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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EVANSTON POLICE PENSION FUND, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. MCKESSON CORPORATION, et al., Defendants.	Case No. 3:18-cv-06525-CRB <u>CLASS ACTION</u> LEAD COUNSEL'S NOTICE OF MOTION AND MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF DATE: June 2, 2023 TIME: 10:00 a.m. CTRM: 6, 17th Floor JUDGE: Honorable Charles R. Breyer

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10
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14
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16
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18
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20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

NOTICE OF MOTION AND MOTION 1

STATEMENT OF ISSUES TO BE DECIDED 2

MEMORANDUM OF POINTS AND AUTHORITIES 1

I. INTRODUCTION 1

II. PROCEDURAL AND FACTUAL BACKGROUND 3

III. THE REQUESTED FEE IS FAIR AND REASONABLE 3

A. A Reasonable Percentage of the Fund Is the Appropriate Method for Awarding Attorneys' Fees in Common Fund Cases 3

B. Factors Considered by Courts in the Ninth Circuit Support Approval of the Requested Fee in This Case 4

1. Lead Counsel Achieved an Excellent Result for the Class 5

2. The Litigation Was Uncertain and Highly Complex 6

3. The Skill Required and Quality of Work 8

4. The Contingent Nature of the Fee and the Financial Burden Carried by Lead Counsel 8

5. Awards Made in Similar Cases Support the Fee Request 10

6. The Class's Reaction to Date Supports the Fee Request 10

7. A Lodestar Crosscheck Confirms that the Requested Fee Is Reasonable 11

IV. COUNSEL'S EXPENSES ARE REASONABLE AND SHOULD BE APPROVED 13

V. CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Andrews v. Plains All Am. Pipeline L.P.,
2022 WL 4453864 (C.D. Cal. Sept. 20, 2022) 5

Baird v. BlackRock Institutional Tr. Co.,
2021 WL 5113030 (N.D. Cal. Nov. 3, 2023) 4

Beckman v. KeyBank, N.A.,
293 F.R.D. 467 (S.D.N.Y. 2013) 12

Boeing Co. v. Van Gemert,
444 U.S. 472 (1980) 3

Cheng Jiangchen v. Rentech, Inc.,
2019 WL 5173771 (C.D. Cal. Oct. 10, 2019) 5, 6, 11

Ciuffitelli v. Deloitte & Touche LLP,
2019 WL 6893018 (D. Or. Nov. 26, 2019) 12

Farrell v. Bank of Am. Corp., N.A.,
827 F. App'x 628 (9th Cir. 2020),
cert. denied sub nom., *Threatt v. Farrel*,
__U.S.__, 142 S. Ct. 71 (2021) 11

Fleming v. Impax Labs.,
2022 WL 2789496 (N.D. Cal. July 15, 2022) 6, 12

Glass v. UBS Fin. Servs., Inc.,
331 F. App'x 452 (9th Cir. 2009) 4

Harris v. Marhoefer,
24 F.3d 16 (9th Cir. 1994) 13

Hatamian v. Advanced Micro Devices, Inc.,
2018 WL 8950656 (N.D. Cal. Mar. 2, 2018) 10

Hefler v. Wells Fargo & Co.,
2018 WL 6619983 (N.D. Cal. Dec. 18, 2018),
aff'd sub nom. Hefler v. Pekoc,
802 F. App'x 285 (9th Cir. 2020) .... *passim*

Hensley v. Eckerhart,
461 U.S. 424 (1983) 5

1
2 **Page**
3
In re Am.-Apparel, Inc. S'holder Litig.,
4 2014 WL 10212865 (C.D. Cal. July 28, 2014) 4
5 *In re Amgen Inc. Sec. Litig.*,
6 2016 WL 10571773 (C.D. Cal. Oct. 25, 2016) 11
7 *In re Apollo Grp., Inc. Sec. Litig.*,
2008 WL 3072731 (D. Ariz. Aug. 4, 2008) 7
8
In re Bluetooth Headset Prods. Liab. Litig.,
9 654 F.3d 935 (9th Cir. 2011) 3, 4
10 *In re Broadcom Corp. Sec. Litig.*,
2005 WL 8153006 (C.D. Cal. Sept. 12, 2005) 5, 12
11
In re Broiler Chicken Antitrust Litig.,
12 2021 WL 5709250 (N.D. Ill. Dec. 1, 2021) 5
13
In re: Cathode Ray Tube (CRT) Antitrust Litig.,
14 2016 WL 4126533 (N.D. Cal. Aug. 3, 2016) 5
15 *In re Facebook Biometric Info. Priv. Litig.*,
522 F. Supp. 3d 617 (N.D. Cal. 2021),
16 *aff'd*, 2022 WL 822923 (9th Cir. Mar. 17, 2022) 12
17
In re JDS Uniphase Corp. Sec. Litig.,
18 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) 9
19 *In re Korean Air Lines Co., Antitrust Litig.*,
2013 WL 7985367 (C.D. Cal. Dec. 23, 2013) 3
20
In re Lidoderm Antitrust Litig.,
21 2018 WL 4620695 (N.D. Cal. Sept. 20, 2018) 5
22 *In re Mylan N.V. Sec. Litig.*,
23 2023 WL 2711552 (S.D.N.Y. Mar. 30, 2023) 7
24 *In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig.*,
768 F. App'x. 651 (9th Cir. 2019) 3
25
In re Omnivision Techs., Inc.,
26 559 F. Supp. 2d 1036 (N.D. Cal. 2008) 3, 5
27
28

