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11 UNITED STATES DISTRICT COURT
 12 SOUTHERN DISTRICT OF CALIFORNIA

13 In re BRIDGEPOINT EDUCATION,
 14 INC. SECURITIES LITIGATION

No. 3:12-cv-01737-JM-JLB

CLASS ACTION

15 This Document Relates To:
 16

17 ALL ACTIONS.

18 LEAD COUNSEL'S MEMORANDUM
 OF POINTS AND AUTHORITIES IN
 19 SUPPORT OF MOTION FOR AN
 AWARD OF ATTORNEYS' FEES
 AND EXPENSES AND
 REIMBURSEMENT OF LEAD
 PLAINTIFF'S EXPENSES
 PURSUANT TO 15 U.S.C. §78u-4(a)(4)

20 DATE: April 25, 2016
 TIME: 10:00 a.m.
 21 CTRM: 5D, The Honorable
 Jeffrey T. Miller

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1 Lead Counsel submits this memorandum in support of its motion for an award
2 of attorneys' fees and expenses and reimbursement of the expenses of Lead Plaintiff
3 Teamsters Local 677 Health Services & Insurance Plan ("Local 677 Plan").¹

4 **I. INTRODUCTION**

5 Lead Counsel has obtained a \$15,500,000 cash settlement for the benefit of Class
6 Members.² This recovery was achieved through the skill, work, tenacity, and effective
7 advocacy of Lead Counsel in the face of considerable opposition. As compensation for
8 its efforts in achieving this result, Lead Counsel seeks an award of attorneys' fees of
9 25% of the Settlement Amount, plus expenses incurred in the prosecution of the Action
10 in the amount of \$509,940.07, plus interest on both amounts at the same rate and for the
11 same period of time as that earned by the Settlement Fund until paid, plus
12 reimbursement of expenses in the amount of \$3,622.00 to Local 677 Plan.

13 ¹ Submitted herewith in further support of this motion are the following:

- 14 • Lead Plaintiffs' Memorandum of Points and Authorities in Support of Motion
15 for Final Approval of Class Action Settlement and Plan of Allocation of
16 Settlement Proceeds ("Settlement Brief");
- 17 • Declaration of Jonah H. Goldstein in Support of Motion for (1) Final Approval
18 of Class Action Settlement and Plan of Allocation of Settlement Proceeds; and
19 (2) an Award of Attorneys' Fees and Expenses and Reimbursement of Lead
20 Plaintiff's Expenses Pursuant to 15 U.S.C. §78u-4(a)(4) ("Goldstein Decl.");
- 21 • Declaration of Jonah H. Goldstein Filed on Behalf of Robbins Geller Rudman
22 & Dowd LLP in Support of Application for Award of Attorneys' Fees and
23 Expenses ("Lead Counsel's Fee and Expense Decl.");
- 24 • Declaration of Frank J. Johnson Filed on Behalf of Johnson & Weaver, LLP in
25 Support of Application for Award of Attorneys' Fees and Expenses ("Johnson
26 Decl.");
- 27 • Declaration of Douglas Strachan in Support of Motion for Final Approval of
28 Class Action Settlement, Plan of Allocation, and an Award of Attorneys' Fees
and Expenses ("Atlanta GEPF Decl."); and
- Declaration of John Capobianco in Support of Motion for Final Approval of
Class Action Settlement, Plan of Allocation, and an Award of Attorneys' Fees
and Expenses ("Local 677 Plan Decl.).

² All capitalized terms not defined herein have the same meanings set forth in the
Stipulation and Agreement of Settlement, dated October 30, 2015 ("Stipulation" or
"Settlement"). Dkt. No. 96-2.

1 The requested fee is consistent with the Ninth Circuit’s 25% fee “benchmark”
2 and fee awards in numerous similar actions in this Circuit. The amount requested is
3 warranted in light of the amount of the recovery obtained for the Class, the extensive
4 efforts of Lead Counsel in obtaining this favorable result, and the significant risks
5 faced and overcome in bringing and prosecuting this Action. Significantly, the fee
6 request is supported by the Court-appointed Lead Plaintiffs City of Atlanta General
7 Employees Pension Fund (“Atlanta GEPF”) and Local 677 Plan (together, “Lead
8 Plaintiffs”) who were actively involved in the Action. Moreover, as of the date of this
9 memorandum, not a single Class Member has objected to Lead Counsel’s attorneys’
10 fee and expense request. *See* Goldstein Decl., ¶78.

11 This Action was prosecuted under the provisions of the Private Securities
12 Litigation Reform Act of 1995 (“PSLRA”) and, therefore, was extremely risky and
13 difficult from the outset. The effect of the PSLRA is to make it harder for investors to
14 bring and successfully conclude securities class actions. Lead Counsel and Lead
15 Plaintiffs were mindful of the fact that in this post-PSLRA environment, a greater
16 percentage of cases are being dismissed than ever before, amid defendants’ constant
17 attempts to push the envelope under the PSLRA. *See* Svetlana Starykh & Stefan
18 Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review*
19 at 19, Figure 16 (NERA Jan. 25, 2016) (available at <http://www.nera.com>) (out of cases
20 where a motion to dismiss was decided, 54% were either granted with or without
21 prejudice). As retired Supreme Court Justice Sandra Day O’Connor recognized: “To
22 be successful, a securities class-action plaintiff must thread the eye of a needle made
23 smaller and smaller over the years by judicial decree and congressional action.” *Alaska*
24 *Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009).

