The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

IN RE BARRETT BUSINESS SERVICES SECURITIES LITIGATION	Case No. 3:14-cv-5884-BHS **CLASS ACTION**
This Document Relates To: ALL ACTIONS.	**LEAD COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES** **ORAL ARGUMENT SET** **HEARING AND NOTING DATE:** The Hon. Benjamin H. Settle February 22, 2017 1:30 p.m. Courtroom E

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Pursuant to the Court's November 7, 2016 Amended Order Preliminarily Approving Settlement and Providing for Notice ("Preliminary Approval Order," ECF No. 117), Lead Counsel Bernstein Litowitz Berger & Grossmann LLP ("Bernstein Litowitz"), on behalf of itself and Liaison Counsel Byrnes Keller Cromwell LLP ("Byrnes Keller") and additional Plaintiffs' Counsel Wolf Haldenstein Adler Freeman & Herz LLP ("Wolf Haldenstein") (collectively, with Lead Counsel, "Plaintiffs' Counsel"), submits this motion for an award of attorneys' fees in the amount of 22% of the Settlement Fund, and reimbursement of Litigation Expenses in the total amount of $114,823.92, plus interest accrued thereon, to be paid from the Settlement Fund.

I. INTRODUCTION

Plaintiffs' Counsel have succeeded in recovering $12 million for the benefit of the Settlement Class. As discussed below, and in the accompanying declarations of Plaintiffs' Counsel, all of the factors considered by courts within the Ninth Circuit support the request for attorneys' fees as a percentage-of-the-fund recovered, in the amount of 22%.[1] The results obtained by Plaintiffs' Counsel in the face of the litigation risks are remarkable. The likelihood of succeeding was highly uncertain. Plaintiffs' Counsel nevertheless undertook this representation on a contingency basis, with no guarantee of success or recovery. They faced substantial risks overcoming Defendants' motions to dismiss. Although Plaintiffs' Counsel were able to conduct a thorough investigation sufficient to draft a detailed Complaint that they believe satisfied the heightened pleading standard of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), Defendants assuredly would have challenged the allegations again at both summary judgment and trial. Even if all claims had survived the pleading and summary

[1] Lead Counsel respectfully refers the Court to the accompanying Declaration of Timothy A. DeLange in Support of Final Approval of Class Action Settlement and Plan of Allocation, and Lead Counsel's Motion for Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("DeLange Declaration"), for a detailed description of the Action, the negotiations leading to the Settlement, the risks of litigation, the reasons for the Settlement, and further support for the request for attorneys' fees and reimbursement of Litigation Expenses. As discussed below, declarations of the three Plaintiffs' Counsel are also attached to the DeLange Declaration as Exhibits 4-A, 4-B, and 4-C.

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judgment stages, Plaintiffs' Counsel faced risks proving falsity, scienter, and loss causation; defeating defenses; demonstrating damages; and establishing that a class action was appropriate for litigation purposes. Even if Plaintiffs had wholly succeeded through motions, trial, and appeals, there was a real risk in actually collecting a substantial judgment.

As detailed in the accompanying DeLange Declaration, Plaintiffs' Counsel vigorously pursued this litigation. Among other things, Plaintiffs' Counsel conducted a comprehensive investigation to prepare the consolidated complaints, including review and analysis of Barrett's press releases and other public statements and public filings with the U.S. Securities and Exchange Commission ("SEC") filings, research and other reports by securities and financial analysts covering Barrett and its business, news articles and other media reports about Barrett, and pricing, trading, and other data concerning Barrett common stock. Plaintiffs' Counsel identified and interviewed numerous percipient witnesses, including six former Barrett employees who provided detailed information in the Complaint. Plaintiffs' Counsel also monitored and analyzed additional information that was revealed throughout the litigation, and when appropriate sought and obtained leave to amend the complaints to add the new information. *See* DeLange Decl. Section II.

Plaintiffs' Counsel opposed Defendants' various rounds of motions to dismiss; engaged and consulted with experts; researched the law applicable to the claims and potential defenses; fully analyzed the available insurance policies and Defendants' ability to fund a recovery; and engaged in a thorough mediation process with experienced defense counsel and successfully negotiated a favorable settlement. *See id.*

Given the substantial recovery obtained for the Settlement Class, the complexity and amount of work involved, the skill and expertise required, and the significant risks that Lead Counsel undertook, the requested award of 22% of the Settlement Amount is fair and reasonable. It is below the Ninth Circuit's 25% "benchmark," and consistent with, or less than, fee awards in other similar cases. A lodestar cross-check confirms that the requested fee, which represents a

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multiplier of 2.5, is fair and reasonable. Moreover, the institutional investor Plaintiffs approve the fairness and reasonableness of the requested fee. *See id.* ¶91.

