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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re Oracle Corporation Securities Litigation

CLASS ACTION

Case No. 5:18-cv-04844-BLF

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

Dept.: Courtroom 3, 5th Floor
Judge: Honorable Beth Labson Freeman

Hearing Date:
January 12, 2023 at 9:00 a.m.

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NOTICE OF 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 Providing for Notice (ECF No. 134) (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 Beth Labson Freeman, on January 12, 2023, at 9:00 a.m. Courtroom 3 – 5th Floor of the Robert F. Peckham Federal Building & United States Courthouse, 280 South 1st Street, San Jose, CA 95113, or at such other location and time as set by the Court, for an Order awarding attorneys' fees and litigation expenses incurred 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. Uslaner in Support of (A) Lead Plaintiff's Motion for Final Approval of Settlement and Plan of Allocation; and (B) Lead Counsel's Motion for Attorneys' Fees and Litigation Expenses ("Uslaner Declaration" or "Uslaner 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, after time for any objections has passed.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Court should approve Lead Counsel's application for an award of attorneys' fees.

2. Whether the Court should approve Lead Counsel's application for payment of Litigation Expenses.

3. Whether the Court should approve Lead Plaintiff's application for an award reimbursing its costs incurred in representing the Class pursuant to the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(a)(4).

MEMORANDUM OF POINTS AND AUTHORITIES

Court-appointed Lead Counsel for the Class and counsel for Lead Plaintiff Union Asset Management AG ("Union" or "Lead Plaintiff") respectfully submits this memorandum of law in support of its application for (a) an award of attorneys' fees in the amount of 20% of the Settlement Fund (plus interest); (b) payment of Lead Counsel's litigation expenses in the amount of $795,465.17; and (c) a PSLRA award to Lead Plaintiff in the amount of $64,750.[1]

PRELIMINARY STATEMENT

Lead Counsel has vigorously litigated this securities class action over the last four years on a fully contingent basis, without receiving any compensation at all. The litigation was hard-fought and faced material risks. As such, Lead Counsel had to—and did—dedicate very substantial efforts to the Action from its outset. Indeed, Lead Counsel conducted an extensive investigation, prepared two detailed complaints, opposed two heavily contested motions to dismiss and, after the Court initially dismissed the Action in its entirety, prevailed in getting securities fraud claims sustained against multiple Defendants. Lead Counsel was also successful in obtaining class certification and conducting substantial fact discovery.

It was due to Lead Counsel's sustained litigation efforts that the proposed $17.5 million Settlement was achieved for the benefit of Lead Plaintiff and the Class. The $17.5 million recovery represents a favorable result for the Class and provides meaningful and prompt compensation to Class members while avoiding the significant risks and delay of continued litigation, including the risk that there may be no recovery at all. Having achieved a significant monetary recovery after four years of litigating this case without any payment at all, Lead Counsel seeks attorneys' fees in the amount of 20% of the Settlement Fund (plus interest at the same rate as the Settlement Fund), as well as payment for the litigation expenses that it incurred in prosecuting the Action on behalf of Lead Plaintiff and the Class.

[1] Unless otherwise defined in this memorandum, all capitalized terms have the meanings defined in the Stipulation and Agreement of Settlement, dated June 23, 2022 (ECF No. 128-1) (the "Stipulation"), or the Uslaner Declaration. Citations to "¶ ___" in this memorandum refer to paragraphs in the Uslaner Declaration and citations to "Ex. ___" refer to exhibits to the Uslaner Declaration.

Lead Counsel respectfully submits that its hard work, skill, and persistence fully merit the requested 20% fee award here. As set forth herein, the requested 20% fee is significantly lower than the 25% "benchmark" accepted by the Ninth Circuit. It also represents a "negative multiplier" or a discount to Lead Counsel's total lodestar devoted to this Action.

First, the Ninth Circuit has long recognized that, in class actions resulting in a common fund like this one, a percentage award is appropriate and an award of 25% of the settlement amount is the "benchmark" or reasonable starting point in considering an award. Here, Lead Counsel's considerable efforts over the past four years, its success in securing a meaningful recovery for the Class, and the substantial risks in the Action are factors that could potentially support an *increase* from the benchmark. But, notwithstanding that reality, Lead Counsel requests a fee percentage of 20% of the Settlement Fund, which is substantially *less* than the benchmark amount, which strongly supports approval. The fee percentage requested is based on the retainer agreement that was entered into between Lead Plaintiff and Lead Counsel at the outset of the Action.

The requested fee percentage is also supported by the other factors considered by courts in determining the reasonableness of the fee, including the quality of the result achieved, the significant risks presented by this contingent fee litigation, the extent and quality of Lead Counsel's efforts, and the lodestar cross-check. Lead Counsel prosecuted the Action on a contingency-fee basis, facing numerous challenges to proving liability and damages that posed serious risks that counsel would receive no compensation for its efforts.

As discussed in the Uslaner Declaration, there were multiple significant risks inherent in the Action from the outset, which were enhanced by the elevated pleading standard required under the PSLRA. The riskiness of the Action is highlighted by the fact that the Company never restated its financials and there was no parallel SEC or DOJ enforcement action brought related to the alleged fraud.

