GLANCY PRONGAY & MURRAY LLP
LIONEL Z. GLANCY (#134180)
PETER A. BINKOW (#173848)
ROBERT V. PRONGAY (#270796)
JASON L. KRAJCER (#234235)
LEANNE H. SOLISH (#280297)
1925 Century Park East, Suite 2100
Los Angeles, CA 90067
Telephone: (310) 201-9150
Facsimile: (310) 201-9160
Email: lglancy@glancylaw.com

Lead Counsel for Lead Plaintiff and the Settlement Class

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TREVOR MILD, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

v.

PPG INDUSTRIES, INC., MICHAEL H. MCGARRY, VINCENT J. MORALES, and MARK C. KELLY,

Defendants.

Case No. 2:18-cv-04231-RGK-JEM

CLASS ACTION

LEAD COUNSEL'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

Hearing Date: October 21, 2019
Time: 9:00 a.m.
Location: Courtroom 850
Judge: Hon. R. Gary Klausner

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Court-appointed Lead Counsel, Glancy Prongay & Murray LLP ("GPM), respectfully request that the Court grant its motion for an award of attorneys' fees in the amount of 25% of the Settlement Fund (*i.e.*, $6,250,000, plus interest earned at the same rate as the Settlement Fund).[1] Lead Counsel also seeks reimbursement of: (i) $724,020.03 in litigation expenses that counsel reasonably and necessarily incurred in prosecuting and resolving the Action; and (ii) $5,000 in costs incurred by the Court-appointed Lead Plaintiff, Joe Cammarata ("Lead Plaintiff"), directly related to his representation of the Settlement Class, as authorized by the PSLRA.

I. PRELIMINARY STATEMENT[2]

The proposed Settlement, which provides for a payment of $25 million in cash in exchange for the resolution of the Action, represents an extremely favorable result for the Settlement Class, particularly when juxtaposed against the significant obstacles that Lead Plaintiff would have had to overcome in order to prevail in this complex securities fraud litigation. In undertaking this litigation, Lead Counsel faced numerous challenges to establishing liability, loss causation, and damages. The risk of losing was very real, and it was greatly enhanced by the fact that Lead Counsel would be litigating against defendants represented by highly skilled defense counsel, under the heightened pleading standard of the PSLRA. Moreover, Defendants vehemently opposed Lead Plaintiff's motion for class certification—

[1] Unless otherwise noted, capitalized terms have the meanings set forth in the Stipulation and Agreement of Settlement dated June 1, 2019 (D.E. 119-1) (the "Stipulation") or in the concurrently filed Declaration of Lionel Z. Glancy ("Glancy Declaration"). Citations to "¶__" or "Ex. __" in this memorandum refer to paragraphs in, or exhibits to, the Glancy Declaration. Unless otherwise indicated, all emphasis is added and citations and quotations omitted.

[2] The Glancy Declaration is an integral part of this submission. For the sake of brevity in this memorandum, the Court is referred to it for a detailed description of, *inter alia*, the factual history of the Action and nature of the claims asserted (¶¶ 11-57); the negotiations leading to the Settlement (¶¶ 58-67); the risks and uncertainties of continued litigation (¶¶ 71-88); and the services Lead Counsel provided for the benefit of the Settlement Class (¶¶ 6, 18-67).

which was pending during settlement discussions—and, the Court's acceptance of certain of Defendants' arguments would have created a significant, and possibly insurmountable, hurdle for the proposed class to have overcome. Similarly, even if the Court were to have certified the proposed class, Lead Plaintiff still faced likely summary judgment motions by both the PPG Defendants and Defendant Kelly. Despite these risks, Lead Counsel worked 14,085.35 hours, and advanced $723,031.53 in hard costs, all on a contingency basis with no guarantee of ever being paid.

Lead Counsel believe that a "benchmark" attorney fee award of 25% properly reflects the many significant risks taken by Lead Counsel, as well as the excellent result achieved in a hard fought and difficult litigation. When examined under either the percentage-of-the-fund or lodestar methods for calculating attorneys' fees, the requested fee is reasonable, and well within the range of attorneys' fees awarded in similar complex, contingency cases. In addition, the costs and expenses requested by Lead Plaintiff and his counsel are likewise reasonable in amount, and they were necessarily incurred in the successful prosecution of the Action. Accordingly, they too should be approved.

II. THE COURT SHOULD APPROVE LEAD COUNSEL'S FEE REQUEST

A. Lead Counsel Is Entitled To An Award Of Attorneys' Fees As A Percentage Of The Common Fund

It is well settled that attorneys who represent a class and are successful in recovering a common fund for the benefit of class members are entitled to a reasonable fee from the common fund as compensation for their services. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("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"). Similarly, the Ninth Circuit has held 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 West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977).

"Under Ninth Circuit law, the district court has discretion in common fund cases to choose either the percentage-of-the-fund or the lodestar method." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). Notwithstanding that discretion, where there is an easily quantifiable benefit to the class—such as a cash common fund—the percentage-of-the-fund approach is the prevailing method used. *See, e.g.*, *Ellison v. Steven Madden, Ltd.*, 2013 WL 12124432, at *8 (C.D. Cal. May 7, 2013) (finding "use of the percentage method" to be the "dominant approach in common fund cases"). For these reasons, among others, Lead Counsel respectfully requests that the Court award attorneys' fees in this case on a percentage-of-the-fund basis.

