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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

STEAMFITTERS LOCAL 449 PENSION PLAN, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. MOLINA HEALTHCARE, INC., J. MARIO MOLINA, JOHN C. MOLINA, TERRY P. BAYER, and RICK HOPFER, Defendants.	Case No. 2:18-cv-03579-AB-JC CLASS ACTION **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND PAYMENT OF EXPENSES** Date: October 22, 2020 Time: 10:00 a.m. Court: 7B (Hon. André Birotte Jr.)

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MEMORANDUM OF POINTS AND AUTHORITIES

Lead Counsel respectfully submits this memorandum of points and authorities in support of its application, on behalf of Plaintiffs' Counsel, for: (i) an award of attorneys' fees of 25% of the Settlement Fund; and (ii) payment of litigation expenses in the amount of $108,880.71.[1]

PRELIMINARY STATEMENT

As detailed in the Settlement Agreement, Molina Healthcare, Inc. ("Molina" or the "Company") and J. Mario Molina, John C. Molina, Terry P. Bayer, and Rick Hopfer (collectively, the "Individual Defendants," and, together with Molina, the "Defendants") have agreed to pay $7,500,000 to secure a settlement of the claims in this class action and related claims (the "Settlement"). This recovery is a favorable result for the Settlement Class and avoids the substantial risks and expenses of continued litigation, including the risk of recovering less than the Settlement Amount, or nothing at all.

Plaintiffs' Counsel have not received any compensation for their prosecution of this case, which required more than two years of vigorous advocacy. Lead Counsel respectfully requests that Plaintiffs' Counsel be awarded an attorneys' fee of 25% of the Settlement Fund, which will include any accrued interest and that Lead Counsel be paid out of the Settlement Fund for litigation expenses in the amount of $108,880.71. This 25% fee request is the Ninth Circuit's "benchmark" for contingent fees and, as discussed below, would provide a negative "multiplier" of Plaintiffs' Counsel's lodestar because the requested fee is 78% of the value of Plaintiffs' Counsel's time in the case. *See, e.g., In re Pac. Enters. Sec. Litig.*, 47

[1] All capitalized terms not otherwise defined herein shall have the same meanings as those set forth in the Stipulation and Agreement of Settlement, dated May 5, 2020 (the "Settlement Agreement") (ECF No. 72). Lead Counsel was assisted in this case by Glancy Prongay & Murray LLP (collectively "Plaintiffs' Counsel"). Any attorneys' fees awarded by the Court to Lead Counsel will be allocated by Lead Counsel to itself and Glancy Prongay & Murray LLP.

F.3d 373, 379 (9th Cir. 1995) ("Twenty-five percent is the 'benchmark' that district courts should award in common fund cases.").[2]

As discussed herein, as well as in the accompanying Declaration of Christine M. Fox in Support of (I) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation, and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses ("Fox Declaration"),[3] it is respectfully submitted that the requested fee is fair and reasonable when considered under the applicable standards in the Ninth Circuit and is well within the range of awards in class actions in the Ninth Circuit and courts nationwide, particularly in view of the substantial risks of pursuing the Action, the litigation efforts, and the results achieved for the Settlement Class. Lead Plaintiff was actively involved in the litigation and believes that the Fee and Expense Application is reasonable. Ex. 1 at ¶5.

Moreover, the expenses requested are reasonable in amount and were necessarily incurred for the successful prosecution of the Action. As such, the requested fees and expenses should be awarded in full.

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[2] All internal quotations and citations are omitted unless otherwise stated.

[3] The Fox Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action; the nature of the claims asserted; the negotiations leading to the Settlement; and the risks and uncertainties of continued litigation; among other things. Citations to "¶" in this memorandum refer to paragraphs in the Fox Declaration.

All exhibits referenced herein are annexed to the Fox Declaration. For clarity, citations to exhibits that themselves have attached exhibits, will be referenced herein as "Ex.__-__." The first numerical reference is to the designation of the entire exhibit attached to the Fox Declaration and the second alphabetical reference is to the exhibit designation within the exhibit itself.

