

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE NQ MOBILE, INC.
SECURITIES LITIGATION

This Document Relates to: All Actions

No. 1:13-cv-07608-WHP

**PLAINTIFFS' COUNSEL'S MEMORANDUM IN SUPPORT OF THEIR MOTION
FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES, AND FOR AN
AWARD TO LEAD PLAINTIFF HERBERT VOLIN UNDER 15 U.S.C. §78u-4(a)(4)**

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Plaintiffs' Counsel respectfully submit this Memorandum of Law in Support of their Motion for Attorneys' Fees and Reimbursement of Expenses, and for an Award to Lead Plaintiff Herbert Volin pursuant to 15 U.S.C. §78u-4(a)(4).

I. INTRODUCTION

In the face of substantial risk, Plaintiffs' Counsel have succeeded in obtaining a \$5.1 million all-cash recovery for the benefit of the Class¹ as a result of their hard work and skill. In consideration of these efforts and the results achieved for the Class, Plaintiffs' Counsel request an award of attorneys' fees in the amount of 30% of the Settlement Fund (or \$1.530 million) and reimbursement of litigation expenses incurred in prosecuting this Action in the aggregate amount of \$60,435.96. Plaintiffs' Counsel also request an award of \$3,000 to one of the lead plaintiffs, Herbert R. Volin, for his reasonable costs and expenses pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §78u-4(a)(4).

For all the reasons set forth herein, in the accompanying Declaration of William C. Fredericks, dated January 27, 2016, ("Fredericks Decl.) and in Plaintiffs' accompanying memorandum in support of final approval of the Settlement (the "Final Approval Brief"), Plaintiffs' Counsel respectfully submit that the requested attorneys' fee award is fair and reasonable. The Settlement represents a highly favorable result, particularly given the substantial risks of continued litigation, and was obtained only as a result of Lead Counsel's efforts. Moreover, the requested fee represents only a very modest lodestar multiplier of 1.3x on Plaintiffs' Counsel's lodestar, and is accordingly well within the "range of reasonableness" in this Circuit under both the percentage and lodestar method for contingent securities class action

¹ Unless otherwise noted, all capitalized terms are defined in the Stipulation of Settlement, which, along with its exhibits, has previously been filed with the Court. *See* ECF Nos. 154-1 – 154-7.

counsel. Similarly, Counsel's request for reimbursement of litigation expenses in the amount of \$60,435.96, and for an award of \$3,000 to Lead Plaintiff Herbert Volin under 15 U.S.C. §78u-4(a)(4), are also fair and reasonable, and should similarly be approved.

Plaintiffs' Counsel also note that, although the Notice apprised Class Members of their intent to seek a 30% fee, plus an award of expenses (including to Lead Plaintiffs) of up to \$185,000 (which is substantially *more* than what Plaintiffs' Counsel are now actually seeking), to date no objections to the fee or expense requests have been received. *See* accompanying Declaration of Carole Sylvester ("Sylvester Decl."), ¶15. (The Sylvester Decl. is Exh. A to the Fredericks Decl.) The deadline for filing such objections is February 10, 2016. Should any objections ultimately be received, Plaintiffs' Counsel will address them in a reply brief.

II. FACTUAL AND PROCEDURAL HISTORY

Lead Plaintiffs respectfully refer the Court to the accompanying Fredericks Decl. at ¶¶6-14, 24 and 29, for a summary of the factual and procedural history of the Action, the work performed, and the results achieved.

III. CLASS COUNSEL ARE ENTITLED TO AN AWARD OF REASONABLE ATTORNEYS' FEES

"[W]here an attorney succeeds in creating a common fund from which members of a class are compensated for a common injury inflicted on the class . . . the attorneys whose efforts created the fund are entitled to a reasonable fee – set by the court – to be taken from the fund." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000); *see also Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S. Ct. 745, 749 (1980) (" [A] lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."). Courts in this District have long recognized that attorneys' fee awards "serve to encourage skilled counsel to represent those who seek redress for

damages inflicted on entire classes of persons, and to discourage future alleged misconduct of a similar nature.” *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 585 (S.D.N.Y. 2008); Accordingly, adequately compensating class counsel for the risks they take in bringing these actions is essential because “[s]uch actions could not be sustained if [they] were not to receive remuneration from the settlement fund for their efforts on behalf of the class.” *Hicks v. Morgan Stanley*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005). Similarly, the Supreme Court has repeatedly emphasized that private securities cases, such as this, are “an indispensable tool with which defrauded investors can recover their losses’ – a matter crucial to the integrity of domestic capital markets.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2508 n.4 (2007).²

