**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEVADA**

| In re: SPECTRUM PHARMACEUTICALS, INC., SECURITIES LITIGATION | Case No. 2:13-cv-00433-LDG (CWH)<br>Base File<br><br>CLASS ACTION |
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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND PAYMENT OF EXPENSES**

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## PRELIMINARY STATEMENT

Lead Counsel Labaton Sucharow LLP ("Labaton Sucharow" or "Lead Counsel"), on behalf of itself and The O'Mara Law Firm, P.C. (collectively, "Plaintiff's Counsel"), respectfully submits this memorandum of points and authorities in support of its application for an award of attorneys' fees and payment of litigation expenses.[1]

As detailed in the Stipulation, Spectrum Pharmaceuticals, Inc. ("Spectrum" or the "Company"), Rajesh C. Shrotriya, Brett L. Scott, and Joseph Kenneth Keller (collectively, "Defendants") have agreed to pay or caused to be paid $7 million to secure a settlement of the claims alleged in this proposed class action (the "Settlement"). This recovery is a very favorable result for the Settlement Class when evaluated in light of all the relevant circumstances – most notably the complicated nature of the Action and the risks of pursuing the Action through summary judgment and trial. The Settlement was achieved following vigorous investigative efforts that allowed Lead Plaintiff's claims to survive a motion to dismiss and the development of Lead Plaintiff's claims to a point where Lead Counsel could engage in meaningful settlement negotiations.

Plaintiff's Counsel have not received any compensation or reimbursement for their successful prosecution of this case, which required over 3,500 hours of billable time. Lead Counsel respectfully requests that Plaintiff's Counsel be awarded an attorneys' fee of 25% of the Settlement Fund, which will include any accrued interest, and that they be reimbursed out of the Settlement Fund for litigation expenses in the amount of $73,439.66, plus any accrued interest. This 25% fee request is the Ninth Circuit's "benchmark" for contingent fees. *See, e.g., In re*

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[1] All capitalized terms not otherwise defined herein shall have the same meanings set forth and defined in the Stipulation and Agreement of Settlement, dated as of November 19, 2015 (the "Stipulation", ECF No. 140-1).

*Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) ("Twenty-five percent is the 'benchmark' that district courts should award in common fund cases."). The requested fee amount has also been approved by Lead Plaintiff, Arkansas Teacher Retirement System. *See* Ex. 1 ¶¶ 2, 6.[2] In addition, the expenses incurred by Plaintiff's Counsel in connection with the prosecution of the Action were both reasonable and necessary. As such, the requested expense amount should be awarded in full.

**ARGUMENT**

## I. LEAD COUNSEL'S REQUEST FOR ATTORNEYS' FEES OF 25% OF THE COMMON FUND SHOULD BE APPROVED

### A. Lead Counsel Is Entitled to an Award of Attorneys' Fees from the Common Fund

It is well settled that attorneys who represent a class and achieve a benefit for class members are entitled to a reasonable fee as compensation for their services. The Supreme Court has 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); *see also Vincent v. Reser*, No. C-11-03572 CRB, 2013 WL 621865, at *4 (N.D. Cal. Feb. 19, 2013) (quoting *Boeing*, 444 U.S. at 478). Indeed, the Ninth Circuit has expressly reasoned that "a private plaintiff, or his attorney, whose efforts

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[2] All exhibits referenced herein are annexed to the Declaration of Jonathan Gardner in Support of Lead Plaintiff's Motion for Final Approval of Proposed Class Action Settlement and Plan of Allocation and Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses ("Gardner Declaration" or "Gardner Decl."). For clarity, citations to exhibits that themselves have attached exhibits, will be referenced herein as "Ex.__-__." The first numerical reference refers to the designation of the entire exhibit attached to the Gardner Declaration and the second numerical reference refers to the exhibit designation within the exhibit itself.

The Gardner Declaration is an integral part of this motion and is incorporated herein by reference. For the sake of brevity, the Court is respectfully referred to the Gardner Declaration for, *inter alia*, a detailed description of the allegations and claims, the procedural history of the Action, the risks faced by the Settlement Class in pursuing litigation, the negotiations that led to a settlement, and a description of the services provided by Lead Counsel.

create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees." *Vincent v. Hughes Air West, Inc*., 557 F.2d 759, 769 (9th Cir. 1977). The purpose of this rule, known as the "common fund doctrine," is to prevent unjust enrichment so that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Wash. Pub. Power Supply Sys. Sec. Litig. (WPPSS*), 19 F.3d 1291, 1300 (9th Cir. 1994), *aff'd in part*, *Class Plaintiffs v. Jaffe & Schlesinger P.A*., 19 F.3d 1306 (9th Cir. 1994).

