ROBBINS GELLER RUDMAN
& DOWD LLP
ELLEN GUSIKOFF STEWART (144892)
JAMES I. JACONETTE (179565)
655 West Broadway, Suite 1900
San Diego, CA 92101-8498
Telephone: 619/231-1058
619/231-7423 (fax)
– and –
SHAWN A. WILLIAMS (213113)
Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: 415/288-4545
415/288-4534 (fax)

Attorneys for Plaintiff

[Additional counsel appear on signature page.]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

CITY OF WARREN POLICE AND FIRE RETIREMENT SYSTEM, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. REVANCE THERAPEUTICS, INC., et al., Defendants.	Case No. 1-15-CV-287794 CLASS ACTION MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES Judge: Hon. Brian C. Walsh Dept: 1 Date Action Filed: 05/01/15 Hearing Date: May 19, 2017 Hearing Time: 9:00 a.m.

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I. INTRODUCTION

Lead Counsel has obtained an all-cash settlement of $6,400,000 for the benefit of the Class in this class action alleging violations of §§11, 12(a)(2) and 15 of the Securities Act of 1933 (the "Litigation").[1] This is a very good recovery obtained in the face of substantial risk and is the product of hard-fought litigation and arm's-length settlement negotiations. Counsel now respectfully moves this Court for an award of attorneys' fees in the amount of 27.5% of the Settlement Amount, as well as payment of the litigation expenses it incurred in prosecuting this Litigation in the amount of $67,907.66. The requested amount is based on negotiation with the putative class representative in this case, City of Warren Police and Fire Retirement System (the "Pension Fund"), and as shown herein, it is well within the range of reasonableness.[2]

As explained below, and in the Memorandum of Points and Authorities in Support of Plaintiff's Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation ("Settlement Memorandum"), submitted herewith,[3] as well as in the previously filed Declaration of James I. Jaconette in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement, dated November 11, 2016 ("Jaconette Decl."), this Settlement represents a highly favorable recovery for the Class in view of the risks, costs, and duration of continued litigation. Absent settlement, this Litigation would likely have continued for years, through the completion of fact discovery, expert discovery, summary judgment, trial, and likely appeals. Plaintiff and its counsel faced substantial obstacles in proving liability and damages, yet nevertheless reached a timely and substantial resolution for the Class.

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[1] Unless otherwise defined herein, all capitalized terms have the meanings ascribed to them in the Stipulation of Settlement dated October 31, 2016 ("Stipulation" or "Settlement").

[2] Fees negotiated between a properly selected institutional lead plaintiff and its counsel should be accorded a presumption of reasonableness. *See In re HealthSouth Corp. Sec. Litig.*, No. CV-03-BE-1500-S, 2010 U.S. Dist. LEXIS 146529, at *9-*10 (N.D. Ala. July 20, 2010) ("This involvement of sophisticated lead Plaintiffs, such as those in this case, in negotiating and thus exercising control over fees represents one of the biggest reforms enacted by Congress in [the] PSLRA.").

[3] Because many of the factors supporting final approval of the Settlement also buttress the requested award of attorneys' fees and expenses, Lead Counsel incorporates herein the concurrently filed Settlement Memorandum.

Lead Counsel vigorously investigated and prosecuted this Litigation on behalf of the Class, as described below. Jaconette Decl., ¶5. As a result, Lead Counsel and its paraprofessionals spent nearly 1,835 hours prosecuting this Litigation, resulting in a lodestar of $853,083.75.

On January 6, 2017, the Court entered an Order Preliminarily Approving Settlement and Providing for Notice ("Preliminary Approval Order"), pursuant to which the Settlement was preliminarily approved. The Preliminary Approval Order also approved the form and manner of notice to be given to the Class.

