UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: VALE S.A. SECURITIES LITIGATION	Case No. 15 Civ. 09539 (GHW) Consolidated with Case No. 16 Civ. 00658 (GHW)

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

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Dated: May 6, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Court-appointed Lead Counsel, Bernstein Litowitz Berger & Grossmann LLP ("Lead Counsel"), respectfully submits this memorandum of law in support of its motion, pursuant to Rule 23(h) of the Federal Rules of Civil Procedure, for an award of attorneys' fees in the amount of 17% of the Settlement Fund, net of Litigation Expenses (or $3,938,004.97, plus interest earned at the same rate as the Settlement Fund).[1] Lead Counsel also seeks $1,811,120.54 for litigation expenses that Lead Counsel reasonably and necessarily incurred in prosecuting and resolving the Action, and $24,144.35 for costs incurred by Lead Plaintiffs directly related to their representation of the Settlement Class, pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA").

PRELIMINARY STATEMENT

The proposed Settlement, which provides for the payment of $25 million in cash to resolve the Action, is a very favorable result for the Settlement Class. In undertaking this litigation, counsel faced numerous challenges to proving liability and damages that posed the serious risk of no recovery, or a substantially lesser recovery than the Settlement. The significant monetary recovery was achieved through the skill, tenacity and effective advocacy of Lead Counsel, which litigated this Action on a fully contingent fee basis against highly skilled defense counsel. The Settlement was reached only after more than four years of hard-fought litigation, including the

[1] Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated February 5, 2020 (ECF No. 183-1), as amended on February 20, 2020 (ECF No. 188-2) (the "Stipulation"), or in the Declaration of Richard D. Gluck in Support of (I) Lead Plaintiffs' Motion for Final Approval of Settlement and Plan of Allocation, and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Litigation Expenses (the "Gluck Declaration" or "Gluck Decl."), filed herewith. In this memorandum, citations to "¶ __" refer to paragraphs in the Gluck Declaration and citations to "Ex. __" refer to exhibits to the Gluck Declaration.

completion of all fact and expert discovery, which required Lead Counsel to dedicate a significant amount of time and resources to the Action.

As detailed in the accompanying Gluck Declaration,[2] Lead Counsel vigorously pursued this litigation from its outset by, among other things: (i) conducting an extensive investigation into the alleged fraud, which included a thorough review of public information such as SEC filings, public reports, research reports, investor call transcripts, economic analyses, and news articles, consultation with experts, obtaining and reviewing sworn witness statements and other evidence obtained by Brazilian federal and state prosecutors, and contacting numerous former Vale and Samarco employees and other potential witnesses; (ii) drafting a detailed consolidated complaint based on this investigation; (iii) successfully opposing Defendants' motion to dismiss in large part; (iv) engaging in substantial nationwide and international discovery efforts, including drafting and serving document requests on Defendants and Letters Rogatory and subpoenas on nonparties; serving and responding to interrogatories; obtaining and reviewing more than 1.3 million pages of documents produced by Defendants and third parties (mostly in Portuguese); producing over 18,000 pages of Lead Plaintiffs' documents to Defendants in response to their requests; taking, defending, or participating in 21 depositions; and exchanging with Defendants eleven expert reports (including rebuttal and reply reports); (v) moving for class certification; (vi) participating in a mediation session overseen by an experienced class action mediator; and (vii) negotiating the Settlement with Defendants.

[2] The Gluck Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action (¶¶ 11-69); the nature of the claims asserted (¶¶ 12-14, 19); the negotiations leading to the Settlement (¶¶ 61-65); the risks and uncertainties of continued litigation (¶¶ 70-86); and a description of the services Lead Counsel provided for the benefit of the Settlement Class (¶¶ 5, 16-69, 109).

The Settlement achieved through Lead Counsel's efforts is a particularly favorable result when considered in light of the significant risks of proving the Defendants' liability and establishing loss causation and damages. These risks are set forth in detail in the Gluck Declaration at paragraphs 70 to 82, and are summarized in the memorandum of law supporting the Settlement. As detailed in those submissions, these risks posed a real possibility that Lead Plaintiffs and the Settlement Class would not be able to recover or would have recovered a lesser amount if the Action proceeded through summary judgment, trial, and appeals.

As compensation for their efforts on behalf of the Settlement Class and the risks of non-payment they faced in bringing the Action on a contingent basis, Lead Counsel seeks attorneys' fee in the amount of 17% of the Settlement Fund, net of Litigation Expenses. The requested fee is well within the range of fees that courts in this Circuit have awarded in securities class actions with comparable recoveries on a percentage basis. The requested fee also represents a negative multiplier of 0.5 of Lead Counsel's lodestar.

