UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE HELIOS AND MATHESON ANALYTICS, INC. SECURITIES LITIGATION	Case No. 1:18-CV-06965-JGK **CLASS ACTION**

MEMORANDUM OF LAW IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARDS TO LEAD PLAINTIFF

Dated: April 1, 2021

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Court-appointed Lead Counsel Levi & Korsinsky, LLP ("L&K") submits this memorandum of law in support of its motion, on behalf of itself and additional counsel Bragar Eagel & Squire, P.C. ("BES," and with Lead Counsel, "Plaintiffs' Counsel"),[1] pursuant to Federal Rules of Civil Procedure ("Rule") 23 and 54(d), for: (i) an award of attorneys' fees in the amount of 25% of the Settlement Fund, which is $2,062,500; (ii) reimbursement of necessary and reasonable litigation expenses of $106,794.83; and (iii) incentive awards of $5,000 each for Plaintiffs, $25,000 in aggregate, pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA").[2]

[1] As stated in the Notice, BES assisted Lead Counsel in this Action. Lead Counsel have agreed to share attorneys' fees awarded by the Court with BES. The allocations of fees among Plaintiffs' Counsel will in no way increase fees that are deducted from the Settlement Fund, and no other attorneys will share the awarded attorneys' fees.

[2] All capitalized terms not defined herein shall have the meaning set forth in the Stipulation and Agreement of Settlement dated December 11, 2020 (ECF No. 126-1, the "Stipulation"), and the Declaration of Shannon L. Hopkins in Support of (1) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation and Final Certification of Settlement Class, and (2) Lead Counsel's Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive Awards to Lead Plaintiff (the "Hopkins Declaration" or "Hopkins Decl."). Unless otherwise noted, all emphasis is added, all internal quotations and citations are omitted, and all citations to "¶ __" and "Ex." refer, respectively, to paragraphs in, and exhibits to, the Hopkins Declaration.

The Hopkins Declaration is an integral part of this submission and, to avoid undue repetition in this memorandum, the Court is referred to it for factual background, a detailed history of efforts undertaken by Plaintiffs and Lead Counsel during the course of this litigation and settlement negotiations, dissemination of Notice, and further factors bearing on the reasonableness and fairness of the Settlement and Plan of Allocation.

PRELIMINARY STATEMENT

The proposed Settlement of $8,250,000 resolves all claims against the Individual Defendants in this Action. For the reasons below, and as discussed in in the accompanying memorandum in support of final approval of the Settlement and the Plan of Allocation (the "Final Approval Memo"), Lead Plaintiff and Plaintiffs' Counsel submit that the Settlement is an excellent recovery for the Class given the significant risks and expenses of continued litigation, including the risk of a smaller recovery years from now, or no recovery at all. Settlement Class members will receive an immediate valuable benefit while avoiding further delay, uncertainty, and risk.

The Settlement is even more significant considering the substantial risks posed by further litigation. Lead Plaintiff's claims focused on Helios's operations of MoviePass, a movie ticket subscription service subsidiary of Helios. Lead Plaintiff alleged Defendants made numerous misrepresentations over a class period of almost an entire year regarding MoviePass's profitability; Helios's systems, technology, skill, and capabilities; Helios's liquidity needs; and violations of Helios's internal controls. The alleged fraud was intricate and complex, with the operative complaint spanning over 200 pages. ECF 92 (the "TAC"). While Lead Plaintiff believes it would have prevailed, Defendants vigorously challenged the claims and would have continued to do so throughout the litigation.

Specifically, Defendants asserted in their motion to dismiss that was pending at the time the Settlement was reached that none of their statements were materially false and misleading or made with the requisite state of mind to deceive (*i.e.*, scienter). Further, Defendants argued that the alleged misrepresentations were forward looking statements protected by the PSLRA and statements of opinions and puffery, and that on October 11, 2017 (the first alleged corrective disclosure) Helios disclosed the very risks Lead Plaintiff complained of such that any subsequent alleged corrective disclosures did not reveal any "new" information. If successful, Defendants'

truth-on-the-market defense would have eliminated any damages after October 11, 2017, thereby slashing the total estimated theoretical damages in this case by over $300 million. Besides the challenges in overcoming Defendants' motion to dismiss, Lead Plaintiff expected contentious litigation over class certification, summary judgment, at trial, and on appeals. Moreover, the only certain available source of recovery for Lead Plaintiff's claims if successful was Defendants' wasting insurance policy. Helios filed for Chapter 7 liquidation, and Defendants' policies were depleting daily not just to defend this Action, but to defend and settle the Trustee's claims and costs associated with numerous regulatory investigations. The potential for no recovery at all by Lead Plaintiff and the Class at a later stage of the litigation was substantially high.

