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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

IN RE STEC, INC. SECURITIES LITIGATION This Document Relates To: ALL ACTIONS	No. SACV 09-01304-JVS (MLGx) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES** Hearing Date: May 20, 2013 Time: 1:30 p.m. Judge: Honorable James V. Selna Courtroom: 10C

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PRELIMINARY STATEMENT

Co-Lead Counsel, the Court-appointed counsel for Lead Plaintiff and the proposed Class, and Plaintiffs' Counsel, respectfully submit this Memorandum of Points and Authorities in support of their application for an award of attorneys' fees and payment of litigation expenses in connection with the $35,750,000 proposed Settlement.[1] This application has the full support of Lead Plaintiff, the State of New Jersey, Department of Treasury, Division of Investment ("Lead Plaintiff" or "New Jersey").[2]

As detailed in the Dubbs Declaration[3] and in Class Representatives' Motion for Final Approval of Proposed Class Action Settlement, Plan of Allocation, and Class Certification (the "Final Approval Brief"), both filed concurrently herewith, the Settlement was reached through Plaintiffs' Counsel's extraordinary efforts, which involved, *inter alia*:

- Co-Lead Counsel's defeat of Defendants' efforts to dismiss the complaint for failing to state a claim;
- Co-Lead Counsel's discovery and marshalling of evidence potentially raising triable issues regarding not only misstatements or omissions by Defendants alleged in the SAC but also regarding additional misstatements and omissions first discovered during discovery;
- Co-Lead Counsel's defeat of Defendants' efforts to reduce the amount of Class Members' alleged damages by eliminating from the certified Class Period the last of the alleged disclosures of the truth on February 23, 2010;

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[1] Unless otherwise defined herein, for ease of reference, all defined terms used are the same as those defined in the Declaration of Thomas A. Dubbs in Support of Class Representatives' Motion for Final Approval of Proposed Class Action Settlement, Plan of Allocation, and Award of Attorneys' Fees and Expenses ("Dubbs Declaration" or "Dubbs Decl.").

[2] *See* Declaration of Brian F. McDonough in Support of Final Approval of Settlement and Reimbursement of Lead Plaintiff's Reasonable Costs and Expenses Relating to its Representation of the Class ("McDonough Decl."), Ex. 1. All exhibits referenced herein are annexed to the Dubbs Declaration.

[3] The Dubbs Declaration contains a detailed description of the summary of the allegations and claims, the procedural history of the Action and the events that led to the Settlement, and other matters.

- Co-Lead Counsel's certification of Plaintiffs' claims under the Exchange Act; and
- Plaintiffs' Counsel's successful negotiation of the Stipulation and briefing related Settlement papers.

These efforts ultimately established that, while Class Representatives and the Class faced significant risks of dismissal at various stages of the case, Defendants likewise faced a credible risk that Class Representatives could prevail at trial.

Plaintiffs' Counsel respectfully request that they be awarded an attorneys' fee of 16.07% of the Settlement Fund, which will include any accrued interest, and that they be reimbursed out of the Settlement Fund for their litigation expenses in the amount of $1,925,895.67, plus accrued interest. This 16.07% request consists of the requests of: (1) Co-Lead Counsel, Labaton Sucharow LLP and Lite DePalma Greenberg, LLC; (2) Liaison Counsel, Lim, Ruger & Kim, LLP; (3) Thomas Bienert, Jr. and Robert S. Green, counsel for Plaintiff Dr. Mark V. Ripperda; and (4) Berman DeValerio, local counsel for Lead Plaintiff in a discovery dispute with non-party EMC Corporation. This request is in accordance with the normal practice in common fund class actions, in which attorneys' fees are awarded on a percentage-of-recovery basis and counsel are reimbursed for their expenses.

As detailed in the Notice of Pendency of Class Action and Proposed Settlement and Motion for Attorneys' Fees and Expenses (the "Notice"), Co-Lead Counsel indicated that they intended to make a motion for an award of attorneys' fees not to exceed 16.75% of the Settlement Fund. The 16.75% cap includes the requests of Plaintiffs' Counsel, as set forth above, and the request of Kahn Swick & Foti ("KS&F"), one of the former co-lead counsel in the Action, for fees in the amount of $210,950.19 (approximately 0.59% of the Settlement Fund). (The KS&F fee request is submitted separately.) The total

fee request for all Plaintiffs' Counsel and KS&F is 16.66%, which is below the 16.75% cap set forth in the Notice.

This fee request also is below the Ninth Circuit's "benchmark" for contingent fees of 25%. *See, e.g., In re Pac. Enter. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) ("[t]wenty-five percent is the 'benchmark' that district courts should award in common fund cases"). Additionally, Plaintiffs' Counsel's lodestar is a negative multiplier of 0.27. Plaintiffs' Counsel submit that the fee sought is eminently reasonable under either the percentage or lodestar methods and should be approved by the Court.

