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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MELVYN KLEIN, Derivatively on Behalf of Nominal Defendant OPUS BANK,

Plaintiff,

v.

STEPHEN H. GORDON, MARK CICIRELLI, MARK E. SCHAFFER, MICHAEL MEYER, ROBERT SHACKLETON, THOMAS M. BOWERS, CURTIS A. GLOVIER, and DAVID KING,

Defendants,

And

OPUS BANK, a California Corporation,

Nominal Defendant.

Case No. 8:17-CV-00123(AB)(JPR)

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR A FEE AND EXPENSE AWARD

Hearing Date: July 20, 2018

Time: 10:00 AM
Courtroom: 7B – First Street
Judge: Hon. André Birotte, Jr.
Action Filed: January 24, 2017

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In connection with the final approval[1] of the Settlement,[2] Plaintiff Melvin Klein ("Plaintiff"), through his undersigned counsel, respectfully submits this memorandum of points and authorities in support of his Motion for a Fee and Expense Award in the amount of $875,000. Opus Bank,[3] the Individual Defendants[4], and plaintiffs Klein and Dillard are referred to collectively herein as the "Plaintiffs" or "Parties." As a result of Plaintiffs' litigation efforts, Opus implemented and agreed to implement plainly material corporate governance reforms. The corporate governance reforms will significantly improve Opus Bank's ("Opus," or the "Bank") corporate governance, internal controls, risk tolerance and compliance. Plaintiffs therefore conferred a substantial benefit upon all Opus shareholders, entitling Plaintiffs' Counsel to an award of fees and expenses. *See Mills v. Elec. Auto-Lite.*, 396 U.S. 375, 396 (1970).

I. INTRODUCTION

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[1] The Stipulation of Settlement (the "Stipulation") is filed in the record as ECF Nos. 36, 36-1 and 37.

[2] All capitalized terms not otherwise defined have the same meaning as in the Stipulation which is also attached as Exhibit 1 to the Declaration of Thomas J. McKenna in Support of Plaintiff's Motion for Final Approval of Settlement and in Support of Plaintiff's Motion for a Fee and Expense Award submitted herewith) (hereinafter "McKenna Fact Decl."). Citations to the Stipulation shall appear in the following format: "Stip. at __."

[3] Pursuant to the Stipulation, this Settlement also intends to settle claims raised in the shareholder derivative action filed by plaintiff Andrew Dillard ("Plaintiff Dillard") pending in the Superior Court of California, Los Angeles County (the "California State Court"), styled *Dillard v. Gordon, et al.*, Case No. BC651522 (the "*Dillard* Action"). Collectively, the *Klein* Action and the *Dillard* Action are referred to herein as the "Derivative Actions."

[4] The "Individual Defendants" are Stephen H. Gordon, Nicole M. Carrillo, Mark Cicirelli, Mark E. Schaffer, Michael L. Meyer, Robert J. Shackleton, Thomas M. Bowers, Curtis A. Glovier, and David King (together with Opus, "Defendants"). Nicole M. Carrillo is a defendant only in *Dillard v. Gordon, et al.*, No. BC651522 (Cal Super. Ct., L.A. Cnty.).

As Opus has acknowledged, the "filing and pendency" of the Derivative Actions "comprised a substantial contributing factor to the decision by the Bank to implement the five initial corporate governance reforms" ("Initial Reforms"), Stipulation, Ex. A at 1. In addition, "Opus acknowledges and agrees that both of the Plaintiffs in the Actions ("Plaintiffs") were a precipitating and material factor in the adoption of the Corporate Governance Reforms by the Bank, and that the Corporate Governance Reforms, as well as the Initial Reforms, confer a substantial benefit to the Bank and its shareholders." *Id*., at 2.

By this Motion, Plaintiff Klein seeks a Fee and Expense Award in the amount of $875,000 (1) to compensate Plaintiffs' Counsel for their contingent efforts in producing the Settlement, which confers substantial benefits upon Opus and Opus Shareholders, (2) to reimburse them for their out-of-pocket case expenses and (3) to provide for a Service Award to each Plaintiff of $2,500.00.

The derivative claims were brought by Plaintiffs on behalf of the stockholders of Opus, the stock of which suffered a major decline in market value following the disclosure of significant charge-offs on certain of the Bank's loans, impacting earnings for the quarter ended September 30, 2016. Such facts were not previously disclosed because of the wrongdoing of Opus's officers and directors.

The Reforms are meaningful and tailored to prevent recurrence of the Individual Defendants' wrongdoing by enhancing the Bank's review, management awareness, and disclosure of risks in Opus's loan portfolio. Further, the Reforms create the new position of Chief Compliance Officer, provide for independent review of the Bank's commercial loan portfolio, and ensure that Opus's Board of Directors (the "Board") fulfills its role in risk oversight of Opus's operations. The Reforms will significantly improve Opus's compliance and internal control environment; prevent misconduct and detect potential violations of applicable law, regulations, and Bank policies;

substantially reduce the likelihood of future wrongdoing and mismanagement; and generate long-term economic benefits by restoring investor confidence in Opus's management. The Reforms are fully set forth in Exhibit A to the Stipulation.

Had such Reforms been implemented earlier, Opus and the Individual Defendants would likely have avoided engaging in the actions that led to the Securities Class Action[5] against Opus and others and the resulting $17 million proposed cash settlement of that action, saving Opus millions of dollars and damages to its reputation.

Because Opus has acknowledged that the Reforms "confer a substantial benefit to the Bank and its shareholders," Stip., Ex. A, page 2, Plaintiffs' counsel are entitled to receive a Fee and Expense Award that reflects the fact that the corporate governance reforms are substantial and provide great value to the Bank. *Id*.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

An in-depth factual background is set forth in the accompanying McKenna Fact Decl. and in the accompanying Memorandum of Points and Authorities in Support of Final Approval ("MPA ISO Fin. App.") and is incorporated by reference herein.

