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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

VINH NGUYEN, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiff,

v.

RADIANT PHARMACEUTICALS
CORPORATION AND DOUGLAS C.
MACLELLAN,

Defendants.

CASE No.:CV-11-0406-DOC
(MLGx)

CLASS ACTION

**LEAD PLAINTIFFS’
MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR AN
AWARD OF ATTORNEYS’ FEES
AND REIMBURSEMENTS OF
EXPENSES AND AWARD TO
LEAD PLAINTIFFS**

Judge: Hon. David O. Carter
Courtroom: 9D
Hearing Date: April 22, 2014
Hearing Time: 8:30 a.m.

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1 Lead Plaintiffs through their undersigned counsel, submit this memorandum
2 of law in support of their Motion, pursuant to Federal Rule of Civil Procedure
3 23(e), for an Order: (1) awarding attorneys’ fees of 28% of the Settlement fund, or
4 \$700,000 and an award to Lead Plaintiffs totaling \$6,000 (\$2,000 each); and (2)
5 reimbursement of \$421,689.87 in expenses that were incurred in prosecuting this
6 Action (the “Fee Petition”).

7 **I. INTRODUCTION**¹

8 Through the efforts of Lead Plaintiffs’ Counsel, as described more fully in
9 the Rosen Declaration filed herewith (“Rosen Decl.”), have achieved a substantial
10 settlement consisting of a \$2,500,000 cash payment. Lead Plaintiffs’ Counsel
11 requests an award of fees in the amount 28% of the Settlement Fund or \$700,000
12 and an award of \$6,000, or \$2,000 each to Lead Plaintiffs. Lead Counsel also
13 request reimbursement from the Settlement Fund of \$421,689.872 in expenses.

14 The Settlement represents approximately 25.8% of Plaintiffs’ best case
15 estimate of damages for the Class. It is an excellent result, particularly when
16 viewed in light of the considerable risks posed by continued litigation and
17 uncertainty of proving liability and obtaining and collecting a larger judgment.
18 *E.g.*, Rosen Decl., ¶¶ 34-39. This recovery is largely attributable to Lead
19 Plaintiffs’ Counsel’s litigation efforts and Settling Defendants’ offers to resolve
20 this Litigation did not even approach the Settlement Amount until Lead Plaintiffs’
21 Counsel had pursued this case to the eve of trial. *E.g.*, Rosen Decl., ¶¶ 18, 21-24.

22 The reaction of the Class also strongly supports the requested fee. The
23 deadline to file objections to the Settlement is April 2, 2014, and the deadline to
24 request exclusion from the settlement is March 24, 2014. To date, one request for
25

26 ¹ Unless otherwise defined, capitalized terms herein have the same meanings
27 attributed to them in the Stipulation and Agreement of Settlement.
28

1 exclusion has been filed but it does not appear to be in compliance with the
2 Court's January 31, 2014 Order because it failed to provide the purchase and sale
3 transactions for Radiant stock during the class period. No objections to the
4 settlement have been filed. Declaration of Josephine Bravata Concerning Mailing
5 of Pendency and Settlement of Class Action and Proof of Claim Release, attached
6 as Ex. 1 to the Rosen Decl. ("Bravata Dec.") ¶¶ 9-10. Pursuant to the Preliminary
7 Approval Order, over 12,389 Notices were mailed to Class Members. *See* Bravata
8 Dec., ¶ 6. The Notice advised Class Members that Lead Plaintiffs' Counsel
9 intended to apply to the Court for an award of attorneys' fees representing up to
10 30% of the Settlement Fund and an award to Lead Plaintiffs not to exceed \$9,000,
11 and that Lead Counsel would seek reimbursement of Plaintiffs' Counsel's out-of-
12 pocket expenses not to exceed \$480,000. *E.g.*, Bravata Dec., Ex. A.

13 The fairness and reasonableness is confirmed when cross-checked with
14 Lead Plaintiffs' Counsel's lodestar. Plaintiffs' Counsel spent a total of 1,441.8
15 hours of professional time having a market value of approximately \$788,955 in
16 prosecuting this litigation, and results in a "negative" multiplier of 0.88—which is
17 low compared to multipliers approved by Courts.

18 The Settlement could not have been achieved but for Lead Plaintiffs' and
19 their counsel's persistent and extensive litigation of this matter. While the parties
20 engaged in frequent settlement negotiations, the amounts offered by Settling
21 Defendants were not close the Settlement Amount, until this action was litigated
22 to the eve of trial.

23 For the reasons set forth more fully below, Lead Plaintiffs' Counsel
24 respectfully submit that such attorneys' fees and expenses are fair and reasonable
25 under applicable legal standards and in light of the contingency risk undertaken,
26 and should be awarded by the Court.