ARGUMENT

I. PLAINTIFFS' COUNSEL SEEK ATTORNEYS' FEES OF 16.07 PERCENT

A. Plaintiffs' Counsel Are Entitled to an Award of Attorneys' Fees and Reimbursement of Expenses from the Common Fund

It has long been recognized that "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Indeed, the Ninth Circuit has expressly reasoned 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*"); *see also Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977) ("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"). The common fund doctrine is also designed to prevent the unjust enrichment of class members who would otherwise reap the benefit of a lawsuit without paying for it. *Boeing*, 444 U.S. at 478.

B. Standard for Approval of Attorneys' Fees in the Ninth Circuit

District courts have discretion to apply either the percentage-of-recovery method or the lodestar method to evaluate an application for attorneys' fees in common fund cases. *WPPSS*, 19 F.3d at 1296.[4] In recent years, the percentage-of-recovery method has become the prevailing method in the Ninth Circuit. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir. 1993).

Courts in this Circuit have used the percentage method with increasing frequency since the enactment of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). *See*, *e.g.*, *In re Omnivision Techs., Inc. Sec. Litig.*, 559 F. Supp. 2d 1036, 1047-48 (N.D. Cal. 2008); *In re Daou Sys. Inc. Sec. Litig.*, No. 98-CV-1537-L (AJB), 2008 WL 2899726, at *1-2 (S.D. Cal. July 24, 2008); *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *18 (C.D. Cal. June 10, 2005).

Recognizing the utility of the percentage-of-recovery method, the Ninth Circuit has stated that "***[t]wenty-five percent is the 'benchmark' that district courts should award in common fund cases.***" *Pac. Enter.*, 47 F.3d at 379, (emphasis added); *accord Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268 (9th Cir. 1989); *Powers v. Eichen*, 229 F.3d 1249, 1256-57 (9th Cir. 2000). The Court may "adjust the benchmark when special circumstances indicate a higher or lower percentage would be appropriate." *Pac. Enter.*, 47 F.3d at 379.

Further, in employing the percentage method, courts may perform a lodestar cross-check to confirm the reasonableness of the requested fee.

[4] Under the lodestar method, the "lodestar" is calculated by multiplying the reasonable hours expended by a reasonable hourly rate. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986). The Court may then enhance a lodestar with a "multiplier" to arrive at a reasonable fee. *Blum v. Stenson*, 465 U.S. 886, 888 (1984).

Vizcaino, 290 F.3d at 1047 (affirming use of percentage method and applying the lodestar method as a cross-check). As detailed below, Plaintiffs' Counsel respectfully submit that their fee request is reasonable under either analysis.[5]

C. Analysis Under the Percentage Method, Lodestar Method and the *Vizcaino* Factors Justifies Plaintiffs' Counsel's Award of a 16.07% Fee in This Case

Plaintiffs' Counsel's request for a fee award of 16.07% of the Settlement Fund is eminently reasonable. Indeed, as set forth in more detail below, the requested attorneys' fees fall well below the Ninth Circuit benchmark of 25% and represent a lodestar multiplier of 0.27.

Plaintiffs' Counsel's fee request also satisfies five objective factors that are often used by courts in the Ninth Circuit to evaluate the reasonableness of a requested fee: the (1) result achieved; (2) risk of litigation; (3) skill required and quality of the work; (4) customary fees for similar cases; and (5) contingent nature of the fee and financial burden carried by counsel. *Vizcaino*, 290 F.3d at 1048-50. 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. *Id.* As set forth below, all of the *Vizcaino* factors militate in favor of approving the requested fee.

1. The Result Achieved

Courts have consistently recognized that the result achieved is an important 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 ("[e]xceptional results are a relevant circumstance" in awarding attorneys' fees).

Here, the result achieved—$35,750,000 in cash—is the result of Co-Lead Counsel's vigorous prosecution of the claims and settlement negotiations and

[5] An analysis of the lodestar cross-check is provided below at Section C (6).

was secured despite the many risks and complexities discussed herein and in the Final Approval Brief. As detailed in Section I.B.4. of the Final Approval Brief, the Settlement represents a substantial and robust 15.3% of the maximum potential recovery at trial, particularly given the risks and costs of continued litigation. This 15.3% compares favorably with other court-approved settlements in PSLRA cases.

Given the notable defenses described below, the results achieved support approval of Plaintiffs' Counsel's fee request. *See In re Omnivision,* 559 F. Supp. 2d at 1046 (the fact that the settlement creates an award of approximately 9% of possible damages is a "substantial achievement on behalf of the class, and weights in favor of granting the requested 28% fee").

2. The Risks of Litigation

The risk of further litigation is also an important factor in determining a fair fee award. *Vizcaino,* 290 F.3d at 1048 ("[r]isk is a relevant circumstance" in awarding attorneys' fees); *Pac. Enter.*, 47 F.3d at 379 (finding that attorneys' fees were justified "because of the complexity of the issues and the risks"). As set forth in detail in the Dubbs Declaration, ¶¶ 261-273, there were substantial risks and uncertainties in this Action that required the skill and attention of Co-Lead Counsel. Below is a brief summary of those risks.