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ARGUMENT

I. LEAD COUNSEL'S REQUEST FOR ATTORNEYS' FEES OF 25% OF THE COMMON FUND SHOULD BE APPROVED

A. Counsel Are Entitled to an Award of Attorneys' Fees from the Common Fund

It is well settled that attorneys who represent a class and achieve a benefit for class members are entitled to a reasonable fee as compensation for their services. The Supreme Court has recognized that "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Vincent v. Reser*, No. C-11-03572 CRB, 2013 WL 621865, at *4 (N.D. Cal. Feb. 19, 2013) (quoting *Boeing*, 444 U.S. at 478). Indeed, the Ninth Circuit has expressly reasoned 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). The purpose of this rule, known as the "common fund doctrine," is to prevent unjust enrichment so that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Wash. Pub. Power Supply Sys. Sec. Litig. (WPPSS)*, 19 F.3d 1291, 1300 (9th Cir. 1994), *aff'd in part*, *Class Plaintiffs v. Jaffe Schlesinger, P.A.*, 19 F.3d 1306 (9th Cir. 1994).

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

In *Blum v. Stenson*, 465 U.S. 886 (1984), 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. . . ." *Id*. at 900 n.16. In this Circuit, a district court has discretion to award fees in common fund cases based on either the lodestar/multiplier method or the percentage-of-the-fund method. *WPPSS*, 19 F.3d

at 1296. In *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1047-48 (9th Cir. 2002), the Ninth Circuit expressly approved the use of the percentage method in common fund cases. Moreover, supporting authority for the percentage method in other circuits is overwhelming.

The rationale for compensating counsel in common fund cases on a percentage basis is sound. Principally, it more closely aligns the lawyers' interest in being paid a fair fee with the interest of the class in achieving the maximum possible recovery in the shortest amount of time. Indeed, one of the nation's leading scholars in the field of class actions and attorneys' fees, Professor Charles Silver of the University of Texas School of Law, has concluded that the percentage method of awarding fees is the only method of fee awards that is consistent with class members' due process rights. Professor Silver notes:

> ***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, including those who contributed to the Manual for Complex Litigation, the Report of the Federal Courts Study Committee, and the report of the Third Circuit Task Force. Indeed, it is difficult to find anyone who contends otherwise. No one writing in the field today is defending the lodestar on the ground that it minimizes conflicts between class counsel and absent claimants.
>
> ***In view of this, it is as clear as it possibly can be that judges should not apply the lodestar method in common fund class actions.*** The Due Process Clause requires them to minimize conflicts between absent claimants and their representatives. The contingent percentage approach accomplishes this.

Charles Silver, Class Actions In The Gulf South Symposium, *Due Process and the Lodestar Method: You Can't Get There From Here*, 74 Tul. L. Rev. 1809, 1819-20 (2000) (emphasis added and footnotes omitted). This is particularly appropriate in cases under the Private Securities Litigation Reform Act's ("PSLRA") where Congress recognized the propriety of the percentage method of fee awards. *See* 15

U.S.C. § 78u-4(a)(6) ("Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class").

C. Analysis Under the Percentage Method and the *Vizcaino* Factors Justify a Fee Award of 25% in this Case

In *Paul, Johnson, Alston & Hunt v. Graulty,* 886 F.2d 268 (9th Cir. 1989), the Ninth Circuit established 25% of a common fund as the "benchmark" award for attorneys' fees. *See also Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376-77 (9th Cir. 1993) (reaffirming 25% benchmark); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000) (same); *see also Destefano v. Zynga Inc.,* No. 12-cv-04007-JSC, 2016 WL 537946, at *17 (N.D. Cal. Feb. 11, 2016) ("In common fund cases in the Ninth Circuit, the 'benchmark' percentage award is 25 percent of the recovery obtained, with 20 to 30 percent as the usual range.") (citing *Vizcaino,* 290 F.3d at 1047).

The guiding principle in this Circuit is that a fee award must be "reasonable under the circumstances." *WPPSS*, 19 F.3d at 1296 (citation and emphasis omitted). In employing the percentage method, courts may perform a lodestar cross-check to confirm the reasonableness of the requested fee. *Vizcaino*, 290 F.3d at 1047 (affirming use of percentage method and applying the lodestar method as a cross-check). Here, as discussed in detail below, Plaintiffs' Counsel have dedicated more than 3,736.6 hours to the prosecution of the case, with a lodestar value of $2,389,397.00. *See* Ex. 5. Accordingly, the requested fee, if granted, would be only a portion of counsel's lodestar in the case.

The fee request readily satisfies the five *Vizcaino* factors that are used by courts within the Ninth Circuit to evaluate the reasonableness of a requested fee: (1) the result achieved; (2) the risk of litigation; (3) the skill required and quality of the work; (4) awards made in similar cases; and (5) the contingent nature of the fee and financial burden carried by counsel. *Vizcaino*, 290 F.3d at 1048-50. The

1 Ninth Circuit has explained that these factors should not be used as a rigid
2 checklist or weighed individually, but, rather, should be evaluated in light of the
3 totality of the circumstances. *Id*. As set forth below, all of the *Vizcaino* factors
4 militate in favor of approving the requested fee.

