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Lead Counsel for Lead Plaintiff

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re VERIFONE HOLDINGS, INC. SECURITIES LITIGATION	Master File No. 3:07-cv-06140-EMC
	CLASS ACTION
This Document Relates To: ALL ACTIONS.	NOTICE OF MOTION AND MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that pursuant to an order of this Court dated October 16, 2013, on February 6, 2014, at 1:30 p.m., in the Courtroom of the Honorable Edward M. Chen, United States District Judge, Northern District of California, at the Phillip Burton United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, Lead Counsel will and hereby does move this Court for an order awarding Lead Counsel attorneys' fees of 20% of the Settlement Fund[1] plus expenses incurred in the prosecution of the litigation, plus interest. This motion is based upon the attached Memorandum of Points and Authorities in Support of Motion for Award of Attorneys' Fees and Expenses; the Declaration of Christopher P. Seefer in Support of Lead Plaintiff's Motion for Final Approval of Settlement and Plan of Allocation for Settlement Proceeds, and Application for Award of Attorneys' Fees and Expenses ("Seefer Decl."), the Declaration of Robert O. Betts, Executive Director of the National Elevator Industry Pension Fund ("Betts Decl."), the Declaration of Layn R. Phillips in Support of Lead Plaintiff's Motion for Final Approval of Settlement ("Phillips Decl."), the Declaration of Christopher P. Seefer Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Robbins Geller Decl."), the Stipulation of Settlement dated as of August 9, 2013 ("Stipulation"), all other pleadings and matters of record, and such additional evidence and testimony as may be presented before or at the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Lead Counsel have succeeded in obtaining a $95,000,000 cash settlement for the benefit of Members of the Class. The substantial recovery obtained for the Class was achieved through the skill, work, tenacity, and effective advocacy of Lead Counsel in the face of considerable risk and determined opposition. Lead Counsel now respectfully move this Court for an award of attorneys' fees of 20% of the Settlement Fund, plus expenses incurred in the prosecution of the Litigation in the amount of $278,994.44, plus interest at the same rate and for the same period of time as that earned by the Settlement Fund until paid. The requested fee is below the Ninth Circuit's 25% "benchmark"

[1] The requested fee of 20% of the Settlement Fund is net of any awarded expenses.

fee in similar actions, numerous decisions in this Circuit, and decisions throughout the United States.[2] The amount requested is warranted in light of the substantial recovery obtained for the Class, the extensive efforts of counsel in obtaining this highly favorable result, and the significant risks in bringing and prosecuting this Litigation.

Significantly, the fee request was negotiated at the beginning of the case with National Elevator, the Court-appointed Lead Plaintiff, who has actively overseen this Litigation from its appointment. Betts Decl., ¶¶5-6. As the Third Circuit held in *In re Cendant Corp. Litig.*, 264 F.3d 201, 220 (3d Cir. 2001): "[C]ourts should afford a presumption of reasonableness to fee requests submitted pursuant to an agreement between a properly-selected lead plaintiff and properly-selected lead counsel." Lead Plaintiff not only negotiated the fee at the beginning of the case but now after having been actively involved in the Litigation and observed first hand Lead Counsel's significant efforts and work over the last six years, it supports the requested fee based on, among other things, the "excellent result" obtained. Betts Decl., ¶6.

This Litigation was prosecuted under the provisions of the Private Securities Litigation Reform Act of 1995 ("PSLRA") and, therefore, was extremely risky and difficult from the outset. The effect of the PSLRA is to make it harder for investors to bring and successfully conclude securities class actions. Lead Counsel and Lead Plaintiff are mindful of the fact that in this post-PSLRA environment, a greater percentage of cases are being dismissed than ever before, amid defendants' constant attempts to push the envelope and contents of the PSLRA. As retired Supreme Court Justice Sandra Day O'Connor recognized: "To be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action." *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009).

[2] Submitted herewith in support of approval of the proposed settlement is the Notice of Motion and Motion for (1) Final Approval of Class Action Settlement; and (2) Approval of the Plan of Allocation of Settlement Proceeds and Memorandum of Points and Authorities in Support Thereof (the "Settlement Brief"). In addition, the Seefer Declaration more fully describes the history of the Litigation, the claims asserted, the investigation undertaken, the negotiation and substance of the settlement and the substantial risks of the Litigation.

