IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge John L. Kane

Master Docket No. 09-md-02063-JLK-KMT (MDL Docket No. 2063)

IN RE: OPPENHEIMER ROCHESTER FUNDS GROUP SECURITIES LITIGATION

This document relates to: *In re California Municipal Fund*

09-cv-01484-JLK-KMT (Lowe)
09-cv-01485-JLK-KMT (Rivera)
09-cv-01486-JLK-KMT (Tackmann)
09-cv-01487-JLK-KMT (Milhem)

MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES

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INTRODUCTION

Lead Counsel for the Class, Sparer Law Group, Additional Class Counsel, Girard Gibbs LLP and Liaison Counsel, the Shuman Law Firm, (collectively, "Plaintiff's Counsel") respectfully submit this motion pursuant to Federal Rule of Civil Procedure 23(h) for an order granting: (i) an award of attorneys' fees in the amount of one-third of the $50.75 million cash settlement including any accrued interest thereon (the "Settlement Fund"); (ii) reimbursement of $3.72 million in litigation expenses incurred by counsel in connection with the prosecution of this action; and (iii) reimbursement of $74,000 to Lead Plaintiff Joseph Stockwell for costs and expenses (including lost wages) directly relating to his representation of the Class.[1]

After nearly a decade of hard-fought litigation, Plaintiff's Counsel have achieved a significant cash recovery for the Class in a securities case that presented novel factual and legal challenges and thus involved considerable risk. The $50.75 million settlement was negotiated at arm's length after extensive document, deposition, and expert discovery over several years. The Court certified the Class following a contested two-day hearing, an order the Tenth Circuit declined to review under Rule 23(f). At the time of the

[1] In accordance with D.C.COLO.LCivR 54.3, accompanying this motion is the Declaration Of Alan W. Sparer In Support Of Motion For Final Approval Of Proposed Class Settlement And Approval Of Plan Of Allocation, And Motion For Award Of Attorneys' Fees And Expenses ("Sparer Declaration"), and the exhibits attached thereto. Pursuant to D.C.COLO.LCivR 7.1(a), Plaintiff's Counsel have conferred with Defendants' counsel, and Defendants take no position on attorneys' fees or reimbursement of expenses and do not agree to any particular language within this Motion.

settlement, the Court had overseen the completion of fact and expert discovery, and had under submission multiple, fully-briefed summary judgment and *Daubert* motions.

The Settlement provides a substantial monetary recovery to Class Members as a result of the skill, commitment, experience, and substantial expenditure of resources brought to bear on their behalf. As compensation for the results achieved for the Class, Plaintiff's Counsel request an attorneys' fee award of one-third of the Settlement Fund, or approximately $16.9 million. The request is warranted under the factors set out in *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714 (5th Cir. 1974), as adopted by the Tenth Circuit, and is consistent with the percentage awards granted in this District and elsewhere in securities class actions. As discussed more fully below, the fee award is less than the time value of the professional services that Plaintiff's Counsel devoted to the case. None of the more than 54,000 individuals and entities that have received notice has objected to any aspect of the settlement to date.

Plaintiff's Counsel respectfully request that the Court grant this Motion and award the requested attorneys' fees and expense reimbursements.[2]

RELEVANT BACKGROUND

This litigation has been pending for nearly nine years. The full factual and procedural background, the issues in dispute, the work performed, the discussions that led to the Settlement, and a description of the Settlement itself, appear in the Sparer

[2] Unless otherwise defined herein, capitalized terms in this motion have the same meaning as set forth in the Stipulation and Agreement of Settlement ("Stipulation") (Doc. 690).

Declaration at Paragraphs 6-41, as well as in Plaintiff's motion for preliminary approval (Doc. 691-92).

ARGUMENT

I. THE REQUESTED FEES AND EXPENSES ARE REASONABLE AND APPROPRIATE AND SHOULD BE AWARDED IN THE COURT'S DISCRETION

Plaintiff's Counsel's prosecution of this action on a fully contingent basis since 2009 resulted in a Settlement that provides for a significant monetary recovery for the Class. An award of one-third of the Settlement Fund as attorneys' fees, reimbursement for incurred litigation expenses in the amount of $3.72 million, and reimbursement to Lead Plaintiff Joseph Stockwell in the amount of $74,000 for lost income directly relating to his representation of the Class are all reasonable and appropriate.

A. The Percentage of the Common Fund Method Is Appropriate

Under the common fund doctrine, "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The doctrine is well settled and geared to avoid unjust enrichment. *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988); *Lucken Family Ltd. P'ship, LLLP v. Ultra Res., Inc*., No. 09-CV-01543-REB-KMT, 2010 WL 5387559, at *2 (D. Colo. Dec. 22, 2010) (recognizing the "prevailing trend in awarding attorney fees in common fund cases is to award fees based on a percentage of the common fund obtained for the benefit of the class"). The common fund doctrine encourages skilled counsel to

represent injured classes. "To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding." *City of Providence v. Aeropostale, Inc.*, No. 11 CIV. 7132 CM GWG, 2014 WL 1883494, at *11 (S.D.N.Y. May 9, 2014) (citation omitted), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015). Because the percentage method aligns the interests of class counsel with the represented class members, "[t]he Tenth Circuit has expressed a preference for the percentage of the fund method in common fund cases." *Vaszlavik v. Storage Corp.*, No. 95-B-2525, 2000 WL 1268824, at *1 (D. Colo. Mar. 9, 2000); *see Rosenbaum v. MacAllister*, 64 F.3d 1439, 1445 (10th Cir. 1995) (suggesting "a preference for the percentage of the fund method in common fund cases") (citation omitted). Courts in this District typically use the lodestar method alternative only as a "cross-check" in determining a reasonable fee. *Vaszlavik*, 2000 WL 1268824, at *1-*2; *Lucken*, 2010 WL 5387559, at *3.

B. The Requested Attorneys' Fees Are Fair and Reasonable Under Both Percentage and Lodestar Methods

Plaintiff's Counsel undertook representation of the Class on a wholly contingent basis, investing a substantial amount of time and money into prosecuting this action, with the expectation that if they were successful in obtaining a recovery for the Class they would receive a percentage of that recovery, but without a guarantee of compensation or recovery of out-of-pocket expenses. Whether calculated under the percentage or lodestar method, the requested award of one-third of the Settlement Fund is fair and reasonable.

See Muehler v. Land O'Lakes, Inc., 617 F. Supp. 1370, 1376 (D. Minn. 1985) ("If the plaintiffs' bar is not adequately compensated for its risk, responsibility, and effort when it is successful, then effective representation for plaintiffs in these cases will disappear"); *Williams v. General Elec. Capital Auto Lease*, No. 94 C 7410, 1995 WL 765266, at *10 (N.D. Ill. Dec. 16, 1995) ("Without significant counsel fees to encourage the pursuit of these claims, the public policy to induce compliance with the law would be disserved").

