UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re BARRICK GOLD SECURITIES LITIGATION	Civil Action No. 1:13-cv-03851-SAS
	CLASS ACTION
This Document Relates To:	ECF Case
ALL ACTIONS.	

LEAD PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

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I. INTRODUCTION

Lead Plaintiffs' Counsel have recovered $140 million for the Class – an outstanding result, achieved in spite of serious obstacles to recovery in the Litigation.[1] To obtain this substantial settlement, Lead Plaintiffs and Lead Plaintiffs' Counsel overcame a number of significant challenges that existed from the filing of the initial complaint. In recognition of this work, Lead Counsel, on behalf of all Lead Plaintiffs' Counsel, now respectfully moves this Court for an award of attorneys' fees in the amount of 25% of the Settlement, and $981,296.48 in expenses that were reasonably and necessarily incurred in prosecuting and resolving the Litigation against Defendants and obtaining this Settlement for the benefit of the Class. As set forth below, the relevant factors articulated in the Second Circuit's *Goldberger* decision strongly support the requested award. *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000).

Importantly, this fee request has the full support of each of the Class Representatives.[2] *See* Exs. 2 & 3. The Second Circuit has directed district courts to:

> give serious consideration to negotiated fees because PSLRA lead plaintiffs often have a significant financial stake in the settlement, providing a powerful incentive to ensure that any fees resulting from that settlement are reasonable. In many

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[1] Capitalized terms used herein are defined and have the meanings contained in the Amended Stipulation of Settlement (ECF No. 167-1).

[2] All exhibits referenced herein are annexed to the accompanying Declaration of James M. Hughes in Support of Lead Plaintiffs' Motion for Final Approval of Settlement and Plan of Allocation and Lead Counsel's Motion for Award of Attorneys' Fees and Payment of Litigation Expenses (the "Hughes Declaration"). For the sake of brevity, the Court is respectfully referred to the Hughes Declaration. For clarity, citations to exhibits that themselves have attached exhibits will be referenced as "Ex. __-__." The first numerical reference is to the designation of the entire exhibit attached to the Hughes Declaration, and the second alphabetical reference is to the exhibit designation within the exhibit itself.

> cases, the agreed-upon fee will offer the best indication of a market rate, thus providing a good starting position for a district court's fee analysis.

In re Nortel Networks Corp. Sec. Litig., 539 F.3d 129, 133-34 (2d Cir. 2008). Notably, following an extensive Court-ordered notice program, only two purported Class Members, each of whom also seek exclusion, have objected to the maximum amount of fees and expenses set forth in the Notice.[3]

As detailed here, in the Hughes Declaration and in the Memorandum of Law in Support of Motion for Final Approval of Settlement and Plan of Allocation ("Settlement Memorandum"), filed herewith, the Settlement achieved here represents an excellent result for Lead Plaintiffs and the Class, particularly when judged in the context of the significant litigation risks attendant in this litigation. The $140 million that Lead Plaintiffs' Counsel obtained provides the Class with a guaranteed and certain recovery in a case that faced substantial obstacles to establishing liability, loss causation, and damages that could have prevented any recovery at all. In achieving this result, Lead Plaintiffs' Counsel collectively worked more than 40,000 hours over the course of three-and-a-half years on this complex litigation, all on a contingency basis, with no guarantee of ever being paid.

Lead Counsel believe that an attorneys' fee award of 25%, together with payment of litigation expenses, properly reflects the many significant risks undertaken, as well as the excellent results achieved in a hard fought and difficult litigation. When examined under either of this Circuit's methods of contingency fee determination (i.e., percentage of the fund or

[3] Pursuant to the Court's Preliminary Approval Order, copies of the Summary Notice were mailed to more than one million potential members of the Class and nominees, advising them that Class Counsel intended to apply to the Court for an award of attorneys' fees not to exceed 25% of the total recovery, plus expenses of no greater than $1,200,000, plus interest on both amounts. If any additional objections are received from Class Members, Lead Counsel will address them in a reply brief, which will be filed with the Court no later than September 30, 2016.

lodestar), Lead Counsel submit that their requested fee award is well within the range of attorneys' fees awarded in similar complex, contingency cases. In addition, the costs and expenses requested by Lead Counsel, including the fees and expenses of the Claims Administrator, Garden City Group, LLC, are reasonable and were necessarily incurred. Accordingly, Lead Counsel request that the Court grant the full amount of costs and expenses requested.

II. HISTORY AND BACKGROUND OF THE ACTION

This securities fraud class action was brought under the Securities Exchange Act of 1934 (the "Exchange Act"). Lead Plaintiffs alleged that Defendants violated the Exchange Act by, *inter alia,* making materially false and misleading statements during the May 7, 2009 through November 1, 2013 Class Period concerning Barrick's proposed flagship new mine – Pascua Lama – that was to be built in the Andes Mountains, on the border between Argentina and Chile.

A detailed description of Lead Plaintiffs' Counsel's prosecution of this case (including key pleadings, discovery efforts, use of experts, dispositive motions and mediation efforts) is set forth in the accompanying Hughes Declaration.

