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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SEB INVESTMENT MANAGEMENT AB, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

v.

ALIGN TECHNOLOGY, INC., JOSEPH M. HOGAN, and JOHN F. MORICI,

Defendants.

Case No. 3:18-cv-06720-VC

CLASS ACTION

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

Hearing Date:	April 28, 2022
Time:	1:30 p.m.
Courtroom:	4, 17th Floor
Judge:	Hon. Vince Chhabria

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NOTICE OF MOTION AND MOTION

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 28, 2022, at 1:30 p.m.,[1] in Courtroom 4 on the 17th Floor of the United States District Court for the Northern District of California, Phillip Burton Federal Building & United States Courthouse, 450 Golden Gate Avenue, San Francisco, California 94102, the Honorable Vince Chhabria presiding, Lead Counsel Kessler Topaz Meltzer & Check, LLP, counsel for Court-appointed Lead Plaintiff SEB Investment Management AB and the Settlement Class, will and hereby does move pursuant to Rule 23(h) of the Federal Rules of Civil Procedure ("Rules") for an order granting an award of attorneys' fees and litigation expenses in the above-captioned securities class action ("Action").

This motion is based on this Notice of Motion and Motion, the supporting Memorandum of Points and Authorities that follows, the accompanying declarations, including the Declaration of Jennifer L. Joost in Support of: (I) Lead Plaintiff's Motion for Final Approval of Proposed Settlement and Plan of Allocation; and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Litigation Expenses ("Joost Declaration" or "Joost Decl."), the Stipulation and Agreement of Settlement dated June 30, 2021 ("Stipulation") (ECF No. 189-2), the papers and pleadings filed in the Action, the arguments of counsel, and any other matters properly before the Court.

Lead Counsel is not aware of any opposition to the motion. Pursuant to the Court's Order Preliminarily Approving Settlement and Providing for Notice dated November 2, 2021 ("Preliminary Approval Order") (ECF No. 198), any objections to the request for attorneys' fees and litigation expenses must be filed by March 31, 2022, and Lead Counsel's reply submission must be filed by April 21, 2022. A proposed order will be submitted with Lead Counsel's reply submission.

STATEMENT OF ISSUES TO BE DECIDED

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

2. Whether the Court should approve Lead Counsel's request for reimbursement of litigation expenses.

[1] Lead Counsel has noticed this motion for the date and time ordered in Judge Koh's November 2, 2022 Preliminary Approval Order: Thursday, April 28th at 1:30 p.m. Lead Counsel recognizes that this Court holds motion hearings on Thursdays at 10:00 a.m. and may reset the time of the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

Lead Counsel respectfully submits this Memorandum of Points and Authorities in support of its motion for: (i) an award of attorneys' fees in the amount of 20% of the Settlement Fund; and (ii) reimbursement of its Litigation Expenses in the amount of $190,419.50.[2]

I. INTRODUCTION

Following nearly three years of dedicated litigation efforts, Lead Counsel, Kessler Topaz Meltzer & Check, LLP ("KTMC"), successfully negotiated a settlement of the Action with Defendants. If approved by the Court, the Settlement will resolve this litigation in its entirety in exchange for $16 million in cash. The Settlement not only eliminates the risks of continued litigation—including overcoming Defendants' challenges to liability, loss causation, and damages, as well as the uncertainties, delays, and expense of litigating the Action through the completion of discovery, class certification, summary judgment, trial, and post-trial appeals, but it also represents a meaningful percentage of the Settlement Class's potential damages as estimated by Lead Plaintiff's damages consultant. By any measure, the Settlement is an excellent result for the Settlement Class.

In order to achieve this recovery, Lead Counsel—as the sole Court-appointed counsel for the Settlement Class—undertook significant efforts, vigorously pursuing this Action against a widely respected defense firm on a fully contingent basis. The litigation was hard-fought and involved material risks. Indeed, Lead Counsel fought two heavily contested pleading motions and, after the Court initially dismissed the Action in its entirety, prevailed in getting securities fraud claims sustained against Defendants. Joost Decl., ¶¶ 43, 61-71. In addition, prior to reaching the Settlement, Lead Counsel engaged in highly-contested discovery efforts, requiring extensive negotiations with Defendants regarding the scope of discovery and litigation of four discovery-related motions before Magistrate Judge Virginia K. DeMarchi. *Id.*, ¶¶ 78-107. Lead Counsel also consulted extensively with