For its diligence and efforts in obtaining this favorable recovery on behalf of the Class, Lead Counsel respectfully requests an award of attorneys' fees of 27.5% of the Settlement Amount and payment of expenses incurred in the prosecution of the Litigation in the amount of $67,907.66. The requested fee is fair and reasonable under the applicable standards and is well within the range of fees awarded by California Superior Courts and is supported by recent California Supreme Court precedent. On August 11, 2016, the California Supreme Court affirmed a one-third percentage-based fee award to class counsel in *Laffitte v. Robert Half Int'l, Inc.*, 1 Cal. 5th 480 (2016) (wage and hour case, $19 million settlement). Lead Counsel's costs and expenses are likewise reasonable in amount, and were necessarily incurred in the successful prosecution of the Litigation. Indeed, although Lead Counsel believes that an award of over 30% is well justified in this case, the amount requested here was arrived at on the basis of negotiation with the Pension Fund and represents almost 17% less of a percentage award than what was indicated in the notice of settlement sent to Class Members.[4]

There is no indication that the Class disagrees. More than 10,000 copies of the Notice of Proposed Settlement of Class Action (the "Notice") were sent to potential Class Members and their nominees, and a Summary Notice was published once in *The Wall Street Journal* and transmitted once over *PR Newswire*.[5] The Notice informed Class Members that Lead Counsel would apply for up to

[4] Seventeen percent (17%) is arrived at by the following calculations: 33-27.5 = 5.5; 5.5/33 = .166; .166 x 100 = 16.7%.

[5] *See* Declaration of Fred Rodriguez Regarding (A) Mailing of the Notice of Proposed Settlement of Class Action and the Proof of Claim and Release Form, (B) Publication of the Summary Notice, (C) Internet Posting, and (D) Requests for Exclusion Received to Date ("Rodriguez Decl."), ¶¶4-12, 15, submitted herewith.

33% of the Settlement Fund plus expenses not to exceed $85,000. While the deadline for filing written objections to the fee and expense request – April 19, 2017 – has not yet expired, to the knowledge of Lead Counsel, not a single Class Member has filed an objection to the fee and expense request or any other aspect of the Settlement. The fair conclusion from the lack of objection is that those most impacted by the requests of counsel do not dispute that the requests are fair and reasonable.[6]

II. THE COURT SHOULD AWARD ATTORNEYS' FEES USING THE PERCENTAGE METHOD

A. The Common Fund Doctrine Allows Courts to Assess the Beneficiaries of the Fund with the Costs of Creating that Fund

Where, as here, litigation has created a common fund for the benefit of the named plaintiffs as well as others, courts have the power to award plaintiffs' counsel their reasonable attorneys' fees and expenses out of the fund created. The California Supreme Court has expressly affirmed "'the historic power of equity to permit . . . a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund of property itself or directly from the other parties enjoying the benefit.'" *Serrano v. Priest*, 20 Cal. 3d 25, 35 (1977).[7]

The common fund doctrine rests on two premises. The first one is the prevention of unjust enrichment – "'that all who will participate in the fund should pay the cost of its creation or protection and that this is best achieved by taxing the fund itself for attorney's fees.'" *Id.* at 35 n.5; *see also Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 27 (2000).

The second is a "salvage" rationale – "encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be promptly and directly compensated should his efforts be successful." *Estate of Stauffer*, 53 Cal. 2d 124, 132 (1959). The salvage purpose requires "'a flavor of generosity . . . in order that an appetite for efforts may be stimulated.'" *Melendres v. Los Angeles*, 45 Cal. App. 3d 267, 273 (1975).

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[6] Lead Counsel will address any objections in its reply memorandum, which will be filed on or before May 12, 2017.

[7] Unless otherwise noted, citations are omitted throughout.

While "[c]ourts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method," *Wershba v. Apple Comput., Inc.*, 91 Cal. App. 4th 224, 254 (2001), the United States Supreme Court has consistently held that where a common fund has been created for the benefit of a class as a result of counsel's efforts, the award of counsel's fee should be determined on a percentage-of-the-fund basis. *See, e.g.*, *Trs. v. Greenough*, 105 U.S. 527, 532 (1882); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (1980). California courts have long accepted the percentage approach for awarding fees in common fund cases as well. *See, e.g.*, *Steiner v. Whittaker Corp.*, No. 000817, Transcript at 8:9-11 (Los Angeles Super. Ct. Mar. 23, 1989) (attached as Ex. 1 to Stewart Decl.).[8]

If there was any doubt that the percentage method of awarding attorneys' fees in a common fund case in California courts was proper, the Supreme Court of California recently

> clarif[ied] . . . that use of the percentage method to calculate a fee in a common fund case, where the award serves to spread the attorney fee among all beneficiaries of the fund, does not in itself constitute an abuse of discretion. We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created.