III. ARGUMENT

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

The Supreme Court has long recognized that "a litigant or 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." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Goldberger*, 209 F.3d at 47; *Savoie v. Merchs. Bank*, 166 F.3d 456, 459-60 (2d Cir. 1999). "The court's authority to reimburse the representative parties . . . stems from the fact that the class-action device is a creature of equity and the allowance of attorney-related costs is

considered part of the historic equity power of the federal courts." 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* §1803, at 325 (3d ed. 2005). The purpose of the common fund doctrine is to fairly and adequately compensate class counsel for services rendered and to ensure that all class members contribute equally towards the costs associated with litigation pursued on their behalf. *See Goldberger*, 209 F.3d at 47; *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695(CM), 2007 WL 4115808, at *2 (S.D.N.Y. Nov. 7, 2007).

"Courts have recognized that, in addition to providing just compensation, awards of fair attorneys' fees from a common fund should also 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." *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132(CM)(GWG), 2014 WL 1883494, at *11 (S.D.N.Y. May 9, 2014); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 585 (S.D.N.Y. 2008); *Veeco Instruments*, 2007 WL 4115808, at *2. Indeed, the Supreme Court has emphasized that private securities actions, such as the instant action, "provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)); *accord Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 318-19 (2007).

Fairly compensating Lead Plaintiffs' Counsel for the risks they took in bringing this action is essential because "[s]uch actions could not be sustained if plaintiffs' counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class." *Hicks v. Morgan Stanley*, No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005).

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

Courts regularly find that the percentage-of-the-fund method, under which counsel is awarded a percentage of the fund that they created, is the preferred means to determine a fee because it "'directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.'" *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005); *see also Hayes v. Harmony Gold Mining Co.*, 509 F. App'x 21, 24 (2d Cir. 2013) ("[A]s the district court recognized, the prospect of a percentage fee award from a common settlement fund, as here, aligns the interests of class counsel with those of the class."). The percentage approach also recognizes that the quality of counsel's services is measured best by the results achieved and is most consistent with the system typically used in the marketplace to compensate attorneys in non-class contingency cases.[4]

The Supreme Court also has indicated that attorneys' fees in common-fund cases generally should be based on a percentage of the fund. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("[U]nder the 'common fund doctrine,' . . . a reasonable fee is based on a percentage of the fund bestowed on the class."). The Second Circuit has expressly approved the percentage method, recognizing that "the lodestar method proved vexing" and had resulted in "an inevitable

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[4] *See, e.g.*, *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014) ("The percentage method better aligns the incentives of plaintiffs' counsel with those of the class members because it bases the attorneys' fees on the results they achieve for their clients, rather than on the number of motions they file, documents they review, or hours they work. The percentage method also accords with the overwhelming prevalence of contingency fees in the market for plaintiffs' counsel." (citation omitted)); *Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172, 184 (W.D.N.Y. 2011) ("[The] advantages of the percentage method . . . are that it provides an incentive to attorneys to resolve the case efficiently and to create the largest common fund out of which payments to the class can be made, and that it is consistent with the system typically used by individual clients to compensate their attorneys.").

waste of judicial resources." *See Goldberger*, 209 F.3d at 48-49 (holding percentage-of-the-fund method may be used to determine appropriate attorneys' fees, although lodestar method also may be used); *Savoie*, 166 F.3d at 460 ("The percentage-of-the-fund method has been deemed a solution to certain problems that may arise when the lodestar method is used in common fund cases."). More recently, the Second Circuit has acknowledged that the "trend in this Circuit is toward the percentage method." *Wal-Mart*, 396 F.3d at 121.[5]

Given the language of the PSLRA, the Supreme Court's indication that the percentage method is proper in this type of case, the Second Circuit's explicit approval of the percentage method in *Goldberger*, and the trend among the district courts in this Circuit, the Court should award Lead Counsel attorneys' fees based on a percentage of the fund created.

C. The Requested Attorneys' Fees Are Reasonable In Light Of Awards In Comparable Cases And Were Approved By Lead Plaintiffs

The Supreme Court has recognized that an appropriate Court-awarded fee is intended to approximate what counsel would receive if they were bargaining for the services in the marketplace. *See Missouri v. Jenkins*, 491 U.S. 274, 285-86 (1989). If this were a non-class action, the customary fee arrangement would be contingent and in the range of 33% of the recovery. *See Blum*, 465 U.S. at 903 n.* ("In tort suits, an attorney might receive one-third of

[5] The determination of attorneys' fees using the percentage-of-the-fund method is also supported by the PSLRA, which states 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" recovered for the class. 15 U.S.C. § 77z-1(a)(6) (emphasis added); 15 U.S.C. § 78u-4(a)(6) (same). Courts have concluded that, by drafting the PSLRA in such a manner, Congress expressed a preference for the percentage, as opposed to the lodestar, method of determining attorneys' fees in securities class actions. *See Veeco*, 2007 WL 4115808, at *3; *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002); *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 430 (S.D.N.Y. 2001); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 465-66 (S.D.N.Y. 2004).

whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.") (Brennan, J., concurring).

The requested 25% fee is well within the range of percentage fees awarded within the Second Circuit in other comparable securities and antitrust cases. Moreover, the fee request is slightly below that which would be awarded under the sliding scale proposed by Judge Gleeson in *Payment Card Interchange Fee*, a $5.7 billion settlement, which is outlined below:

Bracket	Fee percentage	Marginal fee
0–$10 million	33%	$3.3 million
$10 million-$50 million	30%	$12 million
$50 million-$100 million	25%	$12.5 million
$100 million-$500 million	20%	$80 million
$500 million-$1 billion	15%	$75 million
$1 billion-$2 billion	10%	$100 million
$2 billion-$4 billion	8%	$160 million
$4 billion-$5.7 billion	6%	$102 million
TOTALS	(average) 9.56%	$544.8 million

See 991 F. Supp. 2d at 445.

