

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND

IN RE MUTUAL FUNDS INVESTMENT  
LITIGATION

This Document Relates To:  
Scudder Subtrack

MDL 1586

Case No. 04-md-15861-CCB

**PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF  
APPLICATION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES**

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Plaintiffs<sup>1</sup> respectfully submits this memorandum of law in support of Plaintiffs' Counsels' Application for an Award of Attorneys' Fees and Reimbursement of Expenses (the "Fee Application" or "Application"). Pursuant to the Fee Application, Plaintiffs' Counsel seeks an award of attorneys' fees in the amount of 29.25% of the \$13.966 million Settlement Amount, plus interest. This amount includes \$ 3,910,480 (28%), plus interest, for Class and Derivative Counsel and \$174,575 (1.25%), plus interest, for Liaison Counsel.<sup>2</sup> The 28% fee requested for Class and Derivative counsel reflects a 0.35 multiple of the \$11,077,154.16 combined lodestar of Class Counsel, Derivative Counsel, and certain other firms approved by the Court and/or Class Counsel to participate in these Actions.<sup>3</sup> Plaintiffs' Counsel also respectfully request reimbursement of the expenses reasonably incurred by Plaintiffs' Counsel and the Lead Plaintiff in litigating these Actions for the benefit of the Class and the Deutsche/Scudder Settlement Funds.

### **PRELIMINARY STATEMENT**

Concluding approximately six years of extremely hard-fought litigation in Actions that were filed in 2004, Plaintiffs and Plaintiffs' Counsel have obtained a settlements totaling \$13,966,000 in cash, plus interest, for the Class and the Deutsche/Scudder Settlement Funds (the "Settlement"). The Settlement was achieved only after extensive fact discovery, expert discovery, and motion practice, including fully briefing and arguing before the Court Deutsche/Scudder Defendants' motion for summary judgment, Lead Plaintiff's motion for class certification, and several motions by Deutsche/Scudder Defendants to exclude the expert

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<sup>1</sup> Unless otherwise noted, terms used in this memorandum have the same meanings as those referenced or defined in the Preliminary Approval Order dated May 19, 2010.

<sup>2</sup> See Memorandum in Support of Petition of Tydings & Rosenberg LLP for Attorneys' Fees and Costs Incurred as Plaintiffs' Liaison Counsel and Chief Administrative Counsel.

<sup>3</sup> The calculation of this negative lodestar multiplier is based only on the \$3,910,480 requested for Class and Derivative Counsel and excludes the additional \$174,575 requested for Liaison Counsel because Liaison Counsel's lodestar is calculated on a cross-track basis.

opinions of Plaintiffs' damages and liability experts. The parties were only able to reach the Settlement after lengthy negotiations spanning years of the case, and after Plaintiffs and the Deutsche/Scudder Defendants conducted a two-day mediation, chaired by Michael D. Young, Esq. of JAMS.

This Settlement is particularly notable because Plaintiffs and Plaintiffs' Counsel were able to obtain \$13.966 million on behalf of the Class and the Deutsche/Scudder Settlement Funds despite the fact that the Honorable J. Frederick Motz granted motions for summary judgment in favor of defendants in the Janus and Putnam subtracks that were similar to the motion filed by Deutsche/Scudder Defendants. While Plaintiffs and Plaintiffs' Counsel believe that the claims asserted in the Complaints have merit, and that the evidence acquired through discovery supports the claims, Plaintiffs still faced formidable obstacles in proving several elements of their claims, particularly with respect to proving scienter and damages. In light of the risks posed by continued litigation, the \$13.966 million Settlement is an excellent result.

As compensation for the efforts expended to achieve the Settlement for the Class and the Deutsche/Scudder Settlement Funds, Plaintiffs' Counsel are applying for counsel fees of \$4,085,055, plus interest, constituting 29.25% of the Settlement Amount, and for reimbursement of Plaintiffs' Counsel's out-of-pocket expenses in the amount of \$973,395.15.<sup>4</sup> The 29.25% fee requested is well within the range of fees customarily sought by (and awarded to) experienced counsel in similar securities class actions, and the fairness of the percentage fee is underscored by a lodestar crosscheck, which reveals that counsel will not be compensated for a substantial portion of the time they devoted to litigating these Actions on behalf of the Class and

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<sup>4</sup> Each investor class plaintiffs' firm contributed to a Litigation Fund to pay certain common expenses--primarily expert witness expenses. There is a small residual amount in the Litigation Fund that needs to be allocated among the plaintiffs' firms, and that allocation effort is ongoing. This allocation will likely reduce the expense request in certain sub-tracks. Plaintiffs' Counsel will submit any adjusted expense requests with the reply papers that are due on October 6, 2010.



