \$18.25 million all-cash Settlement for the Class represents an excellent recovery, representing approximately 30% of the maximum estimated recoverable damages. *Cf. Cardinal Health*, 528 F. Supp. 2d at 764 (a recovery of 20% "is in the top echelon of all securities class action settlements . . . outstripping

the typical recovery in most securities class actions, which is usually between three and six cents on the dollar.”). The Settlement compares favorably to the median recovery of 5.3% to 7.6% of damages in securities class actions such as this between 2011 and 2020 for cases with comparable damages.⁶ Moreover, courts regularly approve settlements in securities cases recovering a comparable or smaller percentage of maximum damages. *See, e.g., N.Y. State Teachers’ Ret. Sys.*, 315 F.R.D. at 238 (compiling cases approving settlements representing as little as 3.8% of total damages).

Not only does the Settlement represent a substantial portion of the estimated maximum recoverable damages, it is also significant given the risks of further litigation. When this Settlement was reached, cross motions for summary judgment were pending. *See, e.g.,* ECF Nos. 173 through 178, inclusive (Plaintiffs’ Motion for Partial Summary Judgment), and ECF No. 179 (Defendants’ Motion for Summary Judgment). Indeed, during a status conference with the Court on January 13, 2021, the Court remarked that adverse rulings on summary judgment remained a possibility. While Class Representatives and Counsel believe their motion had merit and that they would defeat Defendants’ motion, if the Court did deny both motions then trial would have been all but inevitable. *See* § II.B.4 and § II.B.5, *infra*; *see also* Joint Decl., § I and § IV.A. Instead, the time and resources that Class Counsel

⁶ *See* n.3, *supra*.

devoted to the research, investigation, and prosecution of this Action produced an excellent recovery, providing the Class with an immediate and certain benefit without the substantial expense, risk, and delay of trial and lengthy appeals. *Shane Grp.*, 2019 U.S. Dist. LEXIS 168191, at *30-31 (a 25% recovery “weights in favor of approving the fee award in light of the risks of the litigation”). As such, Class Counsel respectfully submits that the value of the benefits achieved for the class supports the requested fee award.

2. Society’s Stake in Rewarding Attorneys Who Enforce the Securities Laws Supports the Requested Fee

The federal securities laws are remedial; to advance their purpose of protecting investors, courts must encourage private lawsuits. *See Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (“[W]e repeatedly have emphasized that implied private actions provide ‘a most effective weapon in the enforcement’ of the securities laws and are ‘a necessary supplement to [Security Exchange] Commission action.”); *Tellabs*, 551 U.S. at 313 (recognizing that “meritorious private actions” are “an essential supplement” to the federal securities laws). “Indeed, lawyers that pursue private suits such as this on behalf of investors augment the overburdened SEC by ‘acting as ‘private attorneys general.’” *In re Charter Communs., Inc.*, 2005 U.S. Dist. LEXIS 14772, at *59 (E.D. Mo. 2005).

Thus, “[i]n evaluating the reasonableness of a fee request, the court also must consider a society’s stake in rewarding attorneys who produce a common benefit for

class members in order to maintain an incentive to others.” *Delphi*, 248 F.R.D. at 503. Adequately compensating attorneys who assume the risk of litigating securities actions—which are complex, risky, and costly—to a favorable conclusion unquestionably serves the public interest. *See N.Y. State Teachers’ Ret. Sys.*, 315 F.R.D. at 244 (noting “adequate compensation is necessary to encourage attorneys to assume the risk of litigating private lawsuits to protect investors.”); *see also Se. Milk*, 2013 U.S. Dist. LEXIS 70167, at *23-24 (“Awards of substantial attorneys’ fees in cases like this are necessary to incentivize attorneys to shoulder the risk of nonpayment to expose violations of the law and to achieve compensation for injured parties.”).

Because society benefits from strong advocacy on behalf of investors in publicly-traded companies, public policy favors granting Class Counsel’s fee and expense application. *See In re Telectronics Pacing Sys.*, 137 F. Supp. 2d 1029, 1043 (S.D. Ohio 2001) (“Attorneys who take on class action matters serve a benefit to society and the judicial process by enabling . . . small claimants to pool their claims and resources.”).