5 **1. The Result Achieved**

6 Courts have consistently recognized that the result achieved is an important
7 factor to be considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S.
8 424, 436 (1983) (noting "the most critical factor is the degree of success
9 obtained"). Lead Counsel submits that the $7.5 million proposed Settlement is a
10 favorable result for the Settlement Class, both quantitatively and when considering
11 the risk of a lesser (or no) recovery if the case proceeded through a decision in the
12 appeal of the Court's order granting Defendants' motion to dismiss the Complaint,
13 class certification, summary judgment and trial.

14 As discussed in the Fox Declaration, Lead Plaintiff's consulting damages
15 expert has estimated that the most reasonable estimate of aggregate damages, were
16 the case to continue, would range from approximately $177.5 million to $220.8
17 million, taking into account the exclusion of gains on pre-Class Period purchases,
18 as Defendants would likely advocate for, and crediting Lead Plaintiff's
19 disaggregation theories on certain of the corrective disclosures. ¶82. Without
20 disaggregation, damages (also excluding pre-Class Period gains) were estimated to
21 be approximately $257 million.) *Id*. Against these benchmarks, the $7.5 million
22 Settlement, therefore, represents a recovery of approximately 3% to 4.2% of
23 estimated damages—a favorable and reasonable recovery in light of the
24 countervailing legal and factual arguments and litigation risks. *Id*.; *see also* Lead
25 Plaintiff's Memorandum of Points and Authorities in Support its Motion for Final
26 Approval of Class Action Settlement and Plan of Allocation ("Settlement
27 Memorandum"), §I.C. Defendants of course disputed, even if liability were to be
28

proven, the amount that the Settlement Class was allegedly damaged, and would have argued that damages were significantly less, if any.

These percentages of recovery are comparable to recoveries in other securities class actions within the Ninth Circuit. *See, e.g., Int'l Bhd. of Elec. Workers Local 697 Pension Fund v. Int'l Game Tech., Inc.*, No. 3:09-cv-00419-MMD-WGC, 2012 WL 5199742, at *3 (D. Nev. Oct. 19, 2012) (approving $12.5 million settlement recovering approximately 3.5% of the maximum damages that plaintiffs believe could be recovered at trial and noting that the amount is within the median recovery in securities class actions settled in the last few years). The recovery also compares favorably to recoveries achieved in cases in other Circuits. *See, e.g., Schuler v. Medicines Co.*, No. 14 Civ. 1149, 2016 WL 3457218, at *8 (D.N.J. June 24, 2016) (approving $4,250,000 securities fraud settlement that reflects approximately 4.0% of the estimated recoverable damages and noting percentage "falls squarely within the range of previous settlement approvals").

In sum, the Settlement provides a favorable percentage of recovery for the Settlement Class.

2. The Risks of Litigation

The risk involved in the litigation is also an important factor in determining a fair fee award. *Vizcaino*, 290 F.3d at 1048 (noting "[r]isk is a relevant circumstance" in awarding attorneys' fees); *In re Pac. Enters. Sec. Litig.*, 47 F.3d at 379 n.10 (finding that attorneys' fees were justified "because of the complexity of the issues and the risks"); *see also Zynga*, 2016 WL 537946, at *17 (approving requested fee and noting that "as to the second factor . . . the risks associated with the case were substantial given the challenges of obtaining class certification and establishing the falsity of the misrepresentations and loss causation"). As set forth in Section VI. of the Fox Declaration, Lead Counsel confronted, and would continue to do so if the claims were restored, a number of significant legal and factual challenges during the course of the litigation.