Deutsche/Scudder Settlement Funds. The lodestar crosscheck shows that the fee requested in fact represents a negative multiplier - only about 0.35% - of the aggregate lodestar of \$11,077,154.16 accumulated by Plaintiffs' Counsel.<sup>5</sup>

As described herein, Plaintiffs' Counsel bore all the risks and out-of-pocket expenses for approximately six years during this hard-fought litigation against aggressive adversaries, incurring \$973,395.15 in out-of-pocket expenses, and spent over twenty-eight thousand hours incurring over \$11 million in combined lodestar. Plaintiffs included sophisticated institutional investor, Lead Plaintiff Post-Retirement Health Insurance Plan and Trust, that was actively engaged in the prosecution of this Action, approved the Settlement and approved the fee percentage sought by Plaintiffs' Counsel. *See* Declaration of Lawrence Deutsch, Esq. in Support of Final Approval of the Settlement, Lead Counsel's Request for Attorneys' Fees and Reimbursement of Expenses, and Award to Lead Plaintiffs for Costs and Expenses (the "Deutsch Decl.") at ¶ 11.

Significantly, to date, not a single Class Member or Shareholder has objected to the fee and expenses requested. A total of 1,017,092 notices of the Settlement were mailed to Class Members advising them of Plaintiffs' Counsels' intent to apply to the Court for an award of attorneys' fees of 29.25% (Plaintiffs' Counsels' 28% fee request plus Liaison Counsel's 1.25% fee request) of the Settlement Amount, reimbursement of their out-of-pocket expenses not to exceed \$1,050,000 and reimbursement to Class Representatives of their costs and expenses for representing the Class of \$35,000. *Id.* at ¶ 10. Information regarding the settlement, including downloadable copies of the Notice, was made available through the Claim Administrator's

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<sup>5</sup> Excluding Liaison Counsel's lodestar and the \$174,575 requested for Liaison Counsel.

website, *www.scudderfundlitigation.com*. *Id.* The absence of any objections supports the fairness and reasonableness of the fee and expense reimbursement requests.<sup>6</sup>

**I. PLAINTIFFS' COUNSELS' APPLICATION FOR ATTORNEYS' FEES IS REASONABLE AND SHOULD BE APPROVED**<sup>7</sup>

Because the Fourth Circuit has not announced a preferred method for determining the reasonableness of attorneys' fees in common fund cases, nor has it identified factors for the district courts to apply when using the percentage of recovery method, this Court has discretion in determining the reasonableness of the fee award sought in the Fee Application. However, several district courts in this Circuit considering fee applications have considered the following factors:

(1) the results obtained for the class, (2) the quality, skill, and efficiency of the attorneys involved, (3) the complexity and duration of the case, (4) the risk of nonpayment, (5) awards in similar cases, (6) objections, and (7) public policy.

*Helmick v. Columbia Gas Transmission*, 2010 U.S. Dist. LEXIS 65808 (S.D. W. Va. July 1, 2010, at \*14 (citing *Jones v. Dominion Res. Servs.*, 601 F. Supp. 2d 756, 767 (S.D. W. Va. 2009)); *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. at 261; *see also* Pl. Omnibus Fee Mem. at 7-8.<sup>8</sup>

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<sup>6</sup> Moreover, there have been only thirteen requests for exclusion from the Class. *See* Deutsch Decl. ¶ 10.

<sup>7</sup> For a discussion of the criteria for assessing the reasonableness of an attorney's fee request, see pages 6-10 of Plaintiffs' Omnibus Memorandum of Law in Support of Application for Attorneys' Fees and Reimbursement of Expenses ("Pl. Omnibus Fee Mem.").

<sup>8</sup> "These factors are substantially similar to the factors mandated in this Circuit when employing the lodestar method. *See Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir.1978) (the factors to be considered are: (1) time and labor expended; (2) novelty and difficulty of the questions raised; (3) skill required to properly perform the legal services; (4) attorney's opportunity costs in pressing the litigation; (5) customary fee for like work; (6) attorney's expectation at the outset of litigation; (7) time limitations imposed by the client or circumstances; (8) amount in controversy and results obtained; (9) experience, reputation and ability of the attorney; (10) undesirability of the case within the legal community in which the suit arose; (11) nature and length of the professional relationship between the attorney and client; and (12) fee awards in similar cases). Because the lodestar is employed as a 'cross-check' and because these factors are so similar to the seven factors analyzed within, each of the twelve *Barber* factors will not be laid out and analyzed separately." *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. at 261 n.6. In addition, these twelve factors were developed to evaluate the reasonableness of attorneys' fees awarded under fee-shifting statutes, and thus, some of these factors are not directly applicable to awards of attorneys' fees under the

### **A. The Results Obtained**

“A central advantage of the percentage of the fund method is that it looks to the results actually obtained by Lead Counsel rather than just the number of hours they expended, which should be an important point in awarding fees.” *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. at 261 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 436, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)); *see also* Pl. Omnibus Fee Mem. at 8-9. The results obtained in these Actions on behalf of the Class and the Deutsche/Scudder Settlement Funds strongly support a finding that Plaintiffs’ Counsels’ application for attorneys’ fees is reasonable. Plaintiff’s Counsel tenaciously prosecuted these Actions against the Settling Defendants and obtained an excellent Settlement of \$13.966 million in cash.