27 **II. SPECIFIC EFFORTS OF LEAD PLAINTIFFS' COUNSEL**

28

1 This brief description of the Litigation reveals not only the complexities of
2 the case, but also the host of factual and legal issues that Lead Plaintiffs' Counsel
3 had to convincingly address in order to achieve the Settlement. As explained in
4 the Rosen Declaration, the substantial work performed by Lead Plaintiffs'
5 Counsel:

- 6 • reviewed and analyzed publicly available information about Radiant
7 including the Company's SEC filings, news articles, conference call
8 transcripts, analyst reports, and stock trading data;
- 9 • consulted with and retained an experts relating to damages, loss causation,
10 market efficiency, and clinical trials;
- 11 • filed the operative complaint and successfully opposed Defendants'
12 motions to dismiss;
- 13 • obtained class certification;
- 14 • completed fact and expert discovery, which included the review of
15 thousands of documents, and nine fact depositions and three expert
16 depositions;
- 17 • successfully opposed Settling Defendants' motion for summary judgment;
- 18 • engaged in trial preparation;
- 19 • engaged in frequent settlement negotiations throughout the litigation,
20 including an all-day mediation with retired Magistrate Judge Leo S. Papas;
21 and
- 22 • negotiated and drafted the Stipulation of Settlement and Notice to class
23 members.

24 Lead Plaintiffs' Counsel's effort to successfully resolve this Litigation has
25 been without compensation of any kind, and payment of attorneys' fees and
26 reimbursement of expenses were and always has been wholly contingent upon the
27 result achieved.

28

1 As compensation for these efforts, Lead Counsel requests that this Court
2 award attorneys' fees of 28% of the Settlement Fund (\$700,000) plus \$421,689.87
3 in unreimbursed expenses. Lead Plaintiffs' Counsel's 28% fee request is not only
4 consistent with a great number of decisions, both in this Circuit and across the
5 country, but is appropriate compensation for the result Counsel has obtained for
6 the Class.

7 Finally, the Court should consider Class Members' reaction to the award
8 sought. 12,389 Claim Packets, which included the detailed Notice and a Proof of
9 Claim form, were mailed to potential members of the Settlement Class. *See*
10 *Bravata Dec.*, ¶ 6. The Notice advised Class members of the terms of this
11 Settlement, the proposed attorneys' fees, award to lead plaintiffs, the expenses
12 request, and of Class Members' right to object and/or opt out. The Class also was
13 informed that Lead Plaintiffs' Counsel could apply for a fee of up to 30% of the
14 settlement amount. *Bravata Dec.*, Ex. A. The deadline to object or request
15 exclusion is impending and to date, there have been no objections to the requested
16 fee, and there has been one request for exclusion but it failed to address how many
17 shares for which the exclusion accounted. *See Bravata Dec.*, ¶¶ 9-10; *Rosen Dec.*
18 ¶ 27. For the reasons set forth herein, the requested attorneys' fees and expenses
19 are fair and reasonable under the applicable legal standards.

20 **III. REASONABLE PERCENTAGE OF THE "COMMON FUND"**
21 **RECOVERED IS AN APPROPRIATE APPROACH TO AWARDING**
22 **ATTORNEYS' FEES**

23 **A. The Common Fund Doctrine**

24 It has long been recognized that "a private plaintiff, or his attorney, whose
25 efforts create, discover, increase or preserve a fund to which others also have a
26 claim is entitled to recover from the fund the costs of his litigation, including
27 attorneys' fees." *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir.
28 1977). In *Paul, Johnson, Alston & Hunt v. Graultry*, 886 F.2d 268, 271 (9th Cir.

1 1989) (“*Paul, Johnson*”), the Ninth Circuit explained the equitable principle
2 underlying such fee awards:

3 Since the Supreme Court’s 1885 decision in *Central Railroad. & Banking*
4 *Co. of Ga. v. Pettus*, 113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915 (1885), it is
5 well settled that the lawyer who creates a common fund is allowed an *extra*
6 reward, beyond that which he has arranged with his client, so that he might
7 share the wealth of those upon whom he has conferred a benefit. [...]The
8 amount of such a reward is that which is deemed “reasonable” under the
9 circumstances.

(Emphasis in original; citations omitted).

10 The purpose of this “common fund” doctrine is to avoid unjust enrichment,
11 requiring “those who benefit from the creation of the fund [to] share the wealth
12 with the lawyers whose skill and effort helped create it.” *In re Washington Pub.*
13 *Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) (“*WPPSS*”).

