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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE BECKMAN COULTER, INC. SECURITIES LITIGATION

Case No. 8:10-cv-1327-JST (RNBx)

LEAD COUNSEL'S UNOPPOSED MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Judge: Hon. Josephine Staton Tucker
Date: February 27, 2012
Time: 10:00 a.m.
Courtroom: 10A

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In connection with the Court's consideration of final approval of the proposed Settlement in the above-captioned action (the "Action")[1], Labaton Sucharow LLP ("Labaton Sucharow") and Berger & Montague, P.C. ("Berger & Montague"), Court-appointed class counsel ("Lead Counsel"), hereby respectfully submit this Memorandum of Points and Authorities in support of their unopposed motion, pursuant to Rules 23 and 54 of the Federal Rules of Civil Procedure, for entry of an Order that provides: (i) an award of attorneys' fees in the amount of $1,375,000 (*i.e.*, 25% of $5,500,000), plus interest; (ii) reimbursement of $88,928.73 in litigation expenses incurred in successfully prosecuting and resolving this Action, plus interest; and (iii) reimbursement of $3,534.30 in reasonable costs and expenses (including lost wages) directly relating to Lead Plaintiff Arkansas Teacher Retirement System's ("ATRS") representation of the Class, pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §78u-4 (a)(4).

I. SUMMARY OF THE ARGUMENT

As set forth in the Stipulation, defendants Beckman Coulter, Inc. ("Beckman" or the "Company"), Scott T. Garrett and Charles P. Slacik (the "Individual Defendants," and, together with Beckman, "Defendants") and plaintiffs ATRS and Iron Workers District Council of New England Pension Fund ("Iron Workers," and together with ATRS, "Lead Plaintiff") agreed to a settlement of $5 million in cash, with accrued interest (the "Settlement Fund"), and an additional amount, not to exceed $500,000, for the expenses incurred in providing notice to the Class and administering the Settlement ("Notice and Administration Expenses"). If approved, the Settlement will finally resolve and release all

[1] All capitalized terms used herein, unless otherwise defined, have the same meaning as that set forth in the Stipulation of Settlement (the "Stipulation"), dated as of September 13, 2011. (D.E. #59-1.)

Released Claims against Defendants and the Released Defendant Parties in the Action.

The Settlement is a very favorable result for the Class when evaluated in light of all the relevant circumstances - most notably that Defendants have a motion to dismiss pending before the Court, as well as the difficulty of proving scienter, damages and loss causation issues were the Action to continue. The Settlement would not have been possible without the efforts of Lead Counsel, who vigorously prosecuted the claims asserted in the Action on a wholly contingent basis.

Although the Settlement was reached relatively early in the Action, it was achieved only following vigorous investigative efforts that allowed Lead Counsel to develop Lead Plaintiff's claims to a point where Lead Counsel could engage in meaningful settlement negotiations and a mediation with Defendants and ultimately obtain a favorable recovery for the Class. (Defendants deny wrongdoing or liability in all respects and admit nothing as part of the Settlement.) As discussed further herein, without the skill, advocacy and diligent efforts exhibited by Lead Counsel, there was a real risk that Lead Plaintiff could spend several years litigating at sizable cost and not obtain a better recovery (or any recovery at all) for the Class.

As discussed in Lead Plaintiff's Unopposed Motion for Final Approval of Proposed Class Action Settlement and Memorandum of Points and Authorities Thereof ("Final Approval Brief") and the Joint Declaration of Christopher J. McDonald and Sherrie R. Savett (the "Joint Declaration" or "Joint Decl."), filed herewith, Lead Counsel's efforts involved:

- Investigating the claims, including a review of all relevant public information, including Beckman's filings with the Securities and Exchange Commission (the "SEC"); securities analysts' reports;

1 public statements by Defendants; media reports about Defendants;
2 court records in multiple actions involving Beckman; trading data;
3 documents obtained from the Food and Drug Administration (the
4 "FDA") pursuant to requests made under the Freedom of Information
5 Act; adverse event reports from the FDA's Manufacturer and User
6 Facility Device Experience database; and product and other
7 information available on Beckman's website; and analyzing the
8 frequency and severity of FDA recall notices of Beckman products
9 dating back to January 2006, (Joint Decl. ¶19);

10 • drafting a comprehensive Consolidated Class Action Complaint for
11 Violations of Federal Securities Laws (the "Complaint"), (*Id*. ¶8);
12 • identifying and interviewing potential witnesses, including contacting
13 more than 140 former Beckman employees from several Company
14 locations in California, Florida, Minnesota, Indiana, Ohio, Texas, and
15 Tennessee, and conducting interviews of more than 60 of these former
16 employees. These interviews garnered valuable information that
17 provided further support to the allegations in the Complaint and/or
18 aided Lead Counsel in fully understanding the intricacies of the facts
19 at issue in the Action, (*Id*. ¶20);
20 • consulting with experts with extensive experience working for the
21 FDA and within the industry concerning medical devices and
22 radiation producing electronic products, site and plant inspections,
23 good manufacturing practices, quality control, health and safety
24 requirements and pre-market notification requirements pursuant to
25 Section 510(k) of the Federal Food, Drug, and Cosmetic Act (21
26 U.S.C. § 360(k)), (*Id*. ¶21);
27
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- retaining and consulting with expert economists concerning loss causation issues, class-wide damages and the composition of the Class, (*Id.*);
- engaging in several settlement-related communications that culminated in an in-person mediation session before the Honorable Daniel Weinstein (Ret.), an experienced mediator at JAMS,[2] whose assistance resulted in the Parties reaching this Settlement. At the mediation, the Parties exchanged information regarding the merits of the claims and damages in the Action, Lead Plaintiff informally provided information about its ongoing investigation and Defendants informally provided Lead Plaintiff with North American and worldwide trend data concerning Beckman's headcount and expenses related to quality systems dating back to 2006, (*Id.* ¶¶54-55.)

