IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
30TH JUDICIAL DISTRICT, MEMPHIS

IN RE JERNIGAN CAPITAL, INC., SHAREHOLDER LITIGATION	)	
This Document Relates To: ALL ACTIONS.	)	Lead Case No. CH-20-1472-II CLASS ACTION

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, EXPENSES AND SERVICE AWARDS

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Lead Plaintiffs Louis Lane, Mary Pat Forkin Arthur, and Sherry Grosse (collectively "Plaintiffs"),[1] through undersigned counsel, respectfully move the Court for an Order granting Class Counsel attorneys' fees of one-third of the Settlement ($1,308,333) and reimbursement of expenses in the amount of $47,697.20, and approving Service Awards of $5,000 per named plaintiff ($20,000 in the aggregate). Because these requests are reasonable, and for the reasons set forth below, the Court should grant this motion.

I. BACKGROUND

After more than three years of hard-fought litigation, Plaintiffs have secured a cash Settlement in the amount of $3,925,000 for the benefit of the Class of former shareholders of JCAP. As outlined in greater depth in Plaintiffs' contemporaneously filed Motion for Final Approval of Class Action Settlement and their prior Motion for Preliminary Approval of Class Action Settlement, the Settlement represents an excellent result when measured against the significant hurdles the Settlement Class faced going forward. The factual background and history of this Action (including a detailed description of the procedural history, the claims asserted, the investigation and document discovery undertaken, the Parties' motion practice, the negotiations and mediation process resulting in the Settlement, and the risks and uncertainties involved in prosecuting this Action through trial), as well as the benefits of the Settlement, are laid out in significant detail in Plaintiffs' previously-filed Motion for Preliminary Approval, their contemporaneously-filed Motion for Final Approval, and the accompanying Declaration of Gerald Stranch ("Stranch Decl."). For the sake of judicial efficiency, Plaintiffs respectfully refer the Court to those Motions and Declaration and incorporate their contents herein by reference.

[1] Lead (and named) Plaintiff Patrick Forkin passed away during the pendency of this action.

II. CLASS COUNSEL ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES FROM THE COMMON FUND BASED UPON THE PERCENTAGE-OF-THE-RECOVERY METHOD

After a class action settles, Tennessee Rule of Civil Procedure 23.05 requires that "a motion for fees must be filed and served on all parties and, for motions by class counsel, directed to class members in a reasonable manner." Tenn. R. Civ. P. 23.05.[2] The fee amount ultimately awarded is left to the discretion of the trial court. *Kline v. Eyrich*, 69 S.W.3d 197, 203 (Tenn. 2002).

Although the Tennessee Rules of Civil Procedure do not specify a method of determining an appropriate award of attorneys' fees, courts have held that relying upon a percentage of the benefit made available to the Class is the ideal approach because the lodestar method of calculating time and a reasonable hourly rate is disfavored in Tennessee. *See e.g., In re Skelaxin (Metaxalone) Antitrust Litig.*, No. 2:12-cv-83, 2014 U.S. Dist. LEXIS 91661, at *4-5 (E.D. Tenn. June 30, 2014) (recognizing "the trend in 'common fund cases has been toward use of the percentage method'") (citing *In re Cardizem CD Antitrust Litig*., 218 F.R.D. 508, 532 (E.D. Mich. 2003) (courts in the Sixth Circuit have "indicated a preference for the percentage-of-the-fund method in common fund cases."))); *Id.* (finding that counsel fee of one third was fair and within the range of fees ordinarily awarded in complex class actions); *Wright ex. Rel. Wright v. Wright*, 337 S.W.3d 166, 180 (Tenn. 2011) (calling the lodestar approach "problematic" in part because of the potential to reward "inexperience, inefficiency, and incompetence" over "skillful and expeditious disposition of litigation") (quoting *Adams v. Unterkircher*, 714 P.2d 193, 197 (Okla. 1985)).

[2] Pursuant to Rule 23.05, Class Counsel notified Class Members of the fees it intended to request in the notice provided to Class Members and in the Settlement Agreement. All such documents are publicly available on the Settlement Website.
https://www.rg2claims.com/jernigan.html.