Moreover, the fee is requested pursuant to written fee agreements entered into between Lead Counsel and Lead Plaintiffs Alameda County Employees' Retirement Association ("ACERA") and Orange County Employees Retirement System ("OCERS"), respectively, at the outset of the litigation. *See* Declaration of Susan L. Weiss on behalf of ACERA ("Weiss Decl.") (Ex. 1), at ¶ 9; Declaration of Gina M. Ratto on behalf of OCERS ("Ratto Decl.") (Ex. 2) at ¶ 9. Lead Plaintiffs are sophisticated institutional investors that actively supervised the Action and have endorsed the requested fee as consistent with their respective agreement and as fair and reasonable in light of the quality of the result obtained, the work counsel performed, and the risks of the litigation. *See* Weiss Decl. ¶¶ 9-10; Ratto Decl. ¶¶ 9-10.

In addition, while the deadline set by the Court for Settlement Class Members to object to the requested attorneys' fees and expenses has not yet passed, to date, no objections to the requests for fees and expenses have been received. ¶¶ 92, 133. In accordance with the Preliminary Approval Order, more than 230,000 copies of the Notice have been mailed to potential Settlement Class Members and their nominees through May 5, 2020, and the Summary Notice was published in *The Wall Street Journal* and transmitted over the *PR Newswire*. *See* Declaration of Luiggy Segura Regarding (A) Mailing of the Notice and Claim Form; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion Received to Date ("Segura Decl.") (Ex. 3), at ¶¶ 8-9. The Notice advised potential Settlement Class Members that Lead Counsel would apply for an award of attorneys' fees in amount not to exceed 17% of the Settlement Fund, and for payment of litigation expenses (including the reasonable costs and expenses of Lead Plaintiffs) in an amount not to exceed $2 million. *See* Segura Decl. Ex. A, at ¶¶ 5, 71. The fees and expenses sought by Lead Counsel are within the amounts set forth in the Notice.[3]

In light of the recovery obtained, the time and effort devoted by Lead Counsel, the work performed, the skill and expertise required, and the risks that counsel undertook, Lead Counsel submits that the requested fee award is reasonable. In addition, the litigation expenses for which Lead Counsel seeks payment were reasonable and necessary for the successful prosecution of the Action.

[3] The deadline for the submission of objections is May 20, 2020. Should any objections be received, Lead Counsel will address them in reply papers, which will be filed with the Court on or before June 3, 2020.

ARGUMENT

I. LEAD COUNSEL IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES FROM THE COMMON FUND

The Supreme Court has long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). Courts recognize that awards of fair attorneys' fees from a common fund "serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons," and therefore "to discourage future misconduct of a similar nature." *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *23 (S.D.N.Y. Nov. 8, 2010); *see In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *2 (S.D.N.Y. Nov. 7, 2007) (same).

The Supreme Court has emphasized that private securities actions such as this Action are "an essential supplement to criminal prosecutions and civil enforcement actions" by the SEC. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). Compensating plaintiffs' counsel for their risks is crucial, because "[s]uch actions could not be sustained if plaintiffs' counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class." *Hicks v. Morgan Stanley*, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005).

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

Lead Counsel respectfully submits that the Court should award a fee based on a percentage of the common fund obtained. The Second Circuit has expressly approved the percentage method, recognizing that "the lodestar method proved vexing" and had resulted in "an inevitable waste of judicial resources." *Goldberger*, 209 F.3d at 48-49 (holding that either the percentage-of-fund or lodestar method may be used to determine appropriate attorneys' fees); *Savoie v. Merchs. Bank*,

166 F.3d 456, 460 (2d Cir. 1999) (stating that the "percentage-of-the-fund method has been deemed a solution to certain problems that may arise when the lodestar method is used in common fund cases"). More recently, the Second Circuit has reiterated its approval of the percentage method, stating that it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation," and has noted that the "trend in this Circuit is toward the percentage method." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (citations omitted); *see also In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 416 (S.D.N.Y. 2018); *In re Comverse Tech., Inc. Sec. Litig.*, 2010 WL 2653354, at *2 (E.D.N.Y. June 24, 2010).

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

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

The Supreme Court has recognized that an appropriate court-awarded fee is intended to approximate what counsel would receive if they bargained for the services in the marketplace. *See Missouri v. Jenkins*, 491 U.S. 274, 285-86 (1989). If this were a non-representative action, the customary fee arrangement would be contingent, on a percentage basis, and typically in the range of 30% to 33% of the recovery. *See Blum v. Stenson*, 465 U.S. 886, 903 (1984) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.") (Brennan, J., concurring).