B. The Requested Attorneys' Fee Is Supported By The Factors Considered By Courts In The Ninth Circuit

Courts in the Ninth Circuit consider certain factors when determining whether a fee award is "reasonable under the circumstances." *Rodriguez v. Disner*, 688 F.3d 645, 653 (9th Cir. 2012). Those factors include: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; (5) the reaction of the Settlement Class; and (6) awards made in similar cases. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-51 (9th Cir. 2012). The Ninth Circuit has explained that these factors should not be used as a rigid checklist or weighed individually, but, rather, should be evaluated in light of the totality of the circumstances. *Id.* As demonstrated below, each of these factors, along with the lodestar cross-check, militate in favor of approving the requested fee.

1. The Quality Of The Results Achieved Supports The Fee Request

Courts have consistently acknowledged that the quality of the result achieved is the most important factor in determining an appropriate fee award. *See, e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained").

Lead Counsel submits that the $25 million proposed Settlement is in the best interests of the Settlement Class, both quantitatively and when considering the risk of a lesser (or no) recovery if the case proceeded through a decision on class certification, summary judgment and trial. Lead Plaintiff's damages expert estimates that if Lead Plaintiff had fully prevailed on his claims at both summary judgment, and after a jury trial, and if the Court and jury accepted Lead Plaintiff's damages theory, including proof of loss causation as to each of the stock price drop dates alleged in this case—*i.e.*, Lead Plaintiff's ***best case scenario***—total ***maximum*** damages would be $428.2 million. Thus, the $25 million Settlement Amount represents approximately 5.8% of the total ***maximum*** damages potentially available in this Action. ¶¶ 5, 89.

This case, however, was not risk free and there were meaningful potential barriers to recovery. Obstacles included both the well-known general risks of complex securities litigation, as well as the specific risks inherent in this case. ¶¶ 71-88; *see also Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009) ("To be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action"). For example, certain of Defendants' likely arguments concerning loss causation and damages could have reduced ***maximum*** estimated recoverable damages to between approximately $17 and $310.4 million. *See* ¶¶ 5, 90. Under these scenarios, the $25 million recovery equates to between 8.1% and 147% of damages. Accordingly, Lead Counsel's efforts have resulted in a recovery

of between 5.8% and 147% of the Settlement Class' damages.

In comparison, from 1996 through 2018, the median recovery in securities class actions with estimated damages ranging from $400-$599 million was 1.8% (*see* Ex. 4 (Stefan Boettrich and Svetlana Starykh, Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review (NERA Jan. 29, 2019)) at 35, Fig. 27), and the median securities class action settlement in 2018 was approximately 2.6% of estimated damages. *See id*. at 36, Fig. 28. Furthermore, the percentage of damages recovered compares favorably with other securities fraud settlements approved by courts in this Circuit. *See, e.g.*, *Gudimetla v. Ambow Educ. Holding*, 2015 WL 12752443, at *5 (C.D. Cal. Mar. 16, 2015) (approving securities fraud class action settlement where recovery was 5.6% of estimated damages); *In re LJ Int'l, Inc. Sec. Litig.*, 2009 WL 10669955, at *4 (C.D. Cal. Oct. 19, 2009) (approving securities fraud class action settlement where recovery was 4.5% of maximum possible recovery); *Int'l Bhd. of Elec. Workers Local 697 Pension Fund v. Int'l Game Tech., Inc.*, 2012 WL 5199742, at *3 (D. Nev. Oct. 19, 2012) (approving securities fraud class action settlement where recovery was 3.5% of maximum damages and noting "this amount is within the median recovery in securities class actions settled in the last few years").

Given the range of possible results in this litigation, there can be no question that the recovery constitutes a considerable achievement and weighs strongly in favor of the requested fee.

2. The Substantial Risks Of The Litigation Support The Fee Request

The second factor courts in this Circuit consider in awarding attorneys' fees is "[t]he risk that further litigation might result in Plaintiffs not recovering at all, particularly in a case involving complicated legal issues." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046-47 (N.D. Cal 2008); *see also 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 373, 379 (9th Cir. 1995) (finding attorneys' fees "justified because of the complexity of the issues and the risks"). While courts have always recognized that securities class actions carry significant risks, post-PSLRA rulings make it clear that the risk of no recovery has increased significantly. *In re Ikon Office Sols., Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA"). This Action was no exception.

While Lead Counsel believe that the claims of Lead Plaintiff and the Settlement Class are meritorious, Lead Counsel also recognize a substantial number of risks present in the litigation from the outset, and that Lead Plaintiff's ability to succeed at trial and obtain a substantial judgment was far from certain. As discussed in greater detail in the Glancy Declaration, and in Lead Plaintiff's memorandum in support of the Settlement ("Final Approval Memorandum"), there were substantial risks here with respect to getting the class certified, and in establishing both liability and damages. ¶¶ 71-88.

