UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

FUNICULAR FUNDS, LP, individually and on behalf of all others similarly situated,

Plaintiff,

v.

PIONEER MERGER CORP., PIONEER MERGER SPONSOR LLC, JONATHAN CHRISTODORO, RICK GERSON, OSCAR SALAZAR, RYAN KHOURY, SCOTT CARPENTER, MATTHEW COREY, MITCHELL CAPLAN, and TODD DAVIS,

Defendants.

Civil Action No. 22-10986-JSR

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, LITIGATION EXPENSES, AND INCENTIVE AWARD

MORRIS KANDINOV LLP
Aaron T. Morris
Andrew W. Robertson
305 Broadway, 7th Floor
New York, NY 10007
(212) 431-7473

MORROW NI LLP
Angus F. Ni
502 Second Avenue, 14th Floor
Seattle, WA 98104
(646) 453-7294

Attorneys for Lead Plaintiff and the Class

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 2

I. LEAD COUNSEL IS ENTITLED TO AN AWARD OF REASONABLE ATTORNEYS' FEES FROM THE COMMON FUND 2

A. The Requested Fee Is Reasonable Under The Percentage-Of-The-Fund Method 3

B. The Requested Fee Is Reasonable Under the Lodestar Method 4

C. The *Goldberger* Factors Support The Fee 5

1. Time And Labor Expended by Lead Counsel 6

2. The Risks of the Litigation Support the Requested Fee 7

3. The Magnitude And Complexity Of The Action 9

4. The Quality Of Lead Counsel's Representation 10

5. The Requested Fee In Relation To The Settlement 11

6. Public Policy Considerations 11

7. Reaction Of The Class 12

D. Lead Plaintiff Supports The Fee 12

II. LEAD COUNSEL'S EXPENSES ARE REASONABLE AND NECESSARY 12

III. LEAD PLAINTIFF SHOULD BE AWARDED AN INCENTIVE AWARD 13

CONCLUSION 17

TABLE OF AUTHORITIES

Cases **Page(s)**

Boeing Co. v. Van Gemert,
444 U.S. 472 (1980) 2

Blum v. Stenson,
465 U.S. 886 (1984) 4

Central States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC,
504 F.3d 229 (2d Cir. 2007) 4

Christine Asia Co. v. Yun Ma,
No.15-md-2631 (CM), 2019 WL 5257534 (S.D.N.Y. Oct. 16, 2019) 5

City of Detroit v. Grinnell Corp.,
495 F.2d 448 (2d Cir. 1974) 8

City of Providence v. Aeropostale, Inc.,
No. 11 Civ. 7132 (CM), 2014 WL 1883494 (S.D.N.Y. May 9, 2014) 10

Dial Corp. v. News Corp.,
317 F.R.D. 426 (S.D.N.Y. 2016) 15-16

Fogarazzo v. Lehman Bros.,
No. 03 Civ. 5194 (SAS), 2011 WL 671745 (S.D.N.Y. Feb. 23, 2011) 10

Goldberger v. Integrated Resources, Inc.,
209 F.3d 43 (2d Cir. 2000) 2-6

Hicks v. Morgan Stanley,
No. 01 Civ. 10071 (RJH), 2005 WL 2757792 (S.D.N.Y. Oct. 24, 2005) 2

In re Adelphia Communications Corp. Securities & Derivative Litigation,
No. 03 MDL 1529 LMM, 2006 WL 3378705 (S.D.N.Y. Nov. 16, 2006) 10

In re Am. Bank Note Holographics, Inc. Securities Litigation,
127 F. Supp. 2d 418 (S.D.N.Y. 2001) 8

In re Bisys Securities Litigation,
No. 04 CIV. 3840(JSR), 2007 WL 2049726 (S.D.N.Y. July 16, 2007) 3

In re Cardizem CD Antitrust Litigation,
218 F.R.D. 508 (E.D. Mich. 2003) 15

In re China Sunergy Securities Litigation,
No. 07 Civ. 7895(DAB), 2011 WL 1899715 (S.D.N.Y. May 13, 2011) 13

In re Comverse Tech., Inc. Securities Litigation,
No. 06-CV-1825 (NGG), 2010 WL 2653354 (E.D.N.Y. June 24, 2010) 3, 5, 8, 11

In re Credit Default Swaps Antitrust Litigation,
No. 13-md-2476 (DLC), 2016 WL 2731524 (S.D.N.Y. Apr. 26, 2016) 5