[2] All capitalized terms not defined herein have the meanings ascribed to them in the Stipulation and the Joost Declaration. The Joost Declaration is an integral part of this submission and, for the sake of brevity, the Court is respectfully referred to it for a detailed description of, *inter alia*: the procedural history of the Action (Joost Decl., ¶¶ 25-130); the nature of the claims asserted (*id.*, ¶¶ 10-24); the negotiations leading to the Settlement (*id.*, ¶¶ 76-77, 115-116, 119-126); the risks of continued litigation (*id.*, ¶¶ 133-155); and Lead Counsel's efforts on behalf of the Settlement Class (*id.*, ¶¶ 6, 25-130, 178). Unless otherwise noted, all internal quotation marks, citations, or other punctuation are omitted, and all emphasis is added.

experts in the areas of market efficiency, loss causation, and damages in developing Lead Plaintiff's claims and in connection with the Parties' mediation efforts.

As compensation for its efforts and its commitment to bringing the Action to a successful conclusion with a cash recovery for the Settlement Class, as well as the risk of nonpayment faced in prosecuting the Action on a contingent basis, Lead Counsel seeks attorneys' fees in the amount of 20% of the Settlement Fund. As set forth herein, the requested 20% fee (i.e., $3.2 million plus interest) is well within the range of fees awarded in other securities and complex class actions and is less than the 25% "benchmark" accepted by the Ninth Circuit.[3] Further, the requested fee represents a multiplier of approximately 1.16 on Lead Counsel's lodestar, which is on the lower end of the range of multipliers commonly awarded in class actions and other similar cases.[4] In connection with the Settlement, Lead Counsel also requests reimbursement from the Settlement Fund of $190,419.50 in Litigation Expenses. Lead Counsel's requested attorneys' fees and Litigation Expenses are authorized by and made pursuant to an agreement entered into with Lead Plaintiff at the outset of the litigation.[5]

The reaction of the Settlement Class to date also supports Lead Counsel's request for attorneys' fees and Litigation Expenses. Pursuant to the Court's Preliminary Approval Order, 135,086 Notices have been mailed to potential Settlement Class Members or their Nominees and the Summary Notice was published in *The Wall Street Journal* and transmitted over *PR Newswire*.[6] The notices advise recipients that Lead Counsel would be applying to the Court for an award of attorneys' fees in an amount not to exceed 20% of the Settlement Fund, plus reimbursement of Litigation Expenses in an amount not to exceed

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[3] *See In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) ("Twenty-five percent is the 'benchmark' that district courts should award in common fund cases.").

[4] *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 n.6 (9th Cir. 2002) (noting lodestar multipliers ranging from 1 to 4 are common).

[5] A fee agreement entered into by a PSLRA lead plaintiff and its counsel at the outset of the litigation should either be considered presumptively reasonable or, at very least, given considerable weight by the Court. *See In re Cardinal Health, Inc. Sec. Litigs.*, 528 F. Supp. 2d 752, 759 (S.D. Ohio 2007) (strongly endorsing presumption of reasonableness for *ex-ante* fee agreements); *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").

[6] *See* Declaration of Luiggy Segura Regarding (A) Dissemination of Notice Packet; (B) Publication of Summary Notice; and (C) Report on Requests for Exclusion and Claims Received to Date ("Segura Decl.") submitted herewith, ¶¶ 10-11.

$250,000. Segura Decl., Exs. A & B. The notices further inform Settlement Class Members that they can object to these requests until March 31, 2022. *Id*. While the deadline to object has not yet passed, to date, no objections to the maximum amount of attorneys' fees or Litigation Expenses set forth in the notices have been received. Joost Decl., ¶¶ 9, 170.[7]

For the reasons discussed herein, Lead Counsel respectfully submits that its requested fee is fair and reasonable under the applicable legal standards. Lead Counsel also respectfully submits that the Litigation Expenses for which it seeks payment were reasonable and necessary for the successful prosecution of the Action. Accordingly, Lead Counsel requests that its Motion for an Award of Attorneys' Fees and Litigation Expenses be granted in full.[8]

II. LEAD COUNSEL'S REQUEST FOR ATTORNEYS' FEES IS REASONABLE AND SHOULD BE APPROVED

A. Lead Counsel Is Entitled to a Reasonable Fee from the Common Fund Created by the Settlement

Courts in this Circuit recognize 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 W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *see also Stetson v. Grissom*, 821 F.3d 1157, 1165 (9th Cir. 2016). Further, the Supreme Court "has recognized consistently 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). The policy rationale for awarding attorneys' fees from a common fund is that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("*WPPSS*").

