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UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

Rameses Te Lomingkit, Individually And  
On Behalf Of All Others Similarly  
Situated,

Plaintiff,

v.

Apollo Education Group, Inc. (F/K/A  
Apollo Group, Inc.); Peter V. Sperling;  
Gregory W. Cappelli; Brian L. Swartz; and  
William Pepicello,

Defendants.

No. 2:16-cv-00689-PHX-JAT

**CLASS ACTION**

**LEAD COUNSEL'S MOTION FOR  
AN AWARD OF ATTORNEYS' FEES  
AND LITIGATION EXPENSES; AND  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF**

Judge: Hon. James A. Teilborg  
Courtroom: 503  
Date: June 26, 2019  
Time: 1:30 p.m.

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**NOTICE OF LEAD COUNSEL’S MOTION FOR AN AWARD  
OF ATTORNEYS’ FEES AND LITIGATION EXPENSES**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, pursuant to Rule 23(h) of the Federal Rules of Civil Procedure and the Court’s Order Preliminarily Approving Settlement and Authorizing Dissemination of Notice of Settlement (ECF No. 112) (the “Preliminary Approval Order”), Lead Counsel Bernstein Litowitz Berger & Grossmann LLP (“Lead Counsel” or “BLB&G”) will and hereby does move the Court, before the Honorable James A. Teilborg, on June 26, 2019, at 1:30 p.m. in Courtroom 503 of the Sandra Day O’Connor U.S. Courthouse, 401 West Washington Street, Phoenix, AZ 85003, or at such other location and time as set by the Court, for an Order awarding attorneys’ fees and payment of litigation expenses in the above-captioned securities class action (the “Action”).

This Motion is based on the following Memorandum of Points and Authorities, the accompanying Declaration of Jonathan D. Uslander in Support of (I) Lead Plaintiff’s Motion for Final Approval of Class Action Settlement and Plan of Allocation, and (II) Lead Counsel’s Motion for an Award of Attorneys’ Fees and Litigation Expenses (“Uslander Declaration” or “Uslander Decl.”) and its exhibits, all other prior pleadings and papers in this Action, arguments of counsel, and such additional information or argument as may be required by the Court.

A proposed Order will be submitted with Lead Counsel’s reply submission on or before June 19, 2019.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

Lead Counsel for the Court-appointed Lead Plaintiff, Government of Guam Retirement Fund (“GGRF” or “Lead Plaintiff”), and the Settlement Class, respectfully submits this memorandum of law in support of its motion for (a) an award of attorneys’ fees for Plaintiffs’ Counsel in the amount of 25% of the Settlement Fund and (b) \$156,935.08 in Litigation Expenses that were reasonably and necessarily incurred by Plaintiffs’ Counsel in prosecuting and resolving the Action.<sup>1</sup>

### **PRELIMINARY STATEMENT**

The efforts of Lead Counsel and the other Plaintiffs’ Counsel have allowed Lead Plaintiff to achieve a Settlement of the Action for \$7.4 million for the benefit of the Settlement Class. The proposed Settlement is a favorable result in light of the significant challenges that Plaintiffs faced in prevailing in the litigation, including challenges in proving that Defendants’ statements were materially false or misleading and made with scienter, and in establishing loss causation and damages. The Settlement provides a substantial and certain recovery to Settlement Class Members and eliminates these significant risks. It also eliminates the substantial delays and expenses that would result from the years of continued litigation that would be needed to secure a litigated recovery for Plaintiffs.

Plaintiffs’ Counsel dedicated a total of more than 5,900 hours of attorney and other professional staff time over the past three years to bring the Action to this conclusion and have not yet received any compensation for these efforts. ¶¶ 85, 90. As detailed in the

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<sup>1</sup> Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated February 8, 2019 (ECF No. 109-1) (the “Stipulation”) or the Uslander Declaration. Citations to “¶ \_\_” in this memorandum refer to paragraphs in the Uslander Declaration and citations to “Ex. \_\_” refer to exhibits to the Uslander Declaration. Plaintiffs’ Counsel are: (i) Lead Counsel BLB&G; (ii) Tiffany & Bosco P.A. (“Tiffany & Bosco”), local counsel for Lead Plaintiff and the Settlement Class; and (iii) Robbins Geller Rudman & Dowd LLP (“Robbins Geller”), counsel for additional plaintiffs Rameses Te Lomingkit and National Shopmen Pension Fund.



