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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

GREG FLEMING, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. IMPAX LABORATORIES INC., et al., Defendants.	Case No. 4:16-cv-06557-HSG CLASS ACTION LEAD PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR: (1) FINAL APPROVAL OF CLASS ACTION SETTLEMENT; (2) APPROVAL OF PLAN OF ALLOCATION; (3) AWARD OF ATTORNEYS' FEES AND EXPENSES; AND (4) AWARDS TO PLAINTIFFS PURSUANT TO 15 U.S.C. §78u-4(a)(4) AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF DATE: March 31, 2022 TIME: 2:00 p.m. CTRM: 2, 4th Floor JUDGE: Hon. Haywood S. Gilliam, Jr.

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NOTICE OF MOTION

TO: THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 31, 2022, at 2:00 p.m. or as soon thereafter as counsel may be heard, before the Honorable Haywood S. Gilliam, Jr., at the United States District Court, Northern District of California, Oakland Division, Oakland Courthouse, Courtroom 2 – 4th Floor, 1301 Clay Street, Oakland, CA 94612, Lead Plaintiff New York Hotel Trades Council & Hotel Association of New York City, Inc. Pension Fund ("New York Pension Fund" or the "Lead Plaintiff"), and class representative Sheet Metal Workers' Pension Plan of Southern California, Arizona and Nevada ("Sheet Metal Workers' Fund" or the "Class Representative" and together with New York Pension Fund, the "Plaintiffs"), on behalf of themselves and all members of the certified Class, will and do hereby move the Court for an Order pursuant to Federal Rule of Civil Procedure ("Rule") 23: (1) finally certifying the proposed class ("Class") for purposes of effectuating the proposed settlement ("Settlement") of the above-captioned action ("Litigation"); (2) granting final approval of the Settlement on the terms set forth in the Second Amended Stipulation of Settlement, dated October 27, 2021 ("Stipulation")[1]; (3) approving the Plan of Allocation set forth in the Notice of Pendency and Proposed Settlement of Class Action ("Notice"); and (4) approving the requested award of attorneys' fees and litigation expenses and awards to Lead Plaintiff and Class Representative pursuant to 15 U.S.C. §78u-4(a)(4).

This motion is based on the Memorandum of Points and Authorities below, the Declarations of John Heim, Vernon Shaffer, Luke O. Brooks and Luiggy Segura, all prior pleadings in this Litigation, and such additional evidence or argument as may be requested by the Court.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Court should finally approve the $33 million all-cash Settlement.
2. Whether the Class should be finally certified for purposes of the Settlement.
3. Whether the Court should finally approve the Plan of Allocation.

[1] Unless otherwise defined herein, all capitalized terms shall have the meanings ascribed in the Stipulation.

4. Whether the proposed Notice and Proof of Claim and the manner for dissemination of the Notice and Proof of Claim to the Class satisfy Rule 23, the Private Securities Litigation Reform Act of 1995 ("PSLRA"), and due process.

5. Whether the Court should award attorneys' fees of 30% of the Settlement Amount.

6. Whether the Court should award litigation expenses of $176,501.78.

7. Whether the Court should award Lead Plaintiff and Class Representative $9,462.50 and $1,176.10, respectively, for their efforts on behalf of the Class.

MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Rule 23(e), Lead Plaintiff New York Pension Fund and class representative Sheet Metal Workers' Fund submit this memorandum in support of their motion for: (1) final approval of the Settlement of this securities class action for $33 million in cash; (2) approval of the Plan of Allocation; (3) award of attorneys' fees and expenses; and (4) awards to Plaintiffs pursuant to 15 U.S.C. §78u-4(a)(4). The terms of the Settlement are set forth in the Stipulation, which was previously filed with the Court. ECF No. 121-1.

I. INTRODUCTION

The $33 million, all-cash Settlement is a tremendous result for the Class. It is multiples above the median percentage recovery for 2020 securities class action settlements and comes after more than four years of litigation that included a substantial investigation, multiple complaint amendments, significant briefing on Defendants' three motions to dismiss, and a successful appeal to the Ninth Circuit. It is the result of protracted arm's-length settlement negotiations under the supervision of the Honorable Layn Phillips (Ret.), a highly experienced securities class action mediator. There is no question that as a result of these extensive litigation efforts and arm's-length settlement negotiations, Plaintiffs and Lead Counsel had a thorough understanding of the relative strengths and weaknesses of the Class's claims and the propriety of settlement.

While Lead Counsel believes that the Class's claims have significant merit, from the outset Defendants adamantly denied liability and asserted they possessed absolute defenses to the Class's claims. Indeed, the Court granted Defendants' motion to dismiss the entire case with prejudice, highlighting the difficulty in pursuing Plaintiffs' claims. During extensive settlement negotiations,

including a full-day remote mediation with Judge Phillips, Lead Counsel made it clear that while it was prepared to fairly assess the strengths and weaknesses of this case, it would continue to litigate (and, in fact, did), even on appeal, rather than settle for less than fair value. Plaintiffs and their counsel persisted for several months from the mediation until Judge Phillips issued a mediator's proposal on June 26, 2021, and they achieved an amount they believe is an exceptional result and certainly in the best interest of the Class.

Lead Counsel, who is highly experienced in prosecuting securities class actions, has concluded that the Settlement is in the best interest of the Class based on an analysis of all the relevant factors present here, including, *inter alia*: (i) the substantial risk, expense, and uncertainty in continuing the Litigation through yet another motion to dismiss, class certification, summary judgment and *Daubert* motions, trial, probable post-trial motion(s), and appeal(s); (ii) the relative strengths and weaknesses of the claims and defenses asserted; (iii) a complete analysis of the legal and factual issues presented; (iv) past experience in litigating complex actions similar to this Litigation; and (v) the serious disputes between the parties concerning the merits and damages. Importantly, the Settlement is fully supported by Plaintiffs,[2] who are the type of institutional investors favored to serve as lead plaintiff and class representative by Congress when passing the PSLRA.

The reaction of the Class thus far also supports the Settlement and Plan of Allocation. Pursuant to the Court's November 22, 2021 Order Granting Preliminary Approval of Settlement ("Preliminary Approval Order") (ECF No. 122), over 19,000 copies of the Notice were sent to potential Class Members and nominees, and notice was published over the *PR Newswire* and in *The Wall Street Journal*. *See* Declaration of Luiggy Segura Regarding (A) Notice Dissemination; (B) Publication/Transmission of Summary Notice; and (C) Requests for Exclusion Received to Date, dated January 13, 2022 ("Segura Decl."), ¶¶11-12, submitted herewith. To date, there have been no objections to the Settlement or requests for exclusion from the Class.

[2] *See* Declaration of John Heim in Support of Lead Plaintiff's Motion for Final Approval of Settlement ("Heim Decl."), ¶4 and Declaration of Vernon Shaffer in Support of Lead Plaintiff's Motion for Final Approval of Settlement ("Shaffer Decl."), ¶¶3-4, submitted herewith.

Plaintiffs also request that the Court approve the proposed Plan of Allocation, which was set forth in the Notice sent to Class Members. The Plan of Allocation governs how claims will be calculated and how settlement proceeds will be distributed among Authorized Claimants. It was prepared in consultation with Plaintiffs' damages consultant, and is based on the out-of-pocket measure of damages, *i.e.*, the difference between what Class Members paid for their Impax common stock and 2% Convertible Senior Notes during the Class Period and what they would have paid had the alleged misstatements and omissions not been made. It is fair, reasonable, and adequate, and should be approved.

Lead Counsel also respectfully applies for an award of attorneys' fees in the amount of 30% of the Settlement Amount and litigation expenses of $176,501.78, plus interest on both amounts. Lead Counsel's fee request, approved by Lead Plaintiff (*see* Heim Decl., ¶5), and Class Representative (*see* Shaffer Decl., ¶5), is fair and reasonable based on the facts and circumstances here. In particular, it is reasonable when viewed against the stellar result achieved and the significant risks Lead Counsel was able to overcome. These risks are exemplified by the Court's dismissal of this action with prejudice – without Lead Counsel's success in obtaining a partial reversal of that dismissal there would be no recovery at all. Finally, Lead Counsel applies for awards to Lead Plaintiff and Class Representative, pursuant to 15 U.S.C. §78u-4(a)(4), of $9,462.50 and $1,176.10, respectively, for their efforts representing the Class. Heim Decl., ¶6 and Shaffer Decl., ¶7.