Laffitte, 1 Cal. 5th at 503. In so doing, the Supreme Court recognized the advantages of using the percentage method of awarding attorneys' fees as a percentage of the common fund, including the "relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation." *Id.*

The *Laffitte* ruling is consistent with the United States Supreme Court's decision in *Blum v. Stenson*, where 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." 465 U.S. 886, 900 n.16 (1984). In the Ninth Circuit, the district court has discretion to award fees in common fund cases based on either

[8] All unreported authorities cited herein are attached to the Declaration of Ellen Gusikoff Stewart in Support of Plaintiff's Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation and Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses ("Stewart Decl."), submitted herewith.

the percentage-of-the-fund method or the so-called lodestar/multiplier method. *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296 (9th Cir. 1994). The Ninth Circuit has expressly and repeatedly approved the use of the percentage method in common fund cases: *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268 (9th Cir. 1989); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir. 1993); and *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002).[9] Indeed, the California Supreme Court recognized that "[c]urrently, all the circuit courts either mandate or allow their district courts to use the percentage method in common fund cases; none require sole use of the lodestar method [and] [m]ost state courts to consider the question in recent decades have also concluded the percentage method of calculating a fee award is either preferred or within the trial court's discretion in a common fund case." *Laffitte*, 1 Cal. 5th at 493-94.

As a result, Lead Counsel respectfully submits that an award should be made here on a percentage basis.

B. The Requested Fee of 27.5% of the Settlement Fund Created Is Reasonable in This Case

The Court of Appeals in *Laffitte* observed that "the trial court's use of a percentage of 33 1/3 percent of the common fund is consistent with, and in the range of, awards in other class action lawsuits." *Laffitte v. Robert Half Int'l Inc.*, 231 Cal. App. 4th 860, 878 (2014). The court also quoted authority noting that "'[e]mpirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.'" *Id.* The requested 27.5% fee here is well within that "average" (*id.*) and is reasonable when the result and the risks are considered.

In determining the reasonableness of a fee request, California courts typically consider the following "basic factors": (1) the result class counsel obtained; (2) the time and labor required of the

[9] Since *Paul, Johnson* and its progeny, district courts in the Ninth Circuit have almost uniformly shifted to the percentage method in awarding fees in common fund representative actions. *See, e.g.*, *In re Apollo Grp., Inc. Sec. Litig.*, No. CV 04-2147-PHX-JAT, 2012 U.S. Dist. LEXIS 55622, at *20 (D. Ariz. Apr. 20, 2012) ("'Because the benefit to the class is easily quantified in common-fund settlements,' courts can award attorneys a percentage of the common fund 'in lieu of the more often time-consuming task of calculating the lodestar.'") (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011)).

attorneys; (3) the contingent nature of the case and the delay in payment to class counsel; (4) the extent to which the nature of the litigation precluded other employment by class counsel; (5) the experience, reputation, and ability of the attorneys who performed the services, the skill they displayed in the litigation, and the novelty, complexity and difficulty of the case; and (6) the informed consent of the clients to the fee agreement. *In re Cal. Indirect Purchaser X-Ray Film Antitrust Litig.*, No. 960886, 1998 WL 1031494, at *3 (Alameda Super. Ct. Oct. 22, 1998); *see also Serrano*, 20 Cal. 3d at 49; *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1810 n.21 (1996).

"However, no rigid formula applies and each factor should be considered only 'where appropriate.'" *Nat. Gas Anti-Trust Cases*, No. 4221, 2006 WL 5377849, at *3 (San Diego Super. Ct. Dec. 11, 2006); *see also In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2007) ("The Ninth Circuit has approved a number of factors which may be relevant to the district court's determination: . . . (2) the risk of litigation; . . . and (5) awards made in similar cases."); *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 U.S. Dist. LEXIS 13555, at *70-*71 (C.D. Cal. June 10, 2005) (reaction of the class is a factor to be considered).

An analysis of the relevant factors supports the requested fee award.

1. The Result Achieved

Courts have consistently recognized that the result achieved is an important factor to be considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"); *Omnivision*, 559 F. Supp. 2d at 1046 ("The overall result and benefit to the class from the litigation is the most critical factor in granting a fee award.").