1 accompanying Uslander Declaration,<sup>2</sup> Plaintiffs' Counsel's efforts included (i) conducting a  
 2 comprehensive investigation of the claims asserted in the Action, which involved reviewing the  
 3 voluminous public record that included SEC filings, analyst reports, news articles, and  
 4 transcripts of Apollo investor calls, as well as interviews with numerous former Apollo  
 5 employees and other potential witnesses; (ii) researching and drafting an initial complaint, a  
 6 detailed Consolidated Complaint, and Amended Complaint; (iii) briefing and arguing in  
 7 opposition to Defendants' two rounds of motions to dismiss; (iv) briefing an appeal to the Ninth  
 8 Circuit from the Court's order dismissing the Action; (v) consulting with experts in the online  
 9 education industry, loss causation, and damages; and (vi) engaging in extended settlement  
 10 negotiations, including preparing a mediation statement and participating in a mediation session  
 11 and arm's-length settlement negotiations. ¶¶ 5, 10-44.

12 From the outset of this litigation, Plaintiffs' Counsel faced numerous challenges to  
 13 proving liability and damages that posed a serious risk of no recovery for the Settlement Class.  
 14 ¶¶ 45-59. First, Plaintiffs faced substantial challenges in establishing that Defendants'  
 15 statements during the Class Period were materially false or misleading. Indeed, this risk was  
 16 largely realized at the motion to dismiss stage of this case when the Court found that Plaintiffs'  
 17 allegations did not provide an adequate basis for alleging that the Defendants' Class Period  
 18 statements were false or misleading. ¶ 31. Although Plaintiffs appealed the Court's ruling  
 19 dismissing the Action, it was far from certain that they would succeed on appeal and, even if  
 20 they had, they would still have faced other substantial hurdles in proving the falsity of  
 21 Defendants' statements through admissible evidence. ¶¶ 46-47, 51. Proving that Defendants  
 22 made the challenged statements with the intent to mislead or with deliberate recklessness was  
 23 another challenge in this Action from the outset. ¶¶ 46-47, 51. The Court did not reach the

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24  
 25 <sup>2</sup> The Uslander Declaration is an integral part of this submission and, for the sake of brevity  
 26 herein, the Court is respectfully referred to it for a detailed description of, *inter alia*: the  
 27 history of the Action (¶¶ 10-44); the nature of the claims asserted (¶¶ 16-17, 26-27); the  
 28 negotiations leading to the Settlement (¶¶ 36-42); the risks and uncertainties of continued  
 litigation (¶¶ 45-59); and a description of the services Plaintiffs' Counsel provided for the  
 benefit of the Settlement Class (¶¶ 5, 10-44, 82).

1 issue of scienter in either of its decisions on Defendants’ motions to dismiss, but Defendants  
2 vigorously argued that they lacked any motive to mislead investors or any knowledge of the  
3 omitted facts. Meanwhile, Plaintiffs’ Counsel brought the Action on a fully contingent basis  
4 and, thus, all of these litigation risks meant a substantial possibility that counsel might receive  
5 no compensation for the time they spent pursuing the Action.

6 As compensation for Plaintiffs’ Counsel’s efforts and for the risks of non-payment they  
7 faced in bringing the Action on a contingent basis, Lead Counsel seeks an award of 25% of the  
8 Settlement Fund, to be paid from the Settlement Fund. Lead Counsel’s requested fee is  
9 consistent with the Ninth Circuit’s 25% “benchmark” for percentage fees in common fund  
10 cases such as this one. *See, e.g., In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949  
11 (9th Cir. 2015); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011).  
12 As discussed below, the 25% fee request is consistent with percentage fees that have been  
13 awarded in securities class actions in the Ninth Circuit with recoveries of comparable size. In  
14 addition, the lodestar cross-check also confirms the reasonableness of the fee, with the  
15 requested fee representing a negative multiplier of Plaintiffs’ Counsel’s lodestar.

16 Lead Plaintiff GGRF supports the fee request, based on its active supervision of the  
17 work of counsel. *See* Declaration of Joe T. San Agustin submitted by GGRF (“San Agustin  
18 Decl.”), Ex. 3, at ¶ 7. In addition, while the deadline set by the Court for Settlement Class  
19 Members to object to the requested attorneys’ fees and expenses has not yet passed, to date, no  
20 objections to the requests for fees and expenses have been received. ¶¶ 66, 94, 102.<sup>3</sup>

21 In light of the recovery obtained, the time and effort devoted by Plaintiffs’ Counsel, the  
22 wholly contingent nature of the representation, and the considerable risks that counsel  
23 undertook, Lead Counsel respectfully submits that the requested fee award is reasonable and  
24 should be approved by the Court, and that reimbursement of the reasonable expenses  
25 necessarily incurred during the prosecution of the Action should also be approved.

