UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS

ROBERT MURRAY, On Behalf of Himself and All Others Similarly Situated, Plaintiff, vs. EARTHLINK HOLDINGS CORP., et al. Defendants.	))))))))))	No. 4:18-cv-00202-JM <u>CLASS ACTION</u> MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S COUNSEL'S MOTION FOR ATTORNEYS' FEES, LITIGATION EXPENSES, AND AWARD TO LEAD PLAINTIFF PURSUANT TO 15 U.S.C. §78u-4(a)(4)

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY 3

III. THE REQUEST FOR ATTORNEYS' FEES AND EXPENSES SHOULD BE APPROVED 4

A. The Percentage-of-the-Fund Recovered Is the Preferred Approach for Awarding Attorneys' Fees in Common Fund and Securities Cases 4

B. The Requested Fee Is Presumptively Reasonable Because the Court-Appointed Lead Plaintiff Has Approved It 5

C. Consideration of Relevant Factors Support the Requested Fee 5

1. The Benefit Conferred on the Settlement Class Supports the Requested Fee 6

2. The Risk to Which Plaintiff's Counsel Was Exposed Supports the Requested Fee 7

3. The Difficult and Novel Legal and Factual Issues in the Action Support the Requested Fee....................11

4. The Skill and Efficiency of Counsel Supports the Requested Fee 12

5. The Time and Labor Involved Support the Requested Fee 15

6. Reaction of Settlement Class Members Supports the Requested Fee....................16

7. A Comparison Between the Requested Fee Percentage and Percentages Awarded in Similar Cases Supports the Requested Fee 16

D. Reasonably Incurred Litigation Expenses Should Be Awarded 19

E. Lead Plaintiff Is Entitled to an Award Pursuant to 15 U.S.C. §78u-4(a)(4)....................20

IV. CONCLUSION....................21

TABLE OF AUTHORITIES

Page

CASES

Alaska Elec. Pension Fund v. Flowserve Corp.,
572 F.3d 221 (5th Cir. 2009) 7

Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds,
568 U.S. 455 (2013)..........5

Beaver Cnty. Employees' Ret. Fund v. Tile Shop Holdings, Inc.,
2017 WL 2574005 (D. Minn. June 14, 2017)..........10, 11

Boeing Co. v. Van Gemert,
444 U.S. 472 (1980)..........4

Caligiuri v. Symantec Corp.,
855 F.3d 860 (8th Cir. 2017) 6, 16, 20

Carlson v. C.H. Robinson Worldwide, Inc.,
2006 WL 2671105 (D. Minn. Sept. 18, 2006)..........17

Cent. R.R. & Banking Co. v. Pettus,
113 U.S. 116 (1885)..........4

City of Pontiac Gen. Employees' Ret. Sys. v. Wal-Mart Stores, Inc.,
2019 WL 1529517 (W.D. Ark. Apr. 8, 2019)..........17

EEOC v. Faribault Foods, Inc.,
2008 U.S. Dist. LEXIS 29132 (D. Minn. Mar. 28, 2008)..........17

Gunter v. Ridgewood Energy Corp.,
223 F.3d 190 (3d Cir. 2000)..........5

Hensley v. Eckerhart,
461 U.S. 424 (1983)..........6

Hosp. Auth. of Metro. Gov. of Nashville v. Momenta Pharms., Inc.,
2020 WL 3053468 (M.D. Tenn. May 29, 2020)..........17

Huyer v. Buckley,
849 F.3d 395 (8th Cir. 2017) 3, 16, 18

In re Cattle & Beef Antitrust Litig.,
2023 WL 8098644 (D. Minn. Nov. 21, 2023) 18

In re Cendant Corp. Litig.,
264 F.3d 201 (3d Cir. 2001)..........5

Page

In re CenturyLink Sales Pracs. & Sec. Litig.,
2020 WL 7133805 (D. Minn. Dec. 4, 2020)....................7, 13, 19, 20

In re CenturyLink Sales Pracs. & Sec. Litig.,
2021 WL 3080960 (D. Minn. July 21, 2021) 20

In re Genworth Fin. Sec. Litig.,
210 F. Supp. 3d 837 (E.D. Va. 2016) 19

In re Innocoll Holdings Pub. Ltd. Co. Sec. Litig.,
2022 WL 16533571 (E.D. Pa. Oct. 28, 2022)....................8

In re J.P. Morgan Stable Value Fund ERISA Litig.,
2019 WL 4734396 (S.D.N.Y. Sept. 23, 2019)....................17

In re T-Mobile Customer Data Sec. Breach Litig.,
111 F.4th 849 (8th Cir. 2024) 18, 19

In re U.S. Bancorp Litig.,
291 F.3d 1035 (8th Cir. 2002) 3, 16, 17

In re Xcel Energy, Inc., Securities, Derivative & "ERISA" Litig.,
364 F. Supp. 2d 980 (D. Minn. 2005)....................17

Internal Imp. Fund Trs. v. Greenough,
105 U.S. 527 (1881)....................4

J.I. Case Co. v. Borak,
377 U.S. 426 (1964)....................5

Keil v. Lopez,
862 F.3d 685 (8th Cir. 2017) 18

Khoday v. Symantec Corp.,
2016 WL 1637039 (D. Minn. Apr. 5, 2016)....................11, 16

Nelson v. Wal-Mart Stores, Inc.,
2009 WL 2486888 (E.D. Ark. Aug. 12, 2009) 17, 18

Pearlstein v. Blackberry Ltd.,
2022 WL 4554858 (S.D.N.Y. Sept. 29, 2022)....................17

Petrovic v. Amoco Oil Co.,
200 F.3d 1140 (8th Cir. 1999) 5

Page

Phillips v. Caliber Home Loans, Inc.,
2022 WL 832085 (D. Minn. Mar. 21, 2022) 12, 15

Plymouth Cnty. Ret. Sys. v. Patterson Cos., Inc.,
2022 WL 2093054 (D. Minn. June 10, 2022)....................17