This method is also consistent with courts nationwide. *See, e.g., Blum v Stenson*, 465 U.S. 886, 900 n.16 (1984) ("under the 'common fund doctrine,' [] a reasonable fee is based on a percentage of the fund bestowed on the class"); *Swedish Hosp. Corp. v Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) ("a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases."). Accordingly, Class Counsel are entitled to an award of attorneys' fees from the common fund, using the percentage-of-recovery method.

III. THE REQUESTED FEE IS CONSISTENT WITH TENNESSEE'S REASONABLENESS FACTORS

Ultimately, reasonableness is the standard for determining the appropriate fee award percentage. The award of attorneys' fees in common fund cases need only "be reasonable under the circumstances." *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); *Moulton v. US. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009). When awarding fees, a court must make sure that counsel is fairly compensated for the results achieved. *Rawlings*, 9 F.3d at 516. The Tennessee Supreme Court has illuminated several factors that may be relevant in determining the reasonableness of a fee award: (1) the time and labor required, the novelty and difficulty of the litigation, and the skill required; (2) whether taking the case would reasonably appear to preclude other employment; (3) fees customarily charged in similar cases; (4) the amount involved and the results obtained; (5) any time limitations imposed by client or the circumstances; (6) the nature and length of the professional relationship; (7) the experience, reputation, and ability of counsel; (8) whether the fee is contingent or fixed; (9) prior advertisements, if any, by the counsel with respect to the fees the attorney charges; and (10) whether the fee agreement is in writing. *Smith v. All Nations Church of God*, No. W2019-02184-COA-R3-CV, 2020 WL 6940703, at *5 (Tenn. Ct. App. Nov. 25, 2020) (quoting Tenn. Sup. Ct. R. 8; Rules of Prof. Cond. 1.5(a)). As discussed below, the requested fee award for Class Counsel is also supported by an analysis of these factors.

A. The Time and Labor Required, the Novelty and Difficulty of the Litigation, and the Skill Required

As to the first factor, the "prosecution and management of a complex national class action requires unique legal skills and abilities." *Edmonds v. United States*, 658 F. Supp. 1126, 1137 (D.S.C. 1987). Here, Class Counsel are preeminent class action attorneys with decades of experience in prosecuting complex class actions who devoted over 1,500 hours to this litigation. Stranch Decl., ¶15; *see also* Exs. 2 and 3 to the Declaration of J. Gerard Stranch, IV filed on August 16, 2024 in connection with the Motion for Preliminary Approval. Class Counsel's experience and skill are demonstrated by their effective investigation and prosecution of this Action, which resulted in the Settlement before the Court. Stranch Decl., ¶¶3-7. That result is the clearest reflection of counsel's skill and expertise, and that result is all the more impressive in light of the fact that Class Counsel negotiated the Settlement in the face of formidable opposition from highly skilled and experienced defense attorneys.

B. Whether Taking the Case Would Reasonably Appear to Preclude Other Employment

Class Counsel have assumed significant responsibility in prosecuting this litigation and have expended significant labor and effort in prosecuting this action, which otherwise could have been dedicated to other, fee generating matters. Stranch Decl., ¶15. Moreover, Class Counsel have fronted $47,697.20 in litigation expenses, which would be entirely lost if Plaintiffs did not recover in this Action. Stranch Decl., ¶18.

C. Fees Customarily Charged in Similar Cases

Class Counsel's fee request of one-third of the Settlement is commensurate with amounts awarded in similar class actions in Tennessee, the Sixth Circuit, and around the country. *See, e.g.,*