In this case, a Settlement Amount of $6,400,000 in cash has been obtained solely through the efforts of Lead Counsel. As detailed in the Settlement Memorandum, this is a highly favorable result given the risks of proving liability, causation, and damages, and provides an immediate and certain recovery for Class Members without the risk, expense and delay of the completion of discovery, summary judgment, trial and appeals.

2. The Time and Labor Required

Lead Counsel vigorously investigated and prosecuted this Litigation, and its efforts, including: (a) conducted an extensive factual investigation of the events underlying Revance's June 19, 2014

Offering; (b) reviewed and analyzed the representations made by the Company in the Prospectus, as well as subsequent U.S. Securities and Exchange Commission ("SEC") filings; (c) reviewed and analyzed industry and securities analyst reports and comprehensive news reports, press releases and other media files concerning Revance; (d) reviewed and analyzed witness accounts of Revance's operations given by former Revance employees and FDA representatives developed through counsel's investigation; (e) researched and filed the operative Complaint; (f) opposed Defendants' removal of this Litigation to federal court; (g) briefed, argued and prevailed on Plaintiff's motion to remand this Litigation back to state court; (h) negotiated, prepared and filed the joint stipulation transferring this Litigation from San Mateo Superior Court to Santa Clara Superior Court; (i) prepared and filed initial and updated joint case management conference statements setting discovery and briefing schedules;(j) met and conferred with Defendants over discovery requests; (k) retained and consulted with a damages consultant and an expert in the areas of pharmaceutical development and FDA regulatory approval processes; (l) sent discovery requests, obtained and reviewed over 62,700 pages of document discovery from Revance and non-party Medicis Pharmaceutical Corp.; (m) prepared for and participated in a day-long mediation session with the Hon. Layn R. Phillips (Ret.), in which the parties were unable to resolve the Litigation; (n) prior to the mediation with Judge Phillips the parties prepared and submitted detailed mediation statements; and (o) post mediation, the parties continued settlement negotiations, which ultimately resulted in a substantially improved result obtained on behalf of the Class, culminating in this Settlement, were well spent. Jaconette Decl., ¶¶5, 31-32.

Although Lead Counsel makes this application on a percentage-of-recovery basis, using the lodestar approach as a cross-check (although not required by the California Supreme Court in *Laffitte*) on the reasonableness of the requested fee further demonstrates that it is fair and should be awarded. In total, Lead Counsel and its paraprofessionals expended 1,834.90 hours in the prosecution of this Litigation through February 24, 2017, resulting in a lodestar of $853,083.75.[10] The requested fee of 27.5%, or $1,760,000, represents a modest multiplier of 2.06. A "lodestar cross-check . . . provides a

[10] The time and expenses devoted to the Litigation are set forth in the accompanying Declaration of James I. Jaconette Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Lead Counsel's Declaration").

mechanism for bringing an objective measure of the work performed into the calculation of a reasonable attorney fee. If a comparison between the percentage and lodestar calculations produces an imputed multiplier far outside the normal range, indicating that the percentage fee will reward counsel for their services at an extraordinary rate even accounting for the factors customarily used to enhance a lodestar fee, the trial court will have reason to reexamine its choice of a percentage." *Laffitte*, 1 Cal. 5th at 504. That is not the case here. The requested fee results in a multiplier that is within the range of multipliers that have been deemed reasonable by courts in California and nationwide.

"Multipliers can range from 2 to 4 or even higher." *Wershba*, 91 Cal. App. 4th at 255.[11] Indeed, "numerous cases have applied multipliers of between 4 and 12 to counsel's lodestar in awarding fees." *Nat. Gas Anti-Trust Cases*, 2006 WL 5377849, at *4; *Sternwest Corp. v. Ash*, 183 Cal. App. 3d 74, 76 (1986) (remanding for a lodestar enhancement of "two, three, four or otherwise"). In *Lealao*, the court held that a trial court's refusal to enhance the lodestar as a part of a fee award was an abuse of discretion, opining that a multiplier in excess of 3.5 was reasonable and not ruling out class counsel's original request for a multiplier of 8. *Lealao*, 82 Cal. App. 4th at 24, 52.