On a percentage basis, the amount of attorneys' fees requested here accords with the percentage of fee typically awarded in complex cases like this one. *See, e.g.*, *McNeely v. Nat'l Mobile Health Care, LLC*, No. CIV-07-933-M, 2008 WL 4816510, at *15 (W.D. Okla. Oct. 27, 2008) ("Fees in the range of at least one-third of the common fund are frequently awarded in class action cases of this general variety"); *Cimarron Pipeline Const., Inc. v. Nat'l Council on Comp. Ins*., No. CIV 89-1186-T, 1993 WL 355466, at *2 (W.D. Okla. June 8, 1993) ("Fees in the range of 30–40% of any amount recovered are common in complex and other cases taken on a contingent fee basis"); *see also Gaskill v. Gordon*, 942 F. Supp. 382, 387-88 (N.D. Ill. 1996), *aff'd*, 160 F.3d 361 (7th Cir. 1998) (finding that 33% is the norm; awarding 38% of the settlement fund).

A lodestar cross-check against the one-third percentage requested here confirms that this request is reasonable, as the value of the time Plaintiff's Counsel's devoted to the case represents a *greater* amount than they seek as a fee award. *See, e.g., Lucken,*2010 WL 5387559, at *3 (though it is not required, courts may also perform a "lodestar cross-check" to assess the reasonableness of a percentage fee request when the attorneys'

efforts have brought about a common fund). To determine attorneys' fees under the lodestar method, courts multiply the hours worked by a reasonable fee, and may add an "additional percentage to compensate for [the] risk" of taking a case on contingency without assurance of compensation. *Vaszlavik*, 2000 WL 1268824, at *1.

Plaintiff's Counsel spent a combined 35,525.29 hours litigating this action. Sparer Decl. ¶74 & Ex. 7. Counsel's time is reasonable given the length of the action, the hard-fought nature of the litigation, and the complexity of the issues involved. The total lodestar, derived by multiplying the hours worked by each firm's attorneys and professional staff by the prevailing hourly rate for securities class actions,[3] equals $ 19.3 million. *Id.* An award of approximately $16.9 million is less than Plaintiff's Counsel's lodestar, resulting in a "negative multiplier." Accordingly, a lodestar cross-check confirms that the amount requested under the percentage method is fair and reasonable. *See In re Thornburg Mortg., Inc. Sec. Litig.*, 912 F. Supp. 2d 1178, 1259 (D.N.M. 2012) ("The attorneys' fees represent a negative multiplier of the total lodestar amount and are an acceptable percentage of the [common fund]").

[3] Courts previously have approved each firm's rates as reasonable. Sparer Decl. Ex. 4, ¶5 (Declaration Of Alan W. Sparer In Support Of Motion For Award Of Attorneys' Fees And Expenses ("Lead Counsel Decl.")); *id.*, Ex. 5, ¶11 (Declaration Of Daniel C. Girard In Support Of Motion For An Award Of Attorneys' Fees And Expenses ("Girard Decl.")); Sparer Decl. Ex. 6, ¶5 (Declaration Of Kip B. Shuman On Behalf Of The Shuman Law Firm In Support Motion For An Award Of Attorneys' Fees And Reimbursement Of Expenses ("Shuman Decl.")).

C. Application of the "*Johnson* Factors" Demonstrates the Requested Attorneys' Fees Are Fair and Reasonable

The Tenth Circuit has enumerated various factors (the "*Johnson*" factors) that should be considered in determining whether a requested attorney's fee is reasonable. These factors are:

> (1) The time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

In re Mkt. Ctr. E. Retail Prop., Inc., 730 F.3d 1239, 1247 (10th Cir. 2013) (capitalization omitted) (citing *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714 (5th Cir. 1974)). An analysis of these factors demonstrates that the fee requested is reasonable.

1. Counsel Obtained Substantial Benefits for the Class

Although the Court must address the *Johnson* factors, they seldom all apply in a particular case. *Brown*, 838 F.2d at 456. Generally, in "a common fund case, the greatest weight should be given to the monetary results achieved for the benefit of the class [and] this factor is often 'decisive.'" *Lucken*, 2010 WL 5387559, at *3 (quoting *Brown*, 838 F.2d at 456); *see also Oppenlander v. Standard Oil Co. (Ind.)*, 64 F.R.D. 597, 605 (D. Colo. 1974) ("While other criteria in determining reasonable attorney fees are legitimate

considerations, the amount of the recovery, and end result achieved, is of primary importance").

Plaintiff's Counsel's efforts here brought about a substantial economic benefit for the Class. Based on calculations performed by Plaintiff's damages expert, Plaintiff's Counsel estimate that the Class could obtain $381.9 million in Section 11 damages at trial. Sparer Decl. ¶¶58-60. The $50.75 million cash payment from Defendants represents a 13.3% recovery of those estimated damages.[4]

The Settlement also compares favorably to results in similar cases. A March 2017 Cornerstone Research report found that the median settlement in securities class actions of this size was approximately 3% of estimated damages in 2016 and 1.9% between 2006 and 2015, and the median settlement in all Section 11 or 12(a)(2) securities class actions over the past decade was 7.4% of estimated damages.[5] Plaintiff's Counsel's estimate of a 13.3% recovery rate therefore represents an excellent result for the Class.

[4] In response to Plaintiff's motion for preliminary approval, Defendants argued that the maximum damages amount is actually $700 million. Doc. 697. As Plaintiff has explained, however, the $700 million figure incorrectly includes prejudgment interest—which is not an element of Section 11 damages—and does not account for adjustments Ms. Preston made in her second expert report. Doc. 698 at 1.

[5] Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements: 2016 Review & Analysis*, Cornerstone Research, at 8, 11 (2017), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2016-Review-and-Analysis.

2. The Novelty and Difficulty of the Legal and Factual Questions Show that the Requested Fee Is Reasonable

Plaintiff's Counsel assumed considerable risk in taking this matter on a contingent basis. Courts have repeatedly acknowledged the complexities and risks associated with securities class actions. *See, e.g., In re Thornburg Mortg.*, 912 F. Supp. 2d at 1242 (stating that "securities class actions . . . are very difficult cases to try . . . . There are many hurdles—both legal and factual—to overcome, not the least of which are great attorneys on the defense side"); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 CM PED, 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (recognizing that "such litigation is notably difficult and notoriously uncertain") (citation omitted); *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 632 (D. Colo. 1976) (noting that securities litigation involves "difficult, complex and oft-disputed class action questions, and difficult questions regarding computation of damages").