Briefly, between July 28, 2014 and October 16, 2016, the Individual Defendants willfully or recklessly made and/or caused Opus to issue false and misleading statements and fail to disclose that: (1) certain loans were of poor quality, (2) Opus was over-representing the quality of certain loans to the public; (3) the Bank was not accounting for the loans in adherence to U.S. Generally Accepted Accounting Principles ("GAAP"); (4) consistent with the foregoing false representations, Opus would be forced to recognize large charge-offs associated with certain loans; and, (5) Opus's internal controls over financial reporting and accounting were inadequate (collectively, the "Misconduct").

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[5] That action is *Schwartz v. Opus Bank*, et al., 2:16-cv-7991-AB-JPR (C.D. Cal).

On October 17, 2016, the truth was revealed to the investing public when the Bank issued a press release titled, "Opus Bank Announces Loan Charge-Offs Will Impact Third Quarter Earnings." That press release announced Opus's earnings for the third quarter of fiscal year 2016 would include a $0.59 per diluted share impact from $38.8 million in charge-offs recognized on eight loan relationships, which the Bank expected to result in a net loss of approximately $0.05 per diluted share for the quarter. The price of Opus stock fell to $27.20 per share at the close of the market on October 17, 2016, down $7.25, or 21%, from a closing price of $34.45 per share on the prior trading day, October 14, 2016.

Opus sustained damages resulting from the conduct of the Individual Defendants including, but not limited to: (1) legal fees associated with the Securities Class Action filed against the Bank and Defendant Gordon, and amounts paid to outside lawyers, accountants, and investigators in connection thereto; (2) the $17 million cash settlement in the Securities Class Action; and (3) a loss of reputation and goodwill. Such damages could have been avoided through appropriate corporate governance. As a result, the Bank has agreed to implement the Reforms in settling the Derivative Actions.

A. Benefits of the Settlement

Pursuant to the Stipulation, "Opus acknowledges and agrees that both of the Plaintiffs in the Actions ('Plaintiffs') were a precipitating and material factor in the adoption and implementation of the Corporate Governance Reforms by the Bank, and that the Corporate Governance Reforms, as well as the foregoing Initial Reforms, confer a substantial benefit to the Bank and its shareholders." Stip., Ex. A, page 2. Opus has also acknowledged that the Derivative Actions "comprised a substantial contributing factor to the decision by the Bank to implement" five corporate governance reforms (the "Initial Reforms," and together with the eight foregoing

Corporate Governance Reforms, the "Reforms") that were previously adopted by the Bank in response to the filing of the Derivative Actions. Stip., Ex. A, page 2.

The Reforms call for modifications and improvements to, *inter alia*, the Bank's risk oversight and internal controls, and are designed to ensure, *inter alia*, that the Bank identifies and addresses material problems in connection to the Bank's commercial loan portfolio and that the Bank disseminates accurate and truthful statements in its public disclosures. *See* Stip., Ex. A. The Reforms thus directly address the allegations made in the Derivative Actions that Defendants made and/or caused the Bank to make false and misleading statements to the investing public. *Id*.

III. LAW AND ARGUMENT

A. Plaintiffs' Counsel Are Entitled to the Fee Award Under the Substantial Benefits Doctrine

Under the "substantial benefit" doctrine, counsel who prosecute a shareholder derivative action that generates substantial benefits for the corporation are entitled to an award of reasonable attorneys' fees and expenses that is commensurate with the benefits' value and accounts for the risks of proceeding on a contingency basis. *Woodland Hills Residents Assn., Inc. v. City Council*, 23 Cal.3d 917, 946–948 (1979); *see also Mills*, 396 U.S. at 394-96 ("a corporation may receive a 'substantial benefit' from a derivative suit, justifying an award of counsel fees, regardless of whether the benefit is pecuniary in nature . . . . Private stockholders' actions of this sort 'involve corporate therapeutics,' and furnish a benefit to all stockholders"). Since *Mills*, it has become "well established that non-monetary benefits. . . may support a fee award." *Fletcher v. A.J. Industries, Inc.*, 266 Cal. App. 2d 313, 320 (1st Dept. 1968); *see also Koppel v. Wien*, 743 F.2d 129, 134-35 (2d Cir. 1984); *see also Maher v Zapata Corp*, 714 F.2d 436, 461 & n.43 (5th Cir. 1983) (improvements in "the functioning of the corporation may have a substantially greater economic impact on it, both long- and

short-term, than the dollar amount of any likely judgment in its favor.…).[6] Indeed, the value of the comprehensive and rigorous corporate therapeutics here would justify the agreed award, standing alone. *See, e.g.*, *In re Schering-Plough Corp. S'holders Deriv. Litig.*, 2008 U.S. Dist. LEXIS 2569, at *15-16 (D.N.J. Jan. 14, 2008).[7]

B. The Reforms Substantially Benefitted Opus Shareholders

As a result of Plaintiffs' Counsel's efforts, Opus will enjoy long-term benefits flowing from the Settlement's corporate governance, loan review, oversight, training and risk management reforms. These Reforms will prevent recurrence of the alleged wrongdoing Plaintiffs contend damaged Opus and its shareholders, and help to restore investor confidence in the transparency, effectiveness, and fidelity of Opus's management. The value of the corporate therapeutics on investor confidence can only

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[6] *See, e.g.*, *Lane v. Page*, 862 F. Supp. 2d 1182, 1255 (D.N.M. 2012) ("[C]ourts increasingly have recognized that the expenses incurred by one shareholder in the vindication of a corporate right of action can be spread among all shareholders through an award against the corporation, regardless of whether an actual money recovery has been obtained in corporation's favor.") (internal quotation marks omitted); *Smith v. GTE Corp.*, 236 F.3d 1292, 1307 (11th Cir. 2001) (recognizing common benefit doctrine is accomplished by assessing costs against a defendant corporation in shareholder actions because "those costs are, in effect, incurred by the shareholder/beneficiaries."); *United States v. Imperial Irrigation Dist.*, 595 F.2d 525, 531 (9th Cir. 1979) (explaining that shareholders are "beneficiaries [who] had pre-existing relationships with the corporation . . . and had contributed funds to the treasury from which the fee award was to come.").

