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Lead Counsel for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re UBIQUITI NETWORKS, INC. SECURITIES LITIGATION This Document Relates To: ALL ACTIONS.	Master File No. 12-cv-04677-YGR CLASS ACTION NOTICE OF MOTION AND MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF DATE: December 19, 2017 TIME: 2:00 p.m. JUDGE: The Honorable Yvonne Gonzalez Rogers, Oakland Courthouse, Courtroom 1, 4th Floor

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TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD

PLEASE TAKE NOTICE that on December 19, 2017, at 2:00 p.m., in the Courtroom of the Honorable Yvonne Gonzalez Rogers, United States District Judge, at the United States District Court for the Northern District of California, Oakland Division, 1301 Clay Street, Oakland, California 94621, Lead Counsel will and hereby move for an order approving Lead Counsel's application for an award of attorneys' fees of 25% of the Settlement Fund and payment of litigation expenses.

This motion is based upon the following Memorandum in support thereof; the Joint Declaration of Jonathan Gardner and Daniel J. Pfefferbaum in Support of Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation and Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses ("Joint Declaration" or "Joint Decl.") with annexed exhibits; the Stipulation and Agreement of Settlement, dated as of August 4, 2017 (ECF No. 113-1) ("Stipulation" or "Settlement")[1]; all of the prior pleadings and papers in this Action; and such additional information or argument as may be required by the Court.

STATEMENT OF ISSUE TO BE DECIDED

Whether the Court should approve Lead Counsel's motion for an award of attorneys' fees and payment of expenses.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Lead Counsel have succeeded in obtaining a $6,800,000 cash settlement for the benefit of Members of the Settlement Class. The substantial recovery obtained for the Settlement Class was achieved through the skill, work, tenacity, and effective advocacy of Lead Counsel. As compensation for their efforts in achieving this result, Lead Counsel seek an award of attorneys' fees of 25% of the Settlement Fund, plus expenses incurred in the prosecution of the Action in the amount of $111,328.12, plus interest at the same rate and for the same period of time as that earned by the Settlement Fund. The requested fee is consistent with the Ninth Circuit's 25% "benchmark" fee in similar actions, numerous decisions in this Circuit, and decisions throughout the United

[1] All capitalized terms not defined herein shall have the same meanings set forth in the Stipulation.

States.[2] Indeed, this Court recently awarded a fee of 25% of a $7.5 million recovery in a securities class action settlement. *See In re Violin Memory Inc. Securities Litigation*, No. 13-cv-05486-YGR, slip op. (N.D. Cal. July 28, 2016) (Ex. 10).[3] The amount requested is warranted in light of the excellent recovery obtained for the Settlement Class, the extensive efforts of counsel in obtaining this highly favorable result, and the significant risks in bringing and prosecuting this case.

This Action was prosecuted under the provisions of the Private Securities Litigation Reform Act of 1995 ("PSLRA") and, therefore, was extremely risky and difficult from the outset. The effect of the PSLRA is to make it harder for investors to bring and successfully conclude securities class actions. Lead Counsel were mindful of the fact that in this post-PSLRA environment, a greater percentage of cases are being dismissed than ever before, amid defendants' constant attempts to push the envelope and contents of the PSLRA. In a *per curiam* decision, Supreme Court Justice Sandra Day O'Connor recognized: "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). Indeed, Lead Plaintiffs' claims in the Consolidated Amended Complaint for Violation of the Federal Securities Laws ("CAC") alleging violations of Sections 11, 12(a)(2), and 15 of the Securities Act of 1933 (the "1933 Act"), and Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "1934 Act") were dismissed. On September 24, 2014, Lead Plaintiffs appealed that dismissal to the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"). After extensive briefing and oral argument, the Ninth Circuit issued an order that affirmed the dismissal of the Sections 10(b) and 20(a) claims under the 1934 Act and reversed the dismissal of the Sections 11 and 15 claims under the 1933 Act.

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[2] Submitted herewith in support of approval of the proposed Settlement is the Notice of Motion and Motion for Final Approval of Class Action Settlement and Plan of Allocation of Settlement Proceeds and Memorandum of Points and Authorities in Support Thereof (the "Settlement Brief"). In addition, the Court is respectfully referred to the Joint Declaration for a more detailed description of the history of the Action, an overview of the claims asserted, the investigation undertaken, the negotiation of the Settlement, and the substantial risks of the Action.