As required by the Court's November 7, 2016 Preliminary Approval Order, the Court-approved Notice was mailed to potential Settlement Class Members and their brokers and nominees beginning on November 21, 2016. *See* Declaration of Jennifer M. Bareither re Notice Dissemination and Publication ("Bareither Decl."), attached as Exhibit 2 to the DeLange Decl. Over 22,899 Notices have been sent to potential Settlement Class Members and their broker and nominees. *See id.* ¶¶2-11. In addition, the Court-approved Summary Notice was published in the *Investor's Business Daily* and over the *PR Newswire* on November 28, 2016. *See id.* ¶12. Information regarding the Settlement has been made available through a toll-free telephone number and posted on the website established by the Claims Administrator specifically for this Settlement. *See id.* ¶¶13-14. The Notice advised Settlement Class Members that Lead Counsel would seek attorneys' fees on behalf of all Plaintiffs' Counsel in an amount not to exceed 22% of the Settlement Amount, and reimbursement of Litigation Expenses in an amount not to exceed $400,000. *See* Exhibit A to the Bareither Decl. ¶¶5, 67.

Pursuant to the Preliminary Approval Order, the deadline for Settlement Class Members to file any objection to Lead Counsel's fee and expense request is February 1, 2017. To date there are no objections.[2]

For the reasons set forth below, Lead Counsel respectfully requests that the Court approve its motion for attorneys' fees and expenses.

[2] If any objections are received, Lead Counsel will address them in the reply papers to be filed on February 15, 2017.

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II. THE REQUESTED FEES ARE FAIR AND REASONABLE

A. An Award Of Attorneys' Fees From The Common Fund Obtained Is Appropriate

The Supreme Court has recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Indeed, the Supreme Court has emphasized that private securities actions, such as the instant Action, are "a most effective weapon" and "an essential supplement to criminal prosecutions and civil enforcement actions" brought by the SEC. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313, 318 (2007). The PSLRA also authorizes courts to award attorneys' fees and expenses to counsel for the plaintiff class provided the award does not exceed a reasonable percentage of the amount of damages paid to the class. 15 U.S.C. § 78u-4(a)(6).

The Ninth Circuit has expressly approved the percentage-of-recovery approach, which has become the prevailing method for awarding fees in common fund cases in the Ninth Circuit. *See, e.g.*, *Glass v. UBS Fin. Servs., Inc.*, 331 Fed. App'x 452, 456-57 (9th Cir. 2009) (unpubl.) (overruling objection based on use of percentage-of-the-fund approach); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) (recognizing that the "use of the percentage method in common fund cases appears to be [the] dominant" method for determining attorneys' fees).

The percentage-of-recovery method also decreases the burden imposed on courts by eliminating a detailed and time-consuming lodestar analysis. *See In re Apple iPhone/iPod Warranty Litig.*, 40 F. Supp. 3d 1176, 1181 (N.D. Cal. 2014); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378-79 (N.D. Cal. 1989). Rather than engaging in a full-blown lodestar analysis, courts employing the percentage method sometimes use a less rigorous "lodestar cross-check" on the reasonableness of the requested fee. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (affirming use of percentage method and application of lodestar method as a cross-check); *Vincent v. Reser*, 2013 WL 621865, at *5 (N.D. Cal. Feb. 19, 2013) (using

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percentage method with lodestar cross-check); *In re Nuvelo, Inc. Sec. Litig.*, 2011 WL 2650592, at *3 (N.D. Cal. July 6, 2011) (same). Regardless of which method is utilized, the fees awarded must be fair and reasonable under the circumstances of a particular case. *See In re Wash. Pub. Power Supply Sys. Sec. Litig.* ("*WPPSS*"), 19 F.3d 1291, 1295 (9th Cir. 1994).