[7] "This litigation provides an example of how derivative actions that result in the adoption of rigorous compliance standards confer tangible benefits to the corporation and its shareholders . . . . The adoption of the corporate governance and compliance mechanisms required by the settlement can prevent breakdowns in oversight that would otherwise subject the company to the risk of regulatory action, or uncover and remedy a problem at the early stages before it becomes the subject of a government investigation. Effective corporate governance can also affect stock price by bolstering investor confidence and improving consumer perceptions." *Id.*

help reverse Opus's loss of reputation in the marketplace. The requested Fee and Expense Award of $875,000 is a small fraction of the value of these benefits, and is appropriate given the complexity of the matter, the litigation risks, the positive results, and the substantial time and expenses Plaintiffs' Counsel invested on a fully contingent basis.

IV. THE REQUESTED FEE AWARD IS REASONABLE

The Supreme Court has stated that '"the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Klein v. City of Laguna Beach*, 810 F.3d 693, 698-99 (9th Cir. 2016) (quoting *Farrar v. Hobby*, 506 U.S. 103, 114 (1992)). Where, as here, the corporation benefits because of counsel's efforts in securing significant corporate governance reforms, counsel is entitled to an award of attorneys' fees and expenses. *See, e.g., In re Rambus Inc. Derivative Litig.*, 2009 U.S. Dist. LEXIS 131845, at *11 (N.D. Cal. Jan. 20, 2009) (explaining that "courts consistently have approved attorneys' fees and expenses in shareholder actions where the plaintiffs' efforts resulted in significant corporate governance reforms. . ." and awarding $2 million fee where "the corporate governance reforms [we]re of significant value to [the company]"); *In re NVIDIA Corp. Deriv. Litig.*, 2008 U.S. Dist. LEXIS 117351 (N.D. Cal. Dec. 22, 2008); *In re Hewlett-Packard Co. S'hldr Deriv. Litig.*, 2015 U.S. Dist. LEXIS 32212 (N.D. Cal. Mar. 13, 2015). As such, corporate governance reforms have formed the basis of many other derivative settlements, and expert studies demonstrate that such changes increase the market value of a company.[8]

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[8] *See, e.g.*, McKinsey & Company, G*lobal Investor Opinion Survey on Corporate Governance* (2002) (finding that 75% of institutional investors responded to a survey stating that board practices are at least as important to them as financial performance, and 80% responding that they would pay more for a company with good governance

Under the "substantial benefit" doctrine, counsel in shareholder derivative cases who secure a substantial benefit for the corporation are entitled to an award of reasonable attorney's fees and costs commensurate with the value of the benefits achieved, whether or not pecuniary.[9] Although a benefit need not be monetary to be substantial, it must be "something more than technical in its consequence and one that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest." *Mills*, 396 U.S at 396.

The Ninth Circuit has adopted "the same general approach as the Delaware Supreme Court outlined in *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142 (Del. 1980) in evaluating attorney's fees awards.[10] The *Sugarland* factors are: "1) the results achieved; 2) the time and effort of counsel; 3) the relative complexities of the litigation; 4) any contingency factor; and 5) the standing and ability of counsel involved."[11] The degree of success achieved in the litigation is the primary factor in

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than bad governance), and Exhibits 3, 4 and 11 therein, attached to the accompanying McKenna Fee Decl. as Ex. C.

[9] *See Mills*, 396 U.S. at 395 ("an increasing number of lower courts have acknowledged that a corporation may receive a 'substantial benefit' from a derivative suit, justifying an award of counsel fees, regardless of whether the benefit is pecuniary in nature"); *In re Rambus*, 2009 U.S. Dist. LEXIS 131845, at *11 ("Following *Mills*, courts consistently have approved attorneys' fees and expenses in shareholder actions where the plaintiff's efforts resulted in significant corporate governance reforms but no monetary relief."); *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966) (holding that changes in corporate policy or a heightened level of protection for shareholders justifies an award of counsel fees).

[10] *In re Oracle Sec. Litig.*, 852 F. Supp. 1437, 1449 (N.D. Cal. 1994) (internal citation omitted).

[11] *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1070 (Del. Ch. 2015) (internal quotation omitted).

evaluating a fee request.[12] California courts then look to the lodestar figure as a cross-check, which may then be adjusted after evaluating the benefit obtained.[13]

A. The Results Achieved

In brief, the Reforms, among other things, call for the Bank to implement an independent third-party review of the Bank's outstanding commercial loan portfolio to identify problem loans. In addition, the Reforms require the Bank to create a Chief Compliance Officer position to make certain that the Bank has an effective compliance communication program in place to ensure adherence to all laws and regulations applicable to the operations of the Bank. *See* Stip., Ex. A. The Reforms also require the Bank to maintain a separate Audit Committee and a separate Risk Oversight Committee, with different directors serving as the Chair of each, together with mandatory training for employees in credit-focused analysis. *Id.* The Reforms also call for modifications and improvements to, *inter alia*, the Bank's risk oversight, internal controls and compliance, and are designed to ensure, *inter alia*, that the Bank identifies and addresses material problems in connection to the Bank's commercial loan portfolio and that the Bank disseminates accurate and truthful statements in its public disclosures. *Id*.

These Reforms are not only designed to address the "corporate trauma" alleged in the Complaint, but also to strengthen and enhance compliance, as well as oversight of compliance, in the highly regulated banking industry. These reforms also enhance

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[12] *See, e.g.*, *Seinfeld v. Coker*, 847 A.2d 330, 336 (Del. Ch. 2000) ("*Sugarland*'s first factor is indeed its most important – the results accomplished for the benefit of the shareholders").