Many of the substantial risks in the Action were manifested when the Court initially dismissed the Complaint in its entirety for failure to adequately allege falsity and scienter. Even after Lead Plaintiff prevailed on a second round of motion to dismiss briefing with its Amended Complaint and succeeded in certifying the Class, there remained meaningful risks that Defendants

might prevail at summary judgment or trial if Lead Plaintiff and Lead Counsel were unable to prove all of the elements of the claims, including falsity, materiality, scienter, loss causation, and damages. Through their diligence and efforts, Lead Counsel and Lead Plaintiff were able to overcome these hurdles and secure a meaningful recovery for the Class.

Second, as detailed in the accompanying Uslaner Declaration, Lead Counsel dedicated a total of over 17,900 hours of attorney and other professional staff time over the last four years of litigation to bring the Action to this resolution. ¶ 105. In class actions like this one, which are prosecuted on a contingent-fee basis, courts often award fees representing a "multiplier" of counsel's lodestar (often two to four times the amount of their lodestar) to compensate counsel for taking the risks of non-recovery and other factors. Here, Lead Counsel's requested fee does not represent a *positive* multiple of its lodestar, but rather amounts to substantially less than its lodestar—or a "*negative*" lodestar multiplier of 0.38. *Id*. This means that, if awarded, the requested 20% fee will result in a discount—specifically, a substantial 62% discount—on Lead Counsel's total lodestar, which further supports the reasonableness of the requested fee.

In addition to the attorneys' fees sought, Lead Counsel also seeks to recover the litigation expenses incurred in prosecuting and resolving this litigation, which totaled $795,465.17. As discussed below, these expenses were reasonable and necessary for the prosecution and resolution of the litigation and are of the type that are routinely charged to clients in non-contingent litigation. Finally, Lead Plaintiff seeks an award, as permitted under the PSLRA, in the amount of $64,750 in reimbursement for the value of the time dedicated to the Action by its employees.

For the reasons set forth herein, Lead Counsel respectfully requests that the Court award it attorneys' fees in the amount of 20% of the Settlement Fund (plus interest), payment of Lead Counsel's litigation expenses in the amount of $795,465.17, and an award to Lead Plaintiff in the amount of $64,750.

ARGUMENT

I. Lead Counsel's Request for Attorneys' Fees of 20% of the Settlement Fund Is Less Than the 25% "Benchmark Percentage" In this Circuit

The Ninth Circuit has established that, in common-fund cases such as this one, the "benchmark" percentage attorney fee award is 25% of the settlement fund. *See, e.g.*, *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015) ("in this circuit, the benchmark percentage is 25%"); *In re Bluetooth Headset Prods. Liab. Litig.,* 654 F.3d 935, 942 (9th Cir. 2011) ("courts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure"); *Fischel v. Equitable Life Assurance Soc'y of U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002) ("We have established a 25 percent 'benchmark' in percentage-of-the-fund cases"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) ("This circuit has established 25% of the common fund as a benchmark award for attorney fees."); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) ("we established 25 percent of the fund as the 'benchmark' award that should be given in common fund cases").

Courts in this District 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) ("[I]t is well established that 25% of a common fund is a presumptively reasonable amount of attorneys' fees"); *Booth v. Strategic Realty Trust, Inc.*, 2015 WL 6002919, at *7 (N.D. Cal. Oct. 15, 2015) ("[T]he 25% award requested by Class Counsel is equal to the 'benchmark' percentage for a reasonable fee award in the Ninth Circuit. Such a fee award is 'presumptively reasonable.'") (citations omitted). Indeed, courts have found that, "in most common fund cases, the award *exceeds* that benchmark [of 25%]." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008); *see also In re Allergan, Inc. Proxy Violation Derivatives Litig.*, 2018 WL 4959014, at *1 (C.D. Cal. Aug. 13, 2018) ("The Ninth Circuit uses a 25% benchmark in common fund class actions, and 'in most common fund cases, the award exceeds that benchmark,' with a 30% award the norm 'absent extraordinary circumstances that suggest reasons to lower or increase the percentage.'").

Accordingly, the fact that the 20% fee request—which was established pursuant to a fee retainer agreement that Lead Counsel entered into with a sophisticated institutional investor at the outset of the litigation—is substantially below the 25% benchmark strongly supports the reasonableness of the fee.