A. The Requested Attorneys’ Fee Award Is Reasonable Under Both the Percentage Method and the Lodestar Method

In common fund cases, courts may use one of two methods to calculate attorneys’ fees: (1) the percentage method, where the court awards fees as a reasonable percentage of the fund; or (2) the lodestar method, where the court computes fees by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate and, in its discretion, applies a multiplier. *Goldberger*, 209 F.3d at 49. The percentage method is typically preferred “because it reduces the incentive for counsel to drag the case out to increase the number of hours billed” and requires “fewer judicial resources ... [to] evaluat[e] the fairness of the fee petition.” *Hicks*, 2005 WL 2757792, at *8. Here, the requested fee is plainly reasonable under both methods.

The guiding principle of what constitutes a reasonable fee is based upon what counsel would receive if they were bargaining for the service in the marketplace. *See Missouri v. Jenkins*

² Unless otherwise noted, internal citations are omitted and all emphasis is added.

by *Agyei*, 491 U.S. 274, 285-86 (1989). Had this Action been brought as a non-representative (non-class) litigation, the customary fee would have almost certainly been based on a contingent percentage of at least 33⅓% of any recovery – and likely more given the risks and added complexities of suing a defendant company and corporate officers who are located in the People’s Republic of China (“P.R.C.”). *See, e.g., Blum v. Stenson*, 465 U.S. 886, 903 n.* (1984) (“In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers.”); *In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-Civ-8557 (CM), 2014 WL 7323417, at *17 (S.D.N.Y. Dec. 19, 2014) (33⅓% fees are common in the Second Circuit and across the nation).

It is thus not surprising that a 2014 study by NERA Economic Consulting found that, during the 2011-2013 period, the median amount of attorneys’ fees awarded in securities cases that settled for between \$5 million and \$10 million was the amount requested here – namely, 30% of the settlement.³ Similarly, attorneys’ fees in the range of 28%-33% have been awarded in other Chinese securities fraud cases in this District. *See, e.g., Perry v. Duoyuan Printing, Inc.*, No. 10-cv-07235 (GBD), 2013 WL 4505199 (S.D.N.Y. Aug. 22, 2013) (33% award); *In re Giant Interactive Group, Inc. Sec. Litig.*, 279 F.R.D. 151, 165 (S.D.N.Y. 2011) (33% award); *Varghese v. China Shenghuo Pharm. Holdings, Inc.*, 589 F. Supp. 2d 388 (S.D.N.Y. 2008) (28% award); *Ho v. Duoyuan Global Water, Inc.*, 887 F. Supp. 2d 547 (S.D.N.Y. 2012) (33% award).

The requested fee is also plainly reasonable under the lodestar method, where the attorney fee award is derived “by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate.” *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 170-71 (S.D.N.Y. 2007) (quoting *A.R. ex rel. R.V. v. N.Y. City Dep’t of*

³ Comolli & Starykh, *Recent Trends in Securities Class Action Litigation: 2014 Full-Year Review*, NERA Economic Consulting (Jan. 20, 2015) at 34, http://www.nera.com/content/dam/nera/publications/2015/PUB_2014_Trends_0115.pdf.

Educ., 407 F.3d 65, 79 (2d Cir. 2005)). The reasonable hourly rates to be applied are the firm's normal rates (if comparable to those of others in the relevant field), *i.e.*, the "market rate." *See Blum*, 465 U.S. at 895; *Luciano v. The Olsten Corp.*, 109 F.3d 111, 115 (2d Cir. 1997) (lodestar rates should be "in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation").⁴

Here, Lead Counsel alone devoted over 1,900 hours to performing work for the benefit of the Class, resulting in a lodestar of \$1,159,108. *See* Fredericks Decl., ¶31. Thus, the requested attorneys' fee represents only a very modest lodestar multiplier of approximately 1.3 on Lead Counsel's time, which is plainly well within (and, indeed, distinctly at the low end) of the range of reasonableness for lodestar multipliers. *See, e.g., Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (fee equal to **4.65 multiplier** was "well within the range awarded by courts in this Circuit and courts throughout the country"); *Wal-Mart Stores, Inc. v. VISA U.S.A Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (multiplier of 3.5 approved on appeal).

