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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANTOINE DE SEJOURNET, ADAM HENICK, and LINDA HOLDER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

vs.

GOLDMAN KURLAND AND MOHIDIN, LLP, and AHMED MOHIDIN,

Defendants.

CASE No.: 13-cv-1682-DMG (MRWx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES, AND AWARDS TO LEAD PLAINTIFFS

Date: March 11, 2016
Time: 9:30 A.M.
Courtroom: 7- 2nd Floor
Judge: Hon. Dolly M. Gee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Lead Plaintiff Antoine de Sejournet, Adam Henick, and Linda Holder, ("Plaintiffs"), through their undersigned counsel, submit this memorandum of law in support of their Motion, pursuant to Federal Rule of Civil Procedure 23(e), for an Order: (1) awarding attorneys' fees of 33 1/3% of the Settlement Fund, or $475,000; (2) reimbursement of $79,762.41 in expenses that were incurred in prosecuting this Action; and (3) awards of $10,000 to each Lead Plaintiff (the "Fee Petition").

I. INTRODUCTION[1]

The Settlement recovers $1,425,000 for Class Members from a small audit firm and one of its partners. The audit firm's only significant asset, a wasting insurance policy, had only $1.9 million left in it at the time of the Settlement, the remainder having been spent on attorneys' fees. And the $1,425,000 recovery supplements another recovery for Deer shareholders, also won by Lead Counsel, of $2,125,000, which means investors will have recovered $3,550,000 in total.

This is an excellent result, and it is completely unexpected. Though Lead Counsel issued notice to Class Members, no other law firm was willing to prosecute the action. A different law firm contacted Lead Counsel, purportedly representing a Class Member with a substantial loss, but the Class Member pulled out because the prospects of recovery seemed "remote."

Before the parties reached the Settlement, the Action proceeded from the pleadings to a motion to dismiss, past class certification, and through most of document discovery. Settlement discussions, which began in earnest with an all-day mediation, took over a month.

[1] Unless otherwise defined, capitalized terms herein have the same meanings attributed to them in the [Amended] Stipulation and Agreement of Settlement, filed November 3, 2015.

The Settlement results from the efforts of Plaintiffs and Plaintiffs' Counsel. Lead Counsel requests an award of fees in the amount of 33$^{1/3}$% of the Settlement Fund, or $475,000. Lead Counsel also requests reimbursement from the Settlement Fund of $79,762.41 in actual expenses. Rosen Fee Dec. ¶ 7.[2] And Antoine de Sejournet, Linda Holder, and Adam Henick, who were the only persons willing to take on the responsibility of lead plaintiffs and who each spent more than 70 hours on this Action, request an award of $10,000 to compensate them for their time.

The reaction of the Class also strongly supports the requested fee. The deadline to file objections to, or request exclusion from the Settlement is February 26, 2016. Bravata Dec. ¶¶12, 13. To date, no objections and only one request for exclusion have been received. *Id.* Pursuant to the Preliminary Approval Order, over 33,404 Notices were mailed to Class Members. *Id.* ¶7 The Notice advised Class Members that Lead Counsel intended to apply to the Court for an award of attorneys' fees representing up to one-third (33 $^{1/3}$%) of the Settlement Fund and that Lead Counsel would seek reimbursement of Plaintiffs' Counsel's out-of-pocket expenses not to exceed $100,000. Bravata Dec., Ex. A.

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[2] Citations to "SAC ¶__" are to Paragraphs of the Second Amended Complaint, Dkt. # 45. Citations to "Rosen Dec. ¶__/Ex.__" are to Paragraphs of or Exhibits to the Declaration of Laurence M. Rosen In Support of Final Approval of Settlement, filed herewith. Citations to "Bravata Dec. ¶_/Ex. __" are to Paragraphs of or Exhibits to the Declaration Of Josephine Bravata Concerning The Mailing Of The Cafa Notice, The Mailing Of Notice Of Pendency And Settlement Of Class Action And Proof Of Claim And Release Form , attached as Exhibit 1 to the Rosen Dec. Citations to the "Rosen Fee Dec. ¶__" are to Exhibits to the Declaration of Laurence M. Rosen Concerning Fees, attached as Exhibit 2 to the Rosen Dec. Citations to "de Sejournet/Henick/Holder Dec. ¶__" are to Paragraphs of the Declarations of Antoine de Sejournet, Adam Henick, and Linda Holder, filed as Exhibits 3, 4, and 5 of the Rosen Dec.