[3] All exhibits herein are annexed to the Joint Declaration submitted herewith. For clarity, citations to exhibits that themselves have attached exhibits, will be referenced as "Ex. ___ - ___." The first numerical reference refers to the designation of the entire exhibit attached to the Joint Declaration and the second reference refers to the exhibit designation within the exhibit itself.

In addition to the significant litigation risks, the prosecution of this Action required great skill and extensive efforts by Lead Counsel. Lead Counsel marshaled considerable resources and committed substantial amounts of time and effort in the prosecution of the Action. As set forth in more detail in the Joint Declaration and the Settlement Brief, Lead Counsel conducted an in-depth factual investigation, conducted a thorough analysis of the claims asserted, opposed Defendants' motions to dismiss the CAC, successfully, in part, appealed the District Court's order dismissing the CAC, prepared a detailed Consolidated Second Amended Complaint for Violations of the Federal Securities Laws ("SAC"), and consulted with experts on damage issues. Joint Decl., ¶¶4, 16-33. In addition, Lead Counsel reviewed approximately 60,000 pages of core documents produced by Defendants prior to the mediation, including drafts of registration statements for Ubiquiti, Inc.'s ("Ubiquiti" or the "Company") October 14, 2011, initial public offering ("IPO"), road show presentations, underwriter memoranda, due diligence materials, board minutes, financial documents; and other documents relating to counterfeit Ubiquiti's products. *Id.*, ¶35. Lead Counsel also participated in arm's-length settlement negotiations, including an all-day mediation session and extensive follow-up negotiations with the substantial assistance of Robert A. Meyer, a highly respected mediator with significant experience in the mediation of complex class actions. *Id.*, ¶¶37-39. In total, Lead Counsel spent over 4,000 hours in attorney and professional staff time in prosecuting this Action on behalf of the Settlement Class with a resulting lodestar of $2,732,046.50. As a result, the requested fee of 25% or $1,700,000 represents a significant discount of Lead Counsel's lodestar.

Lead Counsel undertook the representation of the Settlement Class on a contingent fee basis and no payment has been made to Lead Counsel to date for their services or for the litigation expenses they have advanced on behalf of the Settlement Class. Lead Counsel firmly believe that the Settlement is the result of their diligent and effective advocacy, as well as their reputations as attorneys who are unwavering in their dedication to the interests of the class and unafraid to zealously prosecute a meritorious case through trial and subsequent appeals. In this case, which asserted claims based on complex legal and factual issues that were vigorously opposed by skilled

and experienced defense counsel, Lead Counsel succeeded in securing a highly favorable result for the Settlement Class.

Importantly, the 25% fee request has been reviewed and approved by Lead Plaintiffs, a process envisioned by Congress when it enacted the PSLRA. In determining that the proposed 25% fee was reasonable, Lead Plaintiffs took into account the amount of the Settlement, the certainty of recovery to the class, and the efforts of Lead Counsel. *See* Ex. 1 ¶6; Ex. 2 ¶6. Lead Plaintiffs were actively involved in this litigation, and believe that the Settlement represents a substantial recovery for the Settlement Class. Ex. 1 ¶¶4-6; Ex. 2 ¶¶4-6.

As discussed herein, as well as in the Settlement Brief and the Joint Declaration, the requested fee is fair and reasonable when considered under the applicable standards in the Ninth Circuit and is well within the range of awards in class actions in this Circuit and courts nationwide, particularly in view of the substantial risks of bringing and pursuing this Action, the considerable investigation and litigation efforts, and the results achieved for the Settlement Class. Moreover, the expenses requested are reasonable in amount and were necessarily incurred for the successful prosecution of this Action.

II. AWARD OF ATTORNEYS' FEES

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

For their efforts in creating a common fund for the benefit of the Settlement Class, Lead Counsel seek a reasonable percentage of the fund recovered as attorneys' fees. The percentage method of awarding fees has become an accepted, if not the prevailing, method for awarding fees in common fund cases in this Circuit and throughout the United States.

It has long been recognized 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 W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). The purpose of this doctrine is to avoid unjust enrichment so that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir.