In re Se. Milk Antitrust Litig., No. 2:07-CV 208, 2013 WL 2155387, at *3 (E.D. Tenn. May 17, 2013) (awarding one-third of common fund); *In re Skelaxin (Metaxalone) Antitrust Litig*, 2014 U.S. Dist. LEXIS 91661, at *4-5 (finding that counsel fee of one-third was fair and within the range of fees ordinarily awarded in complex class actions); *Bessey v. Packerland Plainwell, Inc.,* No. 4:06-cv-95, 2007 WL 3173972, at *4 (W.D. Mich. Oct. 26, 2007) (awarding one-third of common fund and noting that "[e]mpirical studies show that . . . fee awards in class actions average around one-third of recovery"); *In Re Prandin Direct Purchaser Antitrust Litig.,* No. 10-cv-12141, 2015 WL 1396473, at *4 (E.D. Mich. Jan. 20, 2015) (awarding one-third of the common fund); *see also Denver Area Meat Cutters & Emps. Pension Plan v. Clayton,* 209 S.W.3d 584, 592–93 (Tenn. Ct. App. 2006) (affirming trial court award of one-third of settlement fund in common fund case); *Morris v. Lifescan, Inc.*, 54 Fed. Appx. 663, 664 (9th Cir. 2003) (affirming 33% fee in $14.8 million settlement); *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming 33% fee in $12 million settlement); *Muhammad v. Nat'l City Mortg., Inc.*, C.A. No. 2:07-0423, 2008 U.S. Dist. LEXIS 103534, at *26 (S.D. W. Va. Dec. 19, 2008) (one-third of recovery); *Singer v. Becton Dickinson & Co.*, 2010 U.S. Dist. LEXIS 53416, at *23 (S.D. Cal. 2010) ("33.33% of the common fund falls within the typical range of 20% to 50% awarded in similar cases"); *see also* 4 *Newberg on Class Actions* § 14:6 (4th ed. 2002) ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.").

D. The Amount Involved and the Results Obtained

Courts have consistently recognized that the result achieved is one of the most important factors to be considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"). Under the circumstances of this case,

Plaintiffs and Class Counsel concluded that the proposed Settlement – which, as discussed in detail in Plaintiff's Motion for Preliminary Approval and Motion for Final Approval, represents a **3x recovery** of the Earn Out Consideration alleged to have motivated Good to pursue a sale – is a good outcome for the Settlement Class. Moreover, the risk that going forward with litigation might result in no recovery for the Settlement Class, particularly where (as here) complex legal issues are contested, also is a significant factor in the award of fees. The Settlement Amount is thus a favorable result for the Settlement Class when measured against the significant challenges and risks they faced going forward, the additional expenses associated with further litigation, and the complexity of the Action – and it likewise allows shareholders to receive additional recovery in connection with the settlement of the Federal Action. *See In re Pacer Int'l, Inc.*, No. M2015-00356-COA-R3-CV, 2017 Tenn. App. LEXIS 442, at *18-19.

Assuming 100% of the holders of the Settlement Class submit a valid and timely Proof of Claim, the average distribution will be approximately $0.17 per share (before the payment of Court-approved fees and expenses (estimated to be approximately $0.06 per share) and the cost of notice and claims administration). The Class is, in effect, receiving a premium of ~1% to the per-share Merger consideration – which itself represented a *23% premium* to JCAP's closing stock price on the last trading day pre-Merger announcement, a *27.4% premium* over its 30-day volume-weighted average price, and a *92.4% premium* over the post-pandemic low price in late March 2020. By way of reference, the Delaware Court of Chancery – which sees more merger cases than any other jurisdiction – routinely approves merger settlement premiums *near and even below 1%*. *See, e.g.*, *In re Sauer-Danfoss, Inc. S'holders Litig.*, C.A. No. 8396-VCL (Del. Ch. June 19, 2017) (approving settlement that represented an approximately 1.46% price increase); *In re TD Banknorth S'holders Litig.*, C.A. No. 2557-VCL, 2009 WL 1834308 (Del. Ch. June 25, 2009)

(approving settlement that represented an approximately 1.6% price increase); *In re El Paso Corp. S'holder Litig.*, C.A. No. 6949-CS, 2012 WL 6057331 (Del. Ch. Dec. 3, 2012) (approving settlement that represented an approximately 0.5% price increase); *In re Delphi Fin. Grp. S'holder Litig.*, C.A. No. 7144-VCG, 2012 WL 3113652 (Del. Ch. July 31, 2012) (approving settlement that represented an approximately 2.0% price increase); *In re Del Monte Foods Co. S'holder Litig.*, C.A. No. 6027-VCL, 2011 WL 6008590 (Del. Ch. Dec. 1, 2011) (approving settlement that represented an approximately 2.4% price increase). Against this backdrop, there can be no doubt that this monetary recovery represents a substantial benefit for the Class.