II. PROCEDURAL AND FACTUAL BACKGROUND

The accompanying Declaration of Luke O. Brooks in Support of Motion for: (1) Final Approval of Class Action Settlement; (2) Approval of Plan of Allocation; (3) Award of Attorneys' Fees and Expenses; and (4) Awards to Plaintiffs Pursuant to 15 U.S.C. §78u-4(a)(4) ("Brooks Decl."), together with Lead Plaintiff's Notice of Unopposed Motion and Unopposed Motion for Preliminary Approval of Proposed Settlement, and Memorandum of Points and Authorities in Support Thereof (ECF No. 110), filed July 30, 2021, provide a full discussion of the factual background and procedural history of the Litigation, the extensive efforts undertaken by Plaintiffs and Lead Counsel over the course of the Litigation, the negotiations leading to this Settlement and

the risks of continued litigation, and the terms of the Settlement. Accordingly, the Litigation and relevant terms of the Settlement are only briefly described herein.

A. Procedural History

The initial complaint was filed on November 11, 2016. On February 15, 2017, the Court appointed the New York Pension Fund as lead plaintiff and Robbins Geller Rudman & Dowd LLP ("Robbins Geller" or "Lead Counsel") as lead counsel. ECF No. 29. Lead Plaintiff timely filed the Amended Complaint for Violation of the Federal Securities Laws ("FAC") on April 17, 2017, asserting claims pursuant to §§10(b) and 20(a) of the Securities Exchange Act of 1934.

The FAC alleges that Defendants concealed that the profits of two generic drugs had been inflated by illegal and unsustainable price-fixing arrangements with competitors (*id.*, ¶¶191-304), made false statements about and concealed declining revenues and market share for the generic drug diclofenac and Impax's generic drug portfolio (*id.*, ¶¶305-314), and misrepresented the competitive environment for generic drug budesonide (*id.*, ¶¶315-320). The FAC further alleges that once the relevant truth with respect to the alleged misstatements and omissions was revealed to the market through partial disclosures in 2015-2017, the artificial inflation due to the misstatements was removed from the securities causing the Class to be damaged.

On June 1, 2017, Defendants moved to dismiss the FAC. ECF Nos. 50-51. After Lead Plaintiff opposed Defendants' motion (ECF Nos. 52-53), the Court granted Defendants' motion to dismiss with leave to amend on September 7, 2018 (ECF No. 66).

Lead Plaintiff filed the Second Amended Complaint for Violation of the Federal Securities Laws ("SAC") on October 26, 2018. ECF No. 71. On December 6, 2018, Defendants moved to dismiss the SAC (ECF No. 72), which Lead Plaintiff opposed on January 17, 2019 (ECF No. 73). On August 12, 2019, the Court dismissed the SAC with prejudice ("August 12 Order"). ECF No. 86.

Lead Plaintiff appealed the August 12 Order. ECF No. 87. On January 11, 2021, the Ninth Circuit affirmed in part and reversed in part the August 12 Order. App. ECF No. 41-1. On January 25, 2021, Defendants filed their petition for panel rehearing and rehearing *en banc*. App. ECF No. 42. On February 8, 2021, Sheet Metal Workers' Fund filed a motion to intervene with the Ninth

Circuit, which Lead Plaintiff joined (App. ECF No. 43), along with a sworn PSLRA certification, demonstrating its Class Period purchases of Impax common stock (App. ECF No. 43-2, Schedule A).

On March 24, 2021, the Ninth Circuit denied Defendants' petition for rehearing (App. ECF No. 47) and denied Sheet Metal Workers' Fund's motion to intervene "without prejudice to seek leave to intervene on remand." App. ECF No. 48 at 2. The mandate issued on April 1, 2021 (App. ECF No. 50), and upon remand the Funds renewed the motion for the Sheet Metal Workers' Fund to intervene as an additional named plaintiff. ECF No. 93.

The parties attended a full-day remote mediation with Judge Phillips on September 17, 2020. Prior to the mediation, the parties submitted extensive mediation statements. While that mediation did not resolve the Litigation, the parties continued their mediation efforts with the assistance of Judge Phillips, and on June 26, 2021, Judge Phillips issued a mediator's proposal to settle the Litigation for $33 million, which the Settling Parties accepted.

B. Settlement Agreement

Settlement Benefits: Under the Settlement, Defendants have paid, or caused to be paid, $33 million into the Escrow Account, which amount, plus interest, comprises the Settlement Fund. The following amounts will be subtracted: (1) Taxes and Tax Expenses; (2) Notice and Administration Expenses; and (3) Lead Counsel's attorneys' fees and expenses and any awards to Plaintiffs. Stipulation, ¶5.4.

Class Definition: The Class is defined as "all Persons that purchased or acquired Impax common stock or 2% Convertible Senior Notes between February 20, 2014 and August 9, 2016, inclusive." Stipulation, ¶1.4.[3]

Release: In exchange for the benefits provided under the Stipulation, Class Members will release "any and all claims, rights, liabilities, and causes of action of every nature and description,

[3] "Excluded from the Class are: (i) Defendants; (ii) members of the immediate families of the Individual Defendants; (iii) Impax's subsidiaries; (iv) the officers and directors of Impax during the Class Period; (v) any entity in which any Defendant has a controlling interest; and (vi) the legal representatives, heirs, successors and assigns of any such excluded person or entity. Also excluded from the Class will be any Person who timely and validly seeks exclusion from the Class." *Id.*

including both known claims and Unknown Claims . . . that Lead Plaintiff or any other member(s) of the Class asserted or could have asserted in any forum that both (i) arise out of, are based upon, or are related in any way to the allegations, transactions, facts, events, matters, occurrences, disclosures, statements, representations, or omissions referred to in the Action, and (ii) relate to the purchase or acquisition of Impax common stock or 2% Convertible Senior Notes by the Class during the Class Period." Stipulation, ¶1.27. This release "will bar only claims based on an identical factual predicate as that underlying the claims settled in this [Action], as required by Ninth Circuit law." *In re Yahoo! Inc. Sec. Litig.*, No. 17-cv-00373, at ECF No. 105, ¶31 (N.D. Cal. May 9, 2018) (citing *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010)). The proposed release is also consistent with release provisions approved by other courts in this Circuit in similar actions. *See, e.g.*, *In re LendingClub Sec. Litig.*, 2018 WL 1367336, at 4 (N.D. Cal. Mar. 16, 2018) (approving release in securities class action that was "anchored to 'the purchase, acquisition, holding, sale, or disposition of LendingClub common stock by Class Members during the [class] period'") (alteration in original).[4]

Cy Pres Distribution: The Investor Protection Trust is the *cy pres* recipient. *See* Notice, at ¶41. It is a 501(c)(3) non-profit dedicated to investor education and protection. ECF No. 121 at 1. The primary mission of the Investor Protection Trust is "to provide independent, objective information needed by consumers to make informed investment decisions." *Id*. The organization also provides online tools and information "to help investors recognize and avoid investment fraud and financial exploitation." *Id*. The Court preliminarily found that the Investor Protection Trust shares the interests of Class Members in protecting investors and preventing fraud and that there is a sufficient nexus between the *cy pres* recipient and the Class. Preliminary Approval Order, at 15.

Supplemental Agreement: The Settling Parties have entered into a Supplemental Agreement, which provides that if prior to the Settlement Hearing, the number of shares of Impax common stock purchased or acquired during the Class Period, represented by valid claims by Persons who would otherwise be members of the Class, but who request exclusion from the Class, equals or exceeds a

[4] All citations are omitted and emphasis is added throughout unless otherwise noted.

certain amount, Defendants shall have the option to terminate the Settlement. Stipulation, ¶7.3. The Court reviewed the Supplemental Agreement and preliminarily found that the termination provision is fair and reasonable. Preliminary Approval Order, at 17.

III. STANDARDS FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS

A. Class Certification Remains Appropriate

In granting preliminary approval, the Court found this case appropriate for class certification for settlement purposes, and appointed Sheet Metal Workers' Fund as class representative and Robbins Geller as class counsel. Preliminary Approval Order, at 8-12. Because nothing has changed since preliminary approval that would undermine the Court's conclusion, class certification for settlement purposes remains appropriate. *See Vataj v. Johnson*, 2021 WL 5161927 (N.D. Cal. Nov. 5, 2021) (Gilliam, J.) at *4.

B. The Settlement Warrants Final Approval

Rule 23(e) requires judicial approval for the settlement of claims brought as a class action. The Court may approve a proposed settlement only "after a hearing and only on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Ninth Circuit recognizes a "'strong judicial policy that favors settlements, particularly where complex class action litigation is concerned.'" *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 556 (9th Cir. 2019); *see also In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004) (same).

