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14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA
16 SOUTHERN DIVISION

17 IN RE HEWLETT-PACKARD) Case No. SACV 11-1404 AG (RNBx)
18 COMPANY SECURITIES)
19 LITIGATION) **MEMORANDUM OF LAW IN**
20) **SUPPORT OF PLAINTIFFS’**
21) **COUNSEL’S MOTION FOR**
22) **ATTORNEYS’ FEES, PAYMENT OF**
23) **LITIGATION EXPENSES, AND**
24) **REIMBURSEMENT OF LEAD**
25) **PLAINTIFFS’ EXPENSES**
26) **INCLUDING LOST WAGES**
27)
28) Judge: Hon. Andrew J. Guilford
Dept.: Courtroom 10D
Hearing Date: September 15, 2014
Hearing Time: 10:00 a.m.

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1 **I. PRELIMINARY STATEMENT**

2 Co-Lead Counsel Labaton Sucharow LLP and Motley Rice LLC, on behalf
3 of themselves and Barrack, Rodos & Bacine (collectively “Plaintiffs’ Counsel”)¹
4 respectfully submit this Memorandum of Law in support of: (i) their application
5 for an award of attorneys’ fees and payment of litigation expenses, and (ii) the
6 applications of Lead Plaintiffs for reimbursement of their reasonable costs and
7 expenses related to their representation of the Settlement Class, pursuant to
8 Private Securities Litigation Reform Act (“PSLRA”), 15 U.S.C. § 78u-4(a)(4).

9 As set forth in the Stipulation, Hewlett-Packard Company (“HP” or the
10 “Company”) and Defendants Léo Apotheker and R. Todd Bradley (collectively,
11 the “Individual Defendants” and together with HP, “Defendants”) have agreed to
12 pay \$57 million to secure a settlement of the claims alleged in this proposed class
13 action (the “Settlement”). This excellent recovery – which represents a gross
14 recovery of between 12% and 26% of the likely estimated damages – is the result
15 of the unyielding efforts, skill, and effective advocacy of Plaintiffs’ Counsel, with
16 the insight and involvement of the Lead Plaintiffs.

17 As detailed in the accompanying Joint Declaration of Jonathan Gardner and
18 Gregg S. Levin (the “Joint Declaration”) and Lead Plaintiffs’ Memorandum of
19 Law in Support of Their Motion for Final Approval of Class Action Settlement
20 and Plan of Allocation (the “Final Approval Brief”), the efforts of Plaintiffs’
21 Counsel included:

22
23
24 ¹ All capitalized terms used herein are defined in the Stipulation and Agreement of
25 Settlement (“Stipulation”) and have the same meaning as set forth therein. The
26 Stipulation was signed on March 31, 2014, ECF No. 146-1, and preliminarily
27 approved by the Court on May 2, 2014, ECF No. 153.

- 1 ▪ Investigating the events underlying the claims alleged in the Action,
2 including a review of publicly available information and interviews
3 with dozens of potential witnesses;
- 4 ▪ Researching the applicable law with respect to those claims and
5 Defendants’ anticipated defenses;
- 6 ▪ Drafting the First Amended Class Action Complaint for Violation of
7 the Federal Securities Laws, which was filed on February 10, 2012
8 (the “FAC”); briefing Defendants’ motion to dismiss the FAC;
9 drafting the Second Amended Class Action Complaint for Violation
10 of the Federal Securities Laws, which was filed on October 19, 2012
11 (the “Complaint”); and briefing Defendants’ motion to dismiss the
12 Complaint;
- 13 ▪ Reviewing over 300,000 pages of confidential documents provided by
14 HP in advance of a formal mediation process. These documents
15 included: (i) Company emails; (ii) internal memoranda from HP;
16 (iii) corporate minutes of the Company’s board of directors;
17 (iv) spreadsheets from HP regarding webOS-related projects;
18 (v) Company submissions to the U.S. Securities & Exchange
19 Commission; (vi) the source materials utilized by HP in connection
20 with the Company’s webOS development; (vii) slide show
21 presentations concerning HP’s financial, operations, and project
22 planning; and (viii) draft public statements concerning webOS
23 projects;
- 24 ▪ Retaining and consulting with a damages expert to analyze loss
25 causation issues and determine class-wide damages;
- 26 ▪ Retaining and consulting with experts in the technology and web-
27 based communications and data industries to determine, *inter alia*, the
28

1 feasibility of HP producing webOS-enabled PCs and printers in the
2 timeframe the Company touted to the market; and

- 3 ■ Participating in a formal arm’s-length settlement mediation before an
4 independent and highly experienced mediator, Judge Layn R. Phillips
5 (Ret.) (“Judge Phillips”).

6 Plaintiffs’ Counsel have not received any compensation or reimbursement
7 for their successful prosecution of this case, which required over 13,000 hours of
8 billable time and more than \$335,000 in litigation expenses. In accordance with
9 the normal practice in common fund cases, Plaintiffs’ Counsel respectfully request
10 that they be awarded an attorneys’ fee of 25% of the Settlement Fund, which will
11 include any accrued interest, and that they be reimbursed out of the Settlement
12 Fund for their litigation expenses in the amount of \$335,119.93, plus accrued
13 interest.

14 This 25% fee request is the Ninth Circuit’s “benchmark” for contingent
15 fees. *See, e.g., In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995)
16 (“Twenty-five percent is the ‘benchmark’ that district courts should award in
17 common fund cases.”). At its discretion, the Court also may consider Plaintiffs’
18 Counsel’s lodestar, which would yield a reasonable multiplier of 1.89. In
19 addition, the expenses incurred by Plaintiffs’ Counsel in connection with the
20 prosecution of the Action were both reasonable and necessary. As such, the
21 requested expense amount should be awarded in full.

22 **II. FACTUAL BACKGROUND**

23 To avoid repetition, Plaintiffs’ Counsel refer the Court to, and incorporate
24 herein, the Joint Declaration and the Final Approval Brief, which set forth, among
25 other things, a comprehensive review of the history of the Action, the discovery
26 conducted by Plaintiffs’ Counsel, the settlement discussions, and the risks faced
27 by Lead Plaintiffs in the Action.

