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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

HSINGCHING HSU, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

vs.

PUMA BIOTECHNOLOGY, INC., et al.,

Defendants.

Case No. 8:15-cv-00865-DOC-SHK

CLASS ACTION

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION, AN AWARD OF ATTORNEYS' FEES AND EXPENSES, AND AN AWARD TO LEAD PLAINTIFF PURSUANT TO 15 U.S.C. §78u-4(a)(4)

DATE: April 11, 2022
TIME: 8:00 a.m.
CTRM: 9D
JUDGE: Hon. David O. Carter

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

Page

Page

Page

Page

Page

Page

Page

STATUTES, RULES AND REGULATIONS

SECONDARY AUTHORITIES

Pursuant to Federal Rules of Civil Procedure 23(e) and 23(h), Lead Plaintiff Norfolk County Council, as Administering Authority of the Norfolk Pension Fund ("Lead Plaintiff"), on behalf of itself and the Class, respectfully submits this memorandum in support of its motion for: (1) final approval of the Settlement of this securities class action; (2) approval of the Plan of Allocation; (3) an award of attorneys' fees and expenses; and (4) an award to Lead Plaintiff pursuant to 15 U.S.C. §78u-4(a)(4). The terms of the Settlement are set forth in the Stipulation and Agreement of Class Action Settlement dated December 1, 2021 (the "Stipulation"). ECF No. 889.[1]

I. INTRODUCTION

The all-cash, $54,248,374 Settlement provides an unprecedented 100% of the claimed damages (including prejudgment interest) to the Class. It comes after nearly seven years of hard-fought litigation, including extensive motion practice, the completion of fact discovery, class certification, summary judgment, and a two-week jury trial that resulted in a verdict for Lead Plaintiff and the Class in February 2019. After three years of additional litigation concerning the submission and validation of claims through the post-trial claims process, and multiple years of formal and informal, arm's-length settlement negotiations between experienced counsel, the parties reached an agreement to settle the Litigation.

Lead Counsel Robbins Geller Rudman & Dowd LLP ("Robbins Geller"), who is highly experienced in prosecuting securities class actions, has concluded that the Settlement is clearly in the best interest of the Class. The Settlement represents a complete recovery of damages, plus prejudgment interest, from the validated claimants, as identified in the judgment submitted by Lead Plaintiff on September 20, 2021. *See* ECF Nos. 864, 879 (the "Judgment"). It makes no sense to incur the

[1] All capitalized terms not defined herein shall have the same meanings set forth in the Stipulation.

substantial expense, uncertainty, and delay in continuing the Litigation through Defendants' post-trial motions and appeals with no upside for the Class.

Importantly, the Settlement is fully supported by Lead Plaintiff, who is the type of institutional investor favored to serve as lead plaintiff and class representative by Congress when passing the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). *See* Declaration of Alexander Younger in Support of Settlement ("Younger Decl."), filed concurrently herewith. The reaction of the Class thus far also supports the Settlement and Plan of Allocation. Pursuant to the Court's December 29, 2021 Order Preliminarily Approving Settlement and Providing for Notice (ECF No. 890) ("Preliminary Approval Order"), Gilardi mailed 568 copies of the Notice and delivered 46 electronic copies of the Notice (for registered electronic filers) to the representatives of all Class Members who submitted a validated claim, and notice was published over the *Business Wire* and in *The Wall Street Journal*. *See* Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Objections Filed to Date ("Murray Decl."), ¶¶6-8, filed concurrently herewith. To date, there have been no objections to any aspect of the Settlement.

Claims have already been submitted, processed, and validated in accordance with the Court-approved damages formula. *See* ECF No. 778; Murray Decl., ¶4. Thus, Lead Plaintiff also requests that the Court approve the Plan of Allocation, which was set forth in the Notice sent to Class Members. Pursuant to the Plan of Allocation, each validated claimant will receive 100% of their claimed damages and prejudgment interest, less their pro rata share of any: (i) Court-awarded attorney fees, litigation expenses, and Lead Plaintiff award; (ii) settlement administration expenses; and (iii) taxes and tax expenses.

Lead Counsel also respectfully applies for an award of attorneys' fees in the amount of 25% of the Settlement Amount and litigation expenses of $2,890,129.74. Lead Counsel's fee request, approved by Lead Plaintiff (*see* Younger Decl., ¶9), is

at the 25% benchmark that courts in the Ninth Circuit consider presumptively reasonable. Moreover, it is an eminently fair and reasonable fee request based on the facts and circumstances here. The Settlement would not have been achieved without counsel's skill, dogged pursuit, and refusal to accept a lower settlement during this lengthy Litigation. Counsel expended extraordinary resources – thousands of hours and $2,890,129.74 in expenses – all without any assurance that this time or money would be recovered. The quality of Lead Counsel's representation, its efforts on behalf of the Class, and the high stakes of the case further support the requested fee award.

Finally, Lead Counsel applies for an award to Lead Plaintiff, pursuant to 15 U.S.C. §78u-4(a)(4), of $64,505 for its time and effort representing the Class. Younger Decl., ¶11. This Litigation could not have been successfully prosecuted without the substantial participation and assistance of Lead Plaintiff, which expended substantial time and effort over more than six years for the benefit of the Class, including, monitoring the Litigation, consulting with Lead Counsel, participating in discovery, and attending and testifying at trial, among other things.

II. OVERVIEW OF THE LITIGATION

A. Procedural History

This is a securities fraud class action in which plaintiffs alleged that Puma Biotechnology, Inc. and its CEO Alan H. Auerbach made false and misleading statements about the effectiveness of a drug being developed by Puma, called neratinib (or Nerlynx). *See* ECF No. 557 at 1-4. Specifically, plaintiffs alleged that Puma and Auerbach misrepresented the primary efficacy results of a large clinical trial called ExteNET on a July 2014 conference call, and that Puma shareholders suffered damages from the precipitous drops in Puma's stock price when the true ExteNET results were released in May and June 2015. *See id.*

The initial complaint was filed on June 3, 2015. ECF No. 1. In August 2015, Judge Andrew J. Guilford appointed Norfolk as Lead Plaintiff and Robbins Geller as Lead Counsel. ECF No. 55.

Lead Plaintiff filed its consolidated class action complaint in October 2015 (ECF No. 58), and the parties briefed Defendants' motion to dismiss from December 2015 to February 2016. (ECF Nos. 60, 64, 68.) On September 30, 2016, Judge Guilford denied Defendants' motion to dismiss in its entirety. ECF No. 76.

Over the course of approximately 18 months of fact and expert discovery, the parties engaged in extensive document discovery and conducted 43 depositions of various party, third-party, and expert witnesses. The Court certified the Class on December 8, 2017. ECF No. 218. The parties briefed respective motions for summary judgment from July to September 2018 (ECF Nos. 367, 372, 419, 428, 464, 468), and the Court's order on these motions was issued on October 5, 2018 (ECF No. 557).

