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Class Counsel

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

In re MICRO FOCUS INTERNATIONAL PLC SECURITIES LITIGATION This Document Relates To: ALL ACTIONS.	Lead Case No. 18CIV01549 CLASS ACTION CLASS COUNSEL'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND SERVICE AWARDS Assigned for All Purposes to: Hon. Marie S. Weiner, Dept. 2 DATE: July 25, 2023 TIME: 2:00 pm Date Action Filed: 03/28/18

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules, and Regulations

I. INTRODUCTION

Class Counsel, after several years of hard-fought litigation, achieved an extraordinary $107,500,000 all-cash Settlement for the benefit of the Settlement Class – more than ***seven times*** the amount that Defendants were originally willing to pay to resolve all claims in the concurrent federal proceedings.[1] Based on their substantial work and the unique risks they took on during this case, Class Counsel now respectfully request, on behalf of itself and Federal Plaintiff's Counsel, that the Court award attorneys' fees representing one-third of the Settlement Amount (or $35,833,333.33), as well as payment of litigation expenses advanced for the Settlement Class in the amount of $843,852.44, and interest on both amounts.[2] Class Counsel also respectfully ask the Court to approve service awards of $15,000 for each of the two Class Representatives, Ian Green ("Green") and the Cardella Family Irrevoc Trust U/A 06/17/15 ("Cardella Family Trust"), and Federal Plaintiff Iron Workers' Local No. 25 Pension Fund ("Federal Plaintiff" or "Iron Workers"), for their efforts on behalf of the Class. To date, Class Counsel have received only a single objection to the fee and expense request from a putative Settlement Class Member who has no Recognized Loss, but as Class Counsel will ultimately demonstrate in the final approval reply brief, that objection is without merit. Defendants take no position on this motion.

This proposed Settlement represents an outstanding recovery for the Class in view of the risks, costs, and duration of continued litigation.[3] Absent settlement, this litigation would likely have

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[1] Unless otherwise defined herein, all capitalized terms have the meanings ascribed to them in the Stipulation of Settlement, dated January 24, 2023 ("Stipulation"), or the accompanying Joint Declaration of Amanda F. Lawrence, Mark C. Molumphy, and James I. Jaconette in Support of Motions for (1) Final Approval of Class Action Settlement and Plan of Allocation and (2) Award of Attorneys' Fees, Payment of Litigation Expenses, and Service Awards ("Joint Declaration").

[2] Additionally, counsel to the plaintiff in the federal action ("Federal Plaintiff's Counsel") in the United States District Court for the Southern District of New York before the Hon. Andrew L. Carter Jr. (the "Federal Action") also request payment of $122,416.74 in litigation expenses, which is included in the $843,852.44 amount noted above. *See* Declaration of James A. Harrod Filed on Behalf of Bernstein Litowitz Berger & Grossmann LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Bernstein Litowitz Declaration"), attached as Ex. 15 to the Joint Declaration.

[3] Because many of the factors supporting final approval of settlement also buttress the requested award of attorneys' fees and expenses, Class Counsel incorporate herein the concurrently-filed Class Representatives' Memorandum of Points and Authorities in Support of Motion for Final Approval of

proceeded through summary judgment, trial, and potentially multiple appeals. Class Representatives and Class Counsel faced considerable obstacles in proving liability and damages, yet nevertheless reached a timely and substantial resolution for the Class. The requested fee is fair and reasonable under relevant standards and well within the range of fees awarded by California Superior Courts and supported by California Supreme Court precedent. *See, e.g., Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5th 480 (2016) (affirming a one-third percentage-based fee award to class counsel).