Under such a graduated scale, the effective percentage award here would be 25.57%, as follows:

Bracket	Fee percentage	Marginal fee
0-$10 million	33%	$3.3 million
$10 million-$50 million	30%	$12 million
$50 million-$100 million	25%	$12.5 million
$100 million-$140 million	20%	$8 million
TOTALS	(average) 25.57%	$35.8 million

Indeed, attorneys' fee awards of 25% or more in settlements of this magnitude are regularly awarded in New York District Courts, as demonstrated below:

Case/Fee Order	Percentage of the Fund	Settlement Amount
Landmen Partners, Inc. v. Blackstone Group L.P., No. 08-cv-03601-HB-FM, slip op. (S.D.N.Y. Dec. 18, 2013) (ECF No. 191) (Baer, J.)	33.33%	$85 million
In re CIT Group Inc. Securities Litigation, No. 1:08-cv-06613-BSJ-THK, slip op. (S.D.N.Y. June 13, 2012) (ECF No. 184) (Jones, J.)	26.5%	$75 million
In re Comverse Technology, Inc. Securities Litigation, No. 06-CV-1825 (NGG)(RER), 2010 WL 2653354, at *6 (E.D.N.Y. June 24, 2010) (Garaufis, J.)	25%	$225 million
In re Initial Public Offering Securities Litigation, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (Scheindlin, J.)	33-1/3%	$586 million
In re Deutsche Telekom AG Securities Litigation, No. 00-CV-9475 (NRB), 2005 U.S. Dist. LEXIS 45798, at *12-13 (S.D.N.Y. June 14, 2005) (Buchwald, J.)	28%	$120 million
In re Buspirone Antitrust Litigation, MDL No. 1413 (JGK), 2003 U.S. Dist. LEXIS 26538, at *11 (S.D.N.Y. Apr. 17, 2003) (Koeltl, J.)	33-1/3%	$220 million
N.J. Carpenters Health Fund v. Residential Capital, LLC, No. 08-cv-8781 (KPF), slip op. (S.D.N.Y. July 31, 2015) (ECF No. 353) (Failla, J.)	20.75%	$335 million
Board of Trustees of AFTRA Retirement Fund v. JPMorgan Chase Bank, Inc., No. 09 Civ. 686 (SAS), 2012 WL 2064970, at *1-2 (S.D.N.Y. June 7, 2012) (Scheindlin, J.)	25%	$110 million
In re Bank of New York Mellon Corp. Forex Transactions Litig., 12 MD 2335 (LAK), slip op. at 2 (S.D.N.Y. Dec. 4. 2015) (Kaplan, J.)	25%	$180 million

Another factor favoring the reasonableness of Lead Counsel's 25% fee application under the percentage of the fund method is that this fee was negotiated with and approved by the Lead

Plaintiffs, institutional investors charged by the Court and the PSLRA with responsibility for monitoring Lead Plaintiffs' Counsel. *See* Exs. 2 & 3.

The PSLRA was intended to encourage sophisticated and financially interested investors like Lead Plaintiffs to assume control of securities class actions. H.R. Conf. Rep. No. 104-369, at *32 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 731. Congress believed that these institutions would be in the best position to monitor the prosecution of litigation, to assess the quality of counsel's representation, and to determine a fair fee. Here, Lead Plaintiffs, each a large institution, played an active role in the litigation and closely supervised the work of Lead Plaintiffs' Counsel. *See* Ex. 2 ¶¶ 2, 4; Ex. 3 ¶¶ 2, 4. Accordingly, Lead Plaintiffs' endorsement of the fee request supports its approval. *See, e.g.*, *Veeco*, 2007 WL 4115808, at *8 ("[P]ublic policy considerations support the award in this case because the Lead Plaintiff . . . – a large public pension fund – conscientiously supervised the work of lead counsel and has approved the fee request.").

D. The Lodestar Cross-Check Supports The Reasonableness Of The Fee

"Under the lodestar method, the court must engage in a two-step analysis: first, to determine the lodestar, the court multiplies the number of hours each attorney spent on the case by each attorney's reasonable hourly rate; and second, the court adjusts that lodestar figure (by applying a multiplier) to reflect such factors as the risk and contingent nature of the litigation, the result obtained, and the quality of the attorney's work." *Aeropostale*, 2014 WL 1883494, at *13. Performing the lodestar calculation here confirms that the fee requested by Lead Counsel is reasonable and should be approved.

Lead Plaintiffs' Counsel and their paraprofessionals have spent, in the aggregate, 41,891.25 hours in the prosecution of this case producing a total lodestar amount of $20,132,916.25, when multiplied by Lead Plaintiffs' Counsel's billing rates. *See* Exs. 4, 5, 6

& 8. Lead Plaintiffs' Counsel went to great lengths to avoid duplication and waste and ensure that the division of labor created an efficient but steady work-flow within the litigation team. Here, a core group of seven attorneys spent over 1,000 hours each. The document review process was coordinated by a Project Attorney, who, in turn, reported to more senior attorneys to ensure that there was minimal duplication of efforts. *See* Hughes Decl. ¶ 39.