Ray v. Lundstrom,
2012 WL 5458425 (D. Neb. Nov. 8, 2012) 4

Silverman v. Motorola Sols., Inc.,
739 F.3d 956 (7th Cir. 2013) 2, 9

Stevens v. SEI Invs. Co.,
2020 WL 996418 (E.D. Pa. Feb. 28, 2020) 18

Yarrington v. Solvay Pharms., Inc.,
697 F. Supp. 2d 1057 (D. Minn. 2010)....................4, 7, 14, 19

STATUTES, RULES, AND REGULATIONS

15 U.S.C.
§77k....................11
§77l(a)(2) 11
§77o....................11
§78n(a) 11
§78t(a) 11
§78u-4(a)(4) 3, 20
§78u-4(a)(6) 4

SECONDARY AUTHORITIES

Laarni T. Bulan and Laura E. Simmons,
Securities Class Action Settlements: 2023 Review and Analysis
(Cornerstone Research 2024)....................9

I. INTRODUCTION

After six years of hard-fought litigation, and with a three-week jury trial fast approaching, Plaintiff's Counsel achieved an $85 million cash settlement for the benefit of a class of former EarthLink investors. Securities settlements paid following a corporate bankruptcy are rare, and a settlement of this magnitude, in any securities case, is unprecedented in this District. The $85 million Settlement is an outstanding result, brought about by Plaintiff's Counsel's determined and diligent litigation efforts, undertaken on a purely contingent basis, with no compensation for the duration of the case.[1]

In awarding fees, courts consider several factors, including the quality and quantity of the work as reflected in the result obtained, relative to the risk counsel faced. Here, Plaintiff's Counsel devoted over 11,000 hours and advanced over $636,000 in expenses on a contingent basis over a span of six years, all without any assurance of a recovery. During that time, Plaintiff's Counsel successfully opposed four motions to dismiss filed by over twenty defendants; fully briefed and argued a motion for class certification; appeared and objected to a proposed release of the class's claims in bankruptcy proceedings; prevailed on two fiercely-contested discovery motions; took or defended multiple depositions; obtained and analyzed nearly 1.5 million pages of documents; and briefed a one-of-its-kind pleadings motion – offensively filed by Lead Plaintiff against Defendants – that highlighted the strengths of this case and applied additional pressure on Defendants. Knotts Decl., ¶¶11-144.

[1] Unless otherwise stated or defined, all capitalized terms used herein have the meanings provided in the Stipulation of Settlement (the "Stipulation"). ECF 182. All citations are omitted and emphasis is added unless otherwise indicated. The Court is respectfully referred to the accompanying Declaration of David A. Knotts in Support of Settlement Motions ("Knotts Decl.") for a more detailed history of the Action and the factors bearing on the reasonableness of these motions.

The success of this recovery is illustrated by its record-breaking status, across multiple metrics. First, this Settlement is the largest securities class action recovery in the Eighth Circuit in over five years. *Id.*, ¶115. Second, it is the largest such recovery ever achieved in this District. *Id.* Third, it is the second largest such recovery ever achieved in any Arkansas federal court. *Id.* Fourth, it is tied for the sixth largest such recovery in Eighth Circuit history. *Id.* Fifth, it is over five times the nationwide median securities settlement amount of $15 million in 2023. *Id.* These achievements highlight the superb nature of this result, relative to the massive risk in litigating such a case.

Plaintiff's Counsel achieved this result in the face of long odds. This case involved no accounting restatement and no pre-lawsuit investigation or finding of wrongdoing by the SEC, DOJ, or any other entity that could have given Plaintiff's Counsel an inside track in litigating these claims. As a result, Plaintiff's Counsel developed the strategy, evidence, and theories of liability from scratch. Throughout this litigation, Defendants described this case as "a meritless securities class action" and a "groundless lawsuit" with "weak" facts that were "grossly insufficient under Eighth Circuit precedent." *See, e.g.*, ECF 26 at 1, 8; ECF 41 at 2; ECF 81 at 22-23. Yet, Lead Plaintiff and Plaintiff's Counsel vigorously litigated this case for six years, conducted extensive discovery, persevered in multiple contested motions, and achieved this groundbreaking Settlement for the benefit of a class of investors.

Success was far from guaranteed, and a favorable outcome was not even remotely foreseeable to other members of the plaintiffs' bar. At this litigation's inauspicious beginning, no other law firm even attempted to obtain a leadership role in this Action. As one court noted in a similar scenario, "[w]hen this suit got under way, no other law firm was willing to serve as lead counsel. Lack of competition not only implies a higher fee but also suggests that most members of the securities bar saw this litigation as too risky for their practices." *Silverman v. Motorola Sols.,*

Inc., 739 F.3d 956, 958 (7th Cir. 2013). The same holds true here. This $85 million asset was created solely through the efforts of Lead Plaintiff and Plaintiff's Counsel.

Plaintiff's Counsel's request for an award of attorneys' fees and litigation expenses is reasonable under Eighth Circuit precedent. As described in detail below, the requested 32% fee falls comfortably within the range of percentage fees affirmed by the Eighth Circuit and awarded by this Court in common fund cases. In the Eighth Circuit, "courts have frequently awarded attorneys' fees ranging up to 36% in class actions." *Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017). The Eighth Circuit itself has approved a 36% fee award from the total common fund in a complex and difficult contingent case like this one. *See In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002). The requested fee here is well below that percentage.

For all the reasons set forth herein and in the accompanying filings, Plaintiff's Counsel respectfully submits that the requested attorneys' fees of 32% of the Settlement Amount and expenses of $636,422.45 (plus accrued interest earned thereon on both amounts, at the same rate as earned by the Settlement Fund) are fair and reasonable, and should be awarded by the Court. Likewise, the award sought by Lead Plaintiff of $20,000, pursuant to 15 U.S.C. §78u-4(a)(4), is reasonable given his substantial efforts on behalf of the Settlement Class.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

To avoid repetition, Plaintiff's Counsel respectfully refers the Court to the accompanying Knotts Declaration, which contains a detailed discussion of the factual background and procedural history of the litigation, the efforts undertaken by Plaintiff's Counsel, the risks involved, and the arm's-length negotiations leading to the Settlement. *See generally* Knotts Decl.