28

1 **III. ARGUMENT**

2 **A. Plaintiffs' Counsel's Request For Attorneys' Fees Of 25% Of The**
 3 **Common Fund Should Be Approved**

4 **1. Plaintiffs' Counsel are entitled to an award of attorneys'**
 5 **fees from the common fund**

6 It is well settled that attorneys who represent a class and achieve a benefit
 7 for class members are entitled to a reasonable fee as compensation for their
 8 services. The Supreme Court has recognized that "a lawyer who recovers a
 9 common fund for the benefit of persons other than himself or his client is entitled
 10 to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van*
 11 *Gemert*, 444 U.S. 472, 478 (1980); *see also Vincent v. Reser*, No. C-11-03572
 12 CRB, 2013 WL 621865, at *4 (N.D. Cal. Feb. 19, 2013) (quoting *Boeing*, 444
 13 U.S. at 478). Indeed, the Ninth Circuit has expressly reasoned that "a private
 14 plaintiff, or his attorney, whose efforts create, discover, increase or preserve a
 15 fund to which others also have a claim is entitled to recover from the fund the
 16 costs of his litigation, including attorneys' fees." *Vincent v. Hughes Air West,*
 17 *Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). The purpose of this rule, known as the
 18 "common fund doctrine," is to prevent unjust enrichment so that "those who
 19 benefit from the creation of the fund should share the wealth with the lawyers
 20 whose skill and effort helped create it." *In re Wash. Pub. Power Supply Sys. Sec.*
 21 *Litig. (WPPSS)*, 19 F.3d 1291, 1300 (9th Cir. 1994), *aff'd in part, Class Plaintiffs*
 22 *v. Jaffe Schlesinger P.A.* 19 F.3d 1306 (9th Cir. 1994).

22 **2. A reasonable percentage of the fund recovered is the**
 23 **appropriate method for awarding attorneys' fees in**
 24 **common fund cases**

24 In *Blum v. Stenson*, 465 U.S. 886 (1984), the Supreme Court recognized
 25 that under the common fund doctrine a reasonable fee may be based "on a
 26 percentage of the fund bestowed on the class. . . ." *Id.* at 900 n.16. In this Circuit,
 27 a district court has discretion to award fees in common fund cases based on either
 28

1 the so-called lodestar/multiplier method² or the percentage-of-the-fund method.
2 *WPPSS*, 19 F.3d at 1296. However, the percentage-of-recovery method has
3 become the prevailing method in the Ninth Circuit. *See Vizcaino v. Microsoft*
4 *Corp.*, 290 F.3d 1043 (9th Cir. 2002). Other circuits have similarly endorsed the
5 percentage-of-recovery method.

6 The rationale for compensating counsel in common fund cases on a
7 percentage basis is sound. Principally, it more closely aligns the lawyers' interest
8 in being paid a fair fee with the interest of the class in achieving the maximum
9 possible recovery in the shortest amount of time. Indeed, one of the nation's
10 leading scholars in the field of class actions and attorneys' fees, Professor Charles
11 Silver of the University of Texas School of Law, has concluded that the
12 percentage method of awarding fees is the only method of fee awards that is
13 consistent with class members' due process rights. Professor Silver notes:

14 ***The consensus that the contingent percentage approach creates a closer***
15 ***harmony of interests between class counsel and absent plaintiffs than***
16 ***the lodestar method is strikingly broad.*** It includes leading academics,
17 researchers at the RAND Institute for Civil Justice, and many judges,
18 including those who contributed to the Manual for Complex Litigation,
19 the Report of the Federal Courts Study Committee, and the report of the
20 Third Circuit Task Force. Indeed, it is difficult to find anyone who

21 _____
22 ² Under the lodestar method, the "lodestar" is calculated by multiplying the
23 reasonable hours expended by a reasonable hourly rate. *Pennsylvania v.*
24 *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986). The
25 Court may then enhance a lodestar with a "multiplier" to arrive at a reasonable
26 fee. *WPPSS*, 19 F.3d at 1295 n.2 (finding district court abused discretion in
27 refusing to award multiplier). As the Ninth Circuit has explained, "courts have
28 routinely enhanced the lodestar to reflect the risk of non-payment in common fund
cases." *Id.* at 1299-1300.

1 contends otherwise. No one writing in the field today is defending the
 2 lodestar on the ground that it minimizes conflicts between class counsel
 3 and absent claimants.

4 ***In view of this, it is as clear as it possibly can be that judges should not***
 5 ***apply the lodestar method in common fund class actions.*** The Due
 6 Process Clause requires them to minimize conflicts between absent
 7 claimants and their representatives. The contingent percentage approach
 8 accomplishes this.

9 Charles Silver, Class Actions In The Gulf South Symposium, *Due Process and*
 10 *the Lodestar Method: You Can't Get There From Here*, 74 Tul. L. Rev. 1809,
 11 1819-20 (2000) (emphasis added and footnotes omitted) (attached hereto as Ex.
 12 16).³ This is particularly appropriate in PSLRA cases where Congress recognized
 13 the propriety of the percentage method of fee awards. *See* 15 U.S.C. § 78u-
 14 4(a)(6).

15 **3. A fee of 25% of the fund created is reasonable**

16 Recognizing the utility of the percentage-of-recovery method, the Ninth
 17 Circuit has stated that “[t]wenty-five percent is the ‘benchmark’ that district
 18 courts should award in common fund cases.” *Pac. Enters.*, 47 F.3d at 379
 19 (emphasis added); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000)
 20 (reaffirming 25% benchmark); *Evans v. Linden Research, Inc.*, No. C-11-01078
 21 (DMR), 2014 WL 1724891, at *6 (N.D. Cal. Apr. 29, 2014) (“25% of the
 22 recovery obtained is the benchmark in the Ninth Circuit.”) (citing *Vizcaino*, 290
 23 F.3d at 1047); *Dubeau v. Sterling Sav. Bank*, No. 12-CV-01602-CL, 2013 WL
 24 4591034, at *3 (D. Or. Aug. 28, 2013) (same); *Eddings v. Health Net, Inc.*, No.