(a) Falsity of Statements

Defendants have disputed, and would continue to dispute on summary judgment and at trial, the falsity of their statements. Indeed, Defendants have consistently maintained that their statements regarding the EMC Agreement were accurate and made without material omissions. This, however, would be a factual determination to be decided by a jury. *See* Dubbs Decl. ¶ 263.

Additionally, in allowing Plaintiffs to go forward with discovery, the Court did not find it necessary to examine whether Plaintiffs' allegations

regarding (i) sales to the Other OEMs, (ii) STEC's 2009 second quarter revenues, and (iii) competition for the ZeusIOPS were plausible, which adds to the difficulty of predicting how the Court would rule on a motion by Defendants to dismiss these claims on summary judgment. Moreover, when the SEC recently filed its own complaint against Defendant Manouch Moshayedi, the SEC did not allege the falsity of any statements regarding any of these three other subjects. *Id*. ¶ 264.

(b) Scienter Defense

Even if any of Defendants' statements were found by a jury to have been false, Defendants cannot be liable under the Exchange Act for such falsity, unless Defendants made the statements with scienter—*i.e*., knowledge of their falsity, or reckless disregard for whether the statements were true or false. Even under the Securities Act, if the statements were forward looking statements, Defendants cannot be liable unless they made such forward looking statements with knowledge of their falsity. *Id*. ¶ 265; 15 U.S.C. § 78u-5(c)(1)(B); *In re Cutera Sec. Litig*., 610 F.3d 1103, 1112 (9th Cir. 2010).

For example, whether Defendants reasonably believed that their statements about the EMC Agreement were true, may depend, in part, on what they had been told by EMC, and on whether they reasonably doubted what EMC had told them. Therefore, the ability of Class Representatives to prove Defendants' scienter may depend not only on the credibility of Defendants, but also, on the credibility of the EMC witnesses—an additional factor to be determined by the jury. *Id*. ¶ 266.

(c) Safe Harbor Defenses

Under the so called "safe harbor" of the PSLRA, Defendants cannot be held liable for forward looking statements made in the context of other, cautionary language about the same subject, even if the forward looking

statements were knowingly false. Thus, regardless of whether Defendants made knowingly false statements, if they can show that the statements were forward looking statements made in the context of other, adequately cautionary language, regarding the same subjects, which Defendants would no doubt attempt to do, they may not be found liable. *See* Dubbs Decl. ¶ 267; *Employers Teamsters Local Nos. 175 and 505 Pension Trust Fund v. Clorox Co*., 353 F.3d 1125, 1132 (9th Cir. 2004).

(d) Loss Causation and Damages Defenses

In moving to dismiss the CAC, Defendants argued that Plaintiffs had failed to allege that any of the stock drops following any of the alleged corrective disclosures—whether on September 17, 2009, November 3, 2009, or February 23, 2010—had been caused by a disclosure of any truth concealed by Defendants' alleged misstatements. Dubbs Decl. ¶ 268; ECF No. 147 at 21-24. Because the CAC was dismissed for other reasons, the Court never ruled on Defendants' argument, and it is likely that similar arguments would be made by Defendants on a motion for summary judgment and at trial. *See* Dubbs Decl. ¶ 268.[6]

Resolution of issues regarding loss causation and damages would no doubt involve the testimony of expert witnesses and the Parties would end up in a "battle of experts" where it would be impossible to predict with any certainty which arguments would find favor with a jury *See, e.g., In re Warner Commc'ns Sec. Litig*., 618 F. Supp. 735, 744 (S.D.N.Y 1985), *aff'd*, 798 F.2d 735, 744-45 (2d Cir. 1986) (approving settlement where "it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable,

[6] *See also* Dubbs Decl. ¶¶ 269-72 for a discussion of additional risks concerning Class Members' ability to recover damages for the stock drops on February 23, 2010, September 17, 2009 and November 9, 2009, respectively.

rather than the myriad nonactionable factors such as general market conditions").

In sum, Plaintiffs' Counsel submit that an analysis of the risks faced by Class Members strongly support the requested fee award.

3. The Skill Required and the Quality of the Work

As recognized by the court in *Heritage Bond*, the "prosecution and management of a complex national class action requires unique legal skills and abilities." *In re Heritage Bond Litig.*, No. 02-ML-1475 DT (RCX), 2005 WL 1594389, at *12 (C.D. Cal. June 10, 2005). Co-Lead Counsel have many years of experience in complex federal civil litigation, particularly the litigation of securities and other class actions. *See* Exs. 4-8.

Labaton Sucharow LLP is among the nation's preeminent law firms in class action securities litigation and has successfully litigated numerous class actions as Lead and Co-Lead Counsel on behalf of major institutional investors, including *In re American International Group, Inc. Sec. Litig.*, No. 04-8141 (S.D.N.Y.) (representing the Ohio Public Employees Retirement System, State Teachers Retirement System of Ohio, and Ohio Police & Fire Pension Fund and reaching settlements of $1 billion); *In re HealthSouth Corp. Sec. Litig.*, No. 03-1501 (N.D. Ala.) (representing the State of Michigan Retirement System, New Mexico State Investment Council, and the New Mexico Educational Retirement Board and securing settlements of more than $600 million); and *In re Countrywide Sec. Litig.*, No. 07-5295 (C.D. Cal.) (representing the New York State and New York City Pension Funds and reaching settlements of more than $600 million).