As detailed in the Joint Declaration, Class Counsel vigorously pursued the Class' claims and staved off Defendants' relentless efforts to defend those claims. As a result, Class Counsel and their paraprofessionals spent over 24,100 hours prosecuting the Action, resulting in a combined lodestar of $16,235,457. Thus, the requested fee represents a multiplier of approximately 2.2 times counsel's lodestar.[4] This multiplier is reasonable. *Wershba v. Apple Comput., Inc.*, 91 Cal. App. 4th 224, 255 (2001) ("Multipliers can range from 2 to 4 or even higher.").[5]

Further, the Court should consider the Class' reaction to Class Counsel's request for attorneys' fees and expenses. Pursuant to the Court's Order Preliminarily Approving Settlement and Providing for Notice (the "Preliminary Approval Order"), 311,967 copies of the Notice of Proposed Settlement of Class Action ("Settlement Notice"), in the form approved by the Court, have been mailed to

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Class Action Settlement and Approval of Plan of Allocation ("Final Approval Memorandum") and Joint Declaration submitted herewith.

[4] Courts have recognized that "'[m]ultipliers can range from 2 to 4 or even higher.'" *Evans v. Zions Bancorporation, N.A.*, 2022 WL 16815301, at *7 (E.D. Cal. Nov. 8, 2022); *accord Edwards v. Chartwell Staffing Servs., Inc.*, 2018 WL 10455206, at *7 (C.D. Cal. Aug. 27, 2018) (same); *Willner v. Manpower Inc.*, 2015 WL 3863625, at *7 (N.D. Cal. June 22, 2015) (same); *Torres v. ABC Sec. Serv., Inc.*, 2008 WL 7025867 (San Mateo Super. Ct. Aug. 25, 2008) (same); *In re Vitamin Cases*, 2004 WL 5137597, at *14 (S.F. Super. Ct. Apr. 12, 2004) (same); *Bertrand v. Pers. Protective Servs., Inc.*, 2011 WL 5901171 (Alameda Super. Ct. July 28, 2011) (same). All citations and footnotes are omitted unless otherwise noted.

[5] While a lodestar cross-check fully supports the requested fee, a cross-check is not required. *Laffitte*, 1 Cal. 5th at 506 ("We hold further that trial courts have discretion to conduct a lodestar cross-check on a percentage fee, as the court did here; they also retain the discretion to forgo a lodestar cross-check and use other means to evaluate the reasonableness of a requested percentage fee.").

potential Class Members and their nominees.[6] In addition, the Summary Notice of Proposed Settlement of Class Action was published once in the national edition of *The Wall Street Journal* and transmitted once over *Business Wire*. *Id.*, ¶12. The Settlement Notice advised Class Members that Class Counsel will apply to the Court for an award of attorneys' fees in an amount not to exceed one-third of the Settlement Fund, plus expenses not to exceed $1.5 million, and that Class Representatives and Iron Workers could seek service awards of up to $15,000 each. In response, only a single objection to the attorneys' fees and expense request, and a minimal number of exclusion requests, were received, thus supporting the reasonableness of these requests.

For their diligence and efforts in obtaining this outstanding recovery on behalf of the Class, Class Counsel, on behalf of itself and the Federal Plaintiff's Counsel, respectfully request an award of attorneys' fees of one-third of the Settlement Amount and payment of expenses in the amount of $35,833,333.33, and $843,852.44, respectively, plus interest on both amounts. Class Counsel's costs and expenses are likewise reasonable in amount, and were necessarily incurred to successfully prosecute this Action. Finally, the requested service awards are reasonable and supported by declarations from each Class Representative.[7]

[6] *See* Declaration of Alexander P. Villanova Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Villanova Declaration"), ¶11, submitted herewith as Ex. 1 to the Joint Declaration.

[7] *See* accompanying Declaration of Ian Green in Support of Motions for Final Approval of Settlement, Approval of Plan of Allocation, Class Counsel's Fees, Payment of Litigation Expenses, and Class Representatives' Service Awards ("Green Declaration"), attached as Ex. 2 to the Joint Declaration, and Declaration of Cardella Family Irrevoc Trust U/A 06/17/15 in Support of Motions for Final Approval of Settlement, Approval of Plan of Allocation, Class Counsel's Fees, Payment of Litigation Expenses, and Class Representatives' Service Awards ("Cardella Family Trust Declaration"), attached as Ex, 3 to the Joint Declaration. Further, the Federal Plaintiff also requests a service award of $15,000. *See* Declaration of Richard Sawhill, Chairman of Iron Workers' Local No. 25 Pension Fund, in Support of Class Representatives' Motion for Final Approval of Settlement, Plan of Allocation, Class Counsel's Fees, Payment of Litigation Expenses, and Class Representatives Service Awards ("Iron Workers' Declaration"), attached as Ex. 16 to the Joint Declaration.