Page

In re Optical Disk Drive Prods. Antitrust Litig.,
2016 WL 7364803 (N.D. Cal. Dec. 19, 2016),
aff'd, 804 F. App'x 445 (9th Cir. 2020) 6

In re Oracle Corp. Sec. Litig.,
2009 WL 1709050 (N.D. Cal. June 19, 2009),
aff'd, 627 F.3d 376 (9th Cir. 2010) 9

In re Pac. Enters. Sec. Litig.,
47 F.3d 373 (9th Cir. 1995) 6

In re Rite Aid Corp. Sec. Litig.,
396 F.3d 294 (3d Cir. 2005) 4

In re Tesla, Inc. Sec. Litig.,
2022 WL 1497559 (N.D. Cal. Apr. 1, 2022) 7, 9

In re Tyco Int'l, Ltd. Multidistrict Litig.,
535 F. Supp. 2d 249 (D.N.H. 2007) 11

In re Verifone Holdings, Inc. Sec. Litig.,
2014 WL 12646027 (N.D. Cal. Feb. 18, 2014) 12

In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.,
2017 WL 1047834 (N.D. Cal. Mar. 17, 2017) .... *passim*

In re Wash. Mutual, Inc. Sec. Litig,
2011 WL 8190466 (W.D. Wash. Nov. 4, 2011) 10

Lopez v. Youngblood,
2011 WL 10483569 (E.D. Cal. Sept. 2, 2011) 4

Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.,
221 F.R.D. 523 (C.D. Cal. 2004) 10

Ontiveros v. Zamora,
303 F.R.D. 356 (E.D. Cal. 2014) 13

Paul, Johnson, Alston & Hunt v. Graulty,
886 F.2d 268 (9th Cir. 1989) 11

Redwen v. Sino Clean Energy, Inc.,
2013 WL 12303367 (C.D. Cal. July 9, 2013) 13

Page

Savani v. URS Pro. Sols. LLC,
2014 WL 172503 (D.S.C. Jan. 15, 2014)....................9

Stanger v. China Elec. Motor, Inc.,
812 F.3d 734 (9th Cir. 2016)....................8

Steiner v. Am. Broad. Co., Inc.,
248 F. Appx 780 (9th Cir. 2007)....................13

Vataj v. Johnson,
2021 WL 5161927 (N.D. Cal. Nov. 5, 2021)....................4

Vincent v. Hughes Air W., Inc.,
557 F.2d 759 (9th Cir. 1977)....................3

Vincent v. Reser,
2013 WL 621865 (N.D. Cal. Feb. 19, 2013)....................13

Vinh Nguyen v. Radient Pharms. Corp.,
2014 WL 1802293 (C.D. Cal. May 6, 2014)....................7

Vizcaino v. Microsoft Corp.,
290 F.3d 1043 (9th Cir. 2002)....................4, 5, 12

Wing v. Asarco Inc.,
114 F.3d 986 (9th Cir. 1997)....................8

STATUTES, RULES AND REGULATIONS

15 U.S.C.
§78u-4(a)(6)....................4, 9

17 C.F.R.
§240.10b-5....................6

SECONDARY AUTHORITIES

Manual for Complex Litigation
§14.121 (4th ed. 2004)....................4

NOTICE OF MOTION AND MOTION

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE THAT at 10:00 a.m. on June 2, 2023, in the courtroom of the Honorable Charles R. Breyer, at the United States District Court, Northern District of California, San Francisco Courthouse, Courtroom 6 – 17th floor, 450 Golden Gate Avenue, San Francisco, CA 94102, Lead Plaintiff Pension Trust Fund for Operating Engineers will and hereby does respectfully move the Court for an Order awarding attorneys' fees and providing for payment of litigation expenses.