25 The prosecution of this Action also required considerable skill and extensive
26 effort by Lead Counsel. Lead Counsel marshaled the resources and committed
27 substantial amounts of time and expense necessary to effectively prosecute this
28 Action. As set forth in the Goldstein Declaration, this Action included extensive

1 discovery, including the production of nearly two million pages of documents, the
2 taking and defending of 21 party and nonparty depositions, the submission of four
3 expert reports, and the taking of four expert depositions. Moreover, Lead Counsel
4 drafted a comprehensive consolidated complaint, successfully overcame, in part,
5 Defendants' motion to dismiss the consolidated complaint, and successfully obtained
6 certification of the Class.³

7 Lead Counsel also participated in hard fought settlement negotiations, including
8 two all-day mediation sessions with the Honorable Layn R. Phillips (Ret.), a highly
9 respected mediator with extensive experience in the mediation of complex class
10 actions. *See, e.g., See In re Delphi Corp. Sec.*, 248 F.R.D. 483, 498 & n.14 (E.D.
11 Mich. 2008) (recognizing "the outstanding work done by Judge Phillips" in settlement
12 negotiations and "the added benefit of the insight and considerable talents of [this]
13 former federal judge who is one of the most prominent and highly skilled mediators of
14 complex actions").

15 Lead Counsel undertook the representation of the Class on a contingent fee
16 basis, and no payment has been made to Lead Counsel to date for its services or for
17 the litigation expenses it has advanced on behalf of the Class. Lead Counsel firmly
18 believes that the Settlement is the result of its diligent and effective advocacy, as well
19 as its reputation as a law firm which is unwavering in its dedication to the interests of
20 the Class and committed to prosecute a meritorious case through trial and subsequent
21 appeals. In a case asserting claims based on complex legal and factual issues, which
22 were vigorously opposed by highly skilled and experienced defense counsel, Lead
23 Counsel succeeded in securing a favorable result for the Class.

24 Further, a "lodestar" cross-check confirms the reasonableness of the fee request.
25 Plaintiffs' Counsel's lodestar is \$6,232,838.00, and the requested fee would result in a
26 ***negative*** multiplier of approximately 0.62, *i.e.*, an award that is far less than the

27 ³ The Goldstein Declaration more fully describes the history of the Action, the
28 claims asserted, the investigation undertaken, the negotiation and substance of the
Settlement, and the substantial risks of the Action.

1 equivalent value (on an hourly basis) of Lead Counsel’s attorney and paraprofessional
2 time expended in this Action.

3 As discussed herein as well as in the Goldstein Declaration, the requested fee is
4 fair and reasonable when considered under the applicable Ninth Circuit standards,
5 particularly in view of the substantial risks of bringing and pursuing this Action, the
6 extensive investigation and litigation efforts of Lead Counsel, and the result achieved
7 for the Class. Moreover, Lead Counsel’s expenses and charges requested here are
8 reasonable in amount and were necessarily incurred for the successful prosecution of
9 this Action.

10 **II. AWARD OF ATTORNEYS’ FEES**

11 **A. A Reasonable Percentage of the Fund Recovered Is the** 12 **Appropriate Method for Awarding Attorneys’ Fees in** 13 **Common Fund Cases**

14 For their efforts in creating a common fund for the benefit of the Class, Lead
15 Counsel seeks a reasonable percentage of the fund recovered as attorneys’ fees. The
16 percentage method of awarding fees has become an accepted, if not the prevailing
17 method, for awarding fees in common fund cases in this Circuit and throughout the
18 United States.

19 In *Blum v. Stenson*, 465 U.S. 886 (1984), the Supreme Court recognized that
20 under the common fund doctrine a reasonable fee may be based “on a percentage of
21 the fund bestowed on the class.” *Id.* at 900 n.16. Likewise, it has long been
22 recognized in the Ninth Circuit that “a private plaintiff, or his attorney, whose efforts
23 create, discover, increase or preserve a fund to which others also have a claim is
24 entitled to recover from the fund the costs of his litigation, including attorneys’ fees.”
25 *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). The purpose of
26 this doctrine is to avoid unjust enrichment so that “those who benefit from the creation
27 of the fund should share the wealth with the lawyers whose skill and effort helped
28 create it.” *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th
Cir. 1994) (“WPPSS”). This rule, known as the “common fund” doctrine, is firmly

1 rooted in American case law. *See, e.g., Trustees v. Greenough*, 105 U.S. 527 (1882);
 2 *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885).⁴

3 The Ninth Circuit expressly approved the use of the percentage method in
 4 common fund cases.⁵ Since *Paul, Johnson* and its progeny, and although district
 5 courts have discretion to award fees in common fund cases based on either the so-
 6 called lodestar/multiplier method or the percentage-of-the-fund method, *WPPSS*, 19
 7 F.3d at 1296, district courts in this Circuit have almost uniformly shifted to the
 8 percentage method in awarding fees in common fund representative actions.⁶

9 The rationale for compensating counsel in common fund cases on a percentage
 10 basis is sound. First, it is consistent with the practice in the private marketplace where
 11 contingent fee attorneys are customarily compensated by a percentage of the recovery.
 12 Second, it more closely aligns the lawyers' interest in being paid a fair fee with the
 13 interest of the class in achieving the maximum possible recovery in the shortest

14 _____
 15 ⁴ In *Paul, Johnson, Alston & Hunt v. Graultry*, 886 F.2d 268 (9th Cir. 1989), the
 16 Ninth Circuit explained the principle underlying fee awards in common fund cases:

17 Since the Supreme Court's 1885 decision in [*Pettus*, 113 U.S. 116], it is
 18 well settled that the lawyer who creates a common fund is allowed an
extra reward, beyond that which he has arranged with his client, so that
 he might share the wealth of those upon whom he has conferred a
 benefit. The amount of such a reward is that which is deemed
 "reasonable" under the circumstances.