3. The Contingent Nature of the Fee

“Whether counsel’s services were undertaken on a contingent fee basis is another factor for the Court to consider in evaluating a fee request.” *Delphi*, 248 F.R.D. at 503-04. Courts consistently recognize that the risk of receiving little or no

recovery is an important factor that often warrants an increase in attorneys' fees. *See Stanley v. U.S. Steel Co.*, 2009 U.S. Dist. LEXIS 114065, at *8 (E.D. Mich. 2009) (contingency fees "often justif[y] an increase in the award of attorneys' fees."); *see also In re F&M Distribs., Inc. Sec. Litig.*, 1999 U.S. Dist. LEXIS 11090, at *18 (E.D. Mich. 1999).

Here, Class Counsel has collectively spent over 18,233 hours researching, investigating, and prosecuting this case on behalf of the Class, and have incurred \$833,716.99 in costs and expenses with no guarantee of recovery. *See Se. Milk*, 2013 U.S. Dist. LEXIS 70167, at *23-24 (quoting *Behrens v. Wometco Enter., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988) ("If counsel are not rewarded for this risk, few attorneys will undertake 'the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing.'")); *see also Delphi*, 248 F.R.D., at 503-04 (contingent litigation for over two years, incurring almost \$1.5 million dollars in costs with no guarantee of payment weighs in favor of fee request). Accordingly, this factor weighs in favor of a finding that Class Counsel's 32.5% fee request is reasonable. *See Stanley*, 2009 U.S. Dist. LEXIS 114065, at *8.

4. The Value of the Service on an Hourly Basis

Class Counsel has vigorously pursued this litigation from its outset in 2015 and was fully prepared to continue down the path towards trial. As detailed in the

accompanying Joint Declaration, the Settlement was reached only after the Class Representatives and Class Counsel, *inter alia*: (a) extensively investigated the underlying facts and potential claims; (b) drafted and filed the detailed Amended Complaint for Violations of the Federal Securities Laws; (c) opposed Defendants' Motion to Dismiss, including before the Sixth Circuit; (d) consulted with experts regarding market efficiency, damages, and the drug approval process; (e) prepared and served written discovery requests to Defendants, while responding to their own requests to Lead Plaintiffs; (f) prepared and served 40 third-party document subpoenas; (g) carefully reviewed and analyzed approximately 222,000 pages of documents produced by Defendants and third parties; (h) prepared for and defended Class Representatives' and their three retained experts' depositions; (i) prepared for and deposed a representative of the FDA, nine Esperion employees and executives, Esperion's 30(b)(6) representatives, two third-party public relations fact witnesses, two third-party stock market analysts, two members of Esperion's Board of Directors, and Defendants' three expert witnesses; (j) prepared and opposed numerous discovery-related motions; (k) successfully moved for class certification; (l) moved for partial summary judgment and opposed Defendants' motion for summary judgment; (m) submitted a detailed mediation brief and supporting exhibits to Michelle Yoshida of Phillips ADR, followed by in-person mediation; (n) submitted a joint mediation statement to the Honorable Judge Gerald Rosen (Ret.)

of JAMS, followed by two videoconference mediations with Judge Rosen and subsequent settlement communications through him; and (o) prepared settlement and notice papers on behalf of the Class Representatives and the Class. *See generally*, Joint Decl.; *see also Dougherty*, 2020 U.S. Dist. LEXIS 216515, at *23 (ECF No. 193, PageID.13872) (“Moreover, since 2016, Lead Plaintiffs, through Class Counsel, have filed an amended complaint, prevailed at the Sixth Circuit, prepared and filed numerous pleadings, and pursued discovery.”).

Applying the lodestar method as a cross-check to the requested percentage confirms that the attorneys’ fee award Class Counsel seeks here is reasonable. *See N.Y. State Teachers’ Ret. Sys.*, 315 F.R.D. at 243; *see also Se. Milk*, 2013 U.S. Dist. LEXIS 70167, at *20. Under Class Counsel’s applicable billing rates for the 18,233.55 hours spent during this litigation, the total lodestar is \$11,382,903.75.⁷ *See* Joint Decl., at ¶¶ 270-278. Thus, the requested attorney fee of \$5,931,250 represents a negative multiplier of -47.9%. *See id.* ¶ 271.