II. THE COURT SHOULD AWARD ATTORNEYS' FEES USING THE PERCENTAGE METHOD

A. The Common Fund Doctrine Allows Courts to Assess the Beneficiaries of the Fund with the Costs of Creating that Fund

The California Supreme Court has expressly affirmed "'the historic power of equity to permit . . . a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund of property itself or directly from the other parties enjoying the benefit.'" *Serrano v. Priest*, 20 Cal. 3d 25, 35 (1977). Thus, where, as here, litigation has created a common fund for the benefit of a class, courts have the power to award plaintiffs' counsel their reasonable attorneys' fees and expenses out of the fund created. The common fund doctrine rests on two premises. The first is the prevention of unjust enrichment – "'that all who will participate in the fund should pay the cost of its creation or protection and that this is best achieved by taxing the fund itself for attorney's fees.'" *Id.* at 35 n.5; *see also Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 27 (2000). The second is a "salvage" rationale – "encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be promptly and directly compensated should his efforts be successful." *In re Stauffer's Estate*, 53 Cal. 2d 124, 132 (1959). The salvage purpose requires "'a flavor of generosity . . . in order that an appetite for efforts may be stimulated.'" *Melendres v. City of Los Angeles*, 45 Cal. App. 3d 267, 273 (1975).

Moreover, though "'[c]ourts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method'" (*Laffitte*, 1 Cal. 5th at 502), most state courts and circuit courts have "concluded [that] the percentage method of calculating a fee award is either preferred or within the trial court's discretion in a common fund case." *Id.* at 493-94. California courts also widely accept the percentage approach for awarding fees in common fund cases.

> We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created.

Id. at 503. The California Supreme Court reached that conclusion because the percentage method provides for "relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation." *Id.* The U.S. Supreme Court has likewise consistently held that where a common fund has been created for the benefit of a class owing to counsel's efforts, the fee award should be determined on a percentage-of-the-fund basis. *See, e.g.*, *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (1980). As such, Class Counsel respectfully submit that an award should be made on a percentage basis here.[8]

B. The Requested Fee Is Reasonable

In assessing the reasonableness of a fee request, California courts typically consider the following factors: (1) the result class counsel obtained; (2) the time and labor required of the attorneys; (3) the contingent nature of the case and the delay in payment to class counsel; (4) the extent to which the nature of the litigation precluded other employment by class counsel; (5) the experience, reputation, and ability of the attorneys who performed the services, the skill they displayed in the litigation, and the novelty, complexity and difficulty of the case; and (6) the informed consent of the clients to the fee agreement. *See, e.g.*, *Serrano*, 20 Cal. 3d at 49; *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1810 n.21 (1996). "However, no rigid formula applies and each factor should be considered only 'where appropriate.'" *Nat. Gas Anti-Trust Cases, I, II, III, IV*, 2006 WL 5377849, at *3 (San Diego Super. Ct. Dec. 11, 2006); *see also In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) ("The Ninth Circuit has approved a number of factors which may be relevant to the district court's determination: . . . (2) the risk of litigation; . . . and (5) awards made in similar cases."); *In re Heritage Bond Litig.*, 2005 WL 1594403, at *18, *21 (C.D. Cal. June 10, 2005) (reaction of the class is a factor to be considered).

[8] *See also Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (recognizing that under the common fund doctrine, a reasonable fee may be based "on a percentage of the fund bestowed on the class."); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002) (approving the use of the percentage method in common fund cases).