B. Factors Considered By Courts In The Ninth Circuit Support Approval Of The Requested Fee As Fair And Reasonable

Courts in the Ninth Circuit consider the following factors when determining whether a fee is fair and reasonable: (1) the results achieved; (2) the risks of litigation; (3) the skill required and quality of work; (4) the contingent nature of the fee and financial burden carried by the plaintiffs; (5) awards made in similar cases; (6) the reaction of the class; and (7) the amount of a lodestar cross-check. *See Vizcaino*, 290 F.3d at 1048-50; *Omnivision*, 559 F. Supp. 2d at 1046-48. Application of each of these factors here confirms that the requested fee of 22% is fair and reasonable.

1. The Results Achieved, In The Face Of Significant Risks, Support The Requested Fee

Courts have consistently recognized that the settlement achieved is an important factor to consider in determining an appropriate fee award. *See, e.g., Omnivision*, 559 F. Supp. 2d at 1046; *see also Glass*, 331 Fed. App'x at 456-57. Here, Plaintiffs' Counsel succeeded in obtaining a $12 million cash Settlement for the Settlement Class. This achievement was the result of Plaintiffs' Counsel's vigorous investigation, prosecution and settlement negotiations in the face of formidable risks. Consequently, the $12 million recovered on behalf of the Settlement Class represents a substantial achievement that weighs in favor of granting the 22% fee.

Risk that continued litigation might result in the Settlement Class (and Plaintiffs' Counsel) not receiving any recovery at all is another important factor in determining a fair fee award. *See, e.g.*, *In re Heritage Bond Litig.*, 2005 WL 1594389, at *14 (C.D. Cal. June 10, 2005) ("The risks assumed by Class Counsel, particularly the risk of non-payment or

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reimbursement of expenses, is a factor in determining counsel's proper fee award."); *Omnivision,* 559 F. Supp. 2d at 1047; *WPPSS*, 19 F.3d at 1299-301.

If this Action had proceeded, numerous material uncertainties existed. The fraud alleged in this case centered around Barrett and its senior officers allegedly making a series of materially misleading statements and omissions about the true level of Barrett's workers' compensation claims and the Company's workers' compensation reserve. For example, early in the Settlement Class Period, Defendants publicly represented to investors that workers' compensation reserves were "strengthened," while allegedly hiding the Company's true exposure. Specifically, as later confirmed, Barrett began to pay "more dollars out sooner" on claims from prior periods and "put[] up dollars on claims quicker." This process, which Defendants allegedly misleadingly referred to as "reserve strengthening," caused a substantial disruption in the actuarial data related to the Company's workers' compensation claims. Additionally, the rapid transfer of reserve dollars to specifically identified open claims skewed the ratios between the various components of the workers' compensation reserve. Nevertheless, Defendants falsely assured investors that the reserve was "conservative," "adequate," "reasonable and objective," that it represented management's "best estimate," and was the result of an "informed judgment."

The most immediate risk Plaintiffs faced was surviving Defendants' motions to dismiss that were pending when the Settlement was reached. To survive a motion to dismiss, a securities fraud complaint must (i) meet the heightened pleading requirements of Rule 9(b); (ii) contain sufficient facts to "state a claim to relief that is plausible on its face" (*Ashcroft v. Iqbal*, 556 U.S. 662-63 (2009)); and (iii) "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2)(A). If Defendants' motions to dismiss were granted with prejudice, the case would have been dismissed in its entirety without any recovery.

As detailed in the DeLange Declaration, Plaintiffs' Counsel responded in detail to Defendants' arguments in their motions to dismiss that Plaintiffs failed to identify a material omission or misrepresentation of fact in connection with the workers' compensation reserve.

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DeLange Decl. ¶¶48-51. Even assuming that Plaintiffs satisfied the heightened pleading standards of the PSLRA, Defendants undoubtedly would have continued to press those and other arguments at summary judgment or trial, and would have challenged the existence and amount of damages. While Plaintiffs and Plaintiffs' Counsel believe that Plaintiffs' claims are strong and that they would be able to develop the evidence needed to prevail at summary judgment and trial, they nonetheless recognize that if the Court or the jury were to accept any of Defendants' arguments or defenses, either at the pleading stage, summary judgment or at trial, it would eliminate or dramatically limit any potential recovery. These risks were more acute in this case because of the complex nature of accounting for workers' compensation reserves. Whether a jury would appreciate the nuances that both sides would be arguing was uncertain. *Id.* ¶¶52-54.