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

In *Blum v. Stenson*, 465 U.S. 886 (1984), the Supreme Court recognized that under the common fund doctrine a reasonable fee may be based "on a percentage of the fund bestowed on the class. . . ." *Id*. at 900 n.16. In this Circuit, a district court has discretion to award fees in common fund cases based on either the so-called lodestar/multiplier method or the percentage-of-the-fund method. *WPPSS*, 19 F.3d at 1296. However, 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). Other circuits have similarly endorsed the percentage-of-recovery method.

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

> ***The consensus that the contingent percentage approach creates a closer harmony of interests between class counsel and absent plaintiffs than the lodestar method is***

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

Charles Silver, Class Actions In The Gulf South Symposium, *Due Process and the Lodestar Method: You Can't Get There From Here*, 74 Tul. L. Rev. 1809, 1819-20 (2000) (emphasis added and footnotes omitted). This is particularly appropriate in cases under the Private Securities Litigation Reform Act of 1995 ("PSLRA") where Congress recognized the propriety of the percentage method of fee awards. *See* 15 U.S.C. § 78u-4(a)(6) ("Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class".).

### C. A Fee of 25% of the Settlement Fund Is Reasonable

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. Enters*., 47 F.3d at 379 (emphasis added); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000) (reaffirming 25% benchmark); *see also Int'l Brotherhood of Elec. Workers Local 697 Pension Fund v. Int'l Game Tech., Inc.,* No. 3:09-cv-00419-MMD-WGC, 2012 WL 5199742, at *4 (D. Nev. Oct. 19, 2012) ("Twenty-five percent should be the 'bench mark' percentage, but the district court may adjust upward or downward for the circumstances in each case.") (citation omitted); *Evans v. Linden Research, Inc*., No. C-11-01078 (DMR), 2014 WL 1724891, at *6 (N.D. Cal. Apr. 29, 2014) ("25% of the recovery obtained is the benchmark in the Ninth Circuit.") (citing *Vizcaino*, 290 F.3d at 1047); *Dubeau v. Sterling Sav. Bank*, No. 12-CV-

01602-CL, 2013 WL 4591034, at *3 (D. Or. Aug. 28, 2013) (same); *Eddings v. Health Net, Inc.*, No. CV 10-1744-JST (RZX), 2013 WL 3013867, at *5 (C.D. Cal. June 13, 2013) (same); *In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2013 WL 1120801, at *9 (N.D. Cal. Mar. 18, 2013) (same).

The guiding principle in this Circuit is that a fee award be "reasonable under the circumstances." *WPPSS*, 19 F.3d at 1296 (citation and emphasis omitted). In employing the percentage method, courts may perform a lodestar cross-check to confirm the reasonableness of the requested fee. *Vizcaino*, 290 F.3d at 1047 (affirming use of percentage method and applying the lodestar method as a cross-check). Here, in view of the result obtained, the contingent fee risk, the lodestar cross-check, and other relevant factors, an award of 25% of the recovery obtained for the Settlement Class is appropriate under either analysis.

### D. Analysis Under the Percentage Method and the *Vizcaino* Factors Justifies a Fee Award of 25% in this Case

Lead Counsel's request for a fee award of 25% of the Settlement Fund is eminently reasonable. The fee request readily satisfies the five factors that are often used by courts in the Ninth Circuit to evaluate the reasonableness of a requested fee: (1) result achieved; (2) risk of litigation; (3) skill required and quality of the work; (4) awards made in 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) (noting the "most critical factor is the degree of success obtained"); *Vizcaino*, 290 F.3d at 1048 n.7 (noting "[e]xceptional results are a relevant circumstance" in awarding attorneys' fees). Lead Counsel submit that the $7 million proposed Settlement is an excellent result for the Settlement Class, both quantitatively and when considering the risk of a lesser (or no) recovery if the case proceeded through dispositive motions, class certification, and trial.