The 17% attorney fee requested by Lead Counsel under its fee agreements with Lead Plaintiffs is at the very low end of the range of percentage fees that have been awarded in the Second Circuit in securities class actions and other similar litigation with comparable recoveries. *See, e.g.*, *Cen. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care*,

LLC, 504 F.3d 229, 249 (2d Cir. 2007) (affirming district court's award of 30% of $42.5 million settlement fund); *Facebook IPO*, 343 F. Supp. 3d at 415-18 (awarding 25% of $35 million settlement); *In re OSG Sec. Litig.,* No. 12-cv-07948-SAS, slip op. at 1 (S.D.N.Y. Dec. 2, 2015), ECF No. 261 (awarding 30% of $31.6 million settlement) (Ex. 7); *In re Facebook, Inc. IPO Sec. & Derivative Litig. (NASDAQ Actions)*, 2015 WL 6971424, at *12 (S.D.N.Y. Nov. 9, 2015) (awarding 33% of $26.5 million settlement); *City of Austin Police Ret. Sys. v. Kinross Gold Corp.*, 2015 WL 13639234, at *4 (S.D.N.Y. Oct. 15, 2015) (awarding 30% of $33 million settlement); *In re Celestica Inc. Sec. Litig.*, No. 07-cv-00312-GBD, slip op. at 2 (S.D.N.Y. July 28, 2015), ECF No. 267 (awarding 30% of $30 million settlement) (Ex. 8); *City of Pontiac Gen. Emps.' Ret. Sys. v. Lockheed Martin Corp.,* 954 F. Supp. 2d 276, 281 (S.D.N.Y. 2013) (awarding 25% of $19.5 million settlement and noting that 25% is an "increasingly used benchmark"); *Citiline Holdings, Inc. v. iStar Fin., Inc.*, No. 1:08-cv-03612-RJS, slip op. at 1 (S.D.N.Y. Apr. 5, 2013), ECF No. 127 (awarding 30% of $29 million settlement) (Ex. 9); *City of Roseville Emps.' Ret. Sys. v. EnergySolutions, Inc.*, No. 1:09-cv-08633-JFK, slip op. at 2 (S.D.N.Y. Mar. 14, 2013), ECF No. 23 (awarding 26% of $26 million settlement) (Ex. 10); *In re Sadia S.A. Sec. Litig.,* 2011 WL 6825235, at *3 (S.D.N.Y. Dec. 28, 2011) (awarding 30% of $27 million settlement); *In re L.G. Philips LCD Co. Sec. Litig.*, No. 1:07-cv-00909-RJS, slip op. at 1 (S.D.N.Y. Mar. 17, 2011), ECF No. 82 (awarding 30% of $18 million settlement) (Ex. 11).[4]

[4] Indeed, percentage fees of this amount and higher have often been awarded in much larger settlements in the Second Circuit. *See, e.g., In re SunEdison, Inc. Sec. Litig.*, No. 1:16-md-2742-PKC, slip op. at 2 (S.D.N.Y. Oct. 25, 2019), ECF No. 672 (awarding 21% of $74 million settlement) (Ex. 12); *In re Heartware Int'l, Inc. Sec. Litig.*, No. 1:16-cv-00520-RA, slip op. at 2 (S.D.N.Y. Apr. 12, 2019), ECF No. 85 (awarding 24% of $54.5 million settlement) (Ex. 13); *In re Amaranth Natural Gas Commodities Litig.*, 2012 WL 2149094, at *2 (S.D.N.Y. June 11, 2012) (awarding 30% of $77.1 million settlement); *Cornwell v. Credit Suisse Grp.*, 2011 WL 13263367, at *1-2 (S.D.N.Y. July 18, 2011) (awarding 27.5% of $70 million settlement); *In re Priceline.com,*

In sum, the fee requested here is well within the range of fees awarded on a percentage basis in comparable actions.

B. The Requested Attorneys' Fees Are Reasonable Under the Lodestar Method

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

Through February 5, 2020, Lead Counsel has spent a total of 14,548.25 hours of attorney and other professional support time prosecuting the Action for the benefit of the Settlement Class. ¶ 107.[5] Lead Counsel's lodestar, derived by multiplying the hours spent by each attorney and paraprofessional by their current hourly rates, is $8,004,278.75.[6] *See id*. The requested fee of 17% of the $25 million Settlement Amount (less $1,835,264.89 in expenses sought) is $3,938,004.97, plus interest. The requested fee thus represents a "negative" multiplier of approximately 0.5 of the total lodestar, *i.e.*, it is only 50% of the value of Lead Counsel's time at normal rates.

Inc. Sec. Litig., 2007 WL 2115592, at *5 (D. Conn. July 20, 2007) (awarding 30% of $80 million settlement); *In re Philip Servs. Corp. Sec. Litig.*, 2007 WL 959299, at *1, *3 (S.D.N.Y. March 28, 2007) (awarding 26% of $79.75 million settlement).

[5] Lead Counsel have not submitted any time incurred after February 5, 2020, the date the Stipulation was executed. However, since that date, Lead Counsel have expended additional time overseeing dissemination of notice to the Settlement Class and preparing and filing papers in support of preliminary and final approval of the Settlement. If the Settlement is approved, Lead Counsel will continue to expend additional time for many months monitoring and overseeing the administration of the Settlement and distribution of payment to Settlement Class Members.