19 *Id.* at 271 (emphasis in original). All citations and footnotes are omitted and emphasis
 is added, unless otherwise indicated.

20 ⁵ *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002); *Torrison v. Tucson Elec.*
 21 *Power Co.*, 8 F.3d 1370 (9th Cir. 1993); *Six (6) Mexican Workers v. Ariz. Citrus*
 22 *Growers*, 904 F.2d 1301 (9th Cir. 1990); *Paul, Johnson*, 886 F.2d 268.

23 ⁶ Courts in other Circuits also favor the percentage-of-recovery approach for the
 24 award of attorneys' fees in common fund cases. Two Circuits have ruled that the
 percentage method is mandatory in common fund cases. *Swedish Hosp. Corp. v.*
 25 *Shalala*, 1 F.3d 1261 (D.C. Cir. 1993); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d
 26 768, 774-75 (11th Cir. 1991). Other Circuits and commentators have expressly
 approved the use of the percentage method. *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir.
 1994); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) (citing
 27 *Blum*, 465 U.S. 900 n.16, recognizing both "implicitly" and "explicitly" that a
 percentage recovery is reasonable in common fund cases); *Harman v. Lyphomed, Inc.*,
 28 945 F.2d 969, 975 (7th Cir. 1991); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43
 (2d Cir. 2000); Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*,
 108 F.R.D. 237, 254 (Oct. 8, 1985).

1 amount of time.⁷ Indeed, one of the nation's leading scholars in the field of class
 2 actions and attorneys' fees, Professor Charles Silver of the University of Texas School
 3 of Law, has concluded that the percentage method of awarding fees is the only method
 4 of fee awards that is consistent with class members' due process rights. Professor
 5 Silver notes:

6 The consensus that the contingent percentage approach creates a
 7 closer harmony of interests between class counsel and absent plaintiffs
 8 than the lodestar method is strikingly broad. It includes leading
 9 academics, researchers at the RAND Institute for Civil Justice, and many
 10 judges, including those who contributed to the Manual for Complex
 11 Litigation, the Report of the Federal Courts Study Committee, and the
 12 report of the Third Circuit Task Force. Indeed, it is difficult to find
 13 anyone who contends otherwise. No one writing in the field today is
 14 defending the lodestar on the ground that it minimizes conflicts between
 15 class counsel and absent claimants.

16 In view of this, it is as clear as it possibly can be that judges
 17 should not apply the lodestar method in common fund class actions. The
 18 Due Process Clause requires them to minimize conflicts between absent
 19 claimants and their representatives. The contingent percentage approach
 20 accomplishes this.

21 Charles Silver, *Due Process and the Lodestar Method: You Can't Get There from*
 22 *Here*, 74 Tul. L. Rev. 1809, 1819-20 (June 2000).

23 **B. A Percentage Fee of 25% of the Fund Created Is**
 24 **Reasonable in This Case**

25 In *Paul, Johnson*, 886 F.2d at 272, the Ninth Circuit established 25% of a
 26 common fund as the "benchmark" award for attorneys' fees. *See also Torrissi*, 8 F.3d at
 27 1376 (reaffirming 25% benchmark); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir.
 28 2000) (same); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 943 (9th Cir.

29 ⁷ In *Kirchoff v. Flynn*, 786 F.2d 320, 325-26 (7th Cir. 1986), the court stated:

30 The contingent fee uses private incentives rather than careful
 31 monitoring to align the interests of lawyer and client. The lawyer gains
 32 only to the extent his client gains. . . . The unscrupulous lawyer paid by
 33 the hour may be willing to settle for a lower recovery coupled with a
 34 payment for more hours. Contingent fees eliminate this incentive and
 35 also ensure a reasonable proportion between the recovery and the fees
 36 assessed to defendants. . . .

37 At the same time as it automatically aligns interests of lawyer and
 38 client, rewards exceptional success, and penalizes failure, the contingent
 fee automatically handles compensation for the uncertainty of litigation.

1 2011) (reaffirming 25% benchmark in a common fund case). The guiding principle in
2 this Circuit is that a fee award be “reasonable under the circumstances.” *WPPSS*, 19
3 F.3d at 1295. “The Ninth Circuit has approved a number of factors which may be
4 relevant to the district court’s determination: (1) the results achieved; (2) the risk of
5 litigation; (3) the skill required and the quality of work; (4) the contingent nature of the
6 fee and the financial burden carried by the plaintiffs; and (5) awards made in similar
7 cases.” *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2007).

8 In view of the risks in pursuing this Action, the favorable result obtained, the
9 financial commitment of Lead Counsel, the contingent nature of the representation,
10 and the skill of Lead Counsel, an award of 25% of the recovery obtained for the Class
11 is entirely appropriate.

12 **1. The Result Achieved**

13 Courts have consistently recognized that the result achieved is a major factor to
14 be considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)
15 (“most critical factor is the degree of success obtained”); *In re HP Inkjet Printer*
16 *Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013) (“courts aim to tether the value of an
17 attorneys’ fees award to the value of the class recovery”).

