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Lead Counsel for Class Representative Jonathan Davis and the Class

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JONATHAN DAVIS, on Behalf of All Others Similarly Situated,

Plaintiff,

v.

YELP, INC., JEREMY STOPPELMAN, LANNY BAKER, and JED NACHMAN,

Defendants.

Case No.: 3:18-cv-00400-EMC

LEAD COUNSEL'S: (1) NOTICE OF MOTION AND MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES; AND (2) MEMORANDUM OF LAW IN SUPPORT THEREOF

Hearing Date: January 19, 2023
Time: 1:30 p.m.
Location: Courtroom 5, 17th Floor
Judge: Hon. Edward M. Chen

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NOTICE OF MOTION FOR AN AWARD OF ATTORNEYS' FEES

AND REIMBURSEMENT OF LITIGATION EXPENSES

TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that pursuant to Rule 23(h) of the Federal Rules of Civil Procedure and the Court's Amended Order Preliminarily Approving Settlement and Providing for Notice ("Preliminary Approval Order," ECF No. 201), on January 19, 2023, at 1:30 p.m., or as soon thereafter as counsel may be heard, at the United States District Court for the Northern District of California, San Francisco Courthouse, Courtroom 5 – 17th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, before the Honorable Edward M. Chen, lead counsel Glancy Prongay & Murray LLP ("GPM") and Holzer & Holzer, LLC ("H&H" and together with GPM, "Lead Counsel") will, and hereby, do move the Court for an Order awarding attorneys' fees and reimbursement of Litigation Expenses in the above-captioned securities class action (the "Action").[1]

This Motion is based on the following Memorandum of Law, the Joint Declaration, the Declaration of Luiggy Segura Regarding (A) Mailing of Notice Packet (B) Publication of Summary Notice; and (C) Report on Requests for Opting Back into the Class Received to Date (Ex. 1, "Segura Decl."), the Stipulation, all prior pleadings and papers in this Action, and such additional information or argument as may be required by the Court.[2]

[1] Unless otherwise defined herein, all capitalized terms have the meanings set forth in the Stipulation and Agreement of Settlement dated April 14, 2022 (ECF No. 189-1), or the concurrently filed Joint Declaration of Kara M. Wolke and Corey D. Holzer in Support of (I) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation, and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Joint Declaration" or "Joint Decl."). Citations herein to "¶ __" and "Ex. __" refer, respectively, to paragraphs in, and exhibits to, the Joint Declaration.

[2] Defendants take no position with respect to this motion.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Court should approve as fair and reasonable Lead Counsel's application for an award of attorneys' fees in the amount of 33⅓% of the Settlement Fund (*i.e.*, the Settlement Amount, plus interest earned thereon).

2. Whether the Court should approve the request for reimbursement of $930,782.70 in out-of-pocket litigation expenses incurred by Lead Counsel in this Action.

3. Whether the Court should approve the request for reimbursement of $15,000 to Lead Plaintiff Jonathan Davis ("Lead Plaintiff") for his costs, including lost wages, directly related to his representation of the Class, as authorized by the Private Securities Litigation Reform Act of 1995 (15 U.S.C. § 78u-4(a)(4), (the "PSLRA")).

MEMORANDUM OF LAW

Court-appointed Lead Counsel respectfully request the Court grant the motion for an award of attorneys' fees in the amount of 33⅓% of the Settlement Fund, or $7,416,667, plus interest earned at the same rate as the Settlement Fund. Lead Counsel also seeks reimbursement of: (i) $930,782.70 in litigation expenses that Lead Counsel reasonably and necessarily incurred in prosecuting and resolving the Action; and (ii) $15,000 in costs incurred by the Court-appointed Lead Plaintiff directly related to his representation of the Class, as authorized by the PSLRA.

I. PRELIMINARY STATEMENT

The proposed Settlement, which provides for a $22,250,000 cash payment in exchange for the resolution of the Action, is an outstanding result for the Class, and it did not come easily or quickly. Rather, it is the product of Lead Plaintiff and Lead Counsel's hard work and perseverance over the course of nearly four years of hard-fought litigation. Lead Counsel filed the initial complaint in this Action on January 18, 2018, and an agreement in principle to settle the Action was not reached until November 24, 2021, ***approximately two months before the February 7, 2022 trial date***. Getting to this stage of the litigation required an immense commitment of time and resources. At all times Lead Counsel made conscious efforts to litigate the Action efficiently and without duplication of efforts. In so doing, Lead Counsel collectively report spending more than 14,802.15 hours on this litigation, generating a lodestar of more than $9,165,583.00—and $930,782.70 in out-of-pocket costs, all on a fully contingent basis. Very few firms are capable or willing to risk non-payment of such large sums, and those that are must be adequately compensated for this risk to assure that they will undertake similar cases in the future.

Moreover, this Action was fraught with risk. In undertaking this litigation, Lead Counsel faced numerous challenges to establishing liability, loss causation and damages. The risk of losing was very real, and it was greatly enhanced by the fact that they would be litigating against a publicly traded corporate defendant represented by highly skilled defense counsel, under the heightened pleading standard and automatic stay of discovery imposed by the PSLRA. *See* 15 U.S.C. § 78u-4; *see also Hefler v. Wells Fargo & Company*, 2018 WL 6619983, at *13 (N.D. Cal. Dec. 18, 2018) ("Plaintiffs' Counsel faced substantial risks in pursuing this litigation, given the inherent

uncertainties of trying securities fraud cases and the demanding pleading standards of the PLSRA.").[3] Indeed, a review of the current status of securities class action suits filed after 2014 reveals that within each filing year a greater proportion of cases have been dismissed than have been settled.[4] For cases filed between 2015 and 2019, dismissal rates range from 41% to 51% each year while settlement rates range from 15% to 36%. *See* Ex. 5 (NERA Report at p. 12 (Fig. 11)); *see also* Ex. 6 (*Securities Class Action Filings: 2020 Year in Review* (Cornerstone Research 2021) at p. 18 (Fig. 17)) ("Recent annual dismissal rates have been closer to 50%."). There was, therefore, an exceptionally strong possibility that the case would yield little or no recovery after many years of costly litigation. *See Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers*, L.L.P., 212 F.R.D. 400, 409 (E.D. Wis. 2002) ("Shareholder class actions are difficult and unpredictable, and skepticism about optimistic forecasts of recovery is warranted."); *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (observing that "Defendants prevail outright in many securities suits."). Despite the risks, Lead Counsel never wavered in their commitment to Lead Plaintiff, the Class, or the case.

As compensation for Lead Counsel's significant efforts and achievements on behalf of the Class, Lead Counsel respectfully request a fee award in the amount of 33⅓% of the Settlement Fund. The requested fee is consistent with fee awards in comparable class action settlements, whether considered as a percentage of the Settlement Fund or in relation to Lead Counsel's lodestar. In fact, the requested fee represents a "negative" or fractional multiplier of 0.81 on Lead Counsel's lodestar, which itself is a strong indication of the reasonableness of the requested fee. *See Ross v. Trex Company, Inc.*, 2013 WL 12174133, at *1 (N.D. Cal. Dec. 16, 2013) ("Plaintiffs sought no extraordinary award of fees; to the contrary, they sought less than their lodestar, which further

[3] Unless otherwise noted, all internal citations and quotation marks are omitted, and all emphasis is added.