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26  
27 <sup>3</sup> The deadline for the submission of objections is June 5, 2019. Should any objections be  
28 received, Lead Counsel will address them in its reply papers, due on or before June 19, 2019.

## **ARGUMENT**

### **I. Lead Counsel’s Request for Attorneys’ Fees Is Reasonable**

It is well settled that attorneys who represent a class and are successful in recovering a “common fund” for the benefit of class members are entitled to a reasonable fee paid from the fund as compensation for their services. The U.S. Supreme Court has recognized that “a litigant or 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). Similarly, the Ninth Circuit has held that “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.” *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *accord Stetson v. Grissom*, 821 F.3d 1157, 1164-65 (9th Cir. 2016).

As discussed further below, the requested attorneys’ fee in this case is reasonable and consistent with Ninth Circuit law.

#### **A. A Fee of 25% of the Settlement Fund is Reasonable Under Either the Percentage or Lodestar Method**

##### **1. The Requested Attorneys’ Fee Percentage Is Consistent With Ninth Circuit Law**

Lead Counsel’s fee request of 25% of the Settlement Fund is consistent with the Ninth Circuit’s well-established “benchmark” of 25% for percentage fees in common-fund cases. *See, e.g., Online DVD-Rental*, 779 F.3d at 949 (“in this circuit, the benchmark percentage is 25%”); *Bluetooth*, 645 F.3d at 942; *Fischel v. Equitable Life Assurance Soc’y of U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-48 (9th Cir. 2002). Courts have found fee awards in the amount of the 25% benchmark to be “presumptively reasonable.” *In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, at \*4 (N.D. Cal. Aug. 17, 2018); *Booth v. Strategic Realty Tr., Inc.*, 2015 WL 6002919, at \*7 (N.D. Cal. Oct. 15, 2015). Indeed, Courts have also found that, “in most common fund cases, the award exceeds that benchmark” of 25%. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036,

1 1047 (N.D. Cal. 2008); *accord In re Heritage Bond Litig.*, 2005 WL 1594403, at \*19 & n.14  
 2 (C.D. Cal. June 10, 2005).

3 The standard 25% fee requested by Lead Counsel, which has the full support of Lead  
 4 Plaintiff, is also within the range of percentage fees that have been awarded in securities class  
 5 actions in the Ninth Circuit with recoveries of comparable size. *See, e.g., Todd v. STAAR*  
 6 *Surgical Co.*, 2017 WL 4877417, at \*5-6 (C.D. Cal. Oct. 24, 2017) (awarding 25% of \$7  
 7 million settlement); *Kmiec v. Powerwave Techs., Inc.*, 2016 WL 5938709, at \*7 (C.D. Cal. July  
 8 11, 2016) (awarding 25% of \$8.2 million settlement); *Li v. Insys Therapeutics Inc.*, No. CV-14-  
 9 cv-01043-PHX-GMS, slip op. at 7 (D. Ariz. Dec. 7, 2015), ECF No. 80 (Ex. 6) (awarding  
 10 27.5% of \$6.1 million settlement); *Local 617 Teamsters Pension & Welfare Funds v. Apollo*  
 11 *Grp. Inc.*, No. CV-06-02674-PHX-DLR, slip op. at 2 (D. Ariz. July 29, 2015), ECF No. 194  
 12 (Ex. 7) (awarding 25% of \$13.1 million settlement); *Tsirekidze v. Syntax-Brilliant Corp.*, No.  
 13 2:07-cv-02204-FJM, slip op. at 2 (D. Ariz. Feb. 18, 2010), ECF No. 381 (Ex. 8) (awarding 25%  
 14 of \$10 million settlement); *In re Amkor Tech. Inc. Sec. Litig.*, 2009 WL 10708030, at \*2 (D.  
 15 Ariz. Nov. 19, 2009) (awarding 25% of \$11.25 million settlement); *Wood v. Ionatron, Inc.*,  
 16 2009 WL 10673479, at \*5, \*8-9 (D. Ariz. Sept. 28, 2009) (awarding 30% of \$6.5 million  
 17 settlement and noting that the 30% fee is “well within the range routinely approved”); *In re*  
 18 *Amerco Sec. Litig.*, No. CIV-04-2182-PHX-RJB, slip op. at 1 (D. Ariz. Nov. 3, 2006), ECF No.  
 19 290 (Ex. 9) (awarding 30% of \$7 million settlement).