In addition to the significant risks, the prosecution of this Litigation required great skill and an extensive effort by Lead Counsel. Lead Counsel marshaled considerable resources and committed substantial amounts of time and expense in the prosecution of the Litigation. As set forth in the Seefer Declaration, Lead Counsel, among other things, (a) conducted a substantial pre-discovery investigation regarding the underlying facts pertinent to the litigation; (b) filed three amended complaints for violation of the federal securities laws which included evidence developed through counsel's extensive investigation; (c) briefed and opposed Defendants' motions to dismiss the complaints filed; (d) successfully appealed the dismissal of Lead Plaintiff's Third Amended Complaint to the Ninth Circuit Court of Appeals; (e) conducted merits discovery, including serving multiple third-party subpoenas and reviewing over 300,000 pages of documents produced by Defendants and the Securities and Exchange Commission ("SEC"); (f) consulted with an expert in damages to assess the potential damages under various analyses; (g) weighed the risks that would exist if the case proceeded through discovery, class certification, summary judgment, and eventually to trial; (h) extensively prepared for and attended two mediations, including an all-day mediation on March 26, 2013, with the Honorable Layn R. Phillips, United States District Judge (Ret.); and (i) participated in extensive settlement negotiations after the March, 26, 2013 mediation with the assistance of Judge Phillips. Seefer Decl., ¶¶31-112.

Lead Counsel undertook the representation of the Class on a contingent fee basis and no payment has been made to Lead Counsel to date for their services or for the litigation expenses they have advanced on behalf of the Class. Lead Counsel firmly believe that the settlement is the result of their diligent and effective advocacy, as well as their reputations as attorneys who are unwavering in their dedication to the interests of the class and unafraid to zealously prosecute a meritorious case through trial and subsequent appeals. In a case asserting claims based on complex legal and factual issues which were vigorously opposed by highly skilled and experienced defense counsel, Lead Counsel succeeded in securing a highly favorable result for the Class.

As discussed herein as well as in the Settlement Brief and the Seefer and Betts Declarations, the requested fee is fair and reasonable when considered under the applicable standards in the Ninth Circuit and is within the range of awards in class actions in this Circuit and courts nationwide,

particularly in view of the substantial risks of bringing and pursuing this Litigation, the extensive investigation and litigation efforts, the obstacles overcome, and the excellent results achieved for the Class. In addition, the expenses requested are reasonable in amount and were necessarily incurred for the successful prosecution of this Litigation.

II. AWARD OF ATTORNEYS' FEES

A. The Legal Standards Governing the Award of Attorneys' Fees in Common Fund Cases Support the Requested Award

1. A Reasonable Percentage of the Fund Recovered Is the Appropriate Method for Awarding Attorneys' Fees in Common Fund Cases

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

It has long been recognized that "a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees." *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). The purpose of this doctrine is to avoid unjust enrichment so 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*"). This rule, known as the "common fund" doctrine, is firmly rooted in American case law. *See, e.g.*, *Trustees v. Greenough*, 105 U.S. 527 (1882); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885).[3]

[3] In *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268 (9th Cir. 1989), the Ninth Circuit explained the principle underlying fee awards in common fund cases:

> Since the Supreme Court's 1885 decision in [*Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885)], it is 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.

Id. at 271 (citations omitted, emphasis in original).

In *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), the Supreme Court recognized that under the common fund doctrine a reasonable fee may be based "on a percentage of the fund bestowed on the class."[4] In this Circuit, the district court has discretion to award fees in common fund cases based on either the so-called lodestar/multiplier method or the percentage-of-the-fund method. *WPPSS*, 19 F.3d at 1296. In *Paul, Johnson*, 886 F.2d 268, *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990), *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir. 1993), and *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002), the Ninth Circuit expressly approved the use of the percentage method in common fund cases. Moreover, supporting authority for the percentage method in other circuits is overwhelming.[5]

Since *Paul, Johnson* and its progeny, district courts in this Circuit have almost uniformly shifted to the percentage method in awarding fees in common fund representative actions. The rationale for compensating counsel in common fund cases on a percentage basis is sound. First, it is consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated by a percentage of the recovery. Second, it more closely aligns the lawyers' interest in being paid a fair fee with the interest of the class in achieving the maximum possible recovery in the shortest amount of time.[6] Indeed, one of the nation's leading scholars in the

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[4] In contrast to common fund cases, the Supreme Court has always addressed the lodestar method in the context of fee shifting cases.

[5] Courts in other circuits favor the percentage-of-recovery approach for the 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. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 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 footnote 16 of *Blum* recognizing both "implicitly" and "explicitly" that a percentage recovery is reasonable in common fund cases); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); and Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 254 (Oct. 8, 1985).

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

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

field of class actions and attorneys' fees, Professor Charles Silver of the University of Texas School of Law, has concluded that the percentage method of awarding fees is the only method of fee awards that is consistent with class members' due process rights. Professor Silver notes:

> The consensus that the contingent percentage approach creates a closer harmony of interests between class counsel and absent plaintiffs than the lodestar method is strikingly broad. It includes leading academics, researchers at the RAND Institute for Civil Justice, and many judges, including those who contributed to the Manual for Complex Litigation, the Report of the Federal Courts Study Committee, and the report of the Third Circuit Task Force. Indeed, it is difficult to find anyone who contends otherwise. No one writing in the field today is defending the lodestar on the ground that it minimizes conflicts between class counsel and absent claimants.
>
> In view of this, it is as clear as it possibly can be that judges should not apply the lodestar method in common fund class actions. The Due Process Clause requires them to minimize conflicts between absent claimants and their representatives. The contingent percentage approach accomplishes this.