1994) ("*WPPSS*"), *aff'd in part, Class Plaintiffs v. Jaffe Schlesinger P.A.*, 19 F.3d 1306 (9th Cir. 1994). This rule, known as the "common fund" doctrine, is firmly rooted in American case law. *See, e.g., Trustees v. Greenough*, 105 U.S. 527 (1881); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885).[4]

In *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), 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." In this Circuit, the district court has discretion to award fees in common fund cases based on either the lodestar/multiplier method or the percentage-of-the-fund method. *WPPSS*, 19 F.3d at 1296. In *Paul, Johnson*, 886 F.2d at 272, *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990), and *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376-77 (9th Cir. 1993). In *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-48 (9th Cir. 2002), the Ninth Circuit expressly approved the use of the percentage method in common fund cases. Moreover, supporting authority for the percentage method in other circuits is overwhelming.[5] Courts in other circuits favor the percentage-of-recovery approach for the award of attorneys' fees in common fund cases. Two circuits have ruled that the percentage method is mandatory in common fund cases. *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991).

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[4] In *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268 (9th Cir. 1989), the Ninth Circuit explained the principle underlying fee awards in common fund cases:

> Since the Supreme Court's 1885 decision in [*Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885)], it 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.

Id. at 271 (emphasis in original). Citations are omitted throughout unless otherwise indicated.

[5] Other circuits and commentators have expressly approved the use of the percentage method. *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) (citing footnote 16 of *Blum* recognizing both "implicitly" and "explicitly" that a percentage recovery is reasonable in common fund cases); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50-51 (2d Cir. 2000); and Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 254 (Oct. 8, 1985).

Since *Paul*, *Johnson* and its progeny, district courts in the Ninth Circuit have almost uniformly shifted to the percentage method in awarding fees in common fund representative actions. The rationale for compensating counsel in common fund cases on a percentage basis is sound. First, it is consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated by a percentage of the recovery. Second, it more closely aligns the lawyers' interest in being paid a fair fee with the interest of the class in achieving the maximum possible recovery in the shortest amount of time. For example, in *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986), the court stated:

> The contingent fee uses private incentives rather than careful monitoring to align the interests of lawyer and client. The lawyer gains only to the extent his client gains. . . . The unscrupulous lawyer paid by the hour may be willing to settle for a lower recovery coupled with a payment for more hours. Contingent fees eliminate this incentive and also ensure a reasonable proportion between the recovery and the fees assessed to defendants. . . .
>
> At the same time as it automatically aligns interests of lawyer and client, rewards exceptional success, and penalizes failure, the contingent fee automatically handles compensation for the uncertainty of litigation.

Id. at 325-26.

In line with the view of many courts, one of the nation's leading scholars in the field of class actions and attorneys' fees, Professor Charles Silver of the University of Texas School of Law, has concluded that the percentage method of awarding fees is the only method of fee awards that is consistent with class members' due process rights. Professor Silver notes:

> The consensus that the contingent percentage approach creates a closer harmony of interests between class counsel and absent plaintiffs than the lodestar method is strikingly broad. It includes leading academics, researchers at the RAND Institute for Civil Justice, and many judges, including those who contributed to the Manual for Complex Litigation, the Report of the Federal Courts Study Committee, and the report of the Third Circuit Task Force. Indeed, it is difficult to find anyone who contends otherwise. No one writing in the field today is defending the lodestar on the ground that it minimizes conflicts between class counsel and absent claimants.
>
> In view of this, it is as clear as it possibly can be that judges should not apply the lodestar method in common fund class actions. The Due Process Clause requires them to minimize conflicts between absent claimants and their representatives. The contingent percentage approach accomplishes this.

Charles Silver, *Due Process and the Lodestar Method: You Can't Get There from Here*, 74 Tul. L. Rev. 1809, 1819-20 (June 2000) (footnotes omitted).