1 Most notably, this case was dismissed by the District Court on December 13,
2 2018 and was up on appeal to the Ninth Circuit at the time the Settlement was
3 reached. ¶54. The dismissal was based on the Court's assessment that the alleged
4 misstatements and omissions were inactionable and protected by the PSLRA's
5 "safe harbor" rule and that the Complaint, despite Lead Counsel's rigorous
6 investigation, did not allege a strong enough inference of Defendants' scienter.
7 Thus, at the time the Settlement was achieved, Lead Counsel and Lead Plaintiff
8 faced the significant risk that the Ninth Circuit would agree with the District
9 Court's reasoning in the MTD Order and affirm the decision dismissing the Action,
10 leaving the class with no recovery and Lead Counsel no compensation for its work.
11 *Id.*
12 Even if the case was successfully restored as a result of the appeal, Lead
13 Counsel faced serious obstacles before the class would recover and would have
14 had to redouble its efforts to overcome the challenges. Defendants would have
15 continued to challenge (i) the material falsity of each alleged misstatement and
16 omission alleged in the Complaint, and (ii) whether Defendants acted with the
17 requisite scienter. ¶¶56-63. With respect to falsity, Defendants would have
18 advanced compelling arguments that the majority of the alleged false statements
19 regarding Molina's "scalable" administrative infrastructure were forward-looking
20 statements protected by the safe harbor provision. ¶57. And with respect to
21 scienter, Defendants would have vigorously maintained that none of Lead
22 Plaintiff's witnesses or evidence directly showed that the Individual Defendants
23 had knowledge of the alleged deficiencies in Molina's systems. ¶61.
24 Another principal risk of continued the litigation was the difficulty of
25 proving loss causation and damages, which required significant effort on the part
26 of Lead Counsel and would continue to do so. ¶¶64-68. As set forth in the Fox
27 Declaration, if the litigation continued, Defendants would have continued to argue
28 that the stock declines on all three corrective disclosure dates were not in fact

attributable to disclosures related to Molina's administrative infrastructure, but rather were the result of announcements about the Company's poor financial performance and strategic information unconnected to problems with the Company's IT infrastructure. ¶64. Defendants would have asserted that disaggregating the information related to the Company's financial results would reveal no damages resulting from Lead Plaintiff's theory of the case. ¶65. There was also substantial uncertainty surrounding Lead Plaintiff's expert's ability to isolate the proportion of the stock price declines on the corrective disclosure dates attributable specifically to the alleged fraud. *Id*. Because of these challenges, Lead Plaintiff's proposed damages methodology would have come under sustained attack by Defendants, and issues relating to damages would likely have come down to a difficult and unpredictable "battle of the experts."

In addition, if the claims were restored, Lead Plaintiff would have had to move for and argue, and the Court would need to rule on, class certification, summary judgment, and pre-trial *in limine* motions – requiring significant effort on Lead Counsel's part. There was no guarantee that the claims would survive these challenges and, even if they did, how the Court's rulings would affect the future prosecution of the claims.

Overall, Lead Counsel and Lead Plaintiff faced the significant possibility that the Court or a jury would agree with Defendants' arguments and experts and, regardless of who would ultimately be successful at trial, there is no doubt that both sides would have had to present complex and nuanced information to a jury with no certainty as to the outcome. *See In re Omnivision Techs. Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. Jan. 9, 2008) (noting that the risk of litigation, including the ability to prove loss causation and the risk that Defendants prevail on damages, support the requested fee).

If not settled, the Settlement Class in this case faced the considerable risk of years of additional litigation with no guarantee of any recovery. Lead Counsel

worked diligently to achieve a significant result for the Settlement Class in the face of these very real risks. Under these circumstances, the requested fee is fully appropriate.

3. The Skill Required and the Quality of Work

Courts have recognized that the "prosecution and management of a complex national class action requires unique legal skills and abilities." *In re Heritage Bond Litig.*, No. 02-ML-1475-DT (RCX), 2005 WL 1594389, at *12 (C.D. Cal. June 10, 2005) (citation omitted); *see also Vizcaino,* 290 F.3d at 1048. "This is particularly true in securities cases because the Private Securities Litigation Reform Act makes it much more difficult for securities plaintiffs to get past a motion to dismiss." *Zynga*, 2016 WL 537946, at *17 (quoting *Omnivision*, 559 F. Supp. 2d at 1047).

Here, in addition to the complexities of this being a securities case, the claims centered on Defendants' allegedly false and misleading statements and omissions concerning its administrative infrastructure, which Defendants touted as "scalable" and positioned to accommodate growth as the Company expanded into new and existing healthcare markets including the ACA Marketplace. Lead Counsel conducted its own proprietary investigation without the benefit of any governmental or criminal proceeding, restatement, or Company admission to formulate its theory. Among other efforts, Lead Counsel interviewed more than 40 potential witnesses (five of whom were included in the Complaint); researched and prepared a detailed amended complaint; briefed a thorough opposition to Defendants' motion to dismiss; consulted with experts; obtained and reviewed several thousands of pages of core documents from Defendants in connection with the mediation process; briefed an appeal to the Ninth Circuit; and engaged in a hard-fought settlement process with experienced defense counsel and an experienced Mediator. *See generally* Fox Decl. at §§III.-V.