## 20 **2. The Requested Attorneys’ Fees Are** 21 **Reasonable Under the Lodestar Method**

22 Courts in the Ninth Circuit, although not required to do so, often cross-check the  
 23 proposed award against counsel’s lodestar, which is calculated by multiplying the hours  
 24 dedicated to the action by counsel’s attorneys and other professionals by their regular hourly  
 25 rates. *See In re Amgen Inc. Sec. Litig.*, 2016 WL 10571773, at \*9 (C.D. Cal. Oct. 25, 2016)  
 26 (“Although an analysis of the lodestar is not required for an award of attorneys’ fees in the  
 27 Ninth Circuit, a cross-check of the fee request with a lodestar amount can demonstrate the fee  
 28 request’s reasonableness.”); *HCL Partners Ltd. P’ship v. Leap Wireless Int’l, Inc.*, 2010 WL

4156342, at \*2 (S.D. Cal. Oct. 15, 2010) (“Courts have found that a lodestar analysis is not necessary when the requested fee is within the accepted benchmark.”). When the lodestar is used as a cross-check, the “focus is not on the ‘necessity and reasonableness of every hour’ of the lodestar, but on the broader question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys.” *In re Tyco Int’l, Ltd. Multi-Dist. Litig.*, 535 F. Supp. 2d 249, 270 (D.N.H. 2007); *see Glass v. UBS Fin. Servs.*, 331 F. App’x 452, 456-57 (9th Cir. 2009).<sup>4</sup>

In this case, the lodestar method further demonstrates the reasonableness of the requested fee. Plaintiffs’ Counsel spent 5,944.9 hours of attorney and other professional time prosecuting the Action for the benefit of the Settlement Class through April 30, 2019. ¶ 85. Plaintiffs’ Counsel’s lodestar, derived by multiplying the hours spent on the litigation by each attorney or other professional by his or her current hourly rate, is \$3,632,893.25.<sup>5</sup> *Id.* The requested fee of 25% of the recovery, which is equal to \$1,850,000, plus interest earned, therefore represents just 51% of Plaintiffs’ Counsel’s total lodestar – in other words, a negative multiplier of 0.51 on Plaintiffs’ Counsel’s lodestar.<sup>6</sup> ¶ 86.

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<sup>4</sup> *See also In re Am. Apparel, Inc. S’holder Litig.*, 2014 WL 10212865, at \*23 (C.D. Cal. July 28, 2014) (“In contrast to the use of the lodestar method as a primary tool for setting a fee award, the lodestar cross-check can be performed with a less exhaustive cataloging and review of counsel’s hours.”); *In re Apollo Grp. Inc. Sec. Litig.*, 2012 WL 1378677, at \*7 n.2 (D. Ariz. Apr. 20, 2012) (“an itemized statement of legal services is not necessary for an appropriate lodestar cross-check”); *Fernandez v. Victoria Secret Stores, LLC*, 2008 WL 8150856, at \*9 (C.D. Cal. July 21, 2008) (same).

<sup>5</sup> It is well established that it is appropriate to calculate counsel’s lodestar based on current, rather than historical rates, as a method of compensating for the delay in payment and the loss of interest on the funds. *See Missouri v. Jenkins*, 491 U.S. 274, 284 (1989); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994) (“WPPSS”); *Apollo*, 2012 WL 1378677, at \*7 n.2.

<sup>6</sup> Moreover, the actual realized multiplier will decline over time, as Lead Counsel will devote additional attorney time to preparing for the final settlement hearing, overseeing the processing of claims by the Claims Administrator, and overseeing the distribution of the Settlement proceeds to Settlement Class Members with valid claims.

1 The fact that Plaintiffs' Counsel's requested fee in this case is less than the lodestar  
2 value of the time that the firms dedicated to the Action provides additional support for the  
3 reasonableness of the fee request. *See Amgen*, 2016 WL 10571773, at \*9 ("courts have  
4 recognized that a percentage fee that falls below counsel's lodestar strongly supports the  
5 reasonableness of the award"); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL  
6 4537550, at \*26 (S.D.N.Y. Nov. 8, 2010) ("Lead Counsel's request for a percentage fee  
7 representing a significant discount from their lodestar provides additional support for the  
8 reasonableness of the fee request.").

9 Indeed, fee awards in class actions with substantial contingency risks, such as this one,  
10 generally represent positive multipliers of counsel's lodestar, often ranging up to four times the  
11 lodestar or even higher. *See Vizcaino*, 290 F.3d at 1051-52 & n.6 (approving 3.65 multiplier  
12 and finding that "courts have routinely enhanced the lodestar to reflect the risk of non-payment  
13 in common fund cases," and that, when the lodestar is used as a cross-check, "most" multipliers  
14 were in the range of 1 to 4, but citing numerous examples of even higher multipliers); *see also*  
15 *Hopkins v. Stryker Sales Corp.*, 2013 WL 496358, at \*4 (N.D. Cal. Feb. 6, 2013) ("Multipliers  
16 of 1 to 4 are commonly found to be appropriate in complex class action cases."); *Buccellato v.*  
17 *AT&T Operations, Inc.*, 2011 WL 3348055, at \*1-2 (N.D. Cal. June 30, 2011) (awarding 25%  
18 fee on \$12.5 million settlement and stating that a "multiplier of 4.3 is reasonable").