B. A Percentage Fee of 25% of the Fund Created Is Reasonable in This Action

In *Paul, Johnson*, 886 F.2d at 272, the Ninth Circuit established 25% of a common fund as the "benchmark" award for attorneys' fees. *See also Torrisi*, 8 F.3d at 1376 (reaffirming 25% benchmark); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000) (same); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 943 (9th Cir. 2011) (reaffirming 25% benchmark in a common fund case). The guiding principle in this Circuit is that a fee award be "'reasonable under the circumstances.'" *WPPSS*, 19 F.3d at 1295 (emphasis omitted). The requested fee satisfies the five factors that are often used by courts in the Ninth Circuit to evaluate the reasonableness of a requested fee: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) awards made in similar cases; and (5) the contingent nature of the fee and the financial burden carried by the plaintiffs. *Vizcaino*, 290 F.3d at 1048-1050. In view of the risks in pursuing this Action, the highly favorable result obtained, the financial commitment of Lead Counsel, the contingent nature of the representation, and the skill of Lead Counsel, an award of 25% of the recovery obtained for the Settlement Class is entirely appropriate.

1. The Result Achieved

Courts have consistently recognized that the result achieved is a major factor to be considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"); *Vizcaino*, 290 F.3d at 1048 n.7 (noting "[e]xceptional results are a relevant circumstance" in awarding attorneys' fees).

Here, a substantial and certain recovery of $6.8 million in cash has been obtained through the efforts of Lead Counsel at a relatively early stage of the litigation, without the substantial expense, delay, risk, and uncertainty of continued litigation or the assistance of any regulatory or governmental agency. The recovery obtained for the Settlement Class represents an outstanding result of this complex litigation. Importantly, the $6,800,000 Settlement is a very significant portion of Lead Plaintiffs' consulting damages experts' estimates of maximum aggregate damages, if liability were to be established. The maximum estimated damages total approximately $19 million, thus the $6,800,000 Settlement represents a recovery of approximately 35%. *See* Joint Decl., ¶¶5,

69. The 35% recovery of estimated damages is nearly five times greater than the median recovery of 7.4% of estimated damages for Section 11 and/or Section 12(a)(2) claims that settled between 1996-2015, according to a recent Cornerstone Research Study.[6] This recovery was achieved despite the fact that Defendants maintained that no damages could be established.

As detailed in the Settlement Brief (*see* §III.B.1.-3.) and the Joint Declaration (*see* §VII), there were significant legal and factual roadblocks to obtaining a more favorable outcome in this Action. These obstacles included, proving that the Registration Statement contained material false statements or omissions, that Lead Plaintiffs had standing to assert the claims, and establishing damages. Despite these obstacles to recovery, Lead Counsel were able to obtain a substantial and certain benefit for the Settlement Class. Importantly, Settlement Class Members who have already endured some five years of litigation, not only will receive a highly favorable recovery, but will also realize that recovery in the near future instead of a recovery many years down the road or no recovery at all.

2. The Risks of the Litigation

Numerous cases have recognized that risk is an important factor in determining a fee award. *See, e.g.*, *Vizcaino*, 290 F.3d at 1048 n.8 (noting "[r]isk is a relevant circumstance" in awarding attorneys' fees); *WPPSS*, 19 F.3d at 1299-1301. Uncertainty that an ultimate recovery would be obtained is highly relevant in determining risk. *Id.* at 1300. As the court aptly observed in *In re King Resources Co. Securities Litigation*, 420 F. Supp 610, 632 (D. Colo. 1976):

> The litigation also involved unique and substantial issues of law in the technical area of SEC Rule 10b-5, . . . difficult, complex and oft-disputed class action questions, and difficult questions regarding computation of damages.
>
> * * *
>
> In evaluating the services rendered in this case, appropriate consideration must be given to the risks assumed by plaintiffs' counsel in undertaking the litigation. The prospects of success were by no means certain at the outset, and indeed, the chances of success were highly speculative and problematical.

[6] *See* Ex. 8, Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements: 2016 Review and Analysis*, at 11, Fig. 10 (Cornerstone Research 2017).

420 F. Supp. at 632, 636-37; *see also In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, No. 02-ML-1475-DT (RCx), 2005 U.S. Dist. LEXIS 13627, at *44 (C.D. Cal. June 10, 2005) ("The risks assumed by Class Counsel, particularly the risk of non-payment or reimbursement of expenses, is a factor in determining counsel's proper fee award.").

There is no question that from the outset this Action presented a number of sharply contested issues of both fact and law and that Lead Plaintiffs faced formidable defenses to liability and damages. Throughout the Action, Defendants have denied liability and asserted defenses to Lead Plaintiffs' claims. *See Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 576 (9th Cir. 2004) (concluding that district court properly weighed risk when it concluded defendant's belief that it had strong case on the merits supporting finding of risk). Indeed, all of Lead Plaintiffs' claims were initially dismissed.

