BROWER PIVEN
A Professional Corporation
DAVID A.P. BROWER (Admitted *Pro Hac Vice*)
136 Madison Avenue, 5th Floor
New York, New York 10016
Telephone: (212)501-9000
Facsimile: (212) 501-0300
brower@browerpiven.com

Lead Counsel for the Class

MUCKLEROY LUNT, LLC
MARTIN A. MUCKLEROY
Nevada Bar No. 009634
6077 South Fort Apache Road, Suite 140
Las Vegas, Nevada 89148
Telephone: (702) 907-0097
Facsimile: (702) 938-4065
martin@muckleroylunt.com

Counsel for Lead Plaintiff Andrey Slomnitsky and Liaison Counsel for the Class

[Additional counsel appear on signature page.]

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

In re ALLIED NEVADA GOLD CORP., SECURITIES LITIGATION This Document Relates To: ALL ACTIONS.	Case No. 3:14-cv-00175-LRH-WGC CLASS ACTION LEAD PLAINTIFF'S AND PLAINTIFF'S COUNSEL'S MEMORANDUM IN SUPPORT OF (1) PLAINTIFF'S COUNSEL'S APPLICATION FOR AN AWARDS OF ATTORNEYS' FEES; (2) PLAINTIFF'S COUNSEL'S REQUEST FOR REIMBURSEMENT OF THEIR LITIGATION EXPENSES; AND (3) LEAD PLAINTIFF'S REQUEST FOR REIMBURSEMENT FOR HIS TIME AND EXPENSES REPRESENTING THE CLASS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

Page

Page

Page

Page

Page

Page

Page

Page

Page

STATUTES, RULES AND REGULATIONS

Page

SECONDARY AUTHORITIES

I. PRELIMINARY STATEMENT

Lead Plaintiff Andrey Slomnitsky ("Plaintiff"), in the above-entitled action (the "Action"), submits this memorandum in support of Plaintiff's Counsel's[1] application, pursuant FED. R. CIV. P. 23(h) and 54(d)(2), for an award of attorneys' fees for their services rendered in this Action; for reimbursement of their litigation expenses incurred in the successful prosecution of this Action; and for a payment to the Plaintiff to reimburse him for his time and expenses representing the Class in the Action.

Plaintiff's Counsel are simultaneously submitting the Memorandum of Law in Support of Lead Plaintiff's Motion for Final Approval of the Proposed Settlement and Approval of the Plan of Allocation (the "Settlement Memorandum"), Memorandum in Support of Final Certification of the Class and Final Approval of the Class Notice, and the Declaration of David A.P. Brower in Support of Lead Plaintiff's Motion for Final Certification of the Class, Final Approval of the Class Notice, Final Approval of the Proposed Settlement, Approval of the Proposed Plan of Allocation, and Plaintiff's Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Their Litigation Expenses and Lead Plaintiff's request For Reimbursement For His Time and Expenses Representing The Class, dated August 24, 2020 (the "Brower Declaration" or "Brower Decl."). The Brower Declaration describes the history of this Action, the claims asserted, the efforts of Plaintiff's Counsel, the documents reviewed, the evidence adduced, and the negotiations leading to the Settlement set forth in the Stipulation between Plaintiff and defendants Scott Caldwell, Robert Buchan, Randy Buffington and Stephen Jones (collectively, "Defendants"). In addition, the Settlement Memorandum discusses the complexity, magnitude and risks associated with this Action and many of the legal obstacles to Plaintiff's success on the merits. Rather than repeating those matters here, this memorandum will focus on the matters relevant to attorneys' fee requests by successful plaintiffs' attorneys in class action litigation and the appropriateness of the fees requested by

[1] Lead Counsel is Brower Piven, A Professional Corporation ("Brower Piven"). Plaintiff's Counsel is Brower Piven, Robbins, Geller, Rudman & Dowd LLP, and Muckleroy Lundt LLC. All terms not defined herein have the same definition as in the Stipulation and Agreement of Settlement, dated January 24, 2020 ("Stipulation"). Internal citations are omitted throughout unless otherwise noted.

Plaintiff's Counsel here.

This Action was prosecuted by Plaintiff's Counsel on behalf of all persons and entities who purchased Allied Nevada Gold Corporation ("Allied") common stock in the United States or on a securities exchange in the United States between January 18, 2013 through August 5, 2013, inclusive (the "Class" and "Class Period"), on a fully contingent basis, and through their efforts, they have obtained a proposed a cash settlement fund for the benefit of the Class of $14,000,000.00, plus interest (the "Settlement Fund" or the "Settlement").

The Settlement was arrived at only after reviewing public documents and non-public documents produced in discovery by Defendants and numerous third-parties; interviewing numerous witnesses, including former employees of Allied; researching and drafting a detailed Consolidated Amended Complaint and the Second Consolidated Amended Complaint; engaging bankruptcy counsel, filing a Class claim and litigating in the United States Bankruptcy Court for the District of Delaware in connection with Allied's Chapter 11 bankruptcy filing on March 30, 2015, which resulted in agreements with Allied's bankruptcy estate that assured the applicable directors' and officers' ("D&O") insurance coverage would be not treated as an asset of Allied Chapter 11 bankruptcy estate and that Allied or its successor would not obstruct Plaintiffs' Counsel from obtaining documents in Allied's possession relevant to the claims in this Action; defending against two rounds of motions to dismiss; appealing this Court's September 20, 2017 Order dismissing the Action, with prejudice, and successfully obtaining a reversal of that Order and remand of the Action from the United States Court of Appeals for the Ninth Circuit; engaging in an extensive damages analysis; and vigorously negotiating with able opponents at two separate settlement meeting, including a full-day mediation session with JAMS Mediator Jed D. Melnick, Esq.

As discussed below, this motion for fees and expenses is premised on a number of factors, including the substantial monetary result Plaintiff's Counsel have achieved for Class members; the numerous and substantial risks undertaken on a wholly contingent basis; Plaintiff's Counsel's vigorous and skillful prosecution of the Action; and the lack of any objections by Class members to the requested fees or expenses.

As compensation for their efforts on behalf of the Class, Plaintiff's Counsel request an award attorneys' fees equal to 33 1/3 % of the total benefits accrued to the Class, or $4,666,000, plus accrued interest at the same rate earned by the Settlement Fund. Plaintiff's Counsel also seek reimbursement of $324,557.52 in out-of-pocket expenses which they reasonably and necessarily incurred in litigating the claims of Class members. Since this Action arises under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), the award of attorneys' fees are governed by §12D(a)(6) of the PSLRA, which has adopted the percentage of the recovery method for the award of attorneys' fees in securities class actions. *See* Senate Report No. 104-98, 104th Congress, *reprinted in* 1995 U.S.C.C.A.N. 679, 687-90 (Senate Committee Report on the PSLRA criticizing the lodestar method and stating that the PSLRA intends fees to be based on a percentage). As demonstrated herein, the percentage of the recovery method – which is consistent with the practice in the private marketplace where contingent fee attorneys and their clients routinely enter into percentage fee arrangements – has been widely embraced by courts in this Circuit and across the country as the best approach to calculating attorneys' fees. *See, e.g., In re Omnivision Techs., Inc*., 559 F. Supp 2d 1036, 1046 (N.D. Cal. 2008).