In connection with this Motion, Lead Plaintiffs' Counsel reviewed all time submitted by attorneys and paraprofessionals to remove any possible duplication and time spent on efforts that were not of direct benefit to the prosecution of the Litigation, such as that associated with the lead plaintiff application process for those Lead Plaintiffs' Counsel who sought appointment as Lead Counsel with a lead plaintiff movant that was not appointed. Lead Plaintiffs' Counsel also employed an effective hourly rate for any time spent traveling (that did not involve substantive work on the Litigation) by halving the number of hours submitted for travel time. Lead Plaintiffs' Counsel have no "block billing" time entries. In addition, Lead Plaintiffs' Counsel have not included any time incurred after July 15, 2016. The hours that were devoted by Lead Plaintiffs' Counsel were not the result of churn, but rather of skilled, thoughtful, and necessary attorney hours.

It is also respectfully submitted that Lead Plaintiffs' Counsel's billing rates are reasonable when compared against prevailing rates of law firms who specialize in complex litigation in New York City. *See In re Telik*, 576 F. Supp. 2d at 589 ("Perhaps the best indicator of the 'market rate' in the New York area for plaintiffs' counsel in securities class actions is to examine the rates charged by New York firms that *defend* class actions on a regular basis."). Here, the hourly billing rates of Lead Plaintiffs' Counsel range from $695 to $995 for partners/members, $490 to $750 for counsel, and $350 to $800 for other attorneys. *See* Exs. 4-A,

5-A & 6-A. Indeed, defense-firm billing rates analyzed and gathered by Liaison Counsel Labaton Sucharow from bankruptcy-court filings nationwide in 2015 in many cases exceeded these rates. *See* Ex. 10. Further, if Lead Plaintiffs' Counsel's hourly rates are assessed in the aggregate, they result in a reasonable blended rate of $480.60.

The amount of attorneys' fees requested by Lead Counsel herein, $35,000,000, plus interest, represents a slight multiplier of 1.74 to Lead Plaintiffs' Counsel's aggregate lodestar.[6] In complex contingent litigation, lodestar multipliers between 2 and 5 are commonly awarded. *See Wal-Mart*, 396 F.3d at 123 (upholding multiplier of 3.5 as reasonable on appeal); *Davis*, 827 F. Supp. 2d at 185 (awarding fee representing multiplier of 5.3, which was "not atypical" in similar cases); *Cornwell v. Credit Suisse Grp.*, No. 08-cv-03758 (VM), slip op. at 4 (S.D.N.Y. July 18, 2011) (awarding fee representing a multiplier of 4.7), *see* Ex. 9; *Comverse*, 2010 WL 2653354, at *5 (awarding fee representing 2.78 multiplier), *see* Ex. 9; *In re Telik*, 576 F. Supp. 2d at 590 ("In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts, including this Court."); *In re Bisys Sec. Litig.*, No. 04 Civ. 3840(JSR), 2007 WL 2049726, at *3 (S.D.N.Y. July 16, 2007) (awarding 30% fee representing 2.99 multiplier, finding multiplier "falls well within the parameters set in this district and elsewhere"); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 134-35 (D.N.J. 2002) (noting 4.3 multiplier appropriate in light of contingency risk and quality of result achieved); *Maley*, 186 F. Supp. 2d at 369 (awarding fee equal to multiplier of 4.65, which was "well within the range awarded by courts in this Circuit and courts throughout the country").

Lead Plaintiffs' Counsel invested substantial time and effort prosecuting this Litigation against the Defendants to a successful conclusion. Lead Counsel therefore submits that the

[6] The Supreme Court and other courts have held that the use of current rates is proper since such rates compensate for inflation and the loss of use of funds. *See Jenkins*, 491 U.S. at 283-84.

requested fee is reasonable, whether calculated as a percentage of the fund or in relation to Lead Plaintiffs' Counsel's lodestar.

E. The Relevant Factors Confirm That The Requested Fee Is Reasonable

In *Goldberger*, the Second Circuit explained that whether the court uses the percentage-of-the-fund method or the lodestar approach, it should continue to consider the traditional criteria that reflect a reasonable fee in common fund cases, including:

- "'the time and labor expended by counsel'";
- "'the risk of the litigation'";
- "'the magnitude and complexities of the litigation'";
- "'the requested fee in relation to the settlement'";
- "'the quality of representation'"; and
- "'public policy considerations'".

Goldberger, 209 F.3d at 50. Consideration of these factors demonstrates that the requested fee is fair and reasonable.

1. The Time and Labor Expended by Counsel

Lead Plaintiffs' Counsel, which includes Lead Counsel, Liaison Counsel, and an additional firm that performed work for the Class at Lead Counsel's direction, have expended substantial time and effort pursuing the Litigation on behalf of the Class. Since the Litigation commenced over three years ago, Lead Plaintiffs' Counsel and their paraprofessionals devoted more than 40,000 hours to prosecuting the Class' claims. As detailed in the Hughes Declaration, submitted herewith, Lead Plaintiffs' Counsel:

- conducted an extensive pre-discovery factual investigation relating to the Pascua-Lama Project, involving the identification of more than 100 former Barrick employees and other persons with relevant knowledge, contacting 86 and interviewing 22 of them, as well as obtaining a number of internal Barrick documents that allegedly supported the Complaint's allegations, including

monthly progress reports and documents detailing the "Basis for Re-Forecast" for Pascua-Lama;

- researched the law relevant to the claims asserted and Defendants' potential defenses thereto, and drafted a detailed amended complaint;
- prosecuted and defended numerous motions, including successfully opposing Defendants' motion to dismiss, Defendants' motion for reconsideration and Defendant Veenman's motion to certify the motion to dismiss order for appeal pursuant to 28 U.S.C. § 1292(b), and prevailed on Lead Plaintiffs' motion for class certification;
- engaged in extensive document discovery, as well as numerous meet-and-confer discussions, resulting in the production of over 2.2 million pages of documents from Defendants and non-parties, most of which were in Spanish and required translation, and conducted extensive review and analysis of these documents;
- served and responded to interrogatories, and engaged in extensive meet-and-confer discussions related thereto;
- prepared for, took or defended seven depositions of fact and expert witnesses;
- consulted extensively with experts and consultants, including in the areas of damages, market efficiency, accounting issues and mining;
- participated in lengthy arm's-length settlement negotiations and mediation with Defendants; and
- negotiated and drafted the Stipulation and exhibits thereto, as well as the motion for preliminary approval of the Settlement.