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

II. SPECIFIC EFFORTS OF LEAD COUNSEL

The Rosen Law Firm, P.A., which was Lead Counsel in this case, was also lead counsel in another action filed on behalf of investors in Deer Consumer Products, Inc., *Rose v. Deer Consumer Products, Inc.*, Case No. 11-cv-3701-DMG (MRWx). In the course of litigating *Rose*, Lead Counsel learned information suggesting class members in that action also had claims against Deer's auditor, Goldman Kurland Mohidin LLP, and its partner Ahmed Mohidin, the Defendants in this action ("Defendants").[3] To avoid the earliest possible running of the statute of limitations, Lead Counsel and lead plaintiff in *Rose* filed this action on March 8, 2013. Rosen Dec. ¶3. Lead Counsel then issued congressionally-mandated notice of the action. Dkt. # 13-1.

In securities class actions, lead plaintiff movants have 60 days from notice of the action to move for appointment, and approval of their choice of lead counsel. 15 U.S.C. § 78u-4(a)(3)(i)(II) Notice typically results in a flurry of lead plaintiff movants. But not here. Lead Counsel and Lead Plaintiffs were the only persons willing to take on this difficult case. *See* Dkt. # 14. The Court appointed Lead Plaintiffs and Lead Counsel on May 31, 2013. Dkt. # 16.

Plaintiffs filed their Amended Complaint on July 30, 2013. Dkt. # 18. The Amended Complaint resulted from substantial investigation, including not only review of all of Deer's SEC filings and public statements made by and about Deer,

[3] Deer was investigated by the Securities and Exchange Commission. Lead Counsel secured a settlement term in *Rose* requiring Deer to produce to the plaintiffs all the documents it had produced to the SEC. *Rose* dkt. # 91.

but also (a) review of documents filed by and about other companies that employed the same shadowy promoter, Benjamin Wey, (b) review of various lawsuits brought by and against Wey, (c) review of FINRA proceedings against brokerages employed by Wey,[4] (d) consultation with an expert to determine whether Deer's stock traded on an efficient market; (e) consultation with an auditing expert about auditing standards implicated by Defendants' Deer audit; (f) discussions with an investigative journalist and an analyst who had each written exposes on Deer; and (f) an on-the-ground investigation in China that involved locating and contacting former employees of Chinese audit firms that assisted Defendants in conducting the Deer audits, as well as site visits to these firms' offices. Rosen Dec. ¶5. Plaintiffs also relied on the investigation Lead Counsel had conducted in the *Rose* case.

Defendants moved to dismiss the Amended Complaint, citing the principle that to plead a securities fraud case against an auditor, a plaintiff must plead facts showing that "the accounting practices were so deficient that the audit amounted to no audit at all, or an egregious refusal to see the obvious, or to investigate the doubtful, or that the accounting judgments which were made were such that no reasonable accountant would have made the same decisions if confronted with the same facts." Dkt. # 21, at 11 (citing *DSAM Glob. Value Fund v. Altris Software, Inc.*, 288 F.3d 385, 390 (9th Cir. 2002) (internal quotations omitted). Dkt. # 22, at 11. Defendants also moved to strike portions of Plaintiffs' Amended Complaint. Dkt. # 22. Plaintiffs opposed Defendants' motions. Dkts. # 29, 30.

On May 21, 2014, the Court found that the Amended Complaint adequately alleged that Defendants had made certain false statements with scienter, but dismissed for failure to adequately allege loss causation. Dkt. # 41, at 5-18. But

[4] Wey has since been indicted for securities fraud in connection with Deer and other clients. *United States v. Wey*, 15-cr-611-AJN (S.D.N.Y.)

the Court gave leave to amend. *Id.* at 19. And since Defendants did not move to dismiss Plaintiffs' Second Amended Complaint, this action moved to discovery. *Petrie v. Elec. Game Card, Inc.*, 761 F.3d 959, 966 (9th Cir. 2014) (discovery in securities fraud actions stayed until court sustains complaint against motion to dismiss).

This case was heavily litigated. Defendants produced, and Plaintiffs reviewed, over 56,000 pages of documents. Rosen Dec. ¶6. For their part, Plaintiffs produced more than 1,000 pages of documents. *Id.* The Parties each filed a motion to compel, and appeared before Judge Wilner twice to resolve their discovery disputes. Dkts. # 53, 80.