Lead Counsel has extensive and significant experience in the highly specialized field of securities class action litigation and is known as a leader in the field. Ex. 3-C; ¶¶99-100. Lead Counsel has not only used its knowledge and skill from prior cases but also developed specific expertise in the issues presented here. The favorable Settlement is attributable in large part to the diligence, determination, hard work, and skill of Lead Counsel, who developed, litigated, and successfully settled the Action.

The quality of opposing counsel is also important in evaluating the quality of the work done by Lead Counsel. *See, e.g.*, *Heritage Bond*, 2005 WL 1594389, at *12; *In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977). Lead Counsel was opposed in this Action by very skilled and highly respected lawyers at Latham & Watkins LLP and Cooley LLP with well-deserved reputations for vigorous advocacy in the defense of complex civil cases such as this. In the face of this formidable opposition, Lead Counsel was able to develop the Lead Plaintiff's case so as to persuade Defendants to settle the Action on terms favorable to the Settlement Class.

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

It has long been recognized that attorneys are entitled to a larger fee when their compensation is contingent in nature. *See Vizcaino*, 290 F.3d at 1048-50; *Omnivision*, 559 F. Supp. 2d at 1047 ("The importance of assuring adequate representation for plaintiffs who could not otherwise afford competent attorneys justifies providing those attorneys who do accept matters on a contingent-fee basis a larger fee than if they were billing by the hour or on a flat fee."); *see also Zynga,* 2016 WL 537946, at *18 (noting that "when counsel takes on a contingency fee case and the litigation is protracted, the risk of non-payment after years of litigation justifies a significant fee award").

The Supreme Court has also emphasized that private securities actions such as this provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (citation omitted); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (noting that the court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions).[4]

Indeed, there have been many class actions in which plaintiffs' counsel 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. For example, Lead Counsel tried *In re JDS Uniphase Securities Litigation*, Case No. C-02-1486 CW (EDL) (N.D. Cal. Nov. 27, 2007), through to a disappointing verdict for the defendants, receiving no compensation and expending millions of dollars in time and expenses. *See also In re Oracle Corp. Sec. Litig.*, No. C 01-00988 SI, 2009 WL 1709050 (N.D. Cal. June 19, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010) (granting summary judgment to defendants after eight years of litigation, and after plaintiff's counsel incurred over $6 million in expenses and worked over 100,000 hours, representing a lodestar of approximately $48 million).

Lead Counsel is aware of many other hard-fought lawsuits where, because of the discovery of facts unknown when the case was commenced, changes in the

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[4] Additionally, vigorous private enforcement of the federal securities laws and state corporation laws can only occur if private plaintiffs can obtain some semblance of parity in representation with that available to large corporate defendants. If this important public policy is to be carried out, courts should award fees that will adequately compensate private plaintiffs' counsel, taking into account the enormous risks undertaken with a clear view of the economics of a securities class action.

1 law during the pendency of the case, or a decision of a judge or jury following a
2 trial on the merits, excellent professional efforts by members of the plaintiff's bar
3 produced no fee for counsel. *See, e.g.*, *Ward v. Succession of Freeman*, 854 F.2d
4 780 (5th Cir. 1998) (reversing plaintiffs' jury verdict for securities fraud); *Robbins*
5 *v. Koger Props., Inc*., 116 F.3d 1441 (11th Cir. 1997) (reversing $81 million jury
6 verdict and dismissing case with prejudice); *Anixter v. Home-Stake Prod. Co.*, 77
7 F.3d 1215 (10th Cir. 1996) (overturning plaintiffs' verdict obtained after two
8 decades of litigation). As the court in *In re Xcel Energy, Inc. Securities, Derivative*
9 *& "ERISA" Litigation,* 364 F. Supp. 2d 980 (D. Minn. 2005) recognized,
10 "[p]recedent is replete with situations in which attorneys representing a class have
11 devoted substantial resources in terms of time and advanced costs yet have lost the
12 case despite their advocacy." *Id.* at 994. Even plaintiffs who get past summary
13 judgment and succeed at trial may find a judgment in their favor overturned on
14 appeal or on a post-trial motion. *See, e.g., Glickenhaus & Co. v. Household Int'l,*
15 *Inc*., 787 F.3d 408 (7th Cir. 2015) (reversing and remanding jury verdict of $2.46
16 billion after 13 years of litigation on loss causation grounds and error in jury
17 instruction under *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct.
18 2296 (2011)).