As an initial matter, the $7 million Settlement is in-line with other securities fraud settlements. As recently reported by NERA Economic Consulting, the median settlement amount in securities fraud cases in 2015 was $7.3 million. *See* Gardner Decl. ¶ 6 (citing Svetlana Starykh and Stefan Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review* (NERA Jan. 2016) (Ex. 2). Moreover, the Settlement represents a gross recovery of between 6% and 9% of Lead Plaintiff's consulting damage expert's best case scenario of recoverable damages, assuming Lead Plaintiff establishes liability for the entire Class Period and assuming 100% of the stock drop in the alleged corrective disclosure date is found to be attributable to the alleged fraud (*see* Gardner Decl. ¶¶ 7, 72; Approval Brief §I.B.4.) and 16% to 20% of Defendants' estimated range of recoverable damages, assuming that liability and loss causation were proven (*see id.* ¶ 72; §I.B.4.).

This percentage of recovery compares very favorably with recoveries in other securities class actions within the Ninth Circuit. *See, e.g., Int'l Brotherhood of Elect. Workers Local 697 Pension Fund,* 2012 WL 5199742, at *3 (approving $12.5 million settlement recovering about 3.5% of the maximum damages that plaintiffs believe could be recovered at trial and noting that the amount is within the median recovery in securities class actions settled in the last few years);

*McPhail v. First Command Fin. Planning, Inc.*, No. 05cv179-IEG- JMA, 2009 WL 839841, at *5 (S.D. Cal. Mar. 30, 2009) (finding a $12 million settlement recovering 7% of estimated damages was fair and adequate); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) (noting $13.75 million settlement yielding 6% of potential damages after deducting fees and costs was "higher than the median percentage of investor losses recovered in recent shareholder class action settlements"). The recovery also compares favorably to recoveries achieved in cases in other Circuits. *See, e.g., In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig*., No. 02 MDL 1484 (JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) ("The Settlement Fund is approximately $40.3 million. The settlement thus represents a recovery of approximately 6.25% of estimated damages. This is "at the higher end of the range of reasonableness of recovery in class actions securities litigations."). The Settlement Amount thus provides a very favorable percentage of recovery for the Settlement Class.

**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 (noting "[r]isk is a relevant circumstance" in awarding attorneys' fees); *Pac. Enters.*, 47 F.3d at 379 (finding that attorneys' fees were justified "because of the complexity of the issues and the risks"); *see also ATLAS v. Accredited Home Lenders Holding Co.*, No. 07-CV-00488-H (CAB), 2009 WL 3698393, at *3 (S.D. Cal. Nov. 4, 2009) (approving settlement where "litigating the complex securities fraud class action to completion would have resulted in substantial delay and expense"). As set forth further in Section VI. of the Gardner Declaration, there were substantial risks and uncertainties in the Action that required the skill and focus of Lead Counsel to bring this matter to a favorable resolution.

Although the Complaint survived Defendants' motion to dismiss, Lead Plaintiff faced substantial risks in ultimately proving that Defendants' statements and omissions were false and

misleading at the time that they were made or occurred. Defendants' main and powerful defenses would be that Spectrum did not make misleading statements regarding the state of the Fusilev business because Fusilev end-user demand remained strong during the Class Period. *See* Gardner Decl. ¶¶ 44-47. Countering this theme at summary judgment and trial would have required nuanced evidence regarding the meaning and interpretation of end-user demand data in connection with other evidence regarding Fusilev sales and sales cycles. There were significant hurdles to Lead Plaintiff's ability to convince a fact-finder of this key element of Lead Plaintiff's claims.

Lead Plaintiff also faced challenges in proving that Defendants' alleged misstatements were made with scienter, as required by the federal securities laws. *Id*. ¶¶ 48-50. Defendants would have denied that Lead Plaintiff could prove that there was an intentional or severely reckless violation of the Exchange Act. In particular, Defendants would have argued that Lead Plaintiff could not prove scienter because Defendants would show that they sincerely and reasonably believed that Fusilev demand was not being displaced by leucovorin and that their optimism in the prospects for Fusilev were well-grounded and based on a number facts, including, for example, that there are clinical advantages to using Fusilev given that Fusilev was purer in form than leucovorin. *See id*. ¶ 49. Additionally, relying on *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S.Ct. 1318, 1325-28 (2015), Defendants would maintain that its belief in the success of Fusilev was sincerely held and supported by data in their possession and therefore, Lead Plaintiff would fail to satisfy *Omnicare*. *See also* Approval Brief §I.B.1.(b).