18 Here, a substantial and certain recovery of \$15.5 million in cash has been
19 obtained only after extensive negotiations between the parties and with the substantial
20 assistance of Judge Phillips. Additionally, the Lead Plaintiffs, who were actively
21 involved in the litigation, authorized counsel to settle the Action and believe it
22 represents a very good recovery. *See Atlanta GEPF Decl.*, ¶4, and *Local 677 Plan*
23 *Decl.*, ¶4.

24 **2. The Risks of the Litigation and the Novelty and** 25 **Difficulty of the Questions Presented**

26 Numerous cases have recognized that risk, as well as the novelty and difficulty
27 of the issues presented, are important factors in determining a fee award. *E.g.*,
28 *Vizcaino*, 290 F.3d at 1048; *WPPSS*, 19 F.3d at 1299-1301. Uncertainty that an

1 ultimate recovery would be obtained is highly relevant in determining risk. *WPPSS*,
2 19 F.3d at 1300; *In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, No. 02-
3 ML-1475-DT(RCx), 2005 U.S. Dist. LEXIS 13627, at *44 (C.D. Cal. June 10, 2005)
4 (“The risks assumed by Class Counsel, particularly the risk of non-payment or
5 reimbursement of expenses, is a factor in determining counsel’s proper fee award.”).

6 There is no question that from the outset this Action presented a number of
7 sharply contested issues of both fact and law under the federal securities laws and that
8 Lead Plaintiffs faced substantial defenses to liability and damages. Goldstein Decl.,
9 ¶¶8, 25, 34, 58, 71. Throughout the Action, Defendants have adamantly denied
10 liability and asserted that they had absolute defenses to Lead Plaintiffs’ claims. *Id.*;
11 *see Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 576 (9th Cir. 2004) (district court
12 properly weighed risk based on defendant’s belief that it had a strong case on merits).

13 As discussed in the Goldstein Declaration and the Settlement Brief, from the
14 outset, this Action was an especially difficult and highly uncertain securities case. For
15 instance, Defendants asserted throughout this Action that Lead Plaintiffs could not
16 meet their burden of proving falsity or loss causation. Goldstein Decl., ¶72.
17 Defendants had also argued that certain of the alleged false statements were protected
18 by PSLRA’s Safe Harbor provision. Dkt. No. 86. There was also uncertainty and risk
19 associated with demonstrating damages to the end of the Class Period. Defendants
20 have strongly opposed the contention that the Class Period properly extended to
21 July 13, 2012, and instead maintained that the market was aware of the pertinent facts
22 no later than July 9, 2012. Defendants further challenged loss causation and the
23 amount of Lead Plaintiffs’ damages regarding the July 9, 2012 price decline. Both
24 parties claimed the evidence supported their respective positions. If Defendants were
25 successful in either of these arguments, Lead Plaintiffs’ damages would have been
26 significantly reduced. Goldstein Decl., ¶58. Even if Lead Plaintiffs prevailed on any
27 or all of their claims at trial and were awarded damages by a jury, Defendants would
28 surely contest such an award through post-trial motions and/or appeal any such verdict

1 or award, creating the risk of reversal and that the Class would receive nothing even
2 after prevailing at trial.⁸

3 There is no question that absent settlement, Lead Counsel in this case faced the
4 substantial risk of years of additional litigation with no guarantee of any
5 compensation, even if they prevailed on the merits. Lead Counsel achieved a
6 significant and certain recovery for the Class in the face of very substantial risks. As a
7 result, the requested fee is fully justified.

8 **3. The Skill Required and the Quality and Efficiency of** 9 **the Work**

10 The “prosecution and management of a complex national class action requires
11 unique legal skills and abilities.” *Heritage Bond*, 2005 U.S. Dist. LEXIS 13627, at
12 *39. Lead Counsel is a nationally recognized leader in securities class actions and
13 complex litigation. The recovery obtained for the Class is the direct result of the
14 significant efforts of highly skilled and specialized attorneys who possess substantial
15 experience in prosecuting complex securities class actions. *See* www.rgrdlaw.com.
16 Lead Counsel’s reputation as a law firm which will carry a meritorious case through
17 trial and appeals, as well as its demonstrated ability to vigorously develop the
18 evidence in this Action, enabled it to negotiate a favorable recovery for the Class
19 under difficult circumstances. Unlike those cases where plaintiffs’ counsel were able
20 to “free ride” on the work of others (such as the SEC or other governmental agency),
21
22

23 _____
24 ⁸ As the court noted in *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166 (E.D. Pa.
2000):

25 There were the legal obstacles of establishing scienter, damages,
26 causation The court also acknowledges that securities actions have
27 become more difficult from a plaintiff’s perspective in the wake of the
28 PSLRA. The Act imposes many new procedural hurdles It also
substantially alters the legal standards applied to securities fraud claims
in ways that generally benefit defendants rather than plaintiffs.

Id. at 194-95. The court’s statement in *Ikon* is certainly applicable here.

1 here Lead Counsel developed the case without the benefit of a governmental
2 investigation.⁹

3 The quality of opposing counsel is also important in evaluating the quality of
4 the work done by Lead Counsel. *See, e.g., In re Equity Funding Corp. Sec. Litig.*, 438
5 F. Supp. 1303, 1337 (C.D. Cal. 1977). Lead Counsel was opposed in this Action by
6 the very skilled and highly respected firm of Wilson Sonsini Goodrich & Rosati,
7 which has a well-deserved reputation for vigorous advocacy in the defense of complex
8 civil cases such as this. In the face of this formidable opposition, Lead Counsel was
9 able to develop its case so as to persuade Defendants to settle the Action for a
10 substantial sum of money.