A two-week jury trial began on January 15, 2019. On February 4, 2019, the jury returned a verdict against Defendants, finding that Puma and Auerbach knowingly misrepresented the efficacy of neratinib, in violation of §§10(b) and 20(a) of the Securities Exchange Act of 1934. ECF No. 718. The jury awarded damages of $4.50 per share for shares purchased between July 22, 2014 and May 13, 2015. *Id.*

Following the jury verdict, the parties engaged in an extensive and disputed post-trial claims process. This process ultimately resulted in the proposed Judgment submitted by Lead Plaintiff on September 20, 2021. *See* ECF Nos. 864, 879. That Judgment identified 4,455 validated claimants, with total claimed damages, including prejudgment interest, of $54,248,374.00. While the motion for entry of judgment was pending, the parties reached an agreement to settle the Litigation for the total amount of claimed damages and prejudgment interest.

B. The Settlement Agreement

The Settlement requires Defendants to pay, or cause to be paid, the Settlement Amount of $54,248,374.00 plus certain interest, into the Escrow Account. The Settlement Amount, plus accrued interest, comprises the Settlement Fund. The Settlement Amount is required to be paid in two installments. The first payment of $27,124,187.00 was made on January 10, 2022, and the second payment of $27,124,187.00 plus interest is due by June 15, 2022. Stipulation, ¶2.1. Notice to the Class and the cost of settlement administration ("Notice and Administration Expenses") will be funded by the Settlement Fund. Stipulation, ¶6.3. In accordance with the Preliminary Approval Order, the Court-appointed claims administrator, Gilardi & Co. LLC, sent the Notice of Class Action Settlement ("Notice") to representatives of all validated claimants identified in the Judgment, and published the Notice in *The Wall Street Journal* and over the *Business Wire*. Murray Decl., ¶¶6-8.[2]

Once Notice and Administration Expenses, taxes, tax expenses, and Court-approved attorneys' fees and expenses and any award to Lead Plaintiff pursuant to 15 U.S.C. §78u-4(a)(4) in connection with its representation of the Class have been paid from the Settlement Fund, the remaining amount, the Net Settlement Fund, shall be distributed on a pro rata basis to validated claimants in accordance with the damages and prejudgment interest identified in the Judgment. This means that all such Class members shall receive their full claimed damages and prejudgment interest, less their pro rata share of fees, expenses, and awards granted by the Court,

[2] In addition to identifying the Settlement Amount, the Notice informed Class Members that Lead Counsel would be moving for final approval of the Settlement and: (a) an award of attorneys' fees in the amount of 25% of the Settlement Amount; (b) payment of expenses or charges resulting from the prosecution of the Litigation not in excess of $3,100,000; and (c) an award to Lead Plaintiff pursuant to 15 U.S.C. §78u-4(a)(4) not to exceed $100,000. The Notice explained that such fees and expenses shall be paid from the Settlement Fund, and the Notice alerted validated claimants of their right to object to any of these requests.

including the remaining expenses for notice of the Settlement and distribution of the Net Settlement Fund.

In exchange for the benefits provided under the Stipulation, Class members will release any and all claims and causes of action of every nature and description, whether known or unknown, whether arising under federal, state, common, or foreign law, that Lead Plaintiff or any other members of the Class asserted or could have asserted in any forum that arise out of or are based upon: (a) the allegations, transactions, facts, matters or occurrences, representations or omissions referred to in the operative complaint; and (b) the purchase or acquisition of Puma common stock during the Class Period. Stipulation, ¶4.1.

III. THE SETTLEMENT WARRANTS FINAL APPROVAL

A. Legal Standards for Judicial Approval of Class Action Settlements

Federal Rule of Civil Procedure ("Rule") 23(e) requires judicial approval for the settlement of claims brought as a class action. The Court may approve a proposed settlement only "after a hearing and only on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Ninth Circuit recognizes a "'strong judicial policy that favors settlements, particularly where complex class action litigation is concerned.'" *In re Hyundai and Kia Fuel Econ. Litig.*, 926 F.3d 539, 556 (9th Cir. 2019);[3] *see also Young v. LG Chem Ltd.*, 783 F. App'x 727, 737 (9th Cir. 2019) (same); *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) (same). Moreover, courts should defer to "the private consensual decision of the parties" to settle and advance the "'overriding public interest in settling and quieting litigation.'" *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989) (quoting *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976)).

[3] All citations are omitted unless otherwise noted.

Rule 23(e)(2) sets forth the following factors to be considered in determining whether a settlement warrants final approval:

> (2) ***Approval of the Proposal***. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
>
> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

In addition, courts in the Ninth Circuit consider the following factors, most of which overlap with Rule 23(e)(2): "'(1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; . . . and (8) the reaction of the class members to the proposed settlement.'" *Schulein v. Petroleum Dev. Corp.*, 2015 WL 12698312, at *2 (C.D. Cal. Mar. 16, 2015) (quoting *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)). "The relative degree of importance to be attached to any particular factor . . . ." is case specific. *Officers for Just. v. Civ. Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982).

As the Ninth Circuit recently emphasized:

> Deciding whether a settlement is fair is ultimately 'an amalgam of delicate balancing, gross approximations and rough justice,' best left to the district judge, who has or can develop a firsthand grasp of the claims, the class, the evidence, and the course of the proceedings – the whole gestalt of the case. Accordingly, 'the decision to approve or reject a settlement is committed to the sound discretion of the trial judge.'

In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., and Prods. Liab. Litig., 895 F.3d 597, 611 (9th Cir. 2018). Accordingly, approval of a class action settlement will be reversed only if "the district court clearly abused its discretion." *Hyundai*, 926 F.3d at 556. Further, because "'it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements,'" courts should not convert settlement approval into an inquiry into the merits. *Herman v. Andrus Transp. Servs., Inc.*, 2018 WL 6307902, at *2 (C.D. Cal. May 30, 2018) (citing *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998)).

This Court's Preliminary Approval Order considered the Settlement to be fair, reasonable and adequate after a "preliminary review," subject to further consideration at the Settlement Hearing scheduled for April 11, 2022. ECF No. 890, ¶1. The Court's conclusion on preliminary approval is equally true now. *See In re Chrysler-Dodge-Jeep Ecodiesel® Mktg., Sales Pracs. & Prods. Liab. Litig.*, 2019 WL 2554232, at *2 (N.D. Cal. May 3, 2019) (finding that the "conclusions [made in granting preliminary approval] stand and counsel equally in favor of final approval now"); *Snyder v. Ocwen Loan Servicing, LLC*, 2019 WL 2103379, at *4 (N.D. Ill. May 14, 2019) (noting in analyzing Rule 23(e)(2) that "[s]ignificant portions of the Court's analysis remain materially unchanged from the previous order [granting preliminary approval]").

Lead Plaintiff respectfully submits that, especially in light of the fact that this case has already proceeded to verdict and a post-trial claims process, the Settlement

easily satisfies both Rule 23(e)(2) and the relevant Ninth Circuit factors and warrants approval as fair, reasonable, and adequate.