The one-third of the common fund requested is fair and reasonable here when considered under the applicable standards and, as discussed below, is well within the normal range of awards made in contingent fee securities class actions in the Ninth Circuit, particularly in view of the considerable risks attendant in bringing and pursuing this litigation. *See, e.g., In re Pac. Enters. Sec. Litig*., 47 F.3d 373, 379 (9th Cir. 1995) (approving fee equal to 33% of a $12 million settlement fund).

Although highly criticized, *see e.g*., Court Awarded Attorneys' Fees, Report of the Third Circuit Task Force, Oct. 8, 1985 (Arthur Miller, Reporter), reprinted in 108 F.R.D. 237, 246-49, because it "encourages abuses such as unjustified work and protracting the litigation," which the percentage method does not, *In re Activision Sec. Litig*., 723 F. Supp. 1373, 1378 (N.D. Cal. 1989), and "'in practice . . . is difficult to apply [and] time consuming to administer,'" *Lopez v. Youngblood*, No. CV-F-0474 DLB, 2011 WL 10483569, at *4 (E.D.

Cal. Sept. 2, 2011) (quoting *Manual for Complex Litigation* §14.121 (4th ed. 2004)), a "lodestar" analysis may still be used as a cross-check of the appropriateness of settling upon a particular percentage. Importantly, under the lodestar method, plaintiffs' counsel's time in common fund cases is routinely multiplied by a factor of 3 to 4 times their lodestar to compensate them for having undertaken the very real risk of receiving no compensation at all. *See, e.g.*, *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995). Plaintiff's Counsel's total lodestar of $4,888,885.75 reflects 6,470.95 hours of time. Here, the fee sought is a substantial $220,000 discount on the time Plaintiff's Counsel actually spent litigating this Action and reflects a ***negative*** multiplier of their lodestar.

Importantly, under either the percentage-of-the-recovery or the lodestar/multiplier approach, the ultimate objective is an award that, in the Court's view, will fairly and reasonably compensate Plaintiff's Counsel for their successful efforts on behalf of the Class. *See, e.g.*, *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 568 (7th Cir. 1992) (explaining that the goal of the fee-setting process "is to determine what the lawyer would receive if he were selling his services in the market"); *In re Oracle Sec. Litig*., 852 F. Supp. 1437, 1450 (N.D. Cal. 1994) (quoting *In re Cont'l Ill.*, 962 F.2d 566 with approval). Consequently, and for the reasons more specifically set forth below, Plaintiff's Counsel submit that their requested award of attorneys' fees and reimbursement of expenses is fair and reasonable and should be granted.

Furthermore, the deadline for Class members to object to Plaintiff's Counsel's fee request is September 28, 2020. Notice was sent almost 19,000 potential Class members and nominees *See* Brower Decl., Ex. A (Declaration of Michael McGuinness of Epiq Class Action & Claims Solutions, Inc., the professional claims administration approved by this Court in its Order Granting Preliminary Approval Of Proposed settlement, Granting Conditional Class Certification, and Providing For Notice To The Class, dated June 10, 2020, Regarding (A) Mailing of the Notice And Proof Of Claim; (B) Publication Of The Summary Notice; And (C) Requests For Exclusion Received to Date, dated August 20, 2020 ("Epiq Declaration" or "Epiq Decl.") at ¶10). The Notice stated that Plaintiff's Counsel would seek an award of attorneys' fees and reimbursement of expenses not to exceed one-third of the $14,000,000 million total

benefit to the Class. While the deadline for objections has not yet passed, as of August 24, 2020, not a single Class member has objected to Plaintiff's Counsel's request for attorneys' fees or reimbursement of expenses or requested exclusion from the Class. *Id.* at ¶¶17-18; Brower Decl. at ¶¶14-15.

II. THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE AND SHOULD BE APPROVED

A. A Reasonable Percentage of the Fund Recovered is the Appropriate Approach to Awarding Attorneys' Fees in Common Fund Cases

For their efforts in creating a common fund for the benefit of the Class, Plaintiff's Counsel seeks a reasonable percentage of the fund recovered as attorneys' fees. 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); *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"). Likewise, it has long been recognized in the Ninth Circuit 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.'" *In re Omnivision Techs. Inc. Sec. Litig.*, No. 5:11-cv-05235-RMW, 2015 WL 3542413, at *1 (N.D. Cal. June 5, 2015) (citing *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977)).[2]

The Ninth Circuit has expressly and consistently approved the use of the percentage method in common fund cases. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-48 (9th Cir. 2002); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376-77 (9th Cir. 1993); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989). While courts have discretion to employ either a percentage-of-recovery or lodestar method in determining an

[2] The Supreme Court has emphasized that private securities actions, like this 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).

attorneys' fee award, *see Fischel v. Equitable Life Assur. Soc'y of the U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002), the percentage method is the favored method in awarding attorneys' fees in common fund cases. *See Vizcaino,* 290 F.3d at 1050; *In re Korean Air Lines Co., Ltd. Antitrust Litig.*, No. CV 07-05107 SJO (AGRx), 2013 WL 7985367, at *1 (C.D. Cal. Dec. 23, 2013) ("The use of the percentage-of-the-fund method in common-fund cases is the prevailing practice in the Ninth Circuit for awarding attorneys' fees and permits the Court to focus on a showing that a fund conferring benefits on a class was created through the efforts of plaintiffs' counsel."). As a result, courts within the Ninth Circuit have almost uniformly shifted to the percentage method in such cases and used the lodestar method only "when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." *In re Toyota Motor Corp. Unintended Acceleration Mktg.*, No. 8:10ML2151 JVS (FMOx), 2012 U.S. Dist. LEXIS 183941, at *229 (C.D. Cal. Dec. 28, 2012).

Compensating counsel in common-fund cases on a percentage basis is preferable for many reasons. It more closely aligns the lawyers' interest in being paid a fair fee with the interest of the class in achieving the maximum possible recovery in the shortest amount of time. *See, e.g., Wal-Mart Stores, Inc. v. VISA U.S.A., Inc*., 396 F.3d 96, 122 (2d Cir. 2005) (percentage-of-the-recovery method "'provides a powerful incentive for efficient prosecution and early resolution of litigation'"); *see also In re Activision,* 723 F. Supp. at 1377-78. It is also consistent with the practice in the private marketplace where contingent-fee attorneys are customarily compensated by a percentage of the recovery. *See also* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of the Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 724-25 (1986). Further, use of the percentage method decreases the burden imposed on courts by eliminating a detailed and "time-consuming" lodestar analysis and assuring that the beneficiaries do not experience undue delay in receiving their share of the settlement. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011); *Lopez,* 2011 WL 10483569, at *4; *Johnson v. Brennan*, No. 10 Civ. 4712 (CM), 2011 U.S. Dist. LEXIS 105775,

at *43 (S.D.N.Y. Sept. 16, 2011) ("[T]he percentage method preserves judicial resources because it 'relieves the court of the cumbersome, enervating, and often surrealistic process of evaluating fee petitions.'");

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 any damages and prejudgment interest actually paid to the class." 15 U.S.C. §78u-4(a)(6); *see also In re Am. Apparel, Inc. S'holder Litig.*, No. CV 10-06352 MMM (JCGx), 2014 WL 10212865, at *20 (C.D. Cal. July 28, 2014) ("'Congress plainly contemplated that percentage-of-recovery would be the primary measure of attorneys' fees awards in federal securities class actions.'"); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005) ("[T]he percentage-of-recovery method was incorporated in the [PSLRA].").