As compensation for their efforts, Lead Counsel, on behalf of Plaintiffs' Counsel,[3] respectfully request that the Court award attorneys' fees in the amount of 25% of $5,500,000, or $1,375,000, plus interest at the same rate as is earned by the Settlement Fund and reimbursement of litigation expenses in the amount of $88,928.73, plus interest at the same rate as that earned by the Settlement Fund. Lead Counsel has not received any compensation or reimbursement for its successful prosecution of this case, which is valued at an aggregate "lodestar" of $2,176,587.50 (the result of multiplying the number of hours worked by the current billing rates). Accordingly, Lead Counsel is not requesting a multiplier on its time. Lead Counsel respectfully submits that these requests are fully justified by the facts of this case and the applicable law, and are fair and reasonable.

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[2] Daniel H. Weinstein is a former Judge of the Superior Court of the County of San Francisco, CA.

[3] Plaintiffs' Counsel is Lead Counsel and Liaison Counsel Motley Rice LLP.

Furthermore, the requested fee and expense amounts are supported by Lead Plaintiff Iron Workers and named plaintiff Steelworkers Pension Trust, sophisticated institutions that have been involved in the prosecution of the Action and the negotiation of the Settlement. (Exhibits 1 and 3 to the Joint Decl.) Lead Plaintiff ATRS believes that Lead Counsel should be awarded a fair and reasonable attorneys' fee and reimbursement of expenses in light of the amount and quality of the work performed and considering the substantial recovery obtained for the Class. However, it is their practice in securities class actions to defer to the court with respect to the amount of attorneys' fees and expenses that should be awarded. (Joint Decl., Exhibit 2 at ¶4.) In addition, although Notices have been mailed to over 44,016 potential Class Members stating that Lead Counsel would be requesting an award of attorneys' fees not to exceed 25% of $5,500,000 and that litigation expenses would not exceed $148,000, with interest, not a single Class Member has filed an objection to these requests as of the date of this motion. (Joint Decl. ¶60.)

II. HISTORY AND BACKGROUND OF THE ACTION

As detailed in the Complaint, Lead Plaintiff alleges that Defendants made material misrepresentations and omissions in violation of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act") regarding product quality, safety, FDA regulatory compliance and the Company's troponin test, as well as likely customer retention, recurring revenue, business prospects, and earnings forecasts and guidance between July 31, 2009 and July 22, 2010, inclusive (the "Class Period"). Lead Plaintiff alleges that Defendants failed to make proper disclosure of alleged non-compliance with FDA pre-market notification requirements concerning modifications made to the Company's troponin tests, and failed to make proper disclosure of the effects of non-compliance on the Company's operations, products and prospects.

Lead Plaintiff contends that on March 22, 2010, May 14, 2010, and July 22, 2010, Defendants made corrective disclosures which negatively impacted Beckman's common stock price and that as a direct and proximate cause of Defendants' misrepresentations or omissions, Beckman's public shareholders who purchased or acquired Beckman common stock during the Class Period suffered damages in the market when the truth was revealed.

Rather than recite the full background of the Action herein, Lead Plaintiff respectfully refers the Court to the accompanying Joint Declaration for a discussion of, *inter alia*, the Action (including the procedural history, parties, Lead Counsel's investigation and consultations with regulatory, industry, and economic experts and the Complaint's substantive allegations as further informed by Lead Counsel's investigation and consultations with experts) and the Settlement, (including a discussion of the risks of continued litigation, the negotiation process, the Court's preliminary approval, the notice program, the Plan of Allocation and the reaction of the Class to the Settlement). The Joint Declaration also provides further information concerning Lead Counsel's application for attorneys' fees and reimbursement of expenses and ATRS's application for reimbursement of its costs and expenses.