[13] *Ctr. for Biological Diversity v. Cty. of San Bernardino*, 111 Cal. Rptr. 3d 374, 398 (Ct. App. 2010); *Lealao v. Beneficial Cal., Inc.*, 97 Cal. Rptr. 2d 797, 817-18 (Ct. App. 2000).

the functioning and accountability of the Board and its various governing committees.[14] *Id*. The Reforms thus directly address the allegations made in the Derivative Actions that Defendants' internal controls and compliance measures regarding their loan portfolio were insufficient to guard against overly risky loans and/or caused the Bank to make false and misleading statements to the investing public about the operations of the Bank. Moreover, Opus approved the Settlement only after determining that the Settlement of the Derivative Actions, under the terms set forth in the Stipulation, including the institution and maintenance of the Initial Reforms and the Corporate Governance Reforms, confers substantial benefits to the Bank.[15]

B. The Time and Effort of Plaintiffs' Counsel

In considering the time and effort expended by counsel, courts evaluating derivative settlements have recognized that the amount of time spent by counsel to produce the benefit to the corporation is relevant. *See, e.g., In re Anderson Clayton S'holders Litig.*, 1988 Del. Ch. LEXIS 127, at *2 (Del. Ch. Sept. 19, 1988). Courts also look favorably upon counsel who are able to achieve substantial benefits without unduly burdening the parties and the Court with time-consuming and costly motion

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[14] *See Make a Difference Found., Inc. v. Hopkins*, 2012 U.S. Dist. LEXIS 36251, at *7 (D. Colo. Mar.19, 2012) ("[T]he corporate governance reforms provided for as part of the settlement are specifically and appropriately designed to prevent the alleged director misconduct that formed the basis for this action.").

[15] *In re Schering-Plough*, 2008 U.S. Dist. LEXIS 2569, at *15-16 (D. N.J. 2008) (". . . derivative actions that result in the adoption of rigorous compliance standards confer tangible benefits to the corporation and its shareholders . . . can prevent breakdowns in oversight that would otherwise subject the company to the risk of regulatory action, or uncover and remedy a problem at the early stages . . . Effective corporate governance can also affect stock price by bolstering investor confidence and improving consumer perceptions.").

practice, discovery disputes, trials, and appeals and who bring complex matters to a successful early resolution. *See, e.g., In re Ashanti Goldfields Sec. Litig.*, 2005 U.S. Dist. LEXIS 28431, at *10 (E.D.N.Y. Nov. 15, 2005) ("The 'quality of representation' factor is designed to reward 'particularly resourceful' legal work that 'secures a substantial benefit . . . with a minimum of time invested.'"). In addition, "[t]he quality of opposing counsel is also important in evaluating the quality of plaintiff's counsels' work." *In re Warner Commc'ns Secs. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Circ. 1986). By any measure, derivative actions are exceedingly complex and Katten Muchin Rosenman LLP and Cooley LLP, pre-eminent corporate defense firms, zealously defended their clients' interests. Only the intense and sustained effort that Plaintiffs' skilled and experienced counsel devoted to this matter could have driven it to a successful early resolution.

Successful settlement demanded that Plaintiffs' Counsel quickly master a broad range of complex facts and law. Plaintiffs' Counsel conducted intensive research and analysis to master the factual and legal issues inherent in Opus' banking activities and alleged wrongful conduct. The legal issues arising from the multiple layers of procedural defenses and merits defenses were complex.

Additionally, a "lodestar cross-check" also supports the reasonableness of the requested Fee and Expense Award. *Roberti v. OSI Sys. Inc.*, 2015 U.S. Dist. LEXIS 164312, at *19 (C.D. Cal. 2013) ("reasonableness of [fee award] is confirmed by a cross-check with a lodestar comparison"). The "lodestar" is produced by multiplying the number of hours expended by counsel's hourly rate. *Id.*, at *6.

Here, Plaintiffs' Counsel's collective lodestar is over $616,000. Plaintiffs' Counsel collectively have expended over 906 hours in the prosecution and settlement of the Derivative Actions. McKenna Fee Decl., ¶ 4; Brown Fee Decl., ¶ 4; Kim Fee Decl., ¶ 4; Wagner Fee Decl., ¶ 4. Plaintiffs' Counsel were also collectively required

to spend over $18,550 in expenses in the prosecution and settlement of the Derivative Actions. McKenna Fee Decl., ¶ 6, Brown Fee Decl., ¶7; Kim Fee Decl., ¶ 7; Wagner Fee Decl., ¶ 7.

In the Ninth Circuit, lodestar multipliers can range from two to four times, or even higher. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (affirming fee award equal to lodestar multiplier of 3.65 and listing 23 settlements and multipliers for each, where the average multiplier is 3.28).[16] *See, e.g., Blum v. Stenson*, 465 U.S. 886 (1984).

Thus, if the Court were to approve the full Fee and Expense Award, Plaintiffs' Counsel would receive an approximate 1.38 multiplier on their time. McKenna Fact Decl., ¶ 80. As courts in California[17] (and indeed, nationwide)[18] have held, multipliers between two to four are presumptively reasonable to compensate counsel for the

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[16] *See also In re DaVita Healthcare Partners, Inc., Deriv. Litig.*, 2015 U.S. Dist. LEXIS 74372 at *17 (D. Colo. June 5, 2015) ($6.1 million attorneys' fees award with 3.0 lodestar multiplier in a derivative suit that settled for corporate governance reforms); *In re Cadence Design Systems, Inc. Sec. & Deriv. Litig.*, U.S. Dist. LEXIS 56785 (N.D. Cal. Apr. 23, 2012) at *17 (approving fee equal to 2.88 lodestar multiplier); *Buccallato v. AT&T Operations, Inc.*, U.S. Dist. LEXIS 85699 (N.D. Cal. June 30, 2011) at *5 (approving 4.3 lodestar multiplier and listing cases approving multipliers ranging from 4.3 to 9.3).