25
 26 ³ All exhibits referenced herein are annexed to the Joint Declaration.
 27
 28

1 CV 10-1744-JST (RZX), 2013 WL 3013867, at *5 (C.D. Cal. June 13, 2013)
 2 (same); *In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2013 WL 1120801,
 3 at *9 (N.D. Cal. Mar. 18, 2013) (same). The guiding principle in this Circuit is
 4 that a fee award be “reasonable under the circumstances.” *WPPSS*, 19 F.3d at
 5 1296 (citation and emphasis omitted). In employing the percentage method,
 6 courts may perform a lodestar cross-check to confirm the reasonableness of the
 7 requested fee. *Vizcaino*, 290 F.3d at 1047 (affirming use of percentage method
 8 and applying the lodestar method as a cross-check). Here, in view of the result
 9 obtained, the contingent fee risk, and other relevant factors, an award of 25% of
 10 the recovery obtained for the Settlement Class is appropriate under either
 11 analysis.⁴

12 **4. Analysis under the percentage method and the *Vizcaino***
 13 **factors justifies a fee award of 25% in this case**

14 Plaintiffs’ Counsel’s request for a fee award of 25% of the Settlement Fund
 15 is eminently reasonable. Indeed, as set forth in more detail below, the requested
 16 Ninth Circuit benchmark of 25% is consistent with the percentage of fees awarded
 17 to plaintiffs’ counsel in comparable securities fraud cases, and represents a
 18 reasonable lodestar multiplier of 1.89.

19 The instant fee request satisfies five factors that are often used by courts in
 20 the Ninth Circuit to evaluate the reasonableness of a requested fee, namely the:
 21 (1) result achieved; (2) risk of litigation; (3) skill required and quality of the work;
 22 (4) customary fees for similar cases; and (5) contingent nature of the fee and
 23 financial burden carried by counsel. *Vizcaino*, 290 F.3d at 1048-50. The Ninth
 24 Circuit has explained that these factors should not be used as a rigid checklist or

25 _____
 26 ⁴ Each lead plaintiff has also endorsed the fee and expense request as being fair
 27 and reasonable. *See* Joint Decl. ¶¶ 114-119; *see also* Exs. 5-7.
 28

1 weighed individually, but, rather, should be evaluated in light of the totality of the
2 circumstances. *Id.* As set forth below, all of the *Vizcaino* factors militate in favor
3 of approving the requested fee.

4 **a. The result achieved**

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

10 Plaintiffs’ Counsel submit that the \$57 million proposed Settlement is an
11 excellent result for the Settlement Class, both quantitatively and when considering
12 the risk of a lesser (or no) recovery if the case proceeded through dispositive
13 motions, class certification, and trial. The \$57 million Settlement compares
14 favorably to other securities fraud settlements. As recently reported by NERA
15 Economic Consulting, the median settlement amount in securities fraud cases in
16 2013 was \$9.1 million. *See* Joint Decl. ¶ 8 (citing Dr. Renzo Comolli & Svetlana
17 Starykh, *Recent Trends in Securities Class Action Litigation: 2013 Full-Year*
18 *Review* (NERA Jan. 21, 2014) (the “NERA Report”) (Ex. 2).

19 Moreover, the Settlement represents a gross recovery of between 12% and
20 26% of Lead Plaintiffs’ consulting damage expert’s estimated range of
21 recoverable damages. *See* Joint Decl. ¶ 9. This percentage of recovery compares
22 very favorably with recoveries in other securities class actions within this Circuit.
23 *See, e.g., McPhail v. First Command Fin. Planning, Inc.*, No. 05cv179-IEG- JMA,
24 2009 WL 839841, at *5 (S.D. Cal. Mar. 30, 2009) (finding a \$12 million
25 settlement recovering 7% of estimated damages was fair and adequate); *In re*
26 *Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) (noting
27 \$13.75 million settlement yielding 6% of potential damages after deducting fees
28

1 and costs was “higher than the median percentage of investor losses recovered in
2 recent shareholder class action settlements”). The recovery also compares
3 favorably to recoveries achieved in cases in other Circuits. *See, e.g., In re Merrill*
4 *Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007
5 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (“The Settlement Fund is
6 approximately \$40.3 million. The settlement thus represents a recovery of
7 approximately 6.25% of estimated damages. This is “at the higher end of the
8 range of reasonableness of recovery in class actions securities litigations.”). The
9 Settlement Amount thus provides a significant percentage of recovery for the
10 Settlement Class.

11 **b. The risks of litigation**

12 The risk of further litigation is also an important factor in determining a fair
13 fee award. *Vizcaino*, 290 F.3d at 1048 (noting “[r]isk is a relevant circumstance”
14 in awarding attorneys’ fees); *Pac. Enters.*, 47 F.3d at 379 (finding that attorneys’
15 fees were justified “because of the complexity of the issues and the risks”). Here:

16 [T]he parties could reasonably conclude that there are serious disputed
17 questions of law and fact that could significantly impact the further
18 litigation and trial of this case. These questions would have been the
19 subject of extensive discovery and are hotly contested. Many of these
20 issues are highly technical and will involve a battle of the experts. . . .

21 Trial would likely have been an expensive, complex and time-consuming
22 process that promised to feature a battle of various experts.

23 *Roeder v. Atl. Richfield Co.*, No. 3:11-CV-00105-RCJ-WGC, 2013 WL 5878432,
24 at *8-9 (D. Nev. Oct. 21, 2013); *see also ATLAS v. Accredited Home Lenders*
25 *Holding Co.*, No. 07-CV-00488-H (CAB), 2009 WL 3698393, at *3 (S.D. Cal.
26 Nov. 4, 2009) (approving settlement where “litigating the complex securities fraud
27 class action to completion would have resulted in substantial delay and expense”).
28

1 As set forth further in Section VI of the Joint Declaration and pages 11-15 of the
2 Final Approval Brief, incorporated herein by reference, there were substantial
3 risks and uncertainties in the Action that required the skill and focus of Plaintiffs’
4 Counsel to bring this matter to a favorable resolution. Indeed, on two occasions
5 the Court granted Defendants’ motions to dismiss, at least a part of, the claims.