Rule 23(e)(2) (amended as of December 1, 2018) sets forth the factors to be considered in determining whether a settlement warrants final approval:

> **(2)** ***Approval of the Proposal.*** If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
>
> > **(A)** the class representatives and class counsel have adequately represented the class;
> >
> > **(B)** the proposal was negotiated at arm's length;
> >
> > **(C)** the relief provided for the class is adequate, taking into account:

> **(i)** the costs, risks, and delay of trial and appeal;
>
> **(ii)** the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> **(iii)** the terms of any proposed award of attorney's fees, including timing of payment; and
>
> **(iv)** any agreement required to be identified under Rule 23(e)(3); and
>
> **(D)** the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

In addition, courts in the Ninth Circuit consider the following factors, some of which overlap with Rule 23(e)(2): "(1) the strength of plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). "The relative degree of importance to be attached to any particular factor" is case specific. *Officers for Justice v. Civ. Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982).

As the Ninth Circuit recently emphasized:

> Deciding whether a settlement is fair is ultimately "an amalgam of delicate balancing, gross approximations and rough justice," best left to the district judge, who has or can develop a firsthand grasp of the claims, the class, the evidence, and the course of the proceedings – the whole gestalt of the case. Accordingly, "the decision to approve or reject a settlement is committed to the sound discretion of the trial judge."

In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig., 895 F.3d 597, 611 (9th Cir. 2018), *cert. denied sub nom. Fleshman v. Volkswagen, AG*, ___ U.S. ___, 139 S. Ct. 2645 (2019). Accordingly, approval of a class action settlement will be reversed only if "the district court clearly abused its discretion." *Hyundai*, 926 F.3d at 556.

This Court's Preliminary Approval Order "weighed the relevant factors" in assessing the Settlement and "preliminarily [found] that the Settlement Agreement is fair, reasonable, and adequate." Preliminary Approval Order, at 18. The Court's conclusion on preliminary approval is equally true now as little, if anything, has changed between preliminary approval and final approval. *See In re Chrysler-Dodge-Jeep Ecodiesel® Mktg., Sales Practices & Prods. Liab. Litig.*, 2019 WL 2554232, at *2 (N.D. Cal. May 3, 2019) (finding that the "conclusions [made in granting preliminary approval] stand and counsel equally in favor of final approval now"); *Snyder v. Ocwen Loan Servicing, LLC*, 2019 WL 2103379, at *4 (N.D. Ill. May 14, 2019) (noting in analyzing Rule 23(e)(2) that "[s]ignificant portions of the Court's analysis remain materially unchanged from the previous order [granting preliminary approval]").

Plaintiffs respectfully submit that the proposed Settlement satisfies both Rule 23(e)(2) and the relevant Ninth Circuit factors and warrants final approval as fair, reasonable, and adequate.

1. The Proposed Settlement Satisfies the Requirements of Rule 23(e)(2)

a. Plaintiffs and Lead Counsel Have Adequately Represented the Class

Rule 23(e)(2)(A) asks whether the plaintiff and its counsel have adequately represented the class. This factor overlaps with the Ninth Circuit's factor regarding "the extent of discovery completed and the stage of the proceedings." *Hanlon*, 150 F.3d at 1026.

As described in the Brooks Declaration, Plaintiffs and Lead Counsel have adequately represented the Class by diligently prosecuting this Litigation on behalf of the Class, including, substantial investigation, motion practice and appellate practice. *See* Brooks Decl., ¶¶5, 18-30. In particular, Lead Plaintiff and Lead Counsel conducted an extensive factual investigation and drafted both the 174-page FAC and 196-page SAC, briefed and argued Defendants' motions to dismiss and successfully appealed the Court's dismissal of this action – a result that occurs in only 13.3% of appeals in Ninth Circuit civil actions. *See infra*, §VI.B.2. Lead Plaintiff and Lead Counsel also moved with Sheet Metal Workers' Fund to allow it to intervene, worked with experts on complex antitrust, loss causation and damages issues, prepared a detailed mediation statement, and engaged in mediation with Judge Phillips to resolve the Litigation on a highly favorable basis for the Class.

Brooks Decl., ¶¶5, 18-35. Further, courts regularly find counsel adequately informed even where formal discovery has not commenced or has only just begun. *See, e.g.*, *Vataj*, 2021 WL 5161927, at *7 (granting final approval of settlement reached in PSLRA class action before decision on defendants' pending motion to dismiss was issued); *Hefler v. Wells Fargo & Co.*, 2018 WL 4207245, at *10 (N.D. Cal. Sept. 4, 2018) (granting preliminary approval even though the parties were "'only at the outset of formal discovery'"); *Sheikh v. Tesla, Inc.*, 2018 WL 5794532, at *5 (N.D. Cal. Nov. 2, 2018) (approving settlement where "[l]ittle formal discovery had been completed at the time of settlement, and the case [was] in its early stages"). Plaintiffs and Lead Counsel stood ready to, and at all times did, advocate for the best interests of the Class at the time the proposed Settlement was reached. The stellar result achieved is the best indication of their adequate representation. Thus, Rule 23(e)(2)(A) is satisfied.

b. The Proposed Settlement Was Negotiated at Arm's Length and Was Not the Product of Collusion

In the Ninth Circuit, a "'strong presumption of fairness'" attaches to a class action settlement reached through arm's-length negotiations between "experienced and well-informed counsel." *de Rommerswael on Behalf of Puma Biotechnology, Inc. v. Auerbach*, 2018 WL 6003560, at *3 (C.D. Cal. Nov. 5, 2018); *see Rodriguez*, 563 F.3d at 965 ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution.").

There is no hint of collusion here. As detailed in the Brooks Declaration, the parties attended a remote mediation session on September 17, 2020, with Judge Phillips, a highly experienced mediator. *See* Brooks Decl., ¶¶32-33. As part of the settlement discussions, Lead Counsel and Defendants' Counsel prepared and presented submissions concerning, among other things, their respective views on the merits of the Litigation, including Defendants' defenses and issues relating to causation and damages. *Id*., ¶33. Though initially unsuccessful, the parties continued to aggressively litigate the case and persisted with settlement discussions with the mediator's oversight. *Id*., ¶34. Ultimately, the parties accepted the mediator's proposal to resolve the Litigation on June 26, 2021. *Id*. The protracted negotiations under the supervision of Judge Phillips, a neutral and experienced mediator evidence that the Settlement was reached at arm's length. *See Hefler v. Wells*

Fargo & Co., 2018 WL 6619983, at *6 (N.D. Cal. Dec. 18, 2018) ("*Hefler II*"), *aff'd sub nom. Hefler v. Pekoc*, 802 F. App'x 285 (9th Cir. 2020) ("[T]he Settlement was the product of arm's length negotiations through two full-day mediation sessions and multiple follow-up calls supervised by former U.S. District Judge Layn Phillips."); *In re Atmel Corp. Derivative Litig.*, 2010 WL 9525643, at *13 (N.D. Cal. Mar. 31, 2010) ("Judge Phillips' participation weighs considerably against any inference of a collusive settlement.").

Also relevant is the fact that this Settlement was reached after vigorously litigating Defendants' motions to dismiss and Lead Plaintiff's appeal of the Court's dismissal. In addition, the settlement negotiations were undertaken by experienced counsel on both sides, each with a well-developed understanding of the strengths and weaknesses of their respective claims and defenses. Lead Counsel has many years of experience in litigating securities class actions like this one and has negotiated hundreds of settlements of these types of cases, which have been approved by courts across the country. *See* www.rgrdlaw.com. Defendants are also represented by a well-respected defense firm, Latham & Watkins LLP, who zealously represented its clients.

Finally, the Settlement is completely void of even "subtle signs of collusion." There is no clear sailing provision. Lead Counsel will be compensated from the Settlement Amount rather than through a separate payment by a defendant. And, the funds will not revert to any defendant or their insurer under any circumstances. *See* Preliminary Approval Order, at 14. Collectively, these facts demonstrate that the Settlement is entitled to a presumption of fairness and is "not the product of fraud or overreaching by, or collusion between, the negotiating parties." *Officers for Justice*, 688 F.2d at 625.

c. The Relief Provided to the Class Is Adequate

(1) The Proposed Settlement Is Adequate in Light of the Costs, Risk and Delay of Trial and Appeal

Both Rule 23(e)(2)(C) and district courts in the Ninth Circuit consider the substantive adequacy of the proposed settlement in determining final approval. Rule 23(e)(2)(C)(i) considers the adequacy of the Settlement in light of "the costs, risks, and delay of trial and appeal," and the

relevant overlapping Ninth Circuit factors address "the strength of plaintiffs' case; [and] the risk, expense, complexity, and likely duration of further litigation." *Rodriguez*, 563 F.3d at 963.