Likewise, Lite DePalma Greenberg, LLC, has significant experience as Lead or Co-Lead Counsel in class action securities fraud cases, including in this District. *See*, *e.g.*, *Newton v. Tenet Healthcare Corp*. (Tenet Healthcare Sec.

Litig.), cv-02-8462-RSWL (C.D. Cal.) (Co-Lead Counsel; $281.5 million settlement); *In re Motorola Sec. Litig.*, Civ. No. 03-C-287 (N.D. Ill.) (Co-Lead Counsel; $193 million settlement three business days before trial); *In re Atlas Mining Sec. Litig.*, Civil Action No. 07-428-N-EJL (D. Idaho) (sole Lead Counsel; 30% recovery for class).

The Class Members with Securities Act Claims were represented by Bienert, Miller & Katzman, PLC ("BM&K") and Green & Noblin, P.C. ("G&N"). *See* Joint Declaration of Thomas A. Bienert, Jr. and Robert S. Green in Support of Class Representatives' Counsel's Application for Attorneys' Fees and Reimbursement of Litigation Expenses, Ex. 6. The attorneys at BM&K have litigated more than 100 complex trials and appeals and are recognized as some of the best trial lawyers in Orange County. Tom Bienert is a member of the American College of Trial Lawyers and is a specialist in handling "white collar" crimes that include securities matters. BM&K and Mr. Bienert provided a realistic and experienced approach to the issues in this case and the prospects and risks of taking the case to trial in this District. G&N have over 25 years of experience in litigating securities class action cases. *Id.* Robert Green served as trial counsel in multiple securities class action cases. *Id.* He has served as Lead Counsel in other national cases asserting claims under Section 11 of the Securities Act and has obtained appellate rulings in favor of securities purchasers and other class members from the Ninth Circuit, the Delaware Supreme Court, the California Supreme Court and various California Courts of Appeal. *Id.* ¶ 17.

Counsel's skill and expertise were critical to the resolution of this Action. As described in detail in the Dubbs Declaration, Co-Lead Counsel, *inter alia*, defeated Defendants' motions to dismiss the CAC for failure to state a claim; engaged in extensive fact discovery and marshaled evidence potentially raising

triable issues regarding not only misstatements or omissions by Defendants alleged in the SAC but also regarding additional misstatements and omissions first discovered during discovery; certified Plaintiffs' claims under the Exchange Act; exchanged expert reports with Defendants; and defeated Defendants' efforts to reduce the amount of Class Members' alleged damages by eliminating from the certified Class Period the last of the alleged disclosures of the truth on February 23, 2010. Additionally, Plaintiffs' Counsel prepared for and engaged in vigorous settlement negotiations with Defendants, which ultimately let to resolution of the Action.

In sum, this factor strongly supports the award of the fee requested.

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

It has long been recognized that attorneys are entitled to a larger fee when their compensation is contingent in nature. *See Vizcaino*, 290 F.3d at 1048-50. As the Ninth Circuit stated in *WPPSS*:

> 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. . . . 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.

Id. at 1299 (internal citations omitted); *see also In re Omnivision,* 559 F. Supp. 2d at 1047 (explaining that "[t]he 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.").

Indeed, there have been many class actions in which plaintiffs' counsel took on the risk of pursuing claims on a contingency basis, expended thousands of hours, yet received no remuneration whatsoever despite their diligence and

expertise. Numerous recent cases continue to demonstrate the enormous risks associated with prosecuting securities class actions.[7]

Here, because Plaintiffs' Counsel's fee was entirely contingent, the only certainty was that there would be no fee without a successful result and that such result would only be realized after significant amounts of time, effort, and expense had been expended. Plaintiffs' Counsel has risked non-payment of $1,925,895.67 in expenses and $20,995,456.00 in time worked pursuing the claims against Defendants knowing that if their efforts were not successful, no fee would be paid.

5. A 16.07% Fee Award Is Below the Ninth Circuit's 25% Benchmark and Is Less Than the Range of Fees Awarded in Similar Cases

In requesting an award of a 16.07% fee, Plaintiffs' Counsel seek an amount well below the 25% benchmark that has been established by the Ninth Circuit.[8] *Eichen*, 229 F.3d at 1256 ("We have also established twenty-five percent of the recovery as a 'benchmark' for attorneys' fees calculations under the percentage-of-recovery approach."). *See also Pincay Inv. Co. Covad Commc'ns Group*, 90 F. App'x 510, 510 (9th Cir. 2004); *Paul, Johnson*, 886 F.2d at 273 (25% is the proper benchmark for attorneys' fees); *Pac. Enter.,* 47 F.3d at 379 ("twenty-five percent is the 'benchmark' that district courts should award in common fund cases").