Faced with these risks, Lead Plaintiff's Counsel vigorously prosecuted the Action on a fully contingent basis against highly skilled and experienced defense counsel. As described more fully in the Hopkins Declaration, Lead Plaintiff's Counsel conducted an extensive investigation prior to filing the Amended Class Action Complaint (the "FAC"), continued the investigation after its filing resulting in the preparation and filing of second and third amended complaints, opposed two motions to dismiss, monitored and analyzed the filings and claims in the Bankruptcy, reviewed and analyzed the filings in the Bankruptcy Trustee's derivative action, filed a motion to lift the discovery stay to obtain the same books and records that Bankruptcy Trustee relied on in his complaint, consulted with a loss causation, market efficiency and damages expert and prepared for and participated in settlement negotiations, including a full-day mediation via Zoom before mediator David Murphy, Esq. of Phillips ADR.

Lead Plaintiff's Counsel and their professionals have spent 2,633 hours and expended $106,794.83 in out-of-pocket expenses (the "Litigation Expenses") over the course of close to two and a half years, all on a contingency basis with no guarantee of ever being paid. Lead Plaintiff's

Counsel seek approval of an award of attorneys' fees in the amount of 25% of the Settlement Fund, equaling $2,062,500. The requested attorneys' fees award of 25% is fair and reasonable, reflecting the skills and experience of Lead Plaintiff's Counsel, the complexity of the issues in this Action, and the significant risks posed by this litigation. The requested fees compare favorably with similar litigation and settlements, based on both the percentage-of-the-fund method and the lodestar method. Indeed, both the percentage requested and lodestar multiplier here of 1.2 are on the lower range of comparable settlements that are often approved.

The application for fees and expenses has the full support of Lead Plaintiff. *See* Exs. 4-8. Lead Plaintiff is comprised of sophisticated investors with 58 cumulative years of investing experience who supervised the Action and have endorsed Lead Counsel's requested fees and expenses as fair and reasonable in light of the result achieved in the Action, the quality of the work counsel performed, and the risks of the litigation. *Id.* In addition, while the deadline set by the Court for Class Members to object to the requested attorneys' fees and expenses has not yet passed, following the dissemination of Postcard Notices to more than 136,700 potential Class Members and nominees, ***not a single objection*** to attorneys' fees, Litigation Expenses, or the Lead Plaintiff's awards has been received to date. Lead Counsel represents that the requested $106,794.83 in Litigation Expenses is well below the anticipated $166,500 limit of litigation-expense reimbursement included in the Notice to the Class. These expenses were both reasonable and necessary to successfully prosecute and resolve the asserted claims. Additionally, Lead Plaintiff's requested incentive awards are permitted under the PSLRA to compensate them for their time and function as an incentive to serve as representatives of the Class. The requested awards are modest compared to similar cases.

Accordingly, Lead Plaintiff's Counsel submits that the requested attorneys' fees, Litigation Expenses, and awards to Lead Plaintiff should be approved.

ARGUMENT

I. LEAD COUNSEL'S REQUEST FOR ATTORNEYS' FEES IS FAIR AND REASONABLE

A. Lead Counsel Is Entitled To An Award Of Attorneys' Fees From The Common Fund

As the U.S. Supreme Court and the Second Circuit have long recognized, where counsel "recovers a common fund for the benefit of persons other than himself or his client [counsel] 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). The purposes of this doctrine are to "encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and 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. 2010). The common fund doctrine "prevents unjust enrichment of those benefiting from a lawsuit without contributing to its cost." *Goldberger*, 209 F.3d at 47; *City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *10–11 (S.D.N.Y. 2014).

All three branches of the federal government recognize "that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions…." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 478 (2013). Compensating plaintiffs' counsel for the risks they take in bringing these actions is essential 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. 2005).

B. The Court Should Award A Reasonable Percentage Of The Common Fund

The Second Circuit utilizes two main methods for awarding attorneys' fees under the common-fund doctrine: (i) the "percentage method" in which the court awards a reasonable percentage of the common fund; and (ii) the "lodestar method," which considers the number of hours billed multiplied by reasonable hourly rates and then applies a multiplier based on "'other less objective factors,' such as the risk of litigation and the performance of the attorneys." *Goldberger*, 209 F.3d at 47. "The trend in this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A.*, 396 F.3d 96, 122 (2d Cir. 2005); *see also In re Signet Jewelers Ltd. Sec. Litig.*, 2020 WL 4196468, at *15 (S.D.N.Y. 2020) ("the Second Circuit has reiterated its approval of the percentage method"); *In re BioScrip, Inc. Sec. Litig.*, 273 F. Supp. 3d 474, 495-96 (S.D.N.Y. 2017) (percentage method utilized "particularly in complex securities class actions").