The 20% fee requested here is also within—indeed, well below—the range of percentage fees typically awarded in securities class actions and other complex class actions in the Ninth Circuit with recoveries comparable to the $17.5 million achieved here, including by this Court. *See, e.g.*, *In re Merit Med. Sys., Inc. Sec. Litig.*, No. 8:19-cv-02326-DOC-ADS, slip op. at 1-2 (C.D. Cal. Apr. 15, 2022), ECF No. 118 (Ex. 9) (awarding 30% of $18.25 million settlement, representing a 1.44 multiplier); *In re Silver Wheaton Corp. Sec. Litig.*, 2020 WL 4581642, at *4 (C.D. Cal. Aug. 6, 2020) (awarding 30% of $41.5 million settlement); *Avila v. LifeLock Inc.*, 2020 WL 4362394, at *1 (D. Ariz. July 27, 2020) (awarding 30% of $20 million settlement, representing a 1.1 multiplier); *In re Banc of Cal. Sec. Litig.*, 2020 WL 1283486, at *1 (C.D. Cal. Mar. 16, 2020) (awarding 33% of $19.75 million settlement); *In re Extreme Networks, Inc. Sec. Litig.,* 2019 WL 3290770, at *11 (N.D. Cal. July 22, 2019) (Freeman, J.) (awarding 25% of $7 million settlement); *In re Volkswagen "Clean Diesel" Mktg, Sales Practices, and Prods. Liab. Litig.*, 2019 WL 2077847, at *4 (N.D. Cal. May 10, 2019) (awarding 25% of $48 million settlement, representing a 1.59 multiplier); *In re Quality Sys., Inc. Sec. Litig.*, No. SACV 13-01818-CJC-JPR, slip op. at 2 (C.D. Cal. Nov. 19, 2018), ECF No. 120 (Ex. 10) (awarding 25% of $19 million settlement); *Allergan Proxy Derivatives Litig.*, 2018 WL 4959014, at *1 (awarding 20% of $40 million settlement, representing a 1.77 multiplier); *Hatamian v. Advanced Micro Devices, Inc.*, 2018 WL 8950656, at *1-2 (N.D. Cal. Mar. 2, 2018) (awarding 25% of $29.5 million settlement); *Destefano v. Zynga, Inc.*, 2016 WL 537946, at *22 (N.D. Cal. Feb. 11, 2016) (awarding 25% of $23 million settlement, representing a 1.7 multiplier); *In re Novatel Wireless Sec. Litig.*, No. 08-CV-01689-AJB (RBB), slip op. at 1 (S.D. Cal. June 23, 2014), ECF No. 520 (Ex. 11) (awarding 27.5% of $16 million settlement).

Moreover, a statistical review of all PSLRA settlements from 2012 to 2021 reveals that the median fee award in settlements ranging from $10 to $25 million was 27.5%, and, even in the

higher range of settlements from $25 million to $100 million and from $100 million to $500 million, the median fee awards were 25% and 24.5%, respectively. *See* NERA ECONOMIC CONSULTING, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2021 FULL-YEAR REVIEW, at 27 (2022) (Ex. 12). Thus, the 20% fee requested here is unquestionably on the lower end of the range of percentage fees awarded in comparable cases, and its reasonableness is only further confirmed by the fact (discussed below) that it represents a significant negative multiplier or discount on Lead Counsel's total lodestar devoted to the Action.

II. Additional Factors Considered By Courts Support Approval of the Requested Fee

The reasonableness of Lead Counsel's 20% fee request is further confirmed by additional factors considered by courts in this Circuit, including (1) the results achieved, (2) the risks of litigation, (3) the skill required and the quality of work, (4) the contingent nature of the fee and the financial burden carried by the plaintiffs, (5) awards made in similar cases, (6) the class's reaction, and (7) a lodestar cross-check. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002); *Omnivision*, 559 F. Supp. 2d at 1046-48.

A. The Quality of the Result Achieved Supports the Fee Request

Courts consider the results achieved in assessing a fee award request. *See Vizcaino*, 290 F.3d at 1048 ("results are a relevant" factor in awarding attorneys' fees). Lead Counsel respectfully submits that the $17.5 million cash settlement is a very favorable result for the Class, especially when considering the risk of a significantly lower recovery—or no recovery at all—if the case proceeded through summary judgment, trial, and the inevitable appeals.

The $17.5 million Settlement represents a recovery of approximately 7.4% of the Class's realistic maximum damages. ¶ 79. This estimate of realistic maximum damages assumes Lead Plaintiff would have complete success on *all* issues of falsity, materiality, and scienter at summary judgment and trial, which was far from certain. Indeed, Defendants advanced serious arguments regarding all elements of liability, loss causation, and damages that, if accepted, would have substantially lowered the realistic maximum damages or ***eliminated them entirely***. Given the significant risks of establishing liability here, Lead Counsel believes this level of recovery

represents a very favorable result for the Class. Accordingly, Lead Counsel believes that the quality of the result achieved supports the fee requested.

B. The Substantial Risks of the Litigation Support the Fee Request

"The risks assumed by Class Counsel, particularly the risk of non-payment or reimbursement of expenses, is a factor in determining counsel's proper fee award." *In re Heritage Bond Litig.*, 2005 WL 1594389, at *14 (C.D. Cal. June 10, 2005); *see also, e.g.*, *In re Washington Pub. Power Supply Sys. Sec. Litig.* ("*WPPSS*"), 19 F.3d 1291, 1299-1301 (9th Cir. 1994); *Omnivision*, 559 F. Supp. 2d at 1047.

Lead Counsel faced significant risks in bringing this Action from the outset. As an initial matter, the application of the PSLRA to this litigation presented significant risks. Since Congress passed the PSLRA in 1995, courts in this Circuit and across the country have increasingly dismissed cases at the pleading stage in response to defendants' arguments that the complaints do not meet the PSLRA's heightened pleading standards. *See Johnson v. US Auto Parts Network, Inc.*, 2008 WL 11343481, at *3 (C.D. Cal. Oct. 9, 2008) (noting that "securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA").