The requested one-third fee here is consistent with the many cases approving such an award and is warranted in light of the foregoing factors. Indeed, the Court of Appeals in *Laffitte v. Robert Half Int'l Inc.* observed that "the trial court's use of a percentage of 33 1/3 percent of the common fund is consistent with, and in the range of, awards in other class action lawsuits." 231 Cal. App. 4th 860, 878 (2014), *aff'd*, 1 Cal. 5th 480; *see also Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008) ("'Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.'"); Order After Hearing on August 4, 2017 at 8, *In re FireEye, Inc. Sec. Litig.*, No. 1-14-CV-266866 (Santa Clara Super. Ct. Aug. 7, 2017) (granting "one-third of the gross settlement" as "facially reasonable," observing that such an award "is not an uncommon contingency fee allocation").

1. The Settlement Achieved Is an Excellent Result for the Class

The result achieved is an important, if not the most important, factor to be considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"); *Omnivision*, 559 F. Supp. 2d at 1046 ("The overall result and benefit to the class from the litigation is the most critical factor in granting a fee award.").

In this case, the Settlement Amount of $107,500,000 is an excellent result. As detailed in the Final Approval Memorandum, this represents a recovery well in excess of recoveries in similar cases of this size. *See* Janeen McIntosh, Svetlana Starykh, & Edward Flores, 17 *Recent Trends in Securities Class Action Litigation: 2022 Full-Year Review*, NERA ECONOMIC CONSULTING (Jan. 24, 2023)[9] (the median recovery in securities class action settlements from December 2011 to December 2022 involving total investor losses of $1 billion to $4.999 billion was 1.3% of estimated losses, respectively). The Settlement also compares favorably to recoveries in absolute terms. *See* Laarni T. Bulan & Laura E. Simmons, 1 *Securities Class Action Settlements 2022 Review and Analysis*,

[9] Available at https://www.nera.com/content/dam/nera/publications/2023/PUB_2022_Full_Year_Trends.pdf.

CORNERSTONE RESEARCH (March 2023)[10] (listing $13.0 million and $36.2 million as the median and average securities settlement in 2022, respectively).

The significance of the Settlement is also demonstrated by the substantial obstacles that Class Counsel and Class Representatives overcame in order to achieve it – including Defendants' numerous attempts to obtain dismissal, Defendants' multiple appeals to the California Supreme Court, Defendants' efforts to defeat class certification, and Defendants' attempt to settle the Exchange Act claims for just $15 million in the Federal Action. Joint Declaration, ¶¶26-57. Additional hurdles included the complexity of the claims and the considerable risks and costs that further litigation would have entailed. *Id.*, ¶¶76-90. Especially given these risks, $107,500,00 is an excellent result.

2. Achieving the Settlement Required Significant Time and Labor Required

Over the course of almost five years, Class Counsel aggressively and diligently prosecuted this Action, in order to secure the proposed Settlement for the Class. Achieving this result entailed a significant amount of work, including:

(a) extensive factual investigation of the events underlying the Merger;

(b) reviewing and analyzing the representations made by the Company in the Offering Documents;

(c) reviewing and analyzing industry reports, securities analyst reports, comprehensive news reports, press releases, and other media files concerning the Merger;

(d) reviewing, analyzing, researching, and filing detailed complaints;

(e) briefing, arguing, and eventually prevailing on Defendants' multiple attempts to dismiss or stay the Action, including two appeals to the California Supreme Court;

(f) briefing, arguing, and prevailing in having the Court in the Federal Action deny preliminary approval of the Federal Settlement on the grounds that the Federal Court lacks jurisdiction to consider that proposed settlement;

[10] Available at https://www.cornerstone.com/wp-content/uploads/2023/03/Securities-Class-Action-Settlements-2022-Review-and-Analysis.pdf.

(g) briefing, arguing, and prevailing in almost complete part on Defendants' multiple demurrers;

(h) responding to discovery requests issued to Class Representatives and reviewing and producing documents on behalf of Class Representatives;

(i) defending then-proposed Class Representatives Green and August Cardella, Trustee of the Cardella Family Trust, at their respective depositions;

(j) briefing, arguing, and prevailing on Class Representatives' motion for class certification;

(k) issuing document requests and subpoenas to Defendants and non-parties, respectively, and undertaking extensive meet and confers to ensure they undertook satisfactory efforts to search for and produce responsive documents and information;

(l) reviewing and analyzing over 3.1 million pages of documents produced by Defendants and non-parties;

(m) preparing for and conducting 21 depositions of Defendants and non-parties;

(n) preparing for and participating in two formal day-long mediation sessions with the Hon. Layn Phillips (U.S.D.J., ret.) of Phillips ADR in August and December 2022, in addition to consulting with a damages expert, submitting two detailed mediation statements (and exhibits thereto), and participating in follow-up negotiations with the Mediator culminating in the Settlement; and

(o) preparing the Settlement and preliminary approval papers, the final approval papers, and overseeing the notice and claims process.