19 The current hourly rates used to determine Plaintiffs' Counsel's lodestar range are within  
20 the range of reasonable fees for attorneys working on sophisticated and specialized nationwide  
21 securities class action litigation in this Circuit. *See, e.g., Hefler v. Wells Fargo & Co.*, 2018  
22 WL 6619983, at \*14 (N.D. Cal. Dec. 18, 2018) (finding reasonable counsel's rates that ranged  
23 from \$650 to \$1,250 for partners or senior counsel, from \$400 to \$650 for associates, and from  
24 \$245 to \$350 for paralegals, and a blended hourly rate for all timekeepers of \$406); *In re*  
25 *Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 2017 WL 1047834,  
26 at \*5 (N.D. Cal. Mar. 17, 2017) (approving fee award following a lodestar cross-check in which  
27 the court found "billing rates ranging from \$275 to \$1600 for partners, \$150 to \$790 for  
28



1 associates, and \$80 to \$490 for paralegals”). By way of comparison, according to reports,  
 2 Defense Counsel Wilmer Cutler Pickering Hale and Door LLP was charging comparable hourly  
 3 rates over four years ago, including rates for partners ranging from \$735 to \$1,250, with an  
 4 average partner rate of \$905. *See* Billing Rates at the Nation’s Priciest Law Firms, THE  
 5 NATIONAL LAW JOURNAL (Jan. 5, 2015) (Ex. 10).

6 In sum, Lead Counsel’s requested fee award is reasonable, justified, and well within the  
 7 range of what courts in this Circuit award in class actions such as this one, whether calculated  
 8 as a percentage of the fund or as a cross-check on counsel’s lodestar.

9 **B. Lead Plaintiff’s Endorsement of the**  
 10 **Requested Fee Supports its Approval**

11 Lead Plaintiff’s approval of the request also supports its approval by the Court as fair  
 12 and reasonable. Lead Plaintiff GGRF is an institutional investor that is the type of financially  
 13 interested plaintiff that Congress sought to encourage to play an active role in securities  
 14 litigation by enacting the PSLRA. The PSLRA was intended to encourage institutional  
 15 investors like GGRF to assume control of securities class actions in order to “increase the  
 16 likelihood that parties with significant holdings in issuers, whose interests are more strongly  
 17 aligned with the class of shareholders, will participate in the litigation and exercise control over  
 18 the selection and actions of plaintiff’s counsel.” H.R. Conf. Rep. No. 104-369 (1995),  
 19 *reprinted in* 1995 U.S.C.C.A.N. 730, 731 (1995). Congress believed that these institutions  
 20 would be in the best position to monitor the prosecution of securities class actions and to assess  
 21 the reasonableness of counsel’s fee requests.

22 In its role as a fiduciary for the Settlement, GGRF has closely supervised and actively  
 23 participated in the prosecution and settlement of the Action. *See* San Agustin Decl., Ex. 3, at  
 24 ¶ 4. GGRF believes that the requested fee is reasonable in light of the recovery in the Action,  
 25 the work counsel performed, and the risks of the litigation. *Id.* ¶ 7. As courts have recognized,  
 26 Lead Plaintiff’s endorsement of the fee request in this PSLRA action supports its approval.  
 27 *See, e.g., In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at \*8 (S.D.N.Y. Nov. 7,  
 28 2007) (“public policy considerations support the award in this case because the Lead Plaintiff

... —a large public pension fund—conscientiously supervised the work of lead counsel and has approved the fee request”); *In re Lucent Techs., Inc. Sec. Litig.*, 327 F. Supp. 2d 426, 442 (D.N.J. 2004) (“Significantly, the Lead Plaintiffs, both of whom are institutional investors with great financial stakes in the outcome of the litigation, have reviewed and approved Lead Counsel’s fees and expenses request.”).

### **C. The Factors Considered by Courts in the Ninth Circuit Support Approval of the Requested Fee**

Courts in this Circuit may consider the following factors when determining whether a fee is fair and reasonable: (1) the results achieved; (2) the risks of litigation; (3) the skill required and quality of work; (4) the contingent nature of the fee and financial burden carried by the plaintiffs; (5) awards made in similar cases; (6) the reaction of the class; and (7) the amount of a lodestar cross-check. *See Vizcaino*, 290 F.3d at 1048-50; *Omnivision*, 559 F. Supp. 2d at 1046-48. As discussed below, each of these factors further supports approval of the requested fee.