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

This multiplier is significantly below multipliers commonly awarded in securities class actions and other comparable litigation. Indeed, in complex contingent litigation such as this Action, fees representing multiples above the lodestar are regularly awarded to reflect the contingency-fee risk and other relevant factors. *See FLAG Telecom*, 2010 WL 4537550, at *26 ("a positive multiplier is typically applied to the lodestar in recognition of the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors"); *Comverse*, 2010 WL 2653354, at *5 ("Where, as here, counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar"); *see also Wal-Mart*, 396 F.3d at 123 (upholding multiplier of 3.5 as reasonable on appeal); *Woburn Ret. Sys. v. Salix Pharm., Ltd.,* 2017 WL 3579892, at *6 (S.D.N.Y. Aug. 18, 2017) (awarding fee representing a 3.14 multiplier); *Comverse*, 2010 WL 2653354, at *5 (2.78 multiplier); *Cornwell*, 2011 WL 13263367, at *2 (4.7 multiplier).

The fact the requested fee here is equal to only 50% of the value of the time by expended by Lead Counsel at its regular hourly rates strongly supports the reasonableness of the requested fee. *See, e.g., In re Bear Stearns Cos. Sec., Deriv., & ERISA Litig.*, 909 F. Supp. 2d 259, 271 (S.D.N.Y. 2012) (approving fee with negative multiplier and noting that the negative multiplier was a "strong indication of the reasonableness of the [requested] fee"); *FLAG Telecom*, 2010 WL 4537550, at *26 ("Lead Counsel's request for a percentage fee representing a significant discount from their lodestar provides additional support for the reasonableness of the fee request.").

In sum, the requested fee award is well within the range of what courts in this Circuit regularly award in class actions such as this one when calculated as a percentage of the fund and substantially lower when calculated using Lead Counsel's lodestar. Moreover, as discussed below,

each of the factors established for the review of attorneys' fee awards by the Second Circuit in *Goldberger* also strongly supports a finding that the requested fee is reasonable.

IV. THE FEE REQUEST IS ENTITLED TO A PRESUMPTION OF REASONABLENESS BECAUSE IT IS BASED ON FEE AGREEMENTS ENTERED INTO WITH LEAD PLAINTIFFS AT THE OUTSET OF THE LITIGATION

Because the requested fee is based on agreements that Lead Counsel entered into with sophisticated institutional Lead Plaintiffs at the outset of the litigation, *see* Weiss Decl. ¶ 9; Ratto Decl. ¶ 9, the fee should be afforded a presumption of reasonableness. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 282 (3d Cir. 2001). Even if a formal presumption of reasonableness is not afforded to the fee based on the pre-litigation agreements, the existence of the agreements and the approval of the requested fee by Lead Plaintiffs, which were actively involved in the prosecution and settlement of the Action, strongly support approval of the fee. *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133-34 (2d Cir. 2008).

The PSLRA was intended to encourage institutional investors like ACERA and OCERS to assume control of securities class actions in order to "increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel." H.R. Conf. Rep. No. 104-369, at *32 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 731. Congress believed that these institutions would be in the best position to monitor the ongoing prosecution of the litigation and assess the reasonableness of counsel's fee request.

A number of courts have treated fee arrangements between PSLRA lead plaintiffs and their counsel established at the outset of the litigation to be presumptively reasonable in light of Congress's intent to empower lead plaintiffs under the PSLRA to select and supervise attorneys

on behalf of the class. *See Cendant*, 264 F.3d at 282 (*ex ante* fee agreements in securities class actions enjoy "a presumption of reasonableness"); *In re Marsh & McLennan Cos. Sec. Litig.*, 2009 WL 5178546, at *15 (S.D.N.Y. Dec. 23, 2009) ("Since the passage of the PSLRA, courts have found such an agreement between fully informed lead plaintiffs and their counsel to be presumptively reasonable"). The Second Circuit has indicated that the Court should, at least, give "serious consideration" to such agreements, *see Nortel*, 539 F.3d at 133-34. For example, the Second Circuit has stated that:

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

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

Here, Lead Plaintiffs are classic examples of the sophisticated and financially interested investors that Congress envisioned serving as fiduciaries for the class when it enacted the PSLRA. Lead Plaintiffs took an active role in the litigation and closely supervised the work of Lead Counsel. *See* Weiss Decl. ¶¶ 6-7; Ratto Decl. ¶¶ 6-7. Accordingly, the fee should be considered reasonable, and should be approved. *See Veeco*, 2007 WL 4115808, at *8 ("public policy considerations support the award in this case because the Lead Plaintiff . . . —a large public pension fund—conscientiously supervised the work of lead counsel and has approved the fee request").

V. OTHER FACTORS CONSIDERED BY COURTS IN THE SECOND CIRCUIT CONFIRM THAT THE REQUESTED FEE IS FAIR AND REASONABLE

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

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

Goldberger, 209 F.3d at 50 (internal quotes and citation omitted). Consideration of these factors, together with the analyses above, demonstrates that the fee requested by Lead Counsel is reasonable.