14 **B. The Percentage-of-Fund Approach**

15 In *Blum v. Stevenson*, 465 U.S. 886, 900 n.16 (1984), the Supreme Court
16 recognized that under the common fund doctrine a “reasonable” fee may be based
17 “on a percentage of the fund bestowed on the class.” In *Paul, Johnson*, 886 F.2d
18 268, *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir.
19 1990), and *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir. 1993), the
20 Ninth Circuit expressly approved the use of the percentage-of-recovery method in
21 common fund cases.

22 Since *Paul, Johnson* and its progeny, district courts in this Circuit have
23 almost uniformly shifted to the percentage method in awarding fees in
24 representative actions. There are compelling reasons why so many courts have
25 opted for the percentage approach in common fund cases. First, it is consistent
26 with the practice in the private marketplace where contingent fee attorneys are

1 customarily compensated by a percentage of the recovery.³ Second, it more
2 closely aligns the lawyers' interest in being paid a fair fee with the interest of the
3 class in achieving the maximum possible recovery in the shortest amount of time
4 required under the circumstances.⁴ Third, use of the percentage-of-recovery
5 method decreases the burden imposed on the court (by avoiding a detailed and
6 time-consuming lodestar analysis), while assuring that the beneficiaries do not
7 experience unnecessary delay in receiving their share of the settlement. *See In re*
8 *Activision Secs. Litig.*, 723 F. Supp. 1373, 1378-79 (N.D. Cal. 1989).⁵

9 Indeed, the plain text of the PSLRA states that class counsel is entitled to
10 attorneys' fees that represent a "reasonable percentage" of the damages recovered
11 by the class. *See* 15 U.S.C. § 78u-4(a)(6). *See In re Cendant Corp. Sec. Litig.*,
12 404 F.3d 173, 188 n. 7 (3d Cir. 2005) ("[T]he PSLRA has made percentage-of-
13 recovery the standard for determining whether attorney's fees are reasonable.").

14 **C. Courts In This Circuit Have Often Awarded 28% Or More Of The**
15 **Common Fund As A Reasonable Fee**

16 In *Paul, Johnson*, 886 F.2d at 273, the Ninth Circuit originally established
17 25% of the fund recovered as the "benchmark" award to be adjusted upward or

18
19 ³ *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) ("The class
20 counsel are entitled to the fee they would have received had they handled a similar
21 suit on a contingent fee basis, with a similar outcome, for a paying client."); *In re*
22 *Activision Sec. Litig.*, 723 F. Supp. 1373 (N.D. Cal. 1989) (noting that in the
23 marketplace, attorneys and their clients routinely negotiate 25% to 40% percentage
24 fees).

25 ⁴ *See Kirchoff v. Flynn*, 786 F.2d 320, 325-26 (7th Cir. 1986) ("The lawyer gains
26 only to the extent his client gains[,]ensur[ing] a reasonable proportion between
27 the recovery and the fees assessed to the defendant reward[ing] exceptional
28 success . . . penaliz[ing] failure . . . [and] automatically handl[ing] compensation
for the uncertainty of litigation.").

⁵ *See also In re Union Carbide Corp. Consumer Prod. Bus. Sec. Litig.*, 724 F.
Supp. 160, 170 (S.D.N.Y. 1989) ("straight contingent fee awards [are] bereft of
largely judgmental and time-wasting computations of lodestars and multipliers").

1 downward depending on the circumstances of the particular case. *Accord Powers*
2 *v. Eichen*, 229 F.3d 1249, 1256-1257 (9th Cir. 2000); *but see Activision*, 723 F.
3 Supp. at 1377-78 (“This court’s review of recent reported cases discloses that
4 nearly all common fund fee awards range around 30% even after thorough
5 application of either the lodestar or twelve-factor method.”). Indeed, it is not
6 unusual for courts to award fee in excess of 30% in appropriate circumstances.
7 *See, e.g., Morris v. Lifescan, Inc.*, 54 Fed. App. 663, 664 (9th Cir. 2003)
8 (approving 33% fee); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir.
9 1995) (approving fee equal to 33% percent of a \$12 million settlement fund); *In re*
10 *Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (upheld fee award
11 of 33.3% of \$1.725 million settlement).⁶

12 The guiding principle remains that a fee award should be “reasonable under
13 the circumstances.” *WPPSS*, 19 F.3d at 1296 (citation omitted). The attorneys’
14