⁷ “A reasonable hourly rate is determined according to the prevailing market rates in the relevant community. To ascertain the community, district courts ‘are free to look to a national market, an area of specialization market, or any other market they believe is appropriate to fairly compensate particular attorneys[.]’” *In re Auto. Parts Antitrust Litig.*, 2019 U.S. Dist. LEXIS 234447, at *233 (E.D. Mich. 2019) citing *Ford v. Fed.-Mogul Corp.*, 2015 U.S. Dist. LEXIS 3399, at *2-3 (E.D. Mich. 2015) and *McHugh v. Olympia Entm’t, Inc.*, 37 Fed. Appx. 730 (6th Cir. 2002). “Even if counsel’s ‘requested rates are high for the district . . . Class Counsel should be compensated at rates that reflect their skill and their success.’” *Auto. Parts*, 2019 U.S. Dist. LEXIS 234447, at *233.

Typically, a large class action justifies a lodestar multiplier of 1.3 to 4.5. *See N.Y. State Teachers' Ret. Sys.*, 315 F.R.D. at 244 quoting *Cardinal Health*, 528 F. Supp. 2d at 767-68 (“‘Most courts agree that the typical lodestar multiplier’ in a large class action ‘ranges from 1.3 to 4.5’”). Here, the lodestar cross-check results in a **negative** multiplier—accordingly, Class Counsel’s fee is inherently reasonable. *See Rikos*, 2018 U.S. Dist. LEXIS 72722, at *26; *see also In re NTL, Inc. Sec. Litig.*, 2007 U.S. Dist. LEXIS 13661, at *29-31 (S.D.N.Y. 2007) (collecting cases; where the negative multiplier shows no windfall to counsel, the fee is reasonable); *see also In re Lithium Ion Batteries Antitrust Litig.*, 2020 U.S. Dist. LEXIS 233607, at *88-89 (N.D. Cal. 2020) (no windfall to counsel where negative multiplier is present).

5. The Complexity of the Litigation

The complexity of the litigation is a significant factor for courts to consider in evaluating the reasonableness of an attorneys’ fee award. *See N.Y. State Teachers’ Ret. Sys.*, 315 F.R.D. at 244. “As numerous courts have recognized, ‘[s]ecurities litigation class actions are inherently complex.’” *Id.* quoting *New Eng. Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 635 (W.D. Ky. 2006). This case was no different. Here, Class Counsel faced numerous challenges to establishing liability, loss causation, and damages and were opposed zealously at every turn by capable defense counsel. For instance, Defendants aggressively disputed Class Representatives’ ability to establish scienter with respect to

Esperion's August 2015 press release concerning the Company's meeting with the FDA, contested the size of recoverable damages, and moved to exclude Plaintiffs' expert on damages and loss causation. That *Daubert* motion was pending when the Settlement was reached.

Class Representatives and Class Counsel vigorously prosecuted this action on behalf of the Class in the face of such risks, including, *inter alia*, successfully appealing this Court's order dismissing the action to the Sixth Circuit and successfully obtaining class certification. *See Dougherty*, 905 F.3d at 975 (ECF No. 46, PageID.1047); *see Dougherty*, 2020 U.S. Dist. LEXIS 216515, at *27 (ECF No. 193, PageID.13876); *Cardinal Health*, 528 F. Supp. 2d at 765-66 (Overcoming a motion to dismiss in a securities class action "is no small feat considering the fact that dismissal rates in securities class actions have nearly doubled since the passage of the PSLRA."); *Dougherty*, 2020 U.S. Dist. LEXIS 108072, at *14 (ECF No. 152, PageID.7469) (Recognizing "counsel's diligent prosecution of this case to date, including a win in the Sixth Circuit").

When the Settlement was reached, the parties' competing motions for summary judgment, Defendants' motion to exclude Class Representatives' loss causation expert, and Defendants' motion to stay enforcement of and their objections to the Court's order granting Class Representatives' motion to compel were pending before the Court. *See, generally*, ECF Nos. 176, 179, 187, 188-191, 194-195. Even

if Class Representatives were able to overcome each of Defendants' efforts to have this case dismissed and prevented the exclusion of their expert on damages and loss causation, and overcome Defendants' objections, Defendants undoubtedly would have filed additional motions *in limine* to exclude crucial evidence before trial.