Courts embrace the percentage method for many reasons. The percentage method aligns counsel and class interests providing incentive "for efficient prosecution and early resolution," whereas the lodestar method creates an incentive to "bill as many hours as possible," possibly leading to a "disincentive to early settlement." *McDaniel v. Cnty. Of Schenectady*, 595 F.3d 411, 418 (2d Cir. 2010). Courts also recognize that the percentage method aligns with the "dictates" of the PSLRA. *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *3 (S.D.N.Y. 2007); *In re Worldcom, Inc., Sec. Litig.*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005) (PSLRA "contemplates that the percentage method will be used"). The percentage method also "preserves judicial resources because it relieves the court of cumbersome, enervating, and often surrealistic process of evaluating fee petitions." *Johnson v. Brennan*, 2011 WL 4357376, at *15 (S.D.N.Y 2011).

Accordingly, the Court should use the percentage method to calculate the reasonableness of Lead Counsel's request for attorneys' fees.

C. Lead Counsel's Request For Fees Equaling 25% Of The Settlement Fund Is Reasonable Under Either The Percentage Method Or The Lodestar Method

1. The Requested Fees Are Reasonable Under The Percentage Method

The requested 25% of the Settlement Fund here falls within, if not below, the range, of attorneys' fees routinely awarded within the Second Circuit in comparable securities class actions. *See, e.g.*, *Guevoura Fund Ltd. v. Sillerman*, 2019 WL 6889901, at *21 (S.D.N.Y. 2019) (awarding one-third of $7.5 million settlement); *In re Patriot Nat'l, Inc. Sec. Litig.*, 2019 WL 5882171, at *1 (S.D.N.Y. 2019) (awarding 33% of $6.5 million settlement); *Springer v. Code Rebel Corp.*, 2018 WL 1773137, at *5 (S.D.N.Y. 2018) ("33% is within the range of fee awards typically awarded."); *In re China MediaExpress Holdings, Inc. S'holder Litig.*, 2015 WL 13639423, at *1 (S.D.N.Y. 2015) (one-third of $12 million settlement); *In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at *12, 17 (S.D.N.Y. 2014) (one-third of $3.8 million settlement "is consistent with percentage fees award in this Circuit and nationwide"); *Hayes v. Harmony Gold Min. Co.*, 2011 WL 6019219, at *1 (S.D.N.Y. 2011) (approving one-third of $9 million settlement); *In re Telik, Inc., Sec. Litig.*, 576 F. Supp. 2d 570, 587-88 (S.D.N.Y. 2008) (finding 25% of $5 million settlement with 1.6 multiplier was "less than the attorneys' fees awards made by courts in this District and other courts within the Second Circuit," and collecting cases awarding one-third to 45% of settlement); *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 2007 WL 2230177, at *17 (S.D.N.Y. 2007) (one-third of $7.725 million settlement).

Lead Counsel's fee is also consistent with Courts across the country within recent years. *See* Ex. 3 at 23 (NERA report showing median fee award from 2011-2020 for settlements between $5 million and $10 million was 30%). In fact, as noted in the NERA report, the smaller percentage

fee awards (those below 25%) tend to occur as the settlement amount increases (after $100 million). *Id.*; *see also In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, 2006 U.S. Dist. LEXIS 78101, at *61 (S.D.N.Y. 2006) (tapering "awards in megafund cases" to avoid "windfall fees."). Lead Counsel's fee request does not warrant such a reduction as the percentage requested is already well-below the median percentage for settlements of similar size.

Even in comparison to the similar claims filed by the Bankruptcy Trustee, the 25% fee award is reasonable. The Bankruptcy Trustee settled with the Individual Defendants and additional Helios and MoviePass directors and officers for $12 million and received attorneys' fees of $4.2 million, or 35% of the settlement amount. ¶78, Exs. 13-14.

Moreover, courts have also routinely awarded fees of 25% or more where the settlement was reached during the pendency of, or shortly after the pleadings stage, and with little to no formal discovery. *See, e.g.*, *In re Revolution Lighting Techs., Inc. Sec. Litig.*, 2020 WL 4596811, at *2–3 (S.D.N.Y. 2020) (awarding one-third of $2,083,333.33 settlement, plus expenses, in a case where no motion to dismiss was filed); *Code Rebel*, 2018 WL 1773137, at *5 (awarding one-third of $1 million settlement where parties "have not engaged in formal discovery"); *In re Idreamsky Tech. Ltd. Sec. Litig.*, 2018 WL 8950640, at *4 (S.D.N.Y. 2018) (one-third of $4.15 million fund following motion to dismiss decision but prior to discovery); *Vaccaro v. New Source Energy Partners L.P.*, 2017 WL 6398636, at *5, 6 (S.D.N.Y. 2017) (awarding one-third of $2.8 million settlement where "action did not proceed to formal discovery"); *Taft v. Ackermans*, 2007 WL 414493, at *10–11 (S.D.N.Y. 2007) (approving 30% of $15.2 million settlement with multiplier of 1.44 where motion to dismiss pending); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 363-64, 370 (S.D.N.Y. 2002) (awarding one-third of $11.5 million settlement where motions to dismiss pending).