[17] *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001) ("[m]ultipliers can range from 2 to 4 or even higher").

[18] *See In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735-36 (E.D. Pa. 2001) (25% fee representing 10.73 multiplier); *In re RJR Nabisco Sec. Litig.*, No. MDL-818 (MBM), 1992 U.S. Dist. LEXIS 12702, at *22 (S.D.N.Y. Aug. 24, 1992) (approving fees of over $17.7 million, notwithstanding objection that such an award of fees represented a multiplier of six); *Weiss v. Mercedes-Benz of N. Am.*, 899 F. Supp. 1297, 1304 (D.N.J. 1995) (awarding fee resulting in 9.3 multiplier); *Cosgrove v. Sullivan*, 759 F. Supp. 166, 167 n.1 (S.D.N.Y. 1991) (multiplier of 8.74).

inherent risk in contingent fee litigation. Thus, Plaintiffs' Counsel's cumulative lodestar as a cross-check more than justifies the requested Fee and Expense Award. Thus, the Fee and Expense Award should be approved.[19]

In addition, Plaintiffs' Counsel's hourly rates are undoubtedly in line with or less than the rates charged by Defendants' Counsel, which is a relevant consideration. *See Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 768 n.18 (7th Cir. 1982) ("The rates charged by the defendant's attorneys provide a useful guide to rates customarily charged in this type of case. Also, when the defendant has hired expensive, out of town counsel, the plaintiffs seem justified in saying that the nature of the case required the skills of out of town specialists."); *In re Microstrategy, Inc.*, 172 F. Supp. 2d 778, 788 & n.33 (E.D. Va. 2001) (finding rates charged by plaintiff's counsel in securities class action were warranted in part because they were "not inconsistent with the rates charged by lawyers in large, prominent, and, as here, expert law firms that typically represent defendants in securities class actions."). The reasonableness of Plaintiffs' Counsel's hourly rates is further evidenced by the annual survey in the *National Law Journal*, published January 5, 2015, which noted that partners in the top 50 firms charged between $715 and $1,055 per hour. *See* McKenna Fee Decl., Ex. D.

C. The Relative Complexities of the Litigation

There is no question that derivative actions are complex and fraught with risk. The Ninth Circuit, in affirming the district court's approval of a settlement of a derivative action, noted that "the odds of winning [a] derivative lawsuit [are] extremely small" because "derivative lawsuits are rarely successful." *In re Pac. Enters.*, 47 F.3d at 378. Courts and practitioners alike universally recognize that "stockholder litigation is notably difficult and notoriously uncertain." *See Lewis v.*

[19] The Notice described that the requested Fee and Expense Award would not exceed $985,000. The actual request is $875,000, $110,000 less. McKenna Fact Decl., ¶ 81.

Newman, 59 F.R.D. 525, 528 (S.D.N.Y. 1973).[20] Here, Plaintiffs did not issue pre-suit demands on the Board prior to commencing the Derivative Actions. Thus, absent the Settlement, there is an open question whether Plaintiffs would have standing to bring claims on the Bank's behalf. To pursue their claims, Plaintiffs would first have to establish that demand on the Board was excused as a matter of law. Establishing demand futility is always an uncertain proposition, particularly where, as here, a significant portion of the Board consists of "outside" directors. McKenna Fact Decl., ¶ 44.

Even assuming Plaintiffs adequately alleged demand futility, Defendants would undoubtedly contend their actions were protected by the business judgment rule, which creates a powerful presumption that directors are "faithful to their fiduciary duties." *In re Impax Lab., Inc. S'holder Deriv. Litig.*, 2015 U.S. Dist. LEXIS 117979, at *14 (N.D. Cal. Sept. 3, 2015). This is a difficult hurdle for derivative plaintiffs to overcome. *See, e.g., In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 35 (Del. 2006). McKenna Fact Decl., ¶ 45.

Even if Plaintiffs were successful and survived the motion to dismiss stage, continued litigation would have been extremely complex, costly, and of substantial

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[20] *See also Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1292 (9th Cir. 1992) ("[C]omplexity, duration, and sheer enormity of MDL 551 weighs heavily against a conclusion that the district court abused its discretion in approving the Consolidated Settlement."); *Lake v. First Nationwide Bank*, 900 F. Supp. 726, 732 (E.D. Pa. 1995) ("[D]ue to the relative complexity of the issues involved and the amount of data that would need to be processed, the costs of litigating this matter through trial would likely be high" and, due to the thousands of class members involved, "the task of poring through the relevant records would clearly be a significant undertaking."); *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006) (plaintiffs' derivative action lost after 10 years of litigation and despite plaintiffs' success on demand futility and summary judgment motions and a three month long bench trial).

duration. Document discovery would need to be completed, depositions would need to be taken, experts would need to be designated, and expert discovery conducted. Opus's and the Individual Defendants' expected motions for summary judgment would have to be briefed and argued, and if defeated, then a trial would have to be held. Indeed, significant risks remained in defeating Opus's and the Individual Defendants' anticipated motions for summary judgment and obtaining a favorable judgment at trial. McKenna Fact Decl., ¶ 47.

Beyond the hurdle of establishing Defendants' liability for their alleged wrongdoing, Plaintiffs faced considerable uncertainty with respect to establishing damages to Opus. The issue of damages to Opus would have been hotly disputed and the subject of expert testimony proffered by all parties. Conceivably, a jury could find there were no damages, or the damages were a mere fraction of the amount claimed. McKenna Fact Decl., ¶ 48. Plaintiffs' Counsel anticipated that trials of the Derivative Actions would have taken, at minimum, several weeks. The expense of such trials and the use of both judicial resources and the resources of the Parties would have been substantial. Further, submitting a matter to a jury is always, at best, an uncertain proposition. McKenna Fact Decl., ¶ 49.