11 **4. The Contingent Fee Nature of the Case and the** 12 **Financial Burden Carried by Lead Counsel**

13 A determination of a fair fee must include consideration of the contingent
14 nature of the fee and the difficulties which were overcome in obtaining the settlement.

15 It is an established practice in the private legal market to reward
16 attorneys for taking the risk of non-payment by paying them a premium
17 over their normal hourly rates for winning contingency cases. *See*
18 *Richard Posner, Economic Analysis of Law* §21.9, at 534-35 (3d ed.
19 1986). Contingent fees that may far exceed the market value of the
20 services if rendered on a non-contingent basis are accepted in the legal
21 profession as a legitimate way of assuring competent representation for
22 plaintiffs who could not afford to pay on an hourly basis regardless
23 whether they win or lose.

24 *WPPSS*, 19 F.3d at 1299.

25 Indeed, the risk of no recovery in complex cases of this type is very real. There
26 are numerous class actions in which plaintiffs' counsel expended thousands of hours
27 and yet received no remuneration whatsoever despite their diligence and expertise.

28 ⁹ *See In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001) (In
awarding 25% of a \$193 million settlement fund, the court noted the skill and efficiency
of plaintiffs' counsel and outstanding results "in a litigation that was far ahead of public
agencies like the [SEC] and the United States Department of Justice, which long after
the institution of this litigation awakened to the concerns that plaintiffs' counsel first
identified."); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 371 (S.D.N.Y.
2002) (In awarding 33-1/3% of the settlement fund, the court noted, "[i]n this Action,
Plaintiffs' Class Counsel did not 'piggy back' on any prior governmental action
Plaintiffs' Class Counsel developed, litigated and successfully negotiated this Action by
themselves, expending substantial time and effort.").

1 For example, in *In re Oracle Corp. Sec. Litig.*, No. C 01-00988 SI, 2009 U.S. Dist.
2 LEXIS 50995 (N.D. Cal. June 16, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010), a
3 securities class action that Lead Counsel prosecuted, the court granted summary
4 judgment to defendants after eight years of litigation, and after plaintiff's counsel
5 incurred over \$6 million in expenses, and worked over 100,000 hours, representing a
6 lodestar of approximately \$48 million. And, in a case against JDS Uniphase
7 Corporation, after a lengthy trial involving securities claims, the jury reached a verdict
8 in defendants' favor. *See In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486 CW
9 (EDL), 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007). Similarly, even the most
10 promising multi-hundred million dollar case can be eviscerated by a sudden change in
11 the law after years of litigation. *See, e.g., In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d
12 469, 471-73 (S.D.N.Y. 2010) (after completing extensive (and expensive) foreign
13 discovery, 95% of plaintiffs' damages were eliminated by the Supreme Court's
14 reversal of some 40 years of unbroken circuit court precedents in *Morrison v. Nat'l*
15 *Austl. Bank Ltd.*, 561 U.S. 247 (2010)). As one court recognized, "[p]recedent is
16 replete with situations in which attorneys representing a class have devoted substantial
17 resources in terms of time and advanced costs yet have lost the case despite their
18 advocacy." *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 994 (D. Minn. 2005). Even
19 plaintiffs who get past summary judgment and succeed at trial may find their
20 judgment overturned on appeal or on a post-trial motion.¹⁰

21 _____
22 ¹⁰ *See, e.g., In re BankAtlantic Bancorp, Sec. Litig.*, No. 07-61542-CIV-UNGARO,
23 2011 U.S. Dist. LEXIS 48057 (S.D. Fla. Apr. 25, 2011) (court granted defendants'
24 judgment as a matter of law on the basis of loss causation, overturning jury verdict
25 and award in plaintiff's favor), *aff'd*, 688 F.3d 713 (11th Cir. 2012); *Robbins v. Koger*
26 *Props.*, 116 F.3d 1441, 1448-49 (11th Cir. 1997) (jury verdict of \$81 million for
27 plaintiffs against an accounting firm reversed on appeal on loss causation grounds and
28 judgment entered for defendant); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215,
1233 (10th Cir. 1996) (Tenth Circuit overturned securities fraud class action jury
verdict for plaintiffs in case filed in 1973 and tried in 1988 on the basis of 1994
Supreme Court opinion); *In re Apple Computer Sec. Litig.*, No. C-84-20148(A)-JW,
1991 U.S. Dist. LEXIS 15608, at *1-*2 (N.D. Cal. Sept. 6, 1991) (verdict against two
individual defendants, but court vacated judgment on motion for judgment
notwithstanding the verdict); *Backman v. Polaroid Corp.*, 910 F.2d 10, 18 (1st Cir.
1990) (where the class won a substantial jury verdict and motion for J.N.O.V. was

1 Because the fee in this matter was entirely contingent, the only certainties were
2 that there would be no fee without a successful result and that such a result would be
3 realized only after considerable and difficult effort. Lead Counsel committed
4 significant resources of both time and money to the vigorous and successful
5 prosecution of this Action for the benefit of the Class. The contingent nature of
6 counsel's representation strongly favors approval of the requested fee.

7 **5. A 25% Fee Award Is Consistent With the Market**
8 **Rate in Similar Complex, Contingent Litigation**

9 Courts often look to fees awarded in comparable cases to determine if the fee
10 requested is reasonable. *See Vizcaino*, 290 F.3d at 1050 n.4. As demonstrated by the
11 decisions cited in Appendix A attached hereto, a fee of 25% or more has been
12 repeatedly awarded in settlements with comparable recoveries by the courts in this
13 Circuit and District. Indeed, as this Court has noted, 25% is the "benchmark"
14 percentage awarded in this Circuit. *Reed v. 1-800 Contacts, Inc.*, No. 12-cv-02359 JM
15 (BGS), 2014 U.S. Dist. LEXIS 255, at *27 (S.D. Cal. Jan. 2, 2014) (Miller, J.) ("Like
16 the Ninth Circuit, California courts typically calculate 25% of the common fund as the
17 benchmark for a reasonable fee award in common fund cases.").