B. The Settlement Satisfies the Requirements of Rule 23(e)(2)

1. Lead Plaintiff and Its Counsel Have Adequately Represented the Class

Rule 23(e)(2)(A) asks whether the "class representatives and class counsel have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A). As explained above and in connection with preliminary approval, Lead Plaintiff and its counsel have adequately represented the Class as required by Rule 23(e)(2)(A) by diligently prosecuting this Litigation for over six years and through a successful jury verdict on behalf of the Class. Indeed, this case is one of only 15 securities fraud class actions in the last 25 years to have been litigated to a verdict. Following trial, Lead Plaintiff and its counsel also directed a contentious and heavily litigated claims process that ultimately resulted in the identification and validation of 4,455 claims with claimed damages, including prejudgment interest, totaling $54,248,374.00. In short, Lead Plaintiff and its counsel have vigorously prosecuted this case and more than adequately represented the Class. *See Hefler v. Wells Fargo & Co.*, 2018 WL 6619983, at *6 (N.D. Cal. Dec. 18, 2018) (finding, in finally approving settlement, that "Class Counsel had vigorously prosecuted this action through dispositive motion practice, extensive initial discovery, and formal mediation"), *aff'd sub nom. Hefler v. Pekoc*, 802 F. App'x 285 (9th Cir. 2020). Moreover, Lead Plaintiff shares a common interest with all Class Members in obtaining the largest possible recovery from Defendants. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011) (adequacy of representation depends on "an absence of antagonism" and "a sharing of interest" between representatives and absent class members); *see also* ECF No. 218 (in granting class certification, the Court found that Lead Plaintiff "has sufficiently shown adequacy as class representative and class counsel"). Lead Plaintiff and Lead Counsel at all times advocated for the best interests of the Class,

and the stellar result achieved is the best indication of their adequate representation. Thus, Rule 23(e)(2)(A) is satisfied.

2. The Settlement Is the Result of Good Faith, Arm's-Length Negotiations by Informed, Experienced Counsel Who Were Aware of the Risks of the Litigation

The Rule 23(e)(2)(B) factor is a procedural one, asking whether "the [settlement] proposal was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B). In the Ninth Circuit, a "'strong presumption of fairness'" attaches to a class action settlement reached through arm's-length negotiations between "experienced and well-informed counsel." *de Rommerswael on Behalf of Puma Biotechnology, Inc. v. Auerbach*, 2018 WL 6003560, at *3 (C.D. Cal. Nov. 5, 2018); *see Rodriguez*, 563 F.3d at 965 ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution . . . ."). Here, Lead Counsel not only negotiated directly with Defendants over multiple years before reaching the Settlement, but the parties also utilized an experienced mediator, Gregory P. Lindstrom of Phillips ADR, which weighs in favor of this factor. *See In re OSI Sys., Inc. Derivative Litig.*, 2017 WL 5634607, at *3 (C.D. Cal. Jan. 24, 2017) (finding settlement was result of fair negotiations when the "parties engaged in arm's length negotiations conducted by experienced counsel before a respected mediator"). In addition, "[a] settlement is presumed to be fair if reached in arms-length negotiations after relevant discovery has taken place." *Pataky v. Brigantine, Inc.*, 2018 WL 3020159, at *3 (S.D. Cal. June 18, 2018); *see also Sudunagunta v. NantKwest, Inc.*, 2019 WL 2183451, at *3 (C.D. Cal. May 13, 2019) ("'The involvement of experienced class action counsel and the fact that the settlement agreement was reached in arm's length negotiations, after relevant discovery [has] taken place create a presumption that the agreement is fair.'"). Indeed, in a case like this that has progressed through trial, "'[g]reat weight is accorded to the recommendation of counsel, who are most closely acquainted with

the facts of the underlying litigation.'" *Gribble v. Cool Transps. Inc.*, 2008 WL 5281665, at *9 (C.D. Cal. Dec. 15, 2008).

In sum, with full awareness of the total damages suffered by validated claimants and the inherent delay and risks that would come with additional litigation, Lead Plaintiff negotiated a Settlement that recovers 100% of the claimed damages, plus prejudgment interest, reflected in the Judgment.

3. The Relief Provided to the Class Is Complete

a. The Substantial Benefits for the Class, Weighed Against the Costs, Risks, and Delay of Continued Litigation, Support Final Approval

Rule 23(e)(2)(C)(i) considers the adequacy of the Settlement in light of "the costs, risks, and delay of trial and appeal" (Fed. R. Civ. P. 23(e)(2)(C)(i)), and the relevant overlapping Ninth Circuit factors address "'the strength of plaintiffs' case; [and] the risk, expense, complexity, and likely duration of further litigation.'" *Rodriguez*, 563 F.3d at 963. Since the Settlement represents the maximum allowable damages pursuant to the jury's per-share damages award, and there is no additional benefit to be gained from further litigation, these factors strongly weigh in favor of final approval. Moreover, the Settlement will expedite validated claimants' recovery for the damages they suffered by eliminating the costs, risks, and delays that would have come from Defendants' appeals. *See Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) ("'[U]nless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.'"); *Ikuseghan v. Multicare Health Sys.*, 2016 WL 3976569, at *4 (W.D. Wash. July 25, 2016) ("Absent the proposed Settlement, Class Members would likely not obtain relief, if any, for a period of years.").

b. The Method for Distributing Relief Is Effective

With respect to Rule 23(e)(2)(C)(ii), Lead Plaintiff and Lead Counsel have taken substantial efforts to insure that all validated claimants are notified about the

proposed Settlement. Pursuant to the Preliminary Approval Order, 568 copies of the Notice were mailed, and 46 electronic copies were delivered, to representatives of all the validated claimants, and the Summary Notice was published in *The Wall Street Journal* and over the *Business Wire*. Murray Decl., ¶¶6-8. Further, the Settlement-specific website – www.PumaBioSecuritiesLitigation.com – was updated to include the Notice and additional information about when and how any objection to the Settlement can be made.

Claims have already been processed in accordance with the Court-approved damages formula and all validated claimants identified, making administration of the Settlement very straightforward. *See* ECF No. 778. Following final approval of the Settlement and resolution of attorneys' fees and expenses, the Lead Plaintiff's 15 U.S.C. §78u-4(a)(4) award, and objections, if any, the Claims Administrator will only need to distribute to validated claimants their calculated damages and prejudgment interest, less any awarded fees and expenses (which will be deducted on a pro rata basis). Thus, this factor supports final approval for the same reason that it supported preliminary approval.

c. Attorneys' Fees

Rule 23(e)(2)(C)(iii) addresses "the terms of any proposed award of attorney's fees, including timing of payment." As further discussed below (§§VI, VII, *infra*), Lead Counsel seeks an award of attorneys' fees of 25% of the Settlement Amount and expenses of $2,890,129.74. This fee request is relatively modest in light of the result achieved and squarely in line with the Ninth Circuit benchmark. It is thus presumptively reasonable. *See, e.g.*, *Staton v. Boeing Co.*, 327 F.3d 938, 968 (9th Cir. 2003) ("'This circuit has established 25% of the common fund as a benchmark award for attorney fees.'").