As discussed in greater detail in the Uslaner Declaration and the Settlement Memorandum, there were many substantial challenges to succeeding in this litigation from the outset. Indeed, throughout the litigation, Defendants vigorously asserted that their public statements were accurate and that the price declines in Oracle stock could not be attributed to the correction of the alleged misstatements or omissions. ¶¶ 64-76.

In order to succeed, Lead Plaintiff would have been required to prove that Defendants' statements were materially false or misleading, that Defendants knew that their statements were false when made or were deliberately reckless in making the statements, and that the disclosures concerning Defendants' false and misleading statements caused declines in the price of Oracle's stock. In addition, Lead Plaintiff would have had to establish the amount of per share damages.

Success in these tasks was far from certain. This was not a case in which Oracle ever restated its financials, nor was there ever any parallel SEC or other government action brought against Oracle or any of the Defendants for the alleged fraud. Indeed, many of the potential risks

in the action were realized at the pleading stage when the Court initially dismissed Lead Plaintiff's allegations entirely and subsequently sustained only a portion of Lead Plaintiff's Amended Complaint on a narrow "omissions" theory.

Lead Plaintiff would have faced significant additional challenges to get past Defendants' expected motion for summary judgment and succeed at trial. Defendants would argue that Oracle's revenue was accurately reported at all times during the Class Period, and that Oracle's revenue guidance was also accurate. They would also argue that—to the extent the alleged improper sales practices occurred at all—they affected only a small fraction of Oracle's Cloud revenue, and thus any such omissions could not be material. Defendants would also argue that, to the extent that Lead Plaintiff's allegations involve discounts to Cloud customers, such discounts were proper and the failure to disclose such discounts did not constitute securities fraud.

Further, Defendants would argue that, even if any of their statements were false or misleading, they did not have an intent to mislead investors and believed their statements to be true. Indeed, Defendants argued vigorously that they had no motive to commit fraud and that the Individual Defendants did not benefit from the alleged fraud. On the contrary, Defendants could point to the significant amounts of stock buybacks Oracle initiated during the Class Period as indicating that Defendants did not believe the price of Oracle common stock was artificially inflated at that time. In light of these circumstances, Lead Plaintiff and the Class would have faced significant challenges in proving Defendants' scienter—even if they could establish that Defendants had made materially misleading omissions.

Lead Plaintiff also faced significant risks to proving loss causation and damages. For example, Defendants contended that Lead Plaintiff could not establish a causal connection between the alleged misrepresentations and the loss allegedly suffered by investors. Defendants would contend that the alleged disclosures do not correct earlier-reported Cloud revenue or growth rates, and that the vast majority of alleged corrective disclosures do not reference allegedly improper sales practices at all.

These substantial risks faced in prosecuting the securities fraud claims at issue, which Lead Counsel did on a purely contingency fee basis without any payment for over four years, further support the requested fee.

C. The Skill Required and the Quality of the Work Performed Support the Fee Request

Courts have recognized that the "'prosecution and management of a complex national class action requires unique legal skills and abilities.'" *Zynga, Inc.*, 2016 WL 537946, at *17; *see also Vizcaino*, 290 F.3d at 1048. "'This is particularly true in securities cases because the Private Securities Litigation Reform Act makes it much more difficult for securities plaintiffs to get past a motion to dismiss.'" *Zynga*, 2016 WL 537946, at *17 (quoting *Omnivision*, 559 F. Supp. 2d at 1047). In considering this factor, courts also consider the quality and vigor of opposing counsel. *See, e.g.*, *In re Heritage Bond Litig.,* 2005 WL 1594403, at *20 (C.D. Cal. June 10, 2005) ("the quality of opposing counsel is important in evaluating the quality of Plaintiff's counsel's work"); *In re Equity Funding Corp. of Am. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977) ("plaintiffs' attorneys in this class action have been up against established and skillful defense lawyers, and should be compensated accordingly").

Here, Lead Counsel is among the most experienced and skilled practitioners in the securities-litigation field, and the firm has a long and successful track record in securities cases throughout the country, including within this Circuit. ¶ 112. Lead Counsel is consistently ranked among the top plaintiffs' firms in the country. *Id*. For example, the ISS/Securities Class Action Services' 2021 report on the "Top 100 U.S. Class Action Settlements of All Time" shows that BLB&G has been lead or co-lead counsel in more top recoveries than any other firm in history. *Id*.

Lead Counsel's reputation as experienced counsel in complex securities cases facilitated Lead Counsel's ability to negotiate the Settlement, ultimately resulting in the $17.5 million recovery. Lead Counsel achieved this substantial recovery for the benefit of Lead Plaintiff and the Class, notwithstanding that they were opposed in this Action by highly skilled and well-respected lawyers from Morrison & Foerster LLP, who vigorously advocated for their clients.