18 The requested fee is less than the median fee award for securities cases based on
19 an analysis of fee awards recently conducted by NERA. Using data from securities
20 class actions from 2011 through 2015, the study found that for settlements between
21 \$10 million and \$25 million, where this Settlement falls, the median fee award was
22 27.5% of the settlement amount. *Sarykh & Boettrich, supra* at 36, Figure 32.

23 Moreover, if this were a non-representative litigation, the customary fee
24 arrangement would be contingent, on a percentage basis, and in the range of 30% to
25 40% of the recovery. *Aichele v. City of L.A.*, No. 12-cv-10863-DMG, 2015 U.S. Dist.
26 LEXIS 120225, at *17-*18 (C.D. Cal. Sept. 9, 2015) (noting "[a]ttorneys 'regularly

27 denied, on appeal the judgment was reversed and the case was dismissed – after 11
28 years of litigation); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 309 (2d
Cir. 1979) (multimillion dollar judgment reversed after lengthy trial).

1 contract for contingent fees between 30% and 40%” and finding a 25% fee award
2 request “highly reasonable in relation to the market for contingent fees”); *In re M.D.C.*
3 *Holdings Sec. Litig.*, No. CV 89-0090 E (M), 1990 U.S. Dist. LEXIS 15488, at *22
4 (S.D. Cal. Aug. 30, 1990) (“In private contingent litigation, fee contracts have
5 traditionally ranged between 30% and 40% of the total recovery.”); *accord Ikon*, 194
6 F.R.D. at 194 (“in private contingency fee cases, particularly in tort matters, plaintiffs’
7 counsel routinely negotiate agreements providing for between thirty and forty percent
8 of any recovery”).

9 **C. Reaction of the Class Supports Approval of the Attorneys’**
10 **Fees Requested**

11 District courts in the Ninth Circuit also consider the reaction of the class when
12 deciding whether to award the requested fee. *Heritage Bond*, 2005 U.S. Dist. LEXIS
13 13627, at *48 (“The presence or absence of objections . . . is also a factor in
14 determining the proper fee award.”).

15 To date, over 11,900 copies of the Notice of Pendency and Proposed Settlement
16 of Class Action (“Notice”) were mailed to potential Class Members and nominees. *See*
17 ¶¶4-11 to the accompanying Declaration of Carole K. Sylvester Regarding (A) Mailing
18 of the Notice of Pendency and Proposed Settlement of Class Action, the Request for
19 Exclusion Form and the Proof of Claim and Release Form, (B) Publication of the
20 Summary Notice, (C) Internet Posting, and (D) Requests for Exclusion Received to
21 Date. The Summary Notice was published once in *Investor’s Business Daily* and once
22 over the *PR Newswire* on January 12, 2016. *Id.*, ¶14. In addition, the Stipulation, the
23 Notice, Proof of Claim, Exclusion Form, and Amended Order Preliminarily Approving
24 Settlement and Providing for Notice and Approving Proposed Request for Exclusion
25 Form (the “Notice Order”) (Dkt. No. 100) were posted on the website dedicated to the
26 litigation. *Id.*, ¶13. Class Members were informed in the Notice that Lead Counsel was
27 moving the Court for an award of attorneys’ fees in an amount of 25% of the Settlement
28 Amount and for payment of litigation expenses in an amount not to exceed

1 \$600,000.00. Class Members were also advised of their right to object to the fee and
 2 expense request, and that such objections are required to be filed with the Court and
 3 served on counsel no later than February 17, 2016.

4 In addition to Lead Plaintiffs supporting the requested fee, as of the date of this
 5 memorandum, no Class Member has objected to counsel's fee and expense request.
 6 The lack of objection is compelling evidence that the requested fees and expenses are
 7 fair. *See, e.g., 1-800 Contacts*, 2014 U.S. Dist. LEXIS 255, at *20 (“The lack of
 8 objections . . . weigh[s] heavily in favor of approving settlement.”). Moreover, a
 9 small number of objections do not stand in the way of approval of a reasonable fee.
 10 *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000).¹¹

11 **D. The Requested Fee Is Reasonable Under a Lodestar Cross-
 12 Check Analysis**

13 Although Lead Counsel seeks approval of a fee based on a percentage of the
 14 recovery, “[a]s a final check on the reasonableness of the requested fees, courts often
 15 compare the fee counsel seeks as a percentage with what their hourly bills would
 16 amount to under the lodestar analysis.” *Omnivision*, 559 F. Supp. 2d at 1048; *see*
 17 *Vizcaino*, 290 F.3d at 1050 n.5 (“lodestar method is merely a cross-check on the
 18 reasonableness of a percentage figure”).