In addition, the Stipulation (¶5.2) provides that any award of fees and expenses be paid to Lead Counsel at the time of the Effective Date, *i.e.*, after the Court's Settlement Judgment has become final.

4. The Damages Formula Was Already Approved by the Court and All Class Members Have Been Treated Equitably

Rule 23(e)(2)(D) asks whether the proposal to distribute settlement funds treats class members equitably relative to each other. Here, the damages formula was already approved by Judge Guilford in accordance with the Notice of Verdict. ECF No. 778. All Class members already had an opportunity to submit a claim (or opt out of the Litigation in accordance with the Notice of Pendency) and as reflected in the Judgment, all validated claimants have been treated equitably. *See Ciuffitelli v. Deloitte & Touche LLP*, 2019 WL 1441634, at *18 (D. Or. Mar. 19, 2019) (finding "[t]he Proposed Settlement does not provide preferential treatment to Plaintiffs or segments of the class" where "the proposed Plan of Allocation compensates all Class Members and Class Representatives equally in that they will receive a *pro rata* distribution based of the Settlement Fund based on their net losses"); *see also In re Extreme Networks, Inc. Sec. Litig.*, 2019 WL 3290770, at *8 (N.D. Cal. July 22, 2019) ("Under the Agreement, class members who have submitted timely claims will receive payments on a *pro rata* basis based on the value of their original claim and the number of claims filed. In granting preliminary approval, the Court found that this proposed allocation did not constitute improper preferential treatment. The Court adheres to its view that the allocation plan is equitable.").

C. The Remaining Ninth Circuit Factors Are Satisfied

1. The Extent of Discovery Completed and the Stage of the Proceedings at Which the Settlement Was Achieved Strongly Supports Preliminary Approval

Given that fact and expert discovery were completed and the case was tried to a jury verdict, the stage of the proceedings at which the Settlement was achieved strongly supports approval of the Settlement. *See Kmiec v. Powerwave Techs., Inc.*, 2016 WL 5938709, at *4 (C.D. Cal. July 11, 2016) ("[T]he fact that the parties did not settle until after the conclusion of fact discovery indicates that Plaintiffs were well aware of the merits of their case and the difficulties awaiting them at trial.").

2. Risk of Maintaining Class Action Status Through Trial

Because this case was taken through trial as a certified class action, this factor is inapplicable.

3. Experience and Views of Counsel

The opinion of experienced counsel supporting a class settlement after arm's-length negotiations is entitled to considerable weight. *Norris v. Mazzola*, 2017 WL 6493091, at *8 (N.D. Cal. Dec. 19, 2017); *see also Hefler*, 2018 WL 6619983, at *9 ("That counsel advocate in favor of this Settlement weighs in favor of its approval."); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) ("[T]he fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight."), *aff'd*, 661 F.2d 939 (9th Cir. 1981). Indeed, in a case like this which has progressed to trial, "'[g]reat weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.'" *Gribble*, 2008 WL 5281665, at *9. Lead Counsel has significant experience in securities and other complex class action litigation and has negotiated numerous other substantial class action settlements throughout the country. *See* www.rgrdlaw.com. Here, "[t]here is nothing to counter the presumption that Lead Counsel's recommendation is reasonable." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008).

Since being appointed, Lead Plaintiff actively litigated this case through trial and the post-trial claims process. By the time this Settlement was reached, Lead Counsel had a complete understanding of the value of the claims and potential for further risks and delays to recovering damages for validated claimants.

4. The Reaction of Class Members to the Settlement

The reaction of the Class to the Settlement also supports approving the Settlement. *See In re Wells Fargo Collateral Prot. Ins. Litig.*, 2019 WL 6219875, at *4 (C.D. Cal. Nov. 4, 2019) ("This small percentage [of opt outs and objections]

shows a positive class reaction to the settlement agreement and further supports a finding that the settlement is fair, reasonable, and adequate."); *Omnivision*, 559 F. Supp. 2d at 1043 ("'[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members.'"). As explained above and in the Murray Declaration (¶¶6-8), Gilardi disseminated the Notice by mail and electronically and published the Summary Notice. The deadline to object to any aspect of the Settlement is March 21, 2022. To date, no objections have been received. *Id.*, ¶10; *see also Morgan v. Childtime Childcare, Inc.*, 2020 WL 218515, at *2 (C.D. Cal. Jan. 6, 2020) ("Lack of objection speaks volumes for a positive class reaction to the settlement."). Lead Plaintiff will address objections, if any, in its reply.

In sum, each relevant factor identified under Rule 23(e)(2) and by the Ninth Circuit is satisfied. The Settlement is fair, adequate, and reasonable, and the Court should grant final approval.

IV. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

Lead Plaintiff also seeks approval of the Plan of Allocation, which directly tracks the jury's $4.50 per share damages award and the Court-approved claims process and damages formula. *See* ECF No. 778. Assessment of a plan of allocation of settlement proceeds is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair and reasonable. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1284 (9th Cir. 1992); *In re Amgen Inc. Sec. Litig.*, 2016 WL 10571773, at *7 (C.D. Cal. Oct. 25, 2016). An allocation formula need only have a """reasonable, rational basis, particularly if recommended by experienced and competent counsel."""" *Vinh Nguyen v. Radient Pharms. Corp.*, 2014 WL 1802293, at *5 (C.D. Cal. May 6, 2014). "A plan of allocation that reimburses class members based on the extent of their injuries is generally

reasonable." *In re Oracle Sec. Litig.*, 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994).

The Plan of Allocation here provides an equitable basis to allocate the Settlement Fund among all validated claimants. Indeed, claims have already been submitted, processed, and validated through the Court-approved, post-trial claims process, which identified 4,455 validated claimants, with total claimed damages, including prejudgment interest, of $54,248,374.00. Pursuant to the Settlement and Plan of Allocation, which was explained in the Notice sent to Class Members, each validated claimant will receive 100% of their claimed damages and prejudgment interest, less their pro rata share of any: (i) Court-awarded attorney fees, litigation expenses, and Lead Plaintiff award; (ii) settlement administration expenses; and (iii) taxes and tax expenses. As a result, the Plan of Allocation will result in a fair distribution of the available proceeds among Class Members who submitted valid claims. There have been no objections to the Plan of Allocation.