In re Deutsche Telekom AG Securities Litigation.,
No. 00-CV-9475 (NRB), 2005 WL 7984326 (S.D.N.Y. June 14, 2005) 5

In re Facebook, Inc., IPO Securities & Derivative Litigation,
343 F. Supp. 3d 394 (S.D.N.Y. 2018) 3, 13

In re Facebook, Inc. IPO Securities & Derivative Litig.,
MDL No. 12-2389, 2015 WL 6971424 (S.D.N.Y. Nov. 9, 2015) 3

In re FLAG Telecom Holdings, Ltd. Securities Litigation,
No. 02- CV-3400 (CM), 2010 WL 4537550 (S.D.N.Y. Nov. 8, 2010) ....*passim*

In re Global Crossing Securities & ERISA Litigation,
225 F.R.D. 436 (S.D.N.Y. 2004) 10

In re GSE Bonds Antitrust Litigation,
No. 19-CV-1704 (JSR), 2020 WL 3250593 (S.D.N.Y. June 16, 2020) 5

In re LIBOR-Based Financial Instruments Antitrust Litigation,
No. 11 CIV. 5450, 2018 WL 3863445 (S.D.N.Y. Aug. 14, 2018) 15

In re Marsh ERISA Litigation,
265 F.R.D. 128 (S.D.N.Y. 2010) 9

In re Pfizer Inc. Shareholder Derivative Litig.,

780 F. Supp. 2d 336 (S.D.N.Y. 2011) 3-4

In re Rite Aid Corp. Securities Litigation,
362 F. Supp. 2d 587 (E.D. Pa. 2005) 5

In re Sadia S.A. Securities Litigation,
No. 08 Civ. 9528 (SAS), 2011 WL 6825235 (S.D.N.Y. Dec. 28, 2011) 4

In re WorldCom, Inc. Securities Litigation,
388 F. Supp. 2d 319 (S.D.N.Y. 2005) 12

In re Veeco Instruments Inc. Securities Litigation,
No. 05 MDL 01695 (CM), 2007 WL 4115808 (S.D.N.Y. Nov. 7, 2007) 2, 10

J.I. Case Co. v. Borak,
377 U.S. 426 (1964) 2

Maley v. Del Global Technologies Corp.,
186 F. Supp. 2d 358 (S.D.N.Y. 2002) 5

Missouri v. Jenkins,
491 U.S. 274 (1989) 4

Park v. Thomson Corp.,
633 F.Supp.2d 8 (S.D.N.Y.2009) 16

Roberts v. Texaco, Inc.,
979 F. Supp. 185 (S.D.N.Y. 1997) 15-16

Rodriguez v. West Publishing Corp.,
563 F.3d 948 (9th Cir. 2009) 16

Savoie v. Merchants Bank,
166 F.3d 456 (2d Cir. 1999) 3

Sullivan v. DB Investments, Inc.,
667 F.3d 273 (3d Cir.2011) 16

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007) 2, 11

Woburn Retirement System v. Salix Pharmaceuticals, Ltd.,
2017 WL 3579892 (S.D.N.Y. Aug. 18, 2017) 5

Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,
396 F.3d 96 (2d Cir. 2005) 3, 5

Lead Plaintiff, Funicular Funds, LP ("Lead Plaintiff" or "Funicular") and Lead Counsel, Morris Kandinov LLP ("Morris Kandinov" or "Lead Counsel"), having achieved, at a minimum, a Settlement of $13,000,000 in cash for the benefit of the Class, and potentially additional amounts yet to be determined under additional insurance coverage, respectfully submit this memorandum of law in support of their motion for (i) an award of attorneys' fees in the amount of 30% of the Settlement Fund, or $3,900,000 plus interest earned at the same rate as the Settlement Fund; (ii) payment of $507,253.50 in expenses reasonably incurred by Lead Counsel and Lead Plaintiff in prosecuting the Action; and an incentive award to Lead Plaintiff in the amount of $195,000 in recognition of its vigorous representation of the Class at its own substantial risk and expense.