6 Although the Complaint survived Defendants’ second motion to dismiss in
7 part, Lead Plaintiffs faced substantial risks in ultimately proving that Defendants’
8 statements and omissions were false and misleading at the time that they were
9 made or occurred. Defendants likely would argue that the alleged
10 misrepresentations regarding webOS PC and printer development were truthful
11 because HP was devoting substantial resources to develop these products and was
12 on track to deliver them on the scale and in the timeframe claimed. *See* Joint
13 Decl. ¶¶ 71-78.

14 Lead Plaintiffs also faced significant risks in proving that the Defendants’
15 alleged misstatements were made with scienter, as required by the federal
16 securities laws. *Id.* ¶¶ 79-83. Defendants have emphatically denied that Lead
17 Plaintiffs have pled, or could prove, that there was an intentional or severely
18 reckless violation of the Exchange Act. And, while the Court did find that certain
19 of Lead Plaintiffs’ claims survived the motion to dismiss directed to the
20 Complaint, it also noted that scienter presented a “close question.” ECF No. 110
21 at 32.

22 In addition, the Settling Parties have asserted significantly different
23 positions regarding loss causation and damages. Joint Decl. ¶¶ 84-91. In that
24 regard, Defendants contend that Lead Plaintiffs and members of the class cannot
25 prove any losses from the alleged fraud because the market did not react
26
27
28

1 negatively to the August 18, 2011 news relating to webOS discontinuation, but did
2 react negatively to other Company announcements made that same day.⁵ See
3 *Nguyen v. Radiant Pharms. Corp.*, No. SACV 11-00406 DOC (MLGx), 2014 WL
4 1802293, at *2 (C.D. Cal. May 6, 2014) (approving settlement and noting that
5 “[p]roving and calculating damages required a complex analysis, requiring the
6 jury to parse divergent positions of expert witnesses in a complex area of the law”
7 with “[t]he outcome of that analysis [being] inherently difficult to predict”). Loss
8 causation issues would be vigorously contested at summary judgment and trial
9 which would no doubt involve a battle of the experts over loss causation and
10 damages issues.

11 Accordingly, Lead Plaintiffs faced the possibility of the Court granting
12 Defendants’ anticipated motion for summary judgment and, regardless of who
13 would ultimately be successful at trial, there is no doubt that both sides would
14 have had to present complex and nuanced information to a jury with no certainty
15 as to the outcome. See *In re Omnivision*, 559 F. Supp. 2d at 1047 (noting that the
16 risks of litigation, including the ability to prove loss causation and the risk that
17 Defendants prevail on damages, support the requested fee).⁶

18
19 ⁵ See, e.g., *In re Sci. Atl., Inc. Sec. Litig.*, 754 F. Supp. 2d 1339, 1376 (N.D. Ga.
20 2010) (“[I]n order to defeat summary judgment, plaintiffs in a securities fraud
21 case must present evidence disaggregating the fraud and non-fraud-related causes
of the plaintiff’s loss.”).

22 ⁶ While courts have always recognized that securities class actions carry
23 significant risks, post-PSLRA rulings make it clear that the risk of no recovery
24 (and hence no fee) has increased exponentially. See *In re Ikon Office Solutions,*
25 *Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) (noting that “securities
26 actions have become more difficult from a plaintiffs perspective in the wake of the
27 PSLRA”); see also *Redwen v. Sino Clean Energy, Inc.*, No. CV 11-3936 PA
(SSx), 2013 U.S. Dist. LEXIS 100275, at *19-20 (C.D. Cal. July 9, 2013)
28 (“Courts experienced with securities fraud litigation, ‘routinely recognize that

(continued . . .)

1 If not settled, the Settlement Class in this case faced the substantial risk of
 2 years of litigation with no guarantee of a greater recovery. Plaintiffs' Counsel
 3 achieved a significant result for the Settlement Class in the face of very real risks.
 4 Under these circumstances, the requested fee is fully appropriate.

5 **c. The skill required and the quality of the work**

6 Courts have recognized that the "prosecution and management of a
 7 complex national class action requires unique legal skills and abilities." *In re*
 8 *Heritage Bond Litig.*, No. 02-ML-1475 DT (RCX), 2005 WL 1594389, at *12
 9 (C.D. Cal. June 10, 2005); *see also Vizcaino*, 290 F.3d at 1048. Courts also have
 10 acknowledged the "notorious complexity" of securities class action litigation. *In*
 11 *re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. 02 Civ. 5575 (SWK), 2006
 12 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006).

13 Here, Plaintiffs' Counsel conducted its own initial investigation without the
 14 benefit of any government investigation to formulate its theory of the case and
 15 develop sufficient detail to ultimately defeat Defendants' motion to dismiss the
 16 Complaint. As set forth in the Joint Declaration, the investigation included, *inter*
 17 *alia*, reviewing and analyzing an extensive amount of publicly available
 18 information and data concerning HP and interviewing numerous former Company
 19 employees and other persons with relevant knowledge of the underlying facts.
 20 Joint Decl. ¶¶ 6, 19, 33. Additionally, Plaintiffs' Counsel reviewed more than
 21 300,000 pages of documents produced by the Defendants in connection with the
 22 mediation and worked extensively with Lead Plaintiffs' experts in order to

23
 24 _____
 (... continued)

25 securities class actions present hurdles to proving liability that are difficult for
 26 plaintiffs to clear." (quoting *In re Flag Telecom Holdings*, No. 02-CV-3400 (CM)
 (PED), 2010 U.S. Dist. LEXIS 119702, at *48 (S.D.N.Y. Nov. 8, 2010)).