III. AWARD OF ATTORNEYS' FEES

A. The Legal Standards Governing the Award of Attorneys' Fees in Common Fund Cases Support the Requested Award

It has long been recognized that a person who prosecutes a suit that results in the creation of a fund in which others have a common interest may obtain fees from that common fund. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("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"). The Ninth Circuit has specifically found that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped

create it." *Chem. Bank v. Seattle (In re Wash. Pub. Power Supply Sys. Sec. Litig.)*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("*WPPSSS*"). *See also Vincent v. Hughes Air West, 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 benefit from a lawsuit without paying for it. *Boeing*, 444 U.S. at 478; *see also Paul, Johnson, Alston, & Hunt v. Graulty*, 886 F.2d. 268, 271 (9th Cir. 1989).[4]

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

Within the Ninth Circuit, district courts have the discretion to apply either the percentage-of-recovery method or the lodestar method in determining attorneys' fees in a common fund case. *WPPSSS*, 19 F.3d at 1295. In recent years, the percentage-of-recovery method has become the prevailing method for awarding fees in common fund cases in this Circuit and throughout the United States.[5] *See also Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) ("a reasonable fee under the common fund doctrine is calculated as a percentage of the recovery"). Nevertheless, in employing the percentage-of-recovery method, courts often perform a lodestar cross-check on the reasonableness of the requested fee. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (affirming use of percentage method to calculate attorneys'

[4] The justification for compensating class counsel out of the class's recovery is particularly strong in securities class actions, as private securities actions are "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).

[5] The PSLRA has also indicated its preference for a percentage analysis when awarding attorneys' fees in securities class actions. *See* 15 U.S.C. §77z-1(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. . . .").

fees and application of lodestar method as cross-check); *West v. Circle K Stores, Inc.*, No. 04-0438, 2006 U.S. Dist. LEXIS 76558, at *21-22 (E.D. Cal. Oct. 19, 2006) (applying percentage method with lodestar cross-check). No matter which method is chosen - the percentage method or the lodestar method - the fees awarded in common fund cases must be fair and reasonable under the circumstances of a particular case. *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989) (recognizing that an appropriate fee is intended to approximate what counsel would receive if they were bargaining for the services in the marketplace).

The Ninth Circuit has also articulated five factors as pertinent criteria for evaluating the reasonableness of a fee request: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of the work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases. *Vizcaino*, 290 F.3d at 1048-50. Lead Counsel respectfully submits that an analysis of the foregoing *Vizcaino* factors, as well as an analysis under the percentage and lodestar methods, demonstrates that Lead Counsel's request for attorneys' fees is reasonable and appropriate and should be approved by the Court in full.

C. Analyses Under the Percentage Method, the Lodestar Method and the *Vizcaino* Factors Support the Fee Request

1. The Recovery Obtained for the Class

Courts have consistently recognized that the result achieved is an important factor to be considered in making a fee award. *In re DJ Orthopedics, Inc. Sec. Litig.*, No. 01-CV-2238, 2004 WL1445101, at *7 (S.D. Cal. June 21, 2004). Here, the Class will receive a Settlement Fund of $5 million in cash, with accrued interest, and an additional amount, not to exceed $500,000, for the Notice and Administration Expenses, a very favorable recovery. The additional payment of Notice and Administration Expenses was separately bargained for by Lead Counsel and is unusual in securities class actions.

1 This amount is well within the range of reasonableness when compared to
2 other securities class action settlements recently achieved within the Ninth Circuit.
3 *See e.g. In re Limelight Networks, Inc. Securities Litigation,* No. 07-01603 (D.Ariz.
4 March 23, 2011) ($1.9 million); *City of Westland Police and Fire Ret. Sys. and*
5 *Plymouth Cnty. Ret. Sys. v. Sonic Solutions et al.,* No. 07-CV-05111 (N.D. Cal.
6 April 8, 2010) ($5 million); *In re Metawave Comm. Corp. Sec. Litig*., No. 02-625
7 (W.D. Wash. February 11, 2010) ($1.5 million); *In re LJ Int'l Inc., Sec. Litig*., No.
8 07-6076 (C.D. Cal. October 19, 2009) ($2 million); *In re Biolase Tech., Inc. Sec.*
9 *Litig*., No. 04-cv-00947 (C.D. Cal. August 15, 2007) ($1.95 million); *In re Maxim*
10 *Pharm. Inc. Sec. Litig*., No. 04 CV 1900 (S.D. Cal. 2006) ($1 million in cash, $1.3
11 million in stock); *In re Amylin Pharm. Inc. Sec. Litig*., No. CV-01-1455 (S.D. Cal.
12 December 30, 2004) ($2.1 million); *In re Alliance Equip. Release Program Sec.*
13 *Litig*., No. 98-CV-2150 (S.D. Cal. July 3, 2001) ($2 million).
14 Accordingly, the amount of the Settlement supports approval of the fee
15 request.
16 **2. The Risks of Litigation and Difficulty of Claims**
17 At the time the Settlement was reached, the Defendants' motion to dismiss
18 was pending before the Court, with the risk of a lesser recovery (or no recovery at
19 all) if the Court granted the motion in whole or substantial part. Even were the
20 claims to survive the motion to dismiss, Lead Plaintiff would still need to prevail
21 through costly and prolonged litigation, which would likely involve a complex and
22 risky expert-driven challenge to class certification and the attendant risks of
23 maintaining class status, a motion for summary judgment, leading to a battle of the
24 experts with respect to scienter, damages and loss causation, delays inherent in
25 such litigation, including potential appeals and the risk of presenting complex, fact-
26 intensive case issues at trial. (Joint Decl. ¶¶ 37, 52.) *See In re Mfrs. Life Ins. Co.*
27 *Premium Litig*., No. 96-CV-230, 1998 WL 1993385, at *5 (S.D.Cal. Dec. 18,
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1998) ("[E]ven if it is assumed that a successful outcome for plaintiffs at summary judgment or at trial would yield a greater recovery than the Settlement – which is not at all apparent - there is easily enough uncertainty in the mix to support settling the dispute rather than risking no recovery in future proceedings."). Courts are ever mindful of the fact that securities class action litigation "is notably difficult and notoriously uncertain." *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999); *In re Ikon Office Solutions, Inc.*, *Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA").