19 Here, because Plaintiffs' Counsel's fee was entirely contingent, the only
20 certainty was that there would be no fee without a successful result and that such
21 result would only be realized after significant amounts of time, effort, and expense
22 had been expended. Unlike counsel for defendants, who are paid and reimbursed
23 for their expenses on a current basis, Plaintiffs' Counsel have received no
24 compensation for their efforts during the course of the Action. Plaintiffs' Counsel
25 have risked non-payment of $108,880.71 in expenses and $2,389,397.00 in time
26 worked on this matter, knowing that if their efforts were not successful, no fees or
27 expenses would be paid.
28

5. A 25% Fee Award Is the Ninth Circuit's Benchmark and Comparable to Awards in Similar Cases

In requesting a 25% fee, Lead Counsel seeks the benchmark fee that has been established by the Ninth Circuit. *Eichen*, 229 F.3d at 1256 ("We have also established twenty-five percent of the recovery as a 'benchmark' for attorneys' fees calculations under the percentage-of-recovery approach."); *Zynga,* 2016 WL 537946, at *18 ("As to the fifth factor and awards in similar cases, several other courts—including courts in this District—have concluded that a 25 percent award was appropriate in complex securities class actions.").

Fee awards of 25%, or more, have been awarded in numerous securities settlements with comparable, and greater settlements, in district courts throughout the Ninth Circuit. *See*, *e.g*., *Milbeck v. TrueCar, Inc*., et.al., Case No. 2:18-cv-02612-SVW-AGR, slip op. at 2 (C.D. Cal. Jan. 27, 2020) (awarding fees of 25% of $28.25 million settlement) (Ex. 7);[5] *In re Banc of Calif. Sec. Litig*., No. SA CV 17-118 DMG (DFMx), slip op. at 1 (C.D. Cal. Mar. 16, 2020) (awarding fees of 33% of $19.75 million settlement); *In re Extreme Networks, Inc. Sec. Litig*., No. 15-CV-04883-BLF, 2019 WL 3290770, at *11 (N.D. Cal. July 22, 2019) (awarding fees of 25% of $7 million settlement); *Jiangchen v. Rentech, Inc*., No. CV 17-1490-GW-FFMx, 2019 WL 6001562, at *1 (C.D. Cal. Nov. 8, 2019) (awarding fees of 33.3% fee of $2.05 million settlement); *Rieckborn v. Velti PLC*, No. 13-CV-03889, 2015 WL 468329, at *21-22 (N.D. Cal. Feb. 13, 2015) (awarding fees of 25% of $9.5 million partial settlement); *In re Vocera Comm'cns, Inc*., No. 3:13-cv-03567-EMC, slip op. (N.D. Cal. July 29, 2016) (awarding fees of 25% of $9 million settlement) (Ex. 7) *Mulligan v. Impax Labs, Inc*., Case No. 13-cv-01037-EMC, slip op. at 7 (N.D. Cal. July 23, 2015) (awarding fees of 29% of $8 million settlement) (Ex. 7);

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[5] A compendium of unreported slip opinions is submitted as Exhibit 7 to the Fox Declaration.

1 *In re Nuvelo, Inc. Sec. Litig.*, No. C07-0405 CRB, 2011 WL 2650592, at *3 (N.D.
2 Cal. July 6, 2011) (awarding 30% of $8.9 million settlement); *In re Gilead Sci.*
3 *Sec. Litig.*, No. C-03-4999-SI, slip op. at 1 (N.D. Cal. Nov. 5, 2010) (awarding fees
4 of 30% of $8.25 million settlement) (Ex. 7); *cf. In re Hewlett-Packard Co. Sec.*
5 *Litig.*, Case No. SACV 11-1404-AG (RNBx), slip op. at 2-3 (C.D. Cal. Sept. 15,
6 2014) (awarding 25% fee of $57 million settlement) (Ex. 7); *Stanley v. Safeskin*
7 *Corp.*, No. 99CV454 BTM (LSP), slip op. at 9 (S.D. Cal. Apr. 2, 2003) (awarding
8 26% of $55 million settlement) (Ex. 7).