B. Application of the *Goldberger* Factors Confirms that the Requested Attorneys' Fees Are Reasonable

Whether the fee is calculated using the lodestar or percentage method, courts should also consider the factors set forth by the Second Circuit in *Goldberger*, 209 F.3d at 52, in considering a fee request. Those factors include: (1) the magnitude and complexity of the action; (2) the litigation risks involved; (3) the quality of class counsel's representation; (4) the size of the

⁴ As set forth in the Daryl F. Scott Declaration (attached to Fredericks Decl. as Exh. B), the hourly rates used to calculate Lead Counsel's lodestar here are the same used as those in other complex cases, and it is respectfully submitted that they are reasonable and consistent with those routinely approved in other class actions. *See, e.g., City of Austin Police Ret. Sys. v. Kinross Gold Corp.*, No. 1:12-cv01203-VEC, ECF No. 206, Oct. 15, 2015 [Order and Final Judgment] (S.D.N.Y. 2013) (approving Scott+Scott's hourly rates); *Policemen's Ann. & Ben. Fund of the City of Chicago v. BofA, NA*, 907 F. Supp. 2d 536 (S.D.N.Y. 2012) (same).

requested fee in relation to the recoveries obtained; (5) the time and labor expended by class counsel; and (6) public policy considerations. *Goldberger*, 209 F.3d at 50. Review of these factors here further confirms the reasonableness of the requested 30% fee.

1. Magnitude and Complexity of the Action

As a general matter, securities litigation is “notoriously difficult and unpredictable.” *In re AOL Time Warner S’holder Deriv. Litig.*, No. 02 Civ. 6302(SWK), 2006 WL 2572114, at *3 (S.D.N.Y. Sept. 6, 2006). *See also Maley*, 186 F. Supp. 2d at 372 (securities cases are, by their very nature, “a complex animal”). Here, moreover, Plaintiffs’ Counsel faced the additional challenges that many key witnesses, including third parties and their documents, were located in the People’s Republic of China or elsewhere in Asia. *See* Fredericks Decl., ¶18.

In addition, this case centered on complex accounting issues and allegations of related-party transactions that would have ultimately turned on competing expert opinions on materiality and disputed issues of Generally Accepted Accounting Principles (“GAAP”). As reflected in NQ’s briefing on the motions to dismiss, NQ also vigorously contested Plaintiffs’ loss causation and related damages allegations. In short, had the case moved further towards trial, it would have involved multiple “battles of experts” on issues relating to both liability and damages – as well as likely *Daubert* motions and appeals by the losing Parties. And, even if Plaintiffs prevailed after trial and appeals in the U.S., they would have faced the risks of having to litigate anew in the People’s Republic of China to enforce a judgment against NQ and/or its insurers (who were also based in the P.R.C.). The “complexity factor” thus supports the requested fee.

2. Litigation Risks

Courts repeatedly stress that “the risk of the litigation” is a key factor in assessing requested attorneys’ fees awards in class actions. *See, e.g., Telik*, 576 F. Supp. 2d 570; *In re*

Bristol-Myers Squibb Sec. Litig., 361 F. Supp. 2d 229, 233 (S.D.N.Y. 2005) (“[The] . . . most important *Goldberger* factor is the risk in pursuing the case.”).

Here, as detailed in the Final Approval Brief (at §IV.B) and the Fredericks Decl. at ¶¶15-23, the *very* significant risks that Lead Counsel faced in this case included: (a) the risk of being unable to obtain sufficient information to prove their case from discovery (as nearly all of the key third-party witnesses were located in the P.R.C. or other Asian countries); (b) the risk that Plaintiffs would lose a “battle of experts” on accounting liability issues; (c) the risk that Plaintiffs would similarly lose a “battle of experts” on disputed loss causation and damages issues; (d) the risk that any favorable judgment at trial would be overturned on appeal; and (e) the special risk here that, even if Plaintiffs ultimately obtained a judgment at trial (and prevailed on appeal) in the U.S., they would ultimately be unable to enforce any such judgment in the People’s Republic of China against any of the Defendants. And finally, given that NQ lacks significant assets that could be foreclosed on in the U.S. – and given that NQ’s financial condition has been precarious since this Action was first filed – there was also the risk that there would be no assets to collect against even if (after years of further litigation) a Chinese court did enforce a U.S. judgment. Fredericks Decl. ¶22. Thus, specific litigation risks here *strongly* support the requested fee.