III. THE REQUEST FOR ATTORNEYS' FEES AND EXPENSES SHOULD BE APPROVED

A. The Percentage-of-the-Fund Recovered Is the Preferred Approach for Awarding Attorneys' Fees in Common Fund and Securities Cases

It is well established that an attorney "who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The purpose of this doctrine is to avoid unjust enrichment and to spread litigation costs proportionately among all the beneficiaries. *Id.* This rule, known as the common fund doctrine, is firmly rooted in American case law. *See, e.g.*, *Internal Imp. Fund Trs. v. Greenough*, 105 U.S. 527 (1881); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885).

The Eighth Circuit has also embraced the percentage method of awarding fees in common fund cases and has approved awards of such fees in multiple recent occasions. Indeed, "[i]n the Eighth Circuit, 'use of a percentage method of awarding attorney fees in a common-fund case is not only approved, but also 'well established.'" *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1061 (D. Minn. 2010) (also noting that "[a]warding attorney fees based on the percentage of the common fund recovered is a routine calculation of fees").

As for securities actions more specifically, the Private Securities Litigation Reform Act of 1995 (the "PSLRA") provides that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." 15 U.S.C. §78u-4(a)(6). By enacting this provision, "'Congress plainly contemplated that percentage-of-recovery would be the primary measure of attorneys' fees awards in federal securities class actions.'" *Ray v. Lundstrom*, 2012 WL 5458425, at *3 (D. Neb. Nov. 8, 2012).

4907-4888-9610.v1

The percentage method for awarding fees in a common fund case makes sense. Courts have recognized "the stated goal in percentage fee-award cases of 'ensuring that competent counsel continue to be willing to undertake risky, complex, and novel litigation'" and "the importance of a financial incentive to entice qualified attorneys to devote their time to complex, time-consuming cases in which they risk non-payment." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000). This concept is particularly important in a successful securities case given that "Congress, the Executive Branch, and [the Supreme] Court . . . have 'recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission.'" *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 478 (2013); *see also J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964).

B. The Requested Fee Is Presumptively Reasonable Because the Court-Appointed Lead Plaintiff Has Approved It

Under the PSLRA, "courts should afford a presumption of reasonableness to fee requests submitted pursuant to an agreement between a properly-selected lead plaintiff and properly-selected lead counsel." *In re Cendant Corp. Litig.*, 264 F.3d 201, 220 (3d Cir. 2001). Importantly here, Lead Plaintiff, an individual investor with his own money at stake, has approved the requested fee. *See* Declaration of Robert Murray, ¶13 ("Lead Plaintiff Decl."), submitted herewith.

C. Consideration of Relevant Factors Support the Requested Fee

In examining the factors relevant to a fee award, the key issue is whether the requested fee is reasonable. *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999). The Eighth Circuit has affirmed the following seven factors when considering the reasonableness of a percentage fee award:

> (1) the benefit conferred on the class, (2) the risk to which plaintiffs' counsel was exposed, (3) the difficulty and novelty of the legal and factual issues of the case, (4) the skill of the lawyers, both plaintiffs' and defendants', (5) the time and labor involved, (6) the reaction of the class, and (7) the comparison between the requested attorney fee percentage and percentages awarded in similar cases.

Caligiuri v. Symantec Corp., 855 F.3d 860, 866 (8th Cir. 2017) (affirming fee award of 33.3% of common fund). As discussed in detail below, each of these factors confirms the reasonableness of the requested 32% fee here.

1. The Benefit Conferred on the Settlement Class Supports the Requested Fee

In awarding fees, the "most critical factor is the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). The record-breaking $85 million Settlement in this Action provides an immediate cash recovery to a large class of investors. Among other things, the Settlement:

- constitutes the largest securities class action recovery ever achieved in this District;
- constitutes the second largest such recovery ever achieved in any Arkansas federal court;
- is the largest securities class action recovery in the Eighth Circuit in over five years;
- is tied for the sixth largest such recovery in Eighth Circuit history;
- is over five times the median securities settlement amount of $15 million in 2023; and
- represents a remarkable 22% of the estimated aggregate class-wide damages, an amount many times greater than the 4.6% median percentage recovery for securities cases in the Eighth Circuit from 2014 to 2023.

Knotts Decl., ¶115.

Defendants have already deposited the full $85 million into an escrow account, no portion of which can revert back to Defendants if the Settlement is approved and becomes Effective. *Id.*, ¶92; Stipulation, ¶1.12. In *Caligiuri*, the Eighth Circuit affirmed that this factor weighed in favor of a requested 33.3% fee because "'the $60 million cash settlement provides a substantial and immediate benefit to the class.'" 855 F.3d at 866. Here too, the first factor weighs heavily in favor of approving the requested fee.

2. The Risk to Which Plaintiff's Counsel Was Exposed Supports the Requested Fee

"'The theory behind attorneys' fees awards in class actions is not merely to compensate counsel for their time, but to award counsel for the benefit they brought to the class and take into account the risk undertaken in prosecuting the action.'" *In re CenturyLink Sales Pracs. & Sec. Litig.* ("*CenturyLink I*"), 2020 WL 7133805, at *11 (D. Minn. Dec. 4, 2020). Thus, "'[c]ourts have recognized that the risk of receiving little or no recovery is a major factor in awarding attorney fees.'" *Yarrington*, 697 F. Supp. 2d at 1062.