Charles Silver, *Due Process and the Lodestar Method: You Can't Get There from Here*, 74 Tul. L. Rev. 1809, 1819-20 (June 2000) (footnotes omitted).[7]

B. The Requested Fee is Entitled to a Presumption of Reasonableness

As the Third Circuit Court of Appeals has held: "The biggest change [in reviewing fee requests under the PSRLA], we believe, is that court's should afford a ***presumption of reasonableness*** to ***fee*** requests submitted pursuant to an agreement between a properly-selected lead plaintiff and properly-selected lead counsel." *Cendant*, 264 F.3d at 220 (emphasis in original). Indeed, "[s]ince the passage of the PSRLA, many courts have held a fee request submitted pursuant

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

[7] Professor Coffee also argues that a percentage of the recovery is the only reasonable method of awarding fees in common fund cases:

> If one wishes to economize on the judicial time that is today invested in monitoring class and derivative litigation, the highest priority should be given to those reforms that restrict collusion and are essentially self-policing. The percentage of the recovery fee award formula is such a "deregulatory" reform because it relies on incentives rather than costly monitoring. Ultimately, this "deregulatory" approach is the only alternative . . . .

John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 724-25 (May 1986).

to a retainer agreement entered into a by a properly-selected lead plaintiff and a properly-selected lead counsel is 'entitled to deference given the lead plaintiff's role in selecting counsel under the PSLRA.'" *In re Dell Inc. Sec. Litig.*, No. A-06-CA-726-SS, 2010 U.S. Dist. LEXIS 58281, *43 (W.D. Tex. June 11, 2010) (citing *In re Enron Corp. Sec. & Deriv. Litig.*, 586 F. Supp. 2d 732, 749 (S.D. Tex. 2008)), *aff'd*, 669 F.3d 632 (5th Cir. 2012). That is precisely what occurred here. Shortly after National Elevator was appointed as Lead Plaintiff on August 22, 2008, Lead Plaintiff and Lead Counsel agreed to a fee agreement whereby the percentage of the fee agreed to increased as the amount of the class recovery increased and also capped the percentage fee at 23.5% of the overall recovery, net of court approved expenses. *See* Betts Decl., Ex. 1. As the Lead Plaintiff explains, the fee agreement incentivized counsel "to secure the best possible recovery for the Class and at the same time protect the class from being charged inappropriate fees and costs." *Id.*

Most courts are in accord with Lead Plaintiff's view that the percentage of the agreed-to fee should increase as the recovery increases. As the court in *Enron* explained, "while a few courts have adopted the view that the percentage of fee awards should decrease as the recovery increases, especially in mega-fund cases, this is not the majority view." *Enron*, 586 F. Supp. 2d at 813 (citing *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 303 (3d Cir. 2005)). """This position [that the percentage of recovery devoted to attorneys fees should decrease as the size of the overall settlement or recovery increases] . . . has been criticized by respected courts and commentators, who contend that such a fee scale often gives counsel an incentive to settle cases too early and too cheaply."""" *Enron*, 586 F. Supp. 2d at 813-14 (citation omitted).

Here, not only did Lead Plaintiff negotiate a fee agreement at the beginning of the case, it supports the requested fee after being actively involved in the Litigation and viewing Lead Counsel's efforts first hand, "recognizing lead counsel's diligence during the litigation, including their comprehensive investigation of the case, their successful appeal of the district court's order granting defendants' motions to dismiss, and the extensive discovery review undertaken, including the review of hundreds of thousands of pages of documents." Betts Decl., ¶5. Accordingly, National Elevator's negotiation and approval of the requested fee should be given significant weight, and should thus be presumed reasonable. *Cendant*, 264 F.3d at 282.

C. A Percentage Fee of 20% of the Fund Created Is Reasonable in This Case

In *Paul, Johnson*, 886 F.2d at 273, the Ninth Circuit established 25% of a common fund as the "benchmark" award for attorneys' fees. *See also Torrisi*, 8 F.3d at 1376 (reaffirming 25% benchmark); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000) (same). The guiding principle in this Circuit is that a fee award be "'reasonable under the circumstances.'" *WPPSS*, 19 F.3d at 1295 (citation and emphasis omitted). The Ninth Circuit has approved a number of factors which may be relevant to the district court's determination: (1) the results achieved; (2) the risk 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; and (5) awards made in similar cases. *Vizcaino*, 290 F.3d at 1048. In view of the risks in pursuing this Litigation, the highly favorable result obtained, the financial commitment of Lead Counsel, the contingent nature of the representation, the skill of Lead Counsel and the negotiated fee agreement with Lead Plaintiff, an award of 20% of the recovery obtained for the Class is entirely appropriate.

1. The Result Achieved

Courts have consistently recognized that the result achieved is a major factor to be considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"); *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 630 (D. Colo. 1976) ("the amount of the recovery, and end result achieved are of primary importance, for these are the true benefit to the client"); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 547-48 (S.D. Fla. 1988) ("The quality of work performed in a case that settles before trial is best measured by the benefit obtained."), *aff'd*, 899 F.2d 21 (11th Cir. 1990).