3. The Contingent Nature of the Case, Risk of Loss, and the Delay in Payment to Plaintiff's Counsel

Lead Counsel undertook this Litigation on a contingent-fee basis, assuming a significant risk that the Litigation would yield no recovery and leave them uncompensated. Unlike counsel for Defendants, who are paid an hourly rate and paid for their expenses on a regular basis, Lead Counsel has not been compensated for any time or expense since this case began in May 2015. Courts have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 54 (2d Cir. 2000) (the level of risk taken by plaintiff's counsel is "'perhaps the foremost' factor" in considering the appropriate percentage award). This makes sense because in the legal marketplace, an attorney who takes a case on contingency expects a higher fee than an attorney who is paid as the case goes along,

[11] While a lodestar cross-check fully supports the requested fee, a lodestar cross-check is not required, *Laffitte*, 1 Cal. 5th at 506 ("We hold further that trial courts have discretion to conduct a lodestar cross-check on a percentage fee, as the court did here; they also retain the discretion to forgo a lodestar cross-check and use other means to evaluate the reasonableness of a requested percentage fee.").

win or lose. *See Rader v. Thrasher*, 57 Cal. 2d 244, 253 (1962); *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.*, 172 Cal. App. 3d 914, 955 (1985) ("'riskiness,' difficulty or contingent nature of the litigation is a relevant factor in determining a reasonable attorney fee award"). As the Court of Appeals explained in *Cazares v. Saenz*, 208 Cal. App. 3d 279 (1989):

> In addition to compensation for the legal services rendered, there is the raison d'etre for the contingent fee: the contingency. The lawyer on a contingent fee contract receives nothing unless the plaintiff obtains a recovery. Thus, in theory, a contingent fee in a case with a 50 percent chance of success should be twice the amount of a noncontingent fee for the same case. . . .
>
> Finally, even putting aside the contingent nature of the fee, the lawyer under such an arrangement agrees to delay receiving his fee until the conclusion of the case, which is often years in the future. The lawyer in effect finances the case for the client during the pendency of the lawsuit. If a lawyer was forced to borrow against the legal services already performed on a case which took five years to complete, the cost of such a financing arrangement could be significant.

Id. at 288.

Plaintiff faced significant risk concerning its ability to establish both liability and damages. While Plaintiff believes it could have proven its claims, success at trial was far from certain. Defendants have vigorously argued that Plaintiff cannot demonstrate the falsity of the challenged statements made in, and omissions from, the Registration Statement issued in connection with the Company's Offering. More specifically, Defendants maintained that the Registration Statement adequately disclosed the status of the drug's clinical development program and the significant risks faced by the Company. Jaconette Decl., ¶33.

Moreover, even assuming that Plaintiff demonstrated liability, there was no guarantee it would prevail on the issues of loss causation and damages. At summary judgment and trial, Defendants' experts would likely assert a negative causation defense and contend that all of the losses sustained by the Class were due to factors completely unrelated to Defendants' alleged false and misleading statements in the Registration Statement, thereby eliminating any potential recovery. More specifically, Defendants would argue that the losses suffered by the Class were attributable to negative events concerning the efficacy of RT001. There was, therefore, a substantial risk that the finder of fact could agree with Defendants' contention that no damages could be linked to the Defendants' statements or omissions at issue, or that damages were substantially less than the amount Plaintiff has asserted. *See*

In re Warner Commc'ns Sec. Litig., 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985) ("it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors such as general market conditions"), *aff'd*, 798 F.2d 35 (2d Cir. 1986).

In light of these risks, a quick settlement was not likely. Indeed, from the beginning of the case, it was clear that Defendants were prepared to litigate to judgment and through trial and appeals. Thus, from day one, Lead Counsel needed to commit the time and resources necessary to successfully take the case to trial. Indeed, more than 1,830 hours of attorney and paraprofessional time and more than $67,000 in expenses have been incurred. While Plaintiff and its counsel believe that the Class would prevail at trial, the complexity of this case made the outcome at trial uncertain. The contingent nature of counsel's representation and the sizable financial risks borne by Lead Counsel support the percentage fee requested. As the court in *Xcel Energy* 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." *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 994 (D. Minn. 2005); *see also Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012) (affirming ruling that granted defendants' post-trial motion for summary judgment as a matter of law based on failure to prove loss causation, thereby overturning a jury verdict in plaintiff's favor).