While securities class action cases have always been difficult to prosecute, the PSLRA has only increased the risk in achieving a successful outcome. "To be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action." *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009). As here, "[a]t each stage of the litigation, [Plaintiff's Counsel] faced considerable obstacles to the advancement of the case, including certification of the [c]lass, which motion was pending at the time [the] Settlement was reached." *Yarrington*, 697 F. Supp. 2d at 1062. Despite these risks, Lead Plaintiff and Plaintiff's Counsel litigated this case on a contingent basis for six years, conducted extensive discovery, persevered in multiple contested motions, and achieved this groundbreaking Settlement for the benefit of the Settlement Class. *See* Knotts Decl., ¶¶11-144.

This result was achieved in the face of elevated risk and long odds. Given the lack of governmental investigation, accounting restatement, or other pre-litigation finding of wrongdoing, there was no preexisting blueprint for litigating the claims – Plaintiff's Counsel built this case from the ground up. As one court observed in a similar scenario:

> Lead counsel did not ride on anyone's coattails in this action. No government or third-party action or investigation preceded the filing of the plaintiffs' claims. Therefore, ***all*** resulting benefits that accrue to the Settlement class members are attributable to the work of lead counsel, strengthening a conclusion that this Court should approve the requested fee award.

In re Innocoll Holdings Pub. Ltd. Co. Sec. Litig., 2022 WL 16533571, at *11 (E.D. Pa. Oct. 28, 2022). The same holds true here. This $85 million asset was created solely through the efforts of Lead Plaintiff and Plaintiff's Counsel.

These claims were challenging. Defendants described Lead Plaintiff's likelihood of success as follows:

- "This is a meritless securities class action . . . ." ECF 26 at 1.
- "Plaintiff does not cite a single case in any jurisdiction where dismissal was denied under facts remotely as weak as those alleged here." ECF 41 at 2.
- "This case has all the telltale signs of a groundless strike suit that should be dismissed on the pleadings." *Id.* at 11.
- "Plaintiff likewise fails to plead anything resembling particularized facts supporting a 'strong inference' that any Defendant had 'actual knowledge' that the forward-looking statements were false (which, again, they were not)." ECF 26 at 23.
- "Plaintiff appears to view this ever-changing suit as a game of whack-a-mole: As Defendants bat down one specious set of claims, Plaintiff resurfaces with a new complaint advancing a completely different theory." ECF 81 at 1.

Plaintiff's Counsel disagreed, persevered, defeated multiple motions to dismiss, and achieved a record-breaking $85 million recovery, larger than any other securities settlement in the Eighth Circuit over the past five years and over five times the nationwide median for securities settlements.

Perhaps because this matter did not provide for a clear pathway to success, other law firms, and other EarthLink stockholders, viewed this case as far too risky to pursue. Lead Plaintiff Robert Murray was a retail investor holding 10,000 EarthLink shares before the Merger. Knotts Decl., ¶4. Countless other investors, including large financial institutions, no doubt held far more shares of EarthLink at the time of the Merger, which would have entitled them to a presumption of leadership in any contested lead plaintiff motion. *Id.* But after Plaintiff's Counsel issued a widely publicized notice under the PSLRA, following the 60-day waiting period, no other law firm and no other stockholder sought a leadership role in this Action. *Id.* Nobody else wanted this case. "Lack of

competition not only implies a higher fee but also suggests that most members of the securities bar saw this litigation as too risky for their practices." *Silverman*, 739 F.3d at 958.[2]

Once on file, this was not a typical securities case in terms of the risk undertaken by Plaintiff's Counsel. It ultimately involved two bankrupt companies, both of which tried to obtain a complete release of the securities claims here through bankruptcy proceedings. Knotts Decl., ¶¶23-27, 29-32. Plaintiff's Counsel hired well-respected bankruptcy counsel, appeared in Windstream's bankruptcy proceeding, prepared and filed multiple substantive briefs in that proceeding, and successfully fought against that release on behalf of Lead Plaintiff and the entire proposed class. *Id.*

Not surprisingly, studies have shown that "[i]ssuers that have been delisted from a major exchange and/or declared bankruptcy prior to settlement are generally associated with lower [securities] settlement amounts." Laarni T. Bulan and Laura E. Simmons, *Securities Class Action Settlements: 2023 Review and Analysis*, at 4 (Cornerstone Research 2024), *see also* Knotts Decl., ¶106. This case broke that mold.

For years, Defendants' counsel exhausted every possible strategy to end the litigation without any recovery for the Settlement Class. But Plaintiff's Counsel still did not rush to settle this case. The first mediation in this Action did not occur until February 2024, six years into the litigation. That first mediation ended without a settlement. Plaintiff's Counsel continued to push forward, take additional depositions, and litigate the case. Unlike defense counsel, who are paid by the hour and regularly reimbursed their expenses along the way, Plaintiff's Counsel has not been compensated for

---

[2] Only after Lead Plaintiff filed an amended complaint with a deeply researched and further detailed theory of the case did other members of the plaintiffs' bar finally react. Two plaintiffs with the same last name later filed copycat derivative cases in this Court ostensibly on behalf of Windstream (which cases were extinguished and dismissed when those plaintiffs lost standing in connection with Windstream's bankruptcy). *See* Knotts Decl., ¶120. Another plaintiff later filed a tagalong §11 case in Georgia state court (which that court stayed long ago, in favor of Lead Plaintiff's more comprehensive claims in this Court). *Id.* None of those cases ever advanced out of the starting gate. *Id.*

any time or expense since this case began. Plaintiff's Counsel knew that if their efforts were not successful, they would not generate a fee and their expenses would not be paid.

Lead Plaintiff and Plaintiff's Counsel built a very strong case, but further litigation would undoubtedly involve risk, especially with respect to falsity, materiality, damages, loss causation, and evidentiary proof. *See* Knotts Decl., ¶¶93-108. As courts in this Circuit have noted in a complex securities case like this one:

> If Plaintiffs were successful in establishing liability, they faced significant risks establishing causation and damages. The parties had retained highly qualified experts whose damages assessments were at considerable variance. Faced with the uncertainty of a jury trial, there existed the real possibility that the amount of damages the Class would actually recover would be zero or only a fraction of the damages Class Representatives contended.