V. NOTICE TO THE VALIDATED CLAIMANTS SATISFIES DUE PROCESS

Lead Plaintiff has provided the Class with adequate notice of the Settlement. Here, a Notice of Verdict had already been served on all Class members following the jury trial. ECF Nos. 778, 800. Pursuant to the Notice of Verdict, Class members were directed to submit claims by January 28, 2020, and notified that if they did not submit a validated claim, "you will not recover anything, but you will be bound by any judgments entered by the Court. You may not opt out of this action." ECF No. 749-1 at 3. Following the Settlement, and in accordance with the Preliminary Approval Order, the Claims Administrator disseminated the Notice by mail and electronically. *See* Murray Decl., ¶¶6-7. In addition, the Court-approved summary Notice was published in the national edition of *The Wall Street Journal*, and published electronically over the *Business Wire*. *Id.*, ¶8. The Claims Administrator also provided all information regarding the Settlement online through the Settlement

website. *Id*. This method of giving notice, previously approved by the Court, is appropriate because it directs notice in a "reasonable manner to all class members who would be bound by the propos[ed judgment]." Fed. R. Civ. P. 23(e)(1)(B).

The Notice also provided the necessary information for Class Members to make an informed decision regarding the proposed Settlement, as required by the PSLRA. *See* 15 U.S.C. §78u-4(a)(7). The Notice was sufficient because it """generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.""" *Rodriguez*, 563 F.3d at 962; *see also In re Wireless Facilities, Inc. Sec. Litig.*, 253 F.R.D. 630, 636 (S.D. Cal. 2008). Specifically, in accordance with the state of the case and information previously provided in the Notice of Verdict, the Notice described the proposed Settlement, the reason the parties have proposed the Settlement, the amount of the Settlement Fund, the estimated average distribution per damaged share, the maximum amount of attorneys' fees and expenses that Lead Counsel intend to seek in connection with final Settlement approval, the maximum amount Lead Plaintiff will request pursuant to 15 U.S.C. §78u-4(a)(4) in connection with its representation of the Class, the deadline to file an objection, and the date, time, and place of the Settlement Hearing. The content of the Notice and summary Notice were "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

In addition, Rule 23(h)(1) requires that "[n]otice of the motion [for attorneys' fees] must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner." The Notice satisfied the requirements of Rule 23(h)(1), as it notified validated claimants – the only parties with an interest in and right to object to the proposed fee and expense awards – that Lead Counsel will apply to the Court for an award of attorneys' fees of 25% of the Settlement Amount

and litigation expenses not to exceed $3,100,000, to be paid from the Settlement Fund. The Notice also noted the application for an award of no more than $100,000 to Lead Plaintiff pursuant to 15 U.S.C. §78u-4(a)(4) in connection with its representation of the Class.

In sum, the notice program used in connection with the Settlement was the "best notice practicable under the circumstances" (*see* Preliminary Approval Order, ¶4), and complied with the Court's Preliminary Approval Order, Federal Rule of Civil Procedure 23, the PSLRA, and due process. *See, e.g.*, *Hayes v. Magna Chip Semiconductor Corp.*, 2016 WL 6902856, at *4-*5 (N.D. Cal. Nov. 21, 2016).

VI. AWARD OF ATTORNEYS' FEES

Lead Counsel seeks 25% of the Settlement Fund as its reasonable attorneys' fees for its efforts in creating a $54,248,374 common fund for the benefit of the Class. The percentage-of-the-fund method of awarding fees is the prevailing method for awarding fees in common fund cases in this Circuit and throughout the United States. As further detailed below, Lead Counsel's request for 25% is reasonable compensation for its extensive efforts in prosecuting this Litigation, and is the benchmark rate for percentage fees in common fund cases in the Ninth Circuit.

A. A Reasonable Percentage of the Fund Is the Appropriate Method for Awarding Attorneys' Fees

The Supreme Court has 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). Similarly, the Ninth Circuit has long acknowledged that "a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees." *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *accord In re NCAA Grant-in-Aid Cap Antitrust Litig.*, 768 Fed. Appx. 651, 653 (9th Cir. 2019). Courts recognize that awards of fair

attorneys' fees from a common fund are important to incentivizing attorneys to represent class clients, who might otherwise be denied access to counsel, particularly on a contingency basis. *See Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 741 (9th Cir. 2016). An award of fair attorney fees in securities class actions thus serves the public interest; as the Supreme Court has emphasized, private securities actions such as this one are "an essential supplement to criminal prosecutions and civil enforcement actions" brought by the U.S. Securities and Exchange Commission. *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313 (2007).

While courts have the discretion to employ either a percentage-of-recovery or lodestar method in determining an attorneys' fee award, "[t]he use of the percentage-of-the-fund method in common-fund cases is the prevailing practice in the Ninth Circuit for awarding attorneys' fees and permits the Court to focus on a showing that a fund conferring benefits on a class was created through the efforts of plaintiffs' counsel." *In re Korean Air Lines Co., Antitrust Litig.*, 2013 WL 7985367, at *1 (C.D. Cal. Dec. 23, 2013); *see also Omnivision*, 559 F. Supp. 2d at 1046 ("use of the percentage method in common fund cases appears to be dominant"). That is, the Ninth Circuit has expressly and consistently approved the use of the percentage method in common fund cases. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-48 (9th Cir. 2002); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376-77 (9th Cir. 1993); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989). Other circuits are in accord.

The PSLRA also authorizes courts to award attorneys' fees and expenses to counsel for the plaintiff class provided the award does not exceed "a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." 15 U.S.C. §78u-4(a)(6); *see also In re Am. Apparel, Inc. S'holder Litig.*, 2014 WL 10212865, at *20 (C.D. Cal. July 28, 2014) ("'Congress plainly contemplated that percentage-of-recovery would be the primary measure of attorneys' fees awards in federal securities class actions.'"); *In re Rite Aid Corp. Sec.*

Litig., 396 F.3d 294, 300 (3d Cir. 2005) ("[T]he percentage-of-recovery method was incorporated in the [PSLRA].").

The percentage-of-recovery method is particularly appropriate in common fund cases like this because "the benefit to the class is easily quantified." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011); *see also Glass v. UBS Fin. Servs., Inc.*, 331 F. App'x 452, 456-57 (9th Cir. 2009) (overruling objection based on use of percentage-of-the-fund approach); *In re Galena Biopharma, Inc. Sec. Litig.*, 2016 WL 3457165, at *5 (D. Or. June 24, 2016) (percentage-of-recovery method preferred over lodestar method in cash settlement). Among other benefits, the percentage-of-recovery method decreases the burden imposed on courts by eliminating a detailed and "more time-consuming" lodestar analysis. *Bluetooth*, 654 F.3d at 942; *Lopez v. Youngblood*, 2011 WL 10483569, at *4 (E.D. Cal. Sept. 2, 2011) ("'in practice, the lodestar method is difficult to apply [and] time consuming to administer'") (quoting *Manual for Complex Litigation* §14.121 (4th ed. 2004)). It is also consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated by a percentage of the recovery. *See Radient*, 2014 WL 1802293, at *9. Lastly, awarding a percentage-of-recovery as fees more closely aligns "the lawyers' interests with achieving the highest award for the class members" in the shortest amount of time. *Id.*; *see also* Charles Silver, *Due Process and the Lodestar Method: You Can't Get There from Here*, 74 Tul. L. Rev. 1809, at 1819-20 (2000) ("The consensus that the contingent percentage approach creates a closer harmony of interests between class counsel and absent plaintiffs than the lodestar method is strikingly broad. It includes leading academics, researchers at the RAND Institute for Civil Justice, and many judges. . . . Indeed, it is difficult to find anyone who contends otherwise.").