Defendants sharply dispute the alleged violations and resulting damages. They argue that the Fund's investment objective had no clear meaning, and in any event was merely aspirational, and that they disclosed all relevant information, including the extent of the Fund's investment in special tax and special assessment ("dirt") bonds, and the risky nature of the Fund's inverse floater investments. Defendants further argue that Plaintiff lacks an actionable claim because the Fund's portfolio largely stayed within its disclosed regulatory and internal compliance limits. The statute of limitations poses a related risk to the Class claims, with Defendants arguing that the Fund's historical

volatility and risks were disclosed in both Fund statements and independent analyst reports. Loss causation presents further challenges, as this Court previously recognized. *See In re Oppenheimer Rochester Funds Grp. Sec. Litig.*, 838 F. Supp. 2d 1148, 1154 (D. Colo. 2012) ("Plaintiffs will have to address certain analytical and evidentiary impediments to proving that losses suffered during the relevant class period were actually caused by the misrepresentations and omissions alleged rather than the credit market downturn").

Section 11 and Section 12(a) cases involving mutual funds are relatively rare compared to Section 10(b)-5 securities actions. The claims and defenses in this case, as to both liability and damages, present novel issues throughout this litigation, testing the boundaries of established law. Plaintiff's Counsel have successfully navigated these challenges to date and have positioned the case for favorable summary judgment and *Daubert* rulings. With the outcome of trial highly uncertain, Plaintiff's Counsel have secured a substantial and immediate classwide recovery. Thus, the second *Johnson* factor strongly supports the fee award.

3. The Experience, Reputation, and Ability of the Attorneys and the Requisite Skill to Perform the Legal Service Properly

The third and ninth *Johnson* factors also strongly support the fee request. Plaintiff's Counsel have extensive experience litigating large, complex actions, including securities class actions like this one. The resumes of the Sparer Law Group, Girard

Gibbs LLP, and the Shuman Law Firm contain summaries of each firm's qualifications. Sparer Decl. Ex. 4, Attachment C ; *id.*, Ex. 5, Attachment C ; *id.*, Ex. 6, Attachment C.

In the early stages of the litigation, Plaintiff's Counsel coordinated with the attorneys for the lead plaintiffs in the other six actions to file amended complaints, engage experts, and jointly oppose Defendants' motions to dismiss. Sparer Decl. ¶84. Once the other six Rochester Fund actions settled, Class Counsel applied their combined skill and expertise to move this case forward on behalf of the Class. They did so both effectively—prevailing on the motions to dismiss, marshalling a full discovery record, developing expert testimony supporting a complex and multi-targeted legal analysis, obtaining class certification, and preserving the Court's order on appeal—and efficiently, allocating work to avoid duplication while concentrating projects in the hands of the attorney or attorneys best equipped to perform the required tasks.

The quality of Plaintiff's Counsel's work is evidenced by the positive results they have secured in the course of litigation and in the proposed Settlement for the Class, notwithstanding the substantial litigation risks and skilled adversaries they face. Defendants are represented by counsel of the highest caliber at Dechert LLP and Kramer Levin Naftalis & Frankel LLP—national defense firms known for success in federal securities actions—who have mounted a vigorous defense; and Plaintiff's Counsel's legal representation is properly evaluated in view of "the quality of opposing counsel." *Brown*, 838 F.2d at 455; *Horton v. Leading Edge Mktg., Inc.*, No. CIV.A. 04-CV-00212EW, 2008 WL 323222, at *2 (D. Colo. Feb. 4, 2008).

4. Counsel Handled the Action on a Fully Contingent Basis, Precluding Other Employment, and Dedicated Substantial Resources to the Action

The fourth and sixth *Johnson* factors—the extent to which Plaintiff's Counsel were precluded from other employment; and whether the fee is fixed or contingent—also support approval of the requested attorneys' fees. As noted above, Plaintiff's Counsel assumed significant risk by undertaking this action on a purely contingent basis. "The contingent nature of counsel's compensation has long been recognized as justifying a larger fee." *In re King Res. Co. Sec. Litig*., 420 F. Supp. 610, 632 n.8 (D. Colo. 1976). If Defendants prevailed at summary judgment, achieved decertification of the class, or prevailed at trial, this case would yield a significantly reduced recovery or no recovery at all, leaving Plaintiff's Counsel entirely uncompensated for their efforts and litigation expenses.

Moreover, as with virtually all contingent litigation, dedicating thousands of hours to this action precluded Plaintiff's Counsel from accepting other legal work. *See Lucas v. Kmart Corp.*, No. CIV.A. 99-01923, 2006 WL 2729260, at *6 (D. Colo. July 27, 2006) ("Large-scale class actions such as this case . . . necessarily require a great deal of work, and a concomitant inability to take on other cases"). Additionally, the substantial amount of money Plaintiff's Counsel advanced to fund this litigation was unavailable to them to use for other purposes. These factors likewise support the fee request.

5. Counsel Devoted Significant Time and Efforts to the Action

The first *Johnson* factor also supports Plaintiff's Counsel's fee request. In their accompanying declarations, Plaintiff's Counsel describe the work required to bring this case to a successful resolution. These efforts included:

- Investigating and analyzing the claims at issue, including a review of all relevant public information, and extensive research of the applicable law with respect to the claims and defenses asserted by Defendants;
- Preparing and filing detailed initial and consolidated complaints after conducting extensive factual investigations;
- Developing a professional working relationship with opposing counsel that allowed the parties to exchange documents and complete depositions efficiently and with minimal court intervention;
- Successfully opposing Defendants' multiple motions to dismiss;
- Successfully opposing Defendants' early motions for partial summary judgment;
- Preparing the case for trial by developing a robust discovery record including: drafting and propounding written discovery on Defendants; engaging in extensive negotiations with Defendants concerning the production of relevant documents, records, and written discovery responses; reviewing and analyzing, with assistance of experts, millions of pages of documents produced by Defendants; identifying and deposing key fact witnesses; preparing and producing Plaintiff's relevant documents; opposing Defendants' motion to compel the production of additional documents; and preparing for and defending Plaintiff's deposition;
- Briefing and arguing class certification, including in an initial round of briefing including the other six funds, supplemental briefing and a two-day evidentiary hearing, and twice defending class certification orders in response to Defendants' Rule 23(f) appeals to the Tenth Circuit;

- Successfully opposing Defendants' motions for early remand;
- Retaining, consulting, and working closely with experts to assess key liability and damages issues, and develop proof of the Class claims, and defending the deposition of Plaintiff's experts;
- Analyzing Defendants' experts' reports and supporting material with the assistance of Plaintiffs' experts, and deposing each of Defendants' experts;
- Engaging in extensive settlement negotiations with Defendants, including the mediation briefing before Judge Phillips; and
- Drafting the Stipulation and related documents and managing the notice and administration process.

In short, prosecuting and favorably settling this action required an enormous investment of time by Plaintiff's Counsel, who will continue to devote time to overseeing the Settlement administration and distribution. The amount of time and effort devoted to this case supports the requested fee award.