In addition to providing just compensation, an award of fair attorneys' fees from a common fund ensures that "competent counsel continue to be willing to undertake risky, complex, and novel litigation." *Gunter v.*

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[7] Lead Counsel will address any objections received in its reply submission due on April 21, 2022.

[8] Consistent with the Court's established practice and unless otherwise ordered, 10% of the total amount of attorneys' fees awarded to Lead Counsel will be withheld until after a distribution of the Net Settlement Fund to Authorized Claimants has been made. Lead Counsel believes that 10% is a reasonable hold-back percentage given its commitment to litigating this Action on behalf of the Settlement Class for nearly three years without receiving any compensation for its efforts. The proposed order to be submitted with Lead Counsel's reply will reflect this holdback.

Ridgewood Energy Corp., 223 F.3d 190, 198 (3d Cir. 2000). The Supreme Court has emphasized that private securities actions, such as this Action, provide "a most effective weapon in the enforcement of the securities laws and are a necessary supplement to [SEC] action." *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985); *see also Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308, 313 (2007).

B. The Court Should Calculate the Fee as a Percentage of the Common Fund

Where a settlement produces a common fund, courts in this Circuit have discretion to employ either the percentage-of-recovery method or the lodestar method in awarding attorneys' fees. *See WPPSS*, 19 F.3d at 1296; *Vizcaino*, 290 F.3d at 1047. Notwithstanding that discretion, the percentage-of-recovery method has become the prevailing method used in this Circuit. *See, e.g.*, *Glass v. UBS Fin. Servs., Inc.*, 331 F. App'x 452, 456-57 (9th Cir. 2009) (affirming district court's use of percentage-of-recovery method to award 25% fee); *In re Apple Inc. Device Performance Litig.*, 2021 WL 1022866, at *2 (N.D. Cal. Mar. 17, 2021) (finding "use of the percentage-of-the-fund method in common-fund cases [to be] prevailing practice in the Ninth Circuit for awarding attorneys' fees"); *In re OmniVision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) (similar).

Courts have found the percentage-of-recovery method for awarding attorneys' fees preferable in cases with a common-fund recovery because it: (i) parallels the use of percentage-based contingency fee contracts, which are the norm in private litigation; (ii) aligns the lawyers' interests with those of the class in achieving the maximum possible recovery; and (iii) reduces the burden on the court by eliminating the detailed and time-consuming lodestar analysis. *See, e.g.*, *Apple Inc. Device*, 2021 WL 1022866, at *2; *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1374-77 (N.D. Cal. 1989) (collecting authority and describing benefits of the percentage method over the lodestar method). In addition, the use of the percentage-of-recovery method comports with the language of the PSLRA, which states that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a ***reasonable percentage*** of the amount of any damages and prejudgment interest actually paid to the class." 15 U.S.C. § 78u-4(a)(6); *see also Nguyen v. Radiet Pharma. Corp.*, 2014 WL 1802293, at *9 (C.D. Cal. May 6, 2014) ("[T]he PSLRA has made percentage-of-recovery the standard for determining whether attorney's fees are reasonable.") (quoting *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 188 n.7 (3d Cir. 2005)).

C. A Fee of 20% of the Settlement Fund Is Reasonable Under Either the Percentage-of-Recovery Method or Lodestar Method

Whether assessed under the prevailing percentage-of-recovery method or the lodestar method, the 20% fee request in this case—which represents a modest multiplier of approximately 1.16—is fair and reasonable.

1. Lead Counsel's 20% Fee Request Is Substantially 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) ("[I]n this circuit, the benchmark percentage is 25%."); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) ("[C]ourts 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 the Untied States*, 307 F.3d 997, 1006 (9th Cir. 2002) ("We have established a 25 percent 'benchmark' in percentage-of-the-fund cases[.]"). As a result, courts in this District have found 25% fee awards 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.'").

While the Ninth Circuit has counseled that courts should consider adjustments to the 25% benchmark where a fee "would yield windfall profits for class counsel in light of the hours spent on the case," *see Bluetooth*, 654 F.3d at 942, no such concerns are present here. To start, the 20% fee requested—the fee that Lead Counsel agreed to accept in this matter when retained by Lead Plaintiff—is already substantially below the 25% benchmark and is thus presumptively reasonable. Moreover, as discussed further below, the fact that the 20% fee results in only a slight multiplier on the total lodestar value of Lead Counsel's time in this case eliminates any concern of "windfall profits" as articulated in *Bluetooth.*