In addition to the Settlement Amount obtained on behalf of the Class and the Deutsche/Scudder Settlement Funds in these Actions, while these Actions were pending, several regulatory agencies entered into their own market timing and/or late trading settlements with certain Defendants in these Actions, including the Deutsche/Scudder Defendants. These regulatory settlements resulted in payments to compensate investors, including Class Members, for market timing and/or late trading harm suffered by investors. In total, more than \$150 million has been, or will be, distributed to Deutsche/Scudder investors from these regulatory settlements. In general, these regulatory settlements obtained relief for investors for harm caused by those aspects of Defendants’ conduct which constituted Plaintiffs’ strongest allegations against Defendants. Accordingly, the fact that Plaintiffs’ were able to obtain an additional \$13.966 million for the Class and the Deutsche/Scudder Settlement Funds is a laudable result.

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percentage of the fund method. *See* Pl. Omnibus Fee Mem. at 7-8. Recognizing that fact, some district courts in the Fourth Circuit adopted the seven factors listed above specifically tailored for considering the reasonableness of fees awarded under the percentage method. *Id.*

The Settlement is also supportable when weighed against the risks of continuing to litigate. At the time of settlement, Plaintiffs' had fully briefed and argued before the Court Deutsche/Scudder Defendants' motions for summary judgment, Lead Plaintiff's motion for class certification, and several motions by the Deutsche/Scudder Defendants to exclude the opinions of Plaintiffs' damages and liability experts. In addition, at the time of settlement, Judge Motz had granted motions for summary judgment in favor of defendants in the Janus and Putnam sub-tracks that were similar to the motion for summary judgment filed by Deutsche/Scudder Defendants. If the Deutsche/Scudder Defendants had prevailed on their motions for summary judgment, at best Plaintiffs' would have been compelled to engage in costly and protracted appellate litigation. At worst, Plaintiffs' Actions could have been terminated or the settlement value would have been severely diminished.

Therefore, the results obtained for the Class and the Deutsche/Scudder Settlement Funds strongly support the reasonableness of Plaintiffs' Counsels' fee application, and Plaintiffs respectfully request that the Court grant the application.

**B. The Quality, Skill and Efficiency of the Attorneys**

The quality, skill, and efficiency of Plaintiffs' Counsel support Plaintiffs' Counsels' requested fee. *See* Pl. Omnibus Fee Mem. at 9 (noting that it has been recognized by courts in this Circuit that "prosecution and management of a complex national class action requires unique legal skills and abilities"). Each Plaintiffs' Counsel firm is among the premiere law firms specializing in representation of plaintiffs in class action cases, and particularly in securities class actions. *See* Firm Resumes. As discussed below, these actions posed many difficult and novel questions of law beyond even the complex issues that arise in a typical securities class action. In addition, counsel for Defendants included some of the preeminent law firms in the country and

were formidable foes in these Actions. It was only as a result of the experience, skill and diligent efforts of Plaintiffs' Counsel that Plaintiffs were able to obtain the results described above on behalf of the Class and Deutsche/Scudder Settlement Funds.

In addition, Plaintiffs' Counsel endeavored at all times to prosecute these Actions as efficiently as possible without jeopardizing their effectiveness. Many of Plaintiffs' Counsels' efforts are described below, and in all of these efforts Plaintiffs' Counsel were careful to allocate tasks and assignments among themselves to reduce expenses and to avoid duplication of effort. In addition, throughout the litigation of these Actions, Plaintiffs' Counsel worked cooperatively with counsel for plaintiffs in the other sub-tracks of this multidistrict litigation to reduce expenses, avoid duplication of effort, and develop the most effective strategies for all the plaintiffs in these actions.

### **C. The Complexity and Duration of the Litigation**

The prosecution of these Actions through six years of extremely hard-fought litigation has required a significant investment of time and resources. As explained by the court in *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. at 263, “[t]he very nature of a securities fraud case demands a difficult level of proof to establish liability. Elements such as scienter, reliance, and materiality of misrepresentation are notoriously difficult to establish. Proving damages further implicated complex economic modeling at the hands of sophisticated experts ....” *See also* Pl. Omnibus Fee Mem. at 9-10. As described in the accompanying declarations, Plaintiffs' Counsel has expended a total of 28,628.60 hours on behalf of their clients, the Class, and the Deutsche/Scudder Settlement Funds. *See* Deutsch Decl. at ¶ 72. Class Counsels' efforts have included:

- (a) pre-filing research and investigation of the applicable facts and law underlying Plaintiffs' claims, including analysis of public information and interviews on a confidential basis of former employees of various persons and/or entities involved in market-timing;
- (b) research and drafting of the extensive Complaint, the Second Amended Complaint, and the Third Amended Complaint;
- (c) research and drafting of numerous memoranda of law and other submissions in support of or in opposition to motions filed with the Court, including PRHIPT's motion for lead plaintiff and lead counsel appointment; submissions in opposition to multiple Defendants' motions to dismiss the Complaint and Second Amended Complaint;
- (d) drafting of various status reports and participation in various status conferences as requested by the Court;
- (e) extensive document discovery and document review, drafting and responding to interrogatories, drafting requests for admission and arguing a motion to compel regarding same, preparation for and taking and defense of more than 50 depositions, including expert depositions;
- (f) negotiating, reviewing, and analyzing in conjunction with Lead Plaintiff's damages expert the extensive trading data relating to Scudder Funds;
- (g) drafting and arguing motions for class certification;
- (h) drafting and arguing briefs in opposition to summary judgment and to Defendants' motions *in limine* to exclude Class Plaintiffs' damages and liability experts;
- (i) discussions and negotiations regarding possible settlement of the Actions, including extensive further consultation with Lead Plaintiff's damages consultant, and counsel for the Deutsche/Scudder Defendants;
- (j) negotiation of the Stipulation with the Deutsche/Scudder Defendants, as well as MOU's and Stipulations with the UBS Defendants, Aurum Defendants, Canary Defendants and BAS;
- (k) discussions and other communications with other counsel and the Lead Plaintiff concerning litigation status and strategy;