4. Awards Made in Similar Cases

Lead Counsel is applying for a fee award of 27.5% of the Settlement Fund. This request falls squarely within the parameters of percentage fees awarded in other class action litigation in California. Indeed, courts have routinely awarded attorneys' fees of up to one third of the settlement amount in class actions. *See Paton v. Advanced Micro Devices, Inc.*, No. 1-07-CV-084838, slip op. at 5 (Santa Clara Super. Ct. Aug. 22, 2014) (a fee award of 33-1/3% "was not an uncommon contingency fee percentage"); *see also Robinson v. Audience, Inc.*, No. 1:12-cv-232227, slip op. at 8 (Santa Clara Super. Ct. June 10, 2016) (awarding 30% fee); *In re Castlight Health, Inc. S'holder Litig.*, No. CIV533203, slip op. at 5 (San Mateo Super. Ct. Oct. 29, 2016) (awarding 30% fee); *Wiley v. Envivio, Inc.*, No. CIV517185, slip op. at 6 (San Mateo Super. Ct. June 22, 2015) (awarding 25% fee); *Plymouth Cty. Ret. Sys. v. Model N, Inc.*, No. CIV530291, slip op. at 5 (San Mateo Super. Ct. Apr. 4, 2016) (awarding 30%

fee); *In re CafePress Inc. S'holder Litig.*, No. CIV522744, slip op. at 6 (San Mateo Super. Ct. Aug. 11, 2015) (awarding 30% of settlement amount); *In re Epicor Software Corp. S'holder Litig.*, No. 30-2011-00465495-CU-BT-CXC, slip op. at 1 (Orange Super. Ct. Oct. 24, 2014) (awarding 30% fee), attached as Exhibits 2-8 to the Stewart Decl. "'Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.'" *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008); *see also Lealao*, 82 Cal. App. 4th at 31 n.5 ("'whatever method is used and no matter what billing records are submitted . . ., the result is an award that almost always hovers around 30[%] of the fund created by the settlement'"). A recent study by NERA also found that the median award of attorneys' fees as a percentage of the settlement amount for shareholder class actions that settled between $5 million and $9 million from 2012-2016 was 30%. Stefan Boettrich & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review*, at 39 (Figure 32) (NERA Jan. 23, 2017). The requested fee was disclosed in the Notice and, to date, not a single Class Member has objected to the fee.

5. Experience, Reputation, Ability, and Quality of Counsel, and the Skill They Displayed in Litigation

The skill, experience, reputation, quality, and ability of the attorneys who prosecuted this case also support the requested fee award. Lead Counsel, Robbins Geller Rudman & Dowd LLP, has earned a national reputation for excellence through many years of litigating complex civil actions, particularly the prosecution of securities class actions. As set forth in the firm résumé filed concurrently herewith, Lead Counsel's experience, resources, and high-quality attorneys have allowed it to obtain significant recoveries throughout the country on behalf of its clients. *See* Lead Counsel Decl., Ex. E, filed herewith.

The quality of opposing counsel is also important in evaluating the quality of the work done by Lead Counsel. *See, e.g.*, *In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977). Lead Counsel was opposed in this Litigation by experienced and skilled counsel from Keker & Van Nest LLP and Dechert LLP, large law firms with well-deserved reputations for vigorous advocacy on behalf of their clients. In the face of such knowledgeable and experienced opposition, Lead Counsel

was able to develop a case that was sufficiently strong to persuade Defendants to settle the case for an amount that Lead Counsel believes is highly favorable to the Class. As a result, this factor weighs strongly in favor of the requested fee.

6. Continuing Obligations of Lead Counsel

Lead Counsel's work does not end with the approval of the Settlement. Continuing work will include supervising the claims process, answering shareholder calls and, if necessary, litigating appeals.

7. The Reaction of the Class

While the April 19, 2017 deadline for objecting to counsel's fee and expenses has not passed, to date, Lead Counsel is not aware of a single Class Member who has objected to the fee and expense request or opted-out of the Class. *See* Rodriguez Decl., ¶16. "The absence of objections or disapproval by class members to Class Counsel's fee request further supports finding the fee request reasonable." *Heritage Bond*, 2005 U.S. Dist. LEXIS 13555, at *71.[12]

III. LEAD COUNSEL'S LITIGATION EXPENSES ARE REASONABLE AND SHOULD BE APPROVED

Attorneys who create a common fund for the benefit of a class are entitled to payment from the fund of reasonable litigation expenses and costs. Common fund fee and expense awards include counsel's incurred expenses because those who benefit from their effort should share in the cost. *See Rider v. Cty. of San Diego*, 11 Cal. App. 4th 1410, 1423 n.6 (1992). The appropriate analysis in making a determination if particular costs are compensable is whether the costs are of the type typically billed by attorneys to paying clients in the marketplace. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994).