The Settlement, which represents at least 8.3% of maximum recoverable damages, even assuming Plaintiffs' Counsel were wholly successful in proving Plaintiffs' claims through trial and appeal, far exceeds the median recovery as a percentage of estimated damages.[3]

Moreover, Plaintiffs' Counsel monitored Barrett's financial condition and received financial information from Barrett. Based on their analysis, Plaintiffs' Counsel understood that there was a risk that Barrett would be unable to satisfy a substantial judgment that could be potentially obtained years in the future, and that the available insurance proceeds were

[3] Plaintiffs' Counsel engaged a consultant to assist in estimating potentially recoverable damages. Estimating aggregate damages can be challenging due to, among other things, assumptions that must be made regarding trading activity. The estimate of potential maximum recoverable damages in this case, assuming that Plaintiffs wholly prevailed on all claims and overcame all defenses, was at most approximately $145 million. But that number would be reduced or eliminated entirely if the Court or jury accepted some or all of Defendants' defenses. *Id.* ¶53. Even before accounting for Defendants' causation arguments and other defenses, the recovery of approximately 8.3% of the maximum recoverable damages is significantly higher than the 1.8% median settlement recovery as a percentage of estimated damages in securities class actions in 2015, as reported by Cornerstone Research. *See* Cornerstone Research, "Securities Class Action Settlements: 2015 Review and Analysis," at p. 8, Figure 7, *available at* www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2015-Review-and-Analysis; *see also* NERA, "Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review," at p. 34, Figure 30 (reporting a 0.7% median settlement value as a percentage of investor losses in 2015), *available at* www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf.

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diminishing due to defense costs. Securing both the remaining available insurance proceeds, and a substantial cash contribution from Barrett, required very careful negotiations. Plaintiffs' Counsel had to leverage the strength of the case they had developed, but avoid depleting the available insurance and without compromising the Company's financial condition. Obtaining the maximum possible amount under the circumstances was the product of Plaintiffs' Counsel's experience in negotiations and strategy. DeLange Decl. ¶¶55-56. Courts recognize that counsel's ability to maximize recovery in the face of ability-to-pay issues demonstrates the quality of the result achieved. *See, e.g., In re Genworth Fin. Sec. Litig.*, __ F. Supp. 3d __, 2016 WL 5400360, at *5 (E.D. Va. Sept. 26, 2016) ("Balanced with the risk of losing at trial and the risk that a greater award could result in Genworth's insolvency, the Settlement total provides an excellent result for the class and supports the Court's award of substantial attorneys' fees [of 28% of the $219 million settlement]"); *see also In re Enron Corp. Sec. Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 791-92 (S.D. Tex. 2008) (success obtained by class counsel in face of limited resources to fund a substantial settlement warranted 5.2 multiplier for fee request on $7.2 billion settlement).

Mediator Melnick, in his professional mediator opinion, confirms that the total $12 million Settlement was the most that could be obtained by Plaintiffs at the time the Settlement was reached. Melnick Decl. ¶10.

2. The Skill Required And Quality Of Plaintiffs' Counsel's Work Performed Support The Requested Fee

Another factor to consider in determining what fee to award is the skill required and quality of work performed by counsel. *See Heritage Bond*, 2005 WL 1594389, at *12 ("The experience of counsel is also a factor in determining the appropriate fee award."). "The 'prosecution and management of a complex national class action requires unique legal skills and abilities.' [citation omitted]. 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.

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Here, respectfully, the quality of Plaintiffs' Counsel's work performed – in the face of the PSLRA's heightened pleading standard – was extremely high. As set forth in greater detail in the DeLange Declaration (Section II), Plaintiffs' Counsel extensively developed the record by, among other things:

- Performing an in-depth review and analysis of: (i) Barrett's public SEC filings; (ii) research and other reports by securities and financial analysts covering Barrett and its business; (iii) Barrett's press releases and other public statements made by or about Defendants; (iv) news articles and other media reports about Barrett; (v) transcripts of Barrett's earnings conference calls; and (vi) pricing, trading, and other data concerning Barrett common stock;
- Conducting a thorough investigation identifying and interviewing potential percipient witnesses. Six former Barrett employees provided detailed information contained in the Complaint, including a former risk manager, a former risk management consultant, two former area managers, a branch manager, and a former director of business development;
- Consulting with accounting and damages experts;
- Drafting the detailed voluminous initial consolidated complaint;
- Monitoring additional information and disclosures that were made during the litigation, resulting in Plaintiffs drafting detailed amended consolidated complaints which they believe were sufficient to overcome the PSLRA's heightened pleading standard;
- Preparing extensive briefing in response to Defendants' multiple motions to dismiss; and
- Preparing for and participating in the lengthy mediation process, including drafting Plaintiffs' mediation statements, analyzing Defendants' mediation statements, and analyzing Barrett's financial condition and ability to pay a substantial judgment, and insurance policies.