PRELIMINARY STATEMENT

Lead Plaintiff and Lead Counsel successfully litigated this class action (the "Action") against fierce opposition to a $13,000,000 cash settlement on behalf of all Class A stockholders of Pioneer Merger Corp. ("Pioneer" or the "SPAC") in addition to 80% of any sums recovered under Defendants' Side A insurance coverage (as discussed below). The Settlement represents substantial and immediate compensation to the Class that avoids significant risks and delay associated with continued litigation, including the risk of no recovery at all as well as significant additional litigation and collection risks even if Lead Plaintiff were to prevail at trial. Having achieved this significant monetary recovery after litigating on a contingent basis through the pleading stage, discovery, class certification, and summary judgment briefing, Lead Plaintiff and Lead Counsel respectfully submit that this motion for an award of attorneys' fees, reimbursement of out-of-pocket expenses, and an incentive award to Lead Plaintiff in recognition of the exceptional nature of its litigation efforts on behalf of the Class.

ARGUMENT

I. LEAD COUNSEL IS ENTITLED TO AN AWARD OF REASONABLE ATTORNEYS' FEES 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 Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). Courts recognize that awarding attorneys' fees from a common fund "serve[s] to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons," and therefore "discourage future misconduct of a similar nature." *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02- CV-3400 (CM), 2010 WL 4537550, at *23 (S.D.N.Y. Nov. 8, 2010); *see In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115808, at *2 (S.D.N.Y. Nov. 7, 2007). Private securities actions, in particular, are "an essential supplement to criminal prosecutions and civil enforcement actions." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *accord Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (private securities actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action'") (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)). Upon a favorable settlement for class members, compensating Lead Counsel is essential because "[s]uch actions could not be sustained if plaintiffs' counsel were not to receive remuneration from the settlement fund for its 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).

In this case, Lead Counsel submits that the Court should award a fee of 30% of the common fund obtained. The Second Circuit has expressly approved the percentage method, recognizing that "the lodestar method proved vexing" and had resulted in "an inevitable waste of judicial

resources." *Goldberger*, 209 F.3d at 48-50 (holding that either the percentage of fund method or lodestar method may be used to determine appropriate attorneys' fees); *Savoie v. Merchants Bank*, 166 F.3d 456, 460 (2d Cir. 1999) (stating that 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 reiterated its approval of the percentage method, stating that 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," and has noted that the "trend in this Circuit is toward the percentage method." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005), *cert. denied*, 544 U.S. 1044 (2005); *see also In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 416 (S.D.N.Y. 2018), *aff'd*, 822 Fed. App'x 40 (2d Cir. 2020); *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-CV-1825 (NGG), 2010 WL 2653354, at *2 (E.D.N.Y. June 24, 2010). Lead Counsel's fee request is well supported under both the "percentage" and "lodestar" methods.

A. The Requested Fee Is Reasonable <u>Under The Percentage-Of-The-Fund Method</u>

A 30% attorney fee is well within the range of percentage fees that have been awarded in the Second Circuit in comparable class actions. *See, e.g., In re Bisys Sec. Litig.*, No. 04 CIV. 3840(JSR), 2007 WL 2049726, at *3 (S.D.N.Y. July 16, 2007) (awarding 30% of $65.87 million settlement, representing a 2.99 multiplier); *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, MDL No. 12-2389, 2015 WL 6971424, at *9-10 (S.D.N.Y. Nov. 9, 2015) (awarding 33% of $26.5 million settlement fund), *aff'd*, 674 Fed. App'x 37 (2d Cir. 2016); *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F.Supp.2d 254, 262 (S.D.N.Y.2003) (awarding fees equivalent to roughly 33% of the amount recovered); *In re Pfizer Inc. S'holder Derivative Litig.*, 780 F. Supp. 2d 336, 344 (S.D.N.Y. 2011) (awarding fees equivalent to approximately 30% of the $75 million

settlement); *In re Sadia S.A. Sec. Litig.*, No. 08 Civ. 9528 (SAS), 2011 WL 6825235, at *3 (S.D.N.Y. Dec. 28, 2011) (awarding 30% of $27 million settlement); *see also Cen. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 249 (2d Cir. 2007) (affirming district court's award of 30% of $42.5 million settlement fund).

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-representative action, the customary fee arrangement would be contingent, on a percentage basis, and typically up to 33% of the recovery. *See Blum v. Stenson*, 465 U.S. 886, 903 (1984) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.") (Brennan, J., concurring).