Lead Counsel's efforts over the past four years of litigation included (i) an extensive investigation of the claims at issue, which involved interviews with 115 former Oracle employees or other potential witnesses; (ii) research and preparation of the initial complaint and two detailed amended complaints; (iii) vigorous opposition to two rounds of Defendants' motions to dismiss through briefing and oral argument; (iv) successfully obtaining certification of the Class following a contested motion, including assisting in the preparation of a related expert report; (v) opposing Defendants' Rule 23(f) petition for immediate appellate review of the class certification decision; (vi) conducting substantial fact discovery, which included preparing and exchanging initial disclosures, document requests and interrogatories, serving subpoenas on multiple third-parties, obtaining and reviewing nearly 330,000 pages of documents from Defendants, and producing over 200,000 pages of documents from Lead Plaintiff to Defendants; (vii) extensive work with experts and consultants in loss causation, damages, accounting and the software industry throughout the litigation; and (vii) extended settlement negotiations, including preparing a mediation statement and participating in a full-day mediation with Jed D. Melnick of JAMS. ¶¶ 3, 8-62.

In sum, it was Lead Counsel's extensive effort and skill in prosecuting this litigation that allowed the favorable $17.5 million proposed Settlement with Defendants to be achieved.

D. The Contingent Nature of the Fee Supports the Fee Request

It is well-recognized that a premium is appropriate where attorney fees are contingent in nature, as there is a risk that counsel will receive no compensation or less compensation for their efforts. *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."); *see also Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 261 (N.D. Cal. 2015) ("when counsel takes cases on a contingency fee basis, and litigation is protracted, the risk of non-payment after years of litigation justifies a significant fee award"). The Supreme Court has emphasized that private securities actions, like this one, "provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'" *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 318-19 (2007).

As courts recognize, there have been many class actions in which plaintiffs' counsel took on the risk of pursuing claims on a contingency basis, expending thousands of hours and millions of dollars, yet received no remuneration whatsoever despite their diligence and expertise. *See, e.g.*, *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 504 (2d Cir. 2010) (affirming grant of summary judgment in favor of defendant on loss-causation grounds after years of litigation); *In re Oracle Corp. Sec. Litig.*, 2009 WL 1709050, at *34 (N.D. Cal. June 19, 2009) (granting summary judgment to defendants after eight years of litigation and after plaintiff's counsel incurred over $6 million in expenses and worked over 100,000 hours, representing lodestar of approximately $48 million). Even plaintiffs who get past summary judgment and succeed at trial may find a judgment in their favor overturned on appeal or on a post-trial motion. *See, e.g.*, *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1449 (11th Cir. 1997) (reversing jury verdict of $81 million for plaintiffs); *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, 2011 WL 1585605, at *38 (S.D. Fla. Apr. 25, 2011) (granting defendants' motion for judgment as a matter of law following plaintiffs' verdict).

Here, Lead Counsel committed significant resources, time, and money to prosecute this Action vigorously and successfully for the Class's benefit for over four years—without any payment or any guarantee of a fee. Lead Counsel's fee award and expense reimbursement in this Action has always been at risk and contingent on the result achieved and on this Court's discretion in awarding fees and expenses. If Lead Counsel had been unsuccessful at the motion to dismiss stage, had failed at certifying the Class, or had failed on the expected upcoming motion for summary judgment or at trial, Lead Counsel would have received nothing for its years of diligent prosecution of the claims for the benefit of the Class. This significant contingency-fee risk further supports the requested fee.

E. The Reaction of the Class to Date and the Approval of Lead Plaintiff Support the Fee Request

The reaction of the Class to the proposed Settlement and the fee motion also supports approval of the fee request. *See Heritage Bond*, 2005 WL 1594403, at *21 ("The existence or absence of objectors to the requested attorneys' fee is a factor i[n] determining the appropriate fee award."). A total of 979,887 copies of the Notice and Claim Form have been sent to potential

Class Members and their nominees, and the Court-approved Summary Notice was published in *The Wall Street Journal* and transmitted over the *PR Newswire* on October 18, 2022. *See* Ewashko Decl. (Ex. 3) at ¶¶ 8, 11. The Notice informed potential Class Members that Lead Counsel would apply for an award of attorneys' fees in an amount not to exceed 20% of the Settlement Fund. *See* Notice (Ewashko Decl. Ex. A) at p. 1 and ¶ 39. The Notice further informed Class Members of their right to object to the request for attorneys' fees and expenses. *See id*. at p. 2 and ¶¶ 47-48. Although the deadline for filing any objections will not run until December 22, 2022, to date, no Class Member has filed an objection to the fees and expenses requested. Uslaner Decl. ¶ 118.

In addition, Lead Plaintiff, which took an active role in the litigation and closely supervised the work of Lead Counsel, supports the approval of the requested fee based on the result obtained, the efforts of Lead Counsel and the risks in the Action. *See* Riechwald Decl. (Ex. 1) at ¶¶ 7-8, 10. Lead Plaintiff's endorsement of the fee request further supports its approval. *See, e.g.*, *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.").

While the decision on the appropriate fee is left to the sound discretion of the Court, the fact that the fee request is based on an *ex ante* fee agreement that Lead Plaintiff and Lead Counsel entered into at the outset of the Action provides support for the reasonableness of the request. Numerous courts have found that, in light of Congress's intent to empower lead plaintiffs under the PSLRA to select and supervise attorneys on behalf of the class, a fee agreement entered into by a PSLRA lead plaintiff and its counsel at the outset of the litigation weighs in favor of the reasonableness of the fee. *See, e.g., In re Cendant Corp. Litig.*, 264 F.3d 201, 282 (3d Cir. 2001) (*ex ante* fee agreements in securities class actions should be given "a presumption of reasonableness"); *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008) ("We expect . . . that district courts will give serious consideration to negotiated fees because PSLRA lead plaintiffs often have a significant financial stake in the settlement, providing a powerful incentive to ensure that any fees resulting from that settlement are reasonable.").