This Motion is based on the following Memorandum of Points and Authorities, as well as the accompanying Declaration of Luke O. Brooks in Support of Motions for: (1) Final Approval of Class Action Settlement; (2) Approval of Plan of Allocation; and (3) Award of Attorneys' Fees and Expenses and its exhibits ("Brooks Declaration" or "Brooks Decl."), the Declaration of Spencer A. Burkholz Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Robbins Geller Declaration" or "Robbins Geller Decl."), all prior pleadings and papers in this Action, the arguments of counsel, and such additional information or argument as may be required by the Court.

A proposed Order will be submitted with Lead Counsel's reply submission on May 26, 2023, after the May 12, 2023 deadline for Class Members to object to the motion for fees and expenses has passed.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Court should approve as fair and reasonable Lead Counsel's application for an attorneys' fee award for Lead Counsel in the amount of 25% of the Settlement Fund (the Settlement Amount, plus all interest accrued thereon).

2. Whether the Court should approve Lead Counsel's request for payment of $1,027,452.95 in litigation costs and expenses incurred by Lead Counsel in the Action, plus all interest accrued thereon.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After more than four years of hard-fought litigation, Lead Counsel secured an all-cash settlement of $141,000,000 on behalf of the Class. It yields an exceptional recovery of approximately 20% of the Class's estimated reasonably recoverable damages for the one corrective disclosure remaining following the Court's MTD and MSJ Orders – many multiples of the median ratio of recovery-to-investor losses obtained in securities class action settlements between 2013 and 2022. *See* NERA Rpt. at 17-18, Figs. 18 & 19; Cornerstone Rpt. at 6, 14.[1]

The Settlement would not have been achieved without Lead Counsel's skill, dogged pursuit, and refusal to accept a result that was not in the Class's best interest. Lead Counsel expended substantial resources – approximately 44,160 hours in professional time and over $1 million of expenses – all without any assurance of recovery. Given the size of the Settlement's approximately 20% recovery, the result is an excellent one. As compensation for their efforts, Lead Counsel requests that the Court award the Ninth Circuit's fee percentage benchmark of 25% of the Settlement Amount, plus the interest earned thereon.

Lead Counsel's fee request is reasonable, particularly considering the extent of counsel's efforts and the *ex-ante* risks of this case. *See generally* Brooks Decl. In particular, Lead Counsel conducted a thorough investigation, drafted the Complaint, and ultimately defeated, in part, Defendants' motion to dismiss. Lead Counsel undertook over two years of exhaustive discovery efforts and litigated multiple discovery disputes. Lead Counsel, among other things, conducted a review and analysis of over 1.7 million documents produced by Defendants and nearly 30 third parties, and took and defended expert depositions. Lead Counsel also negotiated with Defendants and a number of third parties, including the generic drug manufacturers who are alleged to have colluded, with respect to an array of discovery disputes, including the permissible scope of discovery

[1] All capitalized terms not defined herein shall have the same meaning set forth in the Stipulation of Settlement dated November 30, 2022 (ECF 277) and in Lead Plaintiff's Notice of Motion and Motion for Final Approval of Class Action Settlement and Plan of Allocation, and Memorandum of Points and Authorities in Support Thereof ("Final Approval Memorandum"), filed herewith.

in light of the Court's MTD Order. Lead Counsel also successfully moved for class certification over Defendants' opposition. And after litigating Defendants' motion for partial summary judgment, Lead Counsel filed the Amended Complaint, which sought to add allegations based on information learned from discovery, including two corrective disclosures. In moving to dismiss the Amended Complaint, Defendants sought dismissal of the action in its entirety, which Lead Counsel opposed. In short, Defendants exhausted every litigation strategy in an effort to end the Action without any recovery for the Class. And at all stages of the Action, Lead Counsel exhibited diligence, hard work, and skill.

Lead Counsel's request for a fee award that is consistent with the Ninth Circuit's 25% fee benchmark in common-fund litigation is warranted here because of the excellent recovery obtained for the Class in light of the risks that Lead Counsel faced in the Action. *See* Brooks Decl., ¶¶57-63. A lodestar cross-check also confirms the reasonableness of the requested fee. The lodestar multiplier of approximately 1.28 of Lead Counsel's time falls well within the range of multipliers awarded in the Ninth Circuit. The fee request is also supported by Lead Plaintiff, a sophisticated institution, a fact that is afforded significant weight in the analysis. *See* §III.B.6, *infra*; Fund Decl., ¶4.

Likewise, Lead Counsel's litigation costs, charges, and expenses of $1,027,452.95 (plus interest accrued thereon) should be awarded in full, as they were reasonably and necessarily incurred in the prosecution of the Action. Robbins Geller Decl., Ex. C.