9 An examination of fee decisions in other federal jurisdictions in securities
10 class actions with comparable settlements also shows that an award of 25% would
11 be reasonable. *See*, *e.g.*, *In re PAR Pharm. Sec. Litig.*, No. 06-3226, 2013 WL
12 3930091, at *10 (D.N.J. July 29, 2013) (court awarded 30% of an $8.1 million
13 settlement to counsel noting that "Lead Counsel's fee request is comparable to fees
14 typically awarded in analogous cases"); *Fogarazzo v. Lehman Bros. Inc.*, No. 03
15 Civ. 5194 (SAS), 2011 WL 671745, at *4 (S.D.N.Y. Feb. 23, 2011) (awarding
16 33.3% of $6.75 million settlement); *In re Van Der Moolen Holding N.V. Sec.*
17 *Litig.*, No. 1:03-CV-8284 (RWS), slip op. at 2 (S.D.N.Y. Dec. 6, 2006) (awarding
18 33 1/3% of $8 million settlement) (Ex. 7); *City of Providence v. Aeropostale, Inc.*,
19 No. 11 Civ. 7132 (CM)(GWG), 2014 WL 1883494, at *12-13 (S.D.N.Y. May 9,
20 2014) (awarding 33% of $15 million settlement fund), *aff'd*, *Arbuthnot v. Pierson*,
21 607 F. App'x. 73 (2d Cir. 2015).

22 Accordingly, it is respectfully submitted that the attorneys' fee requested
23 here is well within the range of fees awarded by district courts within the Ninth
24 Circuit and in comparable securities settlements nationwide.

25 **6. Reaction of the Settlement Class**

26 Although not articulated specifically in *Vizcaino*, district courts in the Ninth
27 Circuit also consider the reaction of the class when deciding whether to award the
28 requested fee. *See Heritage Bond*, 2005 WL 1594389, at *15 ("The presence or

absence of objections . . . is also a factor in determining the proper fee award."). A total of 65,800 copies of the Notice and Claim Form have been sent to potential Class Members and the Court-approved Summary Notice was published in *Investor's Business Daily* and transmitted over the internet using *PR Newswire*. Ex. 2 at ¶¶8-9. In addition, the Settlement Agreement and Notice, among other documents, were posted to a website dedicated to the Settlement. *Id*. at ¶10. Although the objection deadline will not run until October 1, 2020, to date no objections to the requested amount of attorneys' fees and expenses have been received.[6]

7. Lodestar Cross-Check

Although an analysis of counsel's lodestar is not required for an award of attorneys' fees in the Ninth Circuit, a cross-check of the fee request with Plaintiffs' Counsel's lodestar demonstrates its reasonableness. *See Vizcaino*, 290 F.3d at 1048-50; *see also In re Coordinated Pretrial Proceedings In Petroleum Prods. Antitrust Litig*., 109 F.3d 602, 607 (9th Cir. 1997) (comparing the lodestar fee to the percentage fee is an appropriate measure of a percentage fee's reasonableness).

Plaintiffs' Counsel's combined "lodestar" (hours worked multiplied by hourly rates) is $2,389,397.00 for work through September 2020, meaning that the requested fee, if awarded, would represent a negative "multiplier" of .78 or be just 78% of Plaintiffs' Counsel's combined lodestar. *See* Exs. 3-A, 4-A, and 5. Plaintiffs' Counsel's lodestar represents 3,736.6 hours of work at counsel's current hourly rates.[7] Counsel's rates here range from $775 to $1,100 per hour for

[6] Lead Counsel will address any future objections in its reply papers, which will be filed with the Court by October 15, 2020.

[7] The Supreme Court and other courts have held that the use of current rates is proper since such rates compensate for inflation and the loss of use of funds. *See Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989); *Rutti v. Lojack Corp. Inc*., No. SACV 06-350 DOC JCX, 2012 WL 3151077, at *11 (C.D. Cal. July 31, 2012) ("it is well-established that counsel is entitled to current, not historic, hourly rates") (citing *Jenkins*, 491 U.S. at 284).

1 partners, $775 to $795 per hour for of counsels, and $425 to $675 per hour for
2 associates. *See* Exs. 3-A and 4-A; ¶97. Lead Counsel submits that these rates are
3 comparable or less than those used by peer defense-side law firms litigating
4 matters of similar magnitude. Sample defense firm rates in 2019, gathered by
5 Labaton Sucharow from bankruptcy court filings nationwide, often exceeded these
6 rates. Ex. 6; ¶97.