3. Quality of Plaintiffs’ Counsel’s Representation

To evaluate the “quality of representation,” courts consider the recovery obtained and plaintiffs’ counsel’s experience and skill. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004). Here, Lead Counsel obtained a significant recovery for the Class of \$5.1 million in a case where success was far from assured. Perhaps the best measure of the results obtained is that the Settlement represents one of only six securities fraud actions (out of 31 such cases) brought against a China-based company that has resulted in a recovery of more

than \$5 million, and four of those six large settlements are readily distinguishable because these cases also included §11 claims against U.S.-based underwriter defendants. In short, this Settlement appears to be the 3rd largest in a securities case against a Chinese company where there were no U.S.-based underwriter defendants who could contribute to a settlement. *See* Fredericks Decl., ¶24.

As for Lead Counsel's experience and skill, it is respectfully submitted that Scott+Scott has extensive experience and expertise in litigating securities class actions (*see* Fredericks Decl. at Exh. F (attaching firm résumé)), and this Court has also been able to evaluate the quality of Lead Counsel's representation from its own review of the filings submitted, and oral arguments presented, to the Court by counsel over the course of this Action.

Finally, the "quality of opposing counsel is also important in evaluating the quality of Class Counsels' work." *In re KeySpan Corp. Sec. Litig.*, No. 01 CV 5852, 2005 WL 3093399, at *11 (E.D.N.Y. Sept. 30, 2005). Here, Defendants were represented by Skadden Arps, an internationally recognized law firm of unquestioned skill and experience. The ability of Lead Counsel to obtain a favorable Settlement for the Class in the face of such formidable legal opposition confirms the superior quality of their representation. Accordingly, the quality of representation weighs in favor of approving the requested fee.

4. Size of the Fee Request in Relation to the Recovery Obtained

Plaintiffs' Counsel request a fee award equal to 30% of the Settlement Fund. As detailed above at §III.A, an award equal to 30% of the recovery is in line with fee awards routinely approved by courts in this Circuit (and across the country) in other securities fraud cases that settle in the \$5 million range, including in cases involving defendants based in China. Indeed,

given the heightened risks and special complexities of litigating against P.R.C.-based defendants, a higher percentage could be readily justified. In sum, a 30% fee here is reasonable.

5. Time and Labor Expended by Class Counsel

As detailed in the Fredericks Decl. at ¶¶6-14 and discussed at §III(a) above, the Settlement here was reached after one and a half years of contested litigation followed by another six months of extended arm's-length negotiations. In brief, over the course of this action, the work performed by Lead Counsel included: (a) consolidating related cases in different districts before this Court; (b) conducting their own extensive pre-filing investigation into the facts and various legal claims against the Individual Defendants; (c) preparing the highly detailed Amended Complaint; (d) consulting with accounting and damages experts; (e) briefing a motion to authorize alternative service on the various Individual Defendants located in China; (f) translating the Complaint into Chinese and attempting to effect service in China on NQ's Beijing-based auditors, PriceWaterhouseCoopers Zhong Tian; (g) fully briefing the motions to dismiss filed by the NQ Defendants' and PriceWaterhouseCoopers Zhong Tian's U.S.-based affiliate; (h) preparing mediation briefs and participating in a full-day, in-person mediation; and (i) negotiating and preparing the final Settlement papers. *Id.*

To date, Lead Counsel has spent over 1,900 hours litigating this case. Fredericks Decl., ¶31. Lead Counsel respectfully submit that: (a) the time incurred was reasonably necessary to obtain the results achieved, and (b) the requested 30% award would result in only a modest lodestar multiplier. Accordingly, counsel's time and labor also supports the requested fee.

6. Public Policy Considerations

Public policy concerns favor the award of reasonable attorneys' fees in class action securities litigation. *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005)

(“to attract well-qualified plaintiffs’ counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives.”). The Supreme Court has also emphasized that private securities actions play an important role in enforcing the securities laws and “are ‘a necessary supplement to [SEC] action.’” *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985). Moreover, where, as here, many or most Class Members are individuals, “public policy supports an award sufficient to encourage counsel to act on behalf of such investors.” *See In re Merrill Lynch Co. Research Reports*, 246 F.R.D. 156, 175 (S.D.N.Y. 2007); *In re Bristol-Myers Squibb*, 361 F. Supp. 2d at 236 (same). Thus public policy concerns also support the requested fee.