6. Fee Awards in Similar Cases Illustrate the Reasonableness of the Request

The fifth and twelfth *Johnson* factors further demonstrate that the fees requested are reasonable. "The customary fee awarded to class counsel in a common fund settlement is approximately one third of the total economic benefit bestowed on the class." *Lucken*, 2010 WL 5387559, at *5.

Thus, in the Tenth Circuit, a "contingency fee of one-third is relatively standard in lawsuits that settle before trial." *Lewis v. Wal-Mart Stores, Inc.*, No. 02-CV-0944 CVE FHM, 2006 WL 3505851, at *1 (N.D. Okla. Dec. 4, 2006) (awarding fee of one-third of settlement fund). Courts have recognized the reasonableness of attorneys' fee awards in

this range. *See, e.g.*, *In re Oppenheimer Rochester Funds Grp. Sec. Litig.*, No. 09-md-02063, Doc. 527, Order on Motion for Attorney Fees (D. Colo. July 31, 2014) (awarding fee of 30% of common fund at earlier stage of litigation); *In re United Telecom., Inc., Sec. Litig.*, No. CIV. A. 90-2251-0, 1994 WL 326007, at *4 (D. Kan. June 1, 1994) (awarding 33.3%; explaining in part that "[d]ue to the complicated nature of plaintiffs' [securities] claims, success was certainly never a certainty"); *McNeely*, 2008 WL 4816510, at *15 (awarding 33% and noting that "[f]ees in the range of at least one-third of the common fund are frequently awarded"); *Chieftain Royalty Co. v. Laredo Petroleum, Inc*., No. CIV-12-1319-D, 2015 WL 2254606, at *3 (W.D. Okla. May 13, 2015) (40% of common fund); *Campbell v. C.R. England, Inc.*, No. 2:13-CV-00262, 2015 WL 5773709, at *7 (D. Utah Sept. 30, 2015) (33.3% of common fund); *see also* Section I.B, *supra*.

Plaintiff's Counsel's request for an award of one-third of the Settlement Fund also corresponds to the private market for contingency litigation. *See, e.g.*, *Blum v. Stenson*, 465 U.S. 886, 903 n.* (1984) (Brennan, J., concurring) ("In tort suits, an attorney might receive one-third of whatever amount the Plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery"); Peter Robinson, *An Empirical Study of Settlement Conference Nuts and Bolts*, 17 Harv. Negot. L. Rev. 97, 112 (2012) ("In many instances, the attorney's fee would be 33% of a settlement, but 40% if it goes to trial"); *cf. In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001).

Plaintiff's Counsel request an award of one-third of the Settlement Fund, which is a slightly greater percentage than the 30% fees the Court awarded in the earlier settlements in this MDL. *In re Oppenheimer Rochester Funds Grp. Sec. Litig.*, No. 09-md-02063, Doc. 527, Order on Motion for Attorney Fees (D. Colo. July 31, 2014) (awarding fee of 30% of common fund). Plaintiff and his counsel respectfully submit that a slightly greater percentage award is warranted here. Not only did the California Fund present issues not present in the other Rochester cases (*e.g.*, overconcentration in real estate and misrating of bonds), the Settlement was achieved only at an advanced stage of the proceedings on a complete fact and expert discovery record, which required Plaintiff's Counsel to invest substantial sums of money and thousands of hours of attorney time without any assurance of compensation or recovery of out-of-pocket expenses.

The Settlement compares favorably with the settlements of the other six Rochester Fund actions in this MDL, which were achieved by highly experienced counsel and approved by this Court. The $50.75 million Settlement for the California Fund will provide a greater percentage recovery to Class members than the $89.5 million fund in the previous settlements provided to investors in those six funds. Sparer Decl. ¶61. Plaintiff's Counsel thus request a fee award that takes into account the added complexity of the case and the effective prosecution of the action, and compensates for the risk of successfully pursuing this case to a mature stage. *Vaszlavik*, 2000 WL 1268824, at *1; *see also Gottlieb v. Wiles*, 11 F.3d 1104, 1015 (10th Cir. 1993), *overruled in part on*

other ground, *Devlin v. Scardellatti*, 536 U.S. 1 (2002) (the court must "tak[e] into consideration the additional risks and costs that go hand in hand with protracted litigation").

D. The Request for Reimbursement of Expenses is Reasonable

Plaintiff's Counsel also seek reimbursement in the amount of $3.72 million for reasonable and necessary litigation expenses incurred in prosecuting the action, and have submitted declarations attesting to the accuracy of these expenses. Sparer Decl. ¶74 & Ex. 7, ¶4 (Lead Counsel Decl.); *id.*, Ex. 5, ¶¶13-14 (Girard Decl.); *id.*, Ex. 6, ¶¶7-8 (Shuman Decl.). The PSLRA contemplates compensating counsel for expenses incurred in prosecuting a class action, 15 U.S.C. § 78u-4(a)(6), and it is well established that in common fund cases, expenses that would "normally be billed to a private client" may be recovered from the common fund. *Bee v. Greaves*, 910 F.2d 686, 690 (10th Cir. 1990); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392 (1970) ("To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense"); *Vaszlavik*, 2000 WL 1268824, at *4 ("As with attorneys' fees, an attorney who creates or preserves a common fund for the benefit of a class is entitled to receive reimbursement of all reasonable costs incurred"). Each firm reports an itemized table showing the categories of expenses incurred, all of which were necessary to the prosecution of this action.

The expenses incurred here, including for court reporters and transcripts, filing and service, travel, data hosting, document copying, postage, and courier are the types of

costs that would normally be billed to a paying client. It is therefore appropriate to reimburse these expenses from the Settlement Fund.

Plaintiff's Counsel also seek reimbursement for substantial expert witness fees and expenses, which would likewise be billed to a paying client, and such fees are routinely reimbursed in class cases where the expert services are deemed necessary. *See, e.g., In re Crocs, Inc. Sec. Litig.*, No. 07-CV-02351-PAB-KLM, 2014 WL 4670886, at *5 (D. Colo. Sept. 18, 2014) (noting that expert fees being among the "largest expenditures" is an "appropriate use of resources" in a complex securities case). Plaintiff's experts in this case were essential to its effective prosecution and successful resolution.

Plaintiff hired Gifford Fong Associates ("GFA") early in the litigation, and Dr. Fong and GFA were subsequently engaged to provide services and to perform qualitative and quantitative analysis of transactional data for all seven Rochester Municipal cases. Sparer Decl. ¶¶16, 31. The requested litigation expenses include the California Fund's one-seventh share of GFA's services applicable to all the Rochester Municipal cases, as well as the much greater percentage of GFA's work, which was performed exclusively in the California Fund case commencing in 2013. GFA provided critical analysis and insight into the Fund's overall portfolio, its risks, its risk metrics and management, the causes and sources of loss, and the Fund's performance relative to its benchmark and peers. GFA analyzed the Fund's offering documents and other case materials, helping to guide Plaintiff's Counsel's discovery into core issues in the litigation. In all, GFA submitted three reports and Dr. Fong testified at deposition over two days. *Id.* ¶31.