Joint Declaration, ¶98.

3. A Lodestar Crosscheck Confirms the Reasonableness of the Fee Request

While Class Counsel make this fee request based on a percentage-of-recovery methodology, using the lodestar approach as a cross-check further establishes the reasonableness of the requested fee.

> [A] lodestar cross-check . . . provides a mechanism for bringing an objective measure of the work performed into the calculation of a reasonable attorney fee. If a comparison between the percentage and lodestar calculations produces an

> imputed multiplier far outside the normal range, indicating that the percentage fee will reward counsel for their services at an extraordinary rate even accounting for the factors customarily used to enhance a lodestar fee, the trial court will have reason to reexamine its choice of a percentage.

Laffitte, 1 Cal. 5th at 504. By contrast, here, the lodestar cross-check confirms the propriety of the requested fee.

In total, Class Counsel and their paraprofessionals expended 24,121.3 hours prosecuting the Action, as described above, which resulted in a lodestar of $16,235,457. Joint Declaration, ¶99.[11] The requested one-third fee, or $35,833,333.33, represents a modest multiplier of approximately 2.2.[12] There is no question that this multiplier is reasonable; by comparison, "numerous cases have applied multipliers of between 4 and 12 to counsel's lodestar in awarding fees." *Nat. Gas*, 2006 WL 5377849, at *4; *see also Wershba*, 91 Cal. App. 4th at 255 ("Multipliers can range from 2 to 4 or even higher."); *Sternwest Corp. v. Ash*, 183 Cal. App. 3d 74, 76 (1986) (remanding for a lodestar enhancement of "two, three, four or otherwise"). In fact, in *Lealao*, the court opined that a multiplier in excess of 3.5 was reasonable. 82 Cal. App. 4th at 52.

4. The Contingent Nature of the Case, Risk of Loss, and the Delay in Payment to Class Counsel Favor the Requested Award

Class Counsel prosecuted this Action on a contingent-fee basis, assuming significant risk that the Action would not result in any recovery and that they would not receive any compensation. To date, Class Counsel have not been compensated for any time or expense since the Action's inception,

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[11] The time and expenses devoted to the Action are set forth in the accompanying (i) Declaration of James I. Jaconette on Filed Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Robbins Geller Declaration"), attached as Ex. 4 to the Joint Declaration, (ii) Declaration of Mark C. Molumphy on Filed Behalf of Cotchett, Pitre & McCarthy, LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Cotchett Pitre Declaration"), attached as Ex. 5 to the Joint Declaration, and (iii) Declaration of Amanda F. Lawrence on Filed Behalf of Scott+Scott Attorneys at Law LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Scott+Scott Declaration," and collectively with the Robbins Geller Declaration and the Cotchett Pitre Declaration, "Class Counsel Declarations"), attached as Ex. 6 to the Joint Declaration.

[12] Further, when combined with Federal Plaintiff's Counsel's lodestar of $1,928,606.25 on 2,350.75 hours of work performed (*see* Bernstein Litowitz Declaration, ¶4), the total lodestar multiplier across all firms in both the State and Federal Actions is an even more modest 1.97.

in March 2018. Courts regularly hold that the risk of receiving little or no compensation is a prominent factor in assessing an award of attorneys' fees. *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 54 (2d Cir. 2000). This is consistent with the legal marketplace, where an attorney who takes a case on a contingency basis expects a higher fee than an attorney who is paid as the case progresses, win or lose. *See Salton Bay Marina, Inc. v. Imperial Irrigation Dist.*, 172 Cal. App. 3d 914, 955 (1985). The Court of Appeals summarized these points in *Cazares v. Saenz*, 208 Cal. App. 3d 279 (1989):