A. The Time and Labor Expended Support the Requested Fee

The substantial time and effort expended by Lead Counsel in prosecuting the Action and achieving the Settlement also support the requested fee. The Gluck Declaration details the significant efforts that Lead Counsel dedicated to prosecuting Lead Plaintiffs' claims over the course of this four-year litigation. As set forth in greater detail in the Gluck Declaration, Lead Counsel, among other things:

- conducted an extensive investigation into the alleged fraud, which included a thorough review of public information such as SEC filings, public reports, research reports, investor call transcripts, economic analyses, and news articles, consultation with experts, and contacts and interviews with numerous former Vale and Samarco employees or other potential witnesses (¶¶ 17-18);
- researched and drafted the extensive consolidated complaint based on Lead Counsel's investigation (¶¶ 17-19);
- briefed in opposition to, and defeated in part, Defendants' motion to dismiss the Complaint (¶¶ 20-25);
- engaged in substantial nationwide and international fact discovery, including drafting and serving document requests on Defendants and Letters Rogatory and subpoenas on nonparties, propounding interrogatories and requests for admission, obtaining and reviewing more than 1.3 million pages of documents produced by Defendants and third parties (mostly in Portuguese), and taking 10 depositions of current or former Vale executives (¶¶ 28-42, 53-54);
- consulted extensively with experts concerning financial economics, geotechnical engineering and dam safety, corporate governance, loss causation and damages, and Brazilian antitrust law (¶¶ 18, 43-47);
- engaged in extensive expert discovery, including working with Lead Plaintiffs' experts in preparing six initial, reply, or rebuttal reports, analyzing five reports from

Defendants' experts, deposing Defendants' four experts, and defending depositions of Lead Plaintiffs' four experts (¶¶ 44-52);

- moved for class certification, which included submitting an initial and rebuttal expert report on market efficiency and class-wide damages, preparing for and defending Lead Plaintiffs' depositions, and attending the deposition of an analyst at one of Lead Plaintiffs' investment managers (¶¶ 55-60);
- engaged in extensive settlement negotiations with Defendants' Counsel, including participating in a mediation session overseen by an experienced class-action mediator (¶¶ 61-65); and
- negotiated the final terms of the Settlement with Defendants and drafted, finalized, and filed the Stipulation and related documents (¶¶ 65-67).

As noted above, Lead Counsel expended over 14,500 hours prosecuting this Action through February 5, 2020 with a lodestar value of over $8 million. ¶ 107. Throughout the litigation, Lead Counsel staffed the matter efficiently and avoided any unnecessary duplication of effort. ¶ 110. The time and effort devoted to this case by Lead Counsel was critical in obtaining the favorable result achieved by the Settlement, and confirms that the fee request here is reasonable.

B. The Risks of the Litigation Support the Requested Fee

The risk of the litigation is one of the most important *Goldberger* factors. *See Goldberger*, 209 F.3d at 54; *Comverse*, 2010 WL 2653354, at *5. The Second Circuit has recognized that the risks associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award:

> No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 470 (2d Cir. 1974) (citation omitted). "Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *Comverse*, 2010 WL 2653354, at *5 (citation omitted); *see also In re Am. Bank Note*

Holographics, Inc. Sec. Litig., 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (it is "appropriate to take this [contingent-fee] risk into account in determining the appropriate fee to award").

While Lead Counsel believes that Lead Plaintiffs' claims are meritorious, Lead Counsel recognized that there were several substantial risks in the litigation from the outset and that Lead Plaintiffs' ability to succeed at trial and obtain a substantial judgment was far from certain. As discussed in greater detail in the Gluck Declaration and in the memorandum of law in support of the Settlement, there were substantial risks here with respect to liability, loss causation, and damages. ¶¶ 70-82.

First, Lead Plaintiffs faced substantial challenges in proving that Defendants' statements were materially false and misleading when made. The Court had already dismissed several of the alleged misstatements from the Action and Defendants contended that the majority, if not all, of the alleged false statements that remain at issue were too vague and indefinite to support a fraud claim. ¶ 73. Relying on the Second Circuit's recent decision in *Singh v. Cigna Corp.*, 918 F.3d 57, 64 (2d Cir. 2019), Defendants would have argued that Vale's pre-collapse statements in the 2013 Sustainability Report were the type of "simple and generic assertions about having 'policies and procedures'" that are inactionable puffery. ¶¶ 73-74. Defendants would also argue that the 2013 Sustainability Report expressly carved out Samarco facilities like the Fundão Dam from its scope. ¶ 75.