Thus, Lead Plaintiff's Counsel's requested fee of 25% of the Settlement Fund is well within the range, if not lower than, fees commonly awarded in comparable securities class actions.

2. The Requested Fees Are Reasonable Under The Lodestar Method

To ensure the reasonableness of a percentage fee, courts typically use the lodestar method as a "cross-check." *Goldberger*, 209 F.3d at 50. The lodestar is calculated by multiplying the number of hours all attorneys and legal professionals devoted to the action by their current hourly rate. Courts then apply a multiplier, adjusting the lodestar for contingency, risk, "skill of the attorneys, and other factors." *In re Marsh & McLennan Companies, Inc. Sec. Litig.*, 2009 WL 5178546, at *20 (S.D.N.Y. 2009); *see In re Comverse Tech., Inc. Sec. Litig.*, 2010 WL 2653354, at *4–5 (E.D.N.Y. 2010) (counsel are "entitled to a fee in excess of the lodestar" in contingency fee cases). Counsel's submissions "need not be exhaustively scrutinized by the district court. Instead, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case." *Goldberger*, 209 F.3d at 50.

Counsel and professional staff expended 2,663 hours in the prosecution of this Action, for a total lodestar of $1,699,845.75. ¶84. See Ex. 9 (Declaration of Shannon L. Hopkins on Behalf of Levi & Korsinsky, LLP in Support of Application for an Award of Attorneys' Fees and Expenses, the "Hopkins Fee Decl."); Ex 10 (Declaration of Lawrence P. Eagel on Behalf of Bragar Eagel & Squire, P.C. in Support of Application for an Award of Attorneys' Fees and Expenses, the "BES Fee Decl."). Lead Plaintiff's Counsel's lodestar supports the reasonableness of the requested fee.

First, to derive their lodestar, Lead Plaintiff's Counsel utilized the current "market rate," *i.e.*, hourly rates comparable to those normally charged in the community where counsel practices. *Luciano v. Olsten Corp.*, 109 F.3d 111, 115-16 (2d Cir. 1997) ("The 'lodestar' figure should be 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably

comparable skill, experience, and reputation'"); *Hi-Crush*, 2014 WL 7323417, at *15 ("the use of ***current*** rates to calculate the lodestar figure has been endorsed repeatedly" because it provides "a means of accounting for the delay in payment inherent in class actions and for inflation").

Lead Plaintiff's Counsel's billing rates range from $825 to $1,050 for partners; $475 to $875 for other attorneys, and $265 to $375 for professional staff. Ex. 9 at Exhibit A thereto; Ex. 10 at Exhibit A thereto. The hourly rates used by counsel here are comparable to those normally charged by securities action law firms. *See Christine Asia Co. v. Yun Ma*, 2019 WL 5257534, at *19–20 (S.D.N.Y. 2019) (in finding 2.15 multiplier reasonable, cites to 2016 partner rates of $834 to $1,125); *In re GSE Bonds Antitrust Litig.*, 2020 WL 3250593, at *5 (S.D.N.Y. 2020) (rates from firms that practice securities litigation ranging from $350 to $1,150).

Second, the requested fee is approximately 1.2 times the total lodestar, well within the range of multipliers commonly awarded in securities class actions and other complex litigation in this Circuit. *Wal-Mart*, (affirming 3.5 multiplier); *In re Prothena Corp. PLC Sec. Litig.*, 2019 WL 6528672, at *1–2 (S.D.N.Y. 2019) (approving 30% fee of $15.75 million settlement with multiplier of 2.7 where settled prior to filing of motion to dismiss); *Code Rebel*, 2018 WL 1773137, at *5 (2.02 multiplier); *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *18 (S.D.N.Y. 2015) (4.87 multiplier); *Telik*, 576 F. Supp. 2d at 590 (holding in contingency litigation, "lodestar multiples of over four are routinely awarded"); *EVCI*, 2007 WL 2230177, at *17 (2.43 multiplier and collecting cases); *Maley*, 186 F. Supp. 2d at 363-64, 373 (4.65 multiplier after "almost one year").[3]

In sum, the 25% fee award requested is well within the range of reasonableness under both the percentage method and the lodestar cross-check.

[3] The lodestar multiplier does not include additional time that will be expended in completing the claims process.

D. Other Factors Considered By Second Circuit Courts Confirm That Lead Counsel's Fee Request Is Fair And Reasonable

The Second Circuit has enunciated six additional criteria to consider when evaluating the reasonableness of 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. The *Goldberger* factors strongly demonstrate that Lead Counsel's requested fee award is reasonable and appropriate.