The percentage-of-recovery method is also particularly appropriate in securities cases where a common fund has been created like this because "the benefit to the class is easily quantified." *Bluetooth,* 654 F.3d at 942; *see also Glass v. UBS Fin. Servs., Inc.*, 331 F. App'x 452, 456-57 (9th Cir. 2009) (overruling objection based on use of percentage-of-the-fund approach); *In re Galena Biopharma, Inc. Sec. Litig.*, No. 3:14-cv-00367-SI, 2016 WL 3457165, at *5 (D. Or. June 24, 2016) (percentage-of-recovery method preferred over lodestar method in cash settlement); *Omnivision*, 559 F. Supp. 2d at 1046 (recognizing that the "use of the percentage method in common fund cases appears to be [the] dominant" method for determining attorneys' fees).

B. Factors Used By Courts in the Ninth Circuit To Determine Fee Awards

Although not mandated by the Ninth Circuit, courts in this Circuit often consider the following factors when determining an attorneys' fee award: (1) the result obtained for the class; (2) the complexity, difficulty and novelty of the issues; (3) the risks of non-payment assumed by counsel; (4) counsel's experience, skill and quality of representation; (5) awards in similar cases; (6) comparison with counsel's loadstar as a cross-check; and (6) the reaction of the class. *See, e.g., Omnivision*, 559 F. Supp. 2d at 1046 (citing *Vizcaino*, 290 F.3d at 1048-50). As discussed below, application of these factors confirms that a fee of one-third of the

benefits conferred is justified here.

1. Results Obtained for the Class

Courts have consistently recognized that the result achieved is "the most critical factor" in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983); *accord Omnivision*, 559 F. Supp. 2d at 1046 (applying *Hensley* to common fund case); *see also Bluetooth,* 654 F.3d at 942 ("Foremost among these considerations, however, is the benefit obtained for the class."); Here, Plaintiff's Counsel obtained a substantial recovery for the Class. As discussed above in the Settlement Memorandum, the $14,000,000 Settlement represents approximately 15% of the estimated maximum recoverable damages in this case if Plaintiff was completely successful on all issues of liability and damages in the Action, and 100% of eligible Class members filed and proved their claims, which is three times the median percentage recovery for securities class action cases in the Ninth Circuit from 2009 to 2018, and almost seven times the median ratio of settlements to investor losses in 2019. *See* Brower Decl. at ¶81.

On a projected claims-made basis, the estimated actual recovery to claiming Class members is estimated to be approximately 21% of their maximum possible recovery, assuming complete success on all issues of liability and damages for the entire Class, which is three times the median percentage recovery for cases in the Ninth Circuit from 2009 to 2018 and almost ten times the median ratio of settlements to investor losses in 2019. *See* Brower Decl.at ¶82. Further, Class members will receive immediate compensation for their Allied stock losses and will avoid the substantial risks of no recovery had the Action been litigated and lost at summary judgment, trial or on appeal.

This achievement was only the result of Plaintiff's Counsel's relentless litigation and tough settlement negotiations and merits an attorney fee award of one-third of the total benefits achieved for the Class. The requested fee is also commensurate with the results obtained in other cases where class counsel was awarded one-third of a common fund. Indeed, similar and higher percentage fee awards have been made where the amount of the recovery is a much lower percentage of class-wide potential damages. *See, e.g.*, *Omnivision*, 559 F. Supp. 2d at 1046 ("As previously discussed, the Settlement creates a total award of 9% of the possible

damages, which is more than triple the average recovery in securities class action settlements.").

2. The Complexity, Difficulty and Novelty of the Issues

The risks inherent in this litigation, as well as the complexity, difficulty and novelty of the issues presented are important factors in determining a fee award. *See Pac. Enters.*, 47 F.3d at 379 (holding fees justified "because of the complexity of the issues and the risks"); *Vizcaino*, 290 F.3d at 1048 ("Risk is a relevant circumstance."); *Trauth v. Spearmint Rhino Cos. Worldwide*, No. EDCV 09-01316-VAP (DTBx), 2012 U.S. Dist. LEXIS 144816, at *21 n.5 (C.D. Cal. Oct. 5, 2012). Securities class actions are notoriously complex, difficult to prove, and risky. *See In re Heritage Bond Litig.*, No. 02-ML-1475-DT (RCx), 2005 WL 1594389, at *6 (C.D. Cal. June 10, 2005) (noting that class actions, and particularly securities class actions, are typically complex) ("*Heritage I*"); *Hefler v. Wells Fargo & Co.*, No. 16-cv-05479-JST, 2018 WL 6619983, at *13 (N.D. Cal. Dec. 18, 2018) ("'[I]n general, securities actions are highly complex and . . . securities class litigation is notably difficult and notoriously uncertain.'"), *aff'd sub nom*., *Hefler v. Pekoc*, 802 F. App'x 285 (9th Cir. 2020).

Moreover, "securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA." *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000). "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." *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009). *See also Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299, 1306 (W.D. Wash. 2001), *aff'd*, 290 F.3d 1043 (9th Cir. 2002). Accordingly, in securities class actions, fee awards typically exceed the baseline 25% recognized in the Ninth Circuit. *See, e.g.*, *Omnivision*, 559 F. Supp. 2d at 1047. This is because the uncertainty that an ultimate recovery would be obtained is magnified in securities fraud actions. *In re Washington Public Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("*WPPS*").

As described in detail in the Brower Declaration and the Settlement Memorandum, numerous novel and difficult issues stood in Plaintiff's path to ultimate success on the merits

and then an actual recovery on any judgment obtained. First and foremost, among those risks was getting past the pleading stage given the fact that the Action was twice dismissed with prejudice at the pleading stage. It was only due to Plaintiff's Counsel's skill and tenacity that a reversal was obtained, and the Class is recovering anything in this Action, to say nothing of the $14,000,000 result achieved. Notably, only 12.8% of non-government civil cases appealed to the Ninth Circuit were reversed in 2018. The expense and length of continued proceedings necessary to prosecute the Action against Defendants through discovery, trial and appeals would also be substantial. The uncertainty of the outcome and risk of any litigation, especially in complex actions such as this, are well known, as are the difficulties and delays inherent in such litigation. For instance, even if Plaintiff prevailed on the issue of liability, significant additional risks would remain in establishing the existence and amount of damages. In the end, the result in this Action would have hinged on a "battle of the experts" that is always a perilous situation for litigants. In addition, class certification was not assured.

Another reason securities class actions are particularly difficult is the fact that the law continues to dramatically evolve. For instance, the United States Supreme Court has almost annually issued opinions unfavorable to plaintiffs altering and even overturning long established propositions applicable to securities class action. *See, e.g., California Pub. Emps' Ret. Sys. v. ANZ Sec., Inc.*, _U.S._, 137 S. Ct. 2042(2017) (§10(b) statute of repose is not tolled during the pendency of class action); *Morrison v. Nat. Australia Bank Ltd*., 561 U.S. 247 (2010) (limiting geographical reach of §10(b) to securities purchased on U.S. exchanges or in the U.S.). With the ground continuously moving in this particular field, the uncertainty and difficulty of navigating a securities class action through the trial and appellate stages is far more difficult than doing so in cases involving more static areas of the law.