Moreover, ample precedent exists in this Circuit for granting fees to plaintiff's counsel in securities class actions and other complex litigation that far exceed Lead Counsel's 20% fee request. *See, e.g.*, *NECA-IBEW*

Pension Trust Fund et al v. Precision Castparts Corp., et al., No. 16-cv-01756-YY, slip op. (ECF No. 169) at 1-2 (D. Or. May 7, 2021) (awarding 33.3% of $21 million settlement); *In re Impinj, Inc. Sec. Litig.*, No. 18-cv-05704-RSL, slip op. (ECF No. 106) at 1 (W.D. Wash. Nov. 20, 2020) (awarding 25% of $20 million settlement); *Leon D. Milbeck v. Truecar, Inc., et al.*, No. 18-cv-02612-SVW-AGR, slip op. (ECF No. 185) at 2 (C.D. Cal. Jan. 27, 2020) (awarding 25% of $28.25 million settlement); *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: SanDisk LLC Sec. Litig.*, No. 15-cv-01455-VC, slip op. (ECF No. 284) at 2 (N.D. Cal. Oct. 23, 2019) (Chhabria, J.) (awarding 25% of $50 million settlement); *Edenborough v. ADT, LLC*, 2019 WL 4164731, at *4 (N.D. Cal. July 22, 2019) (awarding 25% of $16 million settlement); *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Prods. Liability Litig.*, 2019 WL 2077847, at *2, *4 (N.D. Cal. May 10, 2019) (awarding 25% of $48 million settlement); *Destefano v. Zynga, Inc.*, 2016 WL 537946, at *16-17 (N.D. Cal. Feb. 11, 2016) (awarding 25% of $23 million settlement); *In re Novatel Wireless Sec. Litig.*, No. 08-cv-01689-AJB-RBB, slip op. (ECF No. 520) at 1 (S.D. Cal. June 23, 2014) (awarding 27.5% of $16 million settlement).

2. The Requested Fee Reflects a Multiplier Well Within the Range of Multipliers Regularly Approved in This Circuit

To ensure the reasonableness of a fee awarded under the percentage-of-recovery method, courts in this Circuit may cross-check the proposed fee award against counsel's lodestar, although such a cross-check is not required. *See In re Amgen Inc. Sec. Litig.*, 2016 WL 10571773, at *9 (C.D. Cal. Oct. 25, 2016) ("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 Extreme Networks, Inc. Secs. Litig.*, 2019 WL 3290770, at *10 (N.D. Cal. July 22, 2019) (noting that "lodestar may provide a useful perspective on the reasonableness of a given percentage award"). Under the lodestar method, courts routinely award positive multipliers to account for the contingent nature or risk involved in a case and the quality of the attorneys' work. *See Zynga*, 2016 WL 537946, at *18 ("Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative multiplier to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented."); *Vizcaino*, 290 F.3d at 1051 (noting "courts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases").

As detailed in the Joost Declaration, Lead Counsel exerted substantial effort in advancing this Action over the past three years in the face of an aggressive and determined defense. Through February 17, 2022, Lead Counsel has spent more than 4,675 hours of attorney and other professional support staff time prosecuting the Action for the benefit of the Settlement Class. Joost Decl., ¶ 182. Lead Counsel's lodestar, derived by multiplying the hours spent on the Action by each attorney and professional support staff employee by their 2021 hourly rates, is $2,766,489.50. *See id.*; *see also Khoja v. Orexigen Therapeutics, Inc.*, 2021 WL 5632673, at *6, *10 (S.D. Cal. Nov. 30, 2021) (awarding 33% fee where counsel devoted 4,185.35 hours (equating to a lodestar of $2,995,448.75) in a case where formal discovery had not begun).[9]

The hourly rates utilized by Lead Counsel in calculating its lodestar range from: (i) $820 to $850 for partners; (ii) $385 to $690 for other attorneys; (iii) $305 for a paralegal; and (iv) $350 to $500 for in-house investigators. Joost Decl., ¶ 181.[10] Lead Counsel believes these hourly rates are within the range of reasonable rates for attorneys working on sophisticated class action litigation in this District. *See, e.g.*, *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 2017 WL 1047834, at *5 (N.D. Cal. Mar. 17, 2017) (approving fee following lodestar cross-check in which the court found that "[t]he blended average hourly billing rate is $529 per hour for all work performed and projected, with billing rates ranging from $275 to $1,600 for partners, $150 to $790 for associates, and $80 to $490 for paralegals").[11]

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[9] It is well established and 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); *Fischel*, 307 F.3d at 1010; *White v. Experian Info. Solutions, Inc.*, 2018 WL 1989514, at *15 (C.D. Cal. Apr. 6, 2018) ("Courts in this Circuit regularly apply current billing rates in evaluating fee requests in multi-year litigation to account for the delay in payment."), *aff'd in part*, *rev'd in part sub nom.*, *Radcliffe v. Hernandez*, 794 F. App'x 605 (9th Cir. 2019).