Lead Counsel worked diligently and creatively to contend with significant risks posed by Defendants arguing a number of legal and factual defenses, as they did in their motion to dismiss, including that they did not make misstatements and omissions so as to be liable under the securities laws, that they did not act with scienter, and that Lead Plaintiff cannot not prove loss causation or damages. (Joint Decl. ¶37.)

Defendants argued, and would have continued to maintain, that they did not make any materially false or misleading statements or omissions regarding quality, safety, compliance, or the troponin test. Defendants would also likely have argued that Lead Plaintiff could not prove any omission with respect to: (i) disclosure of a bias in troponin test results prior to February 2010; (ii) disclosure prior to March 2010 that the FDA would require clearance for earlier changes to the troponin test kit; and (iii) Beckman's alleged failure to predict the future effects of the troponin test issues and FDA actions on future recurring revenue, customer retention or business prospects. Moreover, Defendants would have argued that any purported claim based on Beckman's 2010 financial forecasts or other forward-looking statements is barred by the Safe Harbor provision under the PSLRA, which completely insulates Defendants from liability. (*Id*. ¶¶ 39-43.)

Lead Counsel also had to rebut arguments and amass evidence, and would continue to do so, concerning whether Defendants acted with scienter, as required by the securities laws. Defendants claimed that many of their statements were soft opinion and puffery and that there is no evidence to infer that their statements were false when made. They would argue that former employee statements and assertions presented by Lead Plaintiff are not evidence of scienter. Furthermore, Defendants would claim that Beckman's management team made proactive efforts to search out potential problems and that this contradicts any inference of intent to hide issues from investors. Defendants would contend that Lead Plaintiff suggests no motive whatsoever for Beckman or its management team to lie to investors. These are all defenses that Lead Counsel had to rebut in order to reach a negotiated compromise and achieve the Settlement. (*Id*. ¶44-47.)

Finally, Lead Counsel also confronted a significant challenge by Defendants to loss causation and damages. Defendants would likely present evidence, supported by expert analysis and testimony, that loss causation could not be established and that: (i) the stock drops were not statistically significant; and (ii) the stock price drops were caused by other macroeconomic and business factors and not disclosures by the Company. (*Id*. ¶50.)

Taking all of these factors into account, the risk of the litigation and the difficulty of the claims strongly supports their request for attorneys' fees.

3. The Skill Required and the Quality of Representation

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, 2005 U.S. Dist. LEXIS 13627, at *40 (C.D. Cal. June 10, 2005) (citation omitted). Lead Counsel, the law firms of Labaton Sucharow and Berger & Montague, practice extensively in the highly complex field of shareholder securities litigation and have successfully

litigated these types of actions in courts throughout the country. (Joint Decl. ¶¶72-73.) Liaison Counsel, Motley Rice, is also highly experienced in complex litigation. *See* biographies for these firms annexed as Exhibits 6-D, 7-C and 8-C to the Joint Decl.[6] Given the complexity of the issues presented in this Action, it is respectfully submitted that no less than highly skilled counsel could have successfully represented the Class and obtained such a favorable recovery. It is particularly important to reward attorneys with such skills for pursuing such cases as "the stated goal in percentage fee-award cases [is] ensuring that competent counsel continue to be willing to undertake risky, complex and novel litigation." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000) (internal quotations and citation omitted).

During the pendency of this Action, Lead Counsel, as discussed in the Joint Decl., conducted an in-depth and ongoing investigation of the Class' claims prior to reaching the Settlement that involved very complex issues that pertain to many securities class actions, but also challenging factual issues that are particular to the nature of the claims here. Plaintiffs' Counsel's efforts included, *inter alia*, an extensive and thorough review of publicly available information, drafting a detailed consolidated complaint; identifying over 140 potential witnesses and interviewing 60 former employees in several states; consulting with several experts with experience working for the FDA and within the industry of medical devices and radiation-producing electronic products, as well as expert economists; and extensively researching the relevant law. (Joint Decl. ¶¶19-21.) Lead Counsel also prepared for and engaged in vigorous settlement negotiations with Defendants and

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

participated in a formal in-person mediation before an experienced mediator that resulted in the Settlement. (*Id.* ¶¶54-57.)[7]

Likewise, the quality of the work performed by Lead Counsel in attaining the Settlement should also be evaluated in light of the quality of the opposition. *See In re Equity Funding Corp. of Am. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977) (court recognized that "plaintiffs' attorneys in this class action have been up against established and skillful defense lawyers, and should be compensated accordingly"). Throughout the Action, Lead Counsel faced formidable opposition from the prominent law firms representing Defendants – Latham & Watkins LLP. In the face of knowledgeable and solid opposition, Lead Counsel were able to develop a case that was sufficiently strong to persuade the Defendants to settle the case on terms that were very favorable to the Class. Thus, the issues of law and fact presented by this Action coupled with the ability of Lead Counsel to obtain such a favorable recovery for the Class in the face of such legal opposition further reflects the superior quality of Lead Counsel's work.