B. <u>The Requested Fee Is Reasonable Under the Lodestar Method</u>

To ensure the reasonableness of a fee awarded under the percentage-of-the-fund method, courts may cross-check the proposed award against counsel's calculated lodestar. *See Goldberger*, 209 F.3d at 50. Here, counsel[1] committed a total of 2031.3 hours to this Action (1938.4 of which preceded the signing of the Stipulation of Settlement). Counsel's collective lodestar, derived by multiplying the hours spent by each professional by their applicable hourly rates, is $2,306,214 and 2,216,579, respectively. The requested fee of $3,900,000 (before interest) represents a multiplier of only 1.76 and 1.69, respectively.

In complex, high-stakes and risky contingent litigation such as this Action, fees representing multiples significantly above 2x are regularly awarded to reflect the risk assumed, and outcome obtained, by counsel. *See FLAG Telecom*, 2010 WL 4537550, at *26 ("a positive

---

[1] Includes Morris Kandinov LLP and co-counsel Morrow Ni LLP (f.k.a. AFN Law PLLC).

multiplier is typically applied to the lodestar in recognition of the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors"); *Comverse*, 2010 WL 2653354, at *5 ("Where, as here, counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar"); *Wal-Mart*, 396 F.3d at 123 (upholding multiplier of 3.5 as reasonable on appeal); *Christine Asia Co. v. Yun Ma*, No.15-md-2631 (CM), 2019 WL 5257534, at *19 (S.D.N.Y. Oct. 16, 2019) (approving $62.5 million fee based on lodestar multiplier of approximately 2.15, which the Court found to be "well within the range commonly awarded in securities class actions of this complexity and magnitude"); *In re GSE Bonds Antitrust Litig.*, No. 19-CV-1704 (JSR), 2020 WL 3250593, at *5 (S.D.N.Y. June 16, 2020) ("a 4.09 multiplier is within the range of what has considered reasonable by courts"); *Woburn Ret. Sys. v. Salix Pharm., Ltd.*, 2017 WL 3579892, at *6 (S.D.N.Y. Aug. 18, 2017) (3.14 multiplier); *In re Deutsche Telekom AG Sec. Litig.*, No. 00-CV-9475 (NRB), 2005 WL 7984326, at *4 (S.D.N.Y. June 14, 2005) (3.96 multiplier); *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (awarding fee equal to a 4.65 multiplier, which was "well within the range awarded by courts in this Circuit and courts throughout the country"); *In re Credit Default Swaps Antitrust Litig.*, No. 13-md-2476 (DLC), 2016 WL 2731524, at *17 (S.D.N.Y. Apr. 26, 2016) (multiplier of "just over 6"); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589-90 (E.D. Pa. 2005) (6.96 multiplier).

C. The *Goldberger* Factors Support The Fee

In addition to the lodestar test above, the Second Circuit has set forth the following criteria that courts should consider when reviewing a request for attorneys' fees:

> (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Goldberger, 209 F.3d at 50. These factors likewise support Lead Counsel's fee request.

1. Time And Labor Expended by Lead Counsel

Lead Counsel dedicated immediate and substantial time and resources to this matter from the outset, beginning with the filing of a complaint only 15 days following Defendants' announcement that they planned to keep the Termination Fee for themselves. Thereafter, Lead Counsel successfully and efficiently advanced the rights of the Class through multiple litigation stages until settlement discussions bore fruit on the eve of argument on the parties' motions for summary judgment. As set forth in greater detail in the Declaration of Aaron T. Morris (the "Morris Decl."), Lead Counsel, among other things:

- conducted an extensive and expedited investigation of the IPO Documents, other SEC filings, press releases, media reports and other public information (¶ 8);
- drafted a detailed Consolidated Amended Class Action Complaint and then an Amended Complaint (the "Complaint") based on counsel's ongoing investigation and analysis (¶¶ 8, 13);
- briefed, argued and won Defendants' Motion to Dismiss (¶¶ 8-9, 14-15);
- briefed, argued and won Plaintiff's Motion for Class Certification (¶ 18);
- completed contentious and fast-moving discovery, including seven depositions, review and analysis of approximately 37,000 pages of documents produced by Defendants and multiple rounds of interrogatories and requests for admissions (¶ 16);
- engaged thought-leading expert consultants (Professors Rodrigues and Stegemoller) and assisted, under their direction, with research supporting their expert reports (¶ 17);
- represented Lead Plaintiff and its principal in depositions as well as the depositions of multiple non-parties (¶ 16);