While Plaintiff's Counsel believe they would have ultimately prevailed on the merits, Defendants' arguments created significant uncertainties and risk to that result at every stage from pre-trial motions, class certification, discovery, summary judgment, trial and the inevitable post-trial motion and appeals stages. Those stages also make clear the litigation, if it continued, would takes years to complete at a geometrically higher cost in time and expenses –

on both sides. Unfortunately (or ironically), the source funding Defendants' counsel's efforts to defeat Plaintiff was also the major (if not only practical) source of a recovery for the Class and that source -- the D&O insurance coverage -- was a wasting asset that prolonged litigation could have exhausted. That a $14,000,000 recovery was achieved in the face of these risks supports a 33 1/3% fee award. Therefore, an evaluation of the risk of litigation supports the requested fee award.

3. The Contingent Nature of the Fee and the Financial Burden Carried By Plaintiff's Counsel

Corresponding with the difficulty, novelty, and risks of the litigation is the risk undertaken by Plaintiff's Counsel to represent Plaintiff and the Class on a contingent fee basis. *See, e.g., Heritage*, 2005 WL 1594389, at *14 ("The risks assumed by Class Counsel, particularly the risk of non-payment or reimbursement of expenses, is a factor in determining counsel's proper fee award."). As the Ninth Circuit explained:

> It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. *See* Richard Posner, *Economic Analysis of Law* § 21.9, at 534-35 (3d ed. 1986). Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose.

WPPS, 19 F.3d at 1299.

Plaintiff's Counsel undertook this litigation on a wholly contingent basis, and have received no compensation during the nearly four-year course of this Action and have invested 6,470 hours in time and incurred significant expenses (totaling more than $4,888,800) to obtain a Settlement for the benefit of the Class. In addition to the advancement of costs, lawyers working on the case have forgone the business opportunity to devote time to other cases. *See Vizcaino*, 290 F.3d at 1050. Any fee award or expense reimbursement to Plaintiff's Counsel has always been at risk, and completely contingent on the result achieved and on this Court's discretion in awarding fees and reimbursing expenses.

Indeed, the risk of no recovery in complex cases of this type is very real. Plaintiff's

Counsel knows from personal experience that, despite the most vigorous and competent efforts, their success in contingent litigation such as this is never guaranteed. Securities class actions are particularly risky. The rate of dismissals in securities class actions has increased nearly two-fold since passage of the PSLRA. *See In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007). The National Economic Research Associates, Inc. in its report on Recent trends In Securities Class Action Litigation:2018 Full-Year Review, calculates that 45% of all PSLRA cases from 2000 to 2018, 45% of all cases were dismissed on a motion to dismiss at the pleading stage and 30% of motions to dismiss were granted in part and denied in part. Thus, over the past 18 years, 75% of all PSLRA class actions were dismissed, in whole or in part, at the pleading stage.

Surviving past the pleadings stage is, however, no guarantee of ultimate success on the merits. There are numerous class actions in which plaintiffs' counsel expended thousands of hours and yet received no remuneration despite their diligence and expertise where plaintiffs have either lost at trial (and was forced to pay all of defendants' costs) or won at trial only to have a substantial judgment overturned through post-trial motions. For example, in *In re Oracle Corp. Sec. Litig.*, No. C01-00988 SI, 2009 WL 1709050 (N.D. Cal. June 19, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010), the court granted summary judgment to defendants after eight years of litigation, after plaintiff's counsel incurred over $7 million in expenses, and worked over 100,000 hours, representing a lodestar of approximately $40 million. In another PSLRA case, after a lengthy trial involving securities claims against JDS Uniphase Corporation, the jury reached a verdict in defendants' favor. *See In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486 CW (EDL), 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) And success at trial is no guarantee of ultimately success. Numerous cases won by plaintiffs at trial have been verdicts overturned on appeal. *See, e.g., In re Apollo Group, Inc. Sec. Litig.*, No. 04-02147, 2008 U.S. Dist. LEXIS 61995 (D. Ariz. Aug. 4, 2008) (district court vacated $280 million jury verdict for plaintiffs and entered judgment in favor of defendants); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (verdict of $81 million for plaintiffs reversed and judgment entered for defendant).

While bystanders may focus only on the fees awarded for the successes, they fail to consider that those same fees help fund the enormous overhead expenses incurred during the years of litigation when nothing is earned. These cases take hard, diligent work by skilled counsel is required to develop facts and theories to prosecute a case or persuade Defendants to settle on terms favorable to the Class. It is essential that counsel, such as Plaintiff's Counsel here, have the credibility to let Defendants know with certainty that they will persevere in the face of the risk, even at the expense of their fees.

Nor should the Court discount "the importance of assuring adequate representation for plaintiffs who could not otherwise afford competent attorneys justifies providing those attorneys who do accept matters on a contingent fee basis a larger fee than if they were billing by the hour or on a flat fee." *Omnivision,* 559 F. Supp. 2d at 1047. For these reasons, the contingent nature of counsel's representation supports the requested fee.

4. Counsel's Experience, Skill and Quality of Representation

The third factor to consider in determining what fee to award is the skill required and quality of work performed. *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 U.S. Dist. LEXIS 13555, at *63-*64 (C.D. Cal. June 10, 2005) ("*Heritage II*"); *In re TFT-LCD Flat Panel Antitrust Litig.*, No. M 07-1827 SI, 2013 U.S. Dist. LEXIS 49885, at *69 (N.D. Cal. Apr. 1, 2013). The successful prosecution of these complex claims required the participation of highly skilled and specialized attorneys. *Heritage I*, 2005WL 1594389, at *12. ("The experience of counsel is also a factor in determining the appropriate fee award.").

The Brower Declaration describes the background and experience of the firms representing Plaintiff. *See* Brower Decl., Exhs. F - H. Brower Piven and Robbins Geller are nationally recognized firm in the specialized field of complex securities class action litigation. *See* www.browerpiven.com; www.rgrdlaw.com. *See also, e.g.*, *Omnivision*, 559 F. Supp. 2d at 1047 ("'[P]rosecution and management of a complex national class action requires unique legal skills and abilities.'"). Plaintiff's Counsel's efforts in efficiently obtaining a very substantial recovery for the Class is the best indicator of their experience and abilities. Both in terms of work performed and expenses incurred, this case was a model of efficient, effective,

and frugal prosecution of claims by Plaintiff's Counsel. Indeed, "[w]ithout such expertise, it is likely that the hours would have been significantly higher to achieve the same result. Other counsel, even those experienced in [securities] litigation, would likely have had to expend considerably more time to accomplish the same result." *See Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1123 (C.D. Cal. 2008).

From the outset, Plaintiff's Counsel vigorously pursued the this Action to obtain the maximum recovery for the Class, including conducting an investigation into the allegations against Defendants; drafting multiple complaints; litigating in the bankruptcy court to protect the interests of the Class and assuring that Plaintiff's Counsel could obtain discovery from the Chapter 11 and post-Chapter 11 Allied entity; successfully appealing the dismissal of the Action before the Ninth Circuit; conducting discovery including from Defendants and third parties; obtaining and reviewing the voluminous quantity of public and over 360,000 non-public documents relevant to Plaintiff's claims; and consulting with experts in various fields concerning the issues in the case. As a result, Plaintiff's Counsel marshaled the facts needed to successfully negotiate the exceptional Settlement before the Court. The foregoing speaks volumes for the quality of representation the Class has received as does the highly favorable recovery obtained for the Class reflects the substantial skill and experience of Plaintiff's Counsel, who have vigorously prosecuted this case for nearly six years.