Here, Lead Counsel is seeking payment of costs and expenses in an aggregate amount of $67,907.66. As itemized in Lead Counsel's Declaration, counsel's expenses include: (1) expert and consultants' fees; (2) mediation fees; (3) legal filing and process server fees; (4) on-line legal, financial, and factual research; (5) transportation, meals, and hotels; (6) photocopying; and (7) overnight delivery and messenger service fees. The expenses for which Lead Counsel seeks payment are those which are

[12] Lead Counsel will address any objections in its reply memorandum, which will be filed on or before May 12, 2017, in accordance with this Court's Preliminary Approval Order.

normally charged to paying clients, over and above hourly fees. *Id.* ("Harris may recover as part of the award of attorneys' fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'"). Further, the expenses which have been incurred and for which payment is sought were necessary for the successful prosecution of the Litigation, are reasonable in amount, and thus should be paid. *See Vincent v. Reser*, No. 11-03572 CRB, 2013 WL 621865, at *5 (N.D. Cal. Feb. 19, 2013) ("Attorneys who create a common fund are entitled to the reimbursement of expenses they advanced for the benefit of the class.").

IV. CONCLUSION

For the reasons set forth herein, Lead Counsel respectfully submits that the motion for an award of attorneys' fees and expenses is fair, reasonable, and appropriate under all the circumstances of this case and it should, therefore, be granted.

DATED: April 5, 2017

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
ELLEN GUSIKOFF STEWART
JAMES I. JACONETTE

s/ Ellen Gusikoff Stewart
ELLEN GUSIKOFF STEWART

655 West Broadway, Suite 1900
San Diego, CA 92101-8498
Telephone: 619/231-1058
619/231-7423 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
SHAWN A. WILLIAMS
Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: 415/288-4545
415/288-4534 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
SAMUEL H. RUDMAN
MARY K. BLASY
58 South Service Road, Suite 200
Melville, NY 11747
Telephone: 631/367-7100
631/367-1173 (fax)

VANOVERBEKE MICHAUD & TIMMONY, P.C.
THOMAS C. MICHAUD (appearance *pro hac vice*)
79 Alfred Street
Detroit, MI 48201
Telephone: 313/578-1200
313/578-1201 (fax)

Attorneys for Plaintiff

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway, Suite 1900, San Diego, California 92101.

2. That on April 5, 2017, declarant served **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES** by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 5, 2017, at San Diego, California.

Jaclyn Stark

JACLYN STARK

Counsel for Defendant(s)

Linda C. Goldstein
Andrew A. Spievack
Dechert LLP
1095 Avenue of the Americas
New York, NY 10036-6797
212/698-3500
212/698-3599 (Fax)

Joseph A. Fazioli
Dechert LLP
2440 W. El Camino Real, Suite 700
Mountain View, CA 94040-1499
650/813-4800
650/813-4848 (Fax)

Joshua D.N. Hess
Dechert LLP
One Bush Street, Suite 1600
San Francisco, CA 94104
415/262-4500
415/262-4555 (Fax)

Stuart L. Gasner
Michael D. Celio
Laurie Carr Mims
Keker & Van Nest LLP
633 Battery Street
San Francisco, CA 94111
415/391-5400
415/397-7188 (Fax)

Counsel for Plaintiff(s)

Samuel H. Rudman
Robbins Geller Rudman & Dowd LLP
58 South Service Road, Suite 200
Melville, NY 11747
631/367-7100
631/367-1173 (Fax)

James J. Jaconette
Robbins Geller Rudman & Dowd LLP
655 West Broadway, Suite 1900
San Diego, CA 92101
619/231-1058
619/231-7423 (Fax)

Shawn A. Williams
Robbins Geller Rudman & Dowd LLP
Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
415/288-4545
415/288-4534 (Fax)

Thomas C. Michaud
VanOverbeke Michaud & Timmony, P.C.
79 Alfred Street
Detroit, MI 48201
313/578-1200
313/578-1201 (Fax)