Second, even if Lead Plaintiffs succeeded in proving that Defendants' statements were false, Lead Plaintiffs would have faced challenges in proving that Defendants made the alleged false statements with the intent to mislead investors or were reckless in making the statements. The Court found in its order on Defendants' motion to dismiss that Lead Plaintiffs had sufficiently pled scienter for the alleged false statements in the 2013 Sustainability Report by pleading that

Defendant Poppinga, as a Samarco Board member, had access to Board minutes and other documents that contradicted the statements in the report. ¶ 76. Defendants indicated in their request for a pre-motion conference that they would move for summary judgment on the ground that Poppinga was not on the Samarco Board when the 2013 Sustainability Report was issued in April 2014 and there was no evidence suggesting that he had access addressing the Fundão Dam before he joined the Board in January 2015. *Id*.

Lead Plaintiffs also would have faced additional challenges in proving that Defendants made the alleged false statements with the intent to mislead. Defendants would have pointed to other presentations and documents in which the Independent Tailings Review Board and other consultants attested to the safety and structural integrity of the Dam in the months leading up to publication of the 2013 Sustainability Report. Defendants would have asserted that those documents prove they reasonably believed the statements in the Sustainability Report, negating any inference that they acted with the requisite scienter. ¶ 78.

Third, even if Lead Plaintiffs established falsity and scienter, Lead Plaintiffs would have faced significant hurdles in establishing "loss causation" – that the alleged misstatements were the cause of investors' losses – and in proving damages. ¶ 80. Defendants would argue that Lead Plaintiffs' own loss causation expert admits that no artificial price inflation was introduced into Vale's ADRs following any of the alleged misstatements and that Vale's ADRs experienced no statistically significant abnormal price returns immediately following the collapse of the Fundão Dam. ¶ 81. Defendants thus had powerful arguments to support their view that losses suffered by investors could not be casually connected to the alleged misstatements in the 2013 Sustainability Report. Defendants would also argue that the two additional alleged corrective disclosures (when the price of Vale ADRs *did* show significant abnormal declines), which occurred when Brazilian

prosecutors announced they had filed a lawsuit against Vale for its role in the collapse of the Dam and when a Court later found that Vale likely was liable for the environmental harm as both a direct and indirect polluter because of its use of the Fundão Dam and its control of Samarco – cannot support loss causation because neither of those alleged corrective disclosures revealed new information about the pre-collapse fraud. *Id*.

While Lead Plaintiffs believe that they had responses to and evidence to rebut each of Defendants' arguments, they recognize that the outcome was far from certain. In the face of the many uncertainties regarding the outcome of the case, Lead Counsel undertook and prosecuted this case on a wholly contingent basis, knowing that the litigation could last for years and would require the devotion of a substantial amount of time and a significant expenditure of litigation expenses with no guarantee of compensation. ¶¶ 85, 114-17.

Lead Counsel's assumption of this contingency fee risk strongly supports the reasonableness of the requested fee. *See FLAG Telecom*, 2010 WL 4537550, at *27 ("Courts in the Second Circuit have recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award."); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("There was significant risk of non-payment in this case, and Plaintiffs' Counsel should be rewarded for having borne and successfully overcome that risk.").

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

The magnitude and complexity of the Action also support the requested fee. Courts have recognized that securities class action litigation is "notably difficult and notoriously uncertain." *FLAG Telecom*, 2010 WL 4537550, at *27. This case was no exception. As noted above and in the Gluck Declaration, the litigation raised a number of complex questions concerning liability, loss causation, and damages that required extensive efforts by Lead Counsel and consultation with

experts to bring to resolution. Proving the claims at trial would have turned on percipient and expert testimony on myriad complicated issues relating to Vale's use and responsibility for the condition of the Fundão Dam, control of Samarco, tailings dam design and operation, and loss causation. To build the case, Lead Counsel had to dedicate a substantial amount of time to understanding these complex matters, conducting an extensive factual investigation, obtaining discovery, and working extensively with experts to analyze the claims and the evidence obtained. Accordingly, the magnitude and complexity of the Action supports the conclusion that the requested fee is fair and reasonable.

D. The Quality of Lead Counsel's Representation Supports the Requested Fee

The quality of the representation by Lead Counsel is another important factor that supports the reasonableness of the requested fee. Lead Counsel submits that the quality of its representation is best evidenced by the quality of the result achieved. *See, e.g.*, *Veeco*, 2007 WL 4115808, at *7; *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004). Here, as discussed above and in the Gluck Declaration, the Settlement provides a very favorable result for the Settlement Class considering the serious risks of continued litigation and represents a substantial portion of likely recoverable damages. *See* ¶¶ 83-84. Lead Counsel respectfully submits that the quality of its efforts in this Action, together with its substantial experience in securities class actions and its commitment to this litigation, provided it with the leverage necessary to negotiate the Settlement and secure as large a recovery as possible for the Class.