1. Time And Labor Expended By Counsel

Lead Counsel devoted significant time and effort prosecuting this litigation and achieving the Settlement, supporting the requested fee, including, among other work:

- conducting an extensive investigation and analysis of the allegations in preparing the FAC which included, *inter alia* (¶¶5, 21):
    - reviewing press releases, news articles, transcripts, and other public statements issued by or concerning Helios, MoviePass, and the Individual Defendants;
    - research reports issued by financial analysts concerning Helios's business; review of Defendants' filings with the U.S. Securities and Exchange Commission ("SEC");
    - review of docket entries from civil actions involving Defendants filed in courts around the country, including filings in the Bankruptcy;
    - review and analysis of the Bankruptcy Trustee's derivative complaint, which cited numerous internal Company documents supporting the claims asserted in this Action;
    - reviewing analysts' reports regarding the Company;
    - reviewing documents concerning regulatory actions involving Defendants, including records received pursuant to the state of New York's Freedom of Information Law;
    - performing economic analyses of securities movements and pricing data; and

  - retaining a private investigator to locate and interview former Helios employees;

- continuing the investigation described above and monitoring news concerning Defendants, resulting in the preparation of the Second Amended Class Action Complaint and TAC, and briefing a motion to supplement pursuant to Fed. R. Civ. P. 15(d) (¶24, ¶26);

- researching and drafting Lead Plaintiff's responses in opposition to Defendants' arguments in two motions to dismiss, addressing complex issues on falsity, materiality, and scienter (¶¶25-26);

- conducting extensive legal research and analysis in determining the effects of Helios's Bankruptcy on the Action, claims made by the Bankruptcy Trustee, and appropriate avenues for recovery (¶81);

- conducting extensive legal research and fully briefing a motion for relief from the PSLRA's automatic stay (¶31);

- consulting extensively with experts on damages and loss causation issues in connection with Lead Plaintiff's claims, and the Trustee's competing claims, in preparing for settlement negotiations (¶81);

- engaging in extensive, good faith, arm's-length negotiations leading to the Settlement, including: (i) negotiating an appropriate mediator; (ii) preparing visual aids and presenting to counsel for the Individual Defendants and Defendants' insurance carriers, followed up by a question and answer session; (iii) drafting Lead Plaintiff's detailed opening and responsive mediation statements; (iv) analyzing the Individual Defendants' and their carriers' mediation statements and damages analyses, including legal research into the insurance carriers positions regarding coverage; (v) preparing for and participating in an all-day mediation; and, (vi) participating in additional negotiations resulting in the Settlement and terms of the Stipulation (¶¶32-38);

- preparing Lead Plaintiff's Motion for Preliminary Approval of Class Action Settlement and related documents (¶82);

- working with Lead Plaintiff's damages experts to prepare the Plan of Allocation (¶82); and

- overseeing the notice process that was approved by the Court (¶¶44-49).

Lead Counsel will also oversee the finalization of the claims process. ¶82. No additional compensation will be sought for this work. *See In re Facebook, Inc. IPO Sec. & Derivative Litig.*, 2015 WL 6971424, at *10 (S.D.N.Y. 2015) (recognizing counsel "will necessarily need to oversee

the claims process, respond to inquiries, and assist Class Members in submitting their Proof of Claims").

Lead Plaintiff's Counsel devoted 2,633 hours for an aggregate lodestar of $1,699,845.75 in litigating this Action. ¶84; Exs. 9-10. At all times, Lead Plaintiff's Counsel provided comprehensive and focused efforts to achieve the best possible results for the Class, with no certainty of reimbursement for their time. ¶87. Accordingly, the time and effort devoted to the efficient management of this litigation and obtainment of the $8.25 million Settlement confirms that the 25% fee request is reasonable.

2. The Magnitude And Complexities Of The Litigation

Securities class actions are "notably difficult and notoriously uncertain." *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 189 (S.D.N.Y. 2012); *see also In re Bear Stearns Cos. Sec. Deriv. & ERISA Litig.*, 909 F. Supp. 2d 259, 271 (S.D.N.Y. 2012) (same); *Veeco Instruments*, 2007 WL 4115808, at *5 ("A securities case, 'by its very nature, is a complex animal.'"). This case was no exception.

The factual and legal issues in this case were complex and included a significant amount of alleged misrepresentations and corrective disclosures. Defendants vehemently contested falsity, scienter, and damages. Moreover, Lead Plaintiff faced additional issues related to bankruptcy law as a result of Helios's Chapter 7 petition. Prosecuting the Action required skill and dedication which supports the conclusion that the requested fee is fair and reasonable. *City of Providence*, 2014 WL 1883494, at *16 ("the complex and multifaceted subject matter involved in a securities class action such as this supports the fee request').