Beaver Cnty. Employees' Ret. Fund v. Tile Shop Holdings, Inc., 2017 WL 2574005, at *3 (D. Minn. June 14, 2017).

Lead Plaintiff continued to face substantial risk at trial. There are countless securities lawsuits under the PSLRA where – because of changes in the law during the pendency of the case, or a decision of a jury following a trial on the merits, or a reversal on appeal – similarly long and hard fought litigation efforts resulted in no fees, and massive expenses, for plaintiffs' counsel to bear. Knotts Decl., ¶¶105, 122-124. These cases include some that were litigated by the undersigned Plaintiff's Counsel. *Id.* On the other hand, this same team of Robbins Geller Rudman & Dowd LLP ("Robbins Geller") attorneys has taken post-merger cases to trial and won. *Id.*, ¶124. The fact that defendants and their counsel know that leading members of the plaintiffs' bar will go to trial in major, high-risk cases like this one helps give rise to such meaningful settlements.

In addition, while any jury trial is always an uncertain endeavor, the almost decade-long lapse of time between the events at issue here (some of which arose in 2013) and the trial date (November 2024) caused potential gaps in the evidentiary record. *See* Knotts Decl., ¶97. Not only did this timing interval cause certain Defendants to express a complete lack of recall regarding the

genesis of the Merger, but it also increased the risk that documents could be deleted or go missing over time. *Id.* In addition, most of the fact witnesses in this case were named Defendants, were employed by a Defendant, or were highly compensated advisors of a Defendant, and would thus likely be hostile to Lead Plaintiff's claims on the witness stand. *Id.*

In the face of those extreme risks, Plaintiff's Counsel still amassed evidence significant enough to compel one of the largest securities settlements in Eighth Circuit history. *Id.*, ¶115. Accordingly, the substantial risk in litigating this case supports the requested fee.

3. The Difficult and Novel Legal and Factual Issues in the Action Support the Requested Fee

"'While all cases carry the potential for uncertain verdicts, securities cases in particular are complex and difficult to prove.'" *Tile Shop Holdings*, 2017 WL 2574005, at *3. The difficulty and novelty of the issues involved in a case are significant factors to be considered in assessing a fee award. *See, e.g.*, *Khoday v. Symantec Corp.*, 2016 WL 1637039, at *10 (D. Minn. Apr. 5, 2016) ("[t]his factor weighs in favor of the fees requested by counsel" where "there is every indication that the legal and factual issues are complex").

From the outset, the Action involved highly complex legal and factual issues. Lead Plaintiff alleged that Defendants – EarthLink, EarthLink's former Board of Directors, Windstream, the Windstream Board of Directors, and certain Windstream officers – violated federal securities laws by distributing misleading proxy and registration statements to effectuate the Merger (the "Offering Documents"). Knotts Decl., ¶15. Lead Plaintiff alleged violations of §§11, 12(a)(2) and 15 of the Securities Act of 1933 (the "1933 Act"), §§14(a) and 20(a) of the Securities Exchange Act of 1934 (the "1934 Act") and U.S. Securities and Exchange Commission ("SEC") Rule 14a-9 promulgated thereunder. ECF 74. As a result of the alleged misrepresentations and omissions in the Offering Documents, former EarthLink stockholders voted in favor of the Merger, thus permitting the Merger

to close. *Id.* Lead Plaintiff alleged that proposed class members were harmed when Windstream's stock price deteriorated after the close of the Merger. ECF 18 at 2-3.

While discovery was ongoing, Plaintiff's Counsel developed a unique strategy designed to resolve crucial issues in Lead Plaintiff's favor before trial. Knotts Decl., ¶¶84-88. Plaintiff's Counsel conceived of a plan to file a partial motion for judgment on the pleadings as to certain key issues, utilizing the doctrines of both collateral and judicial estoppel. *Id.* This unique strategy required extensive research. Plaintiff's Counsel identified no similar motions for partial judgment on the pleadings ever filed by a plaintiff in any securities case. After an in-depth analysis of the issues, Lead Plaintiff filed the Motion for Partial Judgment on the Pleadings on February 23, 2024. ECF 159-161.

With the hearing date on that motion looming just days away, the parties reached the Settlement now before the Court. Knotts Decl., ¶¶84-88. There can be no doubt that this unique and strategic motion applied immense pressure on Defendants by illuminating a risk that crucial issues of liability could be resolved against them before trial. *Id.* And even if the initial motion itself were not successful, it could set the stage for a subsequent motion for summary judgment briefing and streamlining of the issues at trial. *Id.*

Considering the extreme complexity and duration of this case, this factor also favors approval of the requested attorneys' fees.

4. The Skill and Efficiency of Counsel Supports the Requested Fee

Plaintiff's Counsel prosecuted this case with skill and efficiency. *See, e.g.*, *Phillips v. Caliber Home Loans, Inc.*, 2022 WL 832085, at *6 (D. Minn. Mar. 21, 2022) ("the record reflects that Plaintiffs' counsel are experienced and sophisticated, with years of experience in complex class-action litigation" and awarding 33.3% fee on common fund). Plaintiff's Counsel was led by Robbins Geller, a preeminent class action securities litigation firm, with decades of experience in prosecuting

and trying complex class actions. *See* accompanying Declaration of David A. Knotts Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses, Ex. F. Plaintiff's Counsel achieved a highly favorable result for the Settlement Class, due in large part to their experience and expertise in litigating complex class actions. *See CenturyLink I*, 2020 WL 7133805, at *12 ("Plaintiffs' Counsel has significant complex and class action litigation experience. They expended extensive time and money pursuing discovery and briefing several dispositive and non-dispositive motions. Despite significant pending motions, they managed to negotiate substantial classwide relief.").