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

It has been long-recognized that an attorney is entitled to a larger fee when the compensation is contingent rather than being fixed on a time or contractual basis. *See Vizcaino*, 290 F.3d at 1048-50. As stated by the Ninth Circuit in *WPPSSS*:

> 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.

[7] Lead Counsel will continue to perform legal work on behalf of the Settlement Class should the Court approve the proposed Settlement without seeking additional fees. Additional resources will be expended assisting Settlement Class Members with their Proofs of Claim and related inquiries and working with the claims administrator, A.B. Data, Ltd. ("A.B. Data") to ensure the smooth progression of claims processing.

Id. 19 F.3d at 1299-1300 (internal citations and quotations omitted). *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974) ("No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success."); *see also In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008) ("The importance of assuring adequate representation for plaintiffs who could not otherwise afford competent attorneys justifies providing those attorneys who do accept matters on a contingent-fee basis a larger fee than if they were billing by the hour or on a flat fee.")[8]

Since the commencement of this case, Plaintiffs' Counsel have prosecuted the Class' claims on a wholly contingent basis, and have borne all the risk of this Action. Plaintiffs' Counsel understood from the outset that they were embarking on a complex and expensive litigation, which would require the investment of substantial attorney time and expense, with no guarantee of ever being compensated for the investment of such time and money.[9] Plaintiffs' Counsel also understood that Defendants would (and, in fact, did) retain a large and experienced corporate defense firm to mount a strong defense. In undertaking this risk, Plaintiffs' Counsel were obligated to ensure that sufficient resources were dedicated to the prosecution of this Action.

Moreover, a law firm handling complex contingent litigation does not always prevail. In fact, the factor labeled by the courts as "the risks of litigation"

[8] However, as explained below, Plaintiffs' Counsel are, in fact, requesting a fee that is smaller than their incurred lodestar.

[9] Unlike counsel for the Defendants who were compensated for their efforts throughout the pendency of this Litigation, Plaintiffs' Counsel have provided their services with the understanding that they would only be paid in the event of a successful outcome, and only from the proceeds of any eventual recovery. To date, Plaintiffs' Counsel have not been compensated for any of their time or expenses during the pendency of this Litigation. (Joint Decl. ¶71.)__

is not an empty phrase. *In re Veeco Instruments Sec. Litig.*, No. 05 MDL 01695, 2007 WL 4115808, at *6 (S.D.N.Y. Nov. 7, 2007) ("Indeed, the risk of non-payment in complex cases … is very real."). In numerous cases, Plaintiffs' Counsel, working on a contingent basis such as this, have expended thousands of hours only to receive no compensation. Indeed, there have been many hard-fought lawsuits where, because of: (i) the discovery of facts unknown when the case was commenced; (ii) changes in the law while the case was pending; or (iii) decisions of summary judgment or following a trial on the merits, that excellent professional efforts produced no fee for counsel.[10] Thus, there existed a real risk that Plaintiffs' Counsel would invest substantial resources and efforts and receive nothing, which weighs in favor of approving the instant request.

5. Awards in Similar Cases

The Ninth Circuit has established 25% of the fund recovered for the benefit of a class as a benchmark for fee awards in common fund cases. *See Powers v. Eichen*, 229 F.3d 1249, 1256-57 (9th Cir. 2000); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d at 272; *Six (6) Mexican Workers*, 904 F.2d at 1311; *Heritage Bond Litig.*, 2005 U.S. Dist LEXIS 13627, at *25. While we recognize that district courts in this Circuit have consistently awarded this benchmark, or higher, *see In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377-79 (N.D. Cal. 1989) (awarding

[10] *See, e.g., Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1008 (9th Cir. 2009) (affirming dismissal of second amended complaint for failure to plead scienter). Even a successful jury verdict for plaintiffs is no guarantee of a recovery. *See In re Apollo Grp., Inc. Sec. Litig.*, No. 04-2147, 2008 U.S. Dist. LEXIS 61995 (D. Ariz. Aug. 4, 2008), *vacated on other grounds*, 329 F. App'x. 283 (D.C. Cir. 2009) (granting judgment to defendants and nullifying a unanimous jury verdict for plaintiffs following a two month trial); *see also Winkler v. NRD Mining, Ltd.*, 198 F.R.D. 355 (E.D.N.Y. 2000) (granting defendants' motion for judgment as matter of law after jury verdict for plaintiffs); *Robbins v. Koger Props.*, 116 F.3d 1441 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against an accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant). In fact, after the class prevailed at trial in *In re Vivendi Universal, S.A., Securities Litigation*, No. 02 Civ. 5571 (S.D.N.Y.), but before funds were distributed to class members, the United States Supreme Court issued a decision in *Morrison v. National Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010), which gutted the class' recovery.