3. Risks Of The Litigation

Courts consider the risks of the litigation "perhaps the foremost factor to be considered in determining" a reasonable award of attorneys' fees. *Goldberger*, 209 F.3d at 54. "Little about

litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *Signet*, 2020 WL 4196468, at *19. Among the types of litigation risks considered, "[t]he most salient is the attorneys' risk in accepting a case on a contingency fee…." *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 164 (S.D.N.Y. 2011). This is because:

> No one expects a lawyer to give his services at bargain rates in a civil matter on behalf of a client who is not impecunious. 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).

Lead Plaintiff faced complex legal and factual issues, hotly disputed by Defendants as illustrated in the motion to dismiss briefing. To prevail on the motion to dismiss (which is no easy task),[4] and subsequently on a motion for summary judgement or at trial, Lead Plaintiff would have to establish that the alleged misstatements and omissions were materially false and misleading, as well as Defendants' scienter. ¶27. "The difficulty of establishing liability is a common risk of securities litigation." *In re AOL Time Warner, Inc.*, 2006 WL 903236, at *11 (S.D.N.Y. 2006). Here, Defendants strongly asserted that no statements were false because, among other things, they were forward-looking and opinions with no corresponding knowledge of being misleading. ¶27. Further, Defendants zealously advocated that any possibility of fraud was eliminated by Helios's risk disclosures presented to investors on October 11, 2017. *Id.*

[4] In fact, as reported by NERA (Ex. 3 at 12-13), securities class actions filed after 2014 have been dismissed more frequently than settled; cases filed between 2015 and 2017 were dismissed between 44% to 49% of the time; and 2020 saw a 26% increase in dismissals of standard (*i.e.*, non-merger) cases.

Lead Plaintiff would also have to prove loss causation and damages. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005). To achieve the maximum estimated damages, Lead Plaintiff would have to prevail on every claim alleged and establish loss causation for each corrective disclosure (eight in total considered in Lead Plaintiff's maximum estimate). ¶63. As previously noted, Defendants assert that the alleged corrective disclosures (particularly after the first alleged disclosure on October 11, 2017) did not disclose any new information (*id.*), and thus additional risks exist in establishing damages which would most likely result in a "battle of the experts" where "victory is by no means assured" and the "jury could be swayed by experts for the Defendants, who [c]ould minimize the amount of Plaintiffs' losses." *Bear Stearns*, 909 F.Supp.2d at 267-68.

Further proceedings also bore significant risk. For example, "there is a real risk that class certification may not be granted, or, if granted, it may later be rejected on appeal or decertified." *Bellifemine v. Sanofi-Aventis U.S. LLC*, 2010 WL 3119374, at *4 (S.D.N.Y. 2010) (Koeltl, J.). History is also replete with examples of cases litigated for years only to be dismissed at summary judgment or trial, or after appeal. *Marsh*, 2009 WL 5178546, at *18 ("In numerous class actions, including complex securities cases, plaintiffs' counsel have expended thousands of hours and advanced significant out-of-pocket expenses and received no remuneration whatsoever.") (collecting cases).

Moreover, here there was substantial risk related to collection of any potential future judgment given Helios's limited insurance coverage and the Bankruptcy where shareholders have been deemed unsecured creditors. ¶¶66-67. When the parties reached the Settlement, the Individual Defendants possessed limited insurance coverage. Claimants against the policy proceeds included not only the Class, but also the Trustee who was armed with the Company's internal books and records. Claimed damages in both this Action and the Trustee's action far

exceeded the available coverage. Moreover, Defendants also face ongoing and costly proceedings initiated by regulators including the New York Attorney General, District Attorneys in California, and the SEC. *See* Bankr. Dkt. 1.

Despite these risks, Lead Counsel undertook and prosecuted this Action for over two years on an entirely contingent basis. Lead Counsel never received any compensation for their work, or recompense for expenses, and would have received nothing if the case was not successful. Accordingly, given the significant risks of establishing liability, damages, and the risk of non-payment, this factor supports the requested fee award.

4. The Quality Of Representation

The quality of representation by Lead Plaintiff's counsel is another factor supporting the reasonableness of the requested fee. Since the passage of the PSLRA, L&K and BES have been approved by courts to serve as lead counsel in numerous notable securities class actions throughout the United States. *See* Exs. 9-10. Here, the firms have devoted considerable time and effort to this case, thereby bringing to bear many years of collective experience. *Vaccaro*, 2017 WL 6398636 at *8 (after a review of attorney backgrounds, court finds counsel to have "ample experience").