#### **1. The Results Achieved Support the Fee Request**

Plaintiffs’ Counsel succeeded in obtaining a \$7.4 million cash payment that will provide an immediate and substantial benefit to the Settlement Class, notwithstanding the Court’s order dismissing the Action with prejudice and the substantial risks in the Action. In a case that was dismissed with prejudice, a \$7.4 million recovery represents a positive outcome for the Settlement Class that weighs in favor of granting the requested fee. *See, e.g., In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 134-35 (S.D.N.Y. 2008) (where plaintiffs’ claims had been dismissed with prejudice and were on appeal at the time of settlement there was a “very high risk of complete non-recovery,” which made a \$4.9 million settlement a positive outcome for the class).

#### **2. The Substantial Risks of the Litigation Support the Fee Request**

The risk of non-payment assumed by counsel also supports approval of the fee request. *See, e.g., Omnivision*, 559 F. Supp. 2d at 1047; *WPPSS*, 19 F.3d at 1299-1300; *In re Heritage*



1 *Bond Litig.*, 2005 WL 1594389, at \*14 (C.D. Cal. June 10, 2005) (“The risks assumed by Class  
2 Counsel, particularly the risk of non-payment or reimbursement of expenses, is a factor in  
3 determining counsel’s proper fee award.”).

4 As discussed in greater detail in the Settlement Memorandum, there were many  
5 substantial challenges to succeeding in the litigation that could have resulted in no recovery  
6 and, thus, no fee for class counsel’s years of work on the matter. For example, Plaintiffs faced  
7 significant risks in proving that Defendants’ statements about the status and performance of the  
8 Online Classroom during the Class Period were actionable and materially false or misleading  
9 when made. Defendants contended that many of the challenged statements were generalized  
10 optimistic statements about the Classroom (such as that it was “efficient,” “user-friendly” or an  
11 “upgrade” over Apollo’s past system) and thus were not actionable as “puffery.” ¶ 18. To  
12 succeed at trial, Plaintiffs would likely need to establish through admissible evidence that the  
13 Classroom was suffering from chronic, regular outages and other significant performance  
14 issues before Defendants made the statements at issue; however, even if this could be shown,  
15 Defendants would still be able to argue that those issues did not render their statements false or  
16 misleading. ¶ 51.

17 Plaintiffs also faced additional challenges in proving Defendants’ state of mind at the  
18 time they made the alleged misrepresentations. Plaintiffs would attempt to establish at trial that  
19 the Individual Defendants had actual knowledge of the Classroom’s alleged performance issues  
20 before making their challenged statements and that they nonetheless made the challenged  
21 statements with the intent to deceive or with deliberate recklessness. ¶¶ 52-53. Given the  
22 nature of the alleged misstatements and the lack of a clear-cut financial motive for Defendants  
23 to engage in fraud, Plaintiffs recognize that they faced significant hurdles in establishing this  
24 element of their claim. *Id.*

25 Finally, Plaintiffs also faced significant risks of being unable to establish loss causation  
26 or prove the full amount of their alleged damages. Defendants had substantial arguments that  
27 declines in the price of Apollo stock identified by Plaintiffs were not caused by the disclosure  
28

1 of the alleged misstatements, but were reactions to other news about the Company that was  
2 disclosed at the same time. ¶¶ 55-57.

3 Indeed, one of these significant risks was realized when the Court dismissed the Action  
4 with prejudice after finding that the Amended Complaint failed to adequately allege any false  
5 or misleading statements by Defendants. If that decision had been affirmed on appeal,  
6 Plaintiffs would have obtained no recovery. Moreover, even if the appeal had succeeded,  
7 Plaintiffs would have had to prevail at numerous additional stages in the District Court,  
8 including on a litigated motion for class certification, a motion for summary judgment, and at  
9 trial before any recovery could be obtained. ¶ 92.

### 10 **3. The Skill Required and Quality of the Work** 11 **Performed Support the Fee Request**

12 The skill required and quality of work performed in this case further support the  
13 requested fee. *See Gustafson v. Valley Ins. Co.*, 2004 WL 2260605, at \*2 (D. Or. Oct. 6, 2004).  
14 “The ‘prosecution and management of a complex national class action requires unique legal  
15 skills and abilities.’ This is particularly true in securities cases because the [PSLRA] makes it  
16 much more difficult for securities plaintiffs to get past a motion to dismiss.” *Omnivision*, 559  
17 F. Supp. 2d at 1047 (internal citation omitted); *see also Heritage Bond*, 2005 WL 1594389, at  
18 \*12 (“The experience of counsel is also a factor in determining the appropriate fee award.”).