As discussed in the Joint Declaration and the Settlement Brief, substantial risks and uncertainties in this type of litigation, and in this case in particular, made it far from certain that a recovery, let alone $6.8 million, would ultimately be obtained. From the outset, this post-PSLRA action was an especially difficult and highly uncertain securities case, with no assurance whatsoever that the Action would survive Defendants' attacks on the pleadings, motion for class certification, motion(s) for summary judgment, trial and appeal.

The application of the PSLRA to this Action posed significant risks to Lead Plaintiffs at the very start of the case. After Congress passed the PSLRA, courts in this Circuit and across the country began to regularly dismiss cases at the pleading stage in response to defendants' arguments that the complaints did not meet the PSLRA's heightened pleading standards, making it clear that the risk of no recovery (and hence no fee) had increased exponentially. *See Goldstein v. MCI WorldCom*, 340 F.3d 238, 241 (5th Cir. 2003) (affirming dismissal of securities fraud action against Bernard Ebbers and WorldCom even though Ebbers was later convicted criminally). One way to measure the risk faced by Lead Plaintiffs is a recent study of securities class actions filed and resolved between January 1996 and December 2016, which found that 50% of cases filed in 2012, the year in which this Action was filed, were dismissed in defendants' favor. *See* Stefan Boettrich &

Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review*, at 24, Figure 20 (NERA Jan. 23, 2017) (Ex. 9).

Although Lead Plaintiffs successfully appealed the dismissal of their Sections 11 and 15 claims under the 1933 Act, there is virtually no question that absent settlement, this Action faced the substantial risk of years of additional challenges with no guarantee of any recovery. As a result, the requested fee is justified.

3. The Skill Required and the Quality and Efficiency of the Work

Courts have recognized that the "'prosecution and management of a complex national class action requires unique legal skills and abilities.'" *Heritage Bond*, 2005 U.S. Dist. LEXIS 13627, at *39 (citation omitted); *see also Vizcaino*, 290 F.3d at 1048. These unique skills were called upon here and support the requested fee. From the outset, Lead Counsel engaged in a concerted effort to obtain the maximum recovery for the Class. This case required a determined investigation and the skill to respond to a host of legal and factual defenses raised by Defendants. Lead Counsel demonstrated that, notwithstanding the barriers erected by the PSLRA, they would develop evidence to support a convincing case.

Lead Counsel's investigative efforts and analysis ultimately led to the successful appeal of the dismissal of Lead Plaintiffs' claims under Sections 11 and 15 of the 1933 Act. As set forth in the Joint Declaration, the investigation included, *inter alia*, reviewing and analyzing documents filed by the Company with the SEC; press releases, news articles, and other public statements issued by or concerning Ubiquiti and Defendants; research reports issued by financial analysts concerning the Company; pleadings and documents filed in the Company's litigation against Kozumi USA Corp.; and information provided by former Ubiquiti distributors and employees. Joint Decl., ¶¶17, 32. The substantial recovery obtained for the Settlement Class is the direct result of the significant efforts of highly skilled and specialized attorneys who possess substantial experience in the prosecution of complex securities class actions. Lead Counsel have not only used their knowledge and skill from

prior cases but also developed specific expertise in the issues presented here to overcome the obstacles presented by Defendants.[7]

The quality of opposing counsel is also important in evaluating the quality of the work done by Lead Counsel. *See, e.g.*, *Heritage*, 2005 U.S. Dist. LEXIS 13555 at *66; *In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977). Lead Counsel were opposed in this Action by very skilled and highly respected lawyers from Latham & Watkins LLP and Gibson, Dunn & Crutcher LLP, with well-deserved reputations for vigorous advocacy in the defense of complex civil cases such as this. In the face of this formidable opposition, Lead Counsel were able to develop Lead Plaintiffs' case so as to persuade Defendants to settle the Action on terms highly favorable to the Settlement Class.