IV. THE REQUESTED APPLICATION FOR REIMBURSEMENT OF LITIGATION EXPENSES SHOULD BE GRANTED IN FULL

It is well established that counsel who create a common fund are entitled to the reimbursement of reasonable expenses that they advance to a class. *Giant Interactive Group Inc.*, 279 F.R.D. at 165; *In re Bear Stearns Cos., Inc. Sec., Deriv. & ERISA Litig.*, 909 F. Supp. 2d 259, 272 (S.D.N.Y. 2012) (same). Accordingly, “[c]ourts in the Second Circuit normally grant expense requests in common fund cases as a matter of course.” *In re EVCI Career Colleges Holding Corp. Sec. Litig., Inc.*, No. 05 Civ. 10240, 2007 WL 2230177, at *18 (S.D.N.Y. July 27, 2007).

As detailed in the Fredericks Decl. at Exhibits B-D, Plaintiffs’ Counsel incurred an aggregate total of \$60,435.96 in litigation expenses on behalf of the Class in prosecuting this Action. Fredericks Decl., ¶38. These expenses were reasonably incurred to litigate the case, and are of the type routinely reimbursed by courts, including the costs of, *inter alia*: (i) outside damages and accounting experts; (ii) court fees; (iii) photocopying, postage and delivery expenses; (iv) mediation fees; and (v) legal and financial databases, such as Westlaw. In

addition, Plaintiffs' Counsel here had to incur additional expenses in translating the Complaint into Chinese and seeking to effect service on certain Defendants in the People's Republic of China. Fredericks Decl., ¶9.

Notably, the Notice disseminated to Class Members stated that Plaintiffs' Counsel would seek reimbursement of litigation expenses of up to \$185,000. To date, *no* Class Member has objected to the \$185,000 figure – and Plaintiffs' Counsel are actually seeking a significantly lesser sum of only \$60,435.96 in expenses. The absence of objections thus further supports the requested fee award. *See, e.g., Bell Atl Corp. v. Bolger*, 2 F.3d 1304, 1313 n.15 (3d Cir. 1993).

V. LEAD PLAINTIFF HERBERT VOLIN'S REQUEST FOR AN AWARD UNDER 15 U.S.C. §78u-4(a)(4) SHOULD BE GRANTED

Under 15 U.S.C. §78u-4(a)(4), a lead plaintiff may seek an award of reasonable costs and expenses (including lost wages) directly relating to their representation of the Class. Such awards “encourage[] participation of plaintiffs in the active supervision of their counsel.” *Varljen v. H.J. Meyers & Co., Inc.*, No. 97 Civ. 6742, 2000 WL 1683656, at *5 n.2 (S.D.N.Y. Nov. 8, 2000). Accordingly, courts routinely compensate named plaintiffs for their time incurred in connection with their service to the Class. Moreover, Lead Plaintiff Herbert Volin (who acted as the representative of the other members of the Volin family who were also part of the Court-appointed lead plaintiff “Volin Group”) seeks only a modest §78u-4(a)(4) award of \$3000, which is well within the range of such awards approved on other cases. *See, e.g., In re Colgate-Palmolive Co. ERISA Litigation*, 36 F. Supp. 3d 344, 354 (S.D.N.Y. 2014) (awarding six class representatives \$5,000 each); *Park v. The Thomson Corp.*, No. 05-2931, 2008 WL 4684232, at *7 (Oct. 22, 2008) (noting that a \$5,000 award was warranted because it was “minimal” in amount and there were no objections to it from absent class members); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 264 (S.D.N.Y. 2003) (collecting cases and granting an award of \$15,000 to

class representative). As set forth in his Declaration, Mr. Volin devoted at least 25 hours to this litigation, including time spent collecting relevant documents, reviewing drafts and final copies of pleadings and other court filings, and regularly communicating with counsel by email and telephone regarding the posture and progress of the case. *See* Declaration of Herbert R. Volin, attached as Exhibit G to the Fredericks Decl. Accordingly, the requested award of \$3000 to Mr. Volin should also be approved.

VI. CONCLUSION

Based on the foregoing, Plaintiffs' Counsel respectfully request that the Court enter an order substantially in the form attached to their accompanying Notice of Motion that (i) grants their request for an award of attorneys' fees equal to 30% of the Settlement Fund; (ii) approves their request for reimbursement of litigation expenses in the amount of \$60,435.96, and (iii) grants Lead Plaintiff Herbert Volin an award of \$3000 under 15 U.S.C. §78u-4(a)(4).

Dated: January 27, 2016

SCOTT+SCOTT, ATTORNEYS AT LAW, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2016, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the e-mail addresses for all parties denoted on the Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 27th day of January, 2016 at New York, NY.

/s/ William C. Fredericks

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