19 Here, the attorneys at BLB&G are among the most experienced and skilled practitioners  
20 in the securities litigation field, and the firm has a long and successful track record in securities  
21 cases throughout the country – including within this Circuit.<sup>7</sup> From the outset, Plaintiffs’  
22

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23 <sup>7</sup> *See, e.g., Hefler*, 2018 WL 6619983, at \*8, \*16-17 (BLB&G, as Lead Counsel, obtained  
24 approval of \$480 million settlement); *In re Allergan, Inc. Proxy Violation Sec. Litig.*, No.  
25 8:14-cv-02004 (C.D. Cal.) (BLB&G, as Co-Lead Counsel, successfully obtained approval of  
26 \$250 million settlement); *In re Maxim Integrated Prods., Inc. Sec. Litig.*, No. 08-cv-00832  
27 (N.D. Cal.) (BLB&G, as Co-Lead Counsel, successfully obtained approval of \$173 million  
28 settlement); *In re New Century*, No. 07-cv-00931 (C.D. Cal.) (BLB&G, as Lead Counsel,  
successfully obtained approval of \$125 million settlements); *In re Int’l Rectifier Corp. Sec.  
Litig.*, No. 07-cv-02544 (C.D. Cal.) (BLB&G, as Co-Lead Counsel, successfully obtained  
approval of \$90 million settlement); *see also* Firm Resume of BLB&G (Ex. 4A-3).

Counsel engaged in a concerted effort to obtain the maximum recovery for the Settlement Class. Lead Counsel's efforts leading to the Settlement strongly support the requested percentage fee.

The quality of opposing counsel also is considered in evaluating the services rendered by Plaintiffs' Counsel. *See In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977) ("[P]laintiffs' attorneys in this class action have been up against established and skillful defense lawyers, and should be compensated accordingly."); *accord Quezada v. Schneider Logistics Transloading & Distrib., Inc.*, 2014 WL 12584436, at \*9 (C.D. Cal. May 12, 2014). Here, Defendants were represented by extremely able counsel from Wilmer Cutler Pickering Hale and Dorr LLP, one of the top defense firms in the country. ¶ 88.

#### **4. The Contingent Nature of the Fee Supports the Fee Request**

The fully contingent nature of Plaintiffs' Counsel's fee also supports the fee request. *See WPPSS*, 19 F.3d at 1299 ("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."); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2007 WL 2416513, at \*1 (N.D. Cal. Aug. 16, 2007); *Omnivision*, 559 F. Supp. 2d at 1047.

Here, Plaintiffs' Counsel received no compensation during the course of this three-year litigation, invested over 5,900 hours for a total lodestar of approximately \$3.6 million, and incurred expenses totaling over \$156,000 in prosecuting and resolving the case. ¶¶ 85, 90, 98. Additional work in connection with the Settlement and claims administration will also be required. Any fee award has always been at risk, and contingent on the result achieved and on this Court's discretion in awarding fees and expenses.

Indeed, the risk of no recovery in complex cases is very real. ¶ 91. Lead Counsel knows from personal experience that, despite the most vigorous and competent efforts, success in contingent litigation such as this is never guaranteed. Hard, diligent work by skilled counsel is required to develop facts and theories to prosecute a case or persuade defendants to settle on

1 terms favorable to the class.

## 2 **5. Awards Made in Similar Cases Support the Fee** 3 **Request**

4 Lead Counsel's fee request is also supported by awards made in similar cases. As  
5 discussed in Part I.A.1 above, the 25% fee request is consistent with the Ninth Circuit's 25%  
6 "benchmark" for contingency-fee litigation and well within the range of fee percentages  
7 awarded in comparable settlements. In addition, as discussed in Part I.A.2 above, the resulting  
8 negative multiplier of 0.51 on Plaintiffs' Counsel's lodestar is also well within the range of  
9 lodestar multipliers awarded in cases of this nature with substantial contingency-fee risks.