[10] *See* Declaration of Jennifer L. Joost in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Litigation Expenses Filed on Behalf of Kessler Topaz Meltzer & Check, LLP ("Joost Fee and Expense Declaration") submitted herewith, at Ex. A.

[11] By way of comparison, Defendants' Counsel in the Action, Wilson Sonsini Goodrich & Rosati, P.C., reported hourly rates ranging from $685 to $910 for associates and as high as $1,290 for partners in recent bankruptcy filings. *See In re: Tonopah Solar Energy, LLC*, No. 20-11884 (KBO), Application for Compensation of Wilson Sonsini Goodrich & Rosati, P.C. at ECF No. 173 (Bankr. Del. Oct. 2, 2020); *In re: Insys Therapeutics, Inc.*, No. 19-11292 (JTD), Second Monthly Application Of Wilson, Sonsini, Goodrich & Rosati, P.C. at ECF No. 744 (Bankr. Del. Oct. 15, 2019). These rates are in line with, or exceed, Lead Counsel's rates.

The requested 20% fee, if awarded, represents a multiplier of approximately 1.16 on Lead Counsel's time. Joost Decl., ¶ 182.[12] This multiplier falls well within the range of lodestar multipliers regularly awarded by courts in this Circuit. *See Vizcaino*, 290 F.3d at 1051-52, 1051 n.6 (noting that when the lodestar is used as a cross-check, "most" multipliers were in the range of 1 to 4, but citing numerous examples of even higher multipliers); *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."); *Reyes v. Experian Info. Sols., Inc.*, 2020 WL 5172713, at *4 (C.D. Cal. July 30, 2020) (approving "reasonable lodestar multiplier of 1.92"); *Zynga*, 2016 WL 537946, at *21 (noting approved 1.7 multiplier to be "towards the lower end of the Ninth Circuit's scale").

In sum, Lead Counsel's requested fee award is reasonable, justified, and well within the range of fees that courts in this Circuit regularly award in class actions, under either the percentage-of-recovery method or lodestar method. Moreover, as discussed below, each of the additional factors considered by courts in the Ninth Circuit also weighs in favor of finding the requested fee reasonable.

D. Additional Factors Considered by Courts in the Ninth Circuit Support Approval of the Requested Fee

Courts in this Circuit also consider the following factors when determining whether a fee is fair and reasonable: (1) results achieved; (2) risks of litigation; (3) skill required and quality of work; (4) contingent nature of the fee and financial burden carried by the plaintiffs; (5) awards made in similar cases; and (6) reaction of the class. *See Vizcaino*, 290 F.3d at 1048-50.[13] Each of these factors confirms the requested fee is fair and reasonable.

1. The Results Achieved

Courts have recognized that the result achieved is an important factor in determining an appropriate fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (noting "the most critical factor is the degree of success

[12] Lead Counsel will continue to perform legal work on behalf of the Settlement Class should the Court approve the Settlement. Additional resources will be expended assisting Settlement Class Members with their Claim Forms and related inquires and working with the Claims Administrator, JND Legal Administration ("JND"), to ensure the smooth progression of claims processing and distribution of the Net Settlement Fund. No additional legal fees will be sought for this work.

[13] "The relative degree of importance to be attached to any particular factor will depend upon . . . the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Atlas v. Accredited Home Lenders Holding Co.*, 2009 WL 3698393, at *3 (S.D. Cal. Nov. 4, 2009) (alteration in original).

obtained"); *Vizcaino*, 290 F.3d at 1048 (noting "[e]xceptional results are a relevant circumstance" in awarding attorneys' fees).