The fact that Lead Plaintiff prevailed on his claims at the pleading stage did not, however, guarantee a recovery at trial. Lead Counsel faced significant obstacles to ***proving*** that Defendants' alleged misstatements or omissions were material. For instance, although Lead Plaintiff believes there is significant evidence to support a finding that meeting consensus estimates for adjusted EPS was important to the Individual Defendants, which could support a finding of materiality, Defendants argued and would likely continue to argue that the alleged accounting adjustments were minor and had the effect of both increasing ***and*** decreasing PPG's income over certain periods during the Settlement Class Period. Defendants further argued that the restatement of PPG's financial statements had a trivial impact on adjusted EPS (ranging from a few pennies to no change at all in two quarters), and that in the context of a $14 billion company, these adjustments would not be material to any reasonable investor. ¶ 72.

Lead Plaintiff also faced challenges in proving that Defendants' alleged misstatements were made with scienter. *See, e.g.*, *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1172 (S.D. Cal. 2007) (recognizing "that the issues of scienter and causation are complex and difficult to establish at trial"). Plaintiff believes that the evidence would have established Defendant Kelly (and PPG, through imputation) acted with scienter. Defendant Kelly, however, strongly objected to certain disclosures made by PPG, and further argued that those disclosures did not suggest any kind of purposeful misconduct. Defendants also claimed that Defendant Kelly did not have a motive to commit fraud, as evidenced by his lack of insider stock sales during the Settlement Class Period, and that the alleged earnings smoothing scheme would have had no impact on Defendant Kelly's incentive compensation. ¶ 74. PPG likely would have continued to claim that even if Lead Plaintiff could establish scienter on behalf of Defendant Kelly, his scienter could not be imputed to the Company, because it too was a victim of the alleged earnings smoothing scheme. ¶ 75.

Even assuming that Lead Plaintiff overcame the above risks and successfully established Defendants' liability, he would still have confronted considerable challenges in establishing loss causation and damages. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005) (plaintiffs bear the burden of proving "that the defendant's misrepresentations caused the loss for which the plaintiff seeks to recover"). For example, Defendants and their expert argued that the announcement on April 19, 2018 was part of a detailed Company announcement that included PPG's quarterly financial results and other disappointing news, and thus any stock price decline flowing therefrom would need to be disaggregated from the other confounding news. ¶ 78. Defendants' expert on market efficiency also raised an argument in relation to the alleged May 10, 2018 corrective disclosure concerning

the speed of a price adjustment in an efficient market.[3] ¶ 79. In addition, Defendants and their expert argued that neither of these announcements could serve as a predicate for loss causation because they did not disclose the exact amount of the restatement. ¶ 80. If any of these arguments were accepted by the Court or a jury, class-wide damages would have been drastically reduced. ¶¶ 81, 89-91.

Additionally, Lead Plaintiff would have had to proffer expert testimony to prove: (i) what the "true value" of PPG's common stock would have been had there been no alleged material misstatements or omissions; (ii) the amount by which PPG shares were inflated by the alleged material misstatement and omissions; and (iii) the amount of alleged artificial inflation removed by the disclosures on April 19, 2018 and May 10, 2018. ¶ 82. Defendants almost certainly would have presented their own damages expert(s) to present conflicting conclusions and theories as to the reasons for PPG's share price declines on the alleged disclosure dates, requiring a jury to decide the "battle of the experts." "When the success of a party's case turns on winning a so-called 'battle of experts,' victory is by no means assured." *In re Bear Stearns Cos., Inc. Sec., Deriv., & ERISA Litig.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012).

In sum, the risks posed by litigation were substantial, and they were present every step of the way. Accordingly, this factor weighs heavily in favor of the requested fee award. *See Vinh Nguyen v. Radient Pharm. Corp.*, 2014 WL 1802293, at *9 (C.D. Cal. May 6, 2014) (approving requested fee and concluding the fee "award is also appropriate given the contingent nature of payment and the risk incurred in taking on the case[,]" and noting that "[t]he fee is also commensurate with, and even slightly below, a traditional contingency fee") (citing

[3] Specifically, Defendants argued that in an efficient market, new information is reflected in a stock's price very rapidly, so the full price decline on May 11, 2018 does not present an accurate measure of the amount of inflation that was removed from the stock price due to the May 10, 2018 corrective disclosure. ¶ 79.

Blum v. Stenson, 465 U.S. 886, 904 (1984)); *see also Destefano v. Zynga, Inc.*, 2016 WL 537946, at *17 (N.D. Cal. Feb. 11, 2016) (approving requested fee and noting that, "[a]s to the second factor . . . , the risks associated with this case were substantial given the challenges of obtaining class certification and establishing the falsity of the misrepresentations and loss causation"); *Omnivision*, 559 F. Supp. 2d at 1047 (noting risk of litigation, including plaintiffs' ability to prove loss causation and risk defendants would prevail on damages, supported requested fee).