[4] "[T]he word 'dismissed' is used as shorthand for all cases resolved without settlement; it includes cases where a motion to dismiss was granted (and not appealed or appealed unsuccessfully), voluntary dismissals, cases terminated by a successful motion for summary judgment, or an unsuccessful motion for class certification." Ex. 5 (Janeen McIntosh and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2021 Full-Year Review* (NERA Jan. 25, 2022 at p. 11 n.6 ("NERA Report")).

supports the reasonableness of the fees requested and awarded."); *In re Portal Software, Inc. Sec. Litig.*, 2007 WL 4171201, at *16 (N.D. Cal. Nov. 26, 2007) ("The resulting so-called negative multiplier suggests that the percentage-based amount is reasonable and fair based on the time and effort expended by class counsel.").

Lead Counsel also seek reimbursement of $930,782.70 in out-of-pocket litigation expenses incurred by Lead Counsel in prosecuting this Action. *See* ¶¶10, 15-57. This amount is below the $950,000 limit on Litigation Expenses disclosed in the Notice—which, by definition, included a PSLRA award to Lead Plaintiff. The expenses are reasonable in amount, and were necessarily incurred in the successful prosecution of the Action. Accordingly, they should be approved.

Finally, Lead Plaintiff respectfully requests a PSLRA award in the amount of $15,000 to compensate him for the time and effort he expended on behalf of the Class. Ex. 1, ¶¶10-11. Lead Plaintiff, *inter alia*, reviewed filings, conferred with Lead Counsel about litigation and settlement strategies, produced documents in response to requests for production, responded to interrogatories, was deposed, and authorized his attorneys to settle the case. But for his "commitment to pursuing these claims, the successful recovery for the Class would not have been possible." *Bell v. Pension Comm. of ATH Holding Co., LLC*, 2019 WL 4193376, at *6 (S.D. Ind. Sept. 4, 2019).

For all the reasons set forth herein, and in the Joint Declaration, Lead Counsel respectfully request that the Court award attorneys' fees equal to 33⅓% of the Settlement Fund, approve reimbursement of $930,782.70 in litigation expenses incurred by Lead Counsel, and grant a PSLRA award of $15,000 to Lead Plaintiff.

II. FACTUAL AND PROCEDURAL HISTORY OF THE LITIGATION

The Joint Declaration is an integral part of this submission. For the sake of brevity in this memorandum, the Court is referred to it for a detailed description of, *inter alia*, the factual and procedural history of the Action (¶¶15-57); the nature of the claims asserted (¶19); the negotiations leading to the Settlement (¶¶49-55); the risks and uncertainties of continued litigation (¶¶58-73) and the services Lead Counsel provided for the benefit of the Class (¶10).

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

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

It is well settled that attorneys who represent a class and are successful in recovering a common fund for the benefit of class members are entitled to a reasonable fee from the common fund as compensation for their services. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."). Indeed, the Ninth Circuit has held that "a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees." *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *see also In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("[T]hose who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it.") ("*WPPSS*"); *accord Stetson v. Grissom*, 821 F.3d 1157, 1165 (9th Cir. 2016). This rule, known as the "common fund" doctrine, is "designed to prevent unjust enrichment by distributing the costs of litigation among those who benefit from the efforts of the litigants and their counsel." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal 2008).

B. The Court Should Calculate The Requested Fee As A Percentage Of The Common Fund

District courts in the Ninth Circuit retain discretion to award attorneys' fees in common fund cases based upon either the percentage-of-the-fund method or the lodestar method. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944-45 (9th Cir. 2011) (finding that when a settlement establishes a common fund for the benefit of a class, courts may use either method to gauge the reasonableness of a fee request, but encouraging courts to employ a second method as a cross-check after choosing a primary method). Notwithstanding that discretion, where there is an easily quantifiable benefit to the class—such as a cash common fund—the percentage-of-the-fund approach is the prevailing method used. *See, e.g.*, *Ellison v. Steven Madden, Ltd.*, 2013 WL 12124432, at *8 (C.D. Cal. May 7, 2013) (finding "use of the percentage method" to be the "dominant approach in common fund cases"); *Omnivision*, 559 F. Supp. 2d at 1046 (same).

Most courts have found the percentage approach superior in cases with a common fund recovery because it parallels the use of percentage-based contingency fee contracts, which are the norm in private litigation; aligns the lawyers' interests with that of the class in achieving the maximum possible recovery; and reduces the burden on the court by eliminating the detailed and time-consuming lodestar analysis. *See Omnivision*, 559 F. Supp. 2d at 1046; *Vinh Nguyen v. Radient Pharm. Corp.*, 2014 WL 1802293, at *9 (C.D. Cal. May 6, 2014) ("There are significant benefits to the percentage approach, including consistency with contingency fee calculations in the private market, aligning the lawyers' interests with achieving the highest award for the class members, and reducing the burden on the courts that a complex lodestar calculation requires."); *see also In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1989) (lodestar/multiplier method "adds to the work load of already overworked district courts").

Moreover, application of the percentage-of-the-fund method is consistent with the PSLRA, which provides that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a ***reasonable percentage*** of the amount" recovered for the class. 15 U.S.C. § 78u-1(a)(6); *see also Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 643 (5th Cir. 2012) ("Part of the reason behind the near-universal adoption of the percentage method in securities cases is that the PSLRA contemplates such a calculation."); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005).

For these reasons, among others, Lead Counsel respectfully request that the Court award attorneys' fees in this case on a percentage-of-the-fund basis, and use an informal lodestar cross-check to assess the reasonableness of the percentage award. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 n.5 (9th Cir. 2012) ("The lodestar method is merely a cross-check on the reasonableness of a percentage figure …."); *Glass v. UBS Fin. Servs., Inc.*, 331 Fed. Appx. 452, 456 (9th Cir. 2009) ("the district court properly performed an informal lodestar cross-check").

C. The Requested Fee's Approval Is Supported By The Factors Considered By Courts In The Ninth Circuit

Courts in the Ninth Circuit consider certain factors when determining whether a fee award is "reasonable under the circumstances." *Rodriguez v. Disner*, 688 F.3d 645, 653 (9th Cir. 2012);

Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 967 (9th Cir. 2009). Those factors include: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; (5) the reaction of the Class; and (6) awards made in similar cases. *See Omnivision*, 559 F. Supp. 2d at 1046-48 (citing *Vizcaino*, 290 F.3d at 1048-51); *see also In re Charles Schwab Corp. Sec. Litig.*, 2011 WL 1481424, at *8 (N.D. Cal. Apr. 19, 2011). The Ninth Circuit has explained that these factors should not be used as a rigid checklist or weighed individually, but rather, should be evaluated in light of the totality of the circumstances. *Vizcaino*, 290 F.3d at 1048-50. As demonstrated below, each of these factors, along with the lodestar cross-check, militate in favor of approving the requested fee.