Notice was provided to potential Class Members in accordance with the Preliminary Approval Order. *See* Murray Decl., ¶¶4-15. The Notice advised potential Class Members that Lead Counsel would apply for an award of attorneys' fees in an amount not to exceed 25% of the Settlement Fund and payment of litigation expenses not to exceed $1,500,000. Murray Decl., Ex. C, Notice at 2. To date, no objections to the requested attorneys' fees and expenses have been received. Brooks Decl., ¶71.[2]

Lead Counsel respectfully requests that the requested fee be granted.

[2] The deadline for the filing of objections is May 12, 2023. Should any objections be received, Lead Counsel will address them in their reply papers, due on May 26, 2023.

II. PROCEDURAL AND FACTUAL BACKGROUND

Relevant history and facts are set out in Lead Plaintiff's Final Approval Memorandum and the Brooks Declaration and are not repeated here. *See* Procedural Guidance for Class Action Settlements, Final Approval, §2 ("If the plaintiffs choose to file two separate motions, they should not repeat the case history and background facts in both motions. The motion for attorneys' fees should refer to the history and facts set out in the motion for final approval.").

III. THE REQUESTED FEE IS FAIR AND REASONABLE

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

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).[3] The Ninth Circuit similarly holds 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 Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig.*, 768 F. App'x. 651, 653 (9th Cir. 2019).

In *Blum v. Stenson*, the Supreme Court recognized that under the common fund doctrine, a reasonable fee may be based "on a percentage of the fund bestowed on the class." 465 U.S. 886, 900 n.16 (1984). Although courts have discretion to employ either the percentage of recovery or lodestar method (*In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011)), "[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 In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) ("use of the percentage

[3] Citations are omitted and emphasis is added throughout unless otherwise indicated.

method in common fund cases appears to be dominant"). Thus, the Ninth Circuit has expressly and consistently approved the use of the percentage method in common fund cases. *See, e.g.*, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-48 (9th Cir. 2002).

The PSLRA likewise contemplates that fees be awarded on a percentage basis, authorizing attorneys' fees and expenses to counsel that do 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 award 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." *Bluetooth*, 654 F.3d at 942; *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); *Baird v. BlackRock Institutional Tr. Co.*, 2021 WL 5113030, at *6-*7 (N.D. Cal. Nov. 3, 2023) (applying percentage of the fund method and lodestar crosscheck); *Vataj v. Johnson*, 2021 WL 5161927, at *8 (N.D. Cal. Nov. 5, 2021) (same). 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) ("'[I]n practice, the lodestar method is difficult to apply [and] time consuming to administer.'") (quoting *Manual for Complex Litigation* §14.121 (4th ed. 2004)).

B. Factors Considered by Courts in the Ninth Circuit Support Approval of the Requested Fee in This Case

Courts in this Circuit consider 25% of the common fund the benchmark or "starting point" for the award of fees in a common fund settlement and consider several factors to determine whether to adjust a fee award from the benchmark:

> (1) the results achieved; (2) the risks of litigation; (3) whether there are benefits to the class beyond the immediate generation of a cash fund; (4) whether the percentage rate is above or below the market rate; (5) the contingent nature of the representation

and the opportunity cost of bringing the suit; (6) reactions from the class; and (7) a lodestar cross-check.

In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig., 2017 WL 1047834, at *1 (N.D. Cal. Mar. 17, 2017) ("*Volkswagen* Fee Order") (citing *Vizcaino*, 290 F.3d at 1048-52).

Lead Counsel seeks the benchmark fee of 25% of the Settlement Fund. This request is within the range of percentage fees that courts in this Circuit have awarded in other complex class actions. *See, e.g.*, *Andrews v. Plains All Am. Pipeline L.P.*, 2022 WL 4453864, at *4 (C.D. Cal. Sept. 20, 2022) (awarding 32% of $230 million settlement); *In re Lidoderm Antitrust Litig.*, 2018 WL 4620695, at *1-*3 (N.D. Cal. Sept. 20, 2018) (awarding 33% of $104.75 million settlement); *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 WL 4126533, at *1 (N.D. Cal. Aug. 3, 2016) (awarding 27.5% of $576 million settlement); *In re Broadcom Corp. Sec. Litig.*, 2005 WL 8153006, at *5 (C.D. Cal. Sept. 12, 2005) (awarding 25% of $150 million settlement). In fact, "in most common fund cases, the award exceeds that benchmark." *Omnivision*, 559 F. Supp. 2d at 1047. As discussed below, application of each of these factors here confirms that the requested 25% fee is fair and reasonable.

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); *Hefler v. Wells Fargo & Co.*, 2018 WL 6619983, at *13 (N.D. Cal. Dec. 18, 2018), *aff'd sub nom. Hefler v. Pekoc*, 802 F. App'x 285 (9th Cir. 2020). In fact, clients care most about results and would willingly pay, and are financially better off paying, a larger fee for a great result than a lower fee for a poor outcome. *See In re Broiler Chicken Antitrust Litig.*, 2021 WL 5709250, at *3 (N.D. Ill. Dec. 1, 2021) ("Clients generally want to incentivize their counsel to pursue every last settlement dollar.").