3. The Skill Required And The Quality Of The Work

The third factor to consider in determining what fee to award is the skill required and the quality of the work performed. To this end, courts have recognized that the "prosecution and management of a complex national class action requires unique legal skills and abilities," *Omnivision*, 559 F. Supp. 2d at 1047, and that "[t]he experience of counsel is also a factor in determining the appropriate fee award." *In re Heritage Bond Litig.*, 2005 WL 1594403, at *12 (C.D. Cal. June 10, 2005). "This is particularly true in securities cases because the [PSLRA] makes it much more difficult for securities plaintiffs to get past a motion to dismiss." *Omnivision*, 559 F. Supp. 2d at 1047.

The attorneys at GPM and additional counsel, the Rosen Law Firm, P.A. ("Rosen" and together with GPM, "Plaintiff's Counsel"), are among the most experienced and skilled practitioners in the securities litigation field and the firms have a long record of successfully prosecuting securities cases throughout the country, including within this Circuit. *See* ¶ 119; Ex. 5 (GPM firm resume); Ex. 6 (the "Rosen Decl.") at ¶ 10 & Ex. 3 thereto. Lead Counsel respectfully submits that the quality of their efforts in the litigation, together with their substantial experience in securities class actions and commitment to this litigation, provided Lead Counsel with the leverage necessary to negotiate a favorable settlement.

From the outset, Lead Counsel aggressively sought to obtain the maximum recovery for the Settlement Class. Through their persistent work, the Lead Plaintiff

was able to plead detailed allegations based on counsel's extensive investigation; defeat Defendants' motions to dismiss despite the PSLRA's heightened pleading standard; fully brief class certification; conduct significant fact discovery, including review and analysis of approximately 2.2 million pages of documents; prepare for and defend the depositions of both Lead Plaintiff and his market efficiency expert, and take the deposition of Defendants' expert on market efficiency; and work with experts and consultants to present strong counterarguments to Defendants' positions. ¶ 6. Lead Counsel's extensive efforts and skill led to the Settlement and strongly support the requested percentage fee.

In evaluating the quality of Lead Counsel's work, it is also important to consider the quality and vigor of opposing counsel. *See, e.g.*, *Heritage Bond*, 2005 WL 1594403, at *20; *In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977).[4] Defendants are represented in this Action by Dechert LLP, Ropes & Gray LLP, and Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow, P.C., all of which are extremely capable and well-respected law firms, whose briefs filed in support of Defendants' motions to dismiss and in opposition to Lead Plaintiff's motion for class certification reflected a vigorous defense. ¶ 120. Lead Counsel's ability to obtain a favorable Settlement in the face of this formidable legal opposition confirms the superior quality of Lead Counsel's work and supports the award of the requested fee.

4. The Contingent Nature Of The Fee And The Financial Burden Carried By Counsel Support The Fee Request

The fourth factor is the contingent nature of the fee and the obstacles surmounted. *WPPSS*, 19 F.3d at 1299. Here, Counsel has received no

[4] *See also In re Adelphia Commc'ns Corp. Sec. & Deriv. Litig.*, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006) ("The fact that the settlements were obtained from defendants represented by 'formidable opposing counsel from some of the best defense firms in the country' also evidences the high quality of lead counsels' work."), *aff'd*, 272 F. App'x 9 (2d Cir. 2008).

compensation to date, invested 14,115.45 hours of work equating to a total lodestar of $6,397,220.75, and advanced expenses of $724,020.03 in prosecuting and resolving this Action. Additional work in implementing the Settlement and claims administration will also be required. Since the inception of this case, Lead Counsel has borne the risk that any compensation and expense reimbursement would be contingent on the result achieved, as well as on this Court's discretion in awarding fees and expenses.

The risk of no recovery in complex cases like this one is very real. Lead Counsel knows from personal experience that despite the most vigorous and competent of efforts, success in complex contingent litigation is never guaranteed. *See, e.g.*, *In re: Korean Ramen Antitrust Litigation*, Case No. 3:13-cv-04115 (N.D. Cal. Dec. 17, 2018) (GPM served as Co-Lead Counsel in case where, after more than five years of litigation, a plethora of foreign discovery, the expenditure of many millions of dollars in attorney time and hard costs, as well as a multi-week trial, the jury returned a verdict in favor of defendants alleged to have conspired to fix the prices of Korean ramen noodles).

And Lead Counsel is not alone. There are many other hard-fought lawsuits where, because of the discovery of facts unknown when the case was commenced, changes in the law during the pendency of the case, or a decision of a judge or jury following a trial on the merits, excellent professional efforts by members of the plaintiff's bar produced no attorneys' fees for counsel. *See, e.g.*, *In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d 469, 471-73 (S.D.N.Y. 2010) (after completing significant and expensive foreign discovery, 95% of plaintiffs' damages were eliminated by Supreme Court's reversal, in *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010), of unbroken circuit court precedent over 40 years). Indeed, "[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." *In re Xcel Energy, Inc., Sec., Deriv. & "ERISA"*

Litig., 364 F. Supp. 2d 980, 994 (D. Minn. 2005).[5]

In this case, because Plaintiff's Counsel's fee was entirely contingent, the only certainties were that there would be no fee or expense reimbursement without a successful result and that such result would only be realized after significant amounts of time, effort, and expense had been expended. Nevertheless, Lead Counsel committed significant amounts of both time and money to vigorously and successfully prosecute this Action for the benefit of the Settlement Class. ¶¶ 121-25. The contingent nature of Plaintiff's Counsel's representation strongly favors approval of the requested fee. *Immune Response*, 497 F.Supp.2d at 1176 ("In complex cases, such as this, the risk of no recovery is substantial and must be balanced against an expectation of a sizeable award.").