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

Courts have consistently acknowledged that the quality of the result achieved is the most important factor in determining an appropriate fee award. *See, e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"); *In re Bluetooth*, 654 F.3d at 942 ("Foremost among these considerations, however, is the benefit obtained for the class."); *Rodman v. Safeway*, 2018 WL 4030558, at *3 (N.D. Cal. Aug. 22, 2018); *Omnivision*, 559 F. Supp. 2d at 1046. Lead Counsel submit that the $22,250,000 proposed Settlement is an excellent result for the Class given the many risks of continued litigation and the procedural posture of the case at the time of settlement.

Here, Lead Plaintiff's damages expert estimates that if the Class had fully prevailed on its Exchange Act claims after a jury trial, if the Court and jury accepted Lead Plaintiff's damages theory, and the jury verdict survived the inevitable appeals, the ***total maximum aggregate damages*** would be approximately $180 million. Thus, according to Lead Plaintiff's estimate, the Settlement Amount represents approximately 12.4% of the total ***maximum*** damages ***potentially*** available in this Action. Defendants represented to the Court that damages were, at most, approximately $50-$55 million. *See* ECF No. 201 at 4-5 (citing Defendants' supplemental filing in *Ingrao v. Stoppelman*, No. 3:20-cv-027-EM at ECF No. 60-3). Under Defendants' estimate, the Settlement equates to a recovery between 41% and 45% of the maximum damages. Under either scenario, this recovery is well above the median recovery of 1.8% in securities class actions settled in 2021, as

well as the median recovery of 2.8% for similar securities class actions (with estimated damages of $100-$199 million) from 2012-2021. Ex. 5 (NERA Report) at p. 24, Fig. 22 and p. 23, Fig. 21.

This case was not, however, risk free and there were meaningful barriers to recovery. Obstacles included both the well-known general risks of complex securities litigation, as well as the specific risks inherent in this case. *See Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009) (O'Connor, J. (Ret.)) ("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."); *see also* ¶¶58-73. For example, Defendants maintained throughout the litigation that (i) Lead Plaintiff's revenue guidance claim was dismissed, and (ii) because the sole corrective disclosure on May 9, 2017 revealed Yelp was decreasing its 2017 guidance, investors were reacting to the guidance reduction and not the alleged fraud. ¶64. Thus, according to Defendants, Lead Plaintiff and the Class suffered no damages. *See In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 36 (2d Cir. 2009) ("[T]o establish loss causation, *Dura* requires plaintiffs to disaggregate those losses caused by changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, from disclosures of the truth behind the alleged misstatements").

While Lead Counsel believed they had the better argument on these issues, Lead Plaintiff bore the burden of proof, and a win by Defendants would have eliminated or substantially reduced damages. *See Christine Asia Co., Ltd. v. Yun Ma*, 2019 WL 5257534, at *13 (S.D.N.Y. Oct. 16, 2019) ("While Plaintiffs proceeded as though they had the better arguments, the risk remained that Defendants could have defeated loss causation, or significantly diminished damages, for the one remaining alleged corrective disclosure date."); *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 2009 WL 5178546, at *6 (S.D.N.Y. Dec. 23, 2009) ("There is the undeniable risk that a jury could be swayed by experts for the Defendants, who could minimize the amount of Plaintiffs' losses."). Given the range of possible results in this litigation, including a strong possibility of no recovery whatsoever, there can be no question that the Settlement constitutes a considerable achievement and weighs heavily in favor of the requested fee.

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

The second factor courts in this Circuit consider in awarding attorneys' fees is "[t]he risk that further litigation might result in Plaintiffs not recovering at all, particularly in a case involving complicated legal issues." *Omnivision*, 559 F. Supp. 2d at 1046-47; *see also Vizcaino*, 290 F.3d at 1048 (noting "[r]isk is a relevant circumstance" in awarding attorneys' fees). While courts have always recognized that securities class actions are complex and carry significant risks, post-PSLRA rulings make it clear that the risk of no recovery has increased significantly. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) ("The PSLRA requires a plaintiff to plead a complaint of securities fraud with an unprecedented degree of specificity and detail giving rise to a strong inference of deliberate recklessness. This is not an easy standard to comply with—it was not intended to be—and plaintiffs must be held to it."); *In re Ikon Office Sols., Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA").[5] This Action was no exception.

While Lead Counsel believe that the claims of Lead Plaintiff and the Class are meritorious, Lead Counsel also recognized from the outset that there were substantial risks in the litigation and that Lead Plaintiff's ability to succeed at trial and obtain a large judgment was far from certain. *See Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 55 (2d Cir. 2000) ("It is well-established that litigation risk must be measured as of when the case is filed."); *In re NASDAQ Market-Makers Antirust. Litig.*, 187 F.R.D. 465, 488 (S.D.N.Y. 1998) ("Risk, of course, must be judged as it appeared to counsel at the outset of the case, when they committed their capital (human and otherwise)."); *In re Waste Management, Inc. Sec Litig.*, 2002 WL 35644013, at *28 (S.D. Tex. May 10, 2002) ("These risks must be assessed as they existed at the inception of the litigation, and not in light of the settlement achieved in the end."). Nevertheless, Lead Counsel accepted the challenge.

"One proxy for assessing risk is whether the litigation followed on the heels of some prior

[5] *See also In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 2018 WL 6168013, at *15 (S.D.N.Y. Nov. 26, 2018) ("Courts have recognized that, in general, securities actions are highly complex and that securities class litigation is notably difficult and notoriously uncertain."); *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) ("Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation.").

criminal or civil proceeding involving the same parties or subject matter." *In re Dairy Farmers of America, Inc. Cheese Antitrust Litig.*, 80 F. Supp. 3d 838, 848 (N.D. Ill. 2015). "This inquiry provides insight into whether class counsel benefitted from the work of others, which acts a red flag for judges assessing fee petitions." *Id.* In the instant case, there were no proceedings initiated by the SEC or DOJ and no journalistic investigation into the allegations at issue. ¶97. Rather, "Plaintiffs' counsel (and their teams and experts) were truly the authors of the favorable outcome for the class." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 670 (S.D.N.Y. 2015).[6]

Another indicium of risk is the fact that this was not a restatement case. ¶97; *In re Xcel Energy, Inc., Sec., Deriv. & "ERISA" Litig.*, 364 F. Supp. 2d 980, 995 (D. Minn. 2005) (noting that one of the many hurdles plaintiffs faced was the fact that the case did not involve a restatement of financials). When companies restate their financials, they admit to a material misstatement of their financial reporting. A case predicated on a restatement is, therefore, less risky because the misstatement and materiality elements of a securities fraud claim are already met. *See In re Schering-Plough Corp. Enhance Sec. Litig.*, 2013 WL 5505744 at *30 (D.N.J. Oct. 1, 2013) (granting fee request where the case was the antithesis of cases where liability is virtually certain due to a financial restatement); *Schwartz v. TXU Corp.*, 2005 WL 3148350, at *29 (N.D. Tex. Nov. 8, 2005) ("From the outset, this post-PSLRA action was an especially difficult and highly uncertain securities case, which did not involve restatement of TXU's previously issued financial statements or any other acknowledgments of wrongdoing.").