Moreover, Defendants were represented by multiple powerhouse defense firms, the New York City-based national law firm of Sullivan & Cromwell, which is highly experienced in the defense of securities class actions, and the well-respected Nevada firms of Erwin & Thompson, LLP and, subsequently, Dickenson Wright, LLP, who contested Plaintiff's claims throughout the litigation. Additionally, Allied was represented in its Delaware bankruptcy by Blank Rome LLP and Akin Gump Strauss Hauser & Feld, LLP, also large law national firms that routinely defend securities class actions. In order to protect the interest of the Class both in this Court and in the bankruptcy court, and ultimately obtain the substantial Settlement reached in this Action, Plaintiff's Counsel needed to confront all of these firms arrayed to protect Allied and the individual defendants.

Courts recognize that the quality of opposing counsel should be considered in assessing the requested fee. *See, e.g.*, *Wing v. Asarco Inc.*, 114 F.3d 986, 989 (9th Cir. 1997) (affirming fee award and noting that the court's evaluation of class counsel's work considered "the quality of opposition counsel and [defendant's] record of success in this type of litigation"); *Heritage II*, 2005 U.S. Dist. LEXIS 13555, at *66; *In re Equity Funding Corp. of Am. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977). Thus, the fact that Plaintiff's Counsel achieved this Settlement for the Class in the face of such formidable legal opposition further evidences the quality of their work, and this factor thus weighs in favor of granting Plaintiff's Counsel's request for a one-third of the benefit fee award.

5. Awards in Similar Cases

The Ninth Circuit has held that in common fund cases, "the 'benchmark'" percentage for the fee award should be 25 percent. *See, e.g., Heritage I,* 2005 WL 1594403, at *5. *See also Graulty*, 886 F.2d at 272. District courts may adjust that starting point "'when special circumstances indicate that the percentage recovery would either be too small or too large in light of the hours devoted to the case and other relevant factors.'" *Morgan v. Childtime Childcare Inc.*, No. SACV 17-01641 AG (KESx), 2020 WL 218515, at *4 (C.D. Cal. Jan. 6, 2020); *see also Jimenez v. O'Reilly Auto. Inc*., No. SACV 12-00310 AG (JPRx), 2018 WL 6137591, at *3 (C.D. Cal. June 18, 2018) (upward departure from the 25% benchmark to a 33.33% award was justified because of "complicated nature" of the case and "class counsel's success in achieving class certification"); *Figueroa v. Allied Bldg. Prods. Corp.*, No. SACV 16-02249 AG (KESx), 2018 WL 4860034, at *3 (C.D. Cal. Sept. 24, 2018) (awarding 33% fee award in complex class action wage and hour case).

The Ninth Circuit has also recognized the customary fee as "probative" of what fee is reasonable. *See Vizcaino*, 290 F.3d at 1049; *see also In re Countrywide Fin. Corp. Sec. Litig.*, No. CV 07-05295 MRP (MANx), 2011 U.S. Dist. LEXIS 126721, at *17 (C.D. Cal. Mar. 4, 2011). "If this were a non-representative litigation, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery." *See, e.g., In re Pub. Service Co.,* No. 91-0536M, 1992 U.S. Dist. LEXIS 16326, at *20 (S.D. Ca. July

28, 1992); *In re M.D.C. Holdings Sec. Litig.*, No. 89-0090 E(M), 1990 U.S. Dist. LEXIS 15488, at *22 (S.D. Cal. Aug. 30, 1990) ("[i]n private contingent litigation, fee contracts have traditionally ranged between 30% and 40% of the total recovery").

As a result, "[i]n most common fund cases, the award [of attorneys' fees] exceeds [the] benchmark." *Knight v. Red Door Salons, Inc.*, No. 08-01520 SC, 2009 WL 248367, at *6 (N.D. Cal. Feb. 2, 2009). *See also Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D. Cal. 2010) (same). Courts have also held that exceeding the benchmark is particularly likely in securities cases. *Am. Apparel*, 2014 WL 10212865, at * 23 (citing cases). In fact, "'[e]mpirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average one-third of the recovery." *Romero v. Producers Diary Foods, Inc.*, No. 1:05cv0484 DLB, 2007 WL 3492841, at *4 (E.D. Cal. Nov. 14, 2007) (awarding fees of 33% of the common fund).

Accordingly, the Ninth Circuit and numerous district courts in this Circuit have awarded fees of 30% or greater in complex class action cases. *See, e.g., Morris v. Lifescan, Inc.*, 54 F. App'x 663, 664 (9th Cir. 2003) (affirming attorneys' fee award of 33% of a $14.8 million cash class action settlement); *Pac. Enters.*, 47 F.3d at 379 (approving a fee award of one-third of a $12 million settlement fund in derivative and securities class actions); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000); (affirming award of one-third of the total recovery).[3] These awards in common fund class actions are consistent with

[3] *See also Tawfilis v. Allergan, Inc.*, No. 8:15-cv-00307-JLS-JCG, 2018 WL 4849716, at *7 (C.D. Cal. Aug. 27, 2018) (awarding one-third of $13.45 million settlement fund in antitrust class action); *In re K12 Inc. Sec. Litig.*, No. 4:16-cv-04069-PJH, 2019 WL 3766420, at *1 (N.D. Cal. July 10, 2019) (approving 33% fee award on settlement of $3.5 million in securities class action); *Cheng Jiangchen v. Rentech, Inc.*, No. CV 17-1490-GW-FFMx, 2019 WL 6001562, at *1 (C.D. Cal. Nov. 8, 2019) (approving 33.3% fee award on settlement of $2.05 million in securities class action); *In re Audioeye, Inc., Sec. Litig.*, No. CV-15-00163-TUC-DCB, 2017 WL 5514690, at *4 (D. Ariz. May 8, 2017) (approving 33.3% fee award on settlement of $1.525 million in securities class action); *Schulein v. Petro. Dev. Corp.*, No. SACV 11-1891 (ANx), 2015 WL 12698312, at *6 (C.D. Cal. Mar. 16, 2015) (awarding attorneys' fees in the amount of 30% of a $37.5 million cash settlement); *Boyd v. Bank of Am. Corp.*, No. SACV 13-0561-DOC (JPRx), 2014 WL 6473804, at *10 (C.D. Cal. Nov. 18, 2014) (awarding one-third of $5,800,000 in FLSA case); *Singer v Becton Dickinson & Co.*, No. 08-CV-821-IEG (BLM), 2010 WL 2196104, at *8 (S.D. Cal. June 1, 2010) (awarding 33.33% of common fund and collecting cases and noting that "the request for attorneys' fees in the

awards in similar cases other circuits as well.[4]

6. Reaction of the Class

Courts also consider the reaction of the class when deciding whether to award the requested fee. *Pincay Invs. Co. v. Covad Communs. Group, Inc.*, 90 F. App'x. 510, 511 (9th Cir. 2004); *Heritage I*, 2005 WL 1594389, at *15 ("The presence or absence of objections . . . is also a factor in determining the proper fee award."). While a certain number of objections are to be expected in a large class action such as this, "the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class action settlement action are favorable to the class members." *Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004); *see also Kmiec v. Powerwave Techs., Inc.*, No. SACV 12-00222-CJC(JPRx), 2016 WL 5938709, at *4 (C.D. Cal. July 11, 2016) (a "small number of objections and requests for exclusion supports final approval").