- briefed, argued and successfully opposed Defendants' request for Chapter 15 recognition (¶¶ 21-28);
- coordinated extensively with Cayman Islands counsel regarding the parallel Cayman Proceedings, including assisting in briefing that successfully prevented Defendants from obtaining a ruling in the Cayman Islands before this Court had an opportunity to rule (¶¶ 21-28);
- briefed and fully prepared to argue Plaintiff's Motion for Summary Judgment as well as motions filed by the Sponsor Defendants and the SPAC Defendant (¶¶ 8-9, 19); and
- engaged in difficult multi-party settlement negotiations throughout the litigation with the Joint Official Liquidators ("JOLs") as well as the Sponsor and Individual Defendants, in an effort to obtain a favorable result for the Class without the substantial litigation and collection risks associated with proceeding to trial (¶¶ 5, 8).

Throughout the litigation, Lead Counsel, as a small firm, staffed the matter efficiently and avoided unnecessary duplication and expense. The time and effort devoted to this case by Plaintiff's Counsel was substantial and entirely necessary to obtain the result achieved in this highly contentious and uncertain litigation.

2. The Risks of the Litigation Support the Requested Fee

The Second Circuit has recognized that the risks associated with a case undertaken on a contingent fee basis 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."' *Comverse*, 2010 WL 2653354, at *5; *see also In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (it is "appropriate to take this [contingent-fee] risk into account in determining the appropriate fee to award").

While Lead Counsel always believed that the claims in this Action would prevail at trial, it also recognized that all litigation is inherently risky and uncertain. For example, Defendants vehemently denied that Plaintiff had any right to recovery and argued that it was "not a third-party beneficiary to the Sponsor Agreement and cannot enforce its terms." ECF 60 at 17. Defendants further argued that the Sponsor Agreement had been terminated by initiation of the Cayman Action and did not govern the distribution of the Termination Fee. *See* ECF 60 at 15. Further, even if the Sponsor Agreement remained in effect and Plaintiff had standing to enforce it, Defendants insisted that there had been no breach of the agreement because the Termination Fee had not been transferred to Class B shareholders. *Id* at 16. Defendants also argued that the Sponsor Agreement did not bar them from taking interest in the Termination Fee and did not create an affirmative entitlement to the Termination Fee on the part of Class A shareholders, meaning the JOLs could simply give the assets away to the Cayman Islands government. *Id*. at 13. If Defendants had prevailed on any of these arguments, the Class risked forfeiting a recovery. Finally, even in the event that Lead Plaintiff prevailed at trial, substantial risks remained that could have precluded any recovery, including the diminishing nature of the assets of the SPAC (which after trial and appeal would have been substantially reduced), the likelihood that any judgment would be challenged in the parallel Cayman Islands proceedings, and challenges collecting from the Individual Defendants in light of indemnity obligations under Cayman Islands law.

It is also worth noting that this Action presented unprecedented facts arising from the proliferation of SPACs in recent years, and thus lacked clear precedent. This fact increased the risk to Lead Counsel and further supports the requested fee. *See Mercer v. Duke Univ.*, 401 F.3d 199, 208-09 (4th Cir. 2005) (considering facts that case was "first of its kind" and would "serve as guidance" for future claims).

In the face of these uncertainties, Lead Counsel undertook this case on a contingent basis, knowing that the litigation could last for years and would require the devotion of a substantial time and resources. Lead Counsel's assumption of this risk, and tremendous effort and result, strongly supports the reasonableness of the requested fee. *See FLAG Telecom*, 2010 WL 4537550, at *27 ("Courts in the Second Circuit have recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award."); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("There was significant risk of non-payment in this case, and Plaintiff's Counsel should be rewarded for having borne and successfully overcome that risk.").

3. <u>The Magnitude And Complexity Of The Action</u>

The magnitude and complexity of this Action also support the requested fee. *FLAG Telecom*, 2010 WL 4537550, at *27; *see also City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM), 2014 WL 1883494, at *16 (S.D.N.Y. May 9, 2014) ("the complex and multifaceted subject matter involved in a securities class action such as this supports the fee request"), *aff'd*, 607 Fed. App'x 73 (2d Cir. 2015); *Fogarazzo v. Lehman Bros.*, No. 03 Civ. 5194 (SAS), 2011 WL 671745, at *3 (S.D.N.Y. Feb. 23, 2011) ("in general, securities actions are highly complex"). Here, not only were Lead Plaintiff's claims untested and subject to multiple defenses and arguments under the SPAC's contracts and governing documents, but the cross-border nature of the case and

concurrent liquidation proceedings in the Cayman Islands and Chapter 15 action made it more complex than typical domestic cases. The novel and complicated nature of the claims support award of the requested fee.