Furthermore, Lead Counsel faced talented and tenacious adversaries in this Action. Courts have repeatedly recognized that the quality of the opposition faced by plaintiffs' counsel should also be taken into consideration in assessing the quality of the counsel's performance. *See, e.g.*, *Veeco*, 2007 WL 4115808, at *7 (among factors supporting 30% award of attorneys' fees was that defendants were represented by "one of the country's largest law firms"); *In re Adelphia Commc'ns*

Corp. Sec. & Derivative Litig., 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006) ("The fact that the settlements were obtained from defendants represented by 'formidable opposing counsel from some of the best defense firms in the country' also evidences the high quality of lead counsels' work") (citation omitted), *aff'd*, 272 F. App'x 9 (2d Cir. 2008). Here, Defendants were represented by able counsel from Gibson, Dunn & Crutcher LLP, who zealously represented their clients throughout this Action. *See* ¶ 112. Notwithstanding this capable opposition, Lead Counsel's thorough investigation, ability to present a strong case, successful opposition of Defendants' motion to dismiss, and demonstrated willingness to vigorously prosecute the Action enabled it to achieve the favorable Settlement.

E. The Requested Fee in Relation to the Settlement

Courts have interpreted this factor as requiring the review of the fee requested in terms of the percentage it represents of the total recovery. "When determining whether a fee request is reasonable in relation to a settlement amount, 'the court compares the fee application to fees awarded in similar securities class-action settlements of comparable value.'" *Comverse*, 2010 WL 2653354, at *3 (citation omitted). As discussed in detail in Part III above, the requested fee is well within the range of fees that courts in the Second Circuit have awarded in comparable cases on both a percentage basis and lodestar multiplier basis.

F. Public Policy Considerations Support the Requested Fee

A strong public policy concern exists for rewarding firms for bringing successful securities litigation. *See FLAG Telecom*, 2010 WL 4537550, at *29 (if the "important public policy [of enforcing the securities laws] is to be carried out, the courts should award fees which will adequately compensate Lead Counsel for the value of their efforts, taking into account the enormous risks they undertook"); *Maley v. Del Global Tech. Corp.*, 186 F. Supp. 2d 350, 373 (S.D.N.Y. 2002) ("In considering an award of attorney's fees, the public policy of vigorously

enforcing the federal securities laws must be considered."); *Hicks*, 2005 WL 2757792, at *9 ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding.") (citation omitted). Accordingly, public policy favors granting Lead Counsel's fee and expense application here.

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

The reaction of the Settlement Class to date also supports the requested fee. Through May 5, 2020, JND Legal Administration has disseminated the Notice to over 230,000 potential Settlement Class Members and nominees informing them, among other things, that Lead Counsel intended to apply to the Court for an award of attorneys' fees in an amount not to exceed 17% of the Settlement Fund, and up to $2 million in expenses. *See* Segura Decl. ¶¶ 5, 71 and Ex. A thereto. While the time to object to the Fee and Expense Application does not expire until May 20, 2020, to date, no objections have been received. ¶¶ 118, 133. Should any objections be received, Lead Counsel will address them in its reply papers.

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

Lead Counsel's fee application includes a request for payment of the litigation expenses that Lead Counsel paid or incurred, which were reasonable in amount and necessary to the prosecution of the Action. *See* ¶¶ 120-29. These expenses are properly recovered by counsel. *See Facebook IPO*, 343 F. Supp. 3d at 418 (in a class action, attorneys should be compensated "for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were incidental and necessary to the representation") (citation omitted); *In re China Sunergy Sec. Litig.*, 2011 WL 1899715, at *6 (S.D.N.Y. May 13, 2011) (same); *FLAG Telecom*, 2010 WL 4537550, at *30 ("It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class").

As set forth in detail in the Gluck Declaration, Lead Counsel incurred $1,811,120.54 in litigation expenses in connection with the prosecution of the Action. ¶ 120. These expenses were incurred as a result of Lead Counsel's vigorous pursuit of claims for Lead Plaintiffs and the class through this four-year litigation, which required extensive discovery, including international discovery, and extensive work with experts. The expenses for which payment are sought are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the hour. These expenses include, among others, expert fees, deposition costs, on-line legal and factual research, document management and hosting, travel costs, telephone, and photocopying expenses.

The largest expense, by far, is for retention of Lead Plaintiffs' experts, in the amount of $1,395,890.11, or 77% of the total litigation expenses. ¶ 123. As discussed in the Gluck Declaration, Lead Counsel consulted extensively with experts in loss causation and damages, geotechnical engineering, corporate governance, and Brazilian antitrust law during its investigation and the preparation of the Complaint and during the course of discovery. In connection with Lead Plaintiffs' motion for class certification, Lead Plaintiff's market efficiency expert, Dr. Tabak, submitted a report on the efficiency of the market for Vale ADRs and the methodology for calculating class-wide damages. Lead Counsel also consulted with and submitted expert reports of Professor Finnerty (loss causation and damages), Professor Calixto (corporate governance and Brazilian and EU antitrust law), and Dr. Noorany (geotechnical engineering) during expert discovery. In addition, Lead Counsel retained Brazilian counsel who assisted in specialized areas that required Brazilian attorneys, including submitting the Letters Rogatory to Brazilian courts and obtaining documents and testimony in response from Brazilian third-parties.