Here, a substantial and certain recovery of $95 million in cash has been obtained through the efforts of Lead Counsel in the face of substantial risk and determined opposition. The $95 million recovery appears to be one of the top ten largest securities class action settlements in the Northern District of California and was obtained after the SEC declined to bring any fraud charges against defendants and failed to obtain any recovery for the VeriFone investors. It was the tenacious efforts and unwavering dedication to the interest of the Class that led to this excellent result. As the Lead

Plaintiff states: "But for the efforts of lead counsel, this litigation would not have survived defendants' attempts to dismiss the case, nor would the Class have achieved this excellent result." Betts Decl., ¶5.

The magnitude of this settlement is far greater than a typical securities class action settlement. Indeed, assuming Lead Counsel were able to prevail on every claim asserted, the $95 million settlement represents approximately 10.4% to 16.4% of the Class's maximum estimated damages after trial. This rate of recovery is many times larger than the median settlement value of actions with damages of between $500 million and $4.9 billion in 2012 (1.1%-1.4%).[8] In addition, according to the National Economics Research Associates ("NERA"), which tracks and reports on securities class actions, including securities settlements, over the period 1996-2012, the average settlement was between $8 and $42 million[9] and the median settlement for the same time period was between $3.7 million and $12 million. NERA 2012 Review at 26, Figure 24, and 28, Figure 26, *available at* http://www.nera.com/nera-files/PUB_Trends_01.2013.pdf.

As detailed in the Settlement Brief and the Seefer Declaration, there were significant legal and factual roadblocks to obtaining a more favorable outcome in this Litigation. Despite these obstacles to recovery, Lead Counsel secured a sizeable recovery for the benefit of the Class. Importantly, Lead Counsel could have settled the case at the October 1, 2009 mediation before the filing of a consolidated complaint for an amount significantly less than the $95 million obtained but instead chose to continue to litigate for several more years rather than accept an amount that they believed was less than fair value. Seefer Decl., ¶¶41-43. As a result of this Settlement, Class Members who have suffered losses between August 31, 2006 and April 1, 2008, and have already

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[8] *See* Cornerstone Research Report titled *Securities Class Action Settlements: 2012 Review & Analysis*, at 8, Figure 8. For a more detailed explanation of the damages in this Litigation, the Court is respectfully referred to Lead Plaintiff's Response to the Court's September 5, 2013 Order Re Supplemental Briefing at 9-13 (Dkt. No. 309).

[9] "The average calculation excludes settlements above $1 billion, settlements in IPO laddering cases, and settlements in merger objection cases. The settlements over $1 billion have a large impact on averages, while the IPO laddering cases and merger objection cases are atypical; inclusion of any of these may obscure trends in more usual cases." Dr. Renzo Comolli, Sukaina Klein, Dr. Ronald I. Miller, and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2012 Full-Year Review* at 26 (NERA Jan. 29, 2013) ("NERA 2012 Review").

endured some six years of litigation, not only will receive a highly favorable recovery but will also realize that recovery in the near future instead of a recovery many years down the road or no recovery at all. The outstanding result favors approval of the requested fee.

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

Numerous cases have recognized that risk as well as the novelty and difficulty of the issues presented are important factors in determining a fee award. *E.g.*, *Vizcaino*, 290 F.3d at 1048; *WPPSS*, 19 F.3d at 1299-1301. Uncertainty that an ultimate recovery would be obtained is highly relevant in determining risk. *WPPSS*, 19 F.3d at 1300. As the court aptly observed in *King Res.*:

> The litigation also involved unique and substantial issues of law in the technical area of SEC Rule 10b-5, . . . difficult, complex and oft-disputed class action questions, and difficult questions regarding computation of damages. . . .
>
> * * *
>
> In evaluating the services rendered in this case, appropriate consideration must be given to the risks assumed by plaintiffs' counsel in undertaking the litigation. The prospects of success were by no means certain at the outset, and indeed, the chances of success were highly speculative and problematical.

420 F. Supp. at 632, 636-37. *See also In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, No. 02-ML-1475-DT (RCx), 2005 U.S. Dist. LEXIS 13627, at *44 (C.D. Cal. June 10, 2005) ("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.").

Securities class actions are extremely risky. In fact, according to NERA, somewhere between one third to one half of all modern day securities litigations filed are dismissed. Dr. Jordan Milev, et al., *Recent Trends in Securities Class Action Litigation: 2011 Year-End Review* at 22, Figure 26 (NERA Dec. 14, 2011) ("NERA Mid-Year 2011"), *available at* http://www.nera.com/nera-files/PUB_Trends_Year-End_1211_final.pdf.[10]

[10] For example, in 2000, the most recent year for which all filed cases have now been resolved, 36.9% of the cases were dismissed. The risk of losing appears to have increased substantially since 2000. For cases filed in 2003, a year in which 95.5% of the cases have now been resolved, the dismissal rate was 40.9%. The results for 2005 and 2006 were even worse. For 2005, with 96.3% of the cases filed that year having been resolved, the dismissal rate was 48.7% and for 2006, with 94.7% of the cases filed that year having been resolved, the dismissal rate was 44.3%. NERA Mid-Year 2011 at 13, Figure 16.