15 6 Courts in other jurisdictions also routinely award fees in excess of 28% in
16 similarly sized settlements. *E.g., In re Blech Sec. Litig.*, 2002 WL 31720381
17 (S.D.N.Y. Dec. 4, 2002) (awarding 33-1/3% of \$2,795,000 settlement fund);
18 *Berchin v. General Dynamics Corp.*, 1996 WL 465752, at * 2 (S.D.N.Y. Aug. 14,
19 1996) (33% of first \$3 million); *In re StockerYale, Inc. Secs. Litig.*, 2007 WL
20 4589772, at *6 (D.N.H. Dec. 18, 2007) (33% of \$3.4 million settlement fund);
21 *Smith v. Dominion Bridge Corp.*, 2007 WL 1101272, at *10 (E.D. Pa. Apr. 11,
22 2007) (33% of \$750,000); *Schulte v. Fifth Third Bank*, 2011 WL 3269340, at *31
23 (N.D. Ill. July 29, 2011) (“A number of fee awards in common-fund cases from
24 within the Seventh Circuit show that an award of 33-1/3% of the settlement fund is
25 within the reasonable range”; approving 33.3% of \$9.5 million); *Waters v. Int’l*
26 *Precious Metals Corp.*, 190 F.3d 1291, 1298 (11th Cir. 1999) (one-third award of
27 \$40 million); *Ratner v. Bennett*, 1996 WL 243645 (E.D. Pa. May 8, 1996) (35%
28 award in securities action of \$400,000); *Faircloth v. Certified Fin. Inc.*, 2001
WL 527489, at *12 (E.D. La. May 16, 2001) (35% award of \$1.534 million);
In re Select Comfort Corp. Secs. Litig., No. 99-884 (D. Minn. Feb. 28, 2003)
(awarding 33.3% of the \$ 5,750,000 settlement); *Ray v. Lundstrom*, 2012 WL
5458425, at *3-*4 (D. Neb. Nov. 8, 2012) (awarding 1/3 of \$3.1 million
settlement).

1 fee requested here is in line with the Ninth Circuit benchmark, and is well within
2 the range of percentages courts in this Circuit have awarded in similar securities
3 class action settlements.

4 **IV. AN AWARD OF 28% OF THE SETTLEMENT FUND IS**
5 **REASONABLE IN THIS CASE**

6 **A. Counsel Achieved An Excellent Result For The Class**

7 Courts have consistently recognized that the result achieved is a major
8 factor to be considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S.
9 424, 436 (1983) (the “most critical factor is the degree of success obtained”);
10 *Morris*, 54 Fed. Appx. at 664 (district court, granting a 33% fee, noted that class
11 counsel achieved exceptional results in a risky and complicated class action); *In re*
12 *King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 630 (D. Colo. 1976) (“[T]he amount
13 of recovery and end result achieved are of primary importance, for these are the
14 true benefit to the client”).

15 The Settlement Fund created here consisting \$2,500,000 (plus interest) is an
16 excellent result. This amount, representing approximately 25.8% of the total
17 plaintiffs maximum estimated damages or \$9.675 million, as calculated by
18 Plaintiffs’ expert, (Rosen Decl., ¶ 24), is a significant recovery. The 25.8%
19 recovery is 51% higher the median settlement value for cases of this size, which is
20 17%. *See* Ex. 3 to Rosen Decl., Dr. Renzo Comolli, Sukaina Klein, Ron Miller,
21 and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2012*
22 *Full-Year Review*, at p. 32; *see, also, In re Cendant Corp. Sec. Litig.*, 109 F.Supp.
23 2d 235, 245 (D.N.J. 2000)(citing: (1) study of 377 securities class action
24 settlements which found that the average settlement comprises between 9% and
25 14% of claimed damages and (2) cases which settled for 1.6% - 10% of claimed
26 damages). These figures are based on the gross recovery in cases, before the
27 deduction of attorneys’ fees and expenses. *See also In re Cendant Corp. Litig.*,
28

1 264 F.3d 201, 240 (3d. Cir. 2001) (typical recoveries in securities class actions
2 range from 1.6% to 14% of total losses).

3 The Settlement provides Class Members with approximately 25.8% of
4 Plaintiffs' estimated best possible result, assuming not only complete victory at
5 trial and at the appellate levels, but Settling Defendants' unlimited resources for
6 payment of a judgment. Counsel for Plaintiffs negotiated a settlement representing
7 a percentage of the alleged loss that exceeded many of those above-referenced
8 commendable settlements where the courts awarded even greater fees. Thus, the
9 results achieved by Lead Plaintiffs' Counsel, in light of the legal and factual
10 complexity and magnitude of this case and the significant difficulties of
11 establishing both liability and damages, are adequate, justifying an award of 28%.