5. A Benchmark Fee Award Of 25% Is Consistent With Fee Awards In Similar, Complex, Contingent Litigation

In *Paul, Johnson, Alston & Hunt v. Graulty*, the Ninth Circuit established 25% of the fund as the "benchmark" award for attorneys' fees. 886 F.2d 268, 272 (9th Cir. 1989); *see also Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) (reaffirming 25% benchmark); *Pac. Enterprises Sec. Litig.*, 47 F.3d at 379 (same). However, "in most common fund cases, the award exceeds that benchmark." *Omnivision*, 559 F. Supp. 2d at 1047; *Romero v. Producers Dairy Foods, Inc.*, 2007 WL 3492841, *4 (E.D. Cal. Nov. 14, 2007) (approving a fee award of 33% of the common fund, and stating "[e]mpirical 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,").[6]

[5] *See, e.g.*, *In re Oracle Corp. Sec. Litig.*, 2009 WL 1709050 (N.D. Cal. June 16, 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 lodestar of approximately $48 million).

[6] *See also Singer v. Becton Dickinson and Co.*, 2010 WL 2196104, *8 (S.D. Cal.

"This is particularly true in securities class actions such as this." *In re American Apparel, Inc. Shareholder Litigation*, 2014 WL 10212865, at *23 (C.D. Cal. 2014); *see also Pac. Enterprises Sec. Litig.*, 47 F.3d at 379 (affirming a 33% award of $12 million settlement fund); *In re Mego Financial Corp.*, 213 F.3d at 463 (affirming award of one-third of the total recovery); *Activision*, 723 F. Supp. at 1373 (surveying securities cases nationwide, awarding 32.8% fee from $3.5 million fund, and noting, "[t]his court's review of recent reported cases discloses that nearly all common fund awards range around 30%[.]")).

Here, the requested fee is in line with the Ninth Circuit benchmark and is well within the range of percentages courts in this Circuit have awarded in similar securities settlements. *See, e.g., Heritage Bond*, 2005 WL 1594403, at *19 (awarding 33⅓% of $27.783 million securities settlement) (collecting cases awarding 33⅓%); *City of Roseville Employees' Retirement Sys. v. Micron Tech., Inc.*, No. 06-cv-85-WFD (D. Idaho 2011), D.E. 188 (Ex. 8) (awarding 25% of $42 million securities fraud settlement); *In re Sunbeam Corp. Sec. Litig.*, No. 03-cv-01721-JM (POR) (S.D. Cal. 2006), D.E. 211 (Ex. 9) (awarding 25% of $32.75 million securities fraud settlement); *In re Amazon.com, Inc. Sec. Litig.*, No. 01-cv-0358-L (W.D. Wash. 2005), D.E. 266 (Ex. 10) (awarding 25% of $27.5 million securities class action settlement); *In re Petco Corp. Sec. Litig.*, No. 05-cv-0823-H (RBB) (S.D. Cal. 2008), D.E. 397 (Ex. 11) (awarding 25% of $20.25 million securities settlement). *A fortiori*, this factor also weighs in favor of granting Lead Counsel's 25% fee request.

June 1, 2010) (awarding 33.33% common fund, and collecting cases and noting that "the request for attorneys' fees in the amount of 33.33% of the common fund falls within the typical range of 20% to 50% awarded in similar cases"); *Knight v. Red Door Salons, Inc.*, 2009 WL 248367, at *6 (N.D. Cal. 2009) ("[I]n most common fund cases, the award exceeds that benchmark"); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D. Cal. 2010) (awarding 33 1/3% and stating that "the exact percentage varies depending on the facts of the case and in most common fund cases, the award exceeds that [25%] benchmark.").

6. The Reaction Of The Settlement Class Supports The Requested Fee

"The existence or absence of objectors to the requested attorneys' fee is a factor is determining the appropriate fee award." *Heritage Bond*, 2005 WL 1594403, at *21; *see also OmniVision*, 559 F. Supp. 2d at 1048. While the time to object to the fee and expense application does not expire until September 30, 2019, to date, not a single objection has been received. ¶ 98. Should any objections be received, Lead Counsel will address them in their reply papers. "The lack of objection from any Class Member supports the attorneys' fees award." *Immune Response*, 497 F.Supp.2d at 1177; *see also Knight*, 2009 WL 248367, at *7 (lack of objections supports 30% fee award); *Fernandez*, 2008 WL 8150856, at *13 (3 members objected and 29 opted out, indicating favorable result and award of "generous fee").