In addition, the Parties have asserted significantly different positions regarding loss causation and damages. Gardner Decl. ¶¶ 51-56. Principally, Defendants would likely have

asserted that, *inter alia*, because Lead Plaintiff's fraud theory is based on an undisclosed material decline in end-user demand at the time of the alleged misstatements, Lead Plaintiff's damages calculation must be based on a class period that begins *during* a material decline in end-user demand. Defendants would argue that the first seven weeks of the Class Period saw end-user demand climb to an all-time high, and, therefore, the Class Period begins too early. According to Defendants, the Class Period should begin on the first-alleged misstatement occurring after the first date on which a material declining trend in end-user demand can be identified. Therefore, Defendants would likely assert that the Class Period should begin either on December 12, 2012 or January 9, 2013 (the first alleged misstatements after the dips in demand on November 23, 2012 or December 28, 2012, respectively). *Id.* ¶ 53. Defendants would also have asserted that the alleged corrective disclosure did not reveal any misrepresentations or omissions. If this position prevailed, the class claims would have been dismissed entirely. *See Nguyen v. Radient Pharms. Corp.*, No. SACV 11-00406 DOC (MLGx), 2014 WL 1802293, at *2 (C.D. Cal. May 6, 2014) (approving settlement and noting that "[p]roving and calculating damages required a complex analysis, requiring the jury to parse divergent positions of expert witnesses in a complex area of the law" with "[t]he outcome of that analysis [being] inherently difficult to predict"). Loss causation and damages issues would be vigorously contested at summary judgment and trial which would no doubt involve a battle of the experts.

Accordingly, Lead Plaintiff faced the possibility of the Court granting Defendants' anticipated motion for summary judgment and, regardless of who would ultimately be successful at trial, there is no doubt that both sides would have had to present complex and nuanced information to a jury with no certainty as to the outcome. *See In re Omnivision*, 559 F. Supp. 2d

at 1047 (noting that the risks of litigation, including the ability to prove loss causation and the risk that Defendants prevail on damages, support the requested fee).[3]

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

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

Courts have recognized that 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) (citation omitted); *see also Vizcaino,* 290 F.3d at 1048. Courts also have acknowledged the "notorious complexity" of securities class action litigation. *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. 02 Civ. 5575 (SWK), 2006 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006).

Here, Lead Counsel conducted its own initial investigation without the benefit of any government investigation or Company restatement or admission to formulate its theory of the *case* and develop sufficient detail to ultimately defeat Defendants' motion to dismiss the Complaint. As set forth in the Gardner Declaration, the investigation included, *inter alia*, reviewing and analyzing an extensive amount of publicly available information and data concerning Spectrum and interviewing 26 former Company employees and other persons with

[3] While courts have always recognized that securities class actions carry significant risks, post-PSLRA rulings make it clear that the risk of no recovery (and hence no fee) has increased exponentially. *See 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) ("Courts experienced with securities fraud litigation, 'routinely recognize that securities class actions present hurdles to proving liability that are difficult for plaintiffs to clear.'" (quoting *In re Flag Telecom Holdings Ltd. Sec. Litig.*, No. 02-CV-3400 (CM) (PED), 2010 WL 4537550, at *17 (S.D.N.Y. Nov. 8, 2010))); *In re Ikon Office Sols. Inc. Sec. Litig*., 194 F.R.D. 166, 194 (E.D. Pa. 2000) (noting that "securities actions have become more difficult from a plaintiffs perspective in the wake of the PSLRA").

relevant knowledge of the underlying facts. Gardner Decl. ¶ 17. Additionally, Lead Counsel reviewed approximately 31,000 pages of core documents produced by Defendants in connection with the mediation and worked extensively with Lead Plaintiff's loss causation and damages expert in order to analyze the strengths and weaknesses of the claims asserted in the Action. *Id.* ¶¶ 3, 7, 30-32, 55. Much of the information analyzed and the facts underlying the claims were grounded on complex scientific and financial information. Lead Counsel was required to develop not just expertise about Spectrum's financial prospects but expertise in the area of oncology pharmaceuticals and drug marketability and sales cycles. *Id.* ¶ 93.