12 13 **B. The Risks Of The Litigation**

14 Numerous cases have recognized that the risks of litigation are important
15 factors in determining a fee award. *See, e.g., WPPSS*, 19 F.3d at 1299-1300; *Lindy*
16 *Bros. Builders v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117 (3d
17 Cir. 1976). That –as here–the case is “fraught with risk and recovery is far from
18 certain” is a relevant circumstance which the Court must take into account.
19 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002).

20 The risks of further litigation are also analyzed in connection with approval
21 of the Settlement itself and will not be discussed at length herein. The Court is
22 respectfully referred to paragraphs ¶¶ 34-39 of the Rosen Declaration and to Lead
23 Plaintiffs' Memorandum of Law in Support of Final Approval of Class Action
24 Settlement and Plan of Allocation.

25 In addition to the risks the Class faces *now*, however, *at time of filing*,
26 Plaintiffs undertook additional risks. Plaintiffs' claims were subject to the PSLRA.
27 As Judge Ellison observed in dismissing securities claims brought against BP
28

1 following the Deepwater Horizon disaster, “[t]he Court is acutely aware that
2 federal legislation and authoritative precedents have created for plaintiffs in all
3 securities actions formidable challenges to successful pleading.” *In re BP p.l.c.*
4 *Sec. Litig.*, 852 F. Supp.2 d 767, 820 (S.D. Tex. 2012). That this pleading standard
5 was met was no guarantee that it *would be*.

6 **C. The Skill Required And The Quality And Efficiency Of The Work**

7 The “prosecution and management of a complex national class action
8 requires unique legal skills and abilities” – particularly in securities class actions.
9 *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008). Here,
10 the quality of Lead Plaintiffs’ Counsel’s work on this case is reflected in the
11 excellent result obtained. The standing and prior experience of Lead Plaintiffs’
12 Counsel are relevant in determining fair compensation. *See, e.g., Eltman v.*
13 *Grandma Lee’s Inc.*, 1986 WL 53400, at *9 (E.D.N.Y. May 28, 1986). Lead
14 Plaintiffs’ Counsel’s fee declaration includes a description of the background and
15 experience of Plaintiffs’ counsel. *See Rosen Fee Decl., Ex. 2 to Rosen Decl.* As
16 that submission demonstrates, Lead Plaintiffs’ Counsel has extensive and
17 significant experience in the highly specialized field of securities class action
18 litigation.

19 The quality of opposing counsel is also important in evaluating the quality
20 of the work done by Lead Plaintiff’s Counsel. *See, e.g., In re Equity Funding*
21 *Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977); *King Res.*, 420 F.
22 Supp. at 634; *Arenson v. Bd. of Trade*, 372 F. Supp. 1349, 1354 (N.D. Ill. 1974).
23 Plaintiffs were opposed in this litigation by nationally respected firms. *See Rosen*
24 *Decl.*, ¶¶ 45-47.

25 At every stage of the proceedings, Lead Plaintiffs’ Counsel had to perform
26 with a high level of skill, efficiency, and professionalism. In the face of strong
27 opposition from highly respected securities defense firms, Lead Plaintiffs’
28

1 Counsel assembled a case that survived Settling Defendants' numerous attacks.
2 Moreover, Lead Plaintiffs evaluated the merits and risks presented, negotiated a
3 very favorable amount for the Class, and settled the litigation on an excellent basis
4 for the Class. Such quality, efficiency, and dedication should be rewarded.

5 **D. The Contingent Nature Of The Case And The Financial Burden**
6 **Carried By The Lead Plaintiffs' Counsel**

7 The Ninth Circuit recognizes that the determination of a fair fee must
8 include consideration of the contingent nature of the fee and the difficulties which
9 were overcome in obtaining the settlement:

10 It is an established practice in the private legal market to reward attorneys
11 for taking the risk of non-payment by paying them a premium over their
12 normal hourly rates for winning contingency cases.

13 *See* Richard Posner, *Economic Analysis of Law*, §21.9, at 534-35 (3d ed.1986).
14 Contingent fees that may far exceed the market value of the services if rendered
15 on a non-contingent basis are accepted in the legal profession as a legitimate way
16 of assuring competent representation for plaintiffs who could not afford to pay on
17 an hourly basis regardless of whether they win or lose. *WPPSS*, 19 F.3d at 1299.

18 Lead Plaintiff's Counsel has received no compensation over the course of
19 the three years that this action has been pending and has incurred significant
20 expenses in litigating for the benefit of the Class. Any fee award or expense
21 reimbursement to Lead Plaintiffs' Counsel has always been at risk and completely
22 contingent on the result achieved and on this Court's exercise of its discretion in
23 making any award. *See* Rosen Decl., ¶¶ 48-54.