Here, Lead Plaintiff's damages consultant estimated maximum potential damages in the Action to be $482 million. Joost Decl., ¶ 172. Defendants, however, strenuously maintained, and would continue to maintain, that no or far less damages could be proven at trial. For example, if Defendants prevailed on their argument that a large portion of Align's ASP decline and resulting stock price decline on October 25, 2018, was caused by non-fraud related factors as opposed to the promotional activities at issue in the Action, the Settlement Class's recoverable damages would have decreased significantly to $174.6 million. *Id*. Using the foregoing figures, the $16 million Settlement represents between 3.3% and 9.1% of the Settlement Class's potential damages. *Id.* This recovery range is in line with percentages of damages recovered in other securities class actions. *See, e.g.*, *Vataj v. Johnson*, 2021 WL 5161927, at *6 (N.D. Cal. Nov. 5, 2021) (approving settlement recovering "slightly more than 2% of [] estimated damages"); *Extreme Networks*, 2019 WL 3290770, at *9 (approving settlement representing between 5% and 9.5% of "maximum potential damages"); *IBEW Local 697 Pension Fund v. Int'l Game Tech., Inc.*, 2012 WL 5199742, at *3 (D. Nev. Oct. 19, 2012) (approving settlement recovering approximately 3.5% of maximum damages). The significance of this recovery is further underscored by the fact that the Court had initially dismissed the Action in its entirety. Accordingly, the result obtained for the Settlement Class supports Lead Counsel's fee request.

2. Risks of Litigation

Another factor for courts to consider in determining an appropriate fee is the risks of litigation. *Vizcaino*, 290 F.3d at 1048 (noting "[r]isk is a relevant circumstance" in awarding attorneys' fees); *Zynga*, 2016 WL 537946, at *17 (approving fee request and noting "[a]s to the second factor . . . the risks associated with this case were substantial given the challenges of obtaining class certification and establishing the falsity of the misrepresentations and loss causation").[14]

[14] For purposes of reviewing the reasonableness of a fee award, the Court should also consider all risks the litigation presented from the outset. *See Fischel*, 307 F.3d at 1009 ("[T]here is no dispute that a court should consider risk at the 'outset' of litigation," which the Ninth Circuit has determined to be the point in time "when an attorney determines that there is merit to the client's claim and elects to pursue the claim on the client's behalf.").

From the outset, Lead Counsel faced significant risks in bringing this Action. As an initial matter, the PSLRA's heightened pleading standards 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"); *In re Portal Software, Inc. Sec. Litig.*, 2007 WL 4171201, at *3 (N.D. Cal. Nov. 26, 2007) (noting "significant risks" the PSLRA poses "to plaintiffs' ability to survive . . . summary judgment and prevail[] at trial").

As discussed in greater detail in the Joost Declaration and Settlement Memorandum, there were many substantial challenges to succeeding in the Action. Indeed, following the Court's September 2020 MTD Order, only one allegedly misleading statement remained in the case and, as a result, the fate of this Action largely hinged on the interpretation of that one statement. Joost Decl., ¶¶ 134, 136. Had the Action continued, Defendants would have asserted at summary judgment and trial that Lead Plaintiff's interpretation of the sole remaining statement was incorrect. At the motion to dismiss stage, the Court noted that the "statement [was] ambiguous" as to whether Defendant Hogan was discussing "the impact of competition" but ultimately upheld the statement because at the pleading stage "the Court must adopt Plaintiff's interpretation." ECF No. 138 at 19. Although Lead Plaintiff believed it had strong arguments on this dispute and others, it recognized that there was a real risk that the Court or a jury may ultimately have sided with Defendants, in which case the Settlement Class would have recovered nothing. In fact, the Court noted that, even at the pleading stage, falsity and materiality for the sole remaining statement were "a close call." *Id.* at 23. And, even if Lead Plaintiff succeeded in establishing liability, it would still have had to overcome Defendants' challenges to loss causation and damages. Joost Decl., ¶¶ 151-55. *See Nguyen*, 2014 WL 1802293, at *1-2 (approving requested attorneys' fee and noting the particular challenges of proving and calculating damages).

The 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 nearly three years, further support the requested fee.

3. Skill Required and Quality of Work

"The experience of counsel is also a factor in determining the appropriate fee award." *In re Heritage Bond Litig.*, 2005 WL 1594389, at *12 (C.D. Cal. June 10, 2005). Indeed, "[t]he prosecution and management of a complex national class action requires unique legal skills and abilities." *OmniVision*, 559 F. Supp. 2d at 1047. "This is particularly true in securities cases because the [PSLRA] makes it much more difficult for securities plaintiffs to get past a motion to dismiss." *Zynga*, 2016 WL 537946, at *17.

Lead Counsel has extensive experience and a successful track record prosecuting securities class actions and other complex litigation throughout the country, including within this Circuit. *See* Joost Fee and Expense Decl., Ex. D (KTMC resume). That experience and skill was demonstrated by the effective prosecution of this Action, culminating in the Settlement.