C. A Lodestar Cross-Check Supports The Requested Fee

"In cases where courts apply the percentage-of-the-fund method to calculate fees, they should use a rough calculation of the lodestar as a cross-check to assess the reasonableness of the percentage award." *In re American Apparel, Inc. Shareholder Litig.*, 2014 WL 10212865, at *20 (C.D. Cal. 2014); *see also Vizcaino*, 290 F.3d at 1050 ("while the primary basis of the fee award remains the percentage method, the lodestar may provide a useful perspective on the reasonableness of a given percentage award."). "A lodestar cross-check first computes the plaintiffs' attorneys' reasonable hourly rate for the litigation and multiplies that rate by the number of hours dedicated to the case. The cross-check then compares that figure with the attorneys' fees award, typically resulting in a positive multiplier." *In re Genworth Fin. Sec. Litig.*, 2016 WL 5400360, at *7 (E.D. Va. 2016). Indeed, "[i]n securities class actions, it is common for a counsel's lodestar figure to be adjusted upward by some multiplier reflecting a variety of factors such as the effort expended by counsel, the complexity of the case, and the risks assumed by counsel." *Heritage*

Bond, 2005 WL 1594403, at *22.

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 Intern., Ltd. Multidistrict Litig.*, 535 F.Supp.2d 249, 270 (D.N.H. 2007); *Glass*, 331 Fed.Appx. at 456.[7] In this case, the lodestar method – whether used directly or as a "cross-check" on the percentage method – strongly demonstrates the reasonableness of the requested fee.

Here, Plaintiff's Counsel spent 14,115.45 hours of attorney and other professional support time prosecuting this Action. *See* ¶¶ 116-19. As is customary in seeking a percentage-of-the-fund award in common fund cases and submitting data for a lodestar cross-check, Plaintiff's Counsel have each submitted a declaration that includes a schedule identifying the lodestar of each firm (by individual, position, billing rate, and hours billed).[8] Based on current hourly rates,[9]

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[7] *See also In re Apollo Group Inc. Sec. Litig.*, 2012 WL 1378677, at *7 (D. Ariz. 2012) ("an itemized statement of legal services is not necessary for an appropriate lodestar cross-check"); *In re American Apparel*, 2014 WL 10212865, at *23 ("In contrast to the use of the lodestar method as a primary tool for setting a fee award, the lodestar cross-check can be performed with a less exhaustive cataloging and review of counsel's hours."); *Fernandez v. Victoria Secret Stores, LLC*, 2008 WL 8150856, at *9 (C.D. Cal. 2008).

[8] *See In re Immune Response*, 497 F. Supp. 2d at 1176 ("Here, counsel have provided sworn declarations from attorneys attesting to the experience and qualifications of the attorneys who worked on the case, the hourly rates, and the hours expended."); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306–07 (3d Cir. 2005) ("[t]he district courts [ ] may rely on summaries submitted by the attorneys and need not review actual billing records"); *In re Se. Milk Antitrust Litig.*, 2013 WL 2155387, at *2 n.3 (E.D. Tenn. May 17, 2013).

[9] Courts use current rather historic rates, to ensure that "[a]ttorneys in common fund cases [are] compensated for any delay in payment." *Fischel v. Equitable Life Assur. Soc'y of U.S.*, 307 F.3d 997, 1010 (9th Cir. 2002); *see also LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998) ("[C]urrent rates, rather than historical

this equates to a lodestar of $6,397,220.75. ¶ 116. Lead Counsel's hourly range from $750-$960 for partners, $350-$550 for associates, and $380-$395 per hour for project attorneys. The blended hourly rate for Lead Counsel's timekeepers is $452.41. ¶ 113.

"Courts may find hourly rates reasonable based on evidence of other courts approving similar rates or other attorneys engaged in similar litigation charging similar rates." *Parkinson v. Hyundai Motor Am.*, 796 F.Supp.2d 1160, 1172 (C.D. Cal. 2010). Here, Lead Counsel's rates have been approved by other courts (*see In re CytRx Corp. Sec. Litig.*, 2018 WL 8950655, at *1-2 (C.D. Cal. Sept. 17, 2018) (blended rate of $510.39); *In re K12 Inc. Sec. Litig.*, 2019 WL 3766420, at *2 (N.D. Cal. July 10, 2019) (blended rate of $514.11)), and are consistent with other attorneys engaged in similar litigation.[10]

Moreover, the requested fee of $6,250,000 yields a fractional multiplier of 0.977.[11] ¶ 117. A "multiplier of less than one … suggests that the negotiated fee

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rates, should be applied in order to compensate for the delay in payment.").