F. Lodestar Cross-Check Supports the Fee Request

"Although an analysis of the lodestar is not required for an award of attorneys' fees in the Ninth Circuit, a cross-check of the fee request with a lodestar amount can demonstrate the fee request's reasonableness." *In re Amgen Inc. Secs. Litig.*, 2016 WL 10571773, at *9 (C.D. Cal. Oct. 25, 2016); *see also 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 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.'"); *Glass v. UBS Fin. Servs., Inc.*, 331 F. App'x 452, 456-57 (9th Cir. 2009).

Fee awards in class actions with contingency risks, such as this one, routinely represent *positive multipliers* of counsel's lodestar to account for the possibility of non-payment. *See Rihn v. Acadia Pharm. Inc.*, 2018 WL 513448, at *6 (S.D. Cal. Jan. 22, 2018) ("Courts have 'routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases'" because, in doing so, it provides a "'financial incentive to accept contingent-fee cases which may produce nothing.'"). Courts award lodestar multipliers up to *four times* the counsel's lodestar, and sometimes even more. *See Vizcaino*, 290 F.3d at 1051-52 & n.6 (affirming 28% fee award representing 3.65 multiplier and finding that "courts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases," and that, when the lodestar is used as a cross-check, "most" multipliers were in the range of 1 to 4, but citing examples of higher multipliers); *see also Hopkins v. Stryker Sales Corp.*, 2013 WL 496358, at *4 (N.D. Cal. Feb. 6, 2013) ("Multipliers of 1 to 4 are commonly found to be appropriate in complex class action cases."); *Buccellato v. AT&T Operations, Inc.*, 2011 WL 3348055, at *2 (N.D. Cal. June 30, 2011) (awarding fee representing 4.3 multiplier).

Here, the lodestar cross-check further demonstrates the reasonableness of the requested fee percentage because the fee request is substantially below Lead Counsel's total lodestar. As detailed in the Uslaner Declaration, Lead Counsel spent 17,930.50 hours of attorney and other professional time prosecuting the Action for the benefit of the Class through June 23, 2022 (the date the Stipulation was executed). ¶ 105. Lead 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 $9,134,911.25. *Id*. 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); *WPPSS*, 19 F.3d at 1305; *In re Apollo Inc. Secs. Litig.*, 2012 WL 1378677, at *7 n.2 (D. Ariz. Apr. 20, 2012).

The requested fee of 20% of the Settlement Fund, or $3.5 million (plus interest), is significantly less than Lead Counsel's lodestar, representing a "negative" multiplier of 0.38 on Lead Counsel's lodestar, or in other words just 38% of the value of the time Lead Counsel dedicated to the Action. ¶ 105. The fact that Lead Counsel's requested fee in this case is substantially less than the lodestar strongly supports the reasonableness of the fee request. *See Kuraica v. Dropbox, Inc.,* 2021 WL 5826228, at *7 (N.D. Cal. Dec. 8, 2021) (Freeman, J.) ("A negative multiple 'strongly suggests the reasonableness of [a] negotiated fee.'"); *In re Lithium Ion Batteries Antitrust Litig.,* 2019 WL 3856413, at *8 (N.D. Cal. Aug. 16, 2019) (finding that the requested percentage fee was "particularly appropriate where the lodestar cross-check results in a negative multiplier"), *aff'd*, 853 Fed. App'x 56 (9th Cir. 2021); *Amgen*, 2016 WL 10571773, at *9 ("courts have recognized that a percentage fee that falls below counsel's lodestar strongly supports the reasonableness of the award").

Consistent with the Northern District of California Procedural Guidance for Class Action Settlements and this Court's Standing Order for Civil Cases, the Uslaner Declaration includes a breakdown of the hours that each attorney and other professional devoted to the litigation into 14 distinct projects undertaken over the course of the litigation. *See* ¶ 111 and Ex. 6. In addition, for each attorney whose time is included in Lead Counsel's lodestar, a summary of the principal tasks

that he or she worked on in the litigation has been provided. *See* Ex. 5. Moreover, Lead Counsel has not included in its fee application *any* time expended preparing Lead Counsel's motion for fees and expenses or any of the substantial time expended after the execution of the Stipulation and Agreement of Settlement on June 23, 2022. ¶¶ 105-106. In addition, Lead Counsel also made other reductions to its time in the interest of billing judgment, including, for example, removing timekeepers with fewer than 20 hours dedicated to the Action as well as removing certain other timekeepers and time entries. ¶ 106.