32.8% of the fund, and noting that the benchmark is closer to 30%), an independent analysis of the facts and circumstances of each request must be undertaken to ensure that no adjustments – positive or negative – to the benchmark are appropriate.

Ample precedent exists in this Circuit for granting fees to plaintiffs' counsel that are equal to or greater than the fees requested by Lead Counsel herein. *See, e.g., In re Merix Corp. Sec. Litig.*, No. CV 04-826, slip op. at 8 (D. Or. Jan. 3, 2011) (awarding 33⅓% of $2.5 million settlement fund);[11] *Johnson v. Aljian*, No. 03-5986, slip op. at 5 (C.D. Cal. Sept. 16, 2010) (awarding 33⅓% of $8.1 million settlement fund); *In re: Amkor Tech. Inc. Sec. Litig.*, No. 07-00278, slip op. at 2 (D. Ariz. Nov. 18, 2009) (awarding 25% of $11.25 million settlement fund); *In re Biolase Tech., Inc. Sec. Litig.*, No. 04-cv-00947, slip op. at 3 (C.D. Cal. Aug. 15, 2007) (awarding 25% of $1.95 million settlement fund); *In re Mikohn Gaming Corp. Sec. Litig.*, No. 05-CV-01410, slip op. at 7 (D. Nev. June 6, 2007) (awarding 33⅓% of $2.8 million settlement fund); *In re: Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1174 (S.D. Cal. 2007) (awarding 25% of $10 million settlement fund); *In re Amerco Sec. Litig.*, No. 04-2182, slip op. at 1 (D. Ariz. Nov. 3, 2006) (awarding 30% of $7 million settlement fund); *Tanne v. Autobytel Inc. Sec. Litig.*, No. CV 04-08987, slip op. at 2 (C.D. Cal. Oct. 30, 2006) (awarding 25% of $6.75 million settlement fund); *In re 2TheMart.com, Inc. Sec. Litig.*, No. SACA-99-1127, slip op. at 2 (C.D. Cal. July 8, 2002) (awarding 33⅓% of $2.7 million settlement fund). Accordingly, Lead Counsel respectfully submits that its benchmark attorneys' fees request is consistent with fee awards granted in similar actions in the Ninth Circuit and is warranted under the facts and circumstances of this case based upon the analysis presented herein.

[11] Unpublished opinions are annexed to the Joint Decl. as Exhibit 10.

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6. An Analysis of Plaintiffs' Counsel's Lodestar Supports the Requested Fee Award

Although a lodestar analysis is not required for an award of attorneys' fees in the Ninth Circuit, in this case, a cross-check of the request for attorneys' fees with Plaintiffs' Counsel's lodestar demonstrates its reasonableness. *See Vizcaino*, 290 F.3d at 1048-50. *See also Fla. Ex rel. Butterworth v. Exxon Corp. (In re Coordinated Pretrial Proceedings Petroleum Prods. Antitrust Litig.)*, 109 F.3d 602 (9th Cir. 1997) (comparison of the lodestar fee to the percentage fee is an appropriate measure of a percentage fee's reasonableness); *In re Heritage Bond Litig.*, No. 02-ML-1475, 2005 U.S. Dist. LEXIS 13555 (C.D. Cal. June 10, 2005) (same). Moreover, "the lodestar calculation can be helpful in suggesting a higher percentage when litigation has been protracted [and] may provide a useful perspective on the reasonableness of a given percentage award." *Vizcaino*, 290 F.3d at 1050.

The lodestar method approximates the prevailing market value of Plaintiffs' Counsel's work by multiplying the time spent in the Action by a reasonable hourly fee. A "multiplier" is then calculated by dividing the amount of the fee request by the amount in lodestar that Plaintiffs' Counsel incurred in the Action. The lodestar method therefore serves as a cross-check against the calculation of attorneys' fees under the percentage method by providing further data as to the fees incurred and the reasonableness of the application.

As discussed herein and in the Joint Decl., the work undertaken by Plaintiffs' Counsel wholly supports the Court's approval of Lead Counsel's request for attorneys' fees. Plaintiffs' Counsel devoted over 4,571.4 hours to this Action, amounting to $2,176,587.50 in billable time.[12] (Joint Decl. ¶¶74-75.) As a result,

[12] *See* lodestar and expense submissions of Christopher J. McDonald, Sherrie R.Savett and Mark I. Labaton, on behalf of Labaton Sucharow, Berger & Montague and Motley Rice, respectively, annexed as Exhibits 6, 7 and 8 to the Joint Decl. The rates used by these firms are commensurate with rates used by peer defense-side law firms

Lead Counsel's request for 25% of $5,500,000, or $1,375,000, amounts to less than the value of the time actually spent on this case (a "multiplier" of 0.63). In other words, Lead Counsel's request for attorneys' fees reflects a discount on the time Plaintiffs' Counsel actually spent litigating the matter and requires the application of a *negative* multiplier.[13]