Moreover, a 16.07% attorneys' fee is below the Ninth Circuit's 25% benchmark in securities class actions involving *comparable* recoveries in district courts within the Ninth Circuit. *See, e.g., In re Semtech Corp. Sec.*

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[7] *See, e.g., In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486 CW (N.D. Cal. Aug. 24, 2007) (a jury returned a defendants' verdict with the result that lead counsel received no compensation for years of contingent representation, including overcoming defendants' summary judgment motions and the expenditure of millions of dollars of unreimbursed expenses).

[8] The total requested fee of 16.66% for Plaintiffs' Counsel and Kahn Swick is also well below the Ninth Circuit's 25% benchmark.

Litig., 2:07-cv-07114-CAS (FMOx), slip op. at 2-3 (C.D. Cal. June 27, 2011) (awarding 17% of $20 million settlement) (Ex. 12); *Grasso v. Vitesse Semiconductor Corp.*, No. 06-CV-02639-R, slip op. at 3 (C.D. Cal. Nov. 17, 2008) (awarding 25% of approximatley $20 million settlement) (Ex. 12); *In re Kla-Tencor Corp. Sec. Litig*., No. C-06-04065-CRB, slip op. at 1 (N.D. Cal. Sept. 26, 2008) (awarding 16.5% of $65 million settlement) (Ex. 12); *In re Heritage Bond Litig*., 2005 WL 1594403, at *27 (awarding 33 1/3% of $27.783 million settlement); *Thomas & Thomas Rodmakers Inc. v. Newport Adhesives and Composites, Inc*., No. CV-99-07796-FMC(RNBx), slip op. at 1 (C.D. Cal. Oct. 18, 2005) (awarding 33.13% of $36.25 million settlement) (Ex. 12).

Furthermore, a study shows that between January 1996 and June 2012, the median plaintiffs' attorneys' fee for settlements between $25 and $99.9 million was 27% of the Settlement. *See* Dr. Renzo Comolli, Dr. Ron Miller, Dr. John Montgomery, and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2012 Mid-Year Review*, at 31 (NERA July 24, 2012) (Ex. 13). This study further shows that the requested 16.07% fee here is justified.

Accordingly, it is respectfully submitted that Plaintiffs' Counsel's request for 16.07% is well below the Ninth Circuit's 25% benchmark and below the percentages awarded in other comparable cases in the Ninth Circuit.

6. Lodestar Cross-Check

Plaintiffs' Counsel's "lodestar" is $20,995,456 through March 25, meaning that the requested fee represents a negative multiple of 0.27. Dubbs Decl. ¶ 290, Ex. 3.[9] Although an analysis of the lodestar is not always required for an award of attorneys' fees in the Ninth Circuit, a cross-check of the fee

[9] Counsel's "lodestar" represents 41,050.50 hours of work. As set forth in the Dubbs Declaration, additional work will be required of counsel in connection with, *inter alia*, preparation for and participation in the final approval hearing. However, Plaintiffs' Counsel will not seek payment for this additional work.

request with Plaintiffs' Counsel's lodestar demonstrates its reasonableness. *See Vizcaino*, 290 F.3d at 1048-50. *See also In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997) (comparing the lodestar fee to the percentage fee is an appropriate measure of a percentage fee's reasonableness).

The Ninth Circuit has recognized that attorneys in common fund cases are frequently awarded a multiple of their lodestar, rewarding them "for taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning contingency cases." *Vizcaino,* 290 F.3d at 1051 (citation omitted). For example, the district court in *Vizcaino* approved a fee which reflected a multiple of 3.65 times counsel's lodestar. *Id*. The Ninth Circuit affirmed, holding that the district court correctly considered the range of multiples applied in common fund cases, and noting that a range of lodestar multiples from 1.0 to 4.0 are frequently awarded. *Id*.[10]

Here, the requested fee is below the range of multipliers routinely awarded. Courts have noted that a percentage fee that falls below counsel's lodestar further 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."). Moreover, a negative multiplier, like the negative multipler here, means that Plaintiffs' Counsel are seeking to be paid for only a fraction of the hours expended on the Action. *See In re Initial Pub. Offering Sec. Litig*., No. 21 MC 92(SAS), 2011 WL 2732563,

[10] Similarly, in *WPPSS*, the Ninth Circuit recognized that 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.

at *9 (S.D.N.Y. July 8, 2011) (noting that, with a negative multipler, "every firm was awarded a fraction of its requested fees and was thus compensated for a small fraction of the time spent on the case", *citing* 671 F. Supp. 2d 467, 515-16 (S.D.N.Y. 2009)); *see also In re Marsh & McLennan Cos. Inc. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546 at *20 (S.D.N.Y. Dec. 23, 2009) ("The percentage fee requested represents a negative multiplier of 0.44 to the lodestar. Thus, not only are Lead Counsel not receiving a premium on their lodestar, their fee request amounts to a deep discount from their lodestar.").