Here, against substantial risks, Lead Counsel obtained an excellent recovery for the Class, both in terms of overall amount ($141,000,000) and as a percentage of the estimated recoverable damages (20%). "A 10% recovery of estimated damages is a favorable outcome in light of the challenging nature of securities class action cases." *Cheng Jiangchen v. Rentech, Inc.*, 2019 WL 5173771, at *9 (C.D. Cal. Oct. 10, 2019). Indeed, this recovery is more than four times the median

percentage recovery for cases settled with estimated damages of between $500 and $999 million.[4] The outstanding result obtained for the Class here supports Lead Counsel's fee request and merits an appropriate fee that encourages counsel to seek excellent results.

2. The Litigation Was Uncertain and Highly Complex

The "complexity of the issues and the risks" undertaken are also important factors in determining a fee award. *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995). "'[I]n general, securities actions are highly complex and . . . securities class litigation is notably difficult and notoriously uncertain.'" *Hefler*, 2018 WL 6619983, at *13.

More so in this Action. As explained in Lead Plaintiff's Final Approval Memorandum and the Brooks Declaration, Lead Plaintiff's securities fraud claims involved proving a "'case within a case.'" *Fleming v. Impax Labs.*, 2022 WL 2789496, at *5-*6 (N.D. Cal. July 15, 2022). In particular, Defendants argued emphatically throughout the litigation that in order to prove the falsity of their alleged misrepresentations and omissions, Lead Plaintiff was required to prove an underlying violation of the antitrust laws. *See* Brooks Decl., ¶45. This multiplied the complexity of Lead Plaintiff's already-complex securities fraud claims. *See Rentech, Inc.*, 2019 WL 5173771, at *6 ("In general, securities fraud class actions are complex cases that are time-consuming and difficult to prove."); *In re Optical Disk Drive Prods. Antitrust Litig.*, 2016 WL 7364803, at *6 (N.D. Cal. Dec. 19, 2016) (awarding 25% of $124.5 million settlement) ("'An antitrust class action is arguably the most complex action to prosecute.'"), *aff'd*, 804 F. App'x 445 (9th Cir. 2020).

Despite their ultimate success, Lead Counsel assumed significant risk at every procedural step of the litigation. *See generally* Brooks Decl. At every stage, Defendants sought outright dismissal of the Action, or, at the very least, sought to limit the Class's recoverable damages. Defendants succeeded in obtaining dismissal of two of the four corrective disclosures pled in the Complaint at the motion-to-dismiss stage and a third corrective disclosure at summary judgment. In

[4] *See* Cornerstone Rpt. at 6, 14 (finding median settlements as a percentage of estimated damages was 1.7% in 2022 for cases involving estimated damages of between $500 and $999 million, and 5.9% for Rule 10b-5 cases settled after a ruling on a motion to dismiss but prior to a ruling on a motion for summary judgment); NERA Rpt. at 17-18, Figs. 18 & 19 (noting median ratio of settlements to investor losses was 1.8% in 2022 and 1.7% for settlements of actions with investor losses between $600 and $999 million).

their motions to dismiss the Amended Complaint, Defendants sought outright dismissal of the Action in its entirety. Had the case survived the Court's ruling on those pending motions, Defendants surely would have sought summary judgment of the entire action following completion of discovery. *See, e.g.*, *In re Mylan N.V. Sec. Litig.*, 2023 WL 2711552, at *27-*34 (S.D.N.Y. Mar. 30, 2023) (granting summary judgment and dismissing securities fraud claims for, *inter alia*, failing to establish underlying violations of the Sherman Act).

At trial, the case would have turned largely on expert testimony concerning highly technical accounting and loss causation matters and the credibility of fact witnesses – nearly all of whom would likely be represented by defense counsel (or were still employed at McKesson). Defendants needed only to defeat one element of Lead Plaintiff's claims to prevail, and there was a significant risk the jury would agree with Defendants' experts and find no liability, no damages, or award far less than Lead Plaintiff sought to recover. *See, e.g.*, *Vinh Nguyen v. Radient Pharms. Corp.*, 2014 WL 1802293, at *2 (C.D. Cal. May 6, 2014) (noting, in securities class action, that "Proving and calculating damages required a complex analysis, requiring the jury to parse divergent positions of expert witnesses in a complex area of the law. The outcome of that analysis is inherently difficult to predict and risky."); *see also, e.g.*, *In re Tesla, Inc. Sec. Litig.*, 2022 WL 1497559 (N.D. Cal. Apr. 1, 2022) and *In re Tesla, Inc. Sec. Litig.*, No. 3:18-cv-04865-EMC, ECF 671 (N.D. Cal. Feb. 3, 2023) (jury verdict in favor of securities fraud defendants where court had previously granted summary judgment in favor of plaintiffs on certain elements). And even if Lead Plaintiff survived summary judgment and obtained a favorable verdict at the liability phase of trial, it would ***still*** have faced the risk of partial or complete reversal in post-trial proceedings. *See, e.g.*, *In re Apollo Grp., Inc. Sec. Litig.*, 2008 WL 3072731 (D. Ariz. Aug. 4, 2008) (granting motion for a judgment as a matter of law, overturning $277 million verdict in favor of plaintiffs based on insufficient evidence of loss causation).