D. The Contingent Nature of the Fee

The requested Fee and Expense Award is particularly reasonable in light Plaintiffs' Counsel's risk of non-payment. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F. 3d 43 (2d Cir. 2000) ("Perhaps the foremost of [the less] factors is the attorney's 'risk of litigation,' *i.e.*, the fact that, despite the most vigorous and competent of efforts, success is never guaranteed."). Had Plaintiffs' Counsel failed to secure a substantial benefit for Opus, they would have recovered nothing for the time and expenses invested in this complex and risky litigation. As discussed,

Plaintiffs' Counsel faced significant litigation risks in pursuing this derivative action. These risks and the benefits secured for Opus and its shareholders fully justify the proposed award. *See Cohn v. Nelson*, 375 F. Supp. 2d 844, 863, 865-66 (E.D. Mo. 2005) ("[I]t is imperative that the filing of contingent class action and derivative lawsuits not be chilled by the failure to award attorneys' fees or by the imposition of fee awards that fail to adequately compensate counsel for the risks of pursuing such litigation.… [B]ecause of the complexity and societal importance of stockholder and derivative litigation, the most able counsel should be obtained. The attorneys' fees awarded should reflect this goal.") (citing *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985)).

When Plaintiffs' Counsel undertook this litigation on a fully contingent basis, they did so with the expectation that they would have to devote many hours of hard work to the prosecution of a case involving complex factual and legal issues without any guarantee of successful resolution or of compensation for their efforts. The prosecution of the actions involved the expenditure of significant resources, including time spent by attorneys and staff, as well as hard expenses incurred during the litigation, for which Plaintiffs' counsel received no compensation during the course of litigation. Accordingly, the contingent nature of the representation and the burdens taken on by Plaintiffs' counsel fully support the requested fee award. *See In re MRV Deriv. Litig*, 2013 U.S. Dist. LEXIS 86295, at *19 (C.D. Calif. June 6, 2013) ("the fifth factor is clearly satisfied here as well, as '[t]he litigation was undertaken by Plaintiffs' Counsel on a wholly contingent basis' with the understanding that they were embarking on a complex, expensive, and lengthy litigation with no guarantee of ever being compensated for the investment of time and money the case required.") In light of the extensive corporate governance

changes achieved here, the substantial risks involved, and the contingent nature of the representation, the $875,000 requested Fee and Expense Award is reasonable.

E. The Standing and Ability of Plaintiffs' Counsel

Another factor the Court may consider on an application for counsel fees is the standing and ability of counsel. The attorneys who prosecuted the Derivative Actions are nationally recognized practitioners in the field of shareholder derivative litigation.[21] The standing of opposing counsel may also be considered in determining an allowance of counsel fees. *See, e.g.*, *Warner*, 618 F. Supp. at 749. Defendants here were represented by experienced, skillful and well-respected attorneys that vigorously defended their clients' interests. McKenna Fact Decl., ¶ 61.

Individuals wronged by violations of corporate law should have reasonable access to counsel with the ability and experience necessary to analyze and litigate complex cases. The costs and fees involved in such litigation often substantially outweigh the economic interest the individual shareholder has at stake. Moreover, such individuals rarely have the financial resources to pay customary fixed hourly rates for such services. The complexity and the societal importance of shareholder litigation requires the involvement of the most able counsel obtainable. To encourage first-rate attorneys to represent plaintiffs on a contingent basis in this type of socially important litigation, attorneys' fees awarded should support this goal. *See In re AOL Time Warner S'holder Derivative Litig.*, 2009 U.S. Dist. LEXIS 124372, at *70 (S.D.N.Y. Nov, 9, 2009). The outstanding results achieved in the Derivative Actions are a prime example of the value created by skilled counsel, and their efforts and results deserve to be rewarded.

F. A "Multiplier" on Lodestar is Warranted

[21] *See* Exhibit A to McKenna Fee Decl., Exhibit A to Kim Fee Decl., Exhibit A to Brown Fee Decl., and Exhibit A to Wagner Fee Decl.

In many cases, the contingency of the compensation will support application of a multiplier. "After a court determines the lodestar amount, it may increase or decrease that amount by applying a lodestar multiplier. The multiplier is a device that attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work." *In re Schering-Plough/Merck*, 2010 U.S. Dist. LEXIS 29121, at *55 (internal quotation marks omitted).

> The contingency of compensation . . . is highly relevant in the appraisal of the reasonableness of any fee claim. The effective lawyer will not win all of his cases, and any determination of the reasonableness of his fees in those cases in which his client prevails must take account of the lawyer's risk of receiving nothing for his services. Charges on the basis of a minimal hourly rate are surely inappropriate for a lawyer who has performed creditably when payment of any fee is so uncertain.

McKittrick v. Gardner, 378 F.2d 872, 875 (4th Cir. 1967).[22]

"In shareholder litigation, courts typically apply a multiplier of 3 to 5 to compensate counsel for the risk of contingent representation."[23] Plaintiffs believe that their efforts warrant a positive multiplier, as is usually the case when derivative plaintiffs obtain important governance reforms as settlement consideration. *See, e.g.*,

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[22] *See also In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305-06 (3d Cir. 2005) ("The multiplier is a device that attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work."); *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 265 (E.D. Va. 2009) (noting that "courts have generally held that lodestar multipliers falling between 2 and 4.5 demonstrate a reasonable attorneys' fee") (internal quotation marks omitted).

[23] *Cohn v. Nelson*, 375 F. Supp. 2d 844, 862 (E.D. Mo. 2005); *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052 (9th Cir. 2002) (listing twenty-three shareholder settlements and multipliers for each, in which the average multiplier is 3.28); *Wershba v. Apple Comput., Inc.*, 110 Cal. Rptr. 2d 145, 170 (Ct. App. 2001) (upholding a 1.38 multiplier and noting that "[m]ultipliers can range from 2 to 4 or even higher").