7. The Reaction of the Settlement Class

The Court-approved Notice was sent to 125,482 potential nominees and Class Members and the Court-approved Summary Notice was published in *Investor's Business Daily* and issued over the *PR Newswire*. *See* Affidavit of Jose C. Fraga Regarding (A) Mailing of the Notice and Proof of Claim; (B) Publication of the Summary Notice; and (C) Requests for Exclusion Received to Date, Ex. 2 ¶¶ 6, 7. To date, no objections to the requested amount of attorneys' fees and expenses have been received.[11] As this Circuit has held, a small number of objections do not stand in the way of approval of a reasonable fee. *See In re Mego Fin. Corp. Sec. Litig.,* 213 F.3d 454, 459 (9th Cir. 2000); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977). Moreover, the Third Circuit has noted that a low level of objections is a "rare phenomenon." *In re Rite Aid Corp.,* 396 F.3d 294, 305 (3d Cir. 2005).

8. The Requested Fee Was Negotiated With Lead Plaintiff and Is Presumptively Reasonable

The requested fee was the subject of informed negotiation between Co-Lead Counsel and Lead Plaintiff. "Since [the] passage of the PSLRA, courts have found such an agreement between fully informed lead plaintiffs and their

[11] Plaintiffs' Counsel will address objections to the fee and expenses request, if any, in their reply papers which will be filed with the Court by May 6, 2013.

counsel to be presumptively reasonable." *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05-10240 (CM), 2007 WL 2230177, at *16 (S.D.N.Y. July 27, 2007). In *WorldCom*, the court was persuaded by the fact that the requested fee was negotiated between class counsel and the lead plaintiff. "[W]hen class counsel in a securities lawsuit have negotiated an arm's-length agreement with a sophisticated lead plaintiff possessing a large stake in the litigation, and when that lead plaintiff endorses the application following close supervision of the litigation, the court should give the terms of that agreement great weight." *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 356 (S.D.N.Y. 2005).

Here, as set forth in the McDonough Declaration, the requested fee agreed to between Lead Plaintiff and Co-Lead Counsel represents precisely the type of bargaining that the PSLRA anticipated and to which a court reasonably should give substantial deference. *See* Ex. 1 ¶¶ 13-18. Indeed, in considering the fee request, Lead Plaintiff considered numerous factors, including: (a) the very favorable result achieved for the Class; (b) a desire to maximize the recovery for Class Members; (c) Co-Lead Counsel's litigation efforts; (d) that Plaintiffs' Counsel expended more than 41,000 hours in the prosecution of the claims against Defendants; (e) the quality of Co-Lead Counsel's work, particularly in light of the difficulty of the claims against Defendants; and (f) the fee agreement between Lead Plaintiff and Co-Lead Counsel.[12] *Id.* ¶ 15.[13]

[12] Lead Plaintiff entered into a fee agreement with Co-Lead Counsel at the outset of the litigation, and the requested fee is consistent with the amount set forth in the fee agreement. This fee agreement further supports the reasonableness of the requested fees. *See WorldCom*, 388 F. Supp. 2d at 356.

[13] Lead Plaintiff also approved the language in the Notice that Plaintiffs' Counsel would seek fees "not to exceed 16.75%." *See* Ex. 1 ¶ 17.

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

Plaintiffs' Counsel have incurred expenses in the amount of $1,925,895.67 in prosecuting the claims against Defendants. In assessing whether counsel's expenses are compensable in a common fund case, courts look to 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.'") (citation omitted).

The declarations of Plaintiffs' Counsel include itemized schedules of the expenses incurred. *See* Exs. 4-8. Here, the expenses sought by Plaintiffs' Counsel are of the type that are routinely charged to hourly paying clients and, therefore, should be reimbursed out of the common fund. The main expense relates to work performed by Co-Lead Counsel's experts ($1,098,475). In order for a court to award reimbursement for expert fees, a court must find that the expert's work was "'crucial or indispensable' to the litigation at hand." *In re Immune Response Sec. Litig*., 497 F. Supp. 2d 1166, 1178 (S.D. Cal. 2007). The facts and complexity of this case required Lead Plaintiff to utilize prominent experts in the fields of loss causation and damages, the role of financial analysts, and disclosures required by SEC regulations.

These experts include: (1) John D. Finnerty, Ph.D of Finnerty Economics Consulting; (2) Alan D. Jagolinzer, Ph.D. of the University of Colorado at Boulder; (3) Richard Willis, Ph.D of Vanderbilt University; and (4) Steven L. Henning, Ph.D. of Marks Paneth & Shron. A detailed description of each expert and his role in the Action is found in paragraphs 117-127; 132-135 of the Dubbs Declaration.

Briefly, Dr. Finnerty charged $841,713.85 in connection with his work, opining on, *inter alia*: the materiality of Defendants' alleged misrepresentations and omissions; whether and to what degree investor losses were proximately caused by Defendants' alleged violations of the federal securities laws; and damages suffered by Class Members on a per share basis under Section 10(b) of the Exchange Act. Dr. Finnerty prepared a market efficiency report for the Class Certification motion and also prepared an expert report and a rebuttal report. *See* Dubbs Decl. ¶¶ 117-18, 132, 149.