24 **E. The Customary Fee**

25 If this were not a class action, the customary fee arrangement would be
26 contingent, on a percentage basis, and in the range of 30% to 40% of the recovery.
27 *See, e.g., Blum*, 465 U.S. at 903 n.20 ("In tort suits, an attorney might receive one
28 third of whatever amount the Plaintiff recovers. In those cases, therefore, the fee is

1 directly proportional to the recovery”); *In re M.D.C. Holdings Sec. Litig.*, 1990
2 WL 454747, at *7 (S.D. Cal. 1990) (“In private contingent litigation, fee contracts
3 have traditionally ranged between 30% and 40% of the total recovery”); *Kirchoff*,
4 786 F.2d at 323 (40% contractual award if case had gone to trial). Thus, as the
5 customary contingent fee in the private marketplace – 30% to 40% of the fund
6 recovered – is even greater than the percentage-of-recovery fee requested in this
7 case, Counsel’s request is quite reasonable.

8 Lead Plaintiffs’ Counsel’s efforts were performed and the result was
9 achieved on a wholly contingent basis, despite significant risk and in the face of
10 determined opposition. Under these circumstances, it necessarily follows that
11 Counsel is justly entitled to the award of a reasonable percentage fee based on the
12 benefit conferred and the common fund obtained. Under all of the circumstances
13 present here, a 28% fee plus expenses is fair and reasonable.

14 **F. A Lodestar Cross-Check Shows the Fee Request Is Reasonable**

15 Courts often compare an attorney’s lodestar with a fee request made under
16 the percentage of the fund method as a “cross-check” on the reasonableness of the
17 requested fee. *See, e.g., Vizcaino*, 290 F.3d at 1050; *Fischel v. Equitable Life*
18 *Assur.*, 307 F.3d 997, 1007 (9th Cir. 2002). “[T]he lodestar calculation can be
19 helpful in suggesting a higher percentage when litigation has been protracted
20 [and] may provide a useful perspective on the reasonableness of a given
21 percentage award.” *Vizcaino*, 290 F. 3d at 1050. Significantly, in securities class
22 actions it is common for a counsel’s lodestar figure to be adjusted upward by
23 some multiplier reflecting a variety of factors such as the effort expended by
24 counsel, the complexity of the case, and the risks assumed by counsel.⁷

25
26 ⁷ *See In re Ravisent Sec. Litig.*, 2005 WL 906361, *12 (E.D. Pa. April 18, 2005)
27 (fee represented a multiplier of 3.1 of the lodestar); *In re Linerboard Antitrust*
28 *Litig.*, 2004 WL 1221350, *16 (E.D. Pa. June 2, 2004) (noting that from 2001

1 Here, the total lodestar for the Rosen Law Firm, P.A. is \$788,955. See
2 Rosen Decl., Ex. 2, ¶ 6. Thus, counsel's fee request is equal to approximately
3 0.88 times the lodestar, which is low compared to multipliers approved by Courts.
4 See Rosen Decl., ¶ 43. Thus, this factor supports the requested fee.

5 **G. The Reaction Of The Class Supports The Requested Award**

6 Over 12,000 Claim Packets were mailed to potential Settlement Class
7 Members and a Summary Notice was published on the *GlobeNewswire* and in the
8 *Investor's Business Daily* and made available to the public on the Claims
9 Administrator's website. Bravata Dec., ¶¶ 6-7. Settlement Class Members were
10 informed in the Notice that Plaintiffs' Counsel would apply for attorneys' fees of
11 up to 30% of the Settlement Fund, plus reimbursement of litigation costs and
12 expenses not to exceed \$480,000, plus interest, and were advised of their right to
13 object to Lead Plaintiffs' Counsel's fee request.

14 To date, there has been one request for exclusion and no objections to the
15 requested fee: one exclusion by Alpha Capital Anstalt, failed to provided how
16 many shares it purchased of Radiant. See Bravata Dec., ¶¶ 9-10 & Ex. D thereto.

17
18 **V. LEAD PLAINTIFFS' COUNSEL'S EXPENSES ARE REASONABLE**
19 **AND WERE NECESSARY TO ACHIEVE THE BENEFIT**
20 **OBTAINED**

21 through 2003, the average multiplier approved in common fund cases was 4.35);
22 *Cullen v. Whitman Medical Corp.*, 197 F.R.D. 136, 150-51 (E.D. Pa. 2000)
23 (lodestar of \$1.2 million would require multiplier of 2.04 in order to match
24 awarded fees of one-third of \$7.3 million common fund); *In re Safety Components*,
25 166 F. Supp.2d 72, 103 (D.N.J. 2001) (lodestar of \$534,000 would require
26 multiplier of 2.81 in order to match awarded fees of \$1.5 million); *In re Medical X-*
27 *Ray Film Antitrust Litig.*, 1998 WL 661515, *7 (E.D.N.Y. Aug. 7, 1998) (fee
28 represented a multiplier on the attorneys' lodestar of 1.67); *In re Crazy Eddie Sec.*
Litig., 824 F. Supp. 320, 326-27 (E.D.N.Y. 1993) (the equivalent of a 1.72
multiplier was applied to the attorneys' lodestar).