Here, the Notice was sent to almost 19,000 potential nominees and Class members and

---

amount of 33.33% of the common fund falls within the typical range of 20% to 50% awarded in similar cases"); *Vasquez*, 266 F.R.D. at 491 (awarding 33 1/3% fee award); *Burden v. SelectQuote Ins. Servs.*, No. C 10-5966 LB, 2013 WL 3988771 (N.D. Cal. Aug. 2, 2013) (awarding 33 1/3 in fees); *Barbosa v. Cargill Meat Solutions Corp*., 297 F.R.D. 431, 450 (E.D. Cal. 2013) (same); *Heritage I*, 2005 WL 1594389, at *9 (awarding one-third of a $27.78 million settlement fund in securities class action); *Pub. Serv. Co.,* 1992 U.S. Dist. LEXIS 16326, at *21; *Antonopulos v. N. Am. Thoroughbreds, Inc*., No. 87-0979G (CM), 1991 WL 427893, at *4 (S.D. Cal. May 6, 1991) (same); *M.D.C. Holdings*, 1990 U.S. Dist. LEXIS 15488, at *31 (awarding 30% attorneys' fee plus expenses).

[4] The following is a small sampling of cases in other circuits where courts awarded attorneys' fees of one-third or more of the common fund recovered to plaintiffs' counsel plus expenses in federal securities law class actions. *See, e.g*., *In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-Civ-8557 (CM), 2014 U.S. Dist. LEXIS 177175, at *46 (S.D.N.Y. Dec. 19, 2014) (33 1/3%); *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 374 (S.D.N.Y. 2002) (33 1/3%); *Menkes v. Stolt-Nielsen S.A*., No. 3:03CV00409(DJS), 2011 U.S. Dist. LEXIS 7066, at *14 (D. Conn. Jan. 25, 2011); *In re Southeastern Milk Antitrust Litig*., No. 2:07-cv-208, 2013 U.S. Dist. LEXIS 70167, at *31 (E.D. Tenn. May 17, 2013) (33 1/3%, totaling over $52 million); *In re Titanium Dioxide Antitrust Litig*., No. 10-cv-00318, 2013 U.S. Dist. LEXIS 176099, at *8 (D. Md. Dec. 13, 2013) (33 1/3% on $163.5 million); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-340 (SLR), 2009 U.S. Dist. LEXIS 133251, at *17 (D. Del. Apr. 23, 2009) (33 1/3% fee from $250 million settlement fund)*; In re Ravisent Techs., Inc. Sec. Litig.*, No. 00-CV-1014, 2005 U.S. Dist. LEXIS 6680, at *35, *51 (E.D. Pa. Apr. 18, 2005); *Howes v. Atkins*, 668 F. Supp. 1021, 1027 (E.D. Ky. 1987) (40%).

Summary Notice was published on three separate dates electronically over the *PR Newswire*. Epiq Decl. at ¶¶10-11. Moreover, the Notice was posted on the Claim Administrator's website. The Notice informed Class members that Plaintiff's Counsel would apply for attorneys' fees not to exceed one-third of the total benefits to the Class and reimbursement of litigation expenses not to exceed $450,000. The Notice also advised Class members of their right to object to Plaintiff's Counsel's fee request.

Consistent with *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010), which requires counsel's fee motion to be filed before the deadline for objections to afford class members the opportunity to "thoroughly to examine counsel's fee motion," the deadline for filing any objections is September 28, 2020 (providing for 35 days to examine the papers). As of August 24, 2020, no member of the Class has yet objected to Plaintiff's Counsel's application for an award of attorneys' fees.

7. The Lodestar Cross-Check

Although courts in this Circuit typically apply the percentage approach to determine attorneys' fees in common-fund cases, "[a]s a final check on the reasonableness of the requested fees, courts often compare the fee counsel seeks as a percentage with what their hourly bills would amount to under the lodestar analysis." *Omnivision*, 559 F. Supp. 2d at 1048; *see also Vizcaino*, 290 F.3d at 1050 n.5 (Ninth Circuit noted that an analysis of the "lodestar method is merely a cross-check on the reasonableness of a percentage figure."); *Luna v. Marvell Tech. Grp.*, No. C 15-05447 WHA, 2018 WL 1900150, at *4 (N.D. Cal. Apr. 20, 2018).

When the lodestar is used as a cross-check, "the focus is not on the 'necessity and reasonableness of every hour' of the lodestar, but on the broader question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys." *In re Tyco Int'l., Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 270 (D.N.H. 2007); *Glass*, 331 Fed App'x at 456; *Am. 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 less exhaustive cataloging and review of counsel's hours.'") (quoting *Young v. Polo*

Retail, LLC, No. C-02-4546 VRW, 2007 WL 951821, at *6 (N.D. Cal. Mar. 28, 2007). *In re Apollo Grp., Inc. Sec. Litig.*, No. CV 04-2147-PHX-JAT, 2012 WL 1378677, at *7 (D. Ariz. Apr. 20, 2012) ("an itemized statement of legal services is not necessary for an appropriate lodestar cross-check"); *Fernandez v. Victoria Secret Stores, LLC*, No. CV 06-04149 MMM (SHx), 2008 WL 8150856, at *9 (C.D. Cal. July 21, 2008).

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.[5] The cross-check then compares that figure with the attorneys' fees award. In cases applying the lodestar method, courts next "'routinely enhance[] the lodestar to reflect the risk of non-payment in common fund cases.'" *Vizcaino,*290 F.3d at 1051 (quoting *WPPS*, 19 F.3d at 1300) (Ninth Circuit approving a multiplier of 3.65). "In securities class actions, it is common for a counsel's lo[de]star figure to be adjusted ***upward*** by some multiplier," *Heritage I*, 2005 WL 1594403, at *22,[6] and multipliers of between 3 and 4.5 have been common. *See, e.g., Van*

---

[5] The Supreme Court has held that the use of *current* rates is proper since such rates more adequately compensate for inflation and loss of use of funds. *See Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989).

[6] "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). As demonstrated in the Brower Declaration, and the individual firm declarations annexed thereto, Exhs. F - G, the rates of Plaintiff's Counsel (adjusted for the passage of the years) have been routinely approved by courts in this circuit. *See, e.g.*, *In re Amgen Inc. Sec. Litig.*, No. CV 7-2536 PSG (PLAX), 2016 WL 10571773, at *9 (C.D. Cal. Oct. 25, 2016) (in securities class action, approving hourly rates of $750-985 for partners, $500-800 for of counsel/senior counsels, and $300-725 for other attorneys); *Roberti v. OSI Sys., Inc.*, No. CV13-09174 MWF(MRW), 2015 WL 8329916, at *7 (C.D. Cal. Dec. 8, 2015) (in securities class action, approving hourly rates of between $525 and $975). Additionally, courts have found "[t]he proper reference point in determining an appropriate fee award is the rates charged by private attorneys in the same legal market as prevailing counsel," *Ramon v. Kern High Sch. Dist.*, 98 F. App'x 627, 629 (9th Cir. 2004); *accord Sussman v. Patterson*, 108 F.3d 1206, 1212 (10th Cir. 1997), and have applied out-of-state counsel's hometown billing rates even where prevailing rates in the geographic location of the case might be lower. *See Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1326-27 (W.D. Wash. 2009) ("The Court finds that the hourly rates charged by the attorneys in this case are reasonable for the work performed in each of the respective relevant communities by attorneys of similar skill, experience, and reputation."); *Gottlieb v. Barry*, 43 F.3d 474, 485 n.8 (10th Cir. 1994) ("where the prevailing party used out-of-town counsel whose rates were higher than those charged locally, we have permitted an award based on those higher rates"). As also demonstrated in the Brower Declaration, Plaintiff's Counsel's rates are consistent with