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

It has long been recognized that attorneys are entitled to a large fee when their compensation is contingent in nature. *See Vizcaino*, 290 F.3d at 1048-1050; *In re Omnivision Techs. Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008) ("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 contingency-fee basis a larger fee than if they were billing by the hour or at a flat fee."); *see also Destefano v. Zynga*, No. 12-cv-04007-JSC, 2016 WL 537946, at *18 (N.D. Cal. Feb. 11, 2016) (noting that when 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"). The Ninth Circuit has highlighted the importance of awarding attorneys' fees when counsel take a matter on a contingent basis:

> 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

[7] The firm resumes of Lead Counsel are attached as Exhibit H to the Labaton Fee Declaration and the Robbins Geller Fee Declaration as Exhibit G. *See also* www.labaton.com and www.rgrdlaw.com.

> 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.

Moreover, the Supreme Court has emphasized that private securities actions such as this provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (citation omitted); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (noting that the court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions).[8] Indeed, no government agency has filed an action against Ubiquiti, as a result, this Action is the only one that will compensate the Settlement Class Members for their losses in the purchase of Ubiquiti's common stock.

Lead Counsel undertook this Action on a wholly contingent basis, risking their time and their own money with no guarantee of compensation. Unlike Defendants' Counsel who are paid hourly rates and their expenses on a regular basis, Lead Counsel have not been compensated for any of their time and expenses to date and have prosecuted this Action while faced with the real risk that they might not be compensated at all for their efforts.

Indeed, the risk of no recovery for the Settlement Class and 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 whatsoever despite their diligence and expertise. For example, in *In re Oracle Corp. Securities Litigation*, No. C 01-00988 SI, 2009 U.S. Dist. LEXIS 50995 (N.D. Cal. June 16, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010), a case that Robbins Geller prosecuted, the court granted summary judgment to defendants after eight years of litigation, after plaintiff's counsel incurred over $6 million in expenses, and worked over 100,000 hours,

[8] Additionally, vigorous private enforcement of the federal securities laws and state corporation laws can only occur if private plaintiffs can obtain some semblance of parity in representation with that available to large corporate defendants. If this important public policy is to be carried out, courts should award fees that will adequately compensate private plaintiffs' counsel, taking into account the enormous risks undertaken with a clear view of the economics of a securities class action.

representing a lodestar of approximately $40 million. Additionally, after years of litigation and a lengthy trial involving securities claims prosecuted by Labaton Sucharow against JDS Uniphase Corporation, the jury reached a verdict in defendants' favor. *See In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486 CW (EDL), 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007). Similarly, even the most promising multi-hundred million dollar case can be eviscerated by a sudden change in the law after years of litigation. *See, e.g.*, *In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d 469, 471-73 (S.D.N.Y. 2010) (after completing significant foreign discovery, 95% of plaintiffs' damages were eliminated by the Supreme Court's reversal of some 40 years of unbroken circuit court precedents in *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010)). As the court in *In re Xcel Energy, Inc. Securities, Derivative & ERISA Litigation* recognized, "[p]recedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy." 364 F. Supp. 2d 980, 994 (D. Minn. 2005). Even plaintiffs who get past summary judgment and succeed at trial may find their judgment overturned on appeal or on a post-trial motion.[9]

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 and difficult effort. Lead Counsel committed significant resources of both time and money to the vigorous and successful prosecution of this Action for the benefit of the Settlement Class. The contingent nature of counsel's representation strongly favors approval of the requested fee.

[9] *See, e.g.*, *Glickenhaus & Co., et al. v. Household Int'l, Inc., et al.*, 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 under *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011); *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, No. 07-61542-CIV-UNGARO, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011) (court granted defendants' judgment as a matter of law on the basis of loss causation, overturning jury verdict and award in plaintiff's favor), *aff'd*, *Hubbard v. BankAtlantic Bancorp Inc.*, 688 F.3d 713 (11th Cir. 2012); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1448-49 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against an accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1233 (10th Cir. 1996) (Tenth Circuit overturned securities fraud class action jury verdict for plaintiffs in case filed in 1973 and tried in 1988 on the basis of 1994 Supreme Court opinion).