Thus, there existed a significant risk that class-wide recoverable damages would have been far less than $141,000,000, including the risk of no recovery at all. *Volkswagen* Fee Order, 2017 WL 1047834, at *2 ("Class Counsel 'recognize there are always uncertainties in litigation[.]' It is possible that 'a litigation Class would receive less or nothing at all, despite the compelling merit of

its claims . . . .'") (alteration in original). And any recovery absent the Settlement "would come years in the future and at far greater expense to the . . . Class." *Id.* The $141,000,000 Settlement, achieved in the face of these significant risks, amply supports the requested 25% fee award.

3. The Skill Required and Quality of Work

The quality of Lead Counsel's representation further supports the reasonableness of the requested fee. Lead Counsel successfully litigated the case through several potentially dispositive motions. Lead Counsel is a nationally recognized leader in securities class actions and complex litigation. *See* Brooks Decl., ¶68; Robbins Geller Decl., Ex. H. The firm has a track record of trying cases, or settling cases at a premium. Clients retain Lead Counsel to benefit from its experience and resources in order to obtain the largest possible recovery for the class in question. Here, Lead Counsel's skill and experience brought about an exceptional result, further supporting the requested fee award.

The standing of opposing counsel should also be weighed because such standing reflects the challenge faced by Lead Counsel. *See, e.g.*, *Wing v. Asarco Inc.*, 114 F.3d 986, 989 (9th Cir. 1997). Defendants chose nationally known and highly capable representation from Sidley Austin LLP and Simpson Thacher & Bartlett LLP, both well-regarded and prestigious firms. These firms spared no effort or expense on behalf of Defendants in their zealous defense. Lead Plaintiff's ability to obtain a favorable result for the Class while litigating against these formidable defense firms and their well-financed clients 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

"It is an established practice to reward attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing at all." *Volkswagen* Fee Order, 2017 WL 1047834, at *3. This "practice encourages the legal profession to assume such a risk and promotes competent representation for plaintiffs who could not otherwise hire an attorney." *Id.* "This incentive is especially important in securities cases." *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 741 (9th Cir. 2016).

"The risk of no recovery in complex cases of this sort is not merely hypothetical." *Savani v. URS Pro. Sols. LLC*, 2014 WL 172503, at *5 (D.S.C. Jan. 15, 2014). There have been many class actions in which counsel for the plaintiffs took on the risk of pursuing claims on a contingency basis, expended thousands of hours and dollars, yet received no remuneration whatsoever despite their diligence and expertise. *Supra*, §III.B.2. For example, in *In re Oracle Corp. Sec. Litig.*, 2009 WL 1709050 (N.D. Cal. June 19, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010), a case that Robbins Geller prosecuted, the court granted summary judgment to defendants after eight years of litigation, during which plaintiff's counsel incurred over $7 million in out-of-pocket expenses and worked over 100,000 hours, representing a lodestar of approximately $40 million (in 2010 dollars). In another Ninth Circuit PSLRA case, after a lengthy trial involving securities claims against Tesla, the jury reached a verdict in defendants' favor – despite the Court previously granting summary judgment on certain elements in the ***plaintiff's*** favor, evincing the strength of the claims. *See Tesla*, 2022 WL 1497559 and *Tesla*, No. 3:18-cv-04865-EMC, ECF 671 (N.D. Cal. Feb. 3, 2023); *see also In re JDS Uniphase Corp. Sec. Litig.*, 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) (holding similarly).

Here, Lead Counsel has received no compensation during the course of the Action and invested over 44,160 hours for a total lodestar of $27,519,601.50 and incurred substantial expenses in prosecuting this case. Additional (uncompensated) work in connection with the Settlement and claims administration already has been undertaken and will be required going forward. Any fee award has always been contingent on the result achieved and on this Court's discretion. Indeed, the only certainty was that there would be no fee without a successful result. Nevertheless, Lead Counsel committed significant resources of both time and money to vigorously prosecute this Action, and successfully brought it to a highly favorable conclusion for the Class's benefit. *See generally* Brooks Decl. Meanwhile, "Class Counsel had to turn down opportunities to work on other cases to devote the appropriate amount of time, resources, and energy necessary to handle this complex case." *Volkswagen* Fee Order, 2017 WL 1047834, at *3. The contingent nature of counsel's representation thus supports approval of the requested fee.