The quality of opposing counsel is also important in evaluating the quality of services rendered by Lead Counsel. *See, e.g.*, *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 449 (E.D. Cal. 2013). Defendants in this case were represented by experienced counsel from the nationally prominent defense firm Wilson Sonsini Goodrich & Rosati, P.C. This firm spared no effort or cost in vigorously defending its clients. Notwithstanding this formidable opposition, Lead Counsel's ability to present a strong case and to demonstrate its willingness and ability to prosecute the Action through trial helped secure the Settlement. Accordingly, this factor supports Lead Counsel's fee request.

4. Contingent Nature of Fee and Financial Burden Carried by Lead Plaintiff

Lead Counsel undertook this Action on a contingent fee basis, assuming a substantial risk that the Action would yield no recovery and leave counsel uncompensated. The Ninth Circuit has confirmed that a determination of a fair and reasonable fee must include consideration of the contingent nature of the fee.[15] It is an established practice in the private legal market to reward attorneys for taking on the serious risk of non-payment by permitting a fee award that reflects a premium to normal hourly billing rates. *See, e.g.*, *In re Nuvelo, Inc. Sec. Litig.*, 2011 WL 2650592, at *2 (N.D. Cal. July 6, 2011); *Apple Inc. Device*, 2021 WL 1022866, at *6 ("When counsel takes cases on a contingency fee basis, and litigation is protracted, the risk of non-payment after years of litigation justifies a

[15] *See, e.g.*, *WPPSS*, 19 F.3d at 1299; *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.

significant fee award."); *Browne v. Am. Honda Motor Co., Inc.*, 2010 WL 9499073, *11 (C.D. Cal. Oct. 5, 2010) (finding multiplier of 1.5 "should be applied to increase the lodestar figure," in part because "class counsel handled the matter on a contingency basis [and] there was no guaranty that the claims would have been successful had the case proceeded to trial. Thus, the risk class counsel assumed in handling the case on a contingency fee basis supports an enhancement of the lodestar").

Through February 17, 2022, Lead Counsel has expended more than 4,675 hours prosecuting the Action and have incurred $190,419.50 in Litigation Expenses.[16] Joost Decl., ¶ 182. Any fee (and expense) award has always been at risk, and contingent on the result achieved and on the Court's discretion in awarding fees and expenses.

Indeed, the risk of no recovery in complex cases is very real. Lead Counsel knows from personal experience that, despite the most vigorous and competent efforts, its success in contingent litigation such as this is never guaranteed. *Id*., ¶ 175. The commencement of a class action and denial of motions to dismiss are no guarantee of success. These cases are not always settled, nor are plaintiffs' lawyers always successful.[17] Hard, diligent work by skilled counsel is required to develop facts and theories to prosecute a case or persuade defendants to settle on terms favorable to the class.

Unlike defense counsel—who typically receive payment on a timely and regular basis throughout a case, whether they win or lose—Lead Counsel carried the significant risk of not only funding the expenses of this

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[16] As noted above, additional work in connection with the Settlement and claims administration will still be required.

[17] There have been many hard-fought lawsuits where excellent professional efforts produced no fee for counsel. *See, e.g.*, *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, 2011 WL 1585605, at *38 (S.D. Fla. Apr. 25, 2011) (granting defendants judgment as a matter of law following plaintiff's jury verdict), *aff'd on other grounds*, 688 F.3d 713 (11th Cir. 2012); *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 504 (2d Cir. 2010) (affirming summary judgment in favor of defendant on loss causation grounds); *Robbins v. Koger Props. Inc.*, 116 F.3d 1441, 1443, 1446 (11th Cir. 1997) (jury verdict of over $81 million for plaintiffs against accounting firm reversed on appeal); *In re Apple Comput. Sec. Litig.*, 1991 WL 238298, at *2 (N.D. Cal. Sept. 6, 1991) (after jury rendered a verdict for plaintiffs following an extended trial, the court overturned the verdict); *Landy v. Amsterdam*, 815 F.2d 925, 927 (3d Cir. 1987) (affirmed directed verdict for defendants after five years of litigation). Indeed, even judgments initially affirmed on appeal by an appellate panel are no assurance of a recovery. *See, e.g.*, *Backman v. Polaroid Corp.*, 910 F.2d 10, 11-12 (1st Cir. 1990) (after eleven years of litigation, and following a jury verdict for plaintiffs and an affirmance by a First Circuit panel, plaintiffs' claims were dismissed by an *en banc* decision and plaintiffs recovered nothing).

Action, but also the risk that it would receive no compensation whatsoever unless it prevailed at trial. Accordingly, the contingent nature of the representation, and the burden carried by Lead Counsel, support the requested fee.