Plaintiff also retained Neil Budnick of Channel Rock Partners to review the credit files for the Fund's more than 350 internally-rated "dirt bonds." *Id.* ¶32. Mr. Budnick determined whether each such bond met the key credit rating agency criteria for investment grade. He submitted two reports and was deposed. *Id.* Plaintiff's expert Steve Kohlhagen submitted a report regarding the Fund's adherence to its stated investment objective to seek the highest current income consistent with preservation of capital. Mr. Kohlhagen's report also addressed the question of whether the members of the Fund's Board of Trustees had met their responsibilities for oversight of the Fund's management. *Id.* ¶33. Finally, Candace Preston of Financial Markets Analysis, LLC computed Section 11 and Section 12 damages, submitted two reports, and was deposed. *Id.* ¶34.

Each of these experts, in addition to preparing their own reports, assisted Plaintiff's Counsel in analyzing Defendants' experts' reports.[6] *Id.* ¶36. Defendants served hundreds of pages of opening and rebuttal reports from six experts addressing all major areas of the case: the meaning and interpretation of the Fund's investment objective; its investments in unrated bonds, real-estate-related bonds, and inverse floaters; risk management and oversight by the trustees; loss causation; and damages. *Id.* Aided by Plaintiff's experts, Plaintiff's Counsel analyzed each defense expert report and its supporting material and deposed Defendants' experts. *Id.* Plaintiff's experts then

[6] Plaintiff also retained Mark Adelson to provide expert testimony in support of Plaintiff's motion to exclude a portion of Defendants' ratings expert's report. Defendants then took Mr. Adelson's deposition. Sparer Decl. ¶32.

supplemented their reports in response to Defendants' experts' critiques. *Id.* The Notice advised Class Members that Plaintiff's Counsel would seek reimbursement of expenses of up $3,900,000 (Sparer Decl. Ex. 1 (Declaration Of Alexander Villanova Of Claims Administrator Epiq ("Epiq Decl.") Ex. B at 1, 8)); and the $3.72 million in expenses Plaintiff's Counsel now seek are below the amount specified in the notice. Based on all the foregoing, Plaintiff respectfully submits that the expense request is fair and reasonable and should be granted.

E. Lead Plaintiff Should Be Reimbursed for His Reasonable Lost Wages and Expenses

Plaintiff and Class Representative Joseph Stockwell requests an award of $74,000 for the time he devoted to advancing and protecting the Class's interests over the course of more than eight years. As explained below and in his accompanying Declaration (attached to the Sparer Declaration as Exhibit 3), Mr. Stockwell seeks reimbursement for 185 hours of his time spent on litigation, at $400 per hour. *Id.* ¶¶17-19.

The Court has discretion under the PSLRA to reimburse class representatives for "reasonable costs and expenses (including lost wages) directly relating to the representation of the class." 15 U.S.C. § 77z-1(a)(4); *In re Qwest Commc'ns*, 625 F. Supp. 2d 1143, 1154-55 (D. Colo. 2009). This Court has approved substantial payments to compensate class representatives in securities cases.[7] *In re Core Bond Fund*, No. 09-

[7] A compendium of the orders cited herein that are not available on Westlaw is filed contemporaneously as Exhibit A to this motion.

cv-1186-JLK-KMT (D. Colo. Sept. 30, 2011) (Ex. A-1) (reimbursing lead plaintiff $54,900 in lost wages for 137.5 hours); *In re Rhythms Sec. Litig.*, No. 02-cv-35-JLK-CBS (D. Colo. Apr. 3, 2009) (Ex. A-2) (reimbursing lead plaintiff $135,084 in lost wages for 147.3 hours). Other courts likewise have granted significant reimbursements to lead plaintiffs whose dedication of time and effort benefited a class. For example, in *In re Schering-Plough Corp.*, the court reimbursed more than $100,000 to four entity plaintiffs that "collectively devoted 700 hours" to the securities class action. *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. CIV.A. 08-2177 DMC, 2013 WL 5505744, at *56-*57 (D.N.J. Oct. 1, 2013).

Mr. Stockwell has dedicated at least 185 hours to this action. He sought to become a lead plaintiff because he believed that Fund investors deserved their day in court, and because he felt capable of safeguarding the interests of the Class. Sparer Decl. Ex. 3, ¶17 (Declaration Of Lead Plaintiff Joseph Stockwell In Support Of Motion For Final Approval Of Class Settlement And Motion For Award Of Attorneys' Fees And Expenses). Mr. Stockwell performed numerous important tasks over the life of this case including having (i) assisted with complaint preparation; (ii) reviewed and approved pleadings and motions; (iii) engaged in written discovery and testified at deposition and at the evidentiary hearing on class certification; (iv) participated in regular conferences with Plaintiff's Counsel to discuss and approve strategic decisions; (iv) monitored the selection and work of Plaintiff's experts; and (v) participated in the in-person mediation in January 2016 and consulted with Plaintiff's Counsel in subsequent negotiations. *Id*.

¶6. Mr. Stockwell's commitment to the Class and level of engagement warrant the requested reimbursement.

F. The Reaction of the Class to Date Supports the Fee Request

Courts have deemed the lack of objections from class members significant and a factor that "weighs in favor of the requested award." *In re Crocs, Inc.*, 2014 WL 4670886, at *5; *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 985 F. Supp. 410, 416 (S.D.N.Y. 1997) (lack of objections is "one of the most important" factors in determining reasonableness). In this case, the Court-approved Notice—sent to over 54,000 individuals and broker-intermediaries—disclosed the maximum amounts Plaintiff's Counsel would seek in attorneys' fees, expenses, and reimbursement to the Lead Plaintiff and provides details on how to object. Sparer Decl. Ex. 1, (Epiq Decl. Ex. B). While the October 18, 2017 deadline for objections has not yet passed, to date no objections have been received—yet another factor that weighs in favor of a determination that the requested awards are fair and reasonable.

CONCLUSION

For the reasons set forth above, Plaintiff's Counsel respectfully request that the Court enter an Order approving an award of attorneys' fees equal to one-third of the Settlement Fund; reimbursement of expenses in the amount of $3.72 million; and reimbursement of $74,000 to Lead Plaintiff Mr. Stockwell.

Dated: October 3, 2017

/s/ Alan W. Sparer

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2017, I served a true and correct copy of the foregoing **MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES** with the Clerk of Court using the CM/ECF system.