[10] *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 2017 WL 1047834, at *5 (N.D. Cal. Mar. 17, 2017) (approving fee award in ***2017*** following lodestar cross-check where "[t]he blended average hourly billing rate [was] $529 per hour for all work performed and projected, with billing rates ranging from $275 to $1600 for partners, $150 to $790 for associates, and $80 to $490 for paralegals"); *In re High-Tech Employee Antitrust Litig.*, 2015 WL 5158730, at *9 (N.D. Cal. 2015) (finding reasonable in ***2015*** "billing rates for partners [that] range from about $490 to $975 … for non-partner attorneys, including senior counsel, counsel, senior associates, associates, and staff attorneys, [that] range from about $310 to $800, with most under $500 … [and] for paralegals, law clerks, and litigation support staff [that] range from about $190 to $430, with most in the $300 range."). Lead Counsel's rates for its partners and associates are also comparable to peer plaintiff and defense firms including Defendant Kelly's counsel, Ropes & Gray, litigating matters of similar magnitude. *See* Ex. 7 (defense counsel rates in complex litigation routinely reach as high as $1,500 per hour or higher); Ex. 13 (Ropes & Gray billing rates chart).

[11] In addition to the time expended to date, Lead Counsel will expend additional time preparing Lead Plaintiff's reply in support of final approval, preparing for and

award is a reasonable and fair valuation of the services rendered to the class." *Chun–Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 854 (N.D. Cal. 2010). This is because, as is true here, "the requested [25%] award would not 'yield windfall profits for class counsel in light of the hours spent on the case.'" *Id.* (quoting *Bluetooth*, 654 F.3d at 942). Accordingly, the lodestar cross-check supports the reasonableness of the requested fee. *See Vizcaino*, 290 F.3d at 1051 and n.6 (approving 28% fee award, finding that application of lodestar cross-check, which resulted in 3.65 multiplier, was not an abuse of discretion, and stating that multipliers ranged as high as 19.6, though most run from 1.0 to 4.0).[12]

In sum, Lead Counsel's requested fee award is reasonable, justified, and in line with what courts in this Circuit award in class actions such as this one.

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

In considering the reasonableness of class counsel's requested costs, this Court has considered three factors: (1) the amount requested in relation to the total settlement amount and the attorney fees requested; (2) the length and complexity of the litigation preceding settlement; and (3) whether counsel has shown that specific expenses were necessary in order to achieve settlement. *Bright v. Garberg*, 2014 WL 11497797, at *2 (C.D. Cal. Feb. 24, 2014) (citing, *e.g.*, *In re Media Vision*

attending the final approval hearing, directing the claims administration process, and filing a motion for final distribution. Lead Counsel will not seek additional compensation for this work.

[12] *See also Buccellato v. AT&T Operations, Inc.*, 2011 WL 3348055, at *1-*2 (N.D. Cal. June 30, 2011) (awarding 25% fee; collecting cases and stating that "a multiplier of 4.3 is reasonable"); *Retta v. Millennium Prods. Inc.*, 2017 WL 5479637, at *13 (C.D. Cal. Aug. 22, 2017) (approving multiplier of "roughly" 3.5); *Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1265 (C.D. Cal. 2016) ("Counsel's lodestar yields a 3.07 multiplier, which is well within the range of reasonable multipliers."); *Roberti v. OSI Sys., Inc.*, 2015 WL 8329916, at *7 (C.D. Cal. Dec. 8, 2015) (approving multiplier of just under 2.2 in securities fraud class action); *In re Mannkind Corp. Sec. Litig.*, 2012 WL 13008151, at *8 (C.D. Cal. Dec. 21, 2012) (approving multiplier of 2.3 in securities fraud class action).

Tech. Servs. Litig., 913 F. Supp. 1362, 1370-72 (N.D. Cal. 1996)).

In the aggregate, Counsel has incurred expenses in the amount of $724,020.03 while prosecuting the Action, and these expenses are set forth in the Glancy Declaration at ¶¶ 129-30 and Ex. 6 (Rosen Decl. ¶¶ 8-9).

A. Requested Litigation Expenses Are Only 2.9% Of The Recovery

From the beginning of the case, Counsel was aware that they might not recover any of their expenses and would not recover anything unless and until the Action was successfully resolved. Lead Counsel also understood that, even assuming that the case was ultimately successful, an award of expenses would not compensate for the lost use of the funds advanced to prosecute this Action. Thus, Lead Counsel was motivated to, and did, take significant steps to minimize expenses whenever practicable without jeopardizing the vigorous and efficient prosecution of the Action. ¶ 135. As a result, Plaintiff's Counsel's requested Litigation Expenses are a mere 2.9**%** of the $25 million recovery. This factor demonstrates the reasonableness of Counsel's requested litigation expenses. *Hale v. State Farm Mut. Auto. Ins. Co.*, 2018 WL 6606079, at *15 (S.D. Ill. Dec. 16, 2018) (approving litigation expenses of 2.8% of the common fund and noting the request is less than the average 4%).

B. This Action Involved Complex And Protracted Litigation

The Court is respectfully referred to the Glancy Declaration (¶¶ 18-88), and Final Approval Memorandum (§ IV), for a detailed discussion of the work performed by Lead Counsel and the case's complexity.