Notably, *even if* Lead Counsel's lodestar were *one-third* or *one-quarter* the amount that Lead Counsel has submitted in connection with this Motion, the resulting lodestar multiplier would still be comfortably within the range of multipliers awarded in cases like this with substantial contingency fee risks. *See, e.g., Vizcaino*, 290 F.3d at 1051 (a 3.65 multiplier was "within the range of multipliers applied in common fund cases"); *In re Capacitors Antitrust Litig.*, 2018 WL 4790575, at *6 (N.D. Cal. Sept. 21, 2018) ("a lodestar multiplier of around 4 times has frequently been awarded in common fund cases"); *Petersen v. CJ Am., Inc.*, 2016 WL 11783674, at *1 (S.D. Cal. Oct. 18, 2016) ("[t]he majority of fee awards in the district courts in the Ninth Circuit are 1.5 to 3 times higher than lodestar"); *In re VeriFone Holdings, Inc. Sec. Litig.*, 2014 WL 12646027, at *2 (N.D. Cal. Feb. 18, 2014) (approving fee award 4.3 times lodestar). For example, even if Lead Counsel's lodestar were *quartered* (reduced by 75%)—to roughly $2.3 million—the requested fee of 20% or $3.5 million plus interest would represent a multiplier of 1.5, which is still significantly lower than the multipliers commonly awarded by courts.

The hourly rates used to calculate Lead Counsel's lodestar are also reasonable. The hourly rates for Lead Counsel range from $850 to $1,100 for partners, from $425 to $575 for associates, and from $335 to $375 for paralegals and case managers. *See* Ex. 4. The rates of BLB&G's staff attorneys, who were integrally involved in the prosecution of this case, were $425 or $450 per hour. The blended hourly rate for all timekeepers in the application is $509. Lead Counsel believes these rates are within the range of reasonable fees for attorneys working on sophisticated class action litigation in this District. *See, e.g.*, *Hefler v. Wells Fargo & Co.*, 2018 WL 6619983, at *14 (N.D. Cal. Dec. 17, 2018) (approving Lead Counsel's then-applicable 2018 rates, ranging

from $650 to $1,250 for partners or senior counsel, $400 to $650 for associates, and $245 to $350 for paralegals, as reasonable for purposes of lodestar cross-check), *aff'd sub nom. Hefler v. Pekoc*, 802 Fed. App'x 285 (9th Cir. 2020); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 2017 WL 1047834, at *5 (N.D. Cal. Mar. 17, 2017) (approving fee award following lodestar cross-check where blended average hourly rate was $529 per hour, with hourly rates ranging up to $1,600 for partners and up to $790 for associates).

Lead Counsel's rates are also reasonable in comparison to defense counsel's rates. *See, e.g., In re Valaris PLC*, Second Interim and Final Fee Application of Morrison & Foerster LLP, No. 20-34114 (MI) (Bankr. S.D. Tex. June 11, 2021), ECF No. 1306 (in a 2021 application for compensation in a bankruptcy action, Morrison & Foerster reported partners' rates ranging from $1,175 to $1,700; of counsel or senior counsel rates ranging from $950 to $1,600; associates' rates ranging from $560 to $925; and paralegal rates ranging from $280 to $450) (Ex. 13).

III. Lead Counsel's Expenses Are Reasonable and Should Be Approved

"Attorneys who create a common fund are entitled to the reimbursement of expenses they advanced for the benefit of the class." *Vincent v. Reser,* 2013 WL 621865, at *5 (N.D. Cal. Feb. 19, 2013). In assessing whether counsel's expenses are compensable in a common fund case, courts look to whether the particular costs are of the type typically billed by attorneys to paying clients in the marketplace. *See 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.").

The expenses sought by Lead Counsel are of the type that are charged to hourly paying clients and were required to prosecute the litigation. These expense items were incurred separately by Lead Counsel and are not duplicated in the firm's hourly rates. From the beginning of the case, Lead Counsel was aware that it might not recover any of its expenses and would not recover anything unless and until the Action was successfully resolved. Lead Counsel also understood that, even assuming that the case was ultimately successful, an award of expenses would not compensate it for the lost use of the funds advanced to prosecute this Action. Thus, Lead Counsel was motivated to, and did, take significant steps to minimize expenses whenever practicable without jeopardizing the vigorous and efficient prosecution of the Action. ¶ 120.

As discussed in detail in the Uslaner Declaration, Lead Counsel incurred a total of $795,465.17 in litigation expenses in litigating the Action over the past four years. ¶ 121. The expenses for which payment is sought were reasonable and necessary for the prosecution and resolution of the litigation and are of the types that are routinely charged to clients in non-contingent litigation. These include expert fees, document-management costs, online research, service of process expenses, court fees, copying costs, and postage expenses. ¶¶ 121-128.

Of the total expenses, Lead Counsel incurred $479,450.88, or approximately 60% of the total litigation expenses, on experts and consultants in the areas of financial economics (including damages, loss causation, and market efficiency), accounting, and the software industry. ¶ 123. The combined costs for online legal and factual research amounted to $94,847.83, or approximately 12% of the total expenses. ¶ 124. Lead Counsel incurred $89,703.79 in attorneys' fees and expenses for independent counsel who represented certain former Oracle employees that Lead Counsel contacted during the course of its investigation and who wished to be represented by independent counsel. ¶ 126. The other expenses are also the types of expenses that are necessarily incurred in litigation and routinely charged to clients. These expenses included document management costs, court fees, service of process, long-distance telephone calls, copying and printing, postage and express mail, and travel costs. A complete breakdown by category of the expenses incurred by Lead Counsel is set forth in Exhibit 8 to the Uslaner Declaration.