E. Any Time Limitations Imposed by Client or the Circumstances

The complex nature of this class action presented significant challenges and risks to the Class – including the risk of obtaining no recovery if the litigation were to move forward. There is significant risk and expense in prosecuting Plaintiffs' claims successfully through a hearing on class certification, completion of fact and expert discovery, summary judgment, trial, and subsequent appeals, and there is no assurance that Plaintiffs could prove damages in excess of the Settlement Amount at trial. By contrast, the Settlement allows for Plaintiffs and the Class to recover *now*, as opposed to waiting potentially years to see a recovery, if any, after a full trial on the merits and potential appeals. Accordingly, this factor also weighs in favor of approval.

F. The Nature and Length of the Professional Relationship

This case began four years ago, and has included extensive investigation and document discovery, consultation with valuation experts, briefing of legal issues, and a comprehensive mediation process. At the time the Settlement was reached, Plaintiffs and Class Counsel were well-positioned to assess the fairness of the Settlement in light of its strengths and weaknesses.

G. The Experience, Reputation, and Ability of Counsel

Class Counsel have significant experience in class action litigation and an extensive track record of working on behalf of shareholders to secure substantial monetary recoveries. Stranch Decl., ¶15; Exhibits 2 and 3 to the Declaration of J. Gerard Stranch, IV filed on August 16, 2024 in connection with the Motion for Preliminary Approval. Based upon their experience in class action litigation, thorough investigation of the claims at issue, their analysis of Defendants' legal and factual arguments, and zealous advocacy on behalf of Plaintiffs during the mediation process, Class Counsel was well-suited to evaluate the fairness of the Settlement and determine whether it is in the best interests of the Settlement Class. This experience and reputation weighs in favor of the reasonableness of the fee request.

H. Whether the Fee is Contingent or Fixed

The attorneys' fees in this case were contingent upon the success of the litigation. In litigating this case on a contingent basis, Class Counsel faced the risk of receiving *no recovery whatsoever* for their considerable efforts in this matter. This fact weighs further in favor of the reasonableness of Class Counsel's fee request. *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 329–30 (W.D. Tex. 2007). It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. *See* Richard Posner, *Economic Analysis of Law* §21.9, at 534-35 (3d ed. 1986). "Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless of whether they win or lose." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir.

1994). If this were a non-representative litigation, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 33% to 40% of the recovery. *Blum v. Stenson*, 465 U.S. 886, 903 (1984) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers.").

Contingent fees are also favored – and rewarded – because they grant access to the courts to those not otherwise able to pursue claims by shifting significant risks and costs onto plaintiff's counsel. "The importance of assuring adequate representation for plaintiffs who could not otherwise afford competent attorneys justifies providing those attorneys who do accept matters on a contingent-fee basis a larger fee than if they were billing by the hour or on a flat fee." *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1047 (N.D Cal. 2007). Thus, "courts tend to find above-market-value fee awards" in contingency fee cases more appropriate, to encourage counsel to take on such cases for the benefit of plaintiffs who could not afford to pay hourly fees. *Deaver v. Compass Bank*, 2015 U.S. Dist. LEXIS 166484, at *35 (N.D. Cal. Dec. 11, 2015); *Vela v. Plaquemines Par. Gov't*, 811 So. 2d 1263, 1280–81 (La. Ct. App. 2002) ("the nature of this litigation as a class action [] justifies an award that is higher than…in a more typical [] case"). The contingent nature of this representations supports the reasonableness of Class Counsel's request for a one-third fee.[3]

* * *

Because all relevant factors weigh in favor of the reasonableness of the fee request, the Court should grant Plaintiffs' motion and award Class Counsel one-third of the Settlement, or $1,308,333.

[3] Although not a listed factor, Class Members were informed in the Notice that Class Counsel would seek an award of attorneys' fees not to exceed one-third of the Settlement, and to date, no objections have been made. This fact weighs in further support of Plaintiffs' fee request.