1 Lead Plaintiffs' Counsel's expenses are reasonable and were necessarily
2 incurred as a part of Counsel's efforts to achieve an excellent recovery for the
3 Class. Plaintiffs' Counsel has incurred expenses in an aggregate amount of
4 \$421,689.87 in prosecuting this litigation.

5 These expenses were necessary and vital to achieve the Settlement Amount.
6 It was not until the eve of trial, did Settling Defendants' settlement offers
7 approached the \$2.5 million Settlement Amount. This is not a situation where,
8 Defendants' offers to resolve this litigation decreased as the case progressed.
9 Rosen Decl. ¶ 7.

10 These expenses are detailed in the declaration of Counsel submitted to the
11 Court in support of this Motion. *See* Rosen Decl., ¶¶ 57-65, Ex. 2, ¶ 7. The Notice
12 apprised the Class Members that Plaintiffs' Counsel would seek expenses in an
13 amount not to exceed \$480,000.

14 The Court should approve Plaintiffs' request for reimbursement of Lead
15 Plaintiffs' Counsel's expenses. "Reimbursement of taxable costs [in class action
16 settlements] is governed by 28 U.S.C. § 1920 and Federal Rule of Civil procedure
17 54." *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1177 (S.D. Cal.
18 2007). Courts interpreting these rules have found that counsel for the Class are
19 entitled to reimbursement for those types of out-of-pocket expenses that an
20 attorney would normally expect the client to pay. *Harris v. Marhoefer*, 24 F.3d 16,
21 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees
22 those out-of-pocket expenses that `would normally be charged to a fee paying
23 client") (citation omitted); *see also Immune Response*, 497 F. Supp. 2d at 1177;
24 *Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42*, 8 F.3d 722, 725-26 (10th Cir.
25 1993) (expenses reimbursable if they would normally be billed to a client); *Abrams*
26 *v. Lightolier Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995) (same); *MiltlandRaleigh-*
27 *Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("Attorneys may be
28

1 compensated for reasonable out-of-pocket expenses incurred and customarily
2 charged to their clients, as long as they ‘were incidental and necessary to the
3 representation’ of those clients”) (citation omitted).

4 Counsel has pursued this litigation knowing that its expenses could only be
5 reimbursed (without interest) if the Class won at trial or obtained a settlement.
6 Rosen Decl. ¶ 48. Counsel has had no incentive to incur –and did not incur–
7 unnecessary expenses. The categories of expenses for which counsel seek
8 reimbursement are the type of expenses routinely charged to paying clients and,
9 therefore, should be reimbursed out of the common fund.

10 Among the significant expenses incurred by Lead Plaintiffs’ Counsel on
11 behalf of the Class was the cost of retaining Lead Plaintiffs’ financial and clinical
12 trial experts, class notice expenses, mediation fees, and an expert deposition fee
13 paid to depose the opposing party’s expert– all of which was necessary for the
14 successful prosecution and resolution of the Litigation on behalf of the Class.
15 *Harris*, 24 F.3d at 19; *Immune*, 497 F.Supp. 2d at 1177. Other expenses include the
16 cost of computerized legal research using Westlaw, document hosting, Pacer,
17 which should be (and are routinely) reimbursed. *In re UnitedHealth Group Inc.*
18 *Shareholder Deriv. Litig.*, 631 F.3d 913, 918-19 (8th Cir. 2011).

19 Other significant expenses involved travel, lodging and related meals for the
20 mediation, a dozen depositions across the country, and meetings with Settling
21 Defendants’ counsel and Plaintiffs’ experts. Where possible, Lead Plaintiff’s
22 Counsel participated in these matters by telephone or video conference, resulting in
23 considerable savings of expense to the Class. Travel and lodging expenses were
24 necessary to the prosecution of the action, were reasonable in amount and are
25 properly charged against the fund created. *Thornberry v. Delta Air Lines*, 676 F.2d
26 1240, 1244 (9th Cir. 1982), *vacated on other grounds*, 461 U.S. 952 (1983);
27

28

1 *Harris*, 24 F.3d at 19; *Immune*, 497 F.Supp. 2d at 1177; *In re McDonnell Douglas*
2 *Equip. Leasing Sec. Litig.*, 842 F. Supp. 733, 746 (S.D.N.Y. 1994); *Genden v.*
3 *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 741 F. Supp. 84, 86 (S.D.N.Y. 1990).