> In addition to compensation for the legal services rendered, there is the raison d'etre for the contingent fee: the contingency. The lawyer on a contingent fee contract receives nothing unless the plaintiff obtains a recovery. Thus, in theory, a contingent fee in a case with a 50 percent chance of success should be twice the amount of a noncontingent fee for the same case. . . .
>
> Finally, even putting aside the contingent nature of the fee, the lawyer under such an arrangement agrees to delay receiving his fee until the conclusion of the case, which is often years in the future. The lawyer in effect finances the case for the client during the pendency of the lawsuit. If a lawyer was forced to borrow against the legal services already performed on a case which took five years to complete, the cost of such a financing arrangement could be significant.

Id. at 288.

As set forth in the Final Approval Memorandum (§II.C.2) and the Joint Declaration (¶¶76-90), Class Counsel and Class Representatives faced significant risks regarding their ability to establish both liability and damages. While Class Counsel and Class Representatives believe they could have proven their claims, success at summary judgment and trial (and on appeal) was far from certain. For example, with respect to liability, Defendants have maintained that they did not make any untrue or misleading statements, that the alleged misstatements were immaterial or otherwise inactionable, and that the allegedly omitted information was in fact contained in the Offering Documents or was otherwise known in the market.

In light of these risks, as well as Defendants' efforts to stay and dismiss this case, and as well as Defendants' efforts to settle these claims in the Federal Action, Class Counsel committed the time and resources necessary to successfully take the case through summary judgment, trial, and likely

appeal. Indeed, more than 24,100 hours of Class Counsel's attorney and paraprofessional time and more than $720,000 in expenses have been incurred by Class Counsel.

Ultimately, while Class Counsel and Class Representatives believe that the Class would have prevailed at summary judgment, trial, and appeal, the complexity of this case made the outcome uncertain. As the court in *In re Xcel Energy, Inc. Sec., Derivative "ERISA" Litig.* recognized, "[p]recedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy." 364 F. Supp. 2d 980, 994 (D. Minn. 2005); *see also Hefler v. Wells Fargo & Co.*, 2018 WL 6619983, at *13 (N.D. Cal. Dec. 18, 2018) (quoting *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 416 (S.D.N.Y. 2018), *aff'd*, 822 F. App'x 40 (2d Cir. 2020)) ("'Courts have recognized that, in general, securities actions are highly complex and that securities class litigation is notably difficult and notoriously uncertain.'"), *aff'd sub nom. Hefler v. Pekoc*, 802 F. App'x 285 (9th Cir. 2020); *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012) (affirming ruling that granted defendants' post-trial motion for summary judgment as a matter of law based on failure to prove loss causation, thereby overturning a jury verdict in plaintiff's favor). Accordingly, the contingent nature of Class Counsel's representation and the sizable financial risks borne by Class Counsel support the percentage fee requested.

5. The Requested Award Is in Line with Awards Made in Similar Cases

As noted above (*supra*, §II.B), California courts have regularly awarded one-third of the common fund in class actions and securities cases similar to this one. Examples include: Order Awarding Attorneys' Fees, Payment of Litigation Expenses, and Reimbursement of Plaintiff's Time and Expenses at 1, *Plymouth Cnty. Contributory Ret. Sys. v. Adamas Pharmaceuticals, Inc.*, No. RG19018715 (Alameda Super. Ct. Apr. 13, 2021) (attached as Ex. 7 to the Joint Declaration); Judgment and Order Granting Final Approval of Class Action Settlement at 6, *In re Menlo Therapeutics Inc. Sec. Litig.*, No. 18CIV06049 (San Mateo Super. Ct. Aug. 14, 2020) (attached as Ex. 8 to the Joint Declaration); Judgment and Order Granting Final Approval of Class Action Settlement at 5, *In re ProNAi Therapeutics, Inc. S'holder Litig.*, No. 16-CIV-02473 (San Mateo