While Plaintiffs believe their claims have merit and the Class would survive Defendants' outstanding motion to dismiss and anticipated summary judgment motions, they nevertheless recognize the numerous risks and uncertainties in proceeding to trial. In fact, securities class actions "are highly complex and [litigating] securities class litigation is notably difficult and notoriously uncertain." *Hefler II*, 2018 WL 6619983, at *13. As discussed below, and in the Brooks Declaration (¶¶7-8, 36-43), the many risks of continued litigation, when weighed against the substantial and certain recovery for the Class, confirm the reasonableness of the Settlement. *Baird v. BlackRock*, 2021 WL 5113030 (N.D. Cal. Nov. 3, 2021) (Gilliam, J.), at *4 ("Approval of a class settlement is appropriate when plaintiffs must overcome significant barriers to make their case.").

a) The Risks of Proving Materiality, Falsity and Scienter

Throughout the Litigation, Defendants vigorously contested each of Plaintiffs' allegations, asserting, *inter alia*, that: (i) the alleged misstatements were not false or misleading; (ii) any alleged misstatement was not material; and (iii) Defendants did not make the alleged misstatements with the requisite scienter. Among other things, Defendants challenged whether the SAC adequately pled scienter concerning Lead Plaintiff's price-fixing allegations, and whether it adequately pled materiality, falsity and scienter concerning the diclofenac and budesonide allegations. ECF No. 50; Brooks Decl., ¶41.

Establishing material falsity and scienter presents significant risks in all securities actions, and these risks were heightened in this difficult action. For example, the need to prove an antitrust "case within a case" to establish liability – specifically, the falsity of Defendants' public statements related to Impax's alleged anti-competitive conduct – greatly amplified Plaintiffs' litigation risks. Lead Counsel anticipates that Defendants would take the position that, in order to establish liability, Plaintiffs would have had to prove an underlying antitrust violation by Impax before they could establish any alleged securities law violations. Defendants have argued that Impax was not named in any of the government actions and likely would have argued following discovery that Plaintiffs

could not establish that Impax participated in a wide-ranging antitrust conspiracy, or that the dramatic generic drug price increases at issue were the result of market factors such as supply shortages and/or legitimate business actions, including conscious parallelism. Defendants also likely would have argued that scienter could not be proven because the individuals who spoke on behalf of Impax were not directly involved in the alleged collusive communications with competitors.

With respect to the allegations related to diclofenac, Defendants have argued that the alleged false statements were either non-actionable puffery, true statements of historical fact, non-actionable opinions, or forward-looking statements subject to the PSLRA's safe harbor. They also have asserted that Plaintiffs would not be able to establish scienter. For example, with respect to Defendants' May 10, 2015 statement about diclofenac and Impax's generic portfolio decline, Defendants argued that Defendant Wilkinson made an error, at most, and that he corrected that error later the same day. Although Defendants did not prevail on this argument at the pleading stage, there is substantial risk that the Court at summary judgment or the jury at trial would conclude that Wilkinson misspoke by conflating the figures for Impax's first-quarter portfolio price decline and its first-quarter revenue decline attributable to price, rather than acting with the requisite intent. With respect to the guidance allegations, Defendants argued that Impax had no motive to issue guidance it knew the Company could not meet, and that the miss was simply the product of Defendants' failure to identify the sudden shift in the diclofenac market quickly enough to avoid making the challenged guidance.

The risk that Plaintiffs would be unable to establish liability, and recover nothing at all, was palpable as evidenced by the Court's dismissal of SAC with prejudice. Although the Ninth Circuit reversed in part, there were a number of arguments the Ninth Circuit did not address, such as scienter, which Defendants were likely to raise again with this Court. In addition, Defendants' latest motion to dismiss challenges New York Pension Fund's standing to sue because it did not purchase shares within the narrowed Class Period, ECF No. 96, despite Sheet Metal Workers' Fund's already-filed, renewed motion to intervene, ECF No. 93. While Plaintiffs believe they have strong arguments in response to each of Defendants' challenges, they faced the very real risk that the Court

or the jury could have accepted Defendants' arguments at various critical stages (*e.g.*, pleading, summary judgment, trial and on appeal).

b) Risks Related to Proving Loss Causation and Damages

Plaintiffs also faced risk in proving loss causation and damages. To establish these elements, Plaintiffs would have to prove that fraud-related revelations proximately caused the declines in Impax's securities prices during the Class Period and that those fraud-related causes could be parsed out from any potential non-fraud related news or publicly released information. In addition to the risk of outright dismissal for failure to establish loss causation or damages, Plaintiffs also faced substantial risk that the potential recoverable damages could be trimmed significantly, as they were by the Appellate Opinion that narrowed the Class Period. The class certification, summary judgment, and trial stages each present an opportunity for Defendants to further narrow the Class Period, or strike specific corrective disclosures, which would limit recoverable damages significantly. Defendants have repeatedly argued (and no doubt would have argued again in opposition to class certification, on summary judgment and at trial) that the alleged corrective disclosures on May 11, 2015 and August 10, 2015 were not "corrective" because they did not disclose Impax's participation in a price-fixing scheme and therefore the declines that occurred on those days were not proximately caused by the fraud. ECF No. 72, at 17-18. Plaintiffs would need to continue to combat such arguments.

On summary judgment, Defendants likely would have also argued, consistent with their loss causation arguments, that Plaintiffs' methodology does not take into account other causes of their claimed losses. While Lead Counsel believes Plaintiffs and their expert(s) would have overcome these arguments or defenses, there is certainly no assurance that the jury would agree with Plaintiffs' arguments.

Because the determination of loss causation and damages is a complicated process requiring expert testimony, compounding the above factors was a risk that the Court would grant, in whole or in part, Defendants' motion(s) to exclude the opinions and testimony of Plaintiffs' loss causation and damages expert at trial. Even if Plaintiffs prevailed on these motions, the jury's loss causation and

damage assessments of the expert evidence could vary substantially at trial, reducing this crucial element to a "battle of experts."

In contrast to these risks, the Settlement now guarantees a prompt and sizeable recovery for the Class without the risk of lesser or no recovery associated with further litigation.

c) The Proposed Settlement Eliminates the Additional Cost and Delay of Continued Litigation

There remained much work to do in the Litigation. For instance, if the Settlement was not reached, the parties would be faced with taking and/or defending many fact and expert depositions, briefing class certification, summary judgment and motions to exclude, trying the case before a jury, and litigating the inevitable appeals. Each of these steps is both complex and expensive and the case likely would not be resolved until several years down the road. Moreover, many hours of the Court's time and resources have also been spared as a result of the Settlement.

The $33 million Settlement, at this juncture, results in an immediate, substantial and tangible recovery, without the considerable risk, expense and delay of further litigation. *See Vataj*, 2021 WL 5161927, at *6 ("'[U]nless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.'"); *Ikuseghan v. Multicare Health Sys.*, 2016 WL 3976569, at *4 (W.D. Wash. July 25, 2016) ("Absent the proposed Settlement, Class Members would likely not obtain relief, if any, for a period of years.").

(2) The Proposed Method for Distributing Relief Is Effective

With respect to Rule 23(e)(2)(C)(ii), Plaintiffs and Lead Counsel have taken substantial efforts to insure that the Class is notified about the proposed Settlement. Pursuant to the Preliminary Approval Order, over 19,000 copies of the Notice and Proof of Claim were mailed to potential Class Members and nominees; the Summary Notice was published in *The Wall Street Journal* and transmitted over the *PR Newswire* on December 27, 2021; and a settlement-specific website was created where key documents are posted, including the Stipulation, Notice, Proof of Claim and Preliminary Approval Order. Segura Decl., ¶¶11-14.

The claims process, which is similar to that commonly used in securities class action settlements, is also effective and includes a standard claim form that requests the information necessary to calculate a Claimant's claim amount pursuant to the Plan of Allocation. The Plan of Allocation will govern how Class Members' claims will be calculated and, ultimately, how money will be distributed to Authorized Claimants. (*See* §IV below and Brooks Decl., ¶¶46-49 for a more detailed discussion of the Plan of Allocation.) Thus, this factor supports final approval for the same reason that it supported preliminary approval.

(3) Attorneys' Fees

Rule 23(e)(2)(C)(iii) addresses "the terms of any proposed award of attorney's fees, including timing of payment." As discussed in §VI below, Lead Counsel seeks an award of attorneys' fees of 30% of the Settlement Amount and expenses of $176,501.78, plus interest on both amounts. This fee request was fully disclosed in the Notice (Segura Decl., Ex. A, Notice at ¶5), approved by Lead Plaintiff (Heim Decl., ¶5) and Class Representative (Shaffer Decl., ¶5), and is consistent with awards in securities and other class action settlements. *See* §VI.B.5, *infra*.