4 Similarly, photocopying and scanning costs associated with document
5 retrieval and filing, ECF filings, and comparable costs are customarily reimbursed
6 in common fund cases. *See Harris*, 24 F.3d at 19; *Immune*, 497 F.Supp. 2d at 1177;
7 *McDonnell Douglas*, 842 F. Supp. at 746. Other expenses include providing
8 notices to the Class pursuant to the PSLRA early notice provisions.

9 **VI. THE AWARD TO CLASS REPRESENTTIVES SHOULD BE**
10 **APPROVED**

11 Lead Plaintiffs also request that the Court award them \$6,000 (\$2,000 each)
12 in connection with their lost time in their representation of the Settlement Class.
13 The PSLRA provides that courts are empowered to approve such awards to
14 reimburse plaintiffs for reasonable costs and expenses related to the representation
15 of the class. *See* 15 U.S.C. §78u-4(a)(4). Lead Plaintiffs have diligently and
16 completely fulfilled their obligations as representative plaintiff in the present
17 action by: (1) reviewing the initial complaint and the amended complaints; (2)
18 overseeing the litigation; (3) moving to be appointed class representatives and; (4)
19 participating in discovery, including sitting for their depositions; and (5)
20 communicating with counsel about the action. Courts routinely award lead
21 plaintiffs greater amounts. *E.g. In re Veritas Software Corp. Sec. Litig.*, 396 Fed.
22 App'x 815, 817 (3d Cir. 2010) (\$15,000 for each lead plaintiff); *Buccellato v.*
23 *AT&T Operations, Inc.*, No. C10-00463-LHK, 2011 WL 4526673, at *4 (N.D. Cal.
24 June 30, 2011) (\$20,000 to lead plaintiff, \$5,000 to class representatives); *In re*
25 *Xcel Energy, Inc., Sec., Deriv. & ERISA Litig.*, 364 F. Supp. 2d 980, 1000 (D.
26 Minn. 2005) (approving a \$100,000 award to lead plaintiffs, and noting that awards
27 to lead plaintiffs are important because they further “the important policy role [lead
28

1 plaintiffs] play in the enforcement of the federal securities laws on behalf of
2 persons other than themselves”); *In re Giant Interatice Grp., Inc. Sec. Litig.*, 279
3 F.R.D. 151, 166 (S.D.N.Y. 2011) (awarding \$10,000 as an incentive and for lost
4 time).

5 In short, an award of \$2,000 to each of the three Lead Plaintiffs is warranted.

6 **VII. CONCLUSION**

7 Securities class actions are complex and laden with risk. There are numerous
8 examples where Lead Plaintiffs’ Counsel, in cases such as this, after the
9 expenditure of thousands of hours, has received no compensation whatsoever. This
10 complex litigation has been extremely hard-fought. From the beginning, Plaintiffs
11 have been faced with determined adversaries represented by experienced and
12 equally determined defense counsel. Without any assurance of success, Plaintiffs
13 and their Counsel pursued this Litigation to an excellent conclusion. The
14 Settlement represents a fair recovery on behalf of the class and reflects the skill and
15 dedication of Plaintiffs’ Counsel. It is respectfully requested that the Court
16 approve the fee and expense application and enter the Order submitted herewith
17 awarding Plaintiffs’ Counsel 28% of the Settlement Fund plus reimbursement of
18 \$421,689.87 of expenses, plus interest earned thereon at the same rate and for the
19 same period as that earned on the Settlement Fund until paid, and an award of
20 \$6,000 to Lead Plaintiffs.

21
22 DATED: March 24, 2014

Respectfully submitted,

23
24 **THE ROSEN LAW FIRM P.A.**

25 /s/ Laurence M. Rosen
26 Laurence M. Rosen (SBN 219683)
27 Phillip Kim. (admitted *pro hac vice*)
28 355 South Grand Avenue, Suite 2450
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Lead Counsel for Lead Plaintiffs and the
Class

CERTIFICATE OF SERVICE

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I, Laurence Rosen, hereby declare under penalty of perjury as follows:
I am attorney with the Rosen Law Firm, P.A., with offices at 355 South Grand Avenue, Suite 2450, Los Angeles, CA, 90071. I am over the age of eighteen.

On March 24, 2014, I electronically filed the following **LEAD PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF AN AWARD OF ATTORNEYS’ FEES AND REIMBURSEMENT OF EXPENSES** with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to counsel of record.

Executed on March 24, 2014:

/s/ Laurence Rosen