This fact militates in favor of the reasonableness of Lead Counsel's request for attorneys' fees, as courts have repeatedly recognized that the reasonableness of the fee request under the percentage method "is reinforced by evidence that the percentage fee would represent a negative multiplier of the lodestar." *In re Blech Sec. Litig.*, No. 94-CV-7696 , 2000 WL 661680, at *5 (S.D.N.Y. May 19, 2000); *see also In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138, 2007 WL 4171201, at *16 (N.D. Cal. Nov. 26, 2007) (explaining that a negative multiplier suggests a percentage-based award is fair and reasonable based on the time and effort expended by class counsel); *In re Sterling, Foster & Co., Inc. Sec. Litig.*, 238 F. Supp. 2d 480, 490 (E.D.N.Y. 2002) ("the fact that any reasonable fee would necessarily represent a negative multiplier of the lodestar supports an award at the higher end of the spectrum") (citations omitted). Therefore, Lead Counsel submits that the instant request for attorneys' fees is fair and reasonable when cross-checked against Plaintiffs' Counsel's lodestar.

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litigating matters of a similar magnitude. (*See* sample of defense firm billing rates gathered by Labaton Sucharow from bankruptcy court filings, Joint Decl. Exhibit 9.) The Supreme Court and other courts have also held that the use of current rates is proper since such rates compensate for inflation and the loss of use of funds. *See, e.g., Missouri v. Jenkins*, 491 U.S. at 283-84 (1989).

[13] As courts in this Circuit often award multipliers in the 2-4 range, it is respectfully submitted that this Court should find that the lodestar cross-check here underscores the reasonableness of Lead Plaintiffs' Counsel's application for attorneys' fees. *In re Portal Software, Inc. Sec. Litig.*, 2007 WL 4171201, at *16 ("multipliers are frequently greater than one and often on the order of two to four"). *See, e.g., Vizcaino*, 290 F.3d at 1048-50 (applying 3.65 multiplier); *In re Veritas Software Corp. Sec. Litig.*, No. C-03-0283, 2005 WL 3096079, at *13 (N.D. Cal. Nov. 15, 2005) (applying 4.0 multiplier where motion to dismiss was pending and no formal discovery taken).

1 **D. The Reaction of the Class to Date Supports the Fee Request**

2 Although not articulated specifically in *Vizcaino*, courts also consider the
3 reaction of the class when deciding whether to award the requested fee. *See, e.g.*
4 *Immune Response Sec. Litig.*, 497 F. Supp. 2d at 1177; *In re Rite Aid Corp. Sec.*
5 *Litig*, 396 F.3d 294, 305 (3d Cir. 2005) (finding that "low level of objections is a
6 'rare phenomenon'") (citation omitted). Here, notice of the proposed Settlement
7 was mailed to 44,016 potential Class Members or their nominees, advising that
8 Lead Counsel would be requesting an award of attorneys' fees not to exceed 25%
9 of $5,500,000 and that litigation expenses would not exceed $148,000, with
10 interest earned on both amounts at the same rate earned on the Settlement Fund.[14]

11 As of the filing of this Memorandum, there have been no objections to the
12 application for attorneys' fees and reimbursement of expenses. (Joint Decl. ¶80.)
13 As stated above, the deadline to file an objection to Lead Counsel's request for
14 attorneys' fees and expenses is February 6, 2012. Lead Counsel will address any
15 objections received in its reply papers to be filed with the Court on February 13,
16 2012.

17 The lack of dissent to Lead Counsel's request for attorneys' fees and
18 expenses, to date, weighs in favor of Lead Counsel's Fee Request.

19 **IV. PLAINTIFFS' COUNSEL ARE ENTITLED TO REIMBURSEMENT FOR THEIR REASONABLE LITIGATION EXPENSES**

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21 "[R]easonable costs and expenses incurred by an attorney who creates or
22 preserves a common fund are reimbursed proportionately by those class members
23 who benefit by the settlement." *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp.
24 1362, 1366 (N.D. Cal. 1996). It is well-settled that attorneys who have created a
25 common fund for the benefit of a class are entitled to be reimbursed for their

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27 [14] *See* Declaration of Michelle M. La Count, Esq. (the "La Count Decl."), submitted on behalf of A.B. Data, the Court-authorized claims administrator for the Settlement, annexed to the Joint Decl. as Exhibit 5.
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litigation expenses incurred in creating the fund so long as the submitted expenses are reasonable, necessary and directly related to the prosecution of the action. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994).

Lead Counsel requests reimbursement of litigation expenses in the amount of $88,928.73, plus interest at the same rate as is earned by the Settlement Fund, that have been incurred by Plaintiffs' Counsel to date in connection with the prosecution and resolution of the Action on behalf of the Class. Approximately $38,776, or 44% of these expenses, relate to the cost of experts. Such expenses were critical to Plaintiffs' Counsel's understanding of the claims and damages in the Action and its success in achieving the proposed Settlement. Plaintiffs' Counsel's expenses also reflect routine and typical expenditures incurred in the course of litigation, such as the costs of experts, legal research (*i.e.*, Westlaw and Lexis fees), travel, document duplication, telephone, FedEx, and other incidental expenses directly related to the prosecution of this Action. (Joint Decl. ¶76-78, Exhibits 6, 7 and 8.) *See also Omnivision*, 559 F. Supp. 2d at 1048 ("Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters.") (citing *Harris*, 24 F.3d at 19).