Dr. Jagolinzer charged $33,000 in connection with his work, opining on, *inter alia*: the trading proceeds that Manouch and Mark Moshayedi would have received had their shares been sold within the Rule 10b5-1 plans that were adopted by STEC on May 29, 2009 and certain testimony of Manouch and Mark Moshayedi concerning their Rule 10b5-1 Plans. Dr. Jagolinzer prepared an expert report, along with extensive exhibits. *Id*. ¶¶ 119-20.

Dr. Willis charged $70,500 in connection with his work, opining on, *inter alia*: the role of financial analysts who gather and analyze financial information about the companies they cover in order to build financial "models" used to predict the future performance of those companies. Dr. Willis prepared a 65 page expert report, including exhibits. *Id*. ¶¶ 121-23.

Dr. Henning of Marks Paneth charged $58,520 in connection with his work, opining on, *inter alia*: the disclosures required by relevant SEC regulations concerning the EMC Agreement and the materiality of STEC's omission to disclose that $12 million of its third quarter revenue guidance resulted from its promise to give EMC a benefit in the 2009 fourth quarter in return for EMC's promise to increase its purchase of ZeusIOPS during the 2009 third quarter. Dr. Henning prepared an 18 page expert report and a 12 page rebuttal report. *Id*. ¶¶ 124-27, 133-35.

Plaintiffs' Counsel submit that the expert reports and rebuttal reports prepared by the above experts, along with the substantial advice and analysis provided by them, were crucial to Co-Lead Counsel's successful prosecution of the Action and contributed substantially to obtaining the Settlement.

Plaintiffs' Counsel was also required to travel in connection with this case, and thereby seek reimbursement for the costs of this travel. For instance, counsel traveled to California on numerous occasions to attend hearings on, *inter alia*, Defendants' motions to dismiss, Plaintiffs' motions for class certification and Plaintiffs' motion for preliminary approval of the Settlement. Co-Lead Counsel also traveled to California, Oregon, Massachusetts, Missouri, Illinois, New Jersey and Idaho to take and defend depositions. With respect to such depositions, Co-Lead Counsel sought to minimize the cost of travel by consolidating depositions during a particular time frame, where possible, so as to make each trip as efficient as possible. All airline travel expenses reflect the cost of travel in coach class. Therefore, the expenses in this category are reasonable in amount given the circumstances and demands of this case, and are properly charged against the fund created. *See Thornberry v. Delta Air Lines*, 676 F.2d 1240, 1244 (9th Cir. 1982), *vacated and remanded on other grounds*, 461 U.S. 952 (1983); *Immune Response*, 497 F. Supp. 2d at 1177 ("reimbursement for travel expenses . . . is within the broad discretion of the Court").

Courts also routinely approve reimbursements for the expenses associated with the mediation sessions. *Immune Response*, 497 F. Supp. 2d at 1177 (mediation expenses approved because "reasonable and necessary" and the "case involved protracted litigation, which would not have come to an end prior to trial without the assistance of a mediator"). *Id.* at 1178. As detailed in the Dubbs Declaration, the work performed by Judge Phillips was crucial to the

resolution of this Action. *See* Dubbs Decl. ¶¶ 247-53, 256, 258-59; *see also* Ex. 10 ¶¶ 7-19.

Further, Plaintiffs' Counsel respectfully seeks reimbursement of the $184,088.60 charged by Merrill Communications LLC in connection with electronic document hosting. Co-Lead Counsel contracted with Merrill Corporation to host Lextranet, a remote-access platform that allowed users to view every document produced in this litigation on their own computers. These users could also categorize, label, and search the documents with relative ease. With more than 1.7 million pages of documents produced by Defendants alone, it would not have been possible to adequately analyze and categorize them within the time allotted for discovery without using such a service. In an effort to hold down costs, Co-Lead Counsel aggressively negotiated with Merrill with respect to the costs of these and other critical litigation support services, most importantly court reporting services.

Photocopying costs were also incurred and are also customarily reimbursed in common fund cases. *Omnivision*, 559 F. Supp. 2d at 1048-49; *Immune Response*, 497 F. Supp. 2d at 1177 ("photocopies are also a necessary expense of litigation, in particular in complex securities class action litigation").

Expenses here also include the costs of computerized research. These are the charges for computerized factual and legal research services such as LEXIS/Nexis and Westlaw. It is standard practice for attorneys to use LEXIS/Nexis and Westlaw to assist them in researching legal and factual issues and reimbursement is proper. *Id.* at 1178. Indeed, courts recognize that these tools create efficiencies in litigation and, ultimately, save clients and the class money. *See In re Cont'l Ill. Sec. Litig.*, 962 F .2d 566, 570 (7th Cir. 1992). In approving expenses for computerized research, the court in *Gottlieb v. Wiles*, 150 F.R.D. 174, 186 (D. Colo. 1993), *rev'd and remanded on other grounds*

sub nom, Gottlieb v. Barry, 43 F.3d 474 (10th Cir. 1994), underscored the time-saving attributes of computerized research as a reason reimbursement should be encouraged. The court also noted that fee-paying clients (unlike class members) reimburse counsel for computerized legal and factual research. *Id*.

In sum, Plaintiffs' Counsel respectfully submit that the expenses incurred were reasonable and necessarily incurred in connection with prosecuting the Action and achieving the proposed Settlement for the benefit of the Class.