From the Action's inception, Defendants steadfastly maintained that they did nothing wrong, and that they properly relied on counsel and financial advisors throughout. Knotts Decl., ¶¶20, 37. Although Defendants' motions to dismiss were denied, difficult issues of proof remained as to key elements of Lead Plaintiff's claims, including materiality, falsity, loss causation, and damages. *Id.*, ¶¶93-108. The discovery process would prove crucial to building this case.

Gathering the evidence proving these claims was not easy, but Plaintiff's Counsel developed and executed a discovery plan that provided immense returns for the Settlement Class. *See* Knotts Decl., ¶¶41-74. The expansive scope and complexity of the underlying facts in this case made it particularly challenging to craft a targeted discovery plan. *Id.* The Action involved three extraordinarily complex multi-billion-dollar corporate transactions spanning time periods from 2013 through 2020. *Id.* The challenge for Plaintiff's Counsel was to develop a discovery plan that would obtain the previously hidden corporate evidence regarding all three transactions, but in a targeted manner that would not be swamped with well-founded burden and overbreadth objections from Defendants and the relevant third parties. *Id.*

Plaintiff's Counsel developed a strategic, multi-phased document discovery plan to account for the complexities of these transactions and the lengthy time period involved. *Id.* As the Knotts Decl. describes in more detail:

- In Phase I, Plaintiff's Counsel worked to obtain and review the documents and transcripts that Defendants and several third parties had already produced in three complex lawsuits involving Windstream and the Uniti Arrangement. *Id.*

- In Phase II, Plaintiff's Counsel sought "core documents" regarding the Merger from both companies, including board minutes, board presentations, and due diligence summaries. *Id.* Obtaining these documents required Plaintiff's Counsel to successfully move to compel their production. *Id.*

- In Phase III, Plaintiff's Counsel obtained Merger-related emails, using search terms crafted from those core documents. *Id.* Lead Plaintiff's motion to compel also forced the production of the Merger-related emails. *Id.*

- In Phase IV, Plaintiff's Counsel sought to identify and remediate Defendants' document retention issues. *Id.* Lead Plaintiff obtained necessary information on this issue after successfully opposing Defendants' motion for a protective order. *Id.*

- Phase V involved extensive third party discovery, including Plaintiff's Counsel obtaining hundreds of thousands of documents produced by a combined nine third parties. *Id.*

Most of these complex and time-consuming phases occurred simultaneously given Plaintiff's Counsel's push to keep this case on schedule. *Id.*

The quality and vigor of opposing counsel is also relevant in evaluating the quality of the services rendered by Plaintiff's Counsel. *Yarrington*, 697 F. Supp. 2d at 1063. Here, Defendants were represented by attorneys from Skadden, Arps, Slate, Meagher & Flom LLP and Norton Rose Fullbright US LLP, prominent and experienced corporate defense firms. These firms spared no effort or expense on behalf of Defendants in their zealous defense. Lead Plaintiff also obtained documents from third parties over the strenuous objections of an armada of many of the largest defense firms in the world, including Foros Securities (represented by Alston & Bird LLP), Goldman Sachs (represented by Ropes & Gray LLP), JP Morgan (represented by Jones Day), Kroll

(represented by Faeger Drinker Biddle & Reath LLP), Uniti Group (represented by Davis Polk & Wardwell LLP), and Aurelius (represented by Friedman Kaplan Seiler Adelman & Robbins LLP).

5. The Time and Labor Involved Support the Requested Fee

Plaintiff's Counsel devoted over 11,000 hours and advanced over $636,000 in litigation expenses on a contingent basis over a span of six years, all without any assurance of recovery. Knotts Decl., ¶¶113, 126-131, 138-144. "Plaintiffs' counsel worked on a fully contingent basis and undertook substantial efforts, including factual and legal research, drafting pleadings and other filings, engaging in discovery and reviewing voluminous documents, preparing for and participating in mediation, and successfully negotiating the Settlement Agreement." *Phillips*, 2022 WL 832085, at *6.

Before even filing the case, Plaintiff's Counsel engaged in a detailed review and analysis to draft a strong pleading with multiple viable theories for relief. Knotts Decl., ¶¶12-14. Plaintiff's Counsel reviewed and analyzed information about Windstream's business fundamentals and public representations, then conducted a detailed comparison of that information with the disclosures in the Merger-related Offering Documents. *Id.* All of this hard work uncovered claims missed by all other law firms and investors in EarthLink and Windstream. *Id.*

Following the initial complaint, over the ensuing six years, Plaintiff's Counsel successfully opposed four motions to dismiss; fully briefed and argued a motion for class certification; appeared and objected to a proposed release in bankruptcy proceedings; prevailed on two fiercely-contested discovery motions; took or defended multiple depositions; obtained nearly 1.5 million pages of documents; and fully briefed a unique, offensive pleadings motion that highlighted the strengths of this case and applied additional pressure on Defendants. Knotts Decl., ¶¶11-144. Plaintiff's Counsel retained, consulted with, and paid for multiple accounting, corporate finance, and valuation experts.

Id., ¶¶82-83. The time and labor expended by Plaintiff's Counsel in navigating the complex legal and factual issues implicated in this Action also weigh heavily in favor of the requested fee.

6. Reaction of Settlement Class Members Supports the Requested Fee

The reaction of the Settlement Class to date also supports the requested fee. *See Khoday*, 2016 WL 1637039, at *11 ("This Court concludes that the settlement class supports Plaintiffs' counsel's request for attorney[s'] fees of 33-1/3 percent of the settlement fund."). Over 93,500 copies of the Notice of this Settlement, including the 32% fee request, have been provided to potential Settlement Class Members and nominees. *See* Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Ross D. Murray Decl."), ¶10, submitted herewith. To date, ***no*** objections to the fee request have been received. Thus, the reaction of the Settlement Class weighs in favor of approval of the requested fee as well.