Plaintiffs moved for class certification. Dkt. # 63. Plaintiffs were required to show that common issues predominated over individual issues. Class members must show that they relied on Defendants' false statements, an individual issue that presents an "insuperable" barrier to class certification because it swamps common issues. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2552, n. 6 (2011). But as securities class action plaintiffs typically do, Plaintiffs attempted to "dissipate" the barrier by proving that class members were entitled to a presumption of reliance because Deer's stock traded on an efficient market. *Id.*; dkt. # 65. Proving market efficiency is a difficult and complex task, requiring sophisticated financial and statistical analysis that is almost always conducted by an expert[5] – here, Plaintiffs' expert Peter Lert, Ph.D., CFA. Dkt. # 65-1. The Court granted Plaintiffs' motion for class certification on April 6, 2015, Dkt. # 79, and approved Plaintiffs' proposed notice to the Class on July 16, 2015. Dkt. # 95.

[5] *Unger v. Amedisys Inc.*, 401 F.3d 316, 323 (5th Cir. 2005) (chiding plaintiffs for failing to retain an expert to testify that stock traded on an efficient market.)

The Parties attended an all-day mediation in June 2015. Rosen Dec. ¶7. To prepare for the mediation, the Parties exchanged mediation briefs. *Id.* at ¶8. The briefs were not limited to the Second Amended Complaint's allegations; instead, they focused on the documents that had been produced to date. *Id.* Both Defendant Mohidin and another partner of GKM attended in person. *Id.* at ¶7. The mediation included several in-person session at which the parties discussed the merits. *Id.*

The parties did not reach a settlement at the Mediation. But settlement discussions continued. *Id.* at ¶9. But in July, the Parties accepted a mediator's proposal to settle this action for $1,425,000, *id.*, and informed the Court of the Settlement on July 20, 2015. Dkt. # 96. The Parties then negotiated and signed a term sheet and, thereafter, a Stipulation of Settlement and various exhibits thereto, including proposed preliminary and final approval orders, proposed short and long form notices, and a proposed claim form. Rosen Dec. ¶9. Plaintiffs then moved for preliminary approval of the Settlement, which the Court granted on November 3, 2015. Dkt. # 103. Plaintiffs now move for final approval of the Settlement.

Lead Counsel's effort to successfully resolve this Litigation against Defendants has been wholly contingent upon the result achieved. And Lead Counsel expects it will continue to work to oversee administration of the Settlement, raise any settlement administration issues with the Court, and move to distribute Settlement proceeds.

As compensation for these efforts, Lead Counsel requests this Court to award attorneys' fees of $33^{1/3}$% of the Settlement Fund ($475,000) plus $79,762.41 in unreimbursed expenses. Lead Counsel's $33^{1/3}$% fee request, which is consistent with decisions both in this Circuit and across the country, is appropriate compensation for the result Counsel has obtained for the Class.

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

A. The Common Fund Doctrine

"[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." *In re Heritage Bond Litig.*, No. 02-ML-1475-DT(RCX), 2005 WL 1594389, at *7 (C.D. Cal. June 10, 2005) (internal quotations omitted). "This rule, known as the 'common fund doctrine,' is designed to prevent unjust enrichment by distributing the costs of litigation among those who benefit from the efforts of the litigants and their counsel." *Boyd v. Bank of Am. Corp.*, No. SACV 13-0561-DOC, 2014 WL 6473804, at *8 (C.D. Cal. Nov. 18, 2014) (internal quotations omitted). "District courts have the discretion to calculate fees by either calculating a lodestar or awarding a percentage of the common fund." *Id.* The guiding principle remains that a fee award should be "'reasonable under the circumstances.'" *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296 (9th Cir. 1994) (citation omitted).

B. The Percentage-of-Fund Approach

In *Blum v. Stevenson*, 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." In *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990), and *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir. 1993), the Ninth Circuit expressly approved the use of the percentage-of-recovery method in common fund cases.

Since then, as this Court recently found, district courts have mostly shifted to the percentage method in awarding fees in representative actions. *See Aichele v. City of Los Angeles*, No. CV1210863DMGFFMX, 2015 WL 5286028, at *5 (C.D. Cal. Sept. 9, 2015). There are compelling reasons why so many courts have opted for the percentage approach in common fund cases. First, it is consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated by a percentage of the recovery.[6] 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 required under the circumstances.[7] Third, use of the percentage-of-recovery method decreases the burden imposed on the court (by avoiding a detailed and time-consuming lodestar

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[6] *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992)("The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client."); *In re Activision Sec. Litig.*, 723 F. Supp. 1373 (N.D. Cal. 1989) (noting that in the marketplace, attorneys and their clients routinely negotiate 25% to 40% percentage fees). Furthermore, Professor John C. Coffee, Jr. 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 it 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 (1986).