/s/ Alan W. Sparer
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Exhibit A-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge John L. Kane

Civil Action No. **09-cv-1186-JLK-KMT**

IN RE: CORE BOND FUND

ORDER APPROVING CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

THIS MATTER having come before the Court for a hearing on September 30, 2011, on the Motion for Final Approval of Proposed Class Settlement, Approval of Distribution Plan, and Award of Attorneys' Fees and Expenses; Lead Counsel Labaton Sucharow LLP and Hagens Berman Sobol Shapiro LLP ("Class Counsel") having requested an award of attorneys' fees and reimbursement of litigation expenses, as well as reimbursement of Lead Plaintiff's lost wages and expenses; and the Court having considered all papers filed and proceedings conducted herein, and otherwise being fully informed in the premises and good cause appearing therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. All of the capitalized terms used herein shall have the same meanings as set forth in the Stipulation and Agreement of Settlement, dated May 19, 2011 (the "Stipulation").

2. This Court has jurisdiction to enter this Order awarding attorneys' fees and expenses and over the subject matter of the Consolidated Class Action Complaint and all Parties to the consolidated Action including all Class Members.

3. Class Counsel, on behalf of all plaintiffs' counsel, are entitled to a fee paid out of the common fund created for the benefit of the Class. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (1980). In class action suits where a fund is recovered and fees are awarded therefrom by the court, the Supreme Court has indicated that computing fees as a percentage of the common fund recovered is the proper approach. *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). The Tenth Circuit recognizes the propriety of the percentage-of-the fund method when awarding fees. *See Gottlieb v. Barry*, 43 F.3d 474, 484 (10th Cir. 1994).

4. Notice of Class Counsel's request for attorneys' fees and reimbursement of expenses was given to all Class Members who could be identified with reasonable effort. The form and method of notifying the Class of the request for attorneys' fees and expenses met the requirements of due process, Rule 23 of the Federal Rules of Civil Procedure, and Section 27 of the Securities Act of 1933, 15 U.S.C. §77z-1(a)(7), as amended by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), and constituted the best notice practicable under the circumstances, and constituted due and sufficient notice to all persons and entities entitled thereto.

5. Class Counsel have moved for an award of attorneys' fees of 18.5% of the Settlement Fund, or $8,787,500, plus interest at the same rate as that earned by the Settlement Fund. Class Counsel's fee and expense application has the support of Lead Plaintiff.

6. This Court concludes that the percentage-of-recovery method is appropriate for awarding attorneys' fees in this Action and hereby adopts said method for purposes of this Action.

7. The Court finds that a fee award of 18.5% of the Settlement Fund is consistent with awards made within this District and in similar cases. *See, e.g., In re Spectranetics Corp. Sec. Litig.*, No. 08-02048 (D. Colo. April 4, 2011) (Blackburn, J.) (fee equal to 28% of recovery); *In re Rhythms Sec. Litig.*, No. 02-35 (D. Colo. April 3, 2009) (Kane, J.) (fee equal to 30% of settlement fund).

8. Accordingly, the Court hereby awards attorneys' fees of 18.5% of the Settlement Fund, or $8,787,500, plus interest at the same rate as that earned by the Settlement Fund. The Court finds the fee award to be fair and reasonable. Said fees shall be allocated among plaintiff's counsel in a manner in which Class Counsel believe reflects each counsel's contribution to the prosecution and resolution of the Action.

9. In making this award of attorneys' fees and expenses, the Court has analyzed the factors considered within the Tenth Circuit as set forth in *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454-455 (10th Cir. 1988) *(citing Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). In evaluating these factors, the Court finds that:

a) Class Counsel have conferred a substantial benefit to the Class.

b) Class Counsel faced several novel and difficult legal and factual issues relating, in part, to the inherent complexities of a mutual-fund case as well as legal hurdles posed by Defendants' defenses of truthful disclosures to the factual intricacies of the investments at issue. Furthermore, Class Counsel faced the considerable risk of no recovery given the possibility that the claims would be dismissed in whole or in part for failure to adequately plead loss causation pursuant to the recent ruling in *In re State Street Bank*, 2011 U.S. Dist. LEXIS 35857, at *35, 2011 WL 1206070, at *10. Despite

the novelty and difficulty of the issues raised, Class Counsel secured an excellent result for the Class.

c) Class Counsel are very experienced and skilled practitioners in the securities litigation field, and have considerable experience and capabilities as class action specialists and with claims involving mutual funds. Their efforts in efficiently and expeditiously bringing the Action to a successful conclusion against the Defendants conferred a substantial benefit to the Class.

d) Class Counsel have expended considerable time and labor over the course of the Action investigating, analyzing and prosecuting the claims. This is evidenced by the Class Counsel's practice before the Court and Class Counsel's representations that they have: thoroughly investigated the claims asserted, including a review of all relevant public information, and engaged in extensive research of the applicable law with respect to the claims and defenses asserted by Defendants; filed a detailed and particularized consolidated class action complaint; pursued a Freedom of Information Act request with the Oregon Department of Justice and the Oregon Treasurer; requested, reviewed and analyzed almost 80,000 pages of key documents produced by Defendants, despite the PSLRA stay of discovery; retained and consulted with portfolio experts concerning a complete forensic analysis of the Fund portfolio as well as analysis of key documents produced by Defendants; vigorously defended motions to dismiss; retained and consulted with damages experts in order to analyze Fund transaction data and documents produced by Defendants; engaged in extensive settlement negotiations with Defendants, including three formal in-person mediation sessions before Judge Phillips; worked with wholly

independent counsel to resolve the allocation issues between the Actions, culminating in an allocation mediation session before Judge Phillips; and advocated for a substantial settlement for the Class. Counsel's total lodestar is reported to be $2,066,437.20, based upon 4,275.54 hours of work through July 28, 2011. Additional work was done in preparation for the hearing and Counsel anticipates that more work will be done with respect to the administration and distribution of the Settlement.

e) The services provided by Class Counsel appear to have been successful and efficient, resulting in a very significant recovery for the Class without the substantial expense, risk and delay of continued litigation and trial. Such efficiency and effectiveness supports the requested fee percentage.

f) There have been no objections to the fee and expense application.

10. Class Counsel have also requested reimbursement of litigation expenses in the amount of $412,997.43, plus interest at the same rate as that earned by the Settlement Fund, and an award of $54,900 to Lead Plaintiff Dr. C. Phillip Pattison for reimbursement of lost wages and expenses pursuant to the PSLRA related to his active participation in this Action. Such a request for lost wages is reasonable under the circumstances of this case. *See e.g., In re Marsh & McLennan Co. Inc. Sec. Litig.*, 2009 U.S. Dist. LEXIS 120953, at *61, 2009 WL 5178546, at *21 (S.D.N.Y. Dec. 23, 2009).