Lead Counsel has extensive and significant experience in the highly specialized field of securities class action litigation and is a known leader in the field. *See, e.g.*, *In re Am. Int'l Grp., 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); *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); *In re Schering-Plough Corp. / ENHANCE Securities Litigation*, Civil Action No. 08-397 (DMC) (JAD) (D.N.J.) (representing Massachusetts Pension Reserves Investment Management Board and reaching a settlement of $473 million); Gardner Decl. ¶¶ 91-92; Ex. 4–C. Lead Counsel has not only used its knowledge, skill, and efficiency from prior cases but also developed specific expertise in the issues presented here to overcome the obstacles presented by Defendants. The

favorable Settlement is attributable in substantial part to the diligence, determination, hard work, and skill of Lead Counsel, who developed, litigated, and successfully negotiated the Settlement.

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

It has long been recognized that attorneys are entitled to a larger fee when their compensation is contingent in nature. *See Vizcaino*, 290 F.3d at 1048-50; *In re Omnivision*, 559 F. Supp. 2d at 1047 ("The importance of assuring adequate representation for plaintiffs who could not otherwise afford competent attorneys justifies providing those attorneys who do accept matters on a contingent-fee basis a larger fee than if they were billing by the hour or on a flat fee."); *see also Int'l Brotherhood of Electrical Workers Local 697 Pension Fund*, 2012 WL 5199742, at *4 (awarding fee of 25% of the common fund and noting that "[p]laintiffs' counsel shouldered the risk of non-payment by taking the class action suit on a contingency fee basis."). The Supreme Court has emphasized that private securities actions such as this provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (citation omitted); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (noting that the court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions).[4]

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

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 and dollars, yet received no remuneration whatsoever despite their diligence and expertise. *See, e.g.*, *In re Oracle Corp. Sec. Litig.*, No. C 01-00988 SI, 2009 WL 1709050 (N.D. Cal. June 19, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010) (granting summary judgment to defendants after eight years of litigation, and after plaintiff's counsel incurred over $6 million in expenses and worked over 100,000 hours, representing a lodestar of approximately $48 million). Lead Counsel is aware of many other hard-fought lawsuits where, because of the discovery of facts unknown when the case was commenced, changes in the law during the pendency of the case, or a decision of a judge or jury following a trial on the merits, excellent professional efforts by members of the plaintiff's bar produced no fee for counsel. *See, e.g*, *Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1998) (reversing plaintiffs' jury verdict for securities fraud); *Robbins v. Koger Props., Inc*., 116 F.3d 1441 (11th Cir. 1997) (reversing $81 million jury verdict and dismissing case with prejudice); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning plaintiffs' verdict obtained after two decades of litigation); Gardner Decl. ¶ 81. As the court in *In re Xcel Energy, Inc. Securities, Derivative & ERISA Litigation,* 364 F. Supp. 2d 980 (D. Minn. 2005) recognized, "[p]recedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy." *Id.* at 994. Even plaintiffs who get past summary judgment and succeed at trial may find a judgment in their favor overturned on appeal or on a post-trial motion.

Here, because Plaintiff's 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. Unlike counsel for the

Defendants, who were paid substantial hourly rates and reimbursed for their out-of-pocket expenses on a current basis, Plaintiff's Counsel have received no compensation for their efforts during the course of the Action. Indeed, absent this Settlement, there was a sizeable risk that, at the end of the day, Settlement Class Members, as well as their counsel, would obtain no recovery. Plaintiff's Counsel have risked non-payment of $73,439.66 in expenses and $2,088,443.00 in time worked on this matter, knowing that if its efforts were not successful, no fee would be paid.

#### 5. A 25% Fee Award is the Ninth Circuit's Benchmark and Is Comparable to Attorneys' Fees Awarded in Similar Cases

In requesting a 25% fee, Lead Counsel seek the benchmark that has been established by the Ninth Circuit. *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.").

The requested fee is also reasonable when compared to fee awards in similarly-sized securities class action settlements from district courts within the Ninth Circuit. *See*, *e.g.*, *Int'l Brotherhood of Electrical Workers Local 697 Pension Fund*, 2012 WL 5199742, at *4 (awarding fees of 25% of $12.5 million settlement); *In re Sunterra Corp. Sec. Litig*., No. 2:06-cv-00844-BES-RJJ, slip op. at 1 (D. Nev. Feb. 10, 2009) (awarding fees of 25% of $8 million settlement) (submitted herewith as part of compendium of unpublished opinions, Ex. 8); *In re Alliance Gaming Corp. Sec. Litig*., No. CV-S-04-0821-BES-PAL, slip op. at 1 (D. Nev. June 28, 2007) (awarding fees of 25% of $15.5 million settlement) (Ex. 8); *Rieckborn v. Velti PLC*, No. 13-CV-03889-WHO, 2015 WL 468329, at *21-22 (N.D. Cal. Feb. 3, 2015) (awarding fees of 25% of $9.5 million settlement); *In re Beckman Coulter, Inc. Sec. Litig*., No. 8:10-cv-1327-JST (RNBx), slip op. at 3 (C.D. Cal. Mar. 1, 2012) (awarding fees of 25% of $5.5 million settlement) (Ex. 8);