C. The Requested Litigation Expenses Were Necessary to Obtain the Result Achieved

As detailed in the Glancy Declaration, the requested litigation expenses were critical to Lead Counsel's success in achieving the Settlement. ¶¶ 136-41. The largest expenses were for the retention of experts in the fields of market efficiency, loss causation, damages, and accounting, in the aggregate amount of $582,206.46,

or approximately 80.41% of the total litigation expenses. ¶¶ 136-37. These expert expenses were necessary to obtain the essential relevant information to properly plead Lead Plaintiff's claims in the AC, as well as brief both the oppositions to Defendants' motions to dismiss and class certification. ¶ 141. Other significant expenses included the electronic document review platform/repository ($55,545.70 (7.67%)); the mediator ($28,657.50 (3.96%)) and the private investigator ($17,888.15 (2.47%)). ¶¶ 138-39.

These expenses are the types of expenses routinely charged to clients who pay hourly. They should, therefore, be reimbursed out of the common fund. *See Immune Response*, 497 F. Supp. 2d at 1177-78 (approving counsel's request for reimbursement "for 1) meals, hotels, and transportation; 2) photocopies; 3) postage, telephone, and fax; 4) filing fees; 5) messenger and overnight delivery; 6) online legal research; 7) class action notices; 8) experts, consultants, and investigators; and 9) mediation fees."); *see In re High-Tech Employee Antitrust Litig.*, 2015 WL 5158730, at *16 (approving reimbursement of "(1) expert witness fees; (2) mediator's fees; (3) a document vendor to host the over 3.2 million pages of documents produced; (4) court reporting and videographer services . . . (5) electronic research; (6) copying, mailing, and serving documents; and (7) case-related travel for Plaintiffs, witnesses, experts, and counsel.").[13]

IV. LEAD PLAINTIFF SHOULD BE AWARDED HIS REASONABLE COSTS AND EXPENSES UNDER 15 U.S.C. §78u-4(a)(4)

In connection with Lead Counsel's requests for reimbursement of Litigation

[13] The Notice informed Settlement Class Members that Lead Counsel intended to apply for the reimbursement for Litigation Expenses "in an amount not to exceed $735,000, which may include an application for reimbursement of the reasonable costs (including lost wages) incurred by Lead Plaintiff directly related to his representation of the Settlement Class." Ex. 3-A (Notice pp. 2-3). The requested reimbursement of $724,020.03 (plus $5,000 for Lead Plaintiff) does not exceed the potential expenses disclosed in the Notice and to date there have been no objections to the request for reimbursement of Litigation Expenses. ¶ 134.

Expenses, Lead Plaintiff seeks reimbursement of a total of $5,000 in costs (including lost wages). ¶ 133. The PSLRA permits the Lead Plaintiff in this case to recoup litigation costs (including lost wages) incurred as a result of serving as Plaintiff in the litigation and ensuring that the Settlement Class was adequately represented. 15 U.S.C. § 78u-4(a)(4).

Here, Lead Plaintiff respectfully requests reimbursement in the amount of $5,000. *See* Ex. 1 (Cammarata Declaration) ¶ 11. As set forth in his declaration, Mr. Cammarata stepped forward to represent the Class and spent approximately 35 hours participating in this litigation. *Id*. Among other things, Mr. Cammarata: (i) communicated with Lead Counsel regarding the posture and process of the case, including reviewing significant pleadings, briefs, and Court orders; (ii) assisted Lead Counsel in responding to discovery, which included, among other things, the collection and production of documents; (iii) prepared for and sat for a deposition; and (iv) consulted with counsel regarding the Settlement and ultimately approved the Settlement. *See id*. ¶¶ 4-5.

Lead Plaintiff and his counsel respectfully submit that reimbursement of $5,000 for the considerable time and effort Mr. Cammarata expended for the benefit of the Settlement Class is both reasonable and appropriate. It is also well below reimbursement awards in similar complex cases. *See, e.g.*, *Todd v. STAAR Surgical Co*., 2017 WL 4877417, at *6 (C.D. Cal. Oct. 24, 2017) ($10,000 award for the "significant time and effort Lead Plaintiff expended to support this litigation (including reviewing and commenting on the complaints and significant briefs, traveling to Los Angeles to prepare and sit for deposition, and communicating with counsel to oversee the litigation."); *Immune Response*, 497 F. Supp. 2d at 1173-74 ($40,000 reimbursement to lead plaintiff).

V. CONCLUSION

For the foregoing reasons, Lead Counsel respectfully requests that the Court grant its fee and expense application.

Dated: September 16, 2019

GLANCY PRONGAY & MURRAY LLP

By: *s/ Lionel Z. Glancy*

Lionel Z. Glancy
Peter A. Binkow
Robert V. Prongay
Jason L. Krajcer
Leanne H. Solish
1925 Century Park East, Suite 2100
Los Angeles, CA 90067
Telephone: (310) 201-9150
Facsimile: (310) 201-9160
Email: lglancy@glancylaw.com

Lead Counsel for Lead Plaintiff and the Settlement Class

PROOF OF SERVICE BY ELECTRONIC POSTING

I, the undersigned say:

I am not a party to the above case, and am over eighteen years old. On September 16, 2019, I served true and correct copies of the foregoing document, by posting the document electronically to the ECF website of the United States District Court for the Central District of California, for receipt electronically by the parties listed on the Court's Service List.

I affirm under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 16, 2019, at Los Angeles, California.

s/ Lionel Z. Glancy
Lionel Z. Glancy