In addition, Lead Counsel requests that any award of fees and expenses be paid at the time the Court makes its award. *See, e.g.*, *In re Optical Disk Drive Prod. Antitrust Litig.*, 2016 WL 7364803, at *13 (N.D. Cal. Dec. 19, 2016) ("Quick pay provisions are common practice in the Ninth Circuit."); *In re Vocera Comm's, Inc. Sec. Litig.*, 2016 WL 8201593, at *1 (N.D. Cal. July 29, 2016) (fees to be paid "immediately upon entry of this Order. . . ."); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 7575004, at *1 (N.D. Cal. Dec. 27, 2011) ("Federal Courts, including this Court and others in this District, routinely approve settlements that provide for payment of attorneys' fees prior to final disposition in complex class actions.").

(4) Other Agreements

As discussed in Lead Plaintiff's preliminary approval brief (ECF No. 110 at 4) and in the Stipulation (¶7.3), Defendants and Plaintiffs have entered into a standard supplemental agreement which provides that if Class Members opt out of the Settlement such that the number of shares of Impax common stock represented by such opt outs equals or exceeds a certain amount, Defendants shall have the option to terminate the Settlement. Such agreements are common and do not

undermine the propriety of the Settlement. *See, e.g.*, *Hefler II*, 2018 WL 6619983, at *7 ("The existence of a termination option triggered by the number of class members who opt out of the Settlement does not by itself render the Settlement unfair.") (citing *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 948 (9th Cir. 2015)).[5] Again, the Court has reviewed the Supplemental Agreement here and concluded "that the termination provision is fair and reasonable." Preliminary Approval Order, at 17.

d. The Proposed Plan of Allocation Treats Class Members Equitably

To avoid duplication, the Court is respectfully referred to the discussion of the Plan of Allocation in §IV below and in the Brooks Declaration (¶¶46-49).

2. The Remaining Ninth Circuit Factors Are Satisfied

a. The Settlement Amount

In evaluating the settlement amount, "'courts primarily consider plaintiffs' expected recovery balanced against the value of the settlement offer.'" *Hefler II*, 2018 WL 6619983, at *8; *see In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007). Here, Defendants' payment of $33 million in cash provides an immediate, tangible, and significant recovery to the Class and eliminates the risk that the Class could recover less than the Settlement Amount, or nothing at all, if the Litigation continued.

Specifically, the recovery is well above the median securities class action settlement values over the last ten years, which range from $7 million to $13 million,[6] and is approximately 12.5% of the estimated class-wide damages.[7] Brooks Decl., ¶53. This percentage of recovery is particularly impressive as it is multiples above the reported 1.7% median ratio of securities class action settlements to investor losses in 2020. Janeen McIntosh & Svetlana Starykh, *Recent Trends in*

[5] As is standard in securities class actions, such agreements are not made public in order to avoid incentivizing the formation of a group of opt-outs for the sole purpose of leveraging the Termination Threshold to exact an individual settlement. Pursuant to its terms, the Supplemental Agreement may be submitted to the Court *in camera* or under seal.

[6] 2021 NERA Study, Figure 15 at 17. This figure excludes settlements over $1 billion. *Id.*

[7] While Plaintiffs' consultant estimated recoverable damages were approximately $265 million in the best case damages scenario, Defendants took the position that damages were significantly lower.

Securities Class Action Litigation: 2020 Full-Year Review (Jan. 25, 2021); 2021 NERA Study, Figure 16 at 20. *See In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) (finding that settlement amount was reasonable in part because it was "higher than the median percentage of investor losses recovered in recent shareholder class action settlements").

b. Counsel View This Good-Faith Settlement as Fair, Reasonable, and Adequate

As the Ninth Circuit observed in *Rodriguez*, "[t]his circuit has long deferred to the private consensual decision of the parties" and their counsel in settling an action. 563 F.3d at 965. Courts have recognized that "'"[g]reat weight" is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.'" *Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *accord Omnivision*, 559 F. Supp. 2d at 1043 ("'The recommendations of plaintiffs' counsel should be given a presumption of reasonableness.'").

Lead Counsel has many years of experience in securities and other complex class action litigation and has negotiated numerous other substantial class action settlements throughout the country. *See* www.rgrdlaw.com. Having carefully considered and evaluated, *inter alia*, the relevant legal authorities and evidence to support the claims asserted against Defendants, the likelihood of prevailing on these claims, the risk, expense, and likely duration of continued litigation, and the likely additional appeals and subsequent proceedings necessary if Plaintiffs did prevail against Defendants at trial, Lead Counsel has concluded that the Settlement is a very good result for the Class. *See* Brooks Decl., ¶45. Here, "[t]here is nothing to counter the presumption that Lead Counsel's recommendation is reasonable." *Omnivision*, 559 F. Supp. 2d at 1043. Importantly, both New York Pension Fund and Sheet Metal Workers' Fund, who were active in the Litigation, authorized counsel to settle this case and support the reasonableness of the Settlement. *See* Heim Decl., ¶4; Shaffer Decl., ¶4.

c. The Reaction of Class Members to the Settlement

The reaction of the Class to the Settlement also supports approving the Settlement. *See In re Wells Fargo Collateral Prot. Ins. Litig.*, 2019 WL 6219875, at *4 (C.D. Cal. Nov. 4, 2019) ("Together, the requests for exclusion and objections represents slightly more than 0.0037% of the

total class. This small percentage shows a positive class reaction to the settlement agreement and further supports a finding that the settlement is fair, reasonable, and adequate."); *Omnivision*, 559 F. Supp. 2d at 1043 ("'[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members.'").

The deadline to object to any aspect of the Settlement or to exclude oneself from the Class is March 4, 2022. To date, no objections have been received, and there have been no requests for exclusion. Segura Decl., ¶15; *see also Morgan v. Childtime Childcare, Inc.*, 2020 WL 218515, at *2 (C.D. Cal. Jan. 6, 2020) ("Lack of objection speaks volumes for a positive class reaction to the settlement."). Plaintiffs will address objections, if any, in their reply.

"[T]he fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness." *Hanlon*, 150 F.3d at 1027; *see also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (that there was only one opt out supports upholding district court's approval of settlement); *Vinh Nguyen v. Radient Pharms. Corp.*, 2014 WL 1802293, at *4 (C.D. Cal. May 6, 2014) ("There have been no objections to the Settlement itself, and so the Court finds this factor weighs in favor of the Settlement.").

d. The Presence of a Governmental Participant

Another Ninth Circuit factor is the extent to which a case may have benefitted from a governmental participant. *Rodriguez*, 563 F.3d at 963. Plaintiffs and Lead Counsel pursued this case on their own with no assistance from the SEC or otherwise. There was no governmental participant in the action, and although state attorneys general and the Department of Justice investigated the alleged market-wide price-fixing conspiracy and filed civil and criminal charges against certain of Impax's competitors, no state or federal authority has ever filed price-fixing charges or claims against Impax. Defendants sought to exploit this fact at the pleading stage and could be expected to do so throughout the remainder of the litigation.

e. The Risk of Attaining Class Certification

Assuming the case were to advance beyond the pleading stage, there is always the risk that the Class would not be certified. Here, there was an added risk due to Defendants' loss causation and damages arguments discussed above (§III.B.1.c.(1)(b)). Therefore, this factor weighs in favor of final Settlement approval.

* * *

Accordingly, the proposed Settlement satisfies each of the elements of Rule 23(e)(2) as well as the Ninth Circuit's factors and should therefore be approved.

IV. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

Plaintiffs also seek approval of the Plan of Allocation, which the Court preliminarily approved after finding that it "treats the class members fairly." Preliminary Approval Order, at 18. The Plan of Allocation is set forth in full in the Notice mailed to potential Class Members. Segura Decl., Ex. A, Notice at ¶¶28-43.

Assessment of a plan of allocation of settlement proceeds in a class action under Rule 23 is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair and reasonable. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1284 (9th Cir. 1992). District courts enjoy "'broad supervisory powers over the administration of class action settlements to allocate the proceeds among the claiming class members equitably.'" *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 328 (3d Cir. 2011). An allocation formula need only have a "'reasonable, rational basis, particularly if recommended by experienced and competent counsel.'" *Radient*, 2014 WL 1802293, at *5.