11. Having reviewed the expense information submitted by Class Counsel, the Court hereby approves the requested amount of litigation expenses and awards Class Counsel expenses of $412,997.43, plus interest at the same rate as that earned by the Settlement Fund.

12. The Court hereby awards Lead Plaintiff Dr. C. Phillip Pattison the amount of $54,900 in lost wages and expenses, to be paid upon entry of this Order.

13. The awarded attorneys' fees and expenses of Class Counsel shall be paid within ten (10) calendar days of entry of this Order and entry of the Final Judgment, subject to the terms, conditions and obligations of the Stipulation, which terms, conditions and obligations are incorporated herein.

14. Exclusive jurisdiction is hereby retained over the Parties and the Class Members for all matters relating to this Action, including the administration, interpretation, effectuation or enforcement of the Stipulation and this Order.

15. Any appeal or any challenge affecting this Court's approval of the attorneys' fees and expense application shall in no way disturb or affect the finality of the Judgment.

16. In the event that the Settlement is terminated or does not become Final in accordance with the terms of the Stipulation, this Order shall be rendered null and void to the extent provided by the Stipulation and shall be vacated in accordance with the Stipulation.

17. There is no just reason for delay in the entry of this Order, and immediate entry by the Clerk of the Court is expressly directed.

IT IS SO ORDERED.

DATED: September 30, 2011

THE HONORABLE JOHN L. KANE
UNITED STATES DISTRICT JUDGE

Exhibit A-2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **02-cv-35-JLK-CBS** (consolidated with 02-K-46, 02-K-64, 02-K-78, 02-K-137, 02-K-145, 02-K-146, 02-K-152, 02-K-161, 02-K-168, 02-K-304, and 02-K-351)

IN RE RHYTHMS SECURITIES LITIGATION

This Document Relates to: All Actions

ORDER AND FINAL JUDGMENT

On this **3d** day of **April, 2009**, a hearing having been held before this Court to determine: whether the terms and conditions of the Stipulation and Agreement of Settlement dated November 26, 2008 (the "Stipulation") are fair, reasonable, and adequate for the settlement of all claims asserted by the Class against the Defendants in the Complaint now pending in this Court under the above caption, including the release of the Defendants and the Released Parties, and should be approved; whether judgment should be entered dismissing the Complaint in its entirety, on the merits and with prejudice; whether to approve the Plan of Allocation as a fair and reasonable method to allocate the settlement proceeds among the members of the Class; and whether and in what amount to award Plaintiffs' Counsel fees and reimbursement of expenses and to reimburse Class Representative John Brown's reasonable costs and expenses (including lost wages) directly related to his representation of the Class.

The Court having considered all matters submitted to it at the hearing and otherwise; and it appearing that a notice of the hearing substantially in the form approved by the Court was mailed to all persons or entities reasonably identifiable, who purchased the common stock of Rhythms NetConnections, Inc. ("Rhythms") between January 6, 2000 and April 2, 2001, inclusive (the "Class Period"), as shown by the records of Rhythms' transfer agent and the

records compiled by the Claims Administrator in connection with its previous mailing of a Notice of Pendency of Class Action, at the respective addresses set forth in such records, except those persons or entities excluded from the definition of the Class or who previously excluded themselves from the Class, and that a summary notice of the hearing substantially in the form approved by the Court was published in the national edition of *The Wall Street Journal* and transmitted over *Business Wire* pursuant to the specifications of the Court; and the Court having considered and determined the fairness and reasonableness of the award of attorneys' fees and expenses requested; and all capitalized terms used herein having the meanings as set forth and defined in the Stipulation,

IT IS NOW, THEREFORE, ORDERED THAT:

1. The Court has jurisdiction over the subject matter of the Action, the Class Representative, all Class Members, and the Defendants.

2. The Court, having previously found that this Action meets the requirements of Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure for certification as a class action, and having previously directed notice of the pendency of this Action as a class action be given to the members of the Class and such notice having been given, now finds again and finally confirms that the prerequisites for a class action under Federal Rules of Civil Procedure 23 (a) and (b)(3) have been satisfied in that: i) the number of Class Members is so numerous that joinder of all members thereof is impracticable; ii) there are questions of law and fact common to the Class; iii) the claims of the Class Representative are typical of the claims of the Class he seeks to represent; iv) the Class Representative and Plaintiffs' Co-Lead Counsel have and will fairly and adequately represent the interests of the Class; v) the questions of law and fact

common to the members of the Class predominate over any questions affecting only individual members of the Class; and vi) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

3. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court hereby finally certifies this action as a class action on behalf of all persons who purchased the common stock of Rhythms NetConnections, Inc. between January 6, 2000 and April 2, 2001, inclusive. Excluded from the Class are Defendants, the officers and directors of Rhythms at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns, and any entity in which any excluded person has or had a controlling interest. Also excluded from the Class are the persons and/or entities who previously excluded themselves from the Class by filing a request for exclusion in response to the Notice of Pendency, as listed on Exhibit 1 annexed hereto.

4. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court hereby finally certifies John Brown as Class Representative.

5. Notice of the proposed Settlement of this Action was given to all Class Members who could be identified with reasonable effort. The form and method of notifying the Class of the pendency of the action as a class action and of the terms and conditions of the proposed Settlement met the requirements of Rule 23 of the Federal Rules of Civil Procedure, Section 21D(a)(7) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u-4(a)(7) as amended by the Private Securities Litigation Reform Act of 1995, due process, and any other applicable law, constituted the best notice practicable under the circumstances, and constituted due and

sufficient notice to all persons and entities entitled thereto. Plaintiffs' Co-Lead Counsel has filed with the Court proof of mailing of the Notice and Proof of Claim and proof of publication of the Publication Notice.

6. The Settlement is approved as fair, reasonable, and adequate, and the Class Members and the parties are directed to consummate the Settlement in accordance with the terms and provisions of the Stipulation.

7. The Complaint, which the Court finds was filed on a good faith basis in accordance with the Private Securities Litigation Reform Act and Rule 11 of the Federal Rules of Civil Procedure based upon all publicly available information, is hereby dismissed with prejudice in its entirety and without costs, except those costs provided for in the Stipulation.

8. The Lead Plaintiff and all the other Class Members on behalf of themselves, their heirs, executors, administrators, predecessors, successors and assigns, and any other person claiming (now or in the future) to have acted through or on behalf of them, shall hereby be deemed to have, and by operation of this order shall have, fully, finally, and forever, released, relinquished, settled and discharged the Released Parties from the Settled Claims, and are forever enjoined from instituting, commencing, or prosecuting any Settled Claim against any of the Released Parties directly, indirectly or in any other capacity, whether or not such Class Members execute and deliver a Proof of Claim and Release. The Lead Plaintiff has expressly waived, and all other Class Members are deemed to have waived, any and all provisions, rights and benefits conferred by any law of any state or territory of the United States, or principle of common law, which is similar, comparable, or equivalent to California Civil Code Section 1542.