7. A Comparison Between the Requested Fee Percentage and Percentages Awarded in Similar Cases Supports the Requested Fee

In a case involving the success, risk, and hard work as here, the proposed attorneys' fee of 32% is well-supported in the Eighth Circuit. The Eighth Circuit has observed that "courts have frequently awarded attorneys' fees ranging up to 36% in class actions." *Huyer*, 849 F.3d at 399. In *Huyer*, the Eighth Circuit found that a 33.3% fee was "in line with other awards in the Eighth Circuit." *Id.* The Eighth Circuit also noted, in response to an objector's argument that the fee actually represented 38% of the common fund under an alternative calculation, "[a]lthough 38% is on the high end of the typical range, we cannot say that it is unreasonable when compared to other awards within this circuit." *Id.* In addition to *Huyer*, the Eighth Circuit has approved percentage fee awards above 32% in other cases as well. *See, e.g.*, *Caligiuri*, 855 F.3d at 866 (affirming 33.3% fee award for a $60 million common fund); *U.S. Bancorp Litig.*, 291 F.3d at 1038 (affirming 36% fee award for a $3.5 million common fund).

The following quote and series of citations from this Court when approving a 33.3% contingency fee further supports a 32% request here:

> The amount of attorneys' fees awarded [33.3%] and expenses reimbursed from the Settlement Proceeds are consistent with the awards in similar cases. *See Koenig v. U.S. Bank N.A. (In re U.S. Bancorp Litig.)*, 291 F.3d 1035, 1038 (8th Cir. 2002) (approving award to class counsel of 36 percent of settlement fund); *Carlson v. C.H. Robinson Worldwide, Inc.*, 2006 WL 2671105 (D. Minn. Sept. 18, 2006) (35.5% fee award); *EEOC v. Faribault Foods, Inc.*, 2008 U.S. Dist. LEXIS 29132, at *13-*14 (D. Minn. Mar. 28, 2008) (36% in fees and expenses); *In re Xcel Energy, Inc., Securities, Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 998 (D. Minn. 2005) (surveying eleven cases in the courts in the Eighth Circuit including one fee award of 36%, seven of 33.3%, two of 30%, and one of 25%).

Nelson v. Wal-Mart Stores, Inc., 2009 WL 2486888, at *2 (E.D. Ark. Aug. 12, 2009).

Courts nationwide (including in the Eighth Circuit and in securities cases) have recently found as reasonable similar percentages on similarly-sized or larger settlements:

- *Plymouth Cnty. Ret. Sys. v. Patterson Cos., Inc.*, 2022 WL 2093054, at *1 (D. Minn. June 10, 2022) (awarding 33.3% fee on $63 million securities settlement);
- *City of Pontiac Gen. Employees' Ret. Sys. v. Wal-Mart Stores, Inc.*, 2019 WL 1529517, at *1 (W.D. Ark. Apr. 8, 2019) (awarding 30% fee on $160 million securities settlement);
- *Pearlstein v. Blackberry Ltd.*, 2022 WL 4554858, at *10 (S.D.N.Y. Sept. 29, 2022) (awarding 33.3% fee on $165 million securities settlement);
- *Hosp. Auth. of Metro. Gov. of Nashville v. Momenta Pharms., Inc.*, 2020 WL 3053468, at *1 (M.D. Tenn. May 29, 2020) (awarding 33.3% fee on $120 million settlement); and
- *In re J.P. Morgan Stable Value Fund ERISA Litig.*, 2019 WL 4734396, at *6 (S.D.N.Y. Sept. 23, 2019) (awarding 33.3% fee on $75 million settlement).

"Although not required, courts may apply a lodestar 'cross-check' on the reasonableness of the fee calculated as a percentage of the fund." *In re Cattle & Beef Antitrust Litig.*, 2023 WL 8098644, at *4 (D. Minn. Nov. 21, 2023) (citing *Keil v. Lopez*, 862 F.3d 685, 701 (8th Cir. 2017)). The Eighth Circuit has noted that "the range of multipliers awarded in this and other circuits" includes "multipliers of up to 5.6" and cited with approval a "multiplier of 3.5 [that was] appropriate in [a] class action that was litigated for seven years." *Huyer*, 849 F.3d at 400; *see also Nelson*, 2009 WL 2486888, at *2 (this Court citing approved lodestar multipliers of 2.0, 3.9, 4.7, and 5.6). Lodestar multipliers are appropriate in this scenario because they "compensate counsel for the risk of assuming the representation on a contingency fee basis." *Stevens v. SEI Invs. Co.*, 2020 WL 996418, at *13 (E.D. Pa. Feb. 28, 2020).

Here, a lodestar cross-check further demonstrates the reasonableness of the requested fee percentage. Plaintiff's Counsel spent 11,132.66 hours of attorney and professional time prosecuting the Action through September 6, 2024 (the date Lead Plaintiff obtained the last signature on the Stipulation of Settlement and filed the preliminary approval papers). Plaintiff's Counsel's lodestar, derived by multiplying the hours spent on the litigation by each attorney or other professional by his or her current hourly rate, is $7,570,234.60. Thus, the requested fee of 32% of the Settlement Fund, or $27.2 million, represents a reasonable multiplier of 3.59 on Plaintiff's Counsel's lodestar. In sum, the lodestar cross-check further supports the requested fee.

By way of comparison, in *In re T-Mobile Customer Data Sec. Breach Litig.*, 111 F.4th 849 (8th Cir. 2024), the Eighth Circuit recently reversed a fee award because counsel's lodestar multiplier was 9.6x (including projected future hours). The Court noted that counsel in that case had "worked on the case for just a matter of months, conducted relatively little discovery, and engaged in no substantial motions practice . . . the case had barely gotten off the ground before it settled." *Id.* at 861. That is certainly not the situation here. As described above, Plaintiff's Counsel spent

thousands of hours litigating this exceedingly difficult and unique case for over six years. And, unlike *T-Mobile*, Plaintiff's Counsel included no "projected future hours" in the lodestar calculations here. *Id.* The 11,132.66 hours submitted here are all documented, reviewed, and constitute actual time necessary to litigate the Action.