The Plan of Allocation here provides an equitable basis to allocate the Net Settlement Fund among all Authorized Claimants (Class Members who submit an acceptable Proof of Claim and who have a recognized loss under the Plan of Allocation). It was developed by Lead Counsel with the assistance of Plaintiffs' damages consultant and is "grounded in a formula that will compensate class members for the losses related to their" purchases of Impax securities. *In re Amgen Inc. Sec. Litig.*, 2016 WL 10571773, at *8 (C.D. Cal. Oct. 25, 2016). Individual Authorized Claimants' recoveries will depend on when during the Class Period they bought Impax securities, and whether and when

they sold them. Authorized Claimants will recover their proportional "pro rata" amount of the Net Settlement Fund based on their recognized loss, calculated under the Plan of Allocation using the transactional information provided by claimants. As a result, the Plan of Allocation will result in a fair distribution of the available proceeds among Class Members who submit valid claims. No preferential treatment is provided,[8] and there have been no objections to the Plan of Allocation filed by Class Members. The Plan of Allocation is fair and reasonable, treats Class Members fairly, and should be finally approved.

V. NOTICE TO THE CLASS SATISFIES DUE PROCESS

The Court previously approved the form and content of the Notice, Claim Form and Summary Notice and found Plaintiffs' proposal to mail and publish notice satisfied Rule 23 and due process. Preliminary Approval Order, at 20. In response, Plaintiffs, through Lead Counsel and the Claims Administrator, have disseminated over 19,000 copies of the Court-approved Notice to potential Class Members and their nominees who could be identified with reasonable effort, from multiple sources. *See* Segura Decl., ¶11. In addition, the Court-approved Summary Notice was published in the national edition of *The Wall Street Journal*, and published electronically over the *PR Newswire*. *Id*., ¶12. The Claims Administrator also provided all information regarding the Settlement online through the Settlement website. *Id*., ¶14. This method of giving notice is appropriate because it directs notice in a "reasonable manner to all class members who would be bound by the propos[ed judgment]." Fed. R. Civ. P. 23(e)(1)(B).

Similarly, the Court found that the content of the Notice describes the necessary information required by Rule 23 and due process and for Class Members to make an informed decision regarding the proposed Settlement. Preliminary Approval Order, at 20-21. It informs the Class of, among other things, all the necessary elements of the Settlement, including all relevant dates and deadlines related thereto, and further explains that the Net Settlement Fund will be distributed to eligible Class

[8] *See In re Extreme Networks, Inc. Sec. Litig.*, 2019 WL 3290770, at *8 (N.D. Cal. July 22, 2019) ("In granting preliminary approval, the Court found that this proposed allocation did not constitute improper preferential treatment. The Court adheres to its view that the allocation plan is equitable."); *Hefler II*, 2018 WL 6619983, at *8 (approving settlement where "allocation did not constitute improper preferential treatment").

Members who submit valid and timely Claim Forms under the Plan of Allocation as described in the Notice.

Accordingly, the Notice is sufficient because it "'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" *Rodriguez*, 563 F.3d at 962; *see also Hefler*, 2018 WL 6619983, at *5 (finding very similar notice "sufficiently provided notice to the settlement class members"). In sum, the notice program here fairly apprises Class Members of their rights with respect to the Settlement, is the best notice practicable under the circumstances, and complies with the Court's Preliminary Approval Order, Rule 23, the PSLRA, and due process. *See, e.g.*, Preliminary Approval Order, at 20-21; *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1170 (S.D. Cal. 2007).

VI. AWARD OF ATTORNEYS' FEES

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

For its efforts in creating a $33 million common fund for the benefit of the Class, Lead Counsel seeks a reasonable percentage of the fund recovered as attorneys' fees. The percentage method of awarding fees has become the prevailing method for awarding fees in common fund cases in this Circuit and throughout the United States.

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). 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 attorney's fees.'" *In re Omnivision Techs., Inc. Sec. Litig.*, 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)).

In *Blum v. Stenson*, the Supreme Court recognized that under the common fund doctrine a reasonable fee may be based "on a percentage of the fund bestowed on the class." 465 U.S. 886, 900 n.16 (1984). While courts have discretion to employ either a percentage-of-recovery or lodestar

method in determining an attorneys' fee award, "[t]he 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." *In re Korean Air Lines Co., Ltd. Antitrust Litig.*, 2013 WL 7985367, at *1 (C.D. Cal. Dec. 23, 2013). Thus, 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). Other circuits are in accord.

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.*, 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 particularly appropriate in common fund cases like this because "the benefit to the class is easily quantified." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011); *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); *BlackRock*, 2021 WL 5113030, at *6-*7 (applying percentage of the fund method and lodestar crosscheck); *Vataj*, 2021 WL 5161927, at *8 (same). Among other benefits, the percentage-of-recovery method decreases the burden imposed on courts by eliminating a detailed and "more time-consuming" lodestar analysis. *Bluetooth*, 654 F.3d at 942; *Lopez v. Youngblood*, 2011 WL 10483569, at *4 (E.D. Cal. Sept. 2, 2011) ("'In practice, the lodestar method is difficult to apply [and] time consuming to administer.'") (quoting *Manual for Complex Litigation* §14.121 (4th ed. 2004)).

B. Factors Considered by Courts in the Ninth Circuit Support Approval of the Requested Fee in This Case

Courts in this Circuit consider 25% of the common fund the benchmark or "starting point" for the award of fees in a common fund settlement and apply several factors: "to determine whether to adjust a fee award from the benchmark: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiff; and (5) awards made in similar cases." *See Vataj*, 2021 WL 5161927, at *8 (citing *Vizcaino*, 290 F.3d at 1048-50); *see also BlackRock*, 2021 WL 5113030, at *6-*7 (approving an upward fee adjustment to 29%).

Application of each of these factors here confirms that the requested 30% fee is fair and reasonable.

1. Counsel Achieved a Very Favorable Result for the Class

This Court previously recognized that the result achieved is the "most critical factor" it must consider in making a fee award. *Vataj*, 2021 WL 5161927, at *9 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)); *see Morris v. Lifescan, Inc.*, 54 F. App'x 663, 664 (9th Cir. 2003) (district court, granting a 33% fee, noted that class counsel achieved exceptional results in a risky and complicated class action). In fact, clients care most about results and would willingly pay, and are financially better off paying, a larger fee for a great result than a lower fee for a poor outcome. *See In re Broiler Chicken Antitrust Litig.*, 2021 WL 5709250, at *3 (N.D. Ill. Dec. 1, 2021) ("Clients generally want to incentivize their counsel to pursue every last settlement dollar.").

Here, the $33 million cash recovery is an excellent result for the Class by any measure. The recovery is certain and has been obtained through the considerable efforts of Lead Counsel without the expense, delay, and uncertainty of continued litigation. *See* §III.B.1.c.(1)c), above. This achievement was the result of Lead Counsel's vigorous prosecution, both at the trial court and appellate levels, and settlement negotiations in the face of formidable risks. Moreover, the Settlement is a significant financial recovery that compares well to other similar securities class action settlements. The $33 million recovery is well above the median securities class action settlement values over the last ten years, which range from $7 million to $13 million, and is

approximately 12.5% of reasonably recoverable damages, which far exceeds the median ratio for securities class actions in 2020 of just 1.7%. 2021 NERA Study, Figures 15 and 16 at 17 and 20, respectively. *Compare Vataj*, 2021 WL 5161927, at *9 (finding that a 2% recovery "represents an excellent result for class members"); *Wong v. Arlo Technologies, Inc.*, 2021 WL 1531171 (N.D. Cal. Apr. 19, 2021), at *11 (describing a 2.35% recovery as an "exceptional result[]"); *Omnivision*, 559 F. Supp. 2d at 1046 (awarding 28% fee based on "substantial achievement" of a 9% recovery).

In the end, the Class cares most about getting a great result. This outstanding result obtained for the Class here supports Lead Counsel's fee request and merits an appropriate fee that encourages counsel to seek excellent results.

2. The Litigation Was Risky and Complex

The risks of the Litigation, as well as the complexity and difficulty of the issues presented, are also important factors in determining a fee award. *See In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (holding fees justified "because of the complexity of the issues and the risks"); *Vizcaino*, 290 F.3d at 1048 ("Risk is a relevant circumstance."). Securities class actions are notoriously complex, difficult to prove, and risky. *See Hefler II*, 2018 WL 6619983, at *13 ("'[I]n general, securities actions are highly complex and . . . securities class litigation is notably difficult and notoriously uncertain.'"); *Heritage Bond*, 2005 WL 1594389, at *6 (noting that class actions, and particularly securities class actions, are typically complex). Moreover, "securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA." *In re Ikon Office Sols., 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).