Hughes Decl. ¶¶ 4, 9, 24, 33, 36, 45. Moreover, Lead Plaintiffs' Counsel, with the assistance of their damages expert, calculated the estimated damages suffered by the Class and prepared the proposed Plan of Allocation. Throughout the Litigation, Lead Counsel staffed the matter efficiently and avoided any unnecessary duplication of effort. Lead Plaintiffs' Counsel's work in the Litigation will not end with the Court's approval of the Settlement. Additional hours and resources will necessarily be expended assisting members of the Class with the completion and submission of their Proof of Claim forms, shepherding the claims process, responding to Class Member inquiries, and moving for approval of a distribution. *See Aponte v. Comprehensive Health Mgmt., Inc.*, No. 10 Civ. 4825(JLC), 2013 WL 1364147, at *7 (S.D.N.Y. Apr. 2, 2013).

The significant amount of time and effort devoted to this case by Lead Plaintiffs' Counsel to obtain a $140 million recovery confirms that the 25% fee request is reasonable.

2. The Risks of the Litigation

a. The contingent nature of Lead Plaintiffs' Counsel's Representation supports the requested fee

The risk undertaken in the litigation is often considered the most important *Goldberger* factor. *Goldberger*, 209 F.3d at 54; *Comverse*, 2010 WL 2653354, at *5; *In re Telik*, 576 F. Supp. 2d 570, 592 (S.D.N.Y. 2008). The Second Circuit has recognized that the risk associated with a case undertaken on a contingent fee is an important factor in determining an appropriate fee award:

> No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 470 (2d Cir. 1974).

"Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01-CV-11814(MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004); *Am. Bank Note*, 127 F. Supp. 2d at 433 (concluding it is "appropriate to take this [contingent fee] risk into account in determining the appropriate fee to award"); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 985 F. Supp. 410, 417 (S.D.N.Y. 1997) ("Numerous courts have recognized that the attorney's contingent fee risk is an important factor in determining the fee award."). This risk encompasses not just the risk of no payment, but also the risk of underpayment. *See In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 569-70 (7th Cir. 1992) (reversing district court's fee award when court failed to account for, among other things, risk of underpayment to counsel). When considering

the reasonableness of attorneys' fees in a contingency action, the court should consider the risks of the litigation at the time the suit was brought. *Goldberger*, 209 F.3d at 55; *In re Sadia S.A. Sec. Litig.*, No. 08 Civ. 9528(SAS), 2011 WL 6825235, at *3 (S.D.N.Y. Dec. 28, 2011).

The reasonableness of the requested fee is also supported by an evaluation of the risks undertaken by Lead Plaintiffs' Counsel in prosecuting this class action. Lead Plaintiffs' Counsel undertook this Litigation on a wholly contingent fee basis, investing a substantial amount of time and money to prosecute this very risky Litigation without a guarantee of compensation or even the recovery of expenses. Unlike counsel for Defendants, who are paid substantial hourly rates and reimbursed for their expenses on a regular basis, Lead Plaintiffs' Counsel have not been compensated for any time or expenses since this case began in 2013, and would have received no compensation or even payment of their expenses had this case not been successful.

From the outset, Lead Plaintiffs' Counsel understood that they were embarking on a complex, expensive, and lengthy litigation with no guarantee of ever being compensated for investing the time and money the case would require. In undertaking that responsibility, Lead Plaintiffs' Counsel were obligated to assure that sufficient attorney and paraprofessional resources were dedicated to prosecuting the Litigation and that funds were available to compensate staff and to pay for the considerable costs which a case such as this entails. Under these circumstances, the financial burden on contingent-fee counsel is far greater than on a firm that is paid on an ongoing basis.

In addition to advancing litigation expenses over the past three years, Lead Plaintiffs' Counsel faced the possibility that they would receive no attorneys' fees. It is wrong to presume that a law firm handling complex contingent litigation always wins. There are numerous

instances where in contingent cases such as this one, plaintiff's counsel have expended thousands of hours without receiving any compensation.[7]

Losses in contingent fee litigations, especially those brought under the PSLRA, are exceedingly expensive. As a result, the fees that are awarded in successful litigations are used to cover expenses incurred during the course of the litigation and are taxed by federal, state, and local authorities.

b. Litigation risks

While Lead Plaintiffs remain confident in their ability to prove their claims, including that Defendants made materially false and misleading statements about the Pascua-Lama Project with the requisite scienter, and that once the truth was revealed, Class Members suffered damages on their purchases of Barrick common stock during the Class Period, they recognize that their ability to prove liability was far from certain. As detailed in the Hughes Declaration