4. **The Quality Of Lead Counsel's Representation**

The quality of Lead Counsel's representation is evidenced by the litigation results. *See, e.g.*, *Veeco*, 2007 WL 4115808, at *7; *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004). Lead Counsel prevailed in effectively every skirmish throughout the litigation, and positioned the Class for a settlement that well exceeds the market's expectation for the litigation based on Pioneer's final trading price. *See* Morris Decl. at ¶ 59. The value of Lead Counsel's accomplishments is also reflected in feedback from other Class members, who have praised the litigation efforts and the proposed Settlement. See *Id.* at ¶ 68. Further, courts often take into account the quality of the opposing counsel when assessing the quality of plaintiff's counsel, and this Court should do so here. *See, e.g.*, *Veeco*, 2007 WL 4115808, at *7 (among factors supporting 30% award of attorneys' fees was that defendants were represented by "one of the country's largest law firms"); *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, No. 03 MDL 1529 LMM, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006) ("The fact that the settlements were obtained from defendants represented by 'formidable opposing counsel from some of the best defense firms in the country' also evidences the high quality of lead counsels' work"), *aff'd*, 272 F. App'x 9 (2d Cir. 2008). Defendants retained two of the top defense law firms in the country, Kirkland & Ellis LLP and DLA Piper LLP, and among the best litigators at those firms, to defend this lawsuit. ¶XX. The Court may safely assume that Lead Plaintiff and Lead Counsel met the highest level of resistance available to a potential defendant in the marketplace for attorneys.

5. The Requested Fee In Relation To The Settlement

Courts have interpreted this factor as requiring review of the fee as a percentage of the total recovery. "When determining whether a fee request is reasonable in relation to a settlement amount, 'the court compares the fee application to fees awarded in similar securities class-action settlements of comparable value.'" *Comverse*, 2010 WL 2653354, at *3. As discussed in detail in § I (A), *supra*, the requested 30% fee is well within the range that courts in the Second Circuit have awarded in comparable cases.

6. Public Policy Considerations

The Supreme Court has repeatedly recognized the value of stockholder actions as "an essential supplement to criminal prosecutions and civil enforcement actions." *Tellabs*, 551 U.S. at 313; *see also Bateman Eichler*, 472 U.S. at 310. The public policy issues in this Action were significant, and the SEC took no action. In short, Defendants proposed to turn the SPAC structure on its head by treating its operating account as a piggybank (exactly what they agreed not to do when raising money from public stockholders in the SPAC's IPO) and bargaining away the SPAC's (and, by extension, stockholders') rights to pursue specific performance and damages in exchange for a monetary payment only to Defendants. This settlement sets a valuable precedent in the market, including that: (i) SPAC managers are no different than fiduciaries of operating companies and should not be permitted to use corporate resources and assets to negotiate in favor of their own personal interests at the expense of stockholders; (ii) SPAC managers should not be permitted to renege on their contractual promises to the SPAC in the event that the SPAC fails to complete a transaction; and (iii) Class A public stockholders contribute the vast majority of capital with which the SPAC may complete a business combination, and the equity resulting from that capital should not be treated differently (much less worse than) equity holders of operating companies.

7. Reaction Of The Class

The Notice issued to Class members informed them, among other things, that Lead Counsel intended to apply to the Court for an award of attorneys' fees in an amount not to exceed 30% of the Settlement Fund and up to $600,000 in expenses. *See* Morris Decl. at ¶ 68. While the time to object to the Fee and Expense Application does not expire until May 14, 2024, no objections have been received yet. Should any objections be received subsequently, Lead Counsel will address them in its reply papers.