1 analyze the strengths and weaknesses of the claims asserted in the Action. *Id.* at
2 ¶¶ 7, 20, 53-62, 66-68.

3 The Joint Declaration includes a description of the background and
4 experience of Plaintiffs' Counsel. *See* Joint Decl. ¶¶ 141-43 & Exs. 9, 10, & 11.
5 As that submission demonstrates, Plaintiffs' Counsel have extensive and
6 significant experience in the highly specialized field of securities class action
7 litigation.

8 The quality of opposing counsel is also important in evaluating the quality
9 of the work done by Plaintiffs' Counsel. *See, e.g., Nguyen*, 2014 WL 1802293, at
10 *3 (approving settlement and noting that "Counsel on both sides of this issue are
11 experienced litigators"). Plaintiffs' Counsel were opposed in the Action by
12 Morgan, Lewis & Bockius LLP; Gibson, Dunn & Crutcher, LLP; Munger, Tolles
13 & Olson LLP; Fenwick & West LLP; and Wilson Sonsini Goodrich & Rosati,
14 firms whose reputations for vigorous and effective advocacy on behalf of their
15 clients' interests is well known. Joint Decl. ¶ 144.

16 At every stage of the proceedings, Plaintiffs' Counsel had to perform with a
17 high level of skill, efficiency, and professionalism. In the face of strong
18 opposition from highly respected securities defense firms, and following a
19 thorough investigation, Plaintiffs' Counsel assembled a case that they believed
20 would have succeeded at trial. Moreover, Plaintiffs' Counsel evaluated the merits
21 and risks presented, negotiated a very favorable amount for the Settlement Class,
22 and successfully resolved the litigation. Such quality, efficiency, and dedication
23 should be rewarded.

24 **d. The contingent nature of the fee and the financial burden**
25 **carried by Plaintiffs' Counsel**

26 It has long been recognized that attorneys are entitled to a larger fee when
27 their compensation is contingent in nature. *See Vizcaino*, 290 F.3d at 1048-50; *see*
28 *also In re Omnivision Techs., Inc.*, 559 F. Supp. 2d at 1047 ("The importance of

1 assuring adequate representation for plaintiffs who could not otherwise afford
2 competent attorneys justifies providing those attorneys who do accept matters on a
3 contingent-fee basis a larger fee than if they were billing by the hour or on a flat
4 fee.”); *Eddings*, 2013 WL 3013867, at *6 (awarding fee of 25% of the common
5 fund and noting that “[c]lass counsel took this case on a contingent basis, fronting
6 the expenses, and they have been litigating it for more than three years”).

7 Indeed, there have been many class actions in which plaintiffs’ counsel took
8 on the risk of pursuing claims on a contingency basis, expended thousands of
9 hours and dollars, yet received no remuneration whatsoever despite their diligence
10 and expertise. *See, e.g., In re Oracle Corp. Sec. Litig.*, No. C 01-00988 SI, 2009
11 WL 1709050 (N.D. Cal. June 19, 2009), *aff’d*, 627 F.3d 376 (9th Cir. 2010)
12 (granting summary judgment to defendants after eight years of litigation, and after
13 plaintiff’s counsel incurred over \$6 million in expenses and worked over 100,000
14 hours, representing a lodestar of approximately \$48 million). Plaintiffs’ Counsel
15 are aware of many other hard-fought lawsuits where, because of the discovery of
16 facts unknown when the case was commenced, changes in the law during the
17 pendency of the case, or a decision of a judge or jury following a trial on the
18 merits, excellent professional efforts by members of the plaintiff’s bar produced
19 no fee for counsel. *See, e.g., Joint Decl.* ¶¶ 122-29. As the court in *In re Xcel*
20 *Energy, Inc. Sec., Derivative & ERISA Litig.*, 364 F. Supp. 2d 980 (D. Minn.
21 2005) recognized, “[p]recedent is replete with situations in which attorneys
22 representing a class have devoted substantial resources in terms of time and
23 advanced costs yet have lost the case despite their advocacy.” *Id.* at 994. Even
24 plaintiffs who get past summary judgment and succeed at trial may find a
25 judgment in their favor overturned on appeal or on a post-trial motion.

26 Moreover, securities class actions present unique risks, starting with the
27 PSLRA’s stay of discovery until resolution of the defendants’ motion to dismiss.

28

1 Over one-half of securities class actions are dismissed before ever reaching the
 2 merits. NERA reports that between 2000 and 2013, motions to dismiss were
 3 granted in 48% of securities class actions in which they were filed and the
 4 Plaintiffs voluntarily dismissed in an additional 8% of cases, leaving only 44% of
 5 cases to proceed to discovery. *See* Joint Decl. ¶ 125 (citing NERA Report at 18).

6 Here, because Plaintiffs’ Counsel’s fee was entirely contingent, the only
 7 certainty was that there would be no fee without a successful result and that such
 8 result would only be realized after significant amounts of time, effort, and expense
 9 had been expended. Unlike counsel for the Defendants, who were paid substantial
 10 hourly rates and reimbursed for their out-of-pocket expenses on a current basis,
 11 Plaintiffs’ Counsel have received no compensation for their efforts during the
 12 course of the Action. Indeed, absent this Settlement, there was a sizeable risk that,
 13 at the end of the day, Settlement Class Members, as well as their counsel, would
 14 obtain no recovery. Plaintiffs’ Counsel have risked non-payment of \$335,119.93
 15 in expenses and approximately \$7,525,051.75 in time worked on this matter,
 16 knowing that if its efforts were not successful, no fee would be paid.

17 **e. A 25% fee award is the Ninth Circuit’s benchmark and is**
 18 **comparable to attorneys’ fees awarded in similar cases**

19 In requesting a 25% fee, Plaintiffs’ Counsel seek the benchmark that has
 20 been established by the Ninth Circuit. *Eichen*, 229 F.3d at 1256 (“We have also
 21 established twenty-five percent of the recovery as a ‘benchmark’ for attorneys’
 22 fees calculations under the percentage-of-recovery approach.”)