City of Plantation Police Officers' Emples. Ret. Sys. v. Jeffries, 2014 U.S. Dist. LEXIS 178280 (S.D. Ohio Dec. 29, 2014) (awarding over $1.6 million in fees, representing a multiplier of 3); *In re Intel Corp. Derivative Litig.*, 2010 U.S. Dist. LEXIS 74661 (D. Del. July 22, 2010) (awarding a total of $2.65 million in fees and expenses, reflecting multipliers); *Lambrecht v. Taurel*, 2010 U.S. Dist. LEXIS 75603, at *3 (S.D. Ind. July 27, 2010) (awarding a total of $8.75 million in fees and expenses, reflecting a 1.25 multiplier); *In re AOL Time Warner S'holder Derivative Litig.*, 2009 U.S. Dist. LEXIS 124372, at *2 (S.D.N.Y. Nov. 9, 2009) (awarding a total of $8.77 million in fees, representing a 1.6 multiplier); *In re Schering-Plough*, 2008 U.S. Dist. LEXIS 2569, at *17 (awarding a total of $9.5 million in fees, representing a 1.37 multiplier).[24]

Nevertheless, although Plaintiffs' Counsel risked receiving nothing for their work had they been unable to secure the Reforms, they seek only a modest multiplier of 1.38 to their lodestar. Indeed, the Seventh Circuit has held that "a risk multiplier is not merely available in common fund cases but mandated, if the court finds that counsel had no sure source of compensation for their services."[25]

The standing and ability of counsel further justifies the use of a positive multiplier. The experience, reputation, and ability of counsel should be given special heed when considering the fee and expense application.[26] As noted above, the

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[24] *See Chrysler*, 223 A.2d at 389. (Chancellor exercised "sound business judgment" by taking "the contingent nature of the litigation" into consideration in fixing the amount of attorneys' fees.).

[25] *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 565 (7th Cir. 1994) (internal quotation omitted).

[26] *Officers for Justice v. Civ. Serv. Comm'n of City & Cnty. Of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

attorneys who prosecuted the Derivative Actions are nationally recognized practitioners in the field of shareholder derivative litigation, while Defendants were represented by experienced, skillful and well-respected attorneys who vigorously defended their clients' interests, justifying a positive multiplier.

The time and efforts of counsel also justify the imposition of a positive multiplier. The Court looks favorably upon counsel who are able to achieve substantial benefits without unduly burdening the parties and the Court with time-consuming and costly motion practice, discovery disputes, trials, and appeals—as has been the case here.[27] The services rendered by Plaintiffs' counsel that led to the achievement of substantial benefits were of a high quality and of a sort that could have been rendered only by lawyers who are well-qualified and highly experienced in prosecuting stockholder litigation. Such efficiencies justify a positive multiplier.

The relative complexities of the litigation also support the application of a positive multiplier. Courts recognize that the greater risks attending complex actions raising difficult or novel issues should be accounted for by a multiplier.[28] Derivative litigation "is notoriously difficult and unpredictable" and such actions generally face substantial procedural and legal hurdles.[29] Plaintiffs' Counsel encountered and dealt

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[27] *See, e.g., Seinfeld*, 847 A.2d at 333 ("One of the historic reasons Delaware judges have been so willing to award substantial attorneys' fees, even after a relatively quick settlement of the case, is that our fee awards are not structured to reward lawyers for needlessly prolonging litigation") (citation omitted).

[28] *See, e.g., In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 395 (S.D.N.Y. 1999).

[29] *Maher v. Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983) (citation omitted); *see also In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995) (finding that "the odds of winning [a] derivative lawsuit [are] extremely small" because "derivative lawsuits are rarely successful").

with complex issues at various stages of this litigation, and yet they were able to obtain a settlement providing substantial benefits to Opus and its shareholders.

Thus, all of the *Sugarland* factors support the use of a positive multiplier. A positive multiplier should be applied not only to reward Plaintiffs' Counsel for their considerable effort and meaningful results achieved, but to further the public policy goals that animate shareholder derivative actions.[30] Derivative actions like the instant case play an important role in "protect[ing] the interests of the corporation from the misfeasance and malfeasance of 'faithless directors and managers.'" *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 95, 111 S. Ct. 1711 (1991); *see Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 371 (1966) ("derivative suits have played a rather important role in protecting shareholders of corporations from the designing schemes and wiles of insiders"); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548 (1949) (derivative action is "the chief regulator of corporate management … without it there would be little practical check on [management] abuses"); *see also In re AOL Time Warner S'holder Deriv. Litig.*, 2009 U.S. Dist. LEXIS 124372, at *70 (S.D.N.Y. Nov. 9, 2009) (fee award should incentivize "future counsel to devise remedies as an alternative to money, strengthening corporate America in the long run through innovation and prophylaxis").

Additionally, Plaintiffs' Counsel are members of small law firms, and acceptance of this action necessarily precluded them from devoting resources to other

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[30] *Cohn v. Nelson*, 375 F. Supp. 2d 844, 865-66 (E.D. Mo. 2005) ("[I]t is imperative that the filing of contingent class action and derivative lawsuits not be chilled by the failure to award attorneys' fees or by the imposition of fee awards that fail to adequately compensate counsel for the risks of pursuing such litigation . . . [B]ecause of the complexity and societal importance of stockholder and derivative litigation, the most able counsel should be obtained. The attorneys' fees awarded should reflect this goal.") (citing *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985)).

cases. *See Denton v. Pennymac Loan Servs., LLC*, 252 F. Supp. 3d 504, 518 (E.D. Va. 2017) (accounting for fact that counsel "is a small law firm and thus representing a client on a contingent fee or fee-shifting basis necessarily involved loss of other opportunities."). This fact also justifies a multiplier.