*In re Nuvelo, Inc. Sec. Litig*., No. C07-0405 CRB, 2011 WL 2650592, at *3 (N.D. Cal. July 6, 2011) (awarding fees of 30% of $8.9 million settlement); *In re Infineon Techs. AG Sec. Litig.*, No. C-04-4156-JW, slip op. at 1 (N.D. Cal. Nov. 2, 2011) (awarding fees of 27% of $6.2 million settlement) (Ex. 8); *City of Westland Police and Fire Ret. Sys. v. Sonic Sols.*, No. C 07-05111-CW, slip op. at 1 (N.D. Cal. Apr. 8, 2010) (awarding fees of 25% of $5 million settlement) (Ex. 8); *In re Gilead Sciences Sec. Litig.*, No. C-03-4999-SI, slip op. at 1 (N.D. Cal. Nov. 5, 2010) (awarding fees of 30% of $8.25 million settlement) (Ex. 8).

Accordingly, it is respectfully submitted that the attorneys' fee requested here is well within the range of fees awarded by district courts within the Ninth Circuit in comparable securities settlements.

**6. Reaction of the Settlement Class**

Although not articulated specifically in *Vizcaino*, district courts in the Ninth Circuit also consider the reaction of the class when deciding whether to award the requested fee. *See In re Heritage Bond Litig.*, 2005 WL 1594389, at *15 ("The presence or absence of objections . . . is also a factor in determining the proper fee award."). 15,360 copies of the Court-approved Notice were sent to potential Settlement Class Members and the Court-approved Summary Notice was published in *Investor's Business Daily* and transmitted over *PR Newswire*. *See* Gardner Decl. ¶¶ 39-40, 100; Ex. 3 ¶¶ 3-9. Although the objection deadline will not run until May 23, 2016, to date no objections to the requested amount of attorneys' fees and expenses have been received.[5]

**7. 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 Plaintiff's Counsel's lodestar demonstrates

[5] Lead Counsel will address any objections to the request for attorneys' fees and expenses, if any, in their reply papers, which will be filed with the Court by June 6, 2016.

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).

Plaintiff's Counsel's combined "lodestar" is $2,088,443.00 through May 4, 2016, meaning that the requested fee represents a negative multiplier of .84, or 84% of legal fees. 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 that 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*.;[6] *see also Steiner v. Am. Broad. Co.,* 248 F. App'x. 780, 783 (9th Cir. 2007) ("this multiplier [of 6.85] falls well within the range of multipliers that courts have allowed").

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

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[6] Furthermore, "[i]t is an established practice in the private legal market to reward attorneys for taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning contingency cases. *See* Richard Posner, *Economic Analysis of Law* § 21.9, at 534-35 (3d ed. 1986). Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose." *WPPSS*, 19 F.3d at 1299.

provides additional support for the reasonableness of the fee request.”). Moreover, a negative multiplier, like the negative multiplier here, means that Plaintiff's Counsel are seeking to be paid for only a portion of the hours expended on the Action. *See In re Initial Pub. Offering Sec. Litig*., No. 21 MC 92(SAS), 2011 WL 2732563, at *9 (S.D.N.Y. July 8, 2011) (noting that, with a negative multiplier, “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)).

Plaintiff's Counsel's “lodestar” represents over 3,500 hours of work at current billing rates.[7] With respect to billing rates, Lead Counsel submit that the rates billed, ranging from $375 to $950 per hour for partners, $710 to $775 per hour for “of counsels,” and $335 to $725 per hour for other attorneys, are comparable to peer defense-side law firms litigating matters of similar magnitude. Sample defense firm billing rates, gathered by Labaton Sucharow from bankruptcy court filings nationwide, often exceed these rates. *See* Gardner Decl. ¶ 89; Ex. 7.