While the focus of the inquiry is on assessing risk at the beginning of the case, the litigation risks certainly did not end with the filing of the complaint. Indeed, the risks inherent in this case are highlighted by the Court's previous partial dismissal of Lead Plaintiff's claims. *See Azar v. Yelp, Inc.*, 2018 WL 6182756, at *22 (N.D. Cal. Nov. 27, 2018) (dismissing nine of the 14 statements Plaintiffs alleged were false or misleading either because they were forward-looking, and therefore

[6] *See also Silverman v. Motorola, Inc.*, 2012 WL 1597388, at *3 (N.D. Ill. May 7, 2012) (fee request supported by fact that "there were no governmental investigations or prosecutions related to the alleged fraud upon which Class Counsel could rest their theory of the case. Rather, they investigated the facts and developed their theory of liability from scratch, involving significant time and expense.").

immunized by the PSLRA's safe harbor provisions, or because they could not constitute material omissions); *see also In re Xcel Energy, Inc., Sec., Deriv. & "ERISA" Litig.*, 364 F. Supp. 2d 980, 1003 (D. Minn. 2005) ("The court needs to look no further than its own order dismissing the shareholder … litigation to assess the risks involved.").

Even though Lead Plaintiff partially prevailed at the pleading stage, and *in toto* at summary judgment, major obstacles to proving liability and damages remained. For example, Defendants would continue to contest scienter. ¶61. Defendants forcefully argued throughout the litigation, and would continue to maintain at trial, that: (i) Defendants lacked any financial motive to commit fraud because Baker and Nachman did not sell any shares during the Class Period and Stoppelman's shares were sold pursuant to a Rule 10b5-1 trading plan, which was amended before any of the alleged misstatements or omissions; (ii) Defendants' communications with investors were based on their good faith and complete understanding of Yelp's business at that time; and (iii) Yelp's executives did not try to influence forecast or guidance, or cause forecast or guidance to be higher than what had been set by Yelp's Financial Planning and Analysis Team. *Id.* While Lead Plaintiff strongly disagreed with Defendants and believed he would be able to prove scienter, there is no doubt that the issue would have been contested both at trial and on appeal. *See Brown v. China Integrated Energy Inc.*, 2016 WL 11757878, at *11 (C.D. Cal. July 22, 2016) ("To prevail, Plaintiffs would have to establish Defendants acted with scienter, which can be particularly difficult to establish."); *Yun Ma*, 2019 WL 5257534, at *12 ("[a]lthough Plaintiffs uncovered significant evidence that they believe supported a finding of Defendants' scienter, Defendants would have marshalled substantial evidence in opposition.").

Additionally, Defendants would have asserted that Lead Plaintiff could not establish loss causation with respect to the alleged disclosure date (*see* § III.C.1., *supra*) and, even if he could, damages were much smaller than those calculated by Lead Plaintiff's expert. Indeed, Defendants' expert opined that, if liability was assumed, Lead Plaintiff's expert overstated damages by, *inter alia*: (i) improperly using a one-day event window to measure the price impact of the disclosure after the market closed on May 9th (*i.e.*, only looking at the price decline on May 10, 2017), instead of a two-day event window that included an offsetting price increase in Yelp stock on May 11, 2017

(*see* ECF No. 201, at 4); and (ii) failing to consider alternative industry indices that were more closely aligned with Yelp's industry than the NYCE Arca 100 Tech Index. *See* ECF No. 153 at n.14. Although Lead Plaintiff believed that he had meritorious arguments in response to Defendants' assertions, it cannot be disputed that the Parties held extremely disparate views on loss causation and damages and, had Defendants' arguments been accepted in whole or part, they would have dramatically limited or foreclosed any potential recovery. *See In re Cendant Corp. Litig*, 264 F.3d 201, 239 (3d Cir. 2001) ("[E]stablishing damages at trial would lead to a battle of experts with each side presenting its figures to the jury and with no guarantee whom the jury would believe."); *In re Bear Stearns Cos. Sec., Deriv., & ERISA Litig*., 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012) ("When the success of a party's case turns on winning a so-called 'battle of experts,' victory is by no means assured."); *see also* ECF No. 201 at p. 4-5 (Defendants' expert calculated maximum estimated damages of approximately $50-55 million).

In sum, the risks posed by litigation were substantial, and they were present every step of the way. *See In re Pac. Enters. Sec. Litig*., 47 F.3d 373, 379 (9th Cir. 1995) (finding attorneys' fees of 33% "justified because of the complexity of the issues and the risks"); *In re Immune Response Sec. Litig*., 497 F. Supp. 2d 1166, 1172 (S.D. Cal. 2007) (recognizing "that the issues of scienter and causation are complex and difficult to establish at trial.").

3. The Skill Required And The Quality Of The Work

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

Here, the attorneys at GPM and H&H are among the most experienced and skilled practitioners in the securities litigation field, and both firms have a long record of successfully

prosecuting securities cases throughout the country, including within this Circuit. *See* Exs. 3-C and 4-C (GPM and H&H firm resumes); *see also Cheng Jiangchen v. Rentech, Inc.*, 2019 WL 5173771, at *5 (C.D. Cal. Oct. 10, 2019) ("Lead Counsel [GPM and H&H] ha[ve] significant experience in securities class action lawsuits … and Lead Counsel vigorously pursued Plaintiff's claims, including through four rounds of motions to dismiss and amended complaints."); *Yaron v. Intersect ENT, Inc.*, 2021 WL 5150051, at *2 (N.D. Cal. Nov. 5, 2021) ("Plaintiff's Counsel [GPM and H&H] has conducted the litigation and achieved the Settlement with skill, perseverance and diligent advocacy."). Lead Counsel respectfully submit that the quality of their efforts in the litigation, together with their substantial experience in securities class actions and commitment to this litigation, provided Lead Counsel with the leverage necessary to negotiate a favorable settlement.

From the outset, Lead Counsel aggressively sought to obtain the maximum recovery for the Class. Among other things, Lead Counsel:

- conducted a thorough investigation of the claims asserted in the Action, which included an in-depth review and analysis of (i) Yelp's SEC filings, press releases, investor conference calls, and other public statements; (ii) public reports, blog posts, and news articles concerning Yelp; and (iii) research reports prepared by securities and financial analysts regarding Yelp; as well as working closely with an investigator to develop factual allegations based on interviews with former employees, and consultation with loss causation and damages experts;
- moved for the appointment of Lead Plaintiff pursuant to the PSLRA
- drafted the initial Complaint in the Action, as well as the 45-page Amended Class Action Complaint for Violations of the Federal Securities Laws (ECF No. 25) (the "Complaint");
- researched, drafted, and filed an opposition to Defendants' motion to dismiss, and prepared for and presented oral arguments on the motion;
- prepared for and participated in the Rule 26(f) Conference (ECF No. 53);
- drafted and propounded discovery requests on Defendants, including one set of Requests for Production of Documents, two sets of Interrogatories, and one set of written Requests for Admissions;
- responded to one set of Interrogatories and one set of Requests for Production of Documents propounded upon Lead Plaintiff, and produced 4,000 pages of documents on behalf of Lead Plaintiff;
- engaged in numerous meet and confer discussions with Defendants' Counsel concerning discovery matters, including, *inter alia*, search terms, the relevant time period for which documents were to be produced, custodians, and deponents;