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[7] The risk of no recovery in complex cases of this type is real, and is heightened when lead counsel press to achieve the very best result for those they represent. There are numerous class actions in which lead counsel expended thousands of hours and received no remuneration despite their diligence and expertise or remuneration was delayed for years. *See, e.g.*, *In re Pfizer Inc. Sec. Litig.*, 819 F.3d 642, 667 (2d Cir. 2016) (reversing dismissal and remanding after twelve years of litigation during which time plaintiffs' counsel have received no award of fees and expenses); *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 433 (7th Cir. 2015) (overturning on loss causation grounds and remanding for new trial after thirteen years of litigation and six years after plaintiffs' jury verdict; case settled in 2016); *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713, 725 (11th Cir. 2012) (affirming judgment as matter of law following jury verdict partially in plaintiffs' favor); *In re Oracle Corp. Sec. Litig.*, No. C 01-00988 SI, 2009 WL 1709050, at *34 (N.D. Cal. June 19, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010) (granting summary judgment for defendants after eight years of litigation and after plaintiffs' counsel incurred over $7 million in expenses and worked over 100,000 hours, representing a lodestar of approximately $40 million); *In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486 CW (EDL), 2007 WL 4788556, at *1 (N.D. Cal. Nov. 27, 2007) (jury verdict for defendants); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1449 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1233 (10th Cir. 1996) (overturning securities fraud class action jury verdict for plaintiffs in case filed in 1973 and tried in 1988 on basis of 1994 Supreme Court opinion).

and in the Settlement Memorandum, Defendants raised numerous challenges to the falsity, materiality, scienter, and causation elements of Lead Plaintiffs' claims under the federal securities laws, each of which were vigorously rebutted by the efforts of Lead Plaintiffs' Counsel. For example, Defendants argued that Lead Plaintiffs could not establish that the Pascua-Lama Project was not undertaken pursuant to existing environmental approvals or that Barrick did not have measures in place to protect the environment. Hughes Decl. ¶ 73. Defendants also maintained that Lead Plaintiffs could not prove their "internal control" allegations because Barrick regularly disclosed to investors control issues at Pascua-Lama, along with the steps being taken to address them. For example, in July 2011, Barrick stated that it was "in the process of assessing the impact on, and, as required, redesigning, the internal control over financial reporting and disclosure frameworks to reflect" organizational changes at Pascua-Lama. *Id.* ¶ 75. A few months later, Barrick reported that "work continues to enhance and standardize the project controls, finance and supply chain business processes and systems." *Id.* In July 2012, Barrick disclosed that, as part of its comprehensive review and changes to the management team, it was assessing "the impact on internal control over financial reporting and disclosure." *Id.* Likewise, Defendants maintained that Lead Plaintiffs would be unable to prove that the asset impairment analyses concerning Pascua-Lama that were reported to investors were performed inadequately or were based on incomplete or inaccurate information. *Id.* ¶ 76.[8] Defendants would argue that the impairment charge was caused by the declining price of gold throughout the Class Period – the price of gold declined 23% in the second quarter of 2013 – combined with high capital costs. Indeed, Barrick disclosed that a "decrease of about 7% in

[8] Defendants steadfastly maintained that Lead Plaintiffs' evidence of problems at the Pascua-Lama Project towards the end of the Class Period could not establish the falsity of statements earlier in the Class Period about the Company's internal controls or accounting for capital costs at that stage. *Id.* ¶ 79.

long-term gold prices, a decrease of about 12% in silver prices, an increase of about 10% in operating costs or an increase of about 15% in the total [life-of-mine] capital expenditures, would in isolation, cause the estimated recoverable amount to be equal to the carrying value" – which would require an impairment charge. Write-downs by other large gold mining companies at this time included, for example: Newcrest Mining, $5.7 billion; AngloGold Ashanti, $2.4 billion; GoldCorp, $2.0 billion; and Newmont Mining, $1.8 billion. *Id.* ¶ 79.

Defendants further argued that Lead Plaintiffs could not establish scienter, i.e., that Defendants knew or recklessly disregarded (1) Barrick's non-compliance with applicable environmental regulations at Pascua-Lama; (2) that the Company's internal controls were deficient; and (3) that they had no basis for their capital cost and accounting estimates. In particular, Defendants would argue that Lead Plaintiffs' allegations amount to assertions that Barrick purposefully pursued a massive, multi-billion dollar mining project at Pascua-Lama despite knowing – from the outset – that the Project was not economically or environmentally feasible, which would make no sense. *Id.* ¶ 84.

Moreover, Lead Plaintiffs' Counsel considered that their allegations concerning violations of environmental regulations, improper accounting for Pascua-Lama's capital costs (including compliance with complicated GAAP requirements), and the inadequate nature of Barrick's internal controls, at both Pascua-Lama and the Company level, might not have been understood or credited by a jury.

c. Risk as to damages and loss causation

Whether Lead Plaintiffs could prove damages also was unsettled. With respect to proving loss causation, Defendants would continue to argue that the decline in Barrick's stock price during the Class Period was caused by factors other than Lead Plaintiffs' alleged corrective disclosures and materialization of the risk allegations. *Id.* ¶¶ 90-91. The decline in the price of

gold during the Class Period was a confounding factor that might have caused the stock price movement. *Id.* ¶ 90.[9] Defendants strenuously disagreed with Lead Plaintiffs' damage theories and estimates. For the Class to recover damages at the level estimated by Lead Plaintiffs' Counsel's damages expert, they would need to prevail on each and every one of the claims alleged, for the entirety of the Class Period. The damage assessments of the parties' respective trial experts varied substantially, and trial would become a "battle of experts." The outcome of such battles is never predictable, and there existed the very real possibility that a jury could be swayed by experts for the Defendants to minimize the Class' losses or to show that the losses were attributable to factors other than the alleged misstatements and omissions. Thus, even if Lead Plaintiffs prevailed as to liability at trial, the judgment obtained could well have been only a fraction of the damages claimed.