23 The requested fee is also reasonable compared to fee awards in similarly-
 24 sized securities class action settlements from across the country, including district
 25 courts within the Ninth Circuit:

CASE NAME	ATTORNEYS’ FEES AWARDED	SETTLEMENT AMOUNT
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CASE NAME	ATTORNEYS' FEES AWARDED	SETTLEMENT AMOUNT
<i>In re Tycom Ltd. Sec. Litig.</i> , No. 03-CV-03540 (GEB)(DEA), slip op. at 8 (D.N.J. Aug. 25, 2010)	33⅓%	\$79 million
<i>In re Aetna, Inc. Sec. Litig.</i> , No. CIV. A. MDL 1219, 2001 U.S. Dist. LEXIS 68, at *50 (E.D. Pa. Jan. 4, 2001)	30%	\$82.5 million
<i>In re Bisys Sec. Litig.</i> , No. 04 Civ. 3840, 2007 WL 2049726, at *3 (S.D.N.Y. July 16, 2007)	30%	\$65.9 million
<i>In re Priceline.com, Inc. Sec. Litig.</i> , No. 3:00-CV-1884(AVC), 2007 WL 2115592, at *5 (D. Conn. July 20, 2007)	30%	\$80 million
<i>In re Regions Morgan Keegan Closed-End Fund Litig.</i> , No. 07-cv-02830 SHM dkv, slip op. at 21 (W.D. Tenn. Aug. 5, 2013)	30%	\$62 million
<i>Central Laborers' Pension Fund v. Sirva</i> , No. 04 C-7644, slip op. at 10 (N.D. Ill. Oct. 31, 2007)	29.85%	\$53.3 million
<i>South Ferry LP #2 v. Killinger</i> , No. C04-1599-JCC, slip op. at 9 (W.D. Wash. 2012)	29%	\$41.5 million
<i>Cornwell v. Credit Suisse Grp.</i> , No. 08-cv-03758(VM), slip op. at 2 (S.D.N.Y. July 20, 2011)	27.5%	\$70 million
<i>In re BP Prudhoe Bay Royalty Trust Sec. Litig.</i> , No. C06-1505 MJP, slip op. at 2 (W.D. Wash. June 30, 2009)	27%	\$43.5 million
<i>In re Philip Servs. Corp. Sec. Litig.</i> , No. 98 Civ. 835 (AKH), 2007 WL 959299, at *3 (S.D.N.Y. Mar. 28, 2007)	26%	\$79.75 million
<i>Stanley v. Safeskin Corp.</i> , No. 99CV454 BTM (LSP), slip op. at 9 (S.D. Cal. Apr. 2, 2003)	26%	\$55 million
<i>City of Roseville Emps.' Ret. Sys. v. Micron Tech., Inc.</i> , No. 06-cv-00085-WFD, 2011 WL 1882515, at *1, *7 (D. Idaho Apr. 28, 2011)	25%	\$42 million

CASE NAME	ATTORNEYS' FEES AWARDED	SETTLEMENT AMOUNT
<i>In re Monster Worldwide, Inc. Sec. Litig.</i> , 07-cv-2237 (JSR), 2008 WL 9019514, at *1-2 (S.D.N.Y. Nov. 25, 2008)	25%	\$47.5 million
<i>In re Titan, Inc. Sec. Litig.</i> , No. 04-cv-0676-LAB(NLS), slip op. at 3 (S.D. Cal. Dec. 20, 2005)	25%	\$61.5 million
<i>In re Verisign, Inc. Sec. Litig.</i> , No. C-02-2270-JWC(PVT), slip op. at 1 (N.D. Cal. Apr. 24, 2007)	25%	\$78 million
<i>In re Xcel Energy, Inc. Sec., Derivative & "ERISA" Litig.</i> , 364 F. Supp. 2d 980, 998 (D. Minn. 2005)	25%	\$80 million
<i>Ryan v. Flowserve Corp.</i> , No. 3:03-CV-10769-B, slip op. at 1 (N.D. Tex. May 11, 2010)	25%	\$55 million
<i>Scheiner v. i2 Techs, Inc.</i> , No. 3:01-CV-418-H, 2004 U.S. Dist. LEXIS 28979, at *20 (N.D. Tex. Oct 1, 2004)	25%	\$80 million

As illustrated above, Plaintiffs' Counsel's request for 25% is comparable to fees awarded in similar cases and would be fair and reasonable.

5. Lodestar Cross-Check

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 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). Plaintiffs' Counsel's combined "lodestar" is \$7,525,051.75 through July 25, 2014, meaning that the requested fee represents a reasonable multiplier of 1.89. Ex. 12.

Plaintiffs' Counsel's "lodestar" represents over 13,000 hours of work at current billing rates. With respect to billing rates, Plaintiffs' Counsel submit that

1 the rates billed, ranging from \$975 to \$525 per hour for partners, \$850 to \$550 per
2 hour for “of counsels,” and \$690 to \$350 per hour for other attorneys, are
3 comparable to peer defense-side law firms litigating matters of similar magnitude.
4 Sample defense firm billing rates, gathered from bankruptcy court filings,
5 exceeded these rates in many cases. *See* Joint Decl. ¶ 137 & Ex. 13. Similarly,
6 the National Law Journal’s annual survey of law firm billing rates in 2013 shows
7 that average partner billing rates among the Nation’s largest defense firms ranged
8 from \$930 to \$1,055 per hour and average associate billing rates ranged from
9 \$590 to \$670 per hour. *Id.* & Ex. 14.

10 Additional work will also be required of Plaintiffs’ Counsel on an ongoing
11 basis, including: preparation for, and participation in, the final approval hearing;
12 responding to any additional objections; supervising the claims administration
13 process being conducted by the Claims Administrator, The Garden City Group,
14 Inc. (“GCG”); moving for leave of the Court to distribute the Net Settlement Fund
15 in accordance with the recommendation of GCG; and supervising the distribution
16 of the Net Settlement Fund to Settlement Class Members who have submitted
17 valid proofs of claim. However, Plaintiffs’ Counsel will not seek payment for this
18 work.