D. Lead Plaintiff Supports The Fee

Lead Plaintiff—the largest Pioneer stockholder and the director of this litigation from the outset—endorses Lead Counsel's request for a 30% fee. *See* Declaration of Jacob Ma-Weaver (the "Ma-Weaver Decl.") at ¶¶ 27-32. "[W]hen class counsel in a securities lawsuit have negotiated an arm's-length agreement with a sophisticated lead plaintiff possessing a large stake in the litigation, and when that lead plaintiff endorses the application following close supervision of the litigation, the court should give the terms of that agreement great weight." *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 356 (S.D.N.Y. 2005). Here, Lead Plaintiff's endorsement of the fee, given that it has the most at stake in the Class, is indicative of the strength of counsel's efforts in this litigation and the exceptional nature of the outcome obtained.

II. LEAD COUNSEL'S EXPENSES ARE REASONABLE AND NECESSARY

Lead Plaintiff and Lead Counsel likewise request that the Court award their reasonable litigation expenses incurred in fully prosecuting this Action on behalf of the Class. S*ee Facebook IPO*, 343 F. Supp. 3d at 418 (in a 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"); *In re China Sunergy Sec. Litig.*, No. 07 Civ. 7895(DAB), 2011 WL 1899715, at *6 (S.D.N.Y. May 13, 2011) (same); *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.").

As set forth in detail in the Morris Declaration, Lead Plaintiff and Lead Counsel incurred $507,253.50 of expenses based on expenditures in the following categories: Court & Service Fees, Court Reporting & Videography, Expert Consulting, Technology, Printing and eDiscovery, Travel, and Cayman Islands Counsel. ¶¶ 69-74. Lead Plaintiff and Lead Counsel were fully aware of their duty to the class to limit expenses where possible, as well as the substantial risk that the expenses would not be recoverable if Defendants prevailed in the litigation, and thus took steps to minimize expenses wherever practicable without jeopardizing the strength of the Class's claims in the Action. ¶ 70. The Notice informed Class Members that litigation expenses would not exceed $600,000, and the total amount requested is substantially below that amount and no objections have been received to date. ¶ 68.

III. LEAD PLAINTIFF SHOULD BE AWARDED AN INCENTIVE AWARD

Lead Plaintiff respectfully requests an incentive award of $195,000 based on the unique circumstances of this case and the substantial risks assumed, contributions made, by Lead Plaintiff. *See generally* Ma-Weaver Decl.

First, Lead Plaintiff has been intimately involved in this litigation from the outset, including by coordinating Lead Counsel and counsel in the Cayman Islands with respect to litigation strategy, discovery and motion practice. *See* Ma-Weaver Decl. at ¶¶ 8-19. Lead Plaintiff participated extensively in discovery, including by producing documents and providing deposition testimony, despite that it was Defendants' conduct truly at issue in this litigation, and even took the pen on legal memoranda submitted in the Action. *Id.* at ¶¶ 17-19. Lead Plaintiff also engaged directly with Defendants in connection with settlement discussions and provided substantial support and insight to Lead Counsel throughout the litigation, especially during settlement negotiations. *Id*. at ¶ 3.

Second, Lead Plaintiff advanced over $350,000 for the payment of Cayman Islands counsel (who cannot work on contingency)—at its own risk of reimbursement—to protect the interests of the Class in that forum. *Id*. at ¶ 39. Lead Plaintiff's participation in the Cayman Islands proceeding was essential to preventing the distribution of the disputed assets and the preservation of the claims advanced in this Court, which ultimately resulted in the Settlement. Lead Plaintiff realized that it was the only stockholder to volunteer for this Action and that it risked a total loss of capital expended, but it faithfully represented the Class by all means necessary through litigation to this favorable Settlement. *Id*. at ¶ 37.

Third, Lead Plaintiff assumed significant personal and business risk in a contentious litigation that (in our view, unfairly) focused on his friends, colleagues and clients to create settlement leverage. As discussed more fully in the Ma-Weaver Declaration, Lead Plaintiff chose to assume the risk of loss of business (and revenue greater than any recovery that it stood to make in this action) so as to continue to prosecute this action and ultimately obtain a recovery on behalf of all Class A stockholders. *Id*. No other stockholder (institutional or otherwise) stepped up to advance the claims of the Class (likely because of the burdens and risks of doing so), and the recovery would not have occurred but for Funicular's participation and willingness to take the risks necessary to adjudicate the Class's claims.