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All three Plaintiffs' Counsel have many years of experience in litigation securities class actions throughout the country. *See* Firm Resumes of Plaintiffs' Counsel, attached to DeLange Decl. as Exhibits 4-A-C, 4-B-C, and 4-C-C. The attorneys at Lead Counsel Bernstein Litowitz are among the most experienced and skilled practitioners in the securities litigation field, and the firm has obtained recoveries on behalf of investors in securities class action litigation in this Circuit, alone – both before and after trial – in amounts totaling over $1 billion.[4] Lead Counsel's reputation as experienced and competent counsel in complex class action cases, both willing and able to litigate the case to resolution, facilitated Lead Counsel's ability to negotiate the Settlement, ultimately resulting in the $12 million recovery for the Settlement Class.

The quality and vigor of opposing counsel are also important in evaluating the services rendered by Plaintiffs' Counsel. *See, e.g.*, *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 449 (E.D. Cal. 2013). Throughout the litigation and settlement negotiations, Defendants have been represented by very skilled and highly-respected counsel at Miller Nash Graham & Dunn LLP (representing Barrett), Covington & Burling LLP and Groff Murphy PLLC (representing Defendant Michael Elich), and Janet Hoffman & Associates LLC and Hillis Clark Martin & Peterson P.S. (representing Defendant James Miller).

Mediator Melnick confirms that all counsel were well versed in the risks involved in the claims and defenses in the case:

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[4] *See, e.g., Roberti v. OSI Sys., Inc.*, 2:13-cv-9174-MWF (C.D. Cal.) ($15 million settlement); *In re Maxim Integrated Prods., Inc. Sec. Litig.*, 08-00832-JW (N.D. Cal.) ($173 million settlement); *In re Connetics Sec. Litig.*, 07-02940 SI (N.D. Cal.) ($12.75 million); *In re New Century*, 07-cv-00931 (FMOx) (C.D. Cal.) ($125 million); *In re Int'l Rectifier Corp. Sec. Litig.*, 07-02544-JFW (C.D. Cal.) ($90 million); *In re Gemstar-TV Guide Int'l Inc. Sec. Litig.*, 02-CV-2775-MRP (C.D. Cal.) ($92.5 million); *In re Wells Fargo Mortg.-Backed Certificates Litig.,* 09-CV-1376-LHK (N.D. Cal.) ($125 million); *In re McKesson HBOC, Inc. Sec. Litig.*, 99-CV-20743 RMW (N.D. Cal.) (over $1.04 billion); *In re Wash. Mut., Inc. Sec. Litig.,* 07-cv-1809 (W.D. Wash.) ($208.5 million); *In re Toyota Motor Corp. Sec. Litig.*, CV 10-922 DSF (C.D. Cal.) ($25.5 million); *In re Sunpower Sec. Litig.*, CV 09-5473-RS (N.D. Cal.) ($19.7 million); *In re Dendreon Corp. Class Action Litig.*, C11-01291JLR (W.D. Wash.) ($40 million); *In re Clarent Corp. Sec. Litig.*, Master File No. C-01-3361-CRB (N.D. Cal.) (obtaining plaintiff verdict at trial against CEO for knowing violation of federal securities laws).

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> I found the discussions in the mediation statements and during and related to the mediation sessions to be extremely valuable in helping me understand the relative merits of each Party's positions, and to identify the issues that were likely to serve as the primary drivers and obstacles to achieving a settlement. Counsel presented significant arguments regarding their respective client's positions, and it was apparent to me that both sides possessed strong, non-frivolous arguments, and that neither side was assured of victory.

Melnick Decl. ¶9.

In the face of this knowledgeable and formidable defense, Plaintiffs' Counsel were nonetheless able to develop a case that was sufficiently strong to, they believe, overcome the heightened pleading standard of the PSLRA, and persuade Defendants, and their insurance carriers, to settle on terms favorable to the Settlement Class.