- (l) preparation for and appearance at this Court's May 7, 2010, hearing to consider preliminary approval of the Settlement; and
- (m) attention to various matters relating to notice to the class and settlement administration, including soliciting bids for notice and claims administration, consultations with the Deutsche/Scudder Defendants and the Scudder IDC regarding Class member records and data, and consultations with counsel in other Sub-tracks regarding coordination to establish a settlement website, and related matters.

In addition, Derivative Counsel's efforts included:

- (a) pre-filing research and investigation of the applicable facts and law underlying the Derivative Plaintiffs' claims, including analysis of public information regarding market-timing and late trading;
- (b) research and drafting of the extensive Complaint and the Consolidated Amended Complaint;
- (c) research and drafting of numerous memoranda of law and other submissions in support of and in opposition to various motions, including motions to organize all the derivative actions and in opposition to Defendants' motion to dismiss the Consolidated Amended Complaint;
- (d) participation in the various status conferences as requested by the Court;
- (e) extensive discovery and document review, drafting and responding to interrogatories and document requests, drafting requests for admission, and arguing a motion to compel, and preparing for and taking multiple depositions;
- (f) reviewing and analyzing extensive data relating to fees charged by the fund adviser;
- (g) drafting and arguing briefs in opposition to summary judgment;
- (h) extensive discussions and negotiations regarding possible settlement of the Actions, including extensive consultation with Class Counsel regarding damages, and negotiations with counsel for the Deutsche/Scudder Defendants;

- (i) negotiation of the Stipulation with the Deutsche/Scudder Defendants;
- (j) consultation with other Derivative Counsel and with the Derivative Plaintiffs concerning the progress of the litigation as well as the proposed settlement of the litigation;
- (k) preparation for and appearances at this Court's May 7, 2010, hearing to consider preliminary approval of the Settlement; and
- (l) other work incidental to the preparation and presentation of the settlement for final judicial approval, and consultations with counsel in the other sub-tracks regarding coordination of related matters.

In short, it is evident that Plaintiffs' Counsel expended significant time and labor in building Plaintiffs' cases. Those concerted efforts were undertaken despite the possibility that Plaintiffs would not prevail in their Actions, and that Plaintiffs' Counsel would therefore receive nothing for their efforts. The time and labor expended by counsel in producing the Settlement therefore support the attorneys' fee requested by Plaintiffs' Counsel.

Furthermore, these Actions posed many novel and difficult questions that exceeded even the difficult questions that often arise in a typical securities litigation action. Foremost, the claims in these Actions were based on a novel practice called mutual fund market timing. Because mutual fund market timing was an atypical brand of securities fraud, Plaintiffs' Counsel were required to reconsider the typical standards for proving securities fraud and determine how those standards would apply to allegations concerning market timing. Because, among other things, the way mutual funds are priced differs from the way individual securities are priced, developing the evidence required to prove elements of Plaintiffs' claims in these actions, such as reliance, causation, and damages, required skilled, creative, and tenacious counsel.



#### **D. The Risk of Non-Payment**

Plaintiffs' Counsel faced the risk, throughout the six years that these Actions were pending, that they might never be compensated for their time and efforts or for the expense they incurred while representing the Class and the Deutsche/Scudder Settlement Funds. As noted by the court in *Muhammad v. Nat'l City Mortg., Inc.*, 2008 U.S. Dist. LEXIS 103534, at \*22-23, (S.D. W. Va. Dec. 19, 2008), "counsel bore a substantial risk of nonpayment.... [t]he outcome of the case was hardly a foregone conclusion, but nonetheless counsel accepted representation of the plaintiff and the class on a contingent fee basis, fronting the costs of litigation." *See also In re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d at 387 (approving attorneys' fee award where "lead counsel was required to and did devote exceptional resources to the prosecution, facing some risk of non-recovery as the fee was entirely contingent under the retainer agreement ... and [Defendant's] financial position was unclear"); Pl. Omnibus Fee Mem. at 10. As described herein, to achieve the Settlement in these Actions, Plaintiffs' Counsel was compelled to litigate motions for summary judgment after extensive and complete fact and expert discovery.

In addition to all of the usual risks associated with protracted, sophisticated litigation of this type, the parties had fully briefed and argued before the court the merits of the Deutsche/Scudder Defendants' motion for summary judgment. At the time of settlement, this motion was pending before the Court and Judge Motz had ruled in favor defendants in the Janus and Putnam sub-tracks on similar motions for summary judgment at the time of Settlement. In addition, defendants vigorously opposed Class certification and, during oral argument on Lead Plaintiff's motion for class certification, the Court expressed concern about the manageability of trial for a class of shareholders in all affected Deutsche/Scudder funds.