3. The Magnitude and Complexity of the Litigation

The complexity of the litigation is another factor examined by courts evaluating the reasonableness of attorneys' fees requested by class counsel. *See Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 216 (S.D.N.Y. 1992). It is widely recognized that "shareholder actions are notoriously complex and difficult to prove." *In re Bayer AG Sec. Litig.*, No. 03 Civ. 1546(WHP), 2008 WL 5336691, at *5 (S.D.N.Y. Dec. 15, 2008); *see also In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM)(PED), 2010 WL 4537550, at *27 (S.D.N.Y. Nov. 8, 2010). "[S]ecurities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA." *In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D.

[9] Another litigation risk for Lead Plaintiffs was the proper length of the Class Period. Though Judge Scheindlin granted the motion for class certification for the entirety of the asserted Class Period, she had also previously dismissed Class Representatives' allegations concerning statements regarding Pascua-Lama as a "low-cost project" and those regarding costs and scheduling. *Id.* ¶ 96. Defendants maintained that as a result of the motion to dismiss order, the Class Period should have started no later than July 2011. *Id.*

Pa. 2000); *see also In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. MDL 1500, 2006 WL 903236, at *9 (S.D.N.Y. Apr. 6, 2006) ("[T]he legal requirements for recovery under the securities laws present considerable challenges, particularly with respect to loss causation and the calculation of damages. These challenges are exacerbated . . . where a number of controlling decisions have recently shed new light on the standard for loss causation."). As described in greater detail in the accompanying Settlement Memorandum and the Hughes Declaration, this Litigation involved difficult and complex issues concerning the Pascua-Lama Project, including compliance with GAAP and Chilean environmental regulations. These issues were magnified by the fact that the majority of documents produced by Defendants were in Spanish and that Lead Plaintiffs would have had difficulty in obtaining deposition and trial testimony from witnesses located outside of the Court's jurisdiction, if they could have compelled their testimony at all.

The trial of liability issues alone would have involved substantial attorney and expert time, the introduction of voluminous documentary and deposition evidence, vigorously contested summary judgment and *in limine* motions, and the considerable expenditures of judicial resources. Because this case revolved around "difficult, complex, hotly disputed, and expert-intensive issues," this factor favors awarding a 25% fee. *Aeropostale*, 2014 WL 1883494, at *16.

4. The Quality of Representation Supports the Requested Fee

The quality of the representation by Lead Plaintiffs' Counsel and the standing of that counsel at the bar are important factors that support the reasonableness of the requested fee. The quality of the representation here is best evidenced by the quality of the result achieved. *See In re Flag Telecom*, 2010 WL 4537550, at *28; *Bisys*, 2007 WL 2049726, at *3. It took a great deal of skill to achieve a settlement at this level in this particular case. Specifically, this Action required a comprehensive factual investigation, as well as the ability to develop creative legal

theories, and the skill to respond to a host of legal defenses. In sum, this favorable Settlement is attributable in substantial part to the diligence, determination, hard work, and skill of counsel, who developed, litigated, and successfully negotiated a substantial guaranteed cash recovery in a very difficult case, without the risk of further litigation. *See Teachers' Ret. Sys.*, 2004 WL 1087261, at *7.

Finally, courts repeatedly recognize that the quality of the opposition faced by plaintiffs' counsel should also be taken into consideration in assessing the quality of counsel's performance. *See, e.g.*, *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("The high quality of defense counsel opposing Plaintiffs' efforts further proves the caliber of representation that was necessary to achieve the Settlement."); *Veeco*, 2007 WL 4115808, at *7 (noting fact defendants were represented by "one of the country's largest law firms" was factor supporting 30% award of attorneys' fees). Here, Defendants are represented by lawyers from Debevoise & Plimpton LLP, a highly respected law firm who presented a very skilled defense and spared no effort in representing its clients. Notwithstanding this formidable opposition, Lead Plaintiffs' Counsel's ability to present a strong case and to demonstrate their willingness to continue to vigorously prosecute the Litigation through trial and then inevitable appeals enabled Lead Plaintiffs' Counsel to achieve a very favorable Settlement for the benefit of the Class.

5. Public Policy Considerations

The federal securities laws are remedial in nature, and, to effectuate their purpose of protecting investors, the courts must encourage private lawsuits. *See Basic Inc. v. Levinson*, 485 U.S. 224, 230-31 (1988). The Supreme Court has emphasized that private securities actions such as this "provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'" *Bateman Eichler*, 472 U.S. at 310; *Tellabs*, 551 U.S. at 313 ("This Court has long recognized that meritorious private actions to enforce federal antifraud

securities laws are an essential supplement to criminal prosecutions and civil enforcement actions."). Plaintiffs' counsel in these types of cases typically are retained on a contingent basis, largely due to the huge commitment of time and expense required. The typical class representative is unlikely to be able to pursue long and protracted litigation at his or her own expense, particularly with the knowledge that others similarly situated will be able to "free ride" on these efforts at no cost or risk to themselves. Furthermore, the significant expense combined with the high degree of uncertainty of ultimate success means that contingent fees are virtually the only means of recovery in such cases. Indeed, lawyers that pursue private suits such as this on behalf of investors augment the overburdened SEC by "acting as 'private attorneys general.'" *Ressler v. Jacobson*, 149 F.R.D. 651, 657 (M.D. Fla. 1992). Thus, "public policy favors the granting of [attorney] fees sufficient to reward counsel for bringing these actions and to encourage them to bring additional such actions." *Id.*[10]

Because actionable securities fraud exists and society benefits from strong advocacy on behalf of securities holders, public policy favors the granting of the fee and expense application. *See In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) ("In order 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.").