Vranken, 901 F. Supp. at 298 ("Multipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation.").[7]

Here, Plaintiff's Counsel spent 6,470.95 hours of attorney and paraprofessional time prosecuting this Action for almost six years on behalf of the Class. Brower Decl., Exhs F - G. The resulting lodestar is $4,888,825.75, representing a ***negative*** multiplier of Plaintiff's Counsel's time representing a six figure discount of their time based on their fee request here, This underscores the reasonableness of the fee request. *See, e.g.*, *Castro v. Sanofi Pasteur Inc.*, No. 11-7178 (JMV) (MAH), 2017 WL 4776626, at *9 (D.N.J. Oct. 23, 2017) ("Because the lodestar cross-check results in a negative multiplier, it provides strong evidence that the requested fee is reasonable."). "When the lodestar used in the cross-check is greater than the 25% benchmark fee, *i.e.*, there is a 'negative multiplier,' that is usually a sign that an upward adjustment of the percentage should be made." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. 1486, 2013 WL 12387371, at *5 (N.D. Cal. Nov. 5, 2013), *report and recommendation adopted*, No. C 06-4333 PJH, 2014 WL 12879521 (N.D. Cal. June 27, 2014). "When the lodestar cross-check shows that the percentage fee is lower than the fees the lawyers have accrued on a time-and-services basis, it is relatively easy to support a percentage-

---

other attorneys engaged in similar litigation in their local community. Finally, by comparison, the rates charged by attorneys who practice in the areas of complex litigation and bankruptcy law at Sullivan & Cromwell, Defendants' New York City lead defense counsel here, are significantly higher (by almost a third) to those charged by Plaintiff's Counsel of similar experience in the same locale. *See* Brower Decl., Exh. J. *See Blum,* 465 U.S. at 895 n. 11 ("rates charged in private representations may afford relevant comparisons"); *Bell v. Pension Comm. Of ATH Holding Co., LLC*, No. 1:15-cv-02062-TWP-MPB, 2019 WL 4193376, at *5 (S.D. Ind. Sept. 4, 2019) (recognizing the sue of "national hourly rates" for specialist class counsel) (citing *Clark v. Duke University*, No. 1:16-cv-722, 2019 WL 2579201, at *4 (M.D.N.C. June 24, 2019).

[7] *See also Steinver v. Am. Broad Co.*, 248 F. App'x 780, 783 (9th Cir. 2007) (approving a percentage fee award that corresponded to a multiplier of 6.85); *Buccellato v. AT&T Operations, Inc.*, No. C10-00463-LHK, 2011 U.S. Dist. LEXIS 85699, at *3-*5 (N.D. Cal. June 30, 2011) (finding a multiplier of 4.3 was reasonable); *Craft*, 624 F. Supp. 2d at 1125 (approving a fee award that corresponded to a multiplier of 5.2); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732 (S.D. Tex. 2008) (5.2 multiplier); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706 (E.D. Pa. 2001) (multipliers of 4.5-8.5); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 198 (S.D.N.Y. 1997) (5.5 multiplier); *Keith v. Volpe*, 501 F. Supp. 403, 414 (C.D. Cal. 1980) (multiplier of 3.5).

based fee." *Nilsen v. York Cty.*, 400 F. Supp. 2d 266, 271 (D. Me. 2005). Indeed, "'the fact that any reasonable fee would necessarily represent a negative multiplier of the lodestar supports an award at the higher end of the spectrum.'" *In re Sterling & Foster & Co., Inc. Sec. Litig.,* 238 F. Supp. 2d 480, 490 (E.D.N.Y. 2002). Thus, a "negative multiplier suggests that [the fees requested] despite exceeding the 25% . . . are reasonable." *Young*, 2007 WL 951821, at *8. As such, a "cross-check" confirms that the requested fee amount is reasonable. *See, e.g.*, *Rosado v. eBay, Inc.*, No. 5:12-cv-04005-EJD, 2016 WL 3401987, at *8 (N.D. Cal. June 21, 2016) (same). *Grivas v. Metagenics, Inc.*, No. SACV 15-01838-CJC-DFM, 2019 WL 2005792, at *2 (C.D. Cal. May 6, 2019) (same).

III. PLAINTIFF'S COUNSEL'S EXPENSES WERE REASONABLY AND NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED

Plaintiff's Counsel also requests that the Court grant their application for reimbursement of $324,557.52 in litigation costs incurred in connection with the prosecution of this litigation. "Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters." *Omnivision*, 559 F. Supp. 2d at 1048 (citing *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)). Notably, this amount is significantly lower than the cap on the amount of litigations expenses Plaintiff's Counsel would seek of $450,000 that appeared in the Notice.

The requested expenses are summarized by category in the Brower Declaration (¶144) and detailed in the respective individual firm declarations of Plaintiff's Counsel. *See* Brower Decl., Exhs. F - H. These expenses include, *inter alia*, photocopying, postage, messengers, filing fees, travel, computer database research, electronic document storage, and the fees and expenses of Plaintiff's experts and consultants, including Plaintiff's outside mining and damages experts and Plaintiff's bankruptcy counsel. *Cf.*, *Vincent v. Reser*, No. C 11-03572 CRB, 2013 WL 621865, at *5 (N.D. Cal. Feb. 19, 2013) (granting award of costs and expenses for "'three experts and the mediator, photocopying and mailing expenses, travel expenses, and other reasonable litigation related expenses'"). "Attorneys routinely bill clients for all of these

expenses." *Knight*, 2009 WL 248367, at *7.[8]

Plaintiff's Counsel also submit that these expenses were reasonably and necessarily incurred to achieve the result obtained for the Class, and that they incurred these expenses carefully and avoided duplication of effort and, therefore, multiplying the expenses. From the outset, Plaintiff's Counsel was aware that it might not recover any of their expenses or, at the very least, would not recover anything until the Action was successfully resolved. Plaintiff's Counsel also understood that, even if the case was ultimately successful, payment of its expenses would not compensate it for the lost use of funds advanced to prosecute the Action. Thus, Plaintiff's Counsel was motivated to, and did, take significant steps to minimize expenses wherever practicable without jeopardizing the vigorous and efficient prosecution of the action.

Lastly, the Notice provided to potential Class members informed them that Plaintiff's Counsel would seek reimbursement up to $450,000, substantially more than the actual request here (*i.e.*, over $125,000 less). The deadline for Class members to object to Counsel's request for reimbursement of litigation expenses (like the other relief Plaintiff and Plaintiff's Counsel seek) is September 28, 2020. As of August 24, 2020, no Class member has objected to Plaintiff's Counsel's request for expenses. Brower Decl. at ¶15.[9]

IV. LEAD PLAINTIFF'S REQUEST PURSUANT TO 15 U.S.C. §78u-4(a)(4) FOR REIMBURSEMENT OF HIS TIME IS REASONABLE

Plaintiff seeks an award of $10,000 pursuant to §78u-4(a)(4) in connection with their representation of the Class, as detailed in the accompanying Brower Declaration. The PSLRA permits courts to award lead plaintiffs in federal securities actions reimbursement for their time devoted to participating in and directing the litigation on behalf of a class. *See* 15 U.S.C.