While Plaintiffs believed that their claims were meritorious and that Lead Plaintiff's motion for class certification would have been granted, had Defendants prevailed on either motion, it is almost certain that Plaintiffs would have recovered nothing or very little in these Actions. Furthermore, even if Plaintiffs had prevailed on all these motions, the outcome of a trial and subsequent appeals would have been uncertain, especially considering the difficulty of proving scienter and damages in these Actions.

Accordingly, Plaintiffs' Counsel assumed great risk in prosecuting these actions on a contingent fee basis, and continued to incur additional risk as needed until they were able to obtain a fair settlement on behalf of the Class and the Deutsche/Scudder Settlement Funds.

#### **E. Awards in Similar Cases**

The requested fee percentage is consistent with, and in many cases, lower than, percentages awarded in class action cases in the district courts within the Fourth Circuit and in district courts within other circuits. *See, e.g., Muhammad*, 2008 U.S. Dist. LEXIS 103534, at \*23-24 (West Virginia district court approving requested award of 33.3% of the amount of the common fund established for the class); *Hackworth v. Telespectrum Worldwide, Inc.*, Civil Action No. 3:04-1271 (S.D. W. Va. 2004) (awarding fees of 33-1/3% of the amount of the settlement); *Kidrick v. ABC Television & Appliance Rental, Inc.*, 1999 WL 1027050 (N.D. W. Va. 1999) (awarding a 30.6% fee award); *Adams v. Advanced Mgmt., Inc.*, No. 3:94-042 (N.D. W. Va. 1994) (awarding class counsel 35% of the total settlement).<sup>9</sup>

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<sup>9</sup> The requested fee percentage is also consistent with, and in many cases, lower than percentages awarded in securities class action cases in district courts within other circuits. *See, e.g., Taubenfeld v. Aon Corp.*, 415 F.3d 597, 598 (7th Cir. 2005) (upholding 30% of recovery); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1300 (11th Cir. 1999) (affirming 33.3% of recovery); *Di Giacomo v. Plains All Am. Pipeline*, No. H-99-4137, 2001 WL 34633373, at \*10 (S.D. Fla. Dec. 19, 2001) (awarding 30% of recovery); *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97-C-7694, 2001 WL 1568856, at \*4 (N.D. Ill. Dec. 10, 2001) (awarding

Although the percentage fee requested by Plaintiffs' Counsel is slightly higher than that in other subtracks of this multidistrict litigation, the higher percentage requested by Plaintiffs' Counsel is reasonable because it reflects the additional risk, time, and expense that Plaintiffs' Counsel were compelled to incur through extensive discovery and additional motion practice to achieve a fair settlement of these Actions. Furthermore, as will be shown below, despite being a slightly higher percentage fee, Plaintiffs' Counsels' fee request constitutes a deep discount from counsels' loadstar.

#### **F. The Reaction of the Class**

The Class's uniformly positive reaction to the Settlement and the fee application also supports the requested award. Notices have been mailed to over one million investors. *See* Deutsch Decl., ¶10. To date, no Class member has objected to the Settlement or the requested fee (which was described in the Postcard Notice and the Long Notice). *Id.* This response demonstrates that the Class recognizes Plaintiffs' Counsels' dedicated service and that the quality of representation here weighs in favor of the total 29.25% fee requests. *See Mills Corp.*, 265 F.R.D. at 262, *citing In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005)

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33% of recovery); *In re E.W. Blanch Holdings, Inc. Sec. Litig.*, No. 01-258 (JNE/JGL), 2003 WL 23335319, at \*3 (D. Minn. June 16, 2003) (awarding 33% of recovery); *In re Safety Components Int'l, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 109 (D.N.J. 2001) (awarding 33% of recovery); *Weiss v. Blech (In re Blech Sec. Litig.)*, No. 94 Civ. 7696 (RWS), 2000 WL 661680, at \*1 (S.D.N.Y. May 19, 2000) (awarding 30% of recovery); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 367-68 (S.D.N.Y. 2002) (awarding 33.3% of recovery); *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at \*9 (S.D.N.Y. Oct. 24, 2005) (awarding 30% of recovery); *Blackman v. O'Brien Envtl. Energy, Inc.*, No. 94-5686, 1999 WL 397389, at \*1 (E.D. Pa. May 12, 1999) (awarding 35% of recovery); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 198 (E.D. Pa. 2000) (awarding 30% of recovery); *In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 435 (E.D. Pa. 2001) (awarding 33% of recovery); *In re Corel Corp., Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 495 (E.D. Pa. 2003) (awarding 33% of recovery); *In re Ravisent Techs., Inc. Sec. Litig.*, No. 00-CV-1014, 2005 WL 906361, at \*12 (E.D. Pa. Apr. 18, 2005) (awarding 33% of recovery); *Great Neck Capital Appreciation Inv. P'ship L.L.P. v. PricewaterhouseCoopers L.L.P. (In re Harnischfeger Indus., Inc.)*, 212 F.R.D. 400, 417 (E.D. Wis. 2002) (awarding 30% of recovery).

(affirming fee award and stating that district court “did not abuse its discretion in finding the absence of substantial objections by class members to the fee requests weighed in favor of approving the fee request”).