As discussed above in §III.B.1.c.(1)a), and in the Brooks Declaration (¶¶8, 23, 37), this case posed higher risks than most securities class actions. The risk of no recovery at all – and Lead Counsel obtaining no fee for its years of work – was substantial, as illustrated by the Court's dismissal of the action with prejudice. Lead Plaintiff and Lead Counsel overcame long odds in resurrecting this case on appeal. For instance, during the 12-month period ending September 30,

2021, the percentage of "Other Private Civil" cases reversed by the Ninth Circuit, was only 13.3%. Https://www.uscourts.gov/data-table-numbers/b-5. In other words, only 1.3 out of every 10 appeals resulted in a favorable ruling for the appellant.

Even after obtaining the partial reversal and remand from the Ninth Circuit, substantial risks existed with respect to Plaintiffs' ability to prove their claims. As discussed herein, while Plaintiffs believe they had sufficient evidence to prove each of the elements of their claims, Defendants' arguments created significant uncertainties at the pleading stage, summary judgment and trial. That a $33 million recovery was achieved in the face of these risks and uncertainties strongly supports a 30% fee award.

3. The Skill Required and Quality of Work

The quality of the representation by Lead Counsel is another important factor that supports the reasonableness of the requested fee. This case involved unique and complex issues, at both the trial court level and on appeal, which were successfully prosecuted and managed by Lead Counsel. *Omnivision*, 559 F. Supp. 2d at 1047 ("'[P]rosecution and management of a complex national class action requires unique legal skills and abilities.'"). Robbins Geller is a nationally recognized firm in securities class actions and complex litigation. *See* www.rgrdlaw.com. The highly favorable recovery obtained for the Class, against long odds of any recovery, is the best reflection of Lead Counsel's skill and experience. Not only did Lead Counsel prevail on appeal, it achieved an exceptional recovery both in nominal terms and relative to the median settlement amount and estimated recoverable damages.

The quality of Lead Counsel's work is also reflected in the fact that Defendants were represented by a well-respected defense firm, Latham & Watkins LLP, who vigorously contested each element of Plaintiffs' claims. 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").

This factor weighs in favor of granting Lead Counsel's request for a 30% fee award.

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

A determination of a fair fee must include consideration of the contingent nature of the fee and the difficulties that were overcome in obtaining the settlement:

> 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.

In re Wash. Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1299 (9th Cir. 1994). Indeed, "[c]ourts 'routinely' enhance multipliers to reflect the risk of non-payment in common fund cases." *van Wingerden v. Cadiz, Inc.*, 2017 WL 5565263, at *13 (C.D. Cal. Feb. 8, 2017) (citing *Vizcaino*, 290 F.3d at 1051).

In addition, in order to carry out the important public interest of enforcing the federal securities laws,[9] it is imperative that courts adequately compensate private plaintiffs' counsel working on contingency in order to obtain some parity with large corporate defendants. *See Omnivision*, 559 F. Supp. 2d at 1047 ("The importance of assuring adequate representation for plaintiffs who could not otherwise afford competent attorneys justifies providing those attorneys who do accept matters on a contingent-fee basis a larger fee than if they were billing by the hour or on a flat fee.").

The risk of no recovery for a class and its counsel in complex cases of this type is very real. There are numerous class actions in which plaintiffs' counsel expended thousands of hours and yet received no remuneration despite their diligence and expertise. For example, in *In re Oracle Corp. Sec. Litig.*, 2009 WL 1709050 (N.D. Cal. June 19, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010), a case that Lead Counsel prosecuted, 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

[9] 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).

hours, representing a lodestar of approximately $40 million. In another PSLRA case in this district, 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.*, 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007). *See also Omnivision*, 559 F. Supp. 2d at 1047 ("Plaintiffs have won only three of eleven [securities] cases to reach verdicts since 1996.").

Because the fee in this matter was entirely contingent, the only certainties were that there would be no fee without a successful result and that such a result would be realized only after considerable effort. Nevertheless, Robbins Geller committed significant resources of both time (over 4,700 hours) and money ($176,501.78 in litigation expenses) to vigorously and successfully prosecute this action for the Class's benefit. *See* Declaration of Luke O. Brooks Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("RGRD Decl."), ¶¶4-6. The contingent nature of counsel's representation supports approval of the requested fee.

5. The Requested Fee Award Is Within the Range Awarded in Similar Complex, Contingent Litigation

The requested fee is within the range of similar common fund class action settlements where courts have adjusted the fee above the 25% benchmark based on appropriate factors. *See, e.g.*, *Childtime Childcare*, 2020 WL 218515, at *4 (adjusting fee award to "just under 33.3% of the total settlement amount"); *Jimenez v. O'Reilly Automotive Inc.*, 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); *Figueroa v. Allied Bldg. Prods. Corp.*, 2018 WL 4860034, at *3 (C.D. Cal. Sept. 24, 2018) (awarding 33% fee award in complex class action wage and hour case). In fact, "in most common fund cases, the award exceeds that benchmark." *Omnivision*, 559 F. Supp. 2d at 1047-48 (citing *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377-78 (N.D. Cal. 1989) (surveying securities cases nationwide and noting, "This court's review of recent reported cases discloses that nearly all common fund awards range around 30% . . . ."); *Ikon*, 194 F.R.D. at 194 ("The median in class actions is approximately twenty-five percent, but awards of thirty percent are not uncommon in securities class actions.").

The Ninth Circuit and numerous district courts have approved awards of fees in excess of 25% in securities and other complex class action cases. *See Schulein v. Petroleum Dev. Corp.*, 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 in class action merger case); *Lifescan*, 54 F. App'x at 664 (affirming attorneys' fee award of 33% of a $14.8 million cash settlement in consumer class action); *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); *NECA-IBEW Pension Tr. Fund, et al. v. Precision Castparts Corp., et al.*, No. 3:16-cv-01756-YY, slip op. at 4 (D. Or. May 7, 2021) (ECF No. 169) (awarded 33-1/3% of $21 million recovery); *In re Tezos Sec. Litig.*, No. 3:17-cv-06779-RS, slip op. at 2 (N.D. Cal. Aug. 28, 2020) (ECF No. 262) (awarded one-third of $25 million recovery); *In re Banc of Cal. Sec. Litig.*, No. SACV 17-00118 DMG (DFMx), slip op. at 1 (C.D. Cal. Mar. 16, 2020) (ECF No. 613) (awarded 33% of $19.75 million recovery); *Boyd v. Bank of Am. Corp.*, 2014 WL 6473804, at *10 (C.D. Cal. Nov. 18, 2014) (awarding one-third of $5,800,000 in FLSA case); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482,491-92 (E.D. Cal. 2010) (awarding 33.3% of the net settlement amount); *Singer v. Becton Dickinson and Co.*, 2010 WL 2196104, at *8 (S.D. Cal. June 1, 2010) (same); *Heritage Bond*, 2005 WL 1594389, at *9 (awarding one-third of a $27.78 million settlement fund in securities class action); *see also Tawfilis v. Allergan, Inc.*, 2018 WL 4849716, at *7 (C.D. Cal. Aug. 27, 2018) (awarding one-third of $13.45 million settlement fund in antitrust class action).

Here, Lead Counsel obtained the $33 million Settlement despite very long odds in a highly-risky case that was twice dismissed. The Settlement is a truly remarkable result, obtained through the skill and determination of Lead Counsel and the quality of its work. The fee award Lead Counsel seeks is consistent with the exceptional result and in line with the percentages awarded in many similar securities class action cases in the Ninth Circuit.

6. Reaction of the Class Further Supports Approval of the Attorneys' Fees Requested

District courts in the Ninth Circuit also consider the reaction of the class when deciding whether to award the requested fee. *In re Wireless Facilities, Inc. Sec. Litig. II*, 2008 U.S. Dist. LEXIS 128674, at *23 (S.D. Cal. Dec. 19, 2008) ("The lack of objections from potential claimants

favors awarding Lead Counsel the requested amount of attorneys' fees."); *Heritage Bond*, 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 settlement action are favorable to the class members." *DIRECTV*, 221 F.R.D. at 529.

Class Members were informed in the Notice that Lead Counsel would move the Court for an award of attorneys' fees in an amount of no more than 30% of the Settlement Amount and for payment of litigation expenses not to exceed $250,000. Class Members were also advised of their right to object to the fee and expense request, and that such objections are required to be filed with the Court no later than March 4, 2022. While the time to object has not expired, to date, not a single objection has been received. Should any objections be received, Lead Counsel will address them in its reply papers.

Finally, as Lead Plaintiff and Class Representative also support Lead Counsel's fee and expense request (Heim Decl., ¶5; Shaffer Decl., ¶5), this factor also strongly supports Lead Counsel's request.