IV. THE REQUESTED EXPENSES ARE REASONABLE, WERE NECESSARY FOR PROSECUTING THE ACTION, AND SHOULD BE APPROVED

Plaintiffs also respectfully request that the Court approve the reimbursement of $47,697.20 in litigation expenses that Class Counsel and Liaison Counsel advanced in the prosecution of this Action. Stranch Decl., ¶18. All of these expenses were reasonable and necessary for the prosecution of this Action and should be approved. *Id. See also In re Omnivision Techs.*, 559 F. Supp. 2d at 1048; *Khoja v. Orexigen Therapeutics*, No. 15-cv-00540-JLS-AGS, 2021 U.S. Dist. LEXIS 230105, at *33-34 (S.D. Cal. Nov. 30, 2021) (approving counsel's expenses such as expert and consulting fees, printing, photocopying, postage, transcript fees, mediation expenses, court filing fees and court reporting fees as the "types of expenses [] typically incurred by counsel in complex litigation and [] routinely charged to clients billed by the hour."). These expenses are of the type that are normally charged to paying clients and reasonable in light of the work performed, the scale and duration of the Action, the legal and factual issues presented, and the outstanding recovery achieved. They should therefore be reimbursed in the amount requested. *See Missouri v. Jenkins*, 491 U.S. 274, 287 n.9 (1989) (expenses billed in accordance with "prevailing practice" are reimbursable).

V. THE COURT SHOULD APPROVE PLAINTIFF SERVICE AWARDS

Service awards, which are sometimes referred to as incentive awards, "aim to compensate class representatives for their service to the class," "are paid in most class suits," and "average between $10,000 to $15,000 per class representative." William B. Rubenstein, Newberg on Class Action, § 17.1 (6th ed.); *see also In re Family Dollar Stores, Inc. Pest Infestation Litig.*, No. 2:22-cv-3032, 2024 WL 2000059, at *6 (W.D. Tenn. May 6, 2024) (awarding $5,000 for each class representative); *Fusion Elite All Stars v. Varsity Brands, LLC*, No. 2:20-cv-02600, 2023 WL 6466398, at *8 (W.D. Tenn. Oct. 4, 2023) (awarding between $5,000 and $20,000 in service

awards); *O'Bryant v. ABC Phones of North Carolina, Inc.*, No. 19-cv-02378, 2021 WL 5016872, at *7 (W.D. Tenn. Oct. 28, 2021). "Such awards 'encourage individuals to undertake the responsibilities and risks of representing the class and recognize the time and effort spent in the case.'" *Carter v. Vivendi Ticketing US LLC*, No. 22-cv-01981, 2023 WL 8153712, at *11 (C.D. Cal. Oct. 30, 2023) (quoting *In re Anthem, Inc. Data Breach Litig.*, No. 15-md-02617, 2018 WL 3960068, at *30 (N.D. Cal. Aug. 17, 2018)).

Here, Plaintiffs respectfully request that the Court award $5,000 to each named plaintiff as reasonable Service Awards. These awards are exceedingly reasonable given the average amount of such awards in class actions and are in line with service awards in other securities class actions. *Jackson v. Nationwide Ret. Sols., Inc.*, No. 2:22-cv-3499, 2024 WL 958726, at *7 (S.D. Ohio Mar. 5, 2024) (approving Service Awards of $5,000); *In re Regulus Therapeutics Sec. Litig.*, No. 17cv182-BTM-RBB, 2020 U.S. Dist. LEXIS 202787, *24 (S.D. Cal. Oct. 29, 2020) (noting that "incentive awards typically range from $2,000 to $10,000"); *Shaw v. Toshiba America Information Systems, Inc.*, 91 F.Supp.2d 942, 973 (E.D. Texas 2000) (awarding two lead plaintiffs $25,000 each as compensation for serving as class representatives).

Here, all named plaintiffs actively engaged in this litigation, including assisting in Class Counsel's investigation and providing and reviewing documents and other information. Stranch Decl., ¶16 and Exs. 2-4 (Plaintiffs' declarations). Because Plaintiffs have served the Class well and have actively advanced the Class's interests in this action, and because the requested Service Awards are imminently reasonable in comparison to similar cases, the Court should grant Plaintiffs' motion for Service Awards of $5,000 for each named plaintiff. Finally, the Notice to the Class stated that named plaintiffs would seek service awards, and, to date, no objections have

been made. Based on the foregoing, Plaintiffs respectfully submit that a $5,000.00 service award for each named plaintiff is fair and reasonable.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court approve Class Counsel's fees of $1,308,333, expenses of $47,697.20, and Service Awards of $5,000 each.

DATED: November 8, 2024

Respectfully Submitted By:

/s/ J. Gerard Stranch, IV

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing document has been forwarded, via U.S. mail and e-mail, to the following on this 8th day of November 2024.

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