Here, at the time they retained Lead Counsel, Lead Plaintiff negotiated a 25% fee agreement carefully designed to maximize the Class' ***net*** recovery and align Lead Counsel's interests with those of the Class. *See* Younger Decl., ¶9. In enacting the

PSLRA, Congress believed that institutions with significant financial stakes in the outcome of securities class actions would be well positioned to select counsel and optimize the prosecution of the case and the recovery to the class. *In re Cendant Corp. Litig.*, 264 F.3d 201, 220 (3d Cir. 2001). That is precisely what happened here. The fee structure negotiated *ex ante* by Lead Plaintiff – a large, sophisticated institution with a substantial stake in the litigation – achieved its objective: Lead Counsel aggressively litigated this case through trial and obtained a substantial recovery for the Class. *Cf Hatamian v. Advanced Micro Devices, Inc.*, 2018 WL 8950656, at *2 (N.D. Cal. Mar. 2, 2018) (approving 25% fee where request had been "reviewed and approved as fair and reasonable by Class Representatives, sophisticated institutional investors that were directly involved in the prosecution and resolution of the Action and who have a substantial interest in ensuring that any fees paid to plaintiffs' counsel are duly earned and not excessive").

B. The Court Should Approve a 25% Fee in This Case

Courts in the Ninth Circuit "typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award." *Bluetooth*, 654 F.3d at 942; *see also Graulty*, 886 F.2d 268 at 73; *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) ("In *Graulty*, we established 25 percent of the fund as the 'benchmark' award that should be given in common fund cases."); *Hilsley v. Ocean Spray Cranberries, Inc.*, 2020 WL 520616, at *7 (S.D. Cal. Jan. 31, 2020) ("[T]he 'benchmark' for attorneys' fees in the Ninth Circuit is typically 25% of the common fund[.]"). Because Lead Counsel's request for attorneys' fees is precisely at the 25% benchmark, it is "presumptively reasonable." *See Baird v. BlackRock Institutional Tr. Co., N.A.*, 2021 WL 5113030, at *7 (N.D. Cal. Nov. 3, 2021); *Austin v. Foodliner, Inc.*, 2019 WL 2077851, at *7 (N.D. Cal. May 10, 2019) ("[T]he 25% requested [fee] is the federal law benchmark and is thus presumptively reasonable."). Moreover, application of the other factors that courts in this Circuit consider when determining whether a fee is fair also strongly support the reasonableness of the

requested fee. These factors include, *inter alia*: (1) the results achieved; (2) the risks of litigation; (3) the skill required and quality of work; (4) the contingent nature of the fee and financial burden carried by the plaintiffs; (5) awards made in similar cases; and (6) the reaction of the class. *See Vizcaino*, 290 F.3d at 1048-50.

1. Lead Counsel Achieved an Excellent Result for the Class

Courts have consistently recognized that the result achieved is "the most critical factor" to consider in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). Here, the over $54 million cash recovery is an excellent result for the Class. The recovery is certain and has been obtained through the considerable efforts of Lead Counsel, and avoids the expense and delay of continued litigation. *See* §III.C., *supra*. This achievement was the result of Lead Counsel's vigorous prosecution, from the investigation and filing of the consolidated complaint all the way through trial and the contested post-trial claims process. The result achieved here is also extremely rare – as the successful verdict that Lead Counsel obtained on behalf of the Class is only the 15th verdict in a securities fraud class action since the passage of the PSLRA in 1995. *Cf. Omnivision*, 559 F. Supp. 2d at 1047 (by 2008, "Plaintiffs ha[d] won only three of eleven such cases to reach verdicts since 1996"). The Settlement is also a significant financial recovery that compares well to other similar securities class action settlements. The $54 million recovery is well above the median securities class action settlement values over the last ten years, which range from $7 million to $13 million.[4] 2021 NERA Study, Figure 15 at 17; *Omnivision*, 559 F. Supp. 2d at 1042 (finding that settlement amount was reasonable in part because it was "higher than the median percentage of investor losses recovered in recent shareholder class action settlements"). Moreover, the Settlement reflects an unprecedented 100% of the total claimed damages from the validated

[4] This figure excludes settlements over $1 billion.

claimants, plus prejudgment interest, and thereby represents the maximum allowable damages pursuant to the jury's per-share damages award. This outstanding result obtained for the Class here supports Lead Counsel's relatively modest fee request and merits an appropriate fee that encourages counsel to seek excellent results.

2. The Litigation Was Highly Risky and Complex

The risks of the Litigation, as well as the complexity and difficulty of the issues presented, are also important factors in determining a fee award. *See In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (holding fees justified "because of the complexity of the issues and the risks"); *see also Vizcaino*, 290 F.3d at 1048 ("Risk is a relevant circumstance."). "'[I]n general, securities actions are highly complex and . . . securities class litigation is notably difficult and notoriously uncertain.'" *Hefler*, 2018 WL 6619983, at *13. Moreover, "securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA." *In re Ikon Off. Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000). Indeed, "[t]o be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action." *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009). Despite their ultimate success, Lead Counsel here overcame significant risks, complexities, and uncertainties at every procedural step of this Litigation.

3. The Skill Required and Quality of Work

The quality of Lead Counsel's representation further supports the reasonableness of the requested fee. Not only did Lead Counsel successfully litigate this case through dispositive motions and trial, but it also warded off Defendants' repeated attempts to further delay and limit the Class' recovery through the post-trial claims process – ultimately recovering 100% of the per-share damages awarded by the jury for validated claimants. *See, e.g.*, ECF Nos. 749, 776, 807, 825, 839, 858, 864. This case involved unique and complex issues, which were successfully prosecuted and managed by Lead Counsel. *Omnivision*, 559 F. Supp. 2d at 1047

("'Prosecution and management of a complex national class action requires unique legal skills and abilities.'"). Moreover, Robbins Geller is a nationally recognized leader in securities class actions and complex litigation. *See* www.rgrdlaw.com. The firm has a track record of trying cases, or settling cases at a premium on the eve of trial, and clients retain Robbins Geller to benefit from its experience and resources in order to obtain the largest possible recovery for the Class.

The quality of Lead Counsel's work is also reflected in the fact that Defendants were represented by one of the largest defense firms in the world, Latham & Watkins LLP, who vigorously contested each element of Lead Plaintiff's claims throughout the course of the Litigation. Courts recognize that the quality of opposing counsel should be considered in assessing the requested fee. *See, e.g.*, *Wing v. Asarco Inc.*, 114 F.3d 986, 989 (9th Cir. 1997) (affirming fee award and noting that the court's evaluation of class counsel's work considered "the quality of opposition counsel and [defendant's] record of success in this type of litigation"). Lead Counsel's ability to obtain a favorable result for the Class while litigating against a powerful defense firm further evidences the quality of Lead Counsel's work and weighs in favor of awarding the requested fee.