9. The Defendants, on behalf of themselves, their heirs, executors, administrators, predecessors, successors and assigns, and the other Released Parties, shall hereby be deemed to have, and by operation of this order shall have, released and forever discharged each and every of the Settled Defendants' Claims, and shall forever be enjoined from prosecuting the Settled Defendants' Claims against Lead Plaintiff, all other Class Members and their counsel. The Defendants have expressly waived, and all other Released Parties are deemed to have waived, any and all provisions, rights and benefits conferred by any law of any state or territory of the United States, or principle of common law, which is similar, comparable, or equivalent to California Civil Code Section 1542.

10. All persons and/or entities whose names appear on Exhibit 1 hereto are hereby excluded from the Class, not bound by this Order and Final Judgment, and may not make any claim or receive any benefit from the Settlement. Said excluded persons and entities may not pursue any Settled Claims on behalf of those who are bound by this Order and Final Judgment.

11. Neither this Order and Final Judgment, the Stipulation, nor any of its terms and provisions, nor any of the negotiations or proceedings connected with it, nor any of the documents or statements referred to therein shall be:

(a) offered or received against any of the Defendants as evidence of or construed as or deemed to be evidence of any presumption, concession, or admission by any of the Defendants with respect to the truth of any fact alleged by any of the plaintiffs or the validity of any claim that has been or could have been asserted in the Action or in any litigation, or the

deficiency of any defense that has been or could have been asserted in the Action or in any litigation, or of any liability, negligence, fault, or wrongdoing of any of the Defendants;

(b) offered or received against any of the Defendants as evidence of a presumption, concession or admission of any fault, misrepresentation or omission with respect to any statement or written document approved or made by any of the Defendant;

(c) offered or received against any of the Defendants as evidence of a presumption, concession or admission with respect to any liability, negligence, fault or wrongdoing, or in any way referred to for any other reason as against any of the Defendants, in any other civil, criminal or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of the Stipulation; provided, however, that any of the Defendants may refer to it to effectuate the liability protection granted them hereunder;

(d) construed against any of the Defendants as an admission or concession that the consideration to be given hereunder represents the amount which could be or would have been recovered after trial; or

(e) construed as or received in evidence as an admission, concession or presumption against the Class Representative or any of the other Class Members that any of their claims are without merit, or that any defenses asserted by any of the Defendants have any merit, or that damages recoverable under the Complaint would not have exceeded the Gross Settlement Fund.

12. The Plan of Allocation is approved as fair and reasonable, and Plaintiffs' Counsel and the Claims Administrator are directed to administer the Stipulation in accordance with its terms and provisions. The Court further declares that any appeal of the approval of the Plan of Allocation, award of attorneys' fees, or awards of costs to Plaintiffs' Counsel and/or the Class Representative shall not prevent the Settlement from becoming effective.

13. The provisions of this Order and Final Judgment constitute a full and complete adjudication of the matters considered and adjudged herein, and the Court determines that there is no just reason for delay in the entry of judgment. The Clerk is hereby directed to immediately enter this Order and Final Judgment.

14. The Court finds that all parties and their counsel have complied with each requirement of Rule 11 of the Federal Rules of Civil Procedure as to all proceedings herein.

15. Plaintiffs' Counsel are hereby awarded **30 %** of the Gross Settlement Fund, which sum the Court finds to be fair and reasonable, and **$ 2,000,772.15** in reimbursement of expenses, which expenses shall be paid to Plaintiffs' Co-Lead Counsel from the Gross Settlement Fund with interest from the date such Settlement Fund was funded to the date of payment at the same net rate that the Settlement Fund earns. The award of attorneys' fees shall be allocated among Plaintiffs' Counsel in a fashion which, in the opinion of Plaintiffs' Co-Lead Counsel, fairly compensates Plaintiffs' Counsel for their respective contributions in the prosecution of the Action.

16. Class Representative John Brown is hereby awarded **$ 135,084.00.** This award is for reimbursement of the Class Representative's reasonable costs and expenses (including lost wages) directly related to his representation of the Class. Such payment shall come from the Gross Settlement Fund.

17. In making this award of attorneys' fees and reimbursement of expenses to be paid from the Gross Settlement Fund, the Court has considered and found that:

(a) the settlement has created a fund of $17.5 million in cash that is already on deposit, plus interest thereon, and that numerous Class Members who submit acceptable Proofs of Claim will benefit from the Settlement created by Plaintiffs' Counsel;

(b) Over 81,500 copies of the Notice were disseminated to putative Class Members indicating that Plaintiffs' Counsel were moving for attorneys' fees in the amount of up to 30% of the Gross Settlement Fund and for reimbursement of expenses in an amount of approximately $2.6 million. No objections were filed against the terms of the proposed Settlement or the ceiling on the fees and expenses requested by Plaintiffs' Counsel and the reimbursement of Class Representative John Brown's reasonable costs and expenses (including lost wages) directly related to his representation of the Class, as described in the Notice;

(c) Plaintiffs' Counsel have conducted the litigation with diligence and achieved the Settlement after years of hard-fought litigation and protracted, arms-length negotiations and with the assistance of a mediator;

(d) The action involves complex factual and legal issues and was actively prosecuted over six years and, in the absence of a settlement, would involve further lengthy proceedings with uncertain resolution of the complex factual and legal issues;

(e) Had Plaintiffs' Counsel not achieved the Settlement there would remain a significant risk that the Class may have recovered less or nothing from the Defendants;

(f) Plaintiffs' Counsel have devoted over 27,700 hours, with a lodestar value of $13,352,568.55, to achieve the Settlement; and

(g) The amount of attorneys' fees awarded and expenses reimbursed from the Settlement Fund are fair and reasonable and consistent with awards in similar cases.

18. Exclusive jurisdiction is hereby retained over the parties and the Class Members for all matters relating to this Action, including the administration, interpretation, effectuation or enforcement of the Stipulation and this Order and Final Judgment, and including any application for fees and expenses incurred in connection with administering and distributing the settlement proceeds to the members of the Class.

19. Without further order of the Court, the parties may agree to reasonable extensions of time to carry out any of the provisions of the Stipulation.

Dated: April 3, 2009

s/John L. Kane
SENIOR U.S. DISTRICT JUDGE

EXHIBIT 1

List of Persons and Entities Excluded from the Class in the *In re Rhythms Securities Litigation*

The following persons and entities have properly excluded themselves from the Class in the *In re Rhythms Securities Litigation*:

(1) Elliot K. Fishman, M.D.	(2) Teresa Green
(3) Michael A. Cantrell	(4) Martin Eder
(5) Richard V. Caulfield	(6) Joseph A. Wheelock Jr.
(7) Louie-Chan Associates LLC Larry Lowe, Trustee	

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