Super. Ct. May 24, 2019) (attached as Ex. 9 to the Joint Declaration); Judgment and Order Granting Final Approval of Class Action Settlement at 6, *In re Sunrun, Inc. S'holder Litig.*, No. CIV538215 (San Mateo Super. Ct. Dec. 14, 2018) (attached as Ex. 10 to the Joint Declaration); Judgment and Order Granting Final Approval to Class Action Settlement and Awarding Attorney Fees, Litigation Costs, Service Award and Case Administrators Fees at 2, *Brooks v. Capitol Valley Elec. Inc.*, No. CIV536903 (San Mateo Super. Ct. Mar. 7, 2017) (attached as Ex. 11 to the Joint Declaration); Final Approval Order and Judgment at 5, 7, *Paton v. Advanced Micro Devices, Inc.*, No. 1-07-CV-084838 (Santa Clara Super. Ct. Aug. 22, 2014) (noting fee award of one-third "was not an uncommon contingency fee percentage") (attached as Ex. 12 to the Joint Declaration).

The requested fee award is therefore not just merited by the circumstances of this proposed Settlement, but is also squarely in line with awards in similar cases.

6. The Experience, Reputation, Ability, and Quality of Counsel, and the Skill They Displayed in the Action, Favor the Requested Award

The skill, experience, reputation, quality, and ability of the attorneys who prosecuted this case also support the requested fee award. Class Counsel Robbins Geller Rudman & Dowd LLP, Cotchett, Pitre & McCarthy, LLP, and Scott+Scott Attorneys at Law LLP have earned national reputations for excellence through many years of litigating complex actions, particularly securities class actions. As set forth in their Firm Resumes, Class Counsel's experience, resources, and high-quality attorneys have allowed them to obtain significant recoveries throughout the country on behalf of their clients. *See* Robbins Geller Declaration, Ex. G; Cotchett Pitre Declaration, Ex. G; Scott+Scott Declaration, Ex. G.

The quality of opposing counsel is also important in evaluating the quality of the work done by Class Counsel. *See, e.g.*, *In re Equity Funding Corp. of Am. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977). Here, Class Counsel was opposed by experienced and skilled counsel from Cravath, Swaine & Moore LLP, Mayer Brown LLP, Bergeson, LLP, Morgan, Lewis & Bockius LLP, and Kirkland & Ellis LLP – large law firms with reputations for vigorous and skilled advocacy on behalf of their clients. In the face of such opposition, Class Counsel were able to develop a case that was

sufficiently strong to persuade Defendants to settle for an amount that Class Counsel believe is highly favorable to the Settlement Class. This factor weighs strongly in favor of the requested fee.

7. The Reaction of the Class Favors the Fee Request

While the deadline for objecting to Class Counsel's fee and expenses and opting-out of the proposed Settlement has not passed, to date, Class Counsel are aware of only one objection to the attorneys' fee and expense request, but no other aspect of the proposed Settlement. For reasons that Class Counsel will explain its reply papers, that objection lacks substance here. "The absence of objections or disapproval by class members to Class Counsel's fee request further supports finding the fee request reasonable." *Heritage*, 2005 WL 1594403, at *21.[13] Moreover, that just 52 Settlement Class Members have requested exclusion to date from the proposed Settlement further supports a finding that Class Counsel's fee request is reasonable. *See In re Am. Apparel, Inc. S'holder Litig.*, 2014 WL 10212865, at *15 (C.D. Cal. July 28, 2014) ("In order to gauge the reaction of the other class members, it is appropriate to evaluate the number of requests for exclusion, as well as the objections submitted.").

8. Continuing Obligations of Class Counsel

Class Counsel's work does not end with the approval of the proposed Settlement. Should the Court approve the Settlement, Class Counsel and Class Representatives will continue to work on behalf of the Settlement Class, including supervising the claims process, answering Settlement Class Members' calls and, if necessary, litigating appeals. That work is not accounted for in Class Counsel's current lodestar, but merits consideration when evaluating Class Counsel's fee and expense request here.

In sum, each of the foregoing factors strongly militates in favor of the reasonableness of Class Counsel's fee request, and of granting that request.