19 The Ninth Circuit has recognized that attorneys in common fund cases are
20 frequently awarded a multiple of their lodestar, rewarding them “for taking the
21 risk of nonpayment by paying them a premium over their normal hourly rates for
22 winning contingency cases.” *Vizcaino*, 290 F.3d at 1051 (citation omitted). For
23 example, the district court in *Vizcaino* approved a fee that reflected a multiple of
24 3.65 times counsel’s lodestar. *Id.* The Ninth Circuit affirmed, holding that the
25 district court correctly considered the range of multiples applied in common fund
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1 cases, and noting that a range of lodestar multiples from 1.0 to 4.0 are frequently
 2 awarded. *Id.*;⁷ *see also Steiner v. Am. Broad. Co.*, 248 Fed. App'x. 780, 783 (9th
 3 Cir. 2007) (“this multiplier [of 6.85] falls well within the range of multipliers that
 4 courts have allowed”). Here, Plaintiffs’ Counsel’s request for a multiple of 1.89 is
 5 readily within this range.

6 **6. Reaction of the Settlement Class**

7 The Court-approved Notice was sent to more than 800,000 potential
 8 Settlement Class Members and the Court-approved Summary Notice was
 9 published in *The Wall Street Journal* and transmitted over *PR Newswire*. *See*
 10 Joint Decl. ¶¶ 100-01, 160; Affidavit Regarding (A) Mailing of the Notice and
 11 Proof of Claim Form; (B) Publication of Summary Notice; (C) Website and
 12 Telephone Helpline; and (D) Report on Requests for Exclusions Received to Date,
 13 dated August 8, 2014, Ex. 3 ¶¶ 3-6. Although the objection deadline will not run
 14 until August 25, 2014, to date no objections to the requested amount of attorneys’
 15 fees and expenses have been received. Courts have noted that a low level of
 16 objections is a “rare phenomenon,” *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294,
 17 305 (3d Cir. 2005), and this Circuit has held that a small number of objections will
 18 not stand in the way of approval of a reasonable fee, *see In re Mego Fin. Corp.*

21
 22 ⁷ Furthermore, “[i]t is an established practice in the private legal market to reward
 23 attorneys for taking the risk of nonpayment by paying them a premium over their
 24 normal hourly rates for winning contingency cases. *See Richard Posner,*
 25 *Economic Analysis of Law* § 21.9, at 534-35 (3d ed. 1986). Contingent fees that
 26 may far exceed the market value of the services if rendered on a non-contingent
 27 basis are accepted in the legal profession as a legitimate way of assuring
 28 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.

1 *Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000); *Marshall v. Holiday Magic, Inc.*,
2 550 F.2d 1173, 1178 (9th Cir. 1977).⁸

3 **B. Plaintiffs’ Counsel’s Expenses Are Reasonable And Were**
4 **Necessarily Incurred To Achieve The Benefit Obtained**

5 Plaintiffs’ Counsel have incurred expenses in an aggregate amount of
6 \$335,119.93 in prosecuting the Action. These expenses are outlined in counsel’s
7 declarations submitted to the Court concurrently herewith. Joint Decl. Exs. 9, 10
8 & 11.

9 As the *Vincent* court noted, “[a]ttorneys who created a common fund are
10 entitled to the reimbursement of expenses they advanced for the benefit of the
11 class.” *Vincent v. Reser*, No. 11-03572 (CRB), 2013 WL 621865, at *5 (N.D. Cal.
12 Feb. 19, 2013). In assessing whether counsel’s expenses are compensable in a
13 common fund case, courts look to whether the particular costs are of the type
14 typically billed by attorneys to paying clients in the marketplace. *Harris v.*
15 *Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (“Harris may recover as part of the
16 award of attorney’s fees those out-of-pocket expenses that ‘would normally be
17 charged to a fee paying client.’”) (citation omitted).

18 Here, the expenses sought by Plaintiffs’ Counsel are of the type that are
19 routinely charged to hourly paying clients and, therefore, should be reimbursed
20 out of the common fund. *See Redwen*, 2013 U.S. Dist. LEXIS 100275, at *32
21 (reimbursing “expenses for mediation fees, copying, telephone calls, expert
22 expenses, research costs, travel, postage, messengers, and filing fees.”); *Barbosa*
23 *v. Cargill Meat Solutions Corp.*, No. 1:11-cv-00275-SKO, 2013 WL 3340939, at

24
25 ⁸ Plaintiffs’ Counsel will address objections to the request for attorneys’ fees and
26 expenses, if any, in their reply papers, which will be filed with the Court by
27 September 8, 2014.
28

1 *22 (E.D. Cal. July 2, 2013) (noting that “travel, mediation fees, photocopying,
2 [a] private investigator to locate missing Class Members, and delivery and mail
3 charges” are “routinely reimbursed.”) With respect to expert expenses, some
4 courts have also considered whether the expert’s work was “‘crucial or
5 indispensable’ to the litigation at hand.” *In re Immune Response Sec. Litig.*, 497
6 F. Supp. 2d 1166, 1178 (S.D. Cal. 2007) (citation omitted).

7 The main expense here, totaling approximately \$130,000, relates to work
8 performed by Plaintiffs’ Counsel’s experts. As discussed in the Joint Declaration,
9 the facts and complexity of this case required Lead Plaintiffs to utilize experts in
10 the fields of computer hardware and software, loss causation, and damages. Joint
11 Decl. ¶¶ 66-68. Specifically, the expert retained on the issues of damages and loss
12 causation performed extensive analyses in connection with the mediation and the
13 Plan of Allocation. *Id.* ¶ 68.