5. A 25% Fee Award Is Consistent With Awards in Similar Complex Contingent Litigation

Courts often look to fees awarded in comparable cases to determine if the fee requested is reasonable. *See Vizcaino*, 290 F.3d at 1050 n.4. As noted above, the requested fee of 25% of the Settlement Fund is the "benchmark" fee in the Ninth Circuit. *See Paul, Johnson*, 886 F.2d at 272. As the court in *Zynga* noted, "[a]s to the fifth factor and awards in similar cases, several other courts – including courts in this District have concluded, that a 25% award was appropriate in complex securities class actions." 2016 WL 537946, at *18 (citations omitted). The court in *Xcel*, after considering "cases from [the District of Minnesota], other districts, and [ ] attorney fee studies referenced in other cases" concluded that "this factor – comparison to other cases – supports the 25% requested [fee]." 364 F. Supp. 2d at 998, 999.

The requested fee is also reasonable when compared to fee awards in similarly-sized securities class action settlements from district courts within the Ninth Circuit. *See, e.g.*, *Rieckborn v. Velti PLC*, No. 13-CV-03889, 2015 WL 468329, at *21-22 (N.D. Cal. Feb. 13, 2015) (awarding fees of 25% of $9.5 million partial settlement); *In re Vocera Comm'cns, Inc.*, No. 3:13-cv-03567-EMC (N.D. Cal. July 29, 2016) (court awarded fees of 25% of $9 million recovery) (Ex. 10); *Mulligan v. Impax Labs, Inc.*, Case No. 13-cv-01037-EMC, slip op. at 7 (N.D. Cal. July 23, 2015) (awarding 29% of $8 million settlement) (Ex. 10); *In re Beckman Coulter, Inc. Sec. Litig.*, No. 8:10-cv-1327-JST (RNBx), slip op. at 3 (C.D. Cal. Mar. 1, 2012) (awarding fees of 25% of $5.5 million settlement) (Ex. 10); *In re Nuvelo, Inc. Sec. Litig.*, No. C07-0405 CRB, 2011 WL 2650592, at *3 (N.D. Cal. July 6, 2011) (awarding fees of 30% of $8.9 million settlement); *In re Infineon Techs. AG Sec. Litig.*, No. C-04-4156-JW, slip op. at 1 (N.D. Cal. Nov. 2, 2011) (awarding fees of 27% of $6.2 million settlement) (Ex. 10); *In re Gilead Sci. Sec. Litig.*, No. C-03-4999-SI, slip op. at 1 (N.D. Cal. Nov. 5, 2010) (awarding fees of 30% of $8.25 million settlement) (Ex. 10).

The requested fee is also less than the median fee award for securities cases based on a recent analysis of fee awards conducted in 2016 by NERA. Using data from securities class actions from 1996 through 2016, the study found that for settlements between $5 million and $9 million, where this Settlement falls, the median fee award was 30% of the settlement amount. *See* Stefan Boettrich

& Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review*, at 39, Figure 32 (NERA Jan. 23, 2017) (Ex. 9).

C. Reaction of the Settlement Class to Date Supports Approval of the Attorneys' Fees Requested

Although not articulated specifically in *Vizcaino*, district courts in the Ninth Circuit also consider the reaction of the class when deciding whether to award the requested fee. *Heritage Bond*, 2005 U.S. Dist. LEXIS 13627, at *48 ("The presence or absence of objections . . . is also a factor in determining the proper fee award.").

To date, 12,572 copies of the Notice of Pendency of Class Action, Proposed Settlement, and Motion for Attorneys' Fees and Expenses ("Notice") and the Proof of Claim and Release form ("Proof of Claim") were mailed to potential Class Members and nominees. *See* Ex. 3 ¶8. The Summary Notice was published in *The Wall Street Journal* and transmitted over the *Business Wire* on October 11, 2017. *Id*., ¶9. In addition, the Stipulation, the Notice, Proof of Claim, Preliminary Approval Order, and the SAC were posted to a website dedicated to the Settlement (www.ubiquitisecuritieslitigation.com). *Id*., ¶10. Lead Counsel has also made relevant documents concerning the Settlement available on their firms' websites. Joint Decl., ¶99. Settlement Class Members were informed in the Notice that Lead Counsel would move the Court for an award of attorneys' fees of up to 25% of the Settlement Fund and for expenses in an amount not to exceed $200,000. Settlement 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 November 27, 2017. While the objection deadline has not passed, to date, not a single Settlement Class Member has objected to counsel's fee and expense request or any other aspect of the Settlement.[10]

[10] If any objections are received, Lead Counsel will address them in a reply brief to be filed on or before December 5, 2017, in accordance with the Court's Preliminary Approval Order.