4. The Contingent Nature of the Fee and the Financial Burden Carried by Lead Counsel

Determination of a fair attorneys' fee must include consideration of the contingent nature of the fee and the difficulties that were overcome in obtaining the settlement:

> 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 whether they win or lose.

In re Wash. Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1299 (9th Cir. 1994); *see also Stanger*, 812 F.3d at 741 ("Risk multipliers incentivize attorneys to represent class clients, who might otherwise be denied access to counsel, on a contingency basis. This incentive is especially important in securities cases."). For this reason, "[c]ourts 'routinely' enhance multipliers to reflect the risk of non-payment in common fund cases." *van Wingerden v. Cadiz, Inc.*, 2017 WL 5565263, at *13 (C.D. Cal. Feb. 8, 2017) (citing *Vizcaino*, 290 F.3d at 1051).

The risk of no recovery for a class and its counsel in complex cases of this type is very real. There are numerous examples of class actions in which plaintiffs' counsel expended thousands of hours and yet received no remuneration despite their diligence and expertise. For example, in *In re Oracle Corp. Sec. Litig.*, a case that Lead Counsel prosecuted, the court granted summary judgment to defendants after eight years of litigation, after plaintiff's counsel incurred over $7 million in expenses, and worked over 100,000 hours. 2009 WL 1709050 (N.D. Cal. June 19, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010). In another Ninth Circuit PSLRA case, after a lengthy trial involving securities claims against JDS Uniphase Corporation, the jury reached a verdict in defendants' favor. *See In re JDS Uniphase Corp. Sec. Litig.*, 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007).

Because the fee in this matter was entirely contingent, the only certainty was that there would be no fee without a successful result and that such a result would be realized only after considerable effort. Nevertheless, Robbins Geller committed thousands of hours and $2,890,129.74 to vigorously and successfully prosecute this action for the Class' benefit.[5] The contingent nature of counsel's representation supports approval of the requested fee.

[5] *See* Declaration of Tor Gronborg in Support of Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation, an Award of Attorneys' Fees and Expenses, and an Award to Lead Plaintiff Pursuant to 15 U.S.C. §78u-4(a)(4), ¶¶12-16, filed herewith; Declaration of Tor Gronborg Filed on

5. The Requested Fee Award Is Below the Range Awarded in Similar Complex, Contingent Litigation

As discussed above, Lead Counsel's request for 25% of the common fund is the "benchmark award for attorney fees" in the Ninth Circuit. *Staton*, 327 F.3d at 968. Further evidencing the reasonableness of the fee, however, Lead Counsel's requested fee is actually ***below*** the range of similar common fund class action settlements, where courts have adjusted the fee above the 25% benchmark based on appropriate factors that are present here. *See, e.g.*, *Childtime Childcare*, 2020 WL 218515, at *4 (adjusting fee award to "just under 33.3% of the total settlement amount"); *Jimenez v. O'Reilly Automotive Inc.*, 2018 WL 6137591, at *3 (C.D. Cal. June 18, 2018) (upward departure from the 25% benchmark to a 33.33% award was justified because of "complicated nature" of the case); *Figueroa v. Allied Bldg. Prods. Corp.*, 2018 WL 4860034, at *3 (C.D. Cal. Sept. 24, 2018) (awarding 33% fee award in complex class action wage and hour case). In fact, "in most common fund cases, the award exceeds that benchmark." *Omnivision*, 559 F. Supp. 2d at 1047-48 (citing *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377-78 (N.D. Cal. 1989) (surveying securities cases nationwide and noting, "This court's review of recent reported cases discloses that nearly all common fund awards range around 30% . . . ."); *Ikon*, 194 F.R.D. at 194 ("The median in class actions is approximately twenty-five percent, but awards of thirty percent are not uncommon in securities class actions.")).

Indeed, the Ninth Circuit and numerous district courts have repeatedly approved awards of fees in excess of 25% in securities and other complex class action cases. *See Schulein*, 2015 WL 12698312, at *6 (awarding attorneys' fees in the amount of 30% of a $37.5 million cash settlement in class action merger case); *Morris v. Lifescan, Inc.*, 54 F. App'x 663, 664 (9th Cir. 2003) (affirming attorneys'

Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("RGRD Decl."), filed herewith.

fee award of 33% of a $14.8 million cash settlement in consumer class action); *Pac. Enters.*, 47 F.3d at 379 (approving a fee award of one-third of a $12 million settlement fund in derivative and securities class actions); *NECA-IBEW Pension Tr. Fund, et al. v. Precision Castparts Corp., et al.*, No. 3:16-cv-01756-YY, slip op. at 4 (D. Or. May 7, 2021) (ECF No. 169) (awarded 33-1/3% of $21 million recovery); *In re Tezos Sec. Litig.*, No. 3:17-cv-06779-RS, slip op. at 2 (N.D. Cal. Aug. 28, 2020) (ECF No. 262) (awarded one-third of $25 million recovery); *In re Banc of Cal. Sec. Litig.*, No. 8:17-cv-00118 DMG (DFMx), slip op. at 1 (C.D. Cal. Mar. 16, 2020) (ECF No. 613) (awarded 33% of $19.75 million recovery); *Boyd v. Bank of Am. Corp.*, 2014 WL 6473804, at *10 (C.D. Cal. Nov. 18, 2014) (awarding one-third of $5,800,000 in FLSA case); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482,491-92 (E.D. Cal. 2010) (awarding 33.3% of the net settlement amount); *Singer v. Becton Dickinson & Co.*, 2010 WL 2196104, at *8 (S.D. Cal. June 1, 2010) (same); *In re Heritage Bond Litig.*, 2005 WL 1594389, at *9 (C.D. Cal. June 10, 2005) (awarding one-third of a $27.78 million settlement fund in securities class action); *see also Tawfilis v. Allergan, Inc.*, 2018 WL 4849716, at *7 (C.D. Cal. Aug. 27, 2018) (awarding one-third of $13.45 million settlement fund in antitrust class action).

Here, Lead Counsel obtained the $54 million Settlement after nearly seven years of highly-contested litigation and a successful jury verdict. The Settlement is a truly remarkable result, obtained through the skill and determination of Lead Counsel and the quality of its work. The fee award Lead Counsel seeks is consistent with the exceptional result and supported by, if not below, the percentages awarded in many similar securities class action cases in the Ninth Circuit.