There is no question that from the outset this Litigation presented a number of sharply contested issues of both fact and law and that Lead Plaintiff faced formidable defenses to liability and damages. This was a complex class action involving complex legal and factual issues under the federal securities laws. Throughout the litigation Defendants have adamantly denied liability and asserted that they had absolute defenses to Lead Plaintiff's claims. *See Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 576 (9th Cir. 2004) (concluding that district court properly weighed risk when it concluded defendant's belief that it had strong case on merits supporting finding of risk).

As discussed in the Seefer Declaration and the Settlement Brief, substantial risks and uncertainties in this type of litigation, and in this case in particular, made it far from certain that a recovery, let alone $95 million, would ultimately be obtained. *See* Seefer Decl., ¶¶80-107. From the outset, this post-PSLRA action was an especially difficult and highly uncertain securities case, with no assurance whatsoever that the litigation would survive Defendants' attacks on the pleadings, motion(s) for summary judgment, trial and appeal. As the court noted in *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 194-95 (E.D. Pa. 2000), "[t]here were the legal obstacles of establishing scienter, damages, causation . . . . The court also acknowledges that securities actions have become more difficult from a plaintiff's perspective in the wake of the 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." The court's statement in *Ikon* is certainly applicable here.[11]

[11] Even before the passage of the PSLRA, courts had noted that a securities case "by its very nature, is a complex animal." *Clark v. Lomas & Nettleton Fin. Corp.*, 79 F.R.D. 641, 654 (N.D. Tex. 1978), *vacated on other grounds*, 625 F.2d 49 (5th Cir. 1980). *See also Miller v. Woodmoor Corp.*, No. 74-F-988, 1978 U.S. Dist. LEXIS 15234, at *11-*12 (D. Colo. Sept. 28, 1978):

> The benefit to the class must also be viewed in its relationship to the complexity, magnitude, and novelty of the case. . . .
>
> Despite years of litigation, the area of securities law has gained little predictability. There are few "routine" or "simple" securities actions.

The application of the PSLRA to this Litigation posed significant risks to Lead Plaintiff's ability to survive Defendants' motions to dismiss.[12] For example, with respect to its §10(b) claims, Lead Plaintiff had to survive the high burdens of the PSLRA for pleading scienter. In fact, subsequent to the passage of the PSLRA many cases in this Circuit and in courts across the country have been dismissed at the pleading stage in response to defendants' arguments that the complaints do not meet the PSLRA's heightened pleading standards making it clear that the risk of no recovery (and hence no fee) has increased exponentially. Lead Plaintiff faced this very same risk in this Litigation. Indeed, Lead Plaintiff's claims were initially dismissed by the Court for failure to adequately plead scienter. It was only after Lead Plaintiff successfully appealed the dismissal of Lead Plaintiff's Third Amended Complaint to the Ninth Circuit Court of Appeals that Lead Plaintiff successfully defeated Defendants' attempts to end this Litigation at the pleading stage.

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

3. The Skill Required and the Quality and Efficiency of the Work

The "'prosecution and management of a complex national class action requires unique legal skills and abilities,'" which were called upon here and support the requested fee. *Heritage Bond*, 2005 U.S. Dist. LEXIS 13627, at *39-*40 (citation omitted). Lead Counsel are nationally known in the fields of securities class actions and complex litigation. *See* Robbins Geller Decl., Ex. G; www.rgrdlaw.com.

The quality of the representation is demonstrated by the substantial and certain benefit achieved for the Class and the efficient and effective prosecution and resolution of the litigation under difficult and challenging circumstances. From the outset of the litigation, Lead Counsel

[12] *See* Elliott J. Weiss, Janet E. Moser, *Enter Yossarian: How to Resolve the Procedural Catch-22 that the Private Securities Litigation Reform Act Creates*, 76 Wash. U. L. Q. 457, 459 (Summer 1998) (noting that the PSLRA made it more difficult to set forth a claim and survive a motion to dismiss); Eugene Zelensky, *New Bully on the Class Action Block – Analysis of Restrictions on Securities Class Actions Imposed by the Private Securities Litigation Reform Act of 1995*, 73 Notre Dame L. Rev. 1135 (May 1998).

engaged in a concerted effort to obtain the maximum recovery for the Class. Lead Counsel committed considerable resources and time in the research, investigation, and prosecution of this case. Based upon Lead Counsel's diligent efforts on behalf of the Class and their skill and reputation, Lead Counsel were able to negotiate a favorable result under difficult and challenging circumstances. Such quality, efficiency, and dedication should be rewarded. As Judge Phillips states: "There is no question in my mind that the settlement represents a considered judgment by plaintiff's counsel, Robbins Geller Rudman & Dowd LLP, who are among the most capable and experienced lawyers in the country and who took on a risky and complicated case including a successful appeal to the Ninth Circuit that the proposed settlement is fair and reasonable." Phillips Decl., ¶6.