7 The Ninth Circuit has recognized that attorneys in common fund cases are
8 frequently awarded a ***multiple*** of their lodestar, rewarding them "for taking the risk
9 of nonpayment by paying them a premium over their normal hourly rates for
10 winning contingency cases." *Vizcaino,* 290 F.3d at 1051. For example, the district
11 court in *Vizcaino* approved a fee that reflected a multiple of 3.65 times counsel's
12 lodestar. *Id*. The Ninth Circuit affirmed, holding that the district court correctly
13 considered the range of multiples applied in common fund cases, and noting that a
14 range of lodestar multiples from 1.0 to 4.0 are frequently awarded. *Id*. Courts
15 have noted that a percentage fee that falls ***below*** counsel's lodestar supports the
16 reasonableness of the award. *See, e.g., In re Amgen Inc. Sec. Litig*., Case No. CV
17 07-2536 PSG (PLAx), 2016 WL 10571773, at *9 (C.D. Cal. Oct 25, 2016) (finding
18 the fee request reasonable where the multiplier is negative and noting that counsel
19 is seeking reimbursement for only a portion of the hours expended); *In re Biolase,*
20 *Inc. Sec. Litig*., Case No. SACV 13-1300-JLS (FFMx), 2015 WL 12720318, at *8
21 (C.D. Cal. Oct. 13, 2015) ("A negative multiplier in this context 'suggests' that the
22 percentage-based amount is reasonable and fair based on the time and effort
23 expended by class counsel.").

24 Additional work will be required of Lead Counsel on an ongoing basis,
25 including: correspondence with Class Members; preparation for, and participation
26 in, the final approval hearing; supervising the claims administration process being
27 conducted by the Claims Administrator; and supervising the distribution of the Net
28

1 Settlement Fund to Settlement Class Members who have submitted valid Claim
2 Forms. However, Lead Counsel will not seek payment for this additional work.

3 **II. PLAINTIFFS' COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARY TO ACHIEVE THE BENEFIT OBTAINED**

4

5 Plaintiffs' Counsel have incurred expenses in the aggregate amount of
6 $108,880.71 in prosecuting the Action. Exs. 3-B, 4-B, and 5. These expenses are
7 outlined in Plaintiffs' Counsel's individual fee and expense declarations submitted
8 to the Court concurrently herewith. *Id*.

9 As the *Vincent* court noted, "[a]ttorneys who created a common fund are
10 entitled to the reimbursement of expenses they advanced for the benefit of the
11 class." *Vincent,* 2013 WL 621865, at *5 (citation omitted). In assessing whether
12 counsel's expenses are compensable in a common fund case, courts look to
13 whether the particular costs are of the type typically billed by attorneys to paying
14 clients in the non-contingent marketplace. *Harris v. Marhoefer*, 24 F.3d 16, 19
15 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those
16 out-of-pocket expenses that 'would normally be charged to a fee paying client.'").

17 Here, the expenses sought by Plaintiffs' Counsel are of the type that are
18 charged to hourly paying clients and, therefore, should be paid out of the common
19 fund. The main expense here relates to work performed by Lead Plaintiff's
20 consulting experts ($38,791.25 or approximately 36% of total expenses). In
21 addition to an expert related to evaluating loss causation and damages, the Lead
22 Plaintiff retained an expert to consult in area of healthcare IT Systems. ¶103.
23 Lead Counsel received crucial advice and assistance from these experts.

24 Lead Counsel was also required to travel in connection with court
25 appearances and the mediation, and work long hours. Work-related transportation,
26 lodging, and meal costs totaled $19,660.53 or approximately 18% of aggregate
27 expenses. ¶104. Any first class airfare was reduced to economy rates. Such
28 expenses are reimbursable. *See In re Immune Response Sec. Litig*, 497 F. Supp. 2d

1166, 1177 (S.D. Cal. 2007) ("reimbursement for travel expenses . . . is within the broad discretion of the Court").

The expenses here also include the costs of factual and legal research ($24,348.67 or approximately 22% of total expenses). ¶105. These are the costs of primarily computerized factual and legal research services such as LEXIS/Nexis, Westlaw, and PACER. It is standard practice for attorneys to use LEXIS/Nexis and Westlaw to assist them in researching legal and factual issues and reimbursement is proper. *See Immune Response*, 497 F. Supp. 2d at 1177.

The other expenses for which Lead Counsel seeks payment are the types of expenses that are necessarily incurred in litigation. These expenses include, among others, duplicating costs, long distance telephone and conference call charges, and court filing fees.

In sum, Plaintiffs' Counsel's expenses, in an aggregate amount of $108,880.71, were reasonable and necessary to the prosecution of the Action and should be approved.

CONCLUSION

For all the foregoing reasons, Lead Counsel respectfully requests that the Court award attorneys' fees of 25% of the Settlement Fund and litigation expenses in the amount of $108,880.71.

Dated: September 17, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2020, I authorized the electronic filing of the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing by e-mail to all counsel registered to receive such notice.

/s/ Christine M. Fox
Christine M. Fox