Under these circumstances, an incentive award of $195,000 is supported by precedent. *See, e.g,*, *Dial Corp. v. News Corp.*, 317 F.R.D. 426, 438-39 (S.D.N.Y. 2016) (noting factors to guide court in awarding incentive awards, including personal risk, time and effort, other burdens, and ultimate recovery); *See also In re W. States Wholesale Nat. Gas Antitrust Litig.*, No. 203CVS1431RCJBNW, 2019 WL 4597502, at *2 (D. Nev. Aug. 5, 2019) (granting $525,000 in incentive awards to the class representatives from a $29.25 million settlement when there were

"no objections" from the settlement class for the "payment of incentive awards"); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 536 (E.D. Mich. 2003) (granting $150,000 in incentive awards to two institutional plaintiffs); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251 (S.D. Ohio 1991) (granting $300,000 in incentive awards to class representatives); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (granting $215,000 in incentive awards to the class representatives "for their time and expenses"); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 CIV. 5450, 2018 WL 3863445, at *2 (S.D.N.Y. Aug. 14, 2018) (granting $125,000 in incentive awards to plaintiffs).

For example, In *Dial Corp*., the Court wrote that the "guiding standard in determining an incentive award is broadly stated as being the existence of special circumstances including the personal risk (if any) incurred by the plaintiff-applicant in becoming and continuing as litigant," as well as the time dedicated to the litigation and the ultimate recovery. 317 F.R.D. at 439 (quoting *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 200 (S.D.N.Y. 1997). Courts have emphasized the risks that plaintiffs incur in determining incentive awards. *See, e.g.*, *Park v. Thomson Corp.*, 633 F.Supp.2d 8, 14 (S.D.N.Y.2009) ("The amount of the incentive award is related to the personal risk incurred by the individual or any additional effort expended by the individual for the benefit of the lawsuit"); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 333 n. 65 (3d Cir.2011) (incentive awards are meant "to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation"); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (incentive awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action").

Here, while many cases involve the dispersion of risk among multiple parties, Plaintiff undertook all of the risks itself. *See, e.g.*, *Dial Corp.*, 317 F.R.D. at 439 (granting $300,000 in incentive awards to six plaintiffs). Moreover, this case was an exemplar of why institutional investors often shy away from serving as a lead plaintiff. Funicular's stake was large enough to have pursued an individual action to recover only its respective share of the Termination Fee, and such a case likely would have been less burdensome, distracting and risky. *See* Ma-Weaver Decl. at ¶¶ 34-35. Based on equitable principles, Funicular instead brought this case as a class action to benefit all public stockholders, and it dedicated hundreds of hours of time, advanced and incurred substantial expenses, and undertook significant risk to its business relationships in order to obtain the result proposed by the Settlement. *See Id*. at ¶¶ 8-19, 40-45. Such an effort is exceptional and warrants an incentive award on the high end of the scale.

In *Ingram v. The Coca-Cola Company*, the District Court awarded each of the four class representatives a $300,000 incentive award. The Court noted that the plaintiffs "directly participated in the mediation process and vigorously asserted the interests of the class... [and] *took risks, bore hardships, and made sacrifices that absent class members did not*." *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (emphasis added). In *Coca-Cola*, the plaintiffs were employees who alleged company-wide race-based discrimination. *Id*. at 698. The class representatives' participation risked their careers with the company and potential future employment. Regardless of the success of the case, the potential backlash from serving as a class representative could have outweighed any recovery. *Id.* at 701. Here too, Funicular risked its business and client relationships in order to pursue the litigation—risks that no other Class member assumed but all will reap the benefit of. *See* Ma-Weaver Decl. ¶¶ 40-45.

As a matter of policy and fundamental equity, the Court should incentivize the type of exceptional conduct by Funicular in this Action both to reward Funicular but also to incentivize other sophisticated institutional investors to consider advancing claims on a class-wide basis.

CONCLUSION

For the foregoing reasons, Lead Plaintiff and Lead Counsel respectfully request that the Court award (i) attorneys' fees of 30% of the Settlement Fund, including interest accrued at the same rate as earned by the Settlement Fund; (ii) litigation expense reimbursements of $507,253.50; and (iii) an incentive award to Lead Plaintiff of $195,000.

Date: April 30, 2024

Respectfully submitted,

____

MORRIS KANDINOV LLP
Aaron T. Morris
Andrew W. Robertson
305 Broadway, 7th Floor
New York, NY 10007
(212) 431-7473
aaron@moka.law
andrew@moka.law

AFN LAW, PLLC
Angus F. Ni
502 Second Avenue, 14th Floor
Seattle, WA 98104
(646) 453-7294
angus@moni.law