3. The Contingent Nature Of The Fee And The Financial Burden Carried By Plaintiffs' Counsel Support The Requested Fee

The Ninth Circuit has confirmed that a determination of a fair and reasonable fee must include consideration of the contingent nature of the fee and the obstacles surmounted in obtaining the settlement. *See WPPSS*, 19 F.3d at 1299; *see In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2007 WL 2416513, at *1 (N.D. Cal. Aug. 16, 2007); *see also Omnivision*, 559 F. Supp. 2d at 1047. It is an established practice in the private legal market to reward attorneys for taking on the serious risk of non-payment by permitting a fee award that reflects over their normal hourly rates for prevailing in contingency cases. *See Nuvelo*, 2011 WL 2650592, at *2 (citing *WPPSS*, 19 F.3d at 1299). "This practice encourages the legal profession to assume such a risk and promotes competent representation for plaintiffs who could not otherwise hire an attorney." *Id.*

Here, Plaintiffs' Counsel received no compensation during the two years since the initial complaints were filed in November 2014. During that time, Plaintiffs' Counsel invested over 1,886.35 hours for a total lodestar of over $1,031,678.00, and incurred reasonable and necessary

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expenses of $114,823.92 in prosecuting the case. *See* Exhibits 4-A, 4-B, and 4-C, attached to the DeLange Decl. Additional work in connection with the Settlement and claims administration also will be required. Any fee award has always been at risk, and completely contingent on the result achieved and on this Court's discretion in awarding fees and expenses. Unlike defense counsel – who typically receive payment on a timely basis whether they win or lose – Plaintiffs' Counsel sustained the entire risk that they would have to fund the expenses of this Action and that, unless Plaintiffs' Counsel succeeded, they would not be entitled to any compensation whatsoever. The contingent nature of the representation, and the burden carried by Plaintiffs' Counsel, support the requested fee.

4. The Requested Fee Is Consistent With Or Less Than Awards Made In Similar Cases

The requested fee of 22% is less than the Ninth Circuit's 25% "benchmark" for common fund cases, and below fee percentages regularly awarded in securities class action settlements in the Ninth Circuit and elsewhere. *See, e.g., Glass*, 331 Fed. App'x at 457; *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (referring to 25% in attorneys' fees as a "benchmark award"); *see also Buccellato v. AT&T Operations, Inc.*, 2011 WL 3348055, at *1 (N.D. Cal. June 30, 2011) (recognizing Ninth Circuit's 25% benchmark, surveying cases and granting 25% fee award). Indeed, "in most common fund cases, the award exceeds that benchmark." *Omnivision*, 559 F. Supp. 2d at 1047-48; *see also Activision*, 723 F. Supp. at 1377-78 (surveying securities cases nationwide and noting, "[t]his court's review of recent reported cases discloses that nearly all common fund awards range around 30%").

Courts have repeatedly awarded fees of 25% or more – more than the 22% requested here – where a settlement was reached during the pendency of a motion to dismiss or shortly after, and where no or very limited formal discovery had been obtained as a result of the PSLRA discovery stay. *See, e.g., Glass*, 331 Fed. App'x at 457 (affirming award of 25% where settlement reached early, noting "the favorable timing of the settlement"); *In re Int'l Rectifier Corp. Sec. Litig.*, CV 07-02544-JFW (C.D. Cal.), ECF No. 316 (granting fee award of 25% of

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settlement fund obtained in securities class action prior to substantial formal discovery); *Oh v. Chan*, CV 07-04891 DDP (C.D. Cal.), ECF No. 99 (granting fees equaling 25% of settlement fund obtained in securities class action prior to a ruling on defendants' motion to dismiss). Courts have commended class counsel for recognizing when, as in this case, a prompt resolution of the matter is in the best interests of the class. *See Glass v. UBS Fin. Servs., Inc.*, 2007 WL 221862, at *15 (N.D. Cal. Jan. 26, 2007) ("Class counsel achieved an excellent result for the class members by settling the instant action promptly."), *aff'd*, 331 Fed. App'x at 457.

Indeed, one of the merits of awarding fees on a percentage basis is that it does not penalize attorneys for achieving a prompt resolution of a case, where, as here, sufficient information about the value of the claims could be determined through investigation and careful analysis of the legal and factual issues, thus avoiding the need for costly and lengthy formal discovery. *See Aichele v. City of Los Angeles,* 2015 WL 5286028, at *5 (C.D. Cal. Sept. 9, 2015) ("Many courts and commentators have recognized that the percentage of the available fund analysis is the preferred approach in class action fee requests because it more closely aligns the interests of the counsel and the class, *i.e.*, class counsel directly benefit from increasing the size of the class fund and working in the most efficient manner.") (citing *Vizcaino*, 290 F.3d at 1050 n.5 ("it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement.")).