5. Awards Made in Similar Cases Support the Fee Request

Lead Counsel's fee request is also supported by awards made in similar cases. As discussed in §III.B, the 25% benchmark fee request is within the range of fee percentages awarded in comparable settlements. As further addressed in §III.B.7., the resulting multiplier of 1.28 on Lead Counsel's lodestar is also within the range of lodestar multipliers applied in cases of this nature.

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

Courts within the Ninth Circuit also consider the reaction of the class when deciding whether to award the requested fee. *See, e.g.*, *Volkswagen* Fee Order, 2017 WL 1047834, at *4 (considering that "[o]nly four Class Members out of a class of approximately 475,000 objected to the proposed fee award" to be "a strong, positive response from the class, supporting Class Counsel's requested fees"); *In re Wash. Mutual, Inc. Sec. Litig*, 2011 WL 8190466, at *2 (W.D. Wash. Nov. 4, 2011) (noting, in approving fee request, that "no substantive objections to the amount of fees and expenses requested were filed"). 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." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004); *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 not to exceed 25% of the Settlement Fund and for payment of litigation expenses not to exceed $1,500,000. Class Members were also advised of their right to object to the fee and expense request, and that such objections are to be filed with the Court no later than May 12, 2023. While this deadline has not yet passed, to date, not a ***single*** objection has been received.

Finally, Lead Plaintiff has approved the percentage sought here. Fund Decl., ¶4. Lead Plaintiff's approval supports granting the requested fee. *See Hatamian v. Advanced Micro Devices,*

Inc., 2018 WL 8950656, at *2 (N.D. Cal. Mar. 2, 2018) (approving fee where request "reviewed and approved as fair and reasonable by Class Representatives, sophisticated institutional investors").

7. A Lodestar Crosscheck Confirms that the Requested Fee Is Reasonable

To assess the reasonableness of a fee awarded under the percentage-of-the-fund method, courts may (but are not required to) cross check the proposed award against counsel's lodestar. *Farrell v. Bank of Am. Corp., N.A.*, 827 F. App'x 628, 630 (9th Cir. 2020) (refusing to mandate "a [cross-check] requirement"), *cert. denied sub nom.*, *Threatt v. Farrel*, __U.S.__, 142 S. Ct. 71 (2021); *In re Amgen Inc. Sec. Litig.*, 2016 WL 10571773, at *9 (C.D. Cal. Oct. 25, 2016) (noting that "analysis of the lodestar is not required for an award of attorneys' fees in the Ninth Circuit"). When the lodestar is used as a cross check, "the focus is not on the 'necessity and reasonableness of every hour' of the lodestar, but on the broader question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys." *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 270 (D.N.H. 2007); *accord Volkswagen* Fee Order, 2017 WL 1047834, at *5 n.5 (overruling objection that "the information provided in support of Class Counsel's lodestar amount as inadequate" because "it is well established that '[t]he lodestar cross-check calculation need entail neither mathematical precision nor bean counting . . . [courts] may rely on summaries submitted by the attorneys and need not review actual billing records'"); *Hefler*, 2018 WL 6619983, at *14 (confirming that "'trial courts need not, and indeed should not, become green-eyeshade accountants'" in context of lodestar cross check, and noting that "the Court seeks to 'do rough justice, not to achieve auditing perfection'").

"Courts 'calculate[] the fee award by multiplying the number of hours reasonably spent by a reasonable hourly rate and then enhancing that figure, if necessary, to account for the risks associated with the representation.'" *Rentech, Inc.*, 2019 WL 5173771, at *10 (alteration in original) (quoting *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989)). In this case, the lodestar method demonstrates the reasonableness of the requested fee. As detailed here and in the accompanying Brooks Declaration, 44,164 hours of attorney and para-professional time were expended prosecuting the Action for the benefit of the Class. The hours spent to obtain the results

are more than reasonable. As detailed in the Brooks Declaration, there is no question that the hours expended were necessary.

Lead Counsel's hourly rates, too, are reasonable. In fact, Lead Counsel's rates have recent judicial approval by Judge Gilliam. *See Fleming*, 2022 WL 2789496, at *9 (approving hourly rates of $760 to $1,325 for partners, $895 to $1,150 for counsel, and $175 to $520 for associates, and finding Robbins Geller's "billing rates in line with prevailing rates in this district for personnel of comparable experience, skill, and reputation").