- conducted extensive discovery, including reviewing and analyzing more than 400,000 pages of documents, conducting two Rule 30(b)(6) depositions, and taking the depositions of 15 current and former Yelp employees, including Individual Defendants;
- researched, drafted, and filed a motion for class certification, which included assisting in the preparation and submission of an expert report on market efficiency by Dr. Zachary Nye, Ph.D. (ECF Nos. 62-63), prepared for and defended Lead Plaintiff's deposition, and drafted and filed the Parties' stipulation for class certification (ECF No. 70);
- consulted with experts in the fields of financial analysis, economic materiality, loss causation, damages, advertising, sales practices and outcomes, which included assisting in the preparation and submission of an expert report on damages by Dr. Nye (ECF No. 143-3) and an expert report on Yelp's advertising and sales practices by Jonathan Hochman (ECF No. 143-7), as well as, preparing for and defending the depositions of Dr. Nye and Mr. Hochman, and opposing Defendants' motion to strike Mr. Hochman's report and testimony (ECF No. 138);
- prepared for and deposed Yelp's expert on economic materiality, loss causation and damages, Dr. Vinita Juneja Ph.D., researched, drafted and filed a motion to strike portions of Dr. Juneja's report and testimony, and prepared for oral argument on the motion (ECF Nos. 145-46);
- researched, drafted and filed an opposition to Defendant's motion for summary judgment (ECF Nos.139-44), which was supported by more than 100 exhibits;
- prepared for, and participated in, oral argument opposing Defendants' motion for summary judgment and successfully obtained a denial of Defendants' motion;
- prepared for and engaged in two full day mediation sessions with Judge Daniel Weinstein (Ret.) of JAMS and Jed D. Melnick, Esq. of JAMS, and participated in negotiations on an arm's-length basis to settle the claims asserted in the Action;
- drafted and then negotiated the Stipulation and related exhibits; and
- drafted the preliminary approval and final approval briefs. *See* ¶¶10, 15-57.

Moreover, as evidenced by the fact that the case did not settle at the initial mediation, Lead Counsel and Lead Plaintiff refused to settle "on the cheap." Lead Counsel's extensive efforts, tenacity, skill, and demonstrated willingness to litigate rather than accept a below value settlement led to the Settlement and strongly support the requested fee.

"[T]he quality of opposing counsel is [also] important in evaluating the quality of Plaintiff's counsel's work." *Heritage Bond*, 2005 WL 1594403, at *20; *In re Adelphia Commc'ns Corp. Sec. & Deriv. Litig.*, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006) ("The fact that the settlements were obtained from defendants represented by 'formidable opposing counsel from some of the best defense firms in the country' also evidences the high quality of lead counsels' work."), *aff'd*, 272 F. App'x 9 (2d Cir. 2008). Here, Defendants were represented by Arnold & Porter Kaye Scholer LLP,

an extremely capable and highly respected national law firm, that vigorously defended the Action for nearly four years. ¶95. Notwithstanding this formidable opposition, Lead Counsel was able to obtain a highly favorable recovery for the Class. Thus, this factor militates in favor of the requested fee. *See, e.g.*, *In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977) ("plaintiffs' attorneys in this class action have been up against established and skillful defense lawyers, and should be compensated accordingly"); *Schwartz v. TXU Corp.*, 2005 WL 3148350, at *30 (N.D. Tex. Jan. 13, 2006) ("The ability of plaintiffs' counsel to obtain such a favorable settlement for the Class in the face of such formidable legal opposition confirms the superior quality of their representation").

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

The fourth factor in determining a fair and reasonable fee requires courts in the Ninth Circuit to consider the contingent nature of the fee and the obstacles surmounted:

> 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.

WPPSS, 19 F.3d at 1299; *see also 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."); *Zynga*, 2016 WL 537946, at *18 ("[W]hen counsel takes on a contingency fee case and the litigation is protracted, the risk of non-payment after years of litigation justifies a significant fee award."). "This is especially true where, as here, class counsel has significant experience in the particular type of litigation at issue; indeed, in such contexts, courts have awarded an even higher 33 percent fee award." *Id.*

Lead Counsel have to date received no compensation, have invested 14,802.15 hours of work equating to a total lodestar of $9,165,583.00, and have incurred expenses of $930,782.70 in prosecuting and resolving this Action. Additional work in implementing the Settlement and claims

administration will also be required. *See In re Facebook, Inc. IPO Sec. & Derivative Litig.*, 2015 WL 6971424, at *10 (S.D.N.Y. Nov. 9, 2015) ("Considering that the work in this matter is not yet concluded for Plaintiffs' counsel who will necessarily need to oversee the claims process, respond to inquiries, and assist [c]lass [m]embers in submitting their [p]roof[s] of [c]laim[], the time and labor expended by counsel in this matter support a conclusion that a 33% fee award in this matter is reasonable."). Since the inception of this case, Lead Counsel have borne the risk that any compensation and expense reimbursement would be contingent on the result achieved, as well as on this Court's discretion in awarding fees and expenses.

The risk of no recovery in complex cases like this one is very real. Lead Counsel know from personal experience that despite the most vigorous and competent of efforts, success in complex contingent litigation is never guaranteed. *See, e.g., In re: Korean Ramen Antitrust Litigation*, Case No. 3:13-cv-04115 (N.D. Cal. Dec. 17, 2018) (GPM served as Co-Lead Counsel in case where, after more than five years of litigation, a plethora of foreign discovery, the expenditure of many millions of dollars in attorney time and hard costs, as well as a multi-week trial, the jury returned a verdict in favor of defendants alleged to have conspired to fix the prices of Korean ramen noodles).[7]

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

[7] *See also Gross v. GFI Group, Inc.*, 310 F. Supp. 3d 384, 399 (S.D.N.Y., 2018) (GPM served as Co-Lead Counsel in case where the Court granted summary judgment for defendants following four years of litigation, discovery in the U.S. and U.K., and the expenditure of millions of dollars of attorney time and hard costs), *aff'd on other grounds* 784 Fed. Appx. 27, 29 (2d Cir. Sept. 13, 2019).

advanced costs yet have lost the case despite their advocacy." *In re Xcel Energy, Inc., Sec., Deriv. & "ERISA" Litig.*, 364 F. Supp. 2d 980, 994 (D. Minn. 2005).[8] Even plaintiffs who get past summary judgment and succeed at trial may find a judgment in their favor overturned on appeal or on a post-trial motion. *See, e.g., Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408 (7th Cir. 2015) (reversing and remanding jury verdict of $2.46 billion after 13 years of litigation on loss causation grounds and error in jury instruction in light of *Janus Cap. Grp., Inc. v. First Deriv. Traders*, 564 U.S. 135 (2011)).[9]

Here, because Lead Counsel's fee was entirely contingent, the only certainties were there would be no fee without a successful result and such a result would only be realized after substantial amounts of time, effort, and expense were expended. Nevertheless, Lead Counsel committed significant amounts of both time and money to vigorously and successfully prosecute this Action for the benefit of the Class. ¶¶10, 15-57. Under such circumstances, "[t]he contingent nature of counsel's representation strongly favors approval of the requested fee." *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 488 (S.D.N.Y. 1998).