D. The Requested Fee Is Reasonable Under a Lodestar Cross-Check Analysis

Although Lead Counsel seek approval of a fee based on a percentage of the recovery, and 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 Lead Counsel's lodestar amply demonstrates its reasonableness. *See Vizcaino*, 290 F.3d at 1048-50.

Here, Lead Counsel collectively spent 4,147.90 hours of attorney and professional staff time prosecuting this Action on behalf of the Settlement Class. Exs. 4-A, 5-A, and 6.[11] The resulting lodestar is $2,732,046.50. *Id.* The requested fee of 25% would equal $1,700,000. Thus, the requested fee represents a negative multiplier or just 62% of Lead Counsel's lodestar.[12] Courts have noted that a percentage fee that falls below counsel's lodestar supports the reasonableness of the award. *See, e.g., In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No 02-CV-3400 (CM), 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."); *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 271 (S.D.N.Y. 2012) (approving fee with a negative multiplier and noting that the negative multiplier was a "strong indication of the reasonableness of the [requested] fee"). Accordingly, the lodestar cross-check of Lead Counsel's requested fee supports its reasonableness.

III. LEAD COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED

Lead Counsel also request payment of expenses incurred by them in connection with the prosecution of this Action. Lead Counsel have incurred expenses in the aggregate amount of $111,328.12. These expenses are categorized in the Labaton Sucharow Fee Declaration and the Robbins Geller Fee Declaration submitted to the Court herewith. *See* Exs. 4-C and 5-C. The expenses requested are approximately 1.6% of the Settlement Fund.

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[11] Lead Counsel's hours are also reported according to the category of work conducted. *See* Exs. 4-B and 5-B.

[12] In *Vizcaino*, the Ninth Circuit approved a 28% fee that resulted in a 3.65 multiplier. *Id.* at 1051-52 (finding multipliers ranged as high as 19.6 though most run from 1.0-4.0).

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. *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.'"). Therefore, it is proper to pay reasonable expenses even though they are greater than taxable costs. *Id.* The categories of expenses for which counsel seek payment for here are the type of expenses routinely charged to hourly clients and, therefore, should be paid out of the common fund.

A significant component of Lead Counsel's expenses is the cost of their consulting financial experts and private investigators, which totals $49,762 or 45% of total expenses. In the post-PSLRA era, the use of professional investigators to gather detailed fact-specific information from percipient witnesses in order to plead complaints that will survive motions to dismiss is a necessity. The services of Lead Plaintiffs' consulting damages experts were necessary and contributed materially to the benefits achieved for the Settlement Class, including preparing estimates of damages, analyzing loss causation issues, and assisting with the preparation of the Plan of Allocation.

Other expenses include the costs of computerized research, which total $15,528 or 14% of total expenses. These are the charges for computerized factual and legal research services, including LexisNexis, Westlaw, Courtlink, Thompson and PACER. It is standard practice for attorneys to use these services to assist them in researching legal and factual issues. These services allowed counsel to perform media searches on Ubiquiti, obtain analysts' reports and financial data for Ubiquiti, and conduct legal research.

Lead Counsel were also required to travel in connection with this Action and incurred costs related to working meals, lodging, and transportation, which total $21,101 or 19% of aggregate expenses. This primarily included travel for the mediation of this Action and to court hearings. Other expenses that were necessarily incurred in the prosecution of this Action include expenses for duplicating, mediation fees, filing fees, postage and delivery, and telephone expenses. In sum, Lead

Counsel's expenses, in an aggregate amount of $111,328.12, were reasonable and necessary to the prosecution of the Action and should be approved.

IV. CONCLUSION

Based on the foregoing and upon the entire record herein, Lead Counsel respectfully request that the Court award attorneys' fees in the amount of 25% of the Settlement Fund, plus expenses in the amount of $111,328.12, plus interest earned at the same rate and for the same period as that earned on that portion of the Settlement Fund.

DATED: November 13, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2017, 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 denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Service List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 13, 2017

/s/ Jonathan Gardner
JONATHAN GARDNER

Mailing Information for a Case 12-cv-04677-YGR

In re Ubiquiti Networks, Inc. Securities Litigation

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