III. CLASS REPRESENTATIVES ARE ENTITLED TO REIMBURSEMENT OF REASONABLE LOST WAGES

The PSLRA, 15 U.S.C. §78u-4(a)(4), limits a class representative's recovery to an amount "equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class," but also provides that "[n]othing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class." Here, as explained in ¶ 19 of the McDonough Declaration, Lead Plaintiff is seeking $31,657.53 in lost wages related to New Jersey's active participation in this Action. Class Representative International Brotherhood of Electrical Worers, Local 103 ("Local 103") is seeking $2,750.64 in lost wages related to its participation in the Action, as set forth in the Declaration of Michael Patrick Donovan, Ex. 9, ¶ 6, and chart attached thereto.

Many cases have approved reasonable payments to compensate class representatives for the time and effort devoted by them on behalf of a class. *See e.g.*, *In re Broadcom Corp. Class Action Litig*., No. CV-06-5036-R (CWx) (C.D. Cal. Dec. 4, 2012), slip op. at 2 (awarding costs and expenses to class representative in the amount of $21,087) (Ex. 12); *In re Marsh & McLennan Co. Inc. Sec. Litig*., 2009 WL 5178546, at *21(approving payment of $144,657 to the New Jersey Attorney General's Office and $70,000 to the Ohio Funds*)*;

In re Gilat Satellite Networks, Ltd., No. CV-02-1510 (CPS) (SMG), 2007 WL 2743675, at *18-19 (E.D.N.Y. Sept. 18, 2007) (approving $10,000 award, representing 25 hours at $300/hour, plus other time); *In re WorldCom,* 388 F. Supp. 2d at 359 (approving payment of $11,063.54 to lead plaintiff); *In re Bristol-Myers Squibb Sec. Litig.*, No. 00-1990 (SRC), slip op. at 2 (D.N.J. May 11, 2006) (Ex. 12) (awarding $58,948.64 to institutional class representative).

Section (a)(4) of the PSLRA expressly includes "lost wages" among the items for which it authorizes an award. Consistent with the stated purpose of the statute, its language distinguishes between bounties intended to reward class representatives, which it proscribes, and payments designed to make class representatives whole for the time and expense incurred in supervision of the case. Indeed, given that the central objective of the PSLRA was to '"protect[] investors who join class actions against lawyer-driven lawsuits by . . . increas[ing] the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel,'" *In re Cavanaugh*, 306 F.3d 726, 737 (9th Cir. 2002), it would be unreasonable to penalize institutional class plaintiffs, like Lead Plaintiff here, for devoting time to the litigation by denying them reimbursement.

New Jersey representatives Deputy Attorney General Samuel S. Cornish and Assistant Attorneys General Carol G. Jacobson and Brian McDonough personally devoted at least 242.4 hours in connection with litigating the claims against Defendants. *See* Ex. 1 ¶ 19, and chart attached thereto. Among other things, the New Jersey representatives drafted, reviewed and approved the pleadings, briefs on dispositive motions and mediation statements; consulted with Co-Lead Counsel on discovery matters; evaluated with Co-Lead Counsel

which damages experts to retain and reviewed expert reports; observed jury focus group presentations and reviewed the results of the presentations; provided Co-Lead Counsel with parameters for settlement discussions; worked with Co-Lead Counsel in the selection of a mediator; attended and participated in the mediation sessions; reviewed, edited and approved the Stipulation, Plan of Allocation and other settlement documents; and authorized the selection of The Garden City Group, Inc. as the claims administrator. *See* Ex. 1 ¶ 5. While assisting with the prosecution of the claims against Defendants in the Action, these individuals were unable to perform their regular responsibilities on behalf of New Jersey, which lost those services.

Class Representative Local 103, working under the Direction of Lead Plaintiff, expended 51.5 hours in connection with litigating the claims against Defendants. *See* Ex. 9 ¶ 6, and chart attached thereto. Among other things, Michael Patrick Donovan was deposed by Defendants in this Action and, along with Richard Gambino, supervised the litigation. *Id*. ¶ 2; Dubbs Decl. ¶¶ 87, 151, 300.

Accordingly, Plaintiffs' Counsel submit that the $31,657.53 sought by Lead Plaintiff and the $2,750.04 sought by Local 103, based on their active involvement in connection with litigating the claims against Defendants in this Action, is eminently reasonable and should be granted.

CONCLUSION

Plaintiffs' Counsel has litigated this case with creativity and skill and has produced an exceptional result for the Class. Plaintiffs' Counsel respectfully request that Plaintiffs' Counsel be awarded fees in the amount of 16.07% of the Settlement Fund, together with accrued interest, and be paid for their litigation expenses in prosecuting and settling the Action in the amount of $1,925,895.67, together with accrued interest. Plaintiffs' Counsel also request that Lead

Plaintiff be reimbursed in the amount of $31,657.53 and that Local 103 be reimbursed in the amount of $2,750.04 for lost wages in connection with their participation in the litigation.

Dated: April 8, 2013

Respectfully submitted,

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