5. A 33⅓% Fee Award Is Consistent With Fee Awards In Similar, Complex, Contingent Litigation

In *Paul, Johnson, Alston & Hunt v. Graulty*, the Ninth Circuit established 25% of the fund as the "benchmark" award for attorneys' fees. 886 F.2d 268, 272 (9th Cir. 1989); *see also Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) (reaffirming 25% benchmark). However, "a reasonable fee award is the hallmark of common fund cases" and the guiding principle in this Circuit is that a fee award be "'reasonable under the circumstances.'" *WPPSS*, 19 F.3d at

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[8] *See, e.g., In re Oracle Corp. Sec. Litig.*, 2009 WL 1709050 (N.D. Cal. June 16, 2009), *aff'd* 627 F.3d 376 (9th Cir. 2010) (granting summary judgment to defendants after eight years of litigation and after plaintiff's counsel incurred over $6 million in expenses and worked over 100,000 hours, representing lodestar of approximately $48 million); *In re JDS Uniphase Corp. Sec. Litig.*, 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) (jury verdict for defendants following lengthy trial).

[9] *See also Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (reversing jury verdict of $81 million for plaintiffs); *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011) (granting defendants' motion for judgment as a matter of law following plaintiffs' verdict); *In re Apple Computer Sec. Litig.*, 1991 WL 238298 (N.D. Cal. Sept. 6, 1991) (overturning jury verdict for plaintiffs after extended trial).

1295 n.2.[10] As applied, this means that "in most common fund cases, the award exceeds that benchmark." *Omnivision*, 559 F. Supp. 2d at 1047; *see also Activision*, 723 F. Supp. at 1373 (surveying securities cases nationwide, awarding 32.8% fee from $3.5 million fund, and noting, "[t]his court's review of recent reported cases discloses that nearly all common fund awards range around 30%[.]"); *In re Lidoderm Antitrust Litig.*, 2018 WL 4620695, at *4 (N.D. Cal. Sept. 20, 2018) (awarding 33⅓% of $104,750,000 and stating: "a fee award of one-third is within the range of awards in this Circuit."); *Marshall v. Northrop Grumman Corp.*, 2020 WL 5668935, at *8 (C.D. Cal. Sept. 18, 2020) (awarding one-third of $12.375 million settlement fund, collecting cases and stating: "[a]n attorney fee of one third of the settlement fund is routinely found to be reasonable in class actions."); *Multi-Ethnic Immigrant Workers Org. Network v. City of Los Angeles*, 2009 WL 9100391, at *4 (C.D. Cal. June 24, 2009) (reviewing empirical research and stating: "[n]ationally, the average percentage of the fund award in class actions is approximately one-third."); *Romero v. Producers Dairy Foods, Inc.*, 2007 WL 3492841, *4 (E.D. Cal. Nov. 14, 2007) (approving a fee award of 33% of the common fund, and stating "'[e]mpirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery,'" *citing* 4 Newberg and Conte, NEWBERG ON CLASS ACTIONS § 14.6 (4th ed. 2007). "This is particularly true in securities class actions such as this." *In re American Apparel, Inc. Shareholder Litig.*, 2014 WL 10212865, at *23 (C.D. Cal. July 28, 2014).

In view of the result obtained, the contingent fee risk, the number of hours dedicated to this matter by Lead Counsel, the financial commitment of Lead Counsel, and the important public policy advanced by securities litigation such as this, it is respectfully submitted that an award of 33⅓% of the recovery obtained for the Class is appropriate. *See, e.g., Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 741 (9th Cir. 2016) ("Risk multipliers incentivize attorneys to represent class clients, who

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[10] *See also Paul, Johnson*, 886 F.2d at 271 ("[I]t is well settled that the lawyer who creates a common fund is allowed an ***extra*** reward, beyond that which he has arranged with his client, so that he might share the wealth of those upon whom he has conferred a benefit. The amount of such a reward is that which is deemed 'reasonable' under the circumstances."); *Vizcaino*, 290 F.3d at 1048 ("Selection of the benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case.").

might otherwise be denied access to counsel, on a contingency basis. This incentive is especially important in securities cases.").[11] The requested fee award is consistent with recent attorneys' fee awards in similar complex, contingent litigation in the Ninth Circuit. *See In re Banc of California Sec. Litig.*, 2020 WL 1283486, at *1 (C.D. Cal. Mar. 16, 2020) (awarding 33% of $19.75 million settlement fund); *Kendall v. Odonate Therapeutics, Inc.*, No. 3:20-CV-01828-H-LL, 2022 WL 1997530, at *6 (S.D. Cal. June 6, 2022) (awarding 33 1/3% of $12.75 million settlement fund); *NECA-IBEW Pension Trust Fund et al. v. Precision Castparts Corp., et al.*, No. 16-cv-01756, slip op. at 1-2 (D. Or. May 7, 2021) ECF No. 169 (Ex. 8) (awarding 33.3% of $21 million settlement fund); *In re Tezos Sec. Litig.*, No. 3:17-cv-06779-RS, slip op. at 2 (N.D. Cal. Aug. 28, 2020), ECF No. 262 (Ex. 9) (awarding 33.33% of $25 million settlement fund); *Heritage Bond*, 2005 WL 1594403, at *23 (awarding fee of 33.33% of $27,783,000 settlement fund and noting that "courts in this circuit, as well as other circuits have awarded attorneys' fees of 30% or more in complex class actions"); *Jiangchen v. Rentech, Inc.*, 2019 WL 6001562, at *1 (C.D. Cal. Nov. 8, 2019) (awarding 33 1/3% of $2.05 million settlement fund to GPM and H&H as lead counsel).[12]

Accordingly, Lead Counsel's fee request is in line with other comparable complex cases and should be approved. *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); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (affirming award of one-third of $1.725 million settlement); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (33% award from $12 million common fund "for attorneys' fees is justified because of the complexity of the issues and the risks").

6. The Reaction Of The Class Supports The Requested Fee

"The existence or absence of objectors to the requested attorneys' fee is a factor is [sic] determining the appropriate fee award." *Heritage Bond*, 2005 WL 1594403, at *21; *see also*

[11] *See also Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (private securities actions "provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'"); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (same).

[12] *See also* Ex. 10 (collecting Ninth Circuit cases with 33% or higher fee awards).

OmniVision, 559 F. Supp. 2d at 1048. While the time to object to the requested fee and expenses does not expire until December 29, 2022, to date, not a single objection has been received by Lead Counsel or filed with the Court. ¶77. Should any objections be received, they will be addressed in the reply papers. "The lack of objection from any Class Member supports the attorneys' fees award." *Immune Response*, 497 F. Supp. 2d at 1177; *Omnivision*, 559 F. Supp. 2d at 1048 (same); *see also Fernandez v. Victoria Secret Stores, LLC*, 2008 WL 8150856, at *13 (C.D. Cal. 2008) (three members objected and 29 opted out, indicating favorable result and award of "generous fee").