Additional work will also be required of Lead Counsel on an ongoing basis, including: preparation for, and participation in, the final approval hearing; responding to any objections; supervising the claims administration process being conducted by the Claims Administrator; moving for leave of the Court to distribute the Net Settlement Fund in accordance with the recommendation of the Claims Administrator; and supervising the distribution of the Net Settlement Fund to Settlement Class Members who have submitted valid proofs of claim. However, Lead Counsel will not seek payment for this work.

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[7] The Supreme Court and other courts have held that the use of current rates is proper since such rates compensate for inflation and the loss of use of funds. *See Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989); *Rutti v. Lojack Corp. Inc*., No. SACV 06-350 DOC JCX, 2012 WL 3151077, at *11 (C.D. Cal. July 31, 2012) (“it is well-established that counsel is entitled to current, not historic, hourly rates”) (citing *Jenkins*, 491 U.S. at 284).

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

Plaintiff's Counsel have incurred expenses in an aggregate amount of $73,439.66 in prosecuting the Action. *See*. Ex. 6. These expenses are outlined in counsel's declarations submitted to the Court concurrently herewith. *See* Ex. 4–B and Ex. 5 ¶ 5.

As the *Vincent* court noted, "[a]ttorneys who created a common fund are entitled to the reimbursement of expenses they advanced for the benefit of the class." *Vincent v. Reser*, No. 11-03572 (CRB), 2013 WL 621865, at *5 (N.D. Cal. Feb. 19, 2013). 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).

Here, the expenses sought by Plaintiff's 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 here relates to work performed by Lead Plaintiff's loss causation and damages expert ($16,307.00) With respect to expert expenses, some courts consider whether 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) (citation omitted). As discussed in the Gardner Declaration, the facts and complexity of this case required Lead Plaintiff to utilize an expert in the field of loss causation and damages. Gardner Decl. ¶¶ 7, 55, 72. Specifically, the expert retained on the issues of damages and loss causation performed extensive analyses in connection with the mediation and the Plan of Allocation. *Id.* ¶¶ 7, 55, 63-64, 66, 72.

Courts also routinely approve reimbursements for the expenses associated with mediation. *See, e.g.*, *Franco v. Ruiz Food Prods., Inc.*, No. 1:10-cv-02354-SKO, 2012 WL 5941801, at *22 (E.D. Cal. Nov. 27, 2012) (noting that mediation fees are among the "types of fees" that are "routinely reimbursed"); *In re Immune Response*, 497 F. Supp. 2d at 1178 (approving mediation costs because they were "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"). As detailed in the Gardner Declaration, the work done by Mr. Jed D. Melnick, Esq. of JAMS, which totaled $12,803.64, was crucial to the resolution of the Action. *See* Gardner Decl. ¶¶ 5, 33-34.

The expenses here also include the costs of computerized research ($11,676.30). 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. *See In re Immune Response*, 497 F. Supp. 2d at 1178. 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, 484 (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 reimburse counsel for computerized legal and factual research. *Id.*

Lead Counsel was also required to travel in connection with the motion to dismiss hearing, the mediation, and the Final Approval Hearing. Such expenses are reimbursable. *See In re Immune Response*, 497 F. Supp. at 1177 (reimbursement for travel expenses . . . is within the broad discretion of the Court).

In sum, Plaintiff's Counsel's expenses, in an aggregate amount of $73,439.66, were reasonably and necessarily incurred in the prosecution of the Action and should be approved.

**CONCLUSION**

For the foregoing reasons, Lead Counsel respectfully requests the Court award attorneys' fees of 25% of the Settlement Fund and payment of litigation expenses in the amount of $73,439.66, plus accrued interest at the same rate as is earned by the Settlement Fund. A proposed order will be submitted with Lead Counsel's reply submission on or before June 6, 2016, after the deadlines for requests for exclusion from the Settlement Class and objections have passed.

Dated: May 9, 2016

Respectfully submitted,

By: *_/s/ Jonathan Gardner_*

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*Local Counsel for Lead Plaintiff and the Class*

## CERTIFICATE OF SERVICE

I hereby certify that I am a member of Labaton Sucharow LLP, and on the 9th day of May 2016, I caused to be electronically filed Memorandum of Points and Authorities In Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses with the Clerk of Court using ECF. Accordingly, I also certify that the Memorandum was served on counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

*/s/ Jonathan Gardner*
Jonathan Gardner