7. A Lodestar Crosscheck Confirms that the Requested Fee Is Reasonable

"Courts commonly – even after having decided to utilize the percentage-of-recovery method – perform a 'lodestar cross-check' by comparing the percentage-of-recovery figure with a 'rough calculation of the lodestar . . . to assess the reasonableness of the percentage award.'" *Kmiec v. Powerwave Techs., Inc.*, 2016 WL 5938709, at *5 (C.D. Cal. July 11, 2016) (quoting *Weeks v. Kellogg Co.*, 2013 WL 6531177, at *25 (C.D. Cal. Nov. 23, 2013)); *see also Vizcaino*, 290 F.3d at 1050 ("while the primary basis of the fee award remains the percentage method, the lodestar may provide a useful perspective on the reasonableness of a given percentage award").

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.*,

535 F. Supp. 2d 249, 270 (D.N.H. 2007).[10] In this case, the lodestar method demonstrates the reasonableness of the requested fee. Lead Counsel spent a total of 4,718 hours of professional and paraprofessional time prosecuting this action from its inception through January 13, 2022.[11] RGRD Decl., Ex. A. Lead Counsel's total lodestar for this period is $3,815,664.75. *Id.*[12] The requested 30% fee amounts to a lodestar multiplier of 2.59. Many courts have found a positive multiplier between one and four to be reasonable. *See Vizcaino*, 290 F.3d at 1051, 1051 n.6 (approving 3.65 multiplier and finding that most multipliers ranged from 1.0 to 4.0); *Vataj*, 2021 WL 5161927, at *9 (approving a 2.5 times multiplier on basis that "[i]n similar cases, courts have approved multipliers ranging between 1 and 4"); *see also Hefler II*, 2018 WL 6619983, at *14 (awarding fee representing a 3.22 multiplier); *In re N.C.A.A. Athletic Grant-in-Aid Cap Antitrust Litig.*, 2017 WL 6040065, at *7-*9 (N.D. Cal. Dec. 6, 2017) (awarding fee representing a 3.66 multiplier), *aff'd*, 768 Fed. App'x 651 (9th Cir. 2019); *Steinfeld v. Discover Fin. Servs.*, 2014 WL 1309692, at *2-*3 (N.D. Cal. Mar. 31, 2014) (finding a 3.5 multiplier reasonable); *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014) (approving attorneys' fees that resulted in lodestar multiplier of 2.83); *In re Mercury Interactive Corp. Sec. Litig.*, 2011 WL 826797, at *2 (N.D. Cal. Mar. 3, 2011) (lodestar cross-check multiplier of 3.08 "is within the acceptable range"); *Buccellato v. AT&T Operations, Inc.*, 2011 WL 3348055, at *1-*2 (N.D. Cal. June 30, 2011) (collecting cases and stating that a

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[10] *See also 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 a less exhaustive cataloging and review of counsel's hours.'"); *In re Apollo Grp. Inc. Sec. Litig.*, 2012 WL 1378677, at *7 n.2 (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*, 2008 WL 8150856, at *9 (C.D. Cal. July 21, 2008) (same).

[11] In addition to the time expended to date, Lead Counsel will expend additional time preparing Lead Plaintiff's reply in support of final approval, preparing for and attending the final approval hearing, and directing the claims administration process. Lead Counsel will not seek additional compensation for this work.

[12] Lead Counsel's rates are among the rates approved in the Northern District in other cases and are consistent with other attorneys engaged in similar complex, class action litigation. *See Hefler II*, 2018 WL 6619983, at *14 ("Plaintiffs' Counsel's rates range from $650 to $1,250 for partners or senior counsel. . . .") (citing *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 2017 WL 1047834, at *5 (N.D. Cal. Mar. 17, 2017) (finding reasonable rates of $275 to $1600 for partners, $150 to $790 for associates, and $80 to $490 for paralegals, given blended hourly rate of $529)).

"multiplier of 4.3 is reasonable"). In fact, the Ninth Circuit in *Vizcaino* listed 23 shareholder settlements in which the average multiplier was 3.28. 290 F.3d at 1051-52.

Each of the relevant factors supports the award of attorneys' fees of 30% of the Settlement Amount, accordingly, this fee request is reasonable and should be approved.

VII. LEAD COUNSEL'S LITIGATION EXPENSES ARE REASONABLE

Lead Counsel also requests an award of its litigation expenses in the amount of $176,501.78 incurred in prosecuting and resolving the action on behalf of the Class. RGRD Decl., ¶5. Attorneys who create a common fund for the benefit of a class are entitled to an award of their 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 Vataj*, 2021 WL 5161927, at *10 ("Class Counsel is also entitled to recover 'those out-of-pocket expenses that would normally be charged to a fee paying client.'").

From the outset, Lead Counsel was aware that it might not recover any of its expenses or, at the very least, would not recover anything until the action was successfully resolved. Lead 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, Lead Counsel was motivated to, and did, take significant steps to minimize expenses wherever practicable without jeopardizing the vigorous and efficient prosecution of the action.

Lead Counsel's litigation expenses are detailed in the accompanying Robbins Geller Rudman & Dowd LLP fee and expense declaration setting forth the specific categories of expenses incurred and the amounts. RGRD Decl., ¶¶5-6 and Ex. B. These expenses were necessarily incurred in this Litigation and are the type of expenses routinely charged to clients billed by the hour. These include expenses associated with, among other things, consultants, online legal and factual research, travel, and mediation. *Id.*; *see, e.g.*, *Vincent v. Reser*, 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"); *Knight v. Red Door Salons, Inc.*, 2009 WL 248367, at *7 (N.D. Cal. Feb. 2, 2009) (granting expense award because "[a]ttorneys routinely bill clients for all of these expenses").

A large component of Lead Counsel's expenses is for the costs of consultants, all of whom were qualified and necessary to litigate this action. The RGRD Declaration explains each consultant's qualifications and their role in the Litigation. *See* RGRD Decl., ¶6(d).

The Notice informed potential Class Members that Lead Counsel would apply for payment of litigation expenses in an amount not to exceed $250,000. *See* Segura Decl., Ex. A, Notice at ¶5. The amount of expenses for which payment is now sought is $176,501.78 and to date, no Class Member has objected.

VIII. LEAD PLAINTIFF'S AND CLASS REPRESENTATIVE'S REQUESTS FOR AWARDS PURSUANT TO 15 U.S.C. §78u-4(a)(4) ARE REASONABLE

Lead Plaintiff seeks an award of $9,462.50 and Class Representative seeks an award of $1,176.10, both pursuant to 15 U.S.C. §78u-4(a)(4) in connection with their representation of the Class, as detailed in the accompanying Heim and Shaffer Declarations, respectively. Under the PSLRA, a class representative may seek an award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class. *See* 15 U.S.C. §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). The range of a lead plaintiff award is "typically . . . $2,000 to $10,000" (*Wong*, 2021 WL 1531171, at *12), and "'service awards as high as $5,000 are presumptively reasonable in this judicial district'" (*Vataj*, 2021 WL 5161927, at *10). Thus, courts have awarded reasonable payments similar to those requested here to compensate class representatives for the time, effort, and expenses devoted to litigating on behalf of the class.

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 Heim and Shaffer Declarations, Lead Plaintiff and Class Representative, respectively, devoted significant time and effort to monitoring the Litigation and providing input on litigation and settlement strategy. Heim Decl., ¶3; Shaffer Decl., ¶3. Courts have approved as reasonable awards for class representatives sums that are greater than what Lead Plaintiff and Class Representative are

requesting here. *See, e.g.*, *Todd v. STAAR Surgical Co.*, 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); *Buccellato v. AT&T Operations, Inc.*, 2011 WL 4526673, at *4 (N.D. Cal. June 30, 2011) ($20,000 award); *In re Xcel Energy, Inc. Sec., Derivative, & ERISA Litig.*, 364 F. Supp. 2d 980, 1000 (D. Minn. 2005) (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"). The requested $9,462.50 and $1,176.10 awards are reasonable in light of Lead Plaintiff's and Class Representative's significant contribution to this Litigation in order to protect the interests of absent Class Members.

IX. CONCLUSION

Based on the foregoing and the entire record, Plaintiffs and Lead Counsel respectfully request that the Court approve: the Settlement and the Plan of Allocation; Lead Counsel's request for an award of attorneys' fees of 30% of the Settlement Amount and payment of $176,501.78 in expenses, plus interest earned thereon; and awards of $9,462.50 and $1,176.10 to Lead Plaintiff and Class Representative, respectively, as allowed by the PSLRA.

DATED: January 18, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on January 18, 2022, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

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Manual Notice List

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- (No manual recipients)