Assuming, *arguendo*, that the Court simply denied both Parties' motions for summary judgment, then the resulting trial would have been complicated for jurors given the complex factual issues concerning the development and approval of Esperion's sole pharmaceutical candidate, ETC-1002, and legal issues regarding loss causation and damages. Liability issues alone would have involved substantial attorney and expert time, and the introduction of voluminous documentary and deposition evidence, as well as vigorously contested motions, all of which would have resulted in considerable expenditures of judicial resources. If Class Representatives were successful at trial, Defendants would have undoubtedly appealed any verdict or judgment, or post-judgment relief from the Court.

While Class Counsel believe the evidence obtained in discovery substantiated the claims, there was a strong possibility that the case would yield little or no recovery, suggesting that Class Counsel's work on behalf of the Class, even if successful, would go wholly or partially uncompensated. Accordingly, the requested fee award reflects the many significant risks undertaken by Class Counsel in prosecuting this complex action, as well as the excellent recovery achieved in a hotly

contested and difficult litigation.

6. Quality Representation Supports the Requested Fee

Class Counsel practices extensively in complex federal civil litigation, particularly the litigation of securities class actions, and have successfully litigated these types of actions in courts throughout the country. As Magistrate Judge Whalen observed in his recommendation to certify the class, “the attorneys for lead Plaintiffs have significant collective experience in class litigation.” *Dougherty*, 2020 U.S. Dist. LEXIS 108072, at *14 (ECF No. 152, PageID.7469); *see also* Abadou Decl., submitted herewith; *In re Health Ins. Innovations Secs. Litig.*, 2020 U.S. Dist. LEXIS 231055, at *13 (M.D. Fla. 2020) (“KSF is highly experienced in prosecuting securities class actions.”); *Kasper v. AAC Holdings, Inc., et al.*, No. 3:15-cv-923, slip op., PageID.10528 (M.D. Tenn. 2015) (KSF is an “experienced, practiced securities litigator[.]”); *see also* Llorens Decl., submitted herewith; *Beaver Cty. Emples. Ret. Fund v. Tile Shop Holdings, Inc.*, 2017 U.S. Dist. LEXIS 173303, at *7 (D. Minn. 2017) (Robbins Geller has “significant experience representing shareholders . . . in securities class actions”); *Livonia Emples. Ret. Sys. v. Talmer Bancorp, Inc.*, 2016 U.S. Dist. LEXIS 124417, at *7 (E.D. Mich. 2016) (“Robbins Geller [has] extensive experience in complex securities litigation.”).

Class Counsel’s experience enabled them to identify the complex issues involved in this Action and to formulate effective strategies to prosecute this case.

See Dougherty, 2020 U.S. Dist. LEXIS 216515, at *22 (ECF No. 193, PageID.13871) (“Lead Plaintiffs have ‘vigorously prosecute[d] the interests of the class *through qualified counsel.*’”); *id.* at *23 (PageID.13872) (Class Counsel’s “firms . . . ‘have significant collective experience in class [action] litigation’”). Based upon their diligent efforts and their skill and reputation, Class Counsel negotiated a highly favorable result under difficult and challenging circumstances. Such quality representation, dedication, and tenacity support the requested fee.

Courts rightly consider opposing counsel’s skill when evaluating the services rendered by plaintiffs’ counsel. *See Delphi*, 248 F.R.D. at 504. Here, Defendants were represented by Goodwin Proctor LLP, an international law firm with a reputation for vigorous advocacy in the defense of complex civil cases. *See* § I, *supra*. Here, Defendants asserted an arsenal of arguments in their efforts to, *inter alia*, dismiss the complaint, thwart Class Representatives’ discovery efforts, oppose class certification, obtain summary judgment, defeat Class Representatives’ motion for partial summary judgment, and bar one of Class Representatives’ experts from testifying. *See, e.g.*, ECF Nos. 30, 74, 85, 100, 119, 122, 179, 188, 189, and 204. Accordingly, the \$18.25 million recovery represents an excellent result for the Class given the skilled and determined defense team here, and weighs in favor of Class Counsel’s fee request. *See Delphi*, 248 F.R.D. at 504 (“The ability of [Class] Counsel to negotiate a favorable settlement in the face of formidable legal opposition further

evidences the reasonableness of the fee award requested.”).