The quality of opposing counsel is also important in evaluating the quality of the work done by Lead Counsel. *See, e.g.*, *In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977); *King Res.*, 420 F. Supp. at 634; *Arenson v. Bd. of Trade*, 372 F. Supp. 1349, 1354 (N.D. Ill. 1974). Lead Counsel was opposed in this Litigation by very skilled and highly respected counsel from Sullivan & Cromwell LLP and Morrison & Foerster LLP, law firms with well-deserved reputations for vigorous advocacy in the defense of complex civil cases such as this. In the face of this formidable opposition, Lead Counsel was able to develop their case so as to persuade Defendants to settle the litigation for a substantial sum of money.

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

In addition to the risks associated with complex litigation, "the risk of non-payment or reimbursement of expenses [in cases undertaken on a contingent basis] is a factor in determining the appropriateness of counsel's fee award." *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 U.S. Dist. LEXIS 13555, at *68-*69 (C.D. Cal. June 10, 2005); *see, e.g.*, *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2007); *WPPSS*, 19 F.3d at 1299-1301. Lead Counsel undertook this Litigation on a contingent fee basis, assuming a significant risk that the Litigation would yield no recovery and leave them uncompensated. Unlike counsel for Defendants, who are paid an hourly rate and paid their expenses on a regular basis, Lead Counsel have not been

compensated for any time or expense since the case began in December 2007. As the Seventh Circuit recently held in approving a fee award of 27.5% of a $200 million common fund created in a securities class action, "[c]ontingent fees compensate lawyers for the risk of nonpayment. The greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel." *Silverman v. Motorola Solutions, Inc.*, Nos. 12-2339 & 12-2354, 2013 U.S. App. LEXIS 16878, at *5-*6 (7th Cir. Aug. 14, 2013). As a result, the determination of a fair fee must include consideration of the contingent nature of the fee and the difficulties which were overcome in obtaining the settlement.

> 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* Richard Posner, *Economic Analysis of Law* §21.9, at 534-35 (3d ed. 1986). Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose.

WPPSS, 19 F.3d at 1299.

In awarding counsel's attorneys' fees in *In re Prudential-Bache Energy Income P'ships Sec. Litig.*, No. 888, 1994 U.S. Dist. LEXIS 6621, at *16 (E.D. La. May 18, 1994), the court noted the risks that plaintiffs' counsel had taken:

> Although today it might appear that risk was not great based on Prudential Securities' global settlement with the Securities and Exchange Commission, such was not the case when the action was commenced and throughout most of the litigation. Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

Indeed, the risk of no recovery in complex cases of this type is very real. There are numerous class actions in which plaintiffs' counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise. As the court in *Xcel* recognized, "[p]recedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy." *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 994 (D. Minn. 2005). Lead Counsel have experienced this risk firsthand. For example, in the *Oracle Securities Litigation*, Robbins Geller expended tens of millions of dollars in attorney time and expenses only to see the case dismissed in

its entirety at summary judgment. *In re Oracle Corp. Sec. Litig.*, No. C 01-988 SI, 2009 U.S. Dist. LEXIS 50995 (N.D. Cal. June 16, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010). Similarly, plaintiffs' counsel expended millions of dollars in time and expenses litigating the *BankAtlantic Securities Litigation* through trial and a jury verdict in plaintiffs' favor, only to have the court overturn the verdict and enter judgment for the defendants, a judgment which was upheld on appeal. *See In re BankAtlantic Bancorp, Inc. Sec. Litig.*, No. 07-61542-CIV-UNGARO, 2011 U.S. Dist. LEXIS 48057 (S.D. Fla. Apr. 25, 2011), *aff'd sub. nom, Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012). Indeed, there are numerous class actions in which plaintiffs' counsel expended thousands of hours steering their clients past summary judgment and/or trial, only to lose on appeal or on a post-trial motion and, thus, receive no remuneration whatsoever despite their diligence and efforts.[13]

Because the fee in this matter was entirely contingent, the only certainties were that there would be no fee without a successful result and that such a result would be realized only after considerable and difficult effort. Lead Counsel committed significant resources of both time and money to the vigorous and successful prosecution of this Litigation for the benefit of the Class. Few law firms could have devoted this kind of time and financial resources to this Litigation. In view of the skill and tenacity of Defendants' counsel and the legal and factual difficulties of this Litigation, the risk of never being compensated was real. The contingent nature of counsel's representation strongly favors approval of the requested fee.

[13] *See, e.g.*, *In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486-CW(EDL), 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) (defense verdict by jury); *Robbins v. Koger Props.*, 116 F.3d 1441, 1448-49 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against an accounting firm reversed on appeal on loss causation grounds and 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 denied, on appeal the judgment was reversed and the case was dismissed – after 11 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).