6. The Class' Reaction to Date Supports the Fee Request

District courts in the Ninth Circuit also consider the reaction of the class when deciding whether to award the requested fee. *In re Wireless Facilities, Inc. Sec. Litig. II*, 2008 U.S. Dist. LEXIS 128674, at *23 (S.D. Cal. Dec. 19, 2008) ("The lack

of objections from potential claimants favors awarding Lead Counsel the requested amount of attorneys' fees."); *Heritage Bond*, 2005 WL 1594389, at *15 ("The presence or absence of objections . . . is also a factor in determining the proper fee award."). While a certain number of objections are to be expected in a large class action such as this, "the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *DIRECTV*, 221 F.R.D. at 529; *Hefler*, 2018 WL 6619983, at *15 ("As with the Settlement itself, the lack of objections from institutional investors 'who presumably had the means, the motive, and the sophistication to raise objections' [to the attorneys' fee] weighs in favor of approval.").

Class Members were informed in the Notice that Lead Counsel would move the Court for an award of attorneys' fees in an amount of 25% of the Settlement Amount and for payment of litigation expenses not to exceed $3,100,000. Class members were also advised of their right to object to the fee and expense request, and that such objections are required to be filed with the Court no later than March 21, 2022. While the deadline to object to the fee and expense application has not yet expired, to date, not a single objection has been received. Should any objections be received, Lead Counsel will address them in its reply papers. Finally, Lead Plaintiff supports Lead Counsel's fee and expense request, a fact weighing in favor of approval. Younger Decl., ¶9.

VII. LEAD COUNSEL'S LITIGATION EXPENSES ARE REASONABLE

Lead Counsel also requests an award of its litigation expenses in the amount of $2,890,129.74 incurred in prosecuting and resolving the action on behalf of the Class. RGRD Decl., Ex. A. Attorneys who create a common fund for the benefit of a class are entitled to an award of their expenses incurred in creating the fund so long as the submitted expenses are reasonable, necessary, and directly related to the

prosecution of the action. *See Omnivision*, 559 F. Supp. 2d at 1048 ("Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters."); *In re Broadcom Corp. Sec. Litig*, 2005 WL 8153006, at *8 (C.D. Cal. Sept. 12, 2005) (awarding $3.7 million in expenses accrued during four-year litigation); *In re Allergan, Inc. Proxy Violation Sec. Litig*, No. 8:14-cv-02004-DOC-KES, slip op. at 2 (C.D. Cal. Aug. 14, 2018) (ECF No. 637) (awarding $6.2 million in litigation costs); *Smilovits v. First Solar, Inc.*, 2020 WL 3636773, at *2 (D. Ariz. June 30, 2020) (awarding lead counsel $5.2 million in litigation costs).

From the outset, Lead Counsel was aware that it might not recover any of its expenses or, at the very least, would not recover anything until the action was successfully resolved. Lead Counsel also understood that, even if the case was ultimately successful, payment of its expenses would not compensate it for the lost use of funds advanced to prosecute the action. Thus, Lead Counsel was motivated to, and did, take significant steps to minimize expenses wherever practicable without jeopardizing the vigorous and efficient prosecution of the action.

Lead Counsel's litigation expenses are detailed in the accompanying Robbins Geller fee and expense declaration setting forth the specific categories of expenses incurred and the amounts. RGRD Decl., ¶¶4-5. These expenses were necessarily incurred in this Litigation and are the type of expenses routinely charged to clients billed by the hour. These include expenses associated with, among other things, experts and consultants, service of process, online legal and factual research, travel, and mediation. *Id.*; *see, e.g.*, *Vincent v. Reser*, 2013 WL 621865, at *5 (N.D. Cal. Feb. 19, 2013) (granting award of costs and expenses for "'three experts and the mediator, photocopying and mailing expenses, travel expenses, and other reasonable litigation related expenses'"); *Knight v. Red Door Salons, Inc.*, 2009 WL 248367, at *7 (N.D. Cal. Feb. 2, 2009) (granting expense award because "[a]ttorneys routinely bill clients for all of these expenses").

A large component of Lead Counsel's expenses is for the costs of experts and consultants, all of whom were qualified and necessary to litigate this action. The RGRD Declaration explains each consultant's qualifications and their role in the Litigation. *See* RGRD Decl., ¶5.

The expenses also include the costs of online research. These are the charges for computerized factual and legal research services such as *LexisNexis*, *Westlaw*, and PACER. It is standard practice for attorneys to use these resources to assist them in researching legal and factual issues, and, indeed, these tools create efficiencies in litigation and, ultimately, save clients and the class money. *See id.*

The Notice informed potential Class Members that Lead Counsel would apply for payment of litigation expenses in an amount not to exceed $3,100,000. *See* Murray Decl., Ex. A. The amount of expenses for which payment is now sought is $2,890,129.74 and to date, no Class Member has objected.

VIII. LEAD PLAINTIFF'S REQUEST FOR AN AWARD PURSUANT TO 15 U.S.C. §78u-4(a)(4) IS REASONABLE

Lead Plaintiff seeks an award of $64,505 pursuant to 15 U.S.C. §78u-4(a)(4) for its time and effort in connection with its direct representation of the Class, as detailed in the accompanying Younger Declaration. Under the PSLRA, a class representative may seek an award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class. *See* 15 U.S.C. §78u-4(a)(4); *see also Staton*, 327 F.3d at 977 (holding that named plaintiffs are eligible for "reasonable" payments as part of a class action settlement).

When evaluating the reasonableness of a lead plaintiff award, courts may consider factors such as "'the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . the amount of time and effort the plaintiff expended in pursuing the litigation'" among others. *Id.* As detailed in the Younger Declaration, Lead Plaintiff devoted significant time and effort monitoring the Litigation and overseeing the actions of

Lead Counsel, including reviewing briefs and correspondence concerning the status of the Litigation, producing documents, sitting for deposition, and attending and testifying at trial.

Courts in this District, Circuit, and around the country have approved as reasonable awards for class representatives that are within this range. *See, e.g.*, *Dusek v. Mattel, Inc.*, 2003 WL 27380801, at *1 (C.D. Cal. Sept. 29, 2003) (awarding $117,246 to the lead plaintiffs); *Allergan*, slip op. at 5 (granting lead plaintiff award of approximately $75,000); *Smilovits*, 2020 WL 3636773, at *2 (awarding lead plaintiffs $42,591, plus interest); *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 1000 (D. Minn. 2005) (awarding $100,000 to lead plaintiffs because of "the important policy role [lead plaintiffs] play in the enforcement of the federal securities laws on behalf of persons other than themselves"). The requested $64,505 award is reasonable in light of Lead Plaintiff's significant contribution to this Litigation, including testifying at trial, in order to protect the interests of absent Class members.

IX. CONCLUSION

Based on the foregoing and the entire record, Lead Plaintiff and Lead Counsel respectfully request that the Court approve: the Settlement and the Plan of Allocation; Lead Counsel's request for an award of attorneys' fees of 25% of the Settlement Amount and payment of $2,890,129.74 in expenses; and an award of $64,505 to Lead Plaintiff as allowed by the PSLRA.

DATED: March 7, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on March 7, 2022, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

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