**G. Public Policy**

Award of the requested fee recognizes the substantial benefits conferred on the Class and the Deutsche/Scudder Settlement Funds, reflects the difficult circumstances under which this result was accomplished, and supports the public policy favoring prosecution of such actions. *See Helmick*, 2010 U.S. Dist. LEXIS 65808, at \*18 (internal citation omitted); *see also* Pl. Omnibus Fee Mem. at 10-11 (“At the heart of the class action lies the belief that the interests of justice are well served by class actions that vindicate rights that might otherwise go unprotected and that spare courts the burden of handling numerous lawsuits, some small and some not so small, arising from a common set of facts. Therefore, public policy generally favors attorneys’ fees that will induce attorneys to act and protect individuals who may not be able to act for themselves but also will not create an incentive to bring unmeritorious actions.”). Thus, the fee award is fair to Plaintiffs’ Counsel, the Class and the Deutsche/Scudder Settlement Funds.

**H. Endorsement of the Fee Request by PSLRA Lead Plaintiff**

Plaintiffs’ approval of Plaintiffs’ Counsels’ attorneys’ fee request strongly favors the Court finding that the request is reasonable. While courts retain an obligation to review the reasonableness of fee requests, fee requests that have been reviewed and endorsed by a properly selected PSLRA lead plaintiff are entitled to some deference. *See Mills*, 265 F.R.D. at 261 (“in a PSLRA case . . . a fee request that has been approved and endorsed by properly-appointed lead plaintiffs . . . enjoys a presumption of reasonableness”); *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695(CM), 2007 WL 4115808, at \*8 (S.D.N.Y. Nov. 7, 2007) (same); *In re*

*Lucent Techs., Inc. Sec. Litig.*, 327 F. Supp. 2d 426, 442 (D.N.J. 2004) (“Significantly, the Lead Plaintiffs, both of whom are institutional investors with great financial stakes in the outcome of the litigation, have reviewed and approved Lead Counsel’s fees and expenses request.”); Pl. Omnibus Fee Mem. at 11. Each of the Plaintiffs, including sophisticated institutional investor Lead Plaintiff Post-Retirement Health Insurance Plan and Trust, who was actively engaged in the prosecution of the Class Action, approved the Settlement and fee percentage sought by Plaintiffs’ Counsel. *See* Deutsch Decl. at ¶11.

**I. A “Cross-Check” Of Plaintiffs’ Counsel’s Lodestar Demonstrates the Reasonableness of the Requested Percentage Fee<sup>10</sup>**

District courts in the Fourth Circuit apply the lodestar method as a cross-check on the reasonableness of the requested percentage. *See In re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d 383, 385 (D. Md. 2006). “[W]here the lodestar is used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court.” *Id.* (citing *In re WorldCom Sec. Litig.*, 388 F.Supp.2d 319, 355 (S.D.N.Y. 2005)) (internal quotations omitted)

**1. The Requested Fee Is Reasonable Because It Implies a Negative Multiplier, Indicating that Plaintiffs Will Not Be Compensated For Much Of Their Time Spent Litigating This Case**

Plaintiffs’ Counsel spent over twenty-eight thousand hours on this case and their lodestar for the services performed by the firm is approximately \$11 million. *See* Deutsch Decl. at ¶72. As noted in Plaintiffs’ Omnibus Memorandum, in contingent litigation, lodestar multiples falling between 2 and 4.5 are routinely awarded by courts, including this Court. *See* Pl. Omnibus Fee Mem. at 6. Here, Plaintiffs’ Counsel seek no multiple of their lodestar. In fact, the requested fee represents a negative multiplier to their lodestar. If the requested fee is granted in its entirety,

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<sup>10</sup> For a discussion of the standards for employing a lodestar cross-check, see pages 5-6 of Pl. Omnibus Fee Mem.

Plaintiffs will recoup less than 35% of their lodestar. In other words, not only is Plaintiffs' Counsel not receiving a premium on their lodestar to compensate them for the contingent risk factor, their fee request amounts to a deep discount from their lodestar. Thus, the lodestar "cross-check" unquestionably supports a percentage fee award of 29.25%.

**2. The Number of Hours Expended By Plaintiffs' Counsel and the Rates Charged by Plaintiffs' Counsel Are Reasonable**

Plaintiffs Counsel spent 28,628.60 hours, and their lodestar through September 14, 2010, was \$11,077,154.16. *See* Deutsch Decl. at ¶72. The requested fee represents only a negative multiplier of the lodestar. Plaintiffs' Counsel performed an enormous amount of work on behalf of the Class, litigating these Actions through extensive and complete fact discovery and expert discovery and briefing and arguing before the Court the Deutsche/Scudder Defendants' motions for summary judgment, Lead Plaintiff's motion for class certification, and several motions by the Deutsche/Scudder Defendants to exclude Plaintiffs' damages and liability experts.

Plaintiffs' Counsel bore all the risks and expenses of the litigation and made every effort to be efficient in litigating these Actions. Plaintiffs' counsel are highly experienced in prosecuting securities law claims and shareholder class and derivative actions and believe that they were able to perform the various tasks necessary to advance the Class' and the Deutsche/Scudder Settlement Funds' interests in a more efficient manner compared with counsel with a lesser degree of specialization in this highly-complex field. *See Teachers' Ret. Sys. v. A.C.L.N., Ltd.*, 2004 U.S. Dist. LEXIS 8608, at \*20 (S.D.N.Y. May 14, 2004) (noting that the skill and prior experience of counsel in the specialized field of shareholder securities litigation is relevant in determining fair compensation).