5. A 20% Fee Award Is Below the Market Rate in Similar Complex, Contingent Litigation

Courts often look to fees awarded in comparable cases to determine if the fee requested is reasonable. *See Vizcaino*, 290 F.3d at 1050 n.4. A 20% fee award is below awards in similar complex class action litigation. *See id.* at 1050 (awarding 28% fee of $96.8 million settlement); *Motorola*, 2013 U.S. App. LEXIS 16878, at *4-*5 (awarding 27.5% fee of $200 million settlement); and *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, No. 03 MDL 1529 (LMM), 2006 U.S. Dist. LEXIS 84621, at *16 (S.D.N.Y. Nov. 17, 2006) (awarding 21.4% fee in $460 million settlement). The court in *Xcel* (an $80 million securities class action settlement), after considering "cases from [the District of Minnesota], other districts, and [ ] attorney fee studies referenced in other cases" concluded that "this factor – comparison to other cases – supports the 25% requested [fee]." *Xcel*, 364 F. Supp. 2d at 998, 999.

The requested fee is also less than the median amount of attorney-fee percentage granted for settlements between $25 and $100 million as demonstrated by an analysis of fee awards in class actions conducted by NERA. Analyzing attorney fee awards in securities class action cases settled between January 1996 and December 2002 the median attorney fee award for cases that settled between January 1996 and December 2009 was 28.8% and the median attorney fee award for cases that settled between January 2010 and December 2012 was 25%, both well above the fee requested here. *See* NERA 2012 Review at 34, Figure 31.

Moreover, the requested fee is below the range of three studies relied on by the district court in *Rite Aid*, 146 F. Supp. 2d 706. As the Third Circuit noted in *Rite Aid*, 396 F.3d 294:

> In comparing this fee request to awards in similar cases, the District Court found persuasive three studies referenced by Professor Coffee: one study of securities class action settlements over $10 million that found an average percentage fee recovery of 31%; a second study by the Federal Judicial Center of all class actions resolved or settled over a four-year period that found a median percentage recovery range of 27-30%; and a third study of class action settlements between $100 million and $200 million that found recoveries in the 25-30% range were "fairly standard." We see no abuse of discretion in the District Court's reliance on these studies.

Id. at 303 (citation omitted).

Moreover, if this were a non-representative litigation, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery. The Supreme Court in *Blum*, stated:

> In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.

465 U.S. at 904* (citation omitted); *Ikon*, 194 F.R.D. at 194 ("in private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery"); *In re M.D.C. Holdings Sec. Litig.*, No. CV 89-0090 E (M), 1990 U.S. Dist. LEXIS 15488, at *22 (S.D. Cal. Aug. 30, 1990) ("In private contingent litigation, fee contracts have traditionally ranged between 30% and 40% of the total recovery.").

D. Reaction of the Class Supports Approval of the Attorneys' Fees Requested

Although not articulated specifically by the Ninth Circuit, district courts in the Ninth Circuit also consider the reaction of the class when deciding whether to award the requested fee. *Heritage Bond*, 2005 U.S. Dist. LEXIS 13627, at *48 ("The presence or absence of objections . . . is also a factor in determining the proper fee award.").

To date, over 95,000 copies of the Notice of Proposed Settlement of Class Action ("Notice") were mailed to potential Class Members. *See* ¶¶3-10 to the accompanying Declaration of Carole K. Sylvester Re A) Mailing of the Notice of Proposed Settlement of Class Action and the Proof of Claim and Release Form, B) Publication of the Summary Notice, and C) Internet Posting. The Summary Notice was published once in *Investor's Business Daily* and over the *Business Wire* on November 5, 2013, and in *Globes* on November 6, 2013. *Id.*, ¶15. In addition, the Stipulation, the Notice, Proof of Claim, and Order Preliminarily Approving Settlement and Providing for Notice were posted on the Claims Administrator's and Lead Counsel's websites. Class Members were informed in the Notice that Lead Counsel were moving the Court for attorneys' fees in an amount of 20% of the Settlement Fund and for payment of expenses in an amount not to exceed $360,000. Class Members were also advised of their right to object to the fee and expense request, and that such objections are required to be filed with the Court no later than December 30, 2013. As of the date of this memorandum, to counsel's knowledge, not a single Class Member has filed an objection

to counsel's fee and expense request. A small number of objections do not stand in the way of approval of a reasonable fee. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000).[14]

E. The Requested Fee Is Reasonable Under a Lodestar Cross-Check Analysis

Although Lead Counsel seek approval of a fee based on a percentage of the recovery, "[a]s a final check on the reasonableness of the requested fees, courts often compare the fee counsel seeks as a percentage with what their hourly bills would amount to under the lodestar analysis." *Omnivision*, 559 F. Supp. 2d at 1048. In *Vizcaino*, the Ninth Circuit noted that an analysis of the "lodestar method is merely a cross-check on the reasonableness of a percentage figure, and it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement." 290 F.3d at 1050 n.5.