19 Here, Plaintiffs' Counsel spent 14,008.40 hours of attorney and
 20 paraprofessional time prosecuting this Action on behalf of the Class. Lead Counsel's
 21 Fee and Expense Decl., ¶4; Johnson Decl., ¶5. The resulting lodestar is
 22 \$6,232,838.00. *Id.* The requested fee of 25% would equal \$3.875 million. Thus, the
 23 requested fee represents a *negative* multiplier of approximately 0.62, well below the
 24 range of positive multipliers typically awarded by courts. Indeed, in *Vizcaino*, the
 25 Ninth Circuit approved a 28% fee that resulted in a 3.65 multiplier. 290 F.3d at 1052-
 26 54 (finding multipliers ranged as high as 19.6 though most run from 1.0-4.0); *1-800*
 27 *Contacts*, 2014 U.S. Dist. LEXIS 255, at *28 (same).

28 ¹¹ If any objections are received, Lead Counsel will address them in a reply brief to
 be filed on or before March 3, 2016, in accordance with the Notice Order.

1 **III. LEAD COUNSEL’S EXPENSES ARE REASONABLE AND**
2 **WERE NECESSARILY INCURRED TO ACHIEVE THE**
3 **BENEFIT OBTAINED**

4 Lead Counsel also requests an award of \$509,940.07, representing its expenses
5 and charges in connection with the prosecution of this Action. These expenses and
6 charges are categorized and discussed in Lead Counsel’s Fee and Expense
7 Declaration.

8 Expenses are compensable in a common fund case of this type if they are of the
9 type typically billed by attorneys to paying clients in the marketplace. *Harris v.*
10 *Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (“Harris may recover as part of the award of
11 attorney’s fees those out-of-pocket expenses that ‘would normally be charged to a fee
12 paying client.’”). Therefore, it is proper to pay reasonable expenses even though they
13 are greater than taxable costs. *Id.*; *see also Bratcher v. Bray-Doyle Indep. Sch. Dist.*
14 *No. 42*, 8 F.3d 722, 725-26 (10th Cir. 1993) (expenses reimbursable if they would
15 normally be billed to client); *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1225 (3d Cir.
16 1995) (expenses recoverable if customary to bill clients for them); *Miltland Raleigh-*
17 *Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) (“Attorneys may be
18 compensated for reasonable out-of-pocket expenses incurred and customarily charged
19 to their clients, as long as they ‘were incidental and necessary to the representation’ of
20 those clients.”). Lead Counsel’s expenses and charges are the type of expenses
21 routinely charged to hourly clients and, therefore, should be awarded here.

22 Lead Counsel’s litigation expenses include the fees of the Lead Plaintiffs’
23 expert witness, consultants and investigators (\$246,972.41) (Lead Counsel’s Fee and
24 Expense Decl., ¶6(e)), as well as the cost of Judge Phillips (\$37,129.17) who
25 conducted two mediation sessions and provided substantial assistance in the
26 settlement of this Action. *Id.*, ¶6(j).

27 Other notable expenses include the costs of database management and hosting
28 (\$51,633.40), which Lead Counsel conducted in-house through the use of the Relativity
platform (*id.*, ¶6(h)), as well as online legal and financial research (\$14,056.14). *Id.*,

1 ¶6(g). These are the charges for computerized factual and legal research services,
2 including from the following vendors: LexisNexis; Westlaw; ALM Media Service;
3 Caliber Advisors, Inc.; Pacer; and Thomson Financial. *Id.* It is standard practice for
4 attorneys to use these services to assist them in researching legal and factual issues.

5 **IV. LEAD PLAINTIFF LOCAL 677 PLAN IS ENTITLED TO**
6 **REIMBURSEMENT OF ITS REASONABLE COSTS**

7 Lead Plaintiff Local 677 Plan requests reimbursement of the cost of its time
8 expended in overseeing the Action and working with their counsel to represent the
9 Class. Such awards to class representatives are authorized under the PSLRA. *See* 15
10 U.S.C. §78u-4(a)(4) (the court may award “reasonable costs and expenses (including
11 lost wages) directly relating to the representation of the class to any representative
12 party serving on behalf of a class”); *see, e.g., Patel v. Axesstel, Inc.*, No. 3:14-CV-
13 1037-CAB-BGS, 2015 U.S. Dist. LEXIS 146949 (S.D. Cal. Oct. 23, 2015) (awarding
14 \$3,000 to plaintiff for his reasonable costs and expenses, including lost wages, related
15 to his representation of the class); *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d
16 1166, 1173-74 (S.D. Cal. 2007) (approving reimbursement of \$40,000 in lost wages);
17 *see also Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin.*
18 *Corp.*, No. 2:10-CV-02847-KOB, 2015 WL 5626414, at *2 (N.D. Ala. Sept. 14, 2015)
19 (awarding a total of \$9,000 to lead plaintiffs); *In re Marsh & McLennan Cos., Inc.*
20 *Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 U.S. Dist. LEXIS 120953, at *61 (S.D.N.Y.
21 Dec. 23, 2009) (awarding more than \$200,000 to two groups of plaintiffs).

22 As detailed in its declaration, Lead Plaintiff Local 677 Plan was actively
23 involved in the prosecution of this Action and deserves reimbursement.

24 **V. CONCLUSION**

25 Based on the foregoing and upon the entire record herein, Lead Counsel
26 respectfully requests that the Court award attorneys’ fees in the amount of 25% of the
27 Settlement Amount, plus expenses in the amount of \$509,940.07, plus interest on both
28 amounts earned at the same rate and for the same period as that earned on that portion

1 of the Settlement Fund until paid, plus the reimbursement of expenses in the amount
2 of \$3,622.00 to Local 677 Plan.