Plaintiffs' Counsel's billing rates are also reasonable and have supported other recent fee awards in similar class and derivative actions. *See Ahold*, 461 F. Supp. 2d at 386 n. 6 (applying

reasonable rates for national law firms that prosecuted the case, despite those rates being high for the district). The use of current rates to calculate the lodestar figure has been repeatedly endorsed by courts as a means of accounting for the delay in payment inherent in class actions and for inflation. *See, e.g., Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989) (“an appropriate adjustment for delay in payment” by applying “current” rate is appropriate); *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998) (current rates “should be applied in order to compensate for the delay in payment”). Viewed in light of that market barometer, Plaintiffs’ Counsels’ rates are reasonable.

Courts have repeatedly found rates charged by plaintiffs’ counsel in class actions that are comparable to those at issue here to be reasonable given the nature of such work and the risks associated with financing class actions.<sup>11</sup> Thus, a market check and substantial precedent demonstrate that the rates utilized by plaintiffs’ counsel in calculating their lodestars are reasonable.

## **II. PLAINTIFFS’ COUNSELS’ LITIGATION EXPENSES ARE REASONABLE AND SHOULD BE REIMBURSED<sup>12</sup>**

Plaintiffs’ Counsel are also entitled to recover litigation expenses. *See Mills Corp.*, 265 F.R.D. at 265 (explaining that “[t]he Court is authorized to award costs that are reasonable in nature from the common fund,” and approving reimbursement for expert fees, reproduction costs, mediation costs, and court costs) (internal citations omitted). As one commentator has written:

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<sup>11</sup> *See, e.g., In re Indep. Energy Holdings PLC Sec. Litig.*, No. 00 Civ. 6689, 2003 U.S. Dist. LEXIS 17090, at \*30 (S.D.N.Y. Sept. 26, 2003) (rates of \$650/hour for a partner, and \$300-\$425/hour for associates, are “not extraordinary for a top-flight New York City law firm”); *In re Bankamerica Corp. Secs. Litig.*, 228 F. Supp. 2d 1061, 1065 (E.D. Mo. 2002) (“Similarly, while the hourly rates ranging up to \$695 are high for the Eastern District of Missouri, they are nonetheless within the range of reasonableness in the realm of nationwide securities class actions.”); *Ahold*, (finding weighted average counsel rates of approximately \$340 reasonable).

<sup>12</sup> For a discussion of the criteria for assessing the reasonableness of a request for reimbursement of litigation expenses, see Pl. Omnibus Fee Mem. at 14-15..

[A]n attorney who creates or preserves a common fund by judgment or settlement for the benefit of a class is entitled to receive reimbursement of reasonable fees and expenses involved. The equitable principle that all reasonable expenses incurred in the creation of a fund for the benefit of a class are reimbursable proportionately by those who accept benefits from the fund authorizes reimbursement of full reasonable litigation expenses as costs of the suit.

1 Alba Conte, *Attorney Fee Awards* § 2.19, at 73-74 (3d ed. 2006), citing *Internal Improvement Fund Trustees v. Greenough*, 105 U.S. 527 (1881); Pl. Omnibus Fee Mem. at 12-13.

In this case, Plaintiffs' Counsel seek reimbursement of \$973,395.15 in litigation expenses.<sup>13</sup> See Deutsch Decl. at ¶79.<sup>14</sup> All of the expenses that Plaintiffs' Counsel seeks to have reimbursed from the Settlement Amount are those for which paying clients in the marketplace are typically billed. These expenses were also necessary to the prosecution of the Actions.

Notably, the largest components of the expenses in these actions were expert witness fees and discovery related costs. These expenses were particularly necessary in these Actions where Plaintiffs endeavored to ultimately prove damages and liability beyond what the Deutsche/Scudder Defendants settled for claims asserted by government regulators. Specifically, Plaintiffs relied heavily on their damages expert to develop computer applications to analyze over 177 million trades made in the Deutsche/Scudder fund complex during the relevant time period to identify actual harm caused by non-arrangement market timing. Plaintiffs also relied on their damages expert to develop sophisticated damages models for market timing through omnibus accounts despite not having access to all of the underlying transaction information for these accounts.

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<sup>13</sup> A breakdown of Plaintiffs' Counsel's expenses appears at Deutsch Decl. Exhibits F, H-L.

<sup>14</sup> Plaintiffs' Counsel's requests includes an additional \$1,500 for Class Counsel's and Derivative Counsel's expenses related to attending the final approval hearings in Baltimore on October 21-22, 2010.



In addition, Plaintiffs' Counsel have traveled to this District, to appear before the Court, and to numerous depositions that were taken across the country, but stayed at modestly priced hotels and purchased reasonably priced airline tickets (i.e. – coach class fares). The reimbursement Plaintiffs' Counsel seeks for such items is modest and represents only their reasonable out-of-pocket expenses. *See* Deutsch Decl. at ¶79.