III. CLASS REPRESENTATIVES’ COUNSEL’S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED

“Under the common fund doctrine, ‘class counsel is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and settlement, including expenses incurred . . . with document production, consulting with experts and consultants, travel and other litigation-related expenses.’ *New Eng. Health Care*, 234 F.R.D. at 635; *see also Se. Milk*, 2013 U.S. Dist. LEXIS 70167, at *32 *citing In re F&M Distributors, Inc.*, 1999 U.S. Dist. LEXIS 11090, at *19 (“Expense awards are customary when litigants have created a common settlement fund for the benefit of a class.”). In evaluating “whether the requested expenses should be compensable, courts consider ‘whether the particular costs are the type routinely billed by attorneys to paying clients in similar cases.’” *N.Y. State Teachers’ Ret. Sys.*, 315 F.R.D. at 244.

In the disseminated Notice, Class Counsel stated they would seek payment of costs and expenses not to exceed \$1,000,000. *See Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, And Requests for Exclusion Received to Date (“Murray Decl.”)*, at Ex. A. Class Counsel respectfully requests payment of costs and expenses of \$833,716.99, which were reasonably incurred during the prosecution of this action and are well within the \$1,000,000.00 expense cap

conveyed to the Class. *See id.* These expenses were necessary to litigate a complex securities action; the bulk of them derive from professional services rendered by experts, consultants, and mediators, which were all critical to achieving the Settlement. *See* Joint Decl., at ¶ 177; *id.* at ¶¶ 182-184. The remainder is attributable to travel, deposition transcripts, court reporters, copying and delivery costs, filing fees, computerized research, and other incidental expenses incurred in the ordinary course of litigation, and are typical of a class action and should be awarded from the Settlement Fund. *See id.* Such costs are more than reasonable for a securities class action that has progressed through summary judgment. *See N.Y. State Teachers' Ret. Sys.*, 315 F.R.D. at 244 (awarding \$778,649.83 in similar expenses as “reasonable and ‘the type routinely billed by attorneys to paying clients in similar cases’” in a securities class action that settled prior to resolution of motion to dismiss, but after some discovery); *Delphi*, 248 F.R.D. at 504-05 (awarding \$1.3 million in expenses for, *inter alia*, expert and consultant fees, document management, photocopying, on-line research, messenger services, postage, travel, and “other incidental expenses directly related to the prosecution of this action”).

IV. CLASS REPRESENTATIVES' AWARDS PURSUANT TO 15 U.S.C. §78u-4(a)(4) ARE REASONABLE

Finally, Class Representatives respectfully suggest that the time and expenses that they directly and reasonably incurred for their services to the Class in connection with this Action should also be reimbursed, as provided for by the PSLRA. *See* 15

U.S.C. § 78u-4(a)(4) (class representatives may recover the “reasonable costs and expenses (including lost wages) directly relating to the representation of the class[.]”); *see New Eng. Health Care*, 234 F.R.D. at 635 (“Courts . . . routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages[.]”). The Notice advised that Class Representatives may request reimbursement up to \$15,000.00 for the costs and expenses directly related to their representation of the Class. *See Murray Decl.* at Ex. A. The sole objection to the Settlement received to date (*see, generally*, ECF No. 213) does not challenge this request.

Mr. Wallace’s and Mr. Minett’s declarations support their request for reimbursement of \$7,500.00 each to compensate them for time incurred in their roles as Class Representatives. *See, e.g., Wallace Decl.* at ¶¶ 4-9; *See, e.g., Minett Decl.* at ¶¶ 4-9. Numerous courts have approved similar awards to reimburse class representatives for their time and efforts on behalf of a class. *See Caraco Pharm. Labs.*, No. 2:09-cv-12830-AJT-DAS PageID.2477 (awarding \$13,180 in aggregate; individual awards of \$4,320, \$7,500 and \$1,360); *Zimmerman v. Diplomat Pharmacy, Inc., et al.*, No. 2:16-cv-14005, slip op., PageID.1802 (E.D. Mich. 2019) (Cohn, J.) (awarding aggregate of \$13,657.51; comprised of individual awards of \$2,157.51, \$2,500.00, and \$9,000.00); *New Eng. Health Care*, 234 F.R.D. at 635 (awarding \$7,500.00 each to three plaintiffs, and one \$5,000.00 award to the fourth).

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DECLARATION OF SERVICE

I certify that on July 19, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below, if any).

s/ Ellen Gusikoff Stewart

Ellen Gusikoff Stewart