D. A Lodestar Cross-Check Supports The Requested Fee

"Generally, a district court is 'not required' to conduct a lodestar cross-check to assess the reasonableness of a fee award." *Perez v. Rash Curtis & Associates*, 2020 WL 1904533, at *18 (N.D. Cal. Apr. 17, 2020); *see also In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 748 (9th Cir. 2017) ("Although ***not required to do so***, the district court took an extra step, cross-checking this result by using the lodestar method.") (emphasis added) *vacated on other grounds sub nom. Frank v. Gaos*, 139 S. Ct. 1041 (2019); *Hageman v. AT & T Mobility LLC*, 2015 WL 9855925, at *4 (D. Mon. Feb. 11, 2015) (awarding 33.33% of the $45 million settlement fund as attorney's fees without conducting a lodestar cross-check). However, as "[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 In re Amgen Inc. Sec. Litig.*, 2016 WL 10571773, at *9 (C.D. Cal. Oct. 25, 2016) ("Although an analysis of the lodestar is not required for an award of attorneys' fees in the Ninth Circuit, a cross-check of the fee request with a lodestar amount can demonstrate the fee request's reasonableness.").

"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." *In re Genworth Fin. Sec. Litig.*, 2016 WL 5400360, at *7 (E.D. Va. Sep. 26, 2016). "Calculation of the lodestar, however, is simply the beginning of the analysis." *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 747 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986); *Graulty*, 886 F.2d at 272. In the second step of the analysis, a court adjusts the lodestar to account for, among other things, the time and labor required, the result achieved, the quality of representation, whether the fee is fixed or

contingent, the novelty and difficulty of the questions involved, and awards in similar cases. *See, e.g.*, *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1209 (9th Cir. 2013). In so doing, "courts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases." *Vizcaino*, 290 F.3d at 1051-52 (approving a 3.65 multiplier and finding that when the lodestar is used as a cross-check, "most" multipliers were in the range of 1 to 4, but citing numerous examples of even higher multipliers); *Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 298 (N.D. Cal. 1995) ("Multipliers in the 3–4 range are common in lodestar awards for lengthy and complex class action litigation."); *Buccellato v. AT & T Operations, Inc.*, 2011 WL 3348055, at *2 (N.D. Cal. June 30, 2011) (finding "multiplier of 4.3 is reasonable in light of the time and labor required, the difficulty of the issues involved, the requisite legal skill and experience necessary, the excellent and quick results obtained for the Class, the contingent nature of the fee and risk of no payment, and the range of fees that are customary.").

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 v. UBS Fin. Servs.*, 331 F. App'x. 452, 456 (9th Cir. 2009).[13] Here, the lodestar method – whether used directly or as a "cross-check" on the percentage method – strongly demonstrates the reasonableness of the requested fee.

Lead Counsel (including attorneys, paralegals, and professional support staff) collectively devoted a total of 14,802.15 hours to the prosecution of the Action. ¶90. Lead Counsel at all times worked to avoid duplication of efforts between firms and attorneys and believes the hours submitted in support of the lodestar calculation were necessary for the successful and efficient litigation of the

[13] *See also In re Apollo Grp. Inc. Sec. Litig.*, 2012 WL 1378677, at *7 (D. Ariz. 2012) ("an itemized statement of legal services is not necessary for an appropriate lodestar cross-check"); *Dakota Medical, Inc. v. RehabCare Group, Inc.*, 2017 WL 4180497, at *8 (E.D. Cal. Sept. 21, 2017) ("Where a lodestar is merely being used as a cross-check, the court may use a rough calculation of the lodestar."); *In re Am. Apparel Inc. S'holder Litig.*, 2014 WL 10212865, at *23 (C.D. Cal. Jul. 28, 2014) ("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.").

case. Despite it taking many years to bring the case to a successful conclusion, the individual attorneys staffing the Action remained relatively consistent, allowing those individuals to maintain a high level of institutional knowledge of the law and facts of the case, thereby improving litigation efficiency. Moreover, in drafting briefs, taking and defending depositions, preparing for and conducting hearings, *etc*., the tasks were divided such that a single firm often took the laboring oar on a particular task while the other firm reviewed the work and provided assistance so as to minimize duplication of efforts. The firms were also diligent in seeking to engage attorneys with the appropriate experience level to conduct the various tasks. For example, Lead Counsel utilized staff attorneys to review documents, tasked associates with preparing and responding to discovery, and had partners conduct higher-level depositions. In short, Lead Counsel believes it efficiently litigated the case to the eve of trial.

As is customary when seeking a percentage-of-the-fund award in common fund cases and submitting data for a lodestar cross-check, Lead Counsel is submitting a declaration that includes a schedule breaking down the firms' lodestar by individual, position, billing rate, and hours billed.[14] ¶89; Ex. 3 & 4. Based on current hourly rates,[15] Lead Counsel's lodestar is $9,165,583.00. ¶89.[16]

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

[15] Courts use current rather historic rates, to ensure that "[a]ttorneys in common fund cases [are] compensated for any delay in payment." *Fischel v. Equitable Life Assur. Soc'y of U.S.*, 307 F.3d 997, 1010 (9th Cir. 2002); *see also Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989).

[16] Lead Counsel's rates range from $745-$1,075 for partners, and $375-$795 for non-partners (¶91), and "are comparable to peer plaintiffs and defense-side law firms litigating matters of similar magnitude." *Lea v. TAL Educ. Grp.*, 2021 WL 5578665, at *12 (S.D.N.Y. Nov. 30, 2021) (approving GPM's 2021 rates of $600 to $995 for partners, and $500 to $750 for associates); *Yaron v. Intersect ENT, Inc.*, 2021 WL 5150051, at *2 (N.D. Cal. Nov. 5, 2021) (accepting rates of Lead Counsel GPM and H&H as part of lodestar cross-check); *see also* Ex. 5 (chart of rates charged by peer plaintiff and defense counsel in complex litigation); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 2017 WL 1047834, at *5 (N.D. Cal. Mar. 17, 2017) (approving fee award following lodestar cross-check with billing rates ranging from $275 to $1600 for partners, $150 to $790 for associates, and $80 to $490 for paralegals").

Thus, the 33⅓% fee request (equal to $7,416,667) yields a fractional or "negative" multiplier of 0.81. ¶90.

A "multiplier of less than one … suggests that the negotiated fee award is a reasonable and fair valuation of the services rendered to the class." *Chun–Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 854 (N.D. Cal. 2010) (finding requested fee award was not unreasonable when lodestar cross-check revealed a multiplier of 0.59); *see also In re Myford Touch Consumer Litig.*, 2019 WL 6877477, at *1 (N.D. Cal. Dec. 17, 2019) ("[T]he negative multiplier … suggests the request is reasonable."); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *26 (S.D.N.Y. Nov. 8, 2010) ("Lead Counsel's request for a percentage fee representing a significant discount from their lodestar provides additional support for the reasonableness of the fee request."). Indeed, "an award exceeding 25 percent is reasonable where the total fee award is lower than the lodestar calculation." *Cabiness v. Educ. Fin. Sols., LLC*, 2019 WL 1369929, at *7 (N.D. Cal. Mar. 26, 2019). This is because, as is true here, "the requested award would not 'yield windfall profits for class counsel in light of the hours spent on the case.'" *Id.* (quoting *Bluetooth*, 654 F.3d at 942).[17]

"The fact that [Lead] Counsel's fee award will not only compensate them for time and effort already expended, but for the time that they will be required to spend administering the settlement going forward, also supports their fee request." *Leach v. NBC Universal Media, LLC*, 2017 WL 10435878 at ¶49 (S.D.N.Y. Aug. 24, 2017); *see also Facebook*, 2015 WL 6971424, at *10. Indeed, among other things, Lead Counsel will oversee the claims administration process, respond to shareholder inquiries, and prepare and present a Motion for Distribution of the Net Settlement Fund to the Court. The multiplier will, therefore, diminish as the case moves forward because Lead Counsel will not seek any additional compensation for this work.