Finally, it bears emphasis that the notice advised Class members that Plaintiffs' Counsel would petition the Court for up to \$1,050,000 as reimbursement for litigation expenses. As of September 14, 2010, Plaintiffs' Counsel has not received any objections to their expense application, which seeks an amount less than that specified in the notice. *See* Deutsch Decl. at ¶10.

For these reasons, Plaintiffs' Counsel respectfully request that the listed expenses and costs be awarded because they were necessary and appropriate in prosecuting this action.

### **III. LEAD PLAINTIFF IS ENTITLED TO AN AWARD REIMBURSING ITS EXPENSES INCURRED WHILE PROSECUTING THE ACTION ON BEHALF OF THE CLASS**

The Lead Plaintiff seeks \$16,413.60 as reimbursement for its time, effort, and expenses incurred in connection with the prosecution of this case. Specifically, Plaintiff reviewed documents relevant to the case, reviewed pleadings, conferred with counsel concerning the status of the litigation and settlement negotiations, prepared for and gave deposition testimony, reviewed its deposition transcript, and provided responses to Defendants' discovery requests. *See* Declarations. PRHIPT expended sixty-four hours valued at a total of \$16,413.60 directly relating to the representation of the Class. *See* Deutsch Decl. at ¶90. The Notice informed the Class that Plaintiffs would seek such reimbursement up to \$35,000, and as of September 14, 2010. There have been no objections to the requested award.

Under the Private Securities Litigation Reform Act of 1995, the Court has the discretion to grant an “award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class.” 15 U.S.C. § 78u-4(a)(4). Courts “routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, 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.” *In re Gilat Satellite Networks, Ltd. Sec. Litig.*, No. CV-02-1510, 2007 WL 2743675, at \*19 (E.D.N.Y. Sept. 18, 2007) (awarding plaintiffs \$300 per hour for their time spent managing the case). “Incentive awards are not uncommon in class action litigation ... particularly where ... a common fund has been created for the benefit of the entire class.” *In re Corel Corp. Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 498 (E.D. Pa. 2003) (citation and internal quotes omitted) (alterations in original). Indeed, “[t]hese awards are generally in keeping with the public policy concerns cited in class actions.” *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at \*4 (C.D. Cal. June 10, 2005).

Ample other authority, from this Circuit and beyond, supports the service award requested here. *See, e.g., In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 265 (E.D. Va. 2009) (awarding \$42,419.50 to Lead Plaintiffs); *Jones v. Dominion Res. Servs.*, 601 F. Supp. 2d 756, 768 (S.D. W. Va. 2009) (awarding class representatives approximately \$15,000); *Muhammad*, 2008 U.S. Dist. LEXIS 103534, at \*24-26 (awarding class representative \$5,000).<sup>15</sup>

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<sup>15</sup> *See also In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1173 (S.D. Cal. 2007) (\$40,000.00 award to single plaintiff under § 78u-4(a)(4)); *In re CV Therapeutics, Inc., Sec. Litig.*, No. C 03-3709, 2007 WL 1033478, at \*2 (N.D. Cal. Apr. 4, 2007) (\$26,000.00 award to one plaintiff); *In re Charter Comm., Inc., Sec. Litig.*, Nos. MDL 1506, 4:02-CV-1186, 2005 WL 4045741, at \*25 (E.D. Mo. June 30, 2005) (\$26,625 award to lead plaintiff) (citing *In re Dun & Bradstreet Credit Serv. Cust. Litig.*, 130 F.R.D. 366, 376 (S.D. Ohio 1990) (awarding two class representatives \$55,000.00 each and three class representatives \$35,000.000 each)); *In re Hamilton Bancorp Sec. Litig.*, No. 01-0156-CIV, slip op. (S.D. Fla. Mar. 21, 2005) (awards totaling over \$20,000); *In re Xcel Energy, Inc., Securities, Derivative & ‘ERISA’ Litig.*, 364 F. Supp. 2d 980, 1000 (D. Minn. 2005) (\$100,000 award to lead plaintiffs); *In re Quintus Sec. Litig.*, No. C-00-4263, 2006 WL 3507936, at \*4 (N.D. Cal. Dec. 5, 2006) (\$12,000

V. **CONCLUSION**

For all the foregoing reasons, the Court should approve the Plaintiffs' Counsel's application for attorneys' fees and reimbursement of expenses.

Dated: September 14, 2010

Respectfully submitted,

**BERGER & MONTAGUE, P.C.**

By: \_\_\_\_\_/s/\_\_\_\_\_

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award to the lead plaintiff); *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 635 (W.D. Ky. 2006) (awards totaling \$27,500 under § 78u-4(a)(4)). *Cf. Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251 (S.D. Ohio 1991) (granting awards in the amount of \$50,000 for each of the six class representatives); *In re Remeron End-Payor Antitrust Litig.*, Nos. Civ. 02-2007 FSH, Civ. 04-5126 FSH, 2005 WL 2230314, at \*32 (D.N.J. Sept. 13, 2005) (including two \$30,000 awards); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 914 (S.D. Ohio 2001) (\$50,000 award to one class representative); *see also* Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1308 (2006) (“[W]hen an incentive award was granted, the average total award was \$128,803 ....”).

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