## 10 **6. The Reaction of the Settlement Class to Date** 11 **Supports the Fee Request**

12 The reaction of the Settlement Class to date also supports approval of the fee request.  
13 *See Knight v. Red Door Salons, Inc.*, 2009 WL 248367, at \*6 (N.D. Cal. Feb. 2, 2009);  
14 *Omnivision*, 559 F. Supp. 2d at 1048. Here, the Claims Administrator began mailing the Notice  
15 Packet to potential Settlement Class Members on March 21, 2019. As of May 22, 2019, the  
16 Notice has been mailed to more than 59,000 potential Settlement Class Members and their  
17 nominees. *See* Declaration of Eric Miller, Ex. 2, at ¶ 8. In addition, the Summary Notice was  
18 published in *Investor's Business Daily* and transmitted over the *PR Newswire* on April 1, 2019.  
19 *Id.* ¶ 9. The Notice informed Settlement Class Members that Lead Counsel would seek fees "in  
20 an amount not to exceed 25% of the Settlement Fund." *See id.* Ex. A ¶¶ 5, 74. The Notice  
21 further advised Settlement Class Members of their right to object to the request for attorneys'  
22 fees and expenses. While the deadline for filing any objections is not until June 5, 2019, to  
23 date, no Settlement Class Member has filed an objection to the fees and expenses requested.  
24 ¶¶ 94, 102.

25 In sum, Lead Counsel's requested fee, which is consistent with the Ninth Circuit's 25%  
26 benchmark and results in a fee that is substantially less than Plaintiffs' Counsels' lodestar, is  
27 fair and reasonable in light of the result achieved, the efforts of Plaintiffs' Counsel, the  
28 contingent nature of the fee, and the significant risks of non-payment.

## II. Plaintiffs' Counsel's Expenses Are Reasonable and Should Be Approved

Lead Counsel also requests that the Court grant its application for \$156,935.08 in Plaintiffs' Counsel's expenses incurred in connection with the prosecution of this litigation.

¶ 96. Expenses are reimbursable in a common fund case where they are of the type typically billed by attorneys to paying clients in the marketplace. *See, e.g., 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."); *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (plaintiff may recover "those out-of-pocket expenses that 'would normally be charged to a fee paying client'").

From the beginning of the case, Plaintiffs' Counsel were aware that they might not recover any of their expenses, and would not recover any amounts unless and until the Action was successfully resolved. ¶ 97. Plaintiffs' Counsel also understood that, even assuming that the case was ultimately successful, an award of expenses would not compensate them for the lost use of the funds spent over the last years to prosecute this Action. *Id.* Thus, Plaintiffs' Counsel were motivated to, and did, take significant steps to minimize expenses whenever practicable without jeopardizing the vigorous and efficient prosecution of the Action. *Id.*

As discussed in detail in the Uslaner Declaration, Plaintiffs' Counsel incurred \$156,935.08 in litigation expenses in litigating the Action. ¶ 98. Plaintiffs' Counsel's expenses are supported by sworn Declarations by Plaintiffs' Counsel. *See* Exs. 4A, 4B, and 4C. The expenses for which payment is sought were reasonable and necessary for the prosecution of the litigation and are of the type that are routinely charged to hourly paying clients. These include costs such as expert fees, online legal and factual research, travel costs, court costs, telephone charges, and printing and copying expenses. ¶¶ 98, 101. The largest incurred expense was for the fees of Plaintiffs' experts, in the amount of \$93,482.23, or approximately 60% of the total litigation expenses. ¶ 99. Another large component of the litigation expenses for which Lead Counsel requests reimbursement is the combined costs for online legal and factual research, which amount to \$38,357.30, or approximately 24% of the total amount of expenses. ¶ 100.

1 The other expenses are the types of expenses that are necessarily incurred in litigation  
 2 and routinely charged to clients. These expenses include court fees and costs for travel, service  
 3 of process, long-distance telephone calls, copying and printing, postage and express mail, and  
 4 publication of certain press releases with information for class members, and other similar case-  
 5 related costs. A complete breakdown by category of the expenses incurred by Plaintiffs'  
 6 Counsel is presented in Exhibit 5 to the Uslander Declaration. These expense items are incurred  
 7 separately by Plaintiffs' Counsel and are not duplicated in the firms' hourly rates.

8 The Notice provided to potential Settlement Class Members informed them that Lead  
 9 Counsel intends to apply for the reimbursement of litigation expenses in an amount not to  
 10 exceed \$300,000. The amount of expenses now sought by Lead Counsel—\$156,935.08—is  
 11 significantly less than the amount stated in the Notice. The deadline for objecting to the fee  
 12 and expense application is June 5, 2019. To date, there have been no objections to the request  
 13 for litigation expenses. ¶ 102.

### 14 CONCLUSION

15 For each of these reasons, Lead Counsel respectfully submits that the Court should  
 16 approve the fee and expense application.

17 Dated: May 22, 2019

Respectfully submitted,

18 By: /s/ Jonathan D. Uslander

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