[8] *See also In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1371 (N.D. Cal. 1996); *In re Cont'l Ill.*, 962 F.2d at 570; *Thornberry v. Delta Air Lines, Inc.*, 676 F.2d 1240, 1244 (9th Cir. 1982), *vacated and remanded on other grounds*, 461 U.S. 952 (1983); *In re McDonnell Douglas Equip. Leasing Sec. Litig.*, 842 F. Supp. 733, 746 (S.D.N.Y. 1994); *Genden v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 741 F. Supp. 84, 86 (S.D.N.Y. 1990).

[9] Further, Plaintiff is also seeking approval to pay the Claims Administrator for the cost of the notice program and administration of the Settlement. *See* Brower Decl. at ¶¶155-156.

§78u-4(a)(4); *see also Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003) (holding that named plaintiffs are eligible for "reasonable" payments as part of a class action settlement). Indeed, important policy considerations to encourage enforcement of the federal securities laws by shareholders underlie these awards:

> In granting compensatory awards to the representative plaintiff in PSLRA class actions, courts consider the circumstances, including the personal risks incurred by the plaintiff in becoming a lead plaintiff, the time and effort expended by that plaintiff in prosecuting the litigation, any other burdens sustained by that plaintiff in lending himself or herself to prosecuting the claim, and the ultimate recovery. Furthermore, courts consider not only the efforts of the representative plaintiffs in pursuing claims, but also the important policy role they play in the enforcement of the federal securities laws on behalf of persons other than themselves. Such enforcement is vital because if there were no individual shareholders willing to step forward and pursue a %claim on behalf of other investors, many violations of law might go unprosecuted.

In re Xcel Energy, Inc. Sec., Derivative & ERISA Litig., 364 F. Supp. 2d 980, 1000 (D. Minn. 2005).

When evaluating the reasonableness of a lead plaintiff award, courts may consider factors such as "'the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . the amount of time and effort the plaintiff expended in pursuing the litigation'" among others. *Staton*, 327 F.3d at 977.

As detailed in the Declaration of Andrey Slomnitsky, *see* Brower Decl. Exh. C, Plaintiff devoted time and effort to monitoring the Action and directing his counsel, including reviewing and commenting on case filings, providing input on litigation strategy in connection with discovery, and the parties' mediations.

Plaintiff's request here is also in line with requests in similar cases. *See, e.g.*, *Todd v. STARR Surgical Co.*, No. CV 14-5263 MWF (GJSx), 2017 WL 4877417, at *6 (C.D. Cal. Oct. 24, 2017) (awarding $10,000 award); *In re Veritas Software Corp. Sec. Litig.*, 396 F. App'x 815, 816 (3d Cir. 2010) ($15,000 awarded to each lead plaintiff). Indeed, courts have approved awards to lead plaintiffs in PSLRA cases far greater than what Plaintiff is requesting here. *See, e.g.*, *Dusek v. Mattel, Inc.*, No. CV 99-10864-MRP (CWx), 2003 WL 27380801, at

*1 (C.D. Cal. Sept. 29, 2003) (awarding over $110,000 to three lead plaintiffs).[10]

Finally, the Notice informed the Class that Plaintiff may seek up to $10,000 for his time and expenses representing the Class. As of August 24, 2020, no Class member has objected to that request. Plaintiff's Counsel submits that amount requested is reasonable and, indeed, modest compared to awards made to lead plaintiffs in other PSLRA cases and should be granted.

V. CONCLUSION

Based upon the Brower Declaration and the forgoing, Plaintiff's Counsel respectfully submit that the Court should (1) award Plaintiff's Counsel one-third of the Settlement Fund, or $4,666,000 in attorneys' fees, plus interest at the same rate earned by the Settlement Fund, (2) reimburse Plaintiff's Counsel for their litigation expenses in the amount of $324,557.52, plus interest at the same rate as the Settlement Fund , (3) award the Lead Plaintiff $10,000 for his time and expenses representing the Class in this Action, and (4) approve an initial payment to the Claims Administrator for the costs related to the notice program, in the amount of $58,989.16. *See* Brower Decl. at ¶¶154-155.

DATED: August 24, 2020

Respectfully submitted,
MUCKLEROY LUNT, LLC

/s/ Martin A. Muckleroy

[10] *See also Buccellato v. AT&T Operations, Inc.*, No. C10-00463-LHK, 2011 WL 4526673, at *4 (N.D. Cal. June 30, 2011) ($20,000 award); *Xcel Energy, Inc.*, 364 F. Supp. 2d at 1000 (awarding $100,000 to lead plaintiffs because of "the important policy role [lead plaintiffs] play in the enforcement of the federal securities laws on behalf of persons other than themselves"); *City of Providence v. Aéropostale, Inc.*, No. 11 Civ. 7132 (CM) (GWG), 2014 U.S. Dist. LEXIS 64517, at *56 (S.D.N.Y. May 9, 2014) (awarding $11,235.04 for Lead Plaintiff for its lost wages and expenses), *aff'd sub nom., Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015); *In re Flag Telecom Holdings*, No. 02-CV-3400 (CM) (PED), 2010 U.S. Dist. LEXIS 119702, at *92 (S.D.N.Y. Nov. 8, 2010) (awarded to one lead plaintiff for his services in prosecuting the Action in the amounts of $100,000); *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04-8144 (CM), 2009 U.S. Dist. LEXIS 120953, at *62 (S.D.N.Y. Dec. 23, 2009) (awarding the Ohio Plaintiffs $70,000 and the New Jersey Plaintiffs $144,657.14 as compensation for their reasonable costs and expenses).

Martin A. Muckleroy (SBN 9634)
6077 South Fort Apache Road, Suite 140
Las Vegas, Nevada 89148
Telephone: (702) 907-0097
Facsimile: (702) 938-4065
martin@muckleroylunt.com

Counsel for Lead Plaintiff Andrey Slomnitsky and Liaison Counsel for the Class

BROWER PIVEN
A Professional Corporation
David A.P. Brower
136 Madison Avenue, 5th Floor
New York, New York 10016
Telephone: (212) 501-9000
Facsimile: (212) 501-0300|
brower@browerpiven.com

BROWER PIVEN
A Professional Corporation
Charles J. Piven (admitted *pro hac vice*)
3704 North Charles Street, #1301
Baltimore, Maryland 21218
Telephone: (410) 332-0030
Facsimile: (410) 685-1300
piven@browerpiven.com

Counsel for Lead Plaintiff Andrey Slomnitsky and Lead Counsel for the Class

ROBBINS GELLER RUDMAN & DOWD LLP
Samuel H. Rudman (admitted *pro hac vice*)
Joseph Russello (admitted *pro hac vice*)
William J. Geddish (admitted *pro hac vice*)
58 South Service Road, Suite 200
Melville, New York 11747
Telephone: (631) 367-7100
Facsimile: (631) 367-1173
srudman@rgrdlaw.com
jrussello@rgrdlaw.com
wgeddish@rgrdlaw.com

Additional Counsel for Plaintiff and the Class

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed on August 24, 2020, and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Martin A. Muckleroy
Martin A. Muckleroy