3 DATED: February 2, 2016

Respectfully submitted,

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APPENDIX A

2004 To The Present
9th Circuit Cases In Which Award Of Fees Equaled Or Exceeded
25% Of The Fund Plus Expenses (With Settlement Amounts Of Over \$10 million)

1. *In re Hot Topic, Inc. Sec. Litig.*, No. 2:13-cv-02939-SJO (C.D. Cal. Nov. 6, 2015) (awarded 25% of \$14.9 million recovery, plus expenses);
2. *Local 617 Teamsters Pension & Welfare Funds v. Apollo Grp. Inc*, No. CV-06-02674-PHX-DLR (D. Ariz. July 29, 2015) (awarded 25% of \$13.125 million recovery, plus expenses);
3. *Cunha v. Hansen Natural Corp.*, No. 08-01249-GW (C.D. Cal. Jan. 29, 2015) (awarded 25% of \$16.25 million, plus expenses);
4. *In re Novatel Wireless Sec. Litig.*, No. 08-CV-01689-AJB(RBB) (S.D. Cal. June 23, 2014) (awarded fees of 27.5% of \$16 million recovery, plus expenses);
5. *Plumbers & Pipefitters Local Union No. 630 Pension-Annuity Trust Fund v. Northwest Pipe Co.*, No. 3:09-cv-05724-RBL (W.D. Wash. Mar. 22, 2013) (awarded fees of 25% of \$12.5 million recovery, plus expenses);
6. *Int'l Bhd. of Elec. Workers Local 697 Pension Fund v. Int'l Game Tech.*, No. 3:09-cv-00419-MMD-WGC (D. Nev. Oct. 19, 2012) (awarded fees of 25% of \$12.5 million recovery, plus expenses);
7. *Brown v. Brewer, et al.*, No. 2:06-cv-03731-GHK-SH (C.D. Cal. Mar. 19, 2012) (awarded fees of 27% of \$45 million recovery, plus expenses);
8. *In re Accuray Inc. Sec. Litig.*, No. 4:09-cv-03362-CW (N.D. Cal. Dec. 8, 2011) (awarded fees of 25% of \$13.5 million recovery, plus expenses);
9. *Batwin v. Occam Networks, Inc.*, No. 2:07-cv-02750-CAS(SHx) (C.D. Cal. Feb. 22, 2010) (awarded 25% of \$13.945 million recovery, plus expenses);
10. *In re Dura Pharms., Inc. Sec. Litig.*, No. 99-CV-0151-JLS(WMC) (S.D. Cal. Dec. 4, 2009) (awarded fees of 25% of \$14 million recovery, plus expenses);
11. *In re Wireless Facilities, Inc. Sec. Litig.*, No. 04cv1589 NLS (S.D. Cal. Jan. 13, 2009) (awarded 25% of \$12 million recovery, plus expenses);
12. *In re PETCO Corp. Sec. Litig.*, No. 05-CV-0823 H(RBB) (S.D. Cal. Sept. 2, 2008) (awarded 25% of \$20.25 million recovery, plus expenses);
13. *In re Terayon Commc'n Sys., Inc. Sec. Litig.*, No. C-00-1967-MHP (N.D. Cal. Oct. 3, 2007) (awarded fees of 30% of \$15 million recovery, plus expenses);

14. *In re Alliance Gaming Corp. Sec. Litig.*, No. CV-S-04-0821-BES-PAL (D. Nev. June 28, 2007) (awarding 25% of \$15.5 million recovery, plus expenses);
15. *In re Verisign, Inc. Sec. Litig.*, No. C-02-2270-JW(PVT) (N.D. Cal. Apr. 24, 2007) (awarded 25% of \$80 million recovery, plus expenses);
16. *In re Surebeam Corp. Sec. Litig.*, No. 03-CV-01721-JM(POR) (S.D. Cal. July 17, 2006) (awarded 25% of \$32.75 million recovery, plus expenses);
17. *In re Titan, Inc. Sec. Litig.*, Master File No. 04-CV-0676-LAB(NLS) (S.D. Cal. Dec. 19, 2005) (fee award equal to 25% of \$61.5 million recovery, plus expenses);
18. *In re Amazon.Com, Inc. Sec. Litig.*, Master File No. C-01-0358-L (W.D. Wash. Nov. 11, 2005) (fee award equal to 25% of \$27.7 million recovery, plus expenses);
19. *Thomas & Thomas Rodmakers Inc., et al. v. Newport Adhesives and Composites, Inc., et al.*, Case No. CV-99-07796-FMC(RNBx) (C.D. Cal. Oct. 17, 2005) (awarded fees of 33% of \$36.25 million recovery, plus expenses);
20. *In re Intermune, Inc. Sec. Litig.*, No. C-03-2954-SI (N.D. Cal. Aug. 26, 2005) (fee award equal to 25% of \$10.4 million recovery; plus expenses);
21. *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives and Composites, Inc.*, Case No. CV-99-07796-FMC(RNx) (C.D. Cal. Jan. 31, 2005) (awarded fees of 29% of \$32.75 million recovery, plus expenses);
22. *In re Specialty Laboratories, Inc. Sec. Litig.*, Master File No. CV 02-04352-DDP(RCx) (C.D. Cal. Dec. 28, 2004) (fee award equal to 25% of \$12 million recovery, plus expenses);
23. *In re Infonet Services Corp. Sec. Litig.*, Master File No. CV-01-10456-NM(CWx) (C.D. Cal. July 26, 2004) (fee equal to 25% of \$18 million recovery, plus expenses);
24. *Thurber v. Mattel, Inc.*, No. CV-99-10368-MRP(CWx) (C.D. Cal. Oct. 1, 2003) (fee equal to 27% of \$122 million recovery, plus expenses).