Courts routinely approve litigation expenses such as these. *See, e.g.*, *Vega v. Weatherford U.S., Ltd. P'ship*, 2016 WL 7116731, at *17 (E.D. Cal. Dec. 7, 2016) ("legal research expenses, copying costs, mediation fees, postage, federal express charges, expert fees, . . . and travel expenses," among others, were all categories of expenses "routinely reimbursed" in class actions); *Zynga*, 2016 WL 537946, at *22 ("courts throughout the Ninth Circuit regularly award litigation costs and expenses—including photocopying, printing, postage, court costs, research on online databases, experts and consultants, and reasonable travel expenses—in securities class actions, as attorneys routinely bill private clients for such expenses in non-contingent litigation"); *see also In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 158 (D.N.J. 2013) (approving reimbursement for "fees for experts, costs associated with creating and maintaining electronic document

databases, participating in mediation, travel and lodging expenses, and photocopying, mailing, telephone and deposition transcription costs").

The Notice provided to potential Class Members informed them that Lead Counsel intended to apply for the payment of litigation expenses in an amount not to exceed $900,000. Notice at p. 1 and ¶ 39. The total amount of expenses now sought—$860,215.17 (including $795,465.17 sought by Lead Counsel and $64,750 sought by Lead Plaintiff, as discussed below)—is less than the amount stated in the Notice. The deadline for objecting to the fee and expense application is December 22, 2022. To date, there have been no objections to the request for attorneys' fees or litigation expenses.

IV. Lead Plaintiff Should Be Awarded Its Reasonable Costs and Expenses Under 15 U.S.C. § 78u-4(a)(4)

The PSLRA specifically provides that an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be made to "any representative party serving on behalf of a class." 15 U.S.C. § 78u-4(a)(4); *see also Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003) (holding that named plaintiffs are eligible for "reasonable" payments as part of class-action settlement). When evaluating the reasonableness of a lead plaintiff reimbursement request, courts may consider factors such as "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . [and] the amount of time and effort the plaintiff expended in pursuing the litigation," among others. *Staton*, 327 F.3d at 977.

As detailed in the declaration from Union's Assistant General Counsel, attached as Exhibit 1 to the Uslaner Declaration, Lead Plaintiff is seeking an award of $64,750 in reimbursement for the value of the time Union's employees dedicated to the Action. Here, Lead Plaintiff took a very active role in the litigation and has been fully committed to pursuing the class's claims. *See* Riechwald Decl. ¶¶ 4-8. These efforts included ongoing communications with Lead Counsel, reviewing pleadings and briefs filed in the Action, assisting in responding to Defendants' discovery requests, which led to the production of over 200,000 pages of documents from Lead Plaintiff, and consulting with Lead Counsel regarding the settlement negotiations. *Id.*

¶¶ 7-8. These efforts required Union's employees to dedicate significant time to this Action that they otherwise would have devoted to their regular duties for Union, and thus represented a cost to Union. *See id.* ¶ 15. The requested amount is based on the number of hours that Union's employees committed to these activities multiplied by an hourly rate for each employee based on based on comparable rates for lawyers (or other professionals) of similar experience. *See id.* ¶ 16.

The amount requested is reasonable in light of the significant amount of time that Union's employees dedicated to the representation of the Class. *See, e.g.*, *In re Allergan, Inc. Proxy Violation Sec. Litig.*, No. 8:14-cv-02004-DOC-KESx, slip op. at 5 (C.D. Cal. Aug. 14, 2018), ECF No. 637 (Ex. 14) (granting PSLRA awards in the aggregate amount of over $92,000 to lead plaintiffs); *In re HP Sec. Litig.*, No. 3:12-cv-05980-CRB, slip op. at 2 (N.D. Cal. Nov. 16, 2015), ECF No. 279 (Ex. 15) (awarding $162,900 to lead plaintiff as "reimbursement for its costs and expenses directly related to its representation of the Settlement Class"); *In re Bank of Am. Corp. Sec., Derivative, and ERISA Litig.*, 772 F.3d 125, 133 (2d Cir. 2014) (affirming PSLRA awards of over $450,000 to representative plaintiffs for time spent by their employees on the action); *In re Equifax Inc. Sec. Litig.*, No. 1:17-cv-03463-TWT, slip op. at 4 (N.D. Ga. June 26, 2020), ECF No. 179 (Ex. 16) (awarding $121,375 to lead plaintiff in PSLRA case); *In re Marsh & McLennan Cos. Sec. Litig.*, 2009 WL 5178546, at *21 (S.D.N.Y. Dec. 23, 2009) (awarding over $214,000 to lead plaintiffs); *In re Royal Dutch/Shell Transp. Sec. Litig.*, 2008 WL 9447623, at *29 (D.N.J. Dec. 9, 2008) (awarding "$150,000 to Lead Plaintiffs to compensate them for their reasonable costs and expenses directly relating to their representation of the Class").

CONCLUSION

For all the foregoing reasons, Lead Counsel respectfully requests that the Court award attorneys' fees of 20% of the Settlement Fund; award Litigation Expenses to Lead Counsel in the amount of $795,465.17; and approve a PSLRA award to Lead Plaintiff in the amount of $64,750.

Dated: December 8, 2022

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