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

The reaction of the class to a proposed settlement and fee request is a relevant factor in approving fees. *See Knight v. Red Door Salons*, 2009 WL 248367, at *7 (N.D. Cal. Feb. 2, 2009); *Omnivision*, 559 F. Supp. 2d at 1048. Here, pursuant to the Court's Preliminary Approval Order, beginning on November 21, 2016, the Court-approved Notice was disseminated to more than 22,899 potential Settlement Class Members and their brokers and nominees, and the Summary Notice was published in the *Investor's Business Daily* and over the *PR Newswire* on

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November 28, 2016. *See* Bareither Decl. ¶¶2-12. The Notice informed Settlement Class Members that Lead Counsel would seek fees in an amount not to exceed 22% of the Settlement Amount, and reimbursement of Litigation Expenses in an amount not to exceed $400,000. *See* Exhibit A to the Bareither Decl., ¶¶5, 67. The Notice further advised Settlement Class Members of, among other things, their right to object to Lead Counsel's request for attorneys' fees and Litigation Expenses. To date, there are no objections, further supporting the requested fee. *See, e.g.*, *Red Door Salons*, 2009 WL 248367, at *7 (no objection supports 30% award); *Omnivision*, 559 F. Supp. 2d at 1048 (only three objections supports 28% award).

6. A Lodestar Crosscheck Confirms That The Requested Fee Is Reasonable

Although courts in this Circuit typically apply the percentage approach to determine attorneys' fees in common fund cases, courts may perform an informal lodestar cross-check on the percentage method. *See Glass*, 2007 WL 221862, at *16 ("Under the circumstances presented here, where the early settlement resulted in a significant benefit to the class, the Court finds no need to conduct a lodestar cross-check."), *aff'd*, 331 Fed. App'x at 456-57 ("In reviewing the award of attorneys' fees, the district court properly performed an informal lodestar cross-check, and noted the relatively low time-commitment by plaintiff's counsel"; affirming district court's 25% fee award over objection).

In *Vizcaino*, the Ninth Circuit noted that as follows:

> "[C]ourts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases. . . .This mirrors the established practice in the private legal market of rewarding attorneys for taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning contingency cases.". . . In common fund cases, "attorneys whose compensation depends on their winning the case[] must make up in compensation in the cases they win for the lack of compensation in the cases they lose."

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290 F.3d at 1051 (citation omitted). There, the Ninth Circuit affirmed a fee award that equaled 28% of the settlement fund and a multiplier of 3.65, which the court found to be "within the range of multipliers applied in common fund cases." *Id.* In cases applying the lodestar method, fee "'multipliers of between 3 and 4.5 have been common.'" *Rabin v. Concord Assets Grp., Inc.*, 1991 WL 275757, at *2 (S.D.N.Y. Dec. 19, 1991) (multiplier of 4.4) (citation omitted); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995) ("Multipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation.").

As detailed herein and in the accompanying DeLange Declaration, the work Plaintiffs' Counsel performed in this matter wholly supports the Court's approval of a fee award of 22% of the Settlement Amount, or $2.64 million.[5] Plaintiffs' Counsel devoted 1,886.35 hours to this Action, amounting to a lodestar of $1,031,678.00.[6] Thus, Plaintiffs' Counsel's fee request represents a modest multiplier of approximately 2.5 of Plaintiffs' Counsel's total lodestar.

In sum, Lead Counsel's attorneys' fee request is below the Ninth Circuit's "benchmark" and, whether calculated as a percentage of the Settlement Fund or in relation to Plaintiffs' Counsel's lodestar, is fair and reasonable and warrants the Court's approval.

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[5] As is customary in seeking a percentage-of-the-fund award in common fund cases and submitting data for a lodestar cross-check, included with Plaintiffs' Counsel's declarations are schedules identifying the lodestar of each firm (by individual, position, billing rate, and time billed). *See, e.g., In re ECOtality, Inc. Sec. Litig.*, 2015 WL 5117618, at *4 (N.D. Cal. Aug. 28, 2015) ("The lodestar crosscheck calculation need entail neither mathematical precision nor bean counting . . . . [courts] may rely on summaries submitted by the attorneys and need not review actual billing records."). Unlike the full lodestar method, when conducting a lodestar crosscheck, "the hours documented by counsel need not be exhaustively scrutinized by the district court." *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005).