G. The Awards Made in Similar Cases

The attorneys' fees requested here are well within the range of awards approved in other derivative actions that resulted in corporate governance reforms without any monetary settlement. Indeed, courts around the country have approved much larger fees for settlements involving comparable or even more modest corporate governance reforms. For example, in derivative litigation brought on behalf of Forest Laboratories, the Court awarded $2,175,000 to plaintiffs' counsel in consideration for comparable corporate governance reforms.[31] Those reforms included, *inter alia*: (i) maintaining an executive level Chief of Compliance and Chief Medical Officer; (ii) training related to the misconduct for directors and certain employees; (iii) maintaining a Promotional and Marketing Practices Hotline to facilitate reporting of malfeasance; (iv) maintaining monitoring programs to ensure the company's sales and marketing divisions comply with policies and procedures; and, (v) enhancing review and approval procedures for press releases. These reforms are analogous to the Reforms, demonstrating the significant value that the Reforms confer on Opus, and supporting the application of a positive multiplier.

In another example, in derivative litigation brought on behalf of Moody's Corporation, the court awarded $4,950,000 in fees and expenses to plaintiffs' counsel in consideration for corporate governance reforms similar to those negotiated herein

[31] This case is captioned *In Re Forest Labs., Inc. Deriv. Litig.*, No. 05-cv-3489-RJH, (S.D.N.Y. Feb. 7, 2012).

that were to be maintained for two years.[32] Those reforms involved: (i) posting "core objectives" on the company's internal website and at least annually communicating one or more objectives by top management to employees; (ii) maintaining certain roles and responsibilities of the company's "ratings group" management; (iii) maintaining certain roles and responsibilities of the company's "credit policy group," requiring the credit policy committee to meet at least annually to review major methodology/modeling changes, and requiring the credit policy group to review new, materially different financial products; (iv) requiring certain annual reporting by the ratings group management, the chief credit officer, and a compliance officer to a board committee, and requiring the head of internal audit to make certain quarterly and annual reports to the audit committee; and, (v) maintaining the separation of business groups that had already been accomplished by the company.

Forest Laboratories and Moody's are representative of fee awards in cases similar to this where settlement consideration consists of corporate governance reforms and demonstrates that an award of a positive multiplier is warranted. This position is further supported by the sample of fee awards in other derivative cases where settlement consideration consisted of governance reforms alone. *See* chart attached as Exhibit B to the accompanying McKenna Fee Decl. setting forth numerous shareholder derivative settlements comprised of corporate governance reforms and setting forth the attorneys' fee awards, where such settlements involved companies with a market capitalization similar to Opus's $1 billion market cap.

V. THE SERVICE AWARD FOR PLAINTIFFS SHOULD BE APPROVED

[32] This case is captioned *In re Moody's Corp. S'holder Deriv. Litig.*, No. 08-cv-9323-GBD (S.D.N.Y. Sept. 7, 2012).

Finally, the Stipulation provides for proposed Service Awards for Plaintiffs in the amount of $2,500.00 each, and provides that Defendants will not oppose this request. Stip, 11. Any Service Awards for Plaintiffs approved by the Court would be paid from the Fee and Expense Award, and they would not increase the amount paid by Opus or its insurer. Plaintiffs' Counsel believes these nominal awards should be approved in light of the significant benefits these Opus shareholders created for all Opus Shareholders. McKenna Fact. Decl., ¶ 83-85. There is a long history of federal and common law that authorizes incentive awards for representative plaintiffs in stockholder actions. *See, e.g.*, *Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 354-55 (S.D.N.Y. 2005) (based on the common law's recognition of the important policy role that plaintiffs play in representative actions); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990). This principle was reaffirmed by the District of Minnesota: "[s]uch enforcement is vital because if there were no individual shareholders willing to step forward and pursue a claim on behalf of other investors, many violations of law might go unprosecuted." *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 1000 (D. Minn. 2005). The proposed Service Awards in the Derivative Actions are clearly modest when compared with other awards approved by other courts. *See, e.g., In re Remeron EndPayor*, 2005 U.S. Dist. LEXIS 27011, at *94 (D.N.J. Sep. 13, 2005) (approving awards of $30,000 to both of the named plaintiffs); *In re SmithKline Beckman Corp. Sec. Litig.*, 751 F. Supp. 525, 535 (E.D. Pa. 1990) (approving $5,000 award to each of the representative plaintiffs); *In re Cendant Corp. Derivative. Litig.*, 232 F. Supp. 2d 327 (D.N.J. 2002) (approving award of $25,000 to the lead plaintiff). *See In re Presidential Life Secs.*, 857 F. Supp. 331, 337 (S.D.N.Y. 1994) (incentive awards "need not be subject to intense scrutiny inasmuch as these funds will come out of the attorneys' fees").

VI. CONCLUSION

As demonstrated herein and in the accompanying MPA ISO Fin. App., the benefits of the Reforms are substantial. They enhance the Bank's corporate governance and internal controls, reduce the likelihood that the Bank will suffer similar injury in the future, indisputably confer significant benefits upon Opus and current Opus stockholders, and represent a successful resolution of the litigation. Indisputably, Plaintiffs' efforts were a substantial factor in Opus's decision to implement the Reforms. Thus, the Reforms warrant the requested Fee and Expense Award. Plaintiffs' Counsel's application to receive a positive multiplier of their lodestar is clearly within the range of awards in similar cases and represents fair, reasonable, and adequate compensation for the substantial benefits obtained for Opus and its shareholders. It is respectfully submitted that the instant motion should be granted in its entirety.

Dated: June 15, 2018

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PROOF OF SERVICE BY ELECTRONIC POSTING

I, the undersigned say:

I am not a party to the above case, and am over eighteen years old. On June 15, 2018, I served true and correct copies of the foregoing document, by posting the document electronically to the ECF website of the United States District Court for the Central District of California, for receipt electronically by the parties listed on the Court's Service List.

I affirm under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 15, 2018, at Los Angeles, California.

s/ Avi Wagner
Avi Wagner

Mailing Information for a Case 8:17-cv-00123-AB-JPR Melvyn Klein v. Stephen H. Gordon et al

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