Here, Lead Counsel spent 8,527 hours of attorney and paraprofessional time prosecuting this action on behalf of the Class. Robbins Geller Decl., ¶4. The resulting lodestar is $4,395,407.25. *Id.* The requested fee of 20% net of expenses would equal $19 million. Thus, the requested fee represents a multiplier of approximately 4.3. In *Vizcaino*, the Ninth Circuit approved a 28% fee that resulted in a 3.65 multiplier. *Vizcaino*, 290 F.3d at 1052-54 (finding multipliers ranged as high as 19.6 though most run from 1.0-4.0); *see also Buccellato v. AT&T Operations, Inc.*, No. C10-00463-LHK, 2011 U.S. Dist. LEXIS 85699, at *4 (N.D. Cal. June 30, 2011) ("[t]he resulting multiplier of 4.3 is reasonable"); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999) ("'In recent years multipliers of between 3 and 4.5 have been common' in federal securities cases.") (citations omitted); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 371 (S.D.N.Y. 2002) ("modest multiplier of 4.65 is fair and reasonable"); *Xcel*, 364 F. Supp. 2d at 998-99 (awarding 25% of $80 million settlement fund, representing a 4.7 multiplier); *In re Rite Aid Corp. Sec. Litig.*, 269 F. Supp. 2d 603, 611 (E.D. Pa. 2003) (awarding fee equal to a multiplier of 4.07 and recognizing that

[14] If any objections are received, Lead Counsel will address them in a reply brief to be filed on or before January 16, 2014.

"'multipliers in this range are fairly common'") (citation omitted), *vacated on other grounds*, 396 F.3d 294 (3d Cir. 2005). Accordingly, the multiplier is within the range of multipliers typically awarded by courts.

III. LEAD COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED

Lead Counsel also request payment of expenses incurred by them in connection with the prosecution of this Litigation. Lead Counsel have incurred expenses in the amount of $278,994.44 in prosecuting this Litigation. These expenses are categorized in the Robbins Geller Declaration, submitted to the Court herewith.

The appropriate analysis to apply in deciding which expenses are compensable in a common fund case of this type is whether the particular costs are of the type typically billed by attorneys to paying clients in the marketplace. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'") (citation omitted). Therefore, it is proper to pay reasonable expenses even though they are greater than taxable costs. *Id. See also Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42*, 8 F.3d 722, 725-26 (10th Cir. 1993) (expenses reimbursable if they would normally be billed to client); *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995) (expenses recoverable if customary to bill clients for them); *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they 'were incidental and necessary to the representation' of those clients.") (citation omitted). The categories of expenses for which counsel seek reimbursement here are the type of expenses routinely charged to hourly clients and, therefore, should be reimbursed out of the common fund.

A significant component of Lead Counsel's expenses is the cost of their experts, consultants and investigators. In the post-PSLRA era the use of professional investigators to gather detailed fact-specific information from percipient witnesses in order to plead complaints that will survive motions to dismiss is a necessity. Lead Counsel incurred such expenses in this case. Robbins Geller Decl., ¶6(h)(i). Lead Counsel also incurred the expense of Financial Markets Analysis LLC

("FMA"), an economic consulting firm that specializes in financial and economic issues that typically arise in securities class actions. FMA's services in this Litigation were necessary and contributed materially to the benefits achieved for the Class. Robbins Geller Decl., ¶6(h)(ii).

Other expenses include the costs of computerized research. *Id.*, ¶6(e). These are the charges for computerized factual and legal research services including Lexis Nexis, West Publishing Corporation, Dow Jones Interactive, Dow Jones & Co., Inc., Disclosure, Inc., CDA Investment Technologies, Pacer Service Center, and Choice Point. It is standard practice for attorneys to use these services to assist them in researching legal and factual issues. These services allowed counsel to access VeriFone's SEC filings, perform media searches on VeriFone, and obtain analysts' reports on VeriFone.

Lead Counsel were also required to travel in connection with this litigation and thus incurred the related costs of meals, lodging, and transportation. *Id.*, ¶6(a). Other expenses that were necessarily incurred in the prosecution of this Litigation include expenses for photocopying, mediation fees, local meals, filing fees, postage and overnight delivery, and telephone and telecopier expenses. *Id.*, ¶¶6(a)-(d), (f)-(g).

IV. CONCLUSION

Based on the foregoing and upon the entire record herein, Lead Counsel respectfully submit that the Court award attorneys' fees in the amount of 20% of the Settlement Fund,[15] plus expenses in the amount of $278,994.44, plus interest earned at the same rate and for the same period as that earned on that portion of the Settlement Fund until paid.

DATED: December 16, 2013

Respectfully submitted,

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[15] The 20% fee request is net of expenses.

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2013, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 16, 2013.

s/ CHRISTOPHER P. SEEFER

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