In sum, Lead Counsel's requested fee award is reasonable, justified, and in line with what courts in this Circuit award in class actions such as this one, whether calculated as a percentage of the fund or as a multiple of counsel's lodestar.

[17] *See also In re Initial Pub. Offering Sec. Litig.*, 2011 WL 2732563, at *9 (S.D.N.Y. July 8, 2011) (noting fractional multiplier meant "every firm was . . . compensated for a small fraction of the time spent on the case").

IV. LEAD COUNSEL'S EXPENSES ARE REASONABLE AND SHOULD BE APPROVED

In addition to an award of attorneys' fees, attorneys who create a common fund for the benefit of a class are also entitled to payment of reasonable litigation expenses and costs from the fund. *Omnivision*, 559 F. Supp. 2d at 1048; *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996). The appropriate analysis to apply in deciding which expenses are compensable in a common fund case of this type is whether the particular costs are of the type typically billed by attorneys to paying clients in the marketplace. *See, e.g.*, *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'"); *Omnivision*, 559 F. Supp. 2d at 1048 ("Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters.").

From the beginning of the case, Lead Counsel were aware that they might not recover any of their expenses and would not recover anything unless and until the Action was successfully resolved. Lead Counsel also understood that, even assuming that the case was ultimately successful, an award of expenses would not compensate for the lost use of the funds advanced to prosecute this Action. Thus, Lead Counsel were motivated to, and did, take significant steps to minimize expenses whenever practicable without jeopardizing the vigorous and efficient prosecution of the Action. ¶105.

In the aggregate, Lead Counsel have incurred expenses in the amount of $930,782.70 while prosecuting the Action, and these expenses are set forth in the Joint Declaration, ¶¶106-12, and in each firm's individual supporting declaration. Exs. 3-B & 4-B. The vast majority of expenses were for the retention of experts ($431,938.00), court reporting transcription services ($171,550.37), document management ($131,198.51), the mediators ($63,344.00), and class notice ($54,133.46). These expenses total $852,164.34, or approximately 92% of the total litigation expenses. ¶¶107-11. These expenses were critical to Lead Counsel's success in achieving the Settlement and, like the other categories of expenses for which counsel seek reimbursement, are the types of expenses routinely charged to clients who pay hourly. They should, therefore, be reimbursed out of the

common fund. *See In re High-Tech Employee Antitrust Litig.*, 2015 WL 5158730, at *16 (N.D. Cal. Sept. 2, 2015) (approving reimbursement of "(1) expert witness fees; (2) mediator's fees; (3) a document vendor to host the over 3.2 million pages of documents produced; (4) court reporting and videographer services . . . (5) electronic research; (6) copying, mailing, and serving documents; and (7) case-related travel for Plaintiffs, witnesses, experts, and counsel."); *Immune Response*, 497 F. Supp. 2d at 1177-78 (approving counsel's request for reimbursement "for 1) meals, hotels, and transportation; 2) photocopies; 3) postage, telephone, and fax; 4) filing fees; 5) messenger and overnight delivery; 6) online legal research; 7) class action notices; 8) experts, consultants, and investigators; and 9) mediation fees.").[18]

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

In connection with Lead Counsel's requests for reimbursement of Litigation Expenses, Lead Plaintiff seeks reimbursement of a total of $15,000 in costs. ¶113. The PSLRA permits the Lead Plaintiff in this case to recoup litigation costs (including lost wages) incurred as a result of his serving as Lead Plaintiff and ensuring that the Class was adequately represented. 15 U.S.C. § 78u-4(a)(4). Indeed, courts "routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." *Hicks v. Morgan Stanley*, 2005 WL 2757792, at *10 (S.D.N.Y. Oct. 24, 2005); *In re Am. Int'l Grp., Inc. Sec. Litig.*, 2012 WL 345509, at *6 (S.D.N.Y. Feb. 2, 2012).

Here, Lead Plaintiff respectfully requests reimbursement in the amount of $15,000. *See* Ex. 1 (Declaration of Jonathan Davis, "Davis Decl."), ¶11. As set forth in his declaration, Mr. Davis stepped forward to represent the Class and spent approximately 100 hours participating in this

[18] The Notice informed Class Members that Lead Counsel intended to apply for the reimbursement for Litigation Expenses "in an amount not to exceed $950,000, which may include an application for reimbursement of the reasonable costs and expenses incurred by Lead Plaintiff directly related to his representation of the Class." Ex. 2-A (Notice) at ¶5. Lead Counsel's requested reimbursement of $930,782.70 (plus $15,000 for Lead Plaintiff) is less than the maximum amount of potential expenses disclosed in the Notice and, to date, there have been no objections to the request for reimbursement of Litigation Expenses. ¶104.

litigation. *Id*. Among other things, Mr. Davis: (i) reviewed all significant pleadings, briefs and Court orders in the Action; (ii) regularly communicated with his attorneys via email and telephone about case developments and litigation strategy; (iii) participated in discovery by, *inter alia*, collecting and producing documents, preparing and sitting for his deposition, and responding to interrogatories; (iv) consulted with counsel regarding the mediations and, ultimately, approved the Settlement; and (v) communicated with counsel regarding the process for finalizing the Settlement. *See Id*. at ¶¶4-5.

Lead Plaintiff and his counsel respectfully submit that reimbursement of $15,000 for the considerable time and effort Mr. Davis expended for the benefit of the Class is both reasonable and appropriate. It is also comparable or well below reimbursement awards in similar complex cases. *See, e.g.*, *In re HP Sec. Litig*., No. 3:12-cv-05980-CRB, slip op. at 2 (N.D. Cal. Nov. 16, 2015), ECF No. 279 (Ex. 11) (awarding $162,900 to lead plaintiff from settlement fund as "reimbursement for its costs and expenses directly related to its representation of the Settlement Class"); *Immune Response*, 497 F. Supp. 2d at 1173-74 (awarding $40,000 to lead plaintiff pursuant to PSLRA); *Pierrelouis v. Gogo Inc.*, 2022 WL 7950362, at *2 (N.D. Ill. Oct. 13, 2022) (PSLRA award of $20,000 to lead plaintiff as "reimbursement for his reasonable costs and expenses directly related to his representation of the Settlement Class"); *In re Xcel*, 364 F.Supp.2d at 1000 (awarding eight lead plaintiffs a total of $100,000 pursuant to the PSLRA and noting "the important policy role [lead plaintiffs] play in the enforcement of the federal securities laws on behalf of persons other than themselves").

VI. CONCLUSION

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

Dated: December 15, 2022

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PROOF OF SERVICE BY ELECTRONIC POSTING

I, the undersigned, say:

I am not a party to the above case and I am over eighteen years old. On December 15, 2022, I served true and correct copies of the foregoing document, by posted the document electronically to the ECF website of the United States District Court for the Northern District of California, for receipt electronically by the parties listed on the Court's Service List.

I affirm under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 15, 2022, at Los Angeles, California.

s/ Kara M. Wolke
Kara M. Wolke