[7] *Aichele*, 2015 WL 5286028, at *5; *Kirchoff v. Flynn*, 786 F.2d 320, 325-26 (7th Cir. 1986) ("The lawyer gains only to the extent his client gains[,] ....ensur[ing] a reasonable proportion between the recovery and the fees assessed to the defendant . . . . reward[ing] exceptional success . . . penaliz[ing] failure . . . [and] automatically handl[ing] compensation for the uncertainty of litigation.")

analysis), while assuring that the beneficiaries do not experience unnecessary delay in receiving their share of the settlement. *See Activision*, 723 F. Supp. at 1378-79.[8] Indeed, the plain text of the PSLRA states that class counsel is entitled to attorneys' fees that represent a "reasonable percentage" of the damages recovered by the class. 15 U.S.C. § 78u-4(a)(6); *accord In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 188 n. 7 (3d Cir. 2005) ("the PSLRA had made percentage-of-recovery the standard for determining whether attorney's fees are reasonable.").

When using the percentage-of-the-fund method, courts may consider "the extent to which class counsel 'achieved exceptional results for the class,' whether the case was risky for class counsel [...] the market rate for the particular field of law (in some circumstances), the burdens class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work), and whether the case was handled on a contingency basis." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954-55 (9th Cir. 2015). Courts also consider counsel's skill, the complexity of the issues, and the reactions of the class. *Aichele*, at *2.

IV. AN AWARD OF 33 1/3% OF THE SETTLEMENT FUND IS REASONABLE IN THIS CASE

A. Counsel Achieved An Excellent Result For The Class

The Ninth Circuit has established a benchmark in common fund cases of 25%, which the court may adjust upwards or downwards for special circumstances. *In re Pac. Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995). In securities class actions, awards typically exceed the benchmark. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008) (citing *In re Ikon Office Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000)); *In re Zynga Inc. Sec. Litig.*, No. 12-

[8] *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").

CV-04007-JSC, 2016 WL 537946, at *18 (N.D. Cal. Feb. 11, 2016). That is because securities class actions are especially expensive and risky. *Cf. Stanger v. China Electric Motor, Inc.*, No. 13-56903, 2016 WL 191986, at *4 (9th Cir. Jan. 15, 2016) (risk enhancement of attorneys' fees is "especially important in securities cases").

"The overall result and benefit to the class from the litigation is the most critical factor in granting a fee award." *Deaver v. Compass Bank*, No. 13-CV-00222-JSC, 2015 WL 8526982, at *11 (N.D. Cal. Dec. 11, 2015). And indeed, courts in the Ninth Circuit commonly grant fee awards of $33^{1/3}$% where counsel achieves an excellent result. *Id.* at *11, *15; *Morris v. Lifescan, Inc.*, 54 Fed. App. 663, 664 (9th Cir. 2003); *Pacific Enterprises*, 47 F.3d at 379; *In re Heritage Bond Litig.*, No. 02-ML-1475-DT(RCX), 2005 WL 1594389, at *9 (C.D. Cal. June 10, 2005); *Deaver v. Compass Bank*, No. 13-CV-00222-JSC, 2015 WL 8526982, at *11 (N.D. Cal. Dec. 11, 2015); *Boyd v. Bank of Am. Corp.*, No. SACV 13-0561-DOC, 2014 WL 6473804, at *10 (C.D. Cal. Nov. 18, 2014); *Vandervort v. Balboa Capital Corp.*, 8 F. Supp. 3d 1200, 1209 (C.D. Cal. 2014).

Further, because a large percentage of a small settlement fund is still a smaller dollar amount, courts take into account the size of the settlement fund when making an award. *Aichele*, 2015 WL 5286028, at *5. "For example, it is very common to see 33% contingency fees in cases with funds of less than $10 million, and 30% contingency fees in cases with funds between $10 million and $50 million." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 445 (E.D.N.Y. 2014). Indeed, this Court has favorably cited a law review article suggesting that in general, a fee of 33% of the common fund is reasonable and in line with the general market for contingent fee work. *Aichele*, 2015 WL 5286028, at *6 (citing Silber and Goodrich, Common Funds

and Common Problems: Fee Objections and Class Counsel's Response, 17 Rev. Litig. 525, 546-