Each of these experts was instrumental in Lead Counsel's prosecution of the action and in bringing about the favorable result achieved. *Id*.

Another significant expense was the cost of translation, which came to $123,502.51, or approximately 7% of the total expenses. ¶ 124. The document management costs for hosting and processing the 1.3 million pages of documents received came to $53,603.64, or approximately 3% of the total expenses. ¶ 126. Lead Plaintiffs' share of the mediation costs paid to Phillips ADR for the services of Judge Phillips was $72,061.25 or 4% of the total expenses. ¶ 127. A complete breakdown by category of the expenses incurred by Lead Counsel is set forth in Exhibit 6 to the Gluck Declaration.

The Settlement Notice informed potential Settlement Class Members that Lead Counsel would apply for payment of litigation expenses in an amount not to exceed $2 million which might include the reasonable costs and expenses of Lead Plaintiffs directly related to their representation of the Settlement Class. The total amount of expenses requested is $1,835,264.89, which includes $1,811,120.54 for litigation expenses incurred by Lead Counsel and $24,144.35 in reimbursement of costs and expenses directly incurred by Lead Plaintiffs, an amount well below the amount listed in the Settlement Notice. To date, there has been no objection to the request for expenses. ¶ 133.

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

In connection with its request for Litigation Expenses, Lead Counsel also seeks reimbursement of a total of $24,144.35 in costs and expenses incurred by Lead Plaintiffs ACERA and OCERS directly related to their representation of the Class. The PSLRA specifically provides that an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be made to "any representative party serving on behalf of a class." 15 U.S.C. § 78u-4(a)(4).

Here, ACERA seeks reimbursement of $9,360.90 based on a conservative estimate of the time expended in connection with the Action by ACERA personnel, who spent a substantial amount of time communicating with Lead Counsel, reviewing pleadings and motion papers, gathering and reviewing documents in response to discovery requests, sitting for deposition, and attending the mediation in New York. *See* Weiss Decl. (Ex. 1) ¶¶ 6-7, 13. Lead Plaintiff OCERS seeks reimbursement of $14,783.45 for the time expended in connection with the Action by Gina M. Ratto, OCERS' General Counsel, Shanta Chary OCERS' Director of Investment Operations, and other OCERS employees, who likewise spent a substantial amount of time communicating with Lead Counsel, reviewing pleadings and motion papers, gathering and reviewing documents in response to discovery requests, sitting for deposition, and attending the mediation. *See* Ratto Decl. (Ex. 2) ¶¶ 6-7, 13.

Numerous courts have approved reasonable awards to compensate lead plaintiffs for the time their employees have spent supervising and participating in the litigation on behalf of the class. In *Marsh & McLennan*, the court awarded $144,657 to the New Jersey Attorney General's Office and $70,000 to certain Ohio pension funds, to compensate them "for their reasonable costs and expenses incurred in managing this litigation and representing the Class." 2009 WL 5178546, at *21. As the court noted, their efforts in communicating with lead counsel, reviewing submissions to the court, responding to discovery requests, providing deposition testimony and participating in settlement discussions were "precisely the types of activities that support awarding reimbursement of expenses to class representatives." *Id.*; *see also In re Bank of Am. Corp. Sec., Derivative, & Employee Ret. Income Sec. Act (ERISA) Litig.*, 772 F.3d 125, 133 (2d Cir. 2014) (affirming award of over $450,000 to representative plaintiffs for time spent by their employees on the action); *FLAG Telecom*, 2010 WL 4537550, at *31 (approving award of $100,000 to Lead

Plaintiff for time spent on the litigation); *Veeco*, 2007 WL 4115808, at *12 (awarding institutional lead plaintiff $15,900 for time spent supervising litigation, and characterizing such awards as "routine" in this Circuit); *In re Gilat Satellite Networks, Ltd.,* 2007 WL 2743675, at *19 (E.D.N.Y. Sept. 18, 2007) (granting PSLRA awards where, as here, "the tasks undertaken by employees of Lead Plaintiffs reduced the amount of time those employees would have spent on other work and these tasks and rates appear reasonable to the furtherance of the litigation").

The awards sought by Lead Plaintiffs are reasonable and justified under the PSLRA.

CONCLUSION

For the foregoing reasons, Lead Counsel respectfully requests that the Court award attorneys' fees in the amount of 17% of the Settlement Fund, net of Litigation Expenses; award $1,811,120.54 for the reasonable litigation expenses that Lead Counsel incurred in connection with the prosecution of the Action; and award $24,144.35 in reimbursement of Lead Plaintiffs's costs and expenses.

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Respectfully submitted,

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