Other facts support a finding that Plaintiffs' Counsel provided quality representation. "[T]he quality of representation is best measured by results," *Goldberger*, 209 F.3d at 55. Here, the Settlement provides a very favorable result for the Class in light of the serious risks of continued litigation, and it represents a substantial portion of likely recoverable damages.[5] Lead Counsel submits that the quality of its efforts in the litigation to date, together with its substantial

[5] *See* Final Approval Memo at 12-14 and Hopkins Declaration, ¶¶68-69, (discussing maximum and likely recoverable damages and comparing with median estimated recoveries). In fact, even the maximum theoretical damages recovery of 2.2% falls within the median range of recoveries over the last ten years. *Id.*

experience in securities class actions, provided it with the leverage necessary to negotiate the Settlement. That Lead Counsel was able to secure the Settlement so early in the litigation also speaks to the quality of their representation—especially given that Helios filed for bankruptcy. *Maley*, 186 F. Supp. 2d at 373 ("While this Action was settled before a trial, such efficient prosecution of plaintiffs' claims weighs in favor of a finding of the quality of Plaintiffs' Class Counsel's representation here, especially given the dire financial straits of Del Global.").

Courts have repeatedly recognized that the quality of defense counsel should also be taken into consideration in assessing the quality of the counsel's performance. *Flag Telecom*, 2010 WL 4537550, at *25; *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, 2006 WL 3378705, at *3 (S.D.N.Y. 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). Here, Defendants were represented by able counsel from Greenberg Traurig, LLP a prestigious, global law firm, who zealously represented their clients throughout this Action. *See* ¶86. Notwithstanding this capable opposition, Lead Counsel's thorough investigation, ability to present a strong case, and demonstrated willingness to vigorously prosecute the Action enabled it to achieve the favorable Settlement.

5. The Requested Fee In Relation To Settlement

"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." *Christine Asia Co.*, 2019 WL 5257534, at *17. As detailed in Section I.C. above, the 25% fee award requested here is comparable to, if not lower than, similar settlements and thus this factor supports its approval.

6. Public Policy Considerations

"In considering an award of attorneys' fees, the public policy of vigorously enforcing the federal securities laws must be considered." *Maley*, 186 F. Supp. 2d at 373. "A strong public policy concern exists for rewarding firms for bringing successful securities litigation." *Signet*, 2020 WL 4196468, at *21. Indeed, the Supreme Court has repeatedly recognized that class actions are "a most effective weapon in the enforcement of the securities laws and are a necessary supplement to [SEC] action." *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985); *see also Amgen*, 568 U.S. at 478.

Accordingly, public policy supports granting requests for attorneys' fee under the common fund doctrine because it incentivizes "well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so" to litigate cases that enforce the securities laws. *Worldcom*, 388 F. Supp. 2d at 359; *In re Bristol-Myers Squibb Sec. Litig.*, 361 F. Supp. 2d 229, 373 (S.D.N.Y. 2005) ("public policy supports granting attorneys' fees that are sufficient to encourage plaintiffs' counsel to bring securities class actions that supplement the efforts of the SEC."); *see also Flag Telecom*, 2010 WL 4537550, at *29 (same); *Hicks*, 2005 WL 2757792, at *9 (S.D.N.Y. 2005) ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding.").

Plaintiffs' Counsel was willing to assume the considerable risks prosecuting this litigation and achieved an excellent result for Settlement Class that was not guaranteed. Accordingly, public policy supports the requested fee award.

E. The Class' Positive Reaction To Date Supports The Fee Request

While not an enumerated *Goldberger* factor, courts give "great weight" to the class' reaction to the settlement in considering the reasonableness of the requested attorneys' fees. *Maley*,

186 F. Supp. 2d at 374; *see also Flag Telecom*, 2010 WL 4537550, at *29 ("numerous courts have noted that the lack of objection from members of the class is one of the most important factors in determining the reasonableness of a requested fee"). The reaction of the Settlement Class to date here is overwhelmingly positive, supporting the requested fee award.

As of March 30, 2021, the Claims Administrator has mailed 136,726 copies of the Postcard Notice to potential Settlement Class members and nominees which directs Settlement Class members to the Settlement website where the Notice is accessible. *See* Ex. 1 at ¶10, ¶13 (JND Decl.). The Claims Administrator also published the summary notice in *Investor's Business Daily* on January 11, 2021 and over *PR Newswire* on January 7, 2021. *Id.* at ¶11. The Postcard Notice and long-form Notice each explain that Plaintiffs' Counsel intend to request attorneys' fees of no more than 25% of the Settlement Fund and expenses of no more than $166,500, plus interest. Exs. A and D to JND Decl. Although Settlement Class members have until April 15, 2021 to submit objections, to date no objections to any aspect Lead Counsel's request for fees and expenses, or Lead Plaintiff's request for awards have been filed or received by Lead Counsel. ¶91. "The lack of objections in this day and age, is not only remarkable, but militates in favor of approval of the Fees as requested." *Sillerman*, 2019 WL 6889901, at *22. If any objections are received, Plaintiffs' Counsel will address them in Plaintiffs' reply papers.