14 Co-Lead Counsel also were required to travel to Southern California from
15 New York and South Carolina in connection with the motions to dismiss hearings,
16 the mediation session, the Preliminary Approval Hearing, and the Final Approval
17 Hearing. Such expenses are reimbursable. *See In re Toys R Us FACTA Litig.*,
18 295 F.R.D. 438, 469 (C.D. Cal. 2014) (“Expenses such as reimbursement for
19 travel . . . are typically reimbursable) (citation and internal quotation marks
20 omitted). Courts also routinely approve reimbursements for the expenses
21 associated with mediation. *See, e.g., Franco v. Ruiz Food Prods., Inc.*, No. 1:10-
22 cv-02354-SKO, 2012 WL 5941801, at *22 (E.D. Cal. Nov. 27, 2012) (noting that
23 mediation fees are among the “types of fees” that are “routinely reimbursed”).

24 The expenses here also include the costs of computerized research. These
25 are the charges for computerized factual and legal research services such as
26 LEXIS/Nexis and Westlaw. It is standard practice for attorneys to use
27 LEXIS/Nexis and Westlaw to assist them in researching legal and factual issues
28

1 and reimbursement is proper. *In re Immune Response*, 497 F. Supp. 2d at 1178.
2 In approving expenses for computerized research, the court in *Gottlieb v. Wiles*,
3 150 F.R.D. 174, 186 (D. Colo. 1993), *rev'd and remanded on other grounds sub*
4 *nom*, *Gottlieb v. Barry*, 43 F.3d 474, 484 (10th Cir. 1994), underscored the time-
5 saving attributes of computerized research as a reason reimbursement should be
6 encouraged. The court also noted that fee-paying clients reimburse counsel for
7 computerized legal and factual research. *Id.*

8 In sum, Plaintiffs' Counsel's expenses, in an aggregate amount of
9 \$335,119.93, were reasonably and necessarily incurred in the prosecution of the
10 Action and should be approved.

11 **C. Lead Plaintiffs Should Be Reimbursed For Their**
12 **Reasonable Lost Wages**

13 The PSLRA, 15 U.S.C. § 78u-4(a)(4), limits a class representative's
14 recovery to an amount "equal, on a per share basis, to the portion of the final
15 judgment or settlement awarded to all other members of the class," but also
16 provides that "[n]othing in this paragraph shall be construed to limit the award of
17 reasonable costs and expenses (including lost wages) directly relating to the
18 representation of the class to any representative party serving on behalf of a
19 class." Here, as explained in their respective declarations, attached as Exhibits 5-
20 7 to the Joint Declaration, Lead Plaintiffs are seeking the collective amount of
21 approximately \$13,546.85 in lost wages related to their active participation in the
22 Action.⁹

23 ⁹ This total is broken down as follows: Arkansas Teacher Retirement System
24 \$5,654.61; Labourers' Pension Fund of Central and Eastern Canada \$2,922.24;
25 and Union Asset Management Holding AG \$4,970.00. Due to scheduling and
26 travel issues, the LIUNA Funds are regrettably unable to submit their declaration
27 concerning their request for reimbursement with this filing. Co-Lead Counsel will
28 file the declaration with the Court promptly upon its finalization.

1 Many cases have approved reasonable payments to compensate class
2 representatives for the time and effort devoted by them on behalf of a class. For
3 example, in *In re Marsh & McLennan Co. Inc. Securities Litigation*, No. 04-cv-
4 08144 (CM), 2009 WL 5178546 (S.D.N.Y. Dec. 23, 2009), the court awarded
5 \$144,657 to the New Jersey Attorney General’s Office and \$70,000 to the Ohio
6 Funds, which was requested “to compensate them for their reasonable costs and
7 expenses incurred in managing this litigation and representing the Class.” *Id.* at
8 *21. The court held that their efforts were “precisely the types of activities that
9 support awarding reimbursement of expenses to class representatives.” *Id.*; *see*
10 *also In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510(CPS)(SMG), 2007 WL
11 2743675, at *18-19 (E.D.N.Y. Sept. 18, 2007) (approving \$10,000 award,
12 representing 25 hours at \$300 per hour, plus other time); *Nguyen*, 2014 WL
13 1802293, at *11-12 (awarding \$2,000 each to three lead plaintiffs and finding that
14 such an award “properly reflects the benefits that the class representatives
15 achieved for the class and the representatives’ personal sacrifices”); *McPhail*.
16 2009 WL 839841, at *8 (approving awards to six class representatives ranging
17 from \$923.20 to \$10,422.30 and noting that “the requested reimbursement is
18 consistent with payments in similar securities cases”); *In re Infospace, Inc.*, 330 F.
19 Supp. 2d 1203, 1216 (W.D. Wash. 2004) (awarding \$5,000 to one lead plaintiff
20 and \$6,600 to another lead plaintiff). As explained in one decision, courts “award
21 such costs and expenses to both reimburse named plaintiffs for expenses incurred
22 through their involvement with the action and lost wages, as well as provide an
23 incentive for such plaintiffs to remain involved in the litigation and incur such
24 expenses in the first place.” *Hicks v. Stanley*, No. 01 Civ. 10071(RJH), 2005 WL
25 2757792, at *10 (S.D.N.Y. Oct. 24, 2005).

26 Plaintiffs’ Counsel and Lead Plaintiffs respectfully submit that the amounts
27 sought here are eminently reasonable based on the requesting parties’ active
28

1 involvement in the Action from inception to settlement. *See* Joint Decl. ¶¶ 153-59
2 & Exs. 5-7. As such, these requests should be granted in their entirety.

3 **IV. CONCLUSION**

4 Plaintiffs’ Counsel have litigated this case with creativity and skill and have
5 produced an exceptional result for the Settlement Class. Plaintiffs’ Counsel
6 respectfully request that they be awarded fees in the amount of 25% of the
7 Settlement Fund and be reimbursed for the litigation expenses incurred in
8 prosecuting and settling the Action in the amount of \$335,119.93, together with
9 accrued interest. Plaintiffs’ Counsel also respectfully request reimbursement on
10 behalf of Lead Plaintiffs for their reasonable lost wages under the PSLRA.

11 Dated: August 11, 2014

Respectfully submitted,

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13 By: /s/ Jonathan Gardner

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2014, 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 email addresses denoted on the attached Electronic Mail Notice 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 August 11, 2014.

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