[6] *See* DeLange Decl. ¶80 and Exhibits 4-A, 4-B, and 4-C. Lead Counsel's rates are set in accord with the national market for securities class action litigation, both on the plaintiff side and the defense side. Based on our review of publicly-available information in court filings and data compilations, our rates are aligned with the rates of the national market for defense firms that defend securities class actions and other plaintiff firms that specialize in large and complex securities litigation. *See, e.g.,* National Law Journal, *"Billing Rates Across the Country"* (Jan. 13, 2014), *available at http://www.nationallawjournal.com/id=1202636785489/Billing-Rates-Across-the-Country*.

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III. PLAINTIFFS' COUNSEL'S EXPENSES ARE REASONABLE

Lead Counsel also requests reimbursement of Plaintiffs' Counsel's Litigation Expenses in the total amount of $114,823.92 incurred in prosecuting and resolving the Action on behalf of the Settlement Class. Attorneys who create a common fund for the benefit of a class are entitled to be reimbursed for their out-of-pocket expenses incurred in creating the fund so long as the submitted expenses are reasonable, necessary and directly related to the prosecution of the action. *See Omnivision*, 559 F. Supp. 2d at 1048 ("Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters.").

From the outset, Plaintiffs' Counsel were aware that they might not recover any of their expenses or, at the very least, would not recover anything until the Action was successfully resolved. Plaintiffs' Counsel also understood that, even if the case was ultimately successful, reimbursement for expenses would not compensate them for the lost use of funds advanced to prosecute the Action. Thus, Plaintiffs' Counsel were motivated to, and did, take significant steps to minimize expenses wherever practicable without jeopardizing the vigorous and efficient prosecution of the Action. *See* DeLange Decl. ¶94.

The Plaintiffs' Counsel's expenses sought for reimbursement are detailed in the accompanying sworn declarations of Plaintiffs' Counsel at Exhibits 4-A, 4-B, and 4-C to the DeLange Declaration, setting forth the specific category of expenses incurred and the amount. The types of expenses for which reimbursement is sought are necessarily incurred in litigation and routinely charged to clients billed by the hour. These include expenses associated with, among other things, online legal and factual research, travel, experts and consultants, and mediation. *See, e.g., Vincent*, 2013 WL 621865, at *5 (granting reimbursement of costs and expenses for "three experts and the mediator, photocopying and mailing expenses, travel expenses, and other reasonable litigation related expenses"); *Red Door Salons*, 2009 WL 248367, at *7 (granting reimbursement because "[a]ttorneys routinely bill clients for all of these expenses").

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A large component of Plaintiffs' Counsel's expenses, approximately 60%, is for the cost of experts and consultants with significant experience analyzing accounting, damages, and loss causation in securities class actions. In prosecuting the claims, Plaintiffs' Counsel necessarily worked extensively with experts and consultants. *See* DeLange Decl. ¶96.

The expenses also include mediation costs of $30,628.59, and the costs of online research in the total amount of $6,228.80. These are the charges for computerized factual and legal research services such as *LexisNexis, Westlaw*, and PACER. *Id.* ¶97. It is standard practice for attorneys to use these resources to assist them in researching legal and factual issues; these tools create efficiencies in litigation and, ultimately, save clients and the class money.

The Notice informed potential Settlement Class Members that Lead Counsel would apply, on behalf of Plaintiffs' Counsel, for reimbursement of Litigation Expenses in an amount not to exceed $400,000. *See* Exhibit A to the Bareither Decl., ¶¶5, 67. The amount of expenses for which reimbursement is now sought, $114,823.92, is less than one-third of the maximum amount stated in the Notice. To date, no Settlement Class Member has objected.

IV. CONCLUSION

Lead Counsel respectfully requests that the Court award attorneys' fees in the amount of 22% of the Settlement Amount, and reimbursement of Plaintiffs' Counsel's Litigation Expenses in the amount of $114,823.92, plus interest earned at the same rate and for the same time period as the Settlement Fund, to be paid from the Settlement Fund.

For the Court's convenience, following the objection deadline, Lead Counsel will submit with its Reply papers a proposed Order awarding attorneys' fees and Litigation Expenses.

Dated: January 18, 2017

Respectfully submitted,

By: */s/ Bradley S. Keller*
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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 18th day of January, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel on record in the matter.

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