II. PLAINTIFFS' COUNSEL'S LITIGATION EXPENSES ARE REASONABLE, WERE NECESSARILY INCURRED, AND SHOULD BE REIMBURSED

Pursuant to the Notice, Plaintiffs' Counsel also request reimbursement of Litigation Expenses of $106,794.83. The amount is reasonable and includes the necessary litigation costs and expenses "properly recovered by counsel." *Hi-Crush*, 2014 WL 7323417, at *18. "It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class." *Flag Telecom*, 2010 WL 4537550, at *30; *EVCI*, 2007 WL 2230177,

at *18 ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course.").

The expenses incurred here have been itemized and their accuracy attested to by Plaintiffs' Counsel. ¶¶92-95, Exs. 9-10. These expenses include, for example costs related to court filings, research and online databases, reasonable travel expenses, investigator fees, mediation fees, and expert fees (*id.*), all of which are reasonable and normally reimbursed. *See, e.g., In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004) ("The expenses incurred -- which include investigative and expert witnesses, filing fees, service of process, travel, legal research and document production and review -- are the type for which 'the paying, arms' length market' reimburses attorneys. For this reason, they are properly chargeable to the Settlement fund."). As noted herein, not a single objection by Settlement Class members to the reimbursement of expenses has been received to date and the requested reimbursement amount, when combined with Lead Plaintiff's request for an incentive award, is more than $34,000 lower than maximum listed in the Notice, further supporting approval. ¶92.

III. THE COURT SHOULD GRANT PLAINTIFFS' REQUESTED INCENTIVE AWARDS PURSUANT TO 15 U.S.C. §78U-4(A)(4)

Plaintiffs seek approval for awards of $5,000 each, an aggregate total of $25,000, to compensate them, and as incentive awards in recognition of their time and effort expended on behalf of the Class. ¶¶96-98; *see also* Exs. 4-8 (Declarations of Plaintiffs). The PSLRA expressly permits a plaintiff to seek an "award of reasonable costs and expense (including lost wages) directly relating to the representation of the class[]." 15 U.S.C. § 78u-4(a)(4). "Courts in this Circuit routinely award such costs and expenses both to reimburse the named plaintiff for expenses incurred through their involvement with the action and lost wages, as well as to provide an

incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." *Signet Jewelers*, 2020 WL 4196468, *22, *Giant Interactive*, 279 F.R.D. at 165.

As detailed in the Plaintiffs' declarations, each actively participated in the litigation by, *inter alia*: (i) regularly communicating with Lead Counsel concerning the Action; (ii) remaining fully informed about developments in the case; (iii) reviewing pleadings and materials filed with the Court; (iv) discussing the progress and proposed settlement of the Action with Lead Counsel; and (v) approving the Settlement. Exs. 4-8. Lead Plaintiffs collectively spent at least 212 hours aiding in the prosecution of this Action which could have been spent on other professional activities. Exs. 4-8, ¶10.

The incentive awards requested by Plaintiffs compare favorably to those granted in similar cases. *See, e.g.*, *Vaccaro*, 2017 WL 6398636, at *8 (awarding "$5,000 to each Lead Plaintiff" when motion to dismiss the operative complaint was pending because the lead plaintiffs "assisted in the litigation communicating with counsel, reviewing pleadings, and monitoring settlement negotiations"); *In re Penn West Petroleum Ltd. Sec. Litig.*, Case No. 1:14-cv-06046-JGK, ECF 144 at 4 (S.D.N.Y. June 28, 2016) (Koeltl, J.) (awarding $5,000 to lead plaintiff where settlement reached prior to a decision on fully briefed motion to dismiss); *Revolution Lighting*, 2020 WL 4596811, *3 (awarding $10,000 to lead plaintiff where motion to dismiss never filed); *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 354 (S.D.N.Y. 2014) (awarding six plaintiffs $5,000 each while motion to dismiss pending).

For the foregoing reasons, Lead Plaintiff and Lead Counsel submit that incentive awards of $5,000 for each Plaintiff is reasonable and appropriate.

CONCLUSION

Based on the foregoing, Lead Counsel request that the Court enter an order awarding Lead Counsel 25% of the Settlement Fund, which is $2,062,500, approving reimbursement of Plaintiffs' Counsel's Litigation Expenses in the amount of $106,794.83, and approving a $5,000 incentive payment for each Plaintiff.

DATED: April 1, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Shannon L. Hopkins, counsel for Lead Plaintiff, the Helios and Matheson Investor Group hereby certify on the this 1st day of April, 2021, that according to the word count feature of the word processing program used to prepare this brief, this brief contains 6,661 words (exclusive of the cover page, certificate of compliance, certificate of service, table of contents, table of authorities, and signature blocks) and complies with Local Civil Rule 11.1 of the Southern District of New York, as well as with the Individual Practice Rule 2.D of the Honorable John G. Koeltl.

/s/ Shannon L. Hopkins
Shannon L. Hopkins

CERTIFICATE OF SERVICE

I, Shannon L. Hopkins, hereby certify that this document was filed through the CM/ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on this 1st day of April, 2021.

/s/ *Shannon L. Hopkins*
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