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[10] *See also Maley*, 186 F. Supp. 2d at 373 ("In considering an award of attorney's fees, the public policy of vigorously enforcing the federal securities laws must be considered."); *In re Med. X-Ray Film Antitrust Litig.*, No. CV-93-5904, 1998 WL 661515, at *8 (E.D.N.Y. Aug. 7, 1998) (awarding fee of 33-1/3% because it "furthers the public policy of encouraging private lawsuits"); *Chatelain*, 805 F. Supp. at 216 ("[A]n adequate award furthers the public policy of encouraging private lawsuits in pursuance of the remedial federal securities laws."); *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 750-51 (S.D.N.Y. 1985) ("Fair awards in cases such as this encourage and support other prosecutions, and thereby forward the cause of securities law enforcement and compliance."), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

6. The Class' Reaction to the Fee Request

To date, the Claims Administrator has sent an aggregate of 1,072,843 copies of the Notice to potential Class Members and nominees informing them, *inter alia*, that Lead Counsel intended to apply to the Court for an award of attorneys' fees in an amount not to exceed 25% of the Settlement Fund, plus expenses not to exceed $1,200,000, plus interest on both amounts. *See* Ex. 7. The time to object to the fee request expires on September 21, 2016. To date, only two weeks before the objection deadline, only two purported general objections to the fee and expense amounts set forth in the Summary Notice have been received. Moreover, one of the two objections, on behalf of an individual, his wife, and Jesus Christ's Army Church, is invalid because it does not comply with the terms of the Summary Notice, because it fails to identify the date(s), price(s), and number of shares of all purchases and sales of Barrick common stock on the New York Stock Exchange during the Class Period. Hughes Decl. ¶ 108. Regardless, "such a low level of objection is a 'rare phenomenon.'" *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005).

Additionally, each of the Lead Plaintiffs supports the fee request. *See* Exs. 2 & 3. The fact that only two purported general objections, which could have been lodged against any class action fee request, were received is compelling evidence of the fairness of the fee request.

IV. LEAD PLAINTIFFS' COUNSEL'S EXPENSES WERE REASONABLY INCURRED AND NECESSARY TO THE PROSECUTION OF THIS LITIGATION

Lead Counsel, on behalf of all Lead Plaintiffs' Counsel, also respectfully request an award of $981,296.48 in expenses incurred while prosecuting the Litigation. Lead Plaintiffs' Counsel have submitted declarations regarding these expenses (Exs. 4, 5 & 6), which are properly recoverable. *See, e.g.*, *In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895(DAB), 2011 WL 1899715, at *6 (S.D.N.Y. May 13, 2011) (noting in class action attorneys should be

"'compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were "incidental and necessary to the representation" of those clients'"); *In re Flag Telecom*, 2010 WL 4537550, at *30 ("It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class."); *In re Indep. Energy Holdings PLC Sec. Litig.*, 302 F. Supp. 2d 180, 183 n.3 (S.D.N.Y. 2003) (noting court may compensate class counsel for reasonable expenses necessary to the representation of the class).

Here, Lead Plaintiffs' Counsel's expenses include the costs of hiring experts, consultants and investigators, document database management, travel, transcription services, mediating the Class' claims, and computerized research. These expenses were critical to Lead Plaintiffs' success in achieving the Settlements. *See Global Crossing*, 225 F.R.D. at 468 ("The expenses incurred – which include investigative and expert witnesses, filing fees, service of process, travel, legal research and document production and review – are the type for which 'the paying, arms' length market' reimburses attorneys. For this reason, they are properly chargeable to the Settlement fund."). Not a single objection to the expense amount set forth in the Summary Notice has been received. Accordingly, Lead Counsel respectfully request payment for these expenses, plus interest earned on such amount at the same rate as that earned by the Settlement.

Finally, Garden City Group, LLC, as Court-appointed Claims Administrator, requests payment in the amount of $1,285,960.83 for its work through July 31, 2016, as contemplated by Court's Order Preliminarily Approving Settlement and Providing for Notice (ECF No. 169). *See* Ex. 7.

V. CONCLUSION

Based on the foregoing and the entire record herein, Lead Counsel respectfully requests that the Court award attorneys' fees of 25% of the $140 million recovery and litigation expenses

in the amount of $981,296.48, plus interest on both amounts. Lead Counsel also requests payment of the Claims Administrator's fees and expenses incurred through July 31, 2016.

DATED: September 7, 2016

Respectfully submitted,

MOTLEY RICE LLC

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CERTIFICATE OF SERVICE

I, James M. Hughes, hereby certify that on September 7, 2016, I caused a true and correct copy of the attached Lead Plaintiffs' Memorandum of Law in Support of Motion for an Award of Attorneys' Fees and Expenses to be served electronically on all counsel registered for electronic service for this case.

/s/ James M. Hughes
James M. Hughes