[13] Class Counsel will respond to all objections in the reply papers and will produce a full tally of objections and exclusions received.

III. CLASS COUNSEL'S LITIGATION EXPENSES ARE REASONABLE AND SHOULD BE APPROVED

As with fees, attorneys who create a common fund for the benefit of a class are entitled to payment from the fund of reasonable litigation expenses. *See Vincent v. Reser*, 2013 WL 621865, at *5 (N.D. Cal. Feb. 19, 2013) ("Attorneys who create a common fund are entitled to the reimbursement of expenses they advanced for the benefit of the class."). The reason for this rule, once again, is that the beneficiaries of the common fund should share in the cost of its creation. *See Rider v. County of San Diego*, 11 Cal. App. 4th 1410, 1423 n.6 (1992). In determining whether particular costs are compensable, courts consider whether they are of the type typically billed by attorneys to paying clients in the marketplace. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994).

Here, there is no question that the expenses at issue fall into that category, and are examples of the types of reasonable expenditures necessary to prosecute an action. As itemized in the Class Counsel Declarations and the Bernstein Litowitz Declaration, these expenses include: (1) Filing, Witness and Other Fees; (2) Transportation, Hotels & Meals; (3) Telephone; (4) Postage; (5) Messenger, Overnight Delivery; (6) Court Hearing Transcripts and Deposition Reporting, Transcripts and Videography; (7) Photocopies; (8) Online Legal and Financial Research; and (9) Litigation Fund Contribution. The total amount of these expenses is $843,852.44, accrued over almost five years.[14] Given that Class Counsel have borne these necessary costs and the risk of nonpayment, payment of these costs is fair and reasonable. Indeed, courts routinely approve similar payment requests. *See* Joint Declaration, Exs. 7-13.

IV. CLASS REPRESENTATIVES' AWARD REQUESTS ARE REASONABLE

Class Counsel also seek service awards for Class Representatives Ian Green and the Cardella Family Trust and for Federal Plaintiff of $15,000 each for their time and service in representing the Settlement Class. Such awards are reasonable and merited in this case. The service and time devoted to the litigation by these Plaintiffs are set forth in their respective declarations which are being

[14] This includes the $122,416.74 requested by Federal Plaintiff's Counsel. *See* Joint Declaration, Ex. 15 (Bernstein Litowitz Declaration).

concurrently filed. *See* Green Declaration; Cardella Family Trust Declaration; Iron Workers' Declaration. Courts routinely grant awards to those who, through their efforts and commitment, pursue a case to a successful conclusion for the benefit of a class. Here, these Plaintiffs represented other investors without any promise of a successful resolution or recovery of their losses. Approval of these awards is warranted as a matter of public policy and appropriate under applicable precedents. Judgment and Order Granting Final Approval of Class Action Settlement at 6, *In re Sunrun, Inc. S'holder Litig.*, No. CIV538215 (San Mateo Super. Ct. Dec. 14, 2018) (awarding two plaintiffs $16,000 and $15,000, respectively); *see also* Final Approval Order and Judgment at 6, *SolarCity Wage & Hour Cases*, No. JCCP 4945 (San Mateo Super. Ct. Feb. 1, 2019) (awarding one plaintiff $25,000 and $10,000 each to three other plaintiffs) (attached as Ex. 13 to Joint Declaration); *Kirschenbaum v. Elec. Arts, Inc.*, 2006 WL 2613160 (San Mateo Super. Ct. Jan. 27, 2006) (awarding one plaintiff $30,000 and three other plaintiffs $15,000 each).

V. CONCLUSION

For the reasons set forth herein and in the Final Approval Memorandum and all documents filed in support of preliminary approval, Class Counsel respectfully submit that the requirements of California Code of Civil Procedure §382 and California Rule of Court 3.769 are readily satisfied here, and that the request for an award of attorneys' fees and expenses is fair, reasonable, and appropriate under all the circumstances of this case and should therefore be granted. Additionally, the service awards requested by the Class Representatives and Iron Workers are reasonable in amount and supported by their declarations, and should thus also be approved in their entirety.

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