5. Awards in Similar Cases

Lead Counsel's fee request is also supported by awards made in similar cases. As discussed above, Lead Counsel is seeking a fee that is below the Ninth Circuit's well-established benchmark fee award. *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."). To avoid repetition, Lead Counsel refers the Court to *supra* Section II.C.1, which explains that Lead Counsel's 20% fee request is in line with fee percentages regularly awarded in complex litigation. Further supporting the request, Lead Counsel's 1.16 lodestar multiplier falls on the lower end of multipliers regularly approved in cases of this nature.

6. The Settlement Class's Reaction to Date Supports the Requested Fee

The reaction of the class to a proposed settlement and fee request is also a relevant factor. *See Knight v. Red Door Salons, Inc.*, 2009 WL 248367, at *7 (N.D. Cal. Feb. 2, 2009); *OmniVision*, 559 F. Supp. 2d at 1048. Here, JND began mailing the Notice and Claim Form (together, "Notice Packet") to potential Settlement Class Members and Nominees on December 2, 2021. Segura Decl., ¶¶ 3-4. To date, 135,086 Notice Packets have been mailed. *Id*., ¶ 10. The Notice, as well as the published Summary Notice, informs recipients of Lead Counsel's intent to apply to the Court for an award of attorneys' fees in an amount not to exceed 20% of the Settlement Fund and reimbursement of Litigation Expenses in an amount not to exceed $250,000. *See* Segura Decl., Exs. A & B. The notices further advise Settlement Class Members of their right to object to the request for attorneys' fees and Litigation Expenses. While the time to object does not expire until March 31, 2022, to date, no objections have been filed. Joost Decl., ¶¶ 9, 170. Should any objections be received, Lead Counsel will address them in its reply.

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

Lead Counsel also respectfully requests reimbursement of Litigation Expenses incurred in prosecuting and resolving the Action on behalf of the Settlement Class in the amount of $190,419.50. Attorneys who create a common fund for the benefit of a class are entitled to be reimbursed for their out-of-pocket expenses incurred in creating the fund so long as the submitted expenses are reasonable, necessary, and directly related to the prosecution of the action. *See 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").

A complete breakdown of the Litigation Expenses incurred by Lead Counsel by category is set forth in Exhibit C to the Joost Fee and Expense Declaration. These expense items are billed separately by Lead Counsel, and such charges are not duplicated in its hourly rates. The type of expenses for which Lead Counsel seeks payment were necessarily incurred in this Action and are routinely charged to classes in contingent litigation and clients billed by the hour. These include expenses associated with, among other things, document management, online research, travel, experts/consultants, and mediation. *See, e.g.*, *Vincent v. Reser*, 2013 WL 621865, at *5 (N.D. Feb. 19, 2013) (granting reimbursement of costs for "three experts and the mediator, photocopying and mailing expenses, travel expenses, and other reasonable litigation related expenses"); *Avila v. LifeLock Inc.*, 2020 WL 4362394, at *1-2 (D. Ariz. July 27, 2020) (awarding $350,000 in expenses from $20 million settlement); *Leon D. Milbeck v. Truecar, Inc., et al.*, No. 18-cv-02612-SVW-AGR, slip op. (ECF No. 185) at 2-3 (C.D. Cal. Jan. 27, 2020) (awarding $424,910.42 in expenses from $28.25 million settlement); *In re Yahoo! Inc. Sec. Litig.*, No. 17-cv-00373, slip op. (ECF No. 119), ¶ 4 (N.D. Cal. Sept. 7, 2018) (awarding $353,282.72 in expenses from $80 million settlement).

The largest component of Lead Counsel's expenses by far was the cost of Lead Plaintiff's experts and consultants ($115,626.57, or approximately 60.7% of total expenses). Lead Counsel also incurred the cost of retaining an outside vendor to host Defendants' document production ($9,294.62), the cost of two formal mediations with Mr. Lindstrom ($25,750.00), and the cost of online research ($30,213.59). Joost Decl., ¶¶ 189-191. All of these costs were essential for the successful resolution of the Action. Accordingly, reimbursement of the requested Litigation Expenses is reasonable and appropriate.

IV. CONCLUSION

For the reasons stated herein and in the Joost Declaration, Lead Counsel respectfully requests the Court: (i) award attorneys' fees in the amount of 20% of the Settlement Fund; and (ii) approve reimbursement of Lead Counsel's Litigation Expenses in the amount of $190,419.50.

Respectfully submitted,

Dated: February 24, 2022

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