In sum, because the requested fee is reasonable in relation to fees typically awarded in similar cases, this factor favors approval of the requested fee award.

D. Reasonably Incurred Litigation Expenses Should Be Awarded

Plaintiff's Counsel also request payment of the litigation expenses that they incurred to successfully prosecute and resolve this Action, plus interest on such amounts at the same rate as earned by the Settlement Fund. "The requested costs must be relevant to the litigation and reasonable in amount." *Yarrington*, 697 F. Supp. 2d at 1067. The Notice informed potential Settlement Class Members that Lead Counsel would apply for payment of litigation expenses in an amount not to exceed $950,000. *See* Ross D. Murray Decl., Ex. A (Notice at 2). Plaintiff's Counsel is seeking an amount far lower than that, here $636,422.45, as payment for expenses in connection with the Action. To date, no Settlement Class Member has objected to this amount.

Here, "because counsel had no guarantee that these expenses would ever be reimbursed, [Plaintiff's] Counsel had the incentive to keep the amounts reasonable." *CenturyLink I*, 2020 WL 7133805, at *13. The majority of the expenses ($449,678.50) consisted of the fees paid to multiple experts retained by Lead Plaintiff, which were essential to litigate a case of this complexity through fact discovery and would have been crucial at trial. Knotts Decl., ¶¶82, 142. *See In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d 837, 845-46 (E.D. Va. 2016) ("Notably, over three million dollars, or 82% of the total requested costs, stem from payments to experts retained by counsel. . . . These costs are eminently reasonable in light of the complexity of this case.").

All of Plaintiff's Counsel's remaining expenses also include the typical categories, such as travel for hearings and depositions, document hosting and production, research costs, mediation fees, filing fees, copying, and delivery. Knotts Decl., ¶¶143-144. Such expenses are reasonable in amount and were necessary for the successful prosecution of the Action. *See CenturyLink I*, 2020 WL 7133805, at *13 ("'It is well established that counsel who create a common fund like the one at issue are entitled to the reimbursement of litigation costs and expenses, which include such things as expert witness costs, mediation costs, computerized research, court reports, travel expenses, and copy, telephone, and facsimile expenses.'").

E. Lead Plaintiff Is Entitled to an Award Pursuant to 15 U.S.C. §78u-4(a)(4)

The PSLRA specifically allows for "the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class." 15 U.S.C. §78u-4(a)(4). Lead Plaintiff seeks an award of $20,000 for such work, including: (a) responding to discovery requests and collecting documents for production; (b) preparing for and sitting for a lengthy deposition; (c) consulting with counsel regarding the litigation; (d) reviewing pleadings, motions, and briefs; (e) reviewing correspondence and status reports from counsel; and (f) providing frequent input on settlement negotiations. *See* Lead Plaintiff Decl., ¶¶6-12.

These are precisely the types of activities that courts have found to support awards to representative plaintiffs in PSLRA cases. *See, e.g.*, *In re CenturyLink Sales Pracs. & Sec. Litig.*, 2021 WL 3080960, at *11-*12 (D. Minn. July 21, 2021) (awarding $40,000 to institutional lead plaintiff and $21,000 to individual lead plaintiff for having "communicated with Lead Counsel regarding case strategy and developments, reviewed pleadings and briefs filed in the Action, responded to discovery requests, consulted with Lead Counsel regarding settlement negotiations, and evaluated and approved the proposed Settlement"). As the Eighth Circuit has noted, "courts in this circuit regularly grant service awards of $10,000 or greater." *Caligiuri*, 855 F.3d at 867. The award

sought by Lead Plaintiff here is reasonable and fully justified under the PSLRA based on his extensive involvement throughout the Action and the amount of time he devoted for the benefit of the Settlement Class.

IV. CONCLUSION

The $85 million Settlement is an outstanding culmination of the Action. The rarity of a Settlement of this magnitude in a securities case in the Eighth Circuit underscores the success of this result, as well as its inherent risk had the litigation proceeded further. For all of the reasons stated herein and in the accompanying declarations, Plaintiff's Counsel respectfully requests that the Court grant the requested fees, expenses, and Lead Plaintiff award in connection with this groundbreaking recovery for the Settlement Class.

DATED: January 2, 2025

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
RANDALL J. BARON (admitted *pro hac vice*)
A. RICK ATWOOD, JR. (admitted *pro hac vice*)
DAVID A. KNOTTS (admitted *pro hac vice*)
LION WINTEMUTE (admitted *pro hac vice*)
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)
randyb@rgrdlaw.com
ricka@rgrdlaw.com
dknotts@rgrdlaw.com
lwintemute@rgrdlaw.com

ROBBINS GELLER RUDMAN
& DOWD LLP
NOAM MANDEL (admitted *pro hac vice*)
DESIREE CUMMINGS (admitted *pro hac vice*)
JONATHAN ZWEIG (admitted *pro hac vice*)
420 Lexington Avenue, Suite 1832
New York, NY 10170
Telephone: 212/432-5100
NoamM@rgrdlaw.com
DCummings@rgrdlaw.com
JZweig@rgrdlaw.com

Lead Counsel for Plaintiff

RANDALL K. PULLIAM
Bar No. ABN 98105
HANK BATES
Bar No. ABN 98063
CARNEY BATES & PULLIAM, PLLC
519 W. 7th Street
Little Rock AR 72201
Telephone: 501-312-8500
501/312-8505 (fax)
E-mail: rpulliam@cbplaw.com
E-mail: hbates@cbplaw.com

Local Counsel

JOHNSON FISTEL, LLP
BRETT M. MIDDLETON
501 West Broadway, Suite 800
San Diego, CA 92101
Telephone: 619/230-0063
brettm@johnsonfistel.com

Additional Counsel for Plaintiff