The last piece of the cross check analysis is the risk multiplier. Lead Counsel's lodestar, derived by multiplying the hours spent on the Action by each attorney and litigation professional by their current hourly rates, is $27,519,601.50. Accordingly, the requested fee of 25% represents a slight multiplier of 1.28 on Lead Counsel's lodestar.[5]

Lead Counsel's requested multiplier "is in the bottom of the range approved by courts in other cases of comparable size." *Broadcom*, 2005 WL 8153006, at *5 (granting request for 25% of $150 million settlement where multiplier was 1.64 or 1.81). Indeed, "[c]ourts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers." *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) (citing *Vizcaino*, 290 F.3d at 1052-54); *see, e.g.*, *In re Facebook Biometric Info. Priv. Litig.*, 522 F. Supp. 3d 617, 633 (N.D. Cal. 2021) (awarding fee in $650 million common fund settlement representing 4.71 multiplier), *aff'd*, 2022 WL 822923 (9th Cir. Mar. 17, 2022); *Ciuffitelli v. Deloitte & Touche LLP*, 2019 WL 6893018, at *2, *6 (D. Or. Nov. 26, 2019) (awarding fee in $234,613,000 million fund settlement representing 3.75 multiplier), *report and recommendation adopted*, 2019 WL 6840844 (D. Or. Dec. 16, 2019); *In re Verifone Holdings, Inc. Sec. Litig.*, 2014 WL 12646027, at *2 (N.D. Cal. Feb. 18, 2014) (noting "over 80% of multipliers fall between 1.0 and 4.0" and awarding fee where multiplier was 4.3). Moreover, the Ninth Circuit has determined in the context of a cross-check that a multiplier of 6.85

[5] The actual realized multiplier has already, and will continue to, decline over time as Lead Counsel devotes additional attorney time to preparing final approval materials and overseeing processing of claims by the Claims Administrator and the distribution of the Settlement funds to Class Members with valid claims. No additional counsel fees will be sought for such work.

was "well within the range of multipliers that courts have allowed." *Steiner v. Am. Broad. Co., Inc.*, 248 F. Appx 780, 783 (9th Cir. 2007).

As more fully explained in the Brooks Declaration, given the risk undertaken by Lead Counsel and the results achieved for the Class, a modest risk multiplier of 1.28 is reasonable here.

* * *

In sum, each of the relevant factors supports the award of attorneys' fees of 25% of the Settlement. Accordingly, this fee request is reasonable and should be approved.

IV. COUNSEL'S EXPENSES ARE REASONABLE AND SHOULD BE APPROVED

Lead Counsel further requests an award of their litigation expenses in the amount of $1,027,452.95 (less than the $1,500,000 contained in the Notice). These expenses were incurred in prosecuting and resolving the Action on behalf of the Class. Robbins Geller Decl., Ex. C.

"Attorneys who create a common fund are entitled to the reimbursement of expenses they advanced for the benefit of the class." *Vincent v. Reser*, 2013 WL 621865, at *5 (N.D. Cal. Feb. 19, 2013). In assessing whether counsel's expenses are compensable in a common fund case, courts look to whether the particular costs are the type of "out-of-pocket expenses that 'would normally be charged to a fee-paying client.'" *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *Hefler*, 2018 WL 6619983, at *44. Here, the expenses sought by Lead Counsel, including those associated with, among other things, experts and consultants, service of process, online legal and factual research, document management, travel, and mediation, are of the type that are routinely charged to hourly paying clients and, therefore, should be reimbursed out of the common fund. *See, e.g.*, *Vincent*, 2013 WL 621865, at *5 (granting award of costs and expenses for "'three experts and the mediator, photocopying and mailing expenses, travel expenses, and other reasonable litigation related expenses'"); *Ontiveros v. Zamora*, 303 F.R.D. 356, 375 (E.D. Cal. 2014) (granting expense reimbursement to class counsel and noting "itemized costs relating to . . . expert fees" were "reasonable litigation expenses"); *Redwen v. Sino Clean Energy, Inc.*, 2013 WL 12303367, at *9 (C.D. Cal. July 9, 2013) (reimbursing "expenses for mediation fees, copying, telephone calls, expert expenses, research costs, travel, postage, messengers, and filing fees").

V. CONCLUSION

Lead Counsel obtained an excellent result for the Class. Based on the foregoing and the entire record, Lead Plaintiff and Lead Counsel respectfully request that the Court: (i) award Lead Counsel attorneys' fees of 25% of the Settlement Amount; and (ii) payment of $1,027,452.95 in litigation expenses, plus interest on both amounts at the same rate as earned by the Settlement Fund.

DATED: April 28, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on April 28, 2023, 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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Manual Notice List

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