To date, no objections have been received regarding Lead Counsel's request for expenses. Accordingly, Lead Counsel respectfully request reimbursement of these expenses, plus interest.

V. LEAD PLAINTIFF IS 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 the Declaration of George Hopkins, Joint Decl. Exhibit 2, ATRS is seeking a total of $3,534.30 in costs and expenses related to its active participation in this Action.

Many cases have approved reasonable payments to compensate class representatives for the time and effort devoted by them on behalf of a class. Recently in *In re Marsh & McLennan Co. Inc. Sec. Litig.,* No. 04-cv-08144, 2009 WL 5178546, at * 21 (S.D.N.Y. Dec. 23, 2009), the court awarded $144,657 to the New Jersey Attorney General's Office and $70,000 to the Ohio Funds, which was requested "to compensate them for their reasonable costs and expenses incurred in managing this litigation and representing the Class." The court held that their efforts were "precisely the types of activities that support awarding reimbursement of expenses to class representatives." *Id. See also In re Satyam Computer Services Ltd. Sec. Litig.*, Slip Op., No 09-2027 (S.D.N.Y.) (Jones, J.) (awarding $193,111 to four institutional lead plaintiffs) (Joint Decl. Ex. 10); *In re General Motors Corp. Sec. & Derivative Litig.,* Slip Op., No. MDL 1749 (E.D. Mich. Jan. 6, 2009) (awarding $184,205 to two institutional class representatives and $1,000 to each of the named plaintiffs) (Joint Decl. Ex. 10); *In re Xcel Energy, Inc. Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 1000 (D. Minn. 2005) (awarding $100,000 collectively to eight lead plaintiffs, for having "fully discharged their PSLRA obligations and . . . been actively involved throughout the litigation . . . communicat[ing] with counsel throughout the litigation, review[ing] counsels' submissions, indicat[ing] a willingness to appear at trial, and . . . kept informed of the settlement negotiations, all to effectuate the policies underlying the federal securities laws.").

Some courts have narrowly construed the scope of compensable costs and expenses, largely because of insufficient explanation of the request. *See, e.g., In re*

NTL, Inc. Sec. Litig., No. 02 Civ. 3013, 2007 WL 623808 at *10 (S.D.N.Y. Mar. 1, 2007) (declining award, holding that "[w]ithout a better explanation for claims of $200-800 per hour of 'lost wages,' the Court should decline to award such amounts"). Here, as discussed below, Lead Plaintiff has substantiated its request and submits that the decisions approving reasonable compensation for actual time devoted are more consistent with the purpose and language of the PSLRA.

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 professional 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 a class plaintiff, like Lead Plaintiff here, for devoting time to the litigation by denying it reimbursement. As held in *Xcel Energy*:

> In granting compensatory awards to the representative plaintiff in PSLRA class actions, courts consider the circumstances, including . . . the time and effort expended by that plaintiff in prosecuting the litigation, any other burdens sustained by that plaintiff in lending himself or herself to prosecuting the claim . . . [as well as] the important policy role they play in the enforcement of the federal securities laws on behalf of persons other than themselves. Such enforcement is vital because if there were no individual

shareholders willing to step forward and pursue a claim on behalf of other investors, many violations of law might go unprosecuted.

364 F. Supp. 2d at 1000.

Lead Plaintiff is seeking reimbursement $3,534.30 for the 45.9 hours expended by ATRS pursuing the claims on behalf of the Class.[15] This is time that otherwise would have been dedicated to the work of ATRS. This time was spent: actively consulting, supervising and strategizing with Lead Counsel via email, telephone, and in-person meetings; reviewing pleadings, and participating in discussions relating to mediation and settlement. Mr. Hopkins, Executive Director of ATRS, also attended and actively participated in the mediation. (Joint Decl., Exhibit 2 at ¶¶7-8.)

Accordingly, Lead Counsel and ATRS submit that the total $3,534.30 sought in costs and expenses incurred by ATRS is eminently reasonable and should be granted.

VI. CONCLUSION

For the reasons set forth herein, Lead Counsel respectfully requests that the Court award: (i) attorneys' fees in the amount of $1,375,000 (i.e., 25% of $5,500,000), plus interest at the same rate as is earned by the Settlement Fund; (ii) reimbursement of $88,928.73 in expenses incurred in successfully prosecuting this Action, plus interest at the same rate as is earned by the Settlement Fund; and (iii) reimbursement of $3,534.30 in reasonable costs and expenses (including lost wages) directly relating to ATRS's representation of the Class, pursuant to the PSLRA.

[15] An hourly rate derived from the annual income of George Hopkins is approximately $77 per hour. (Joint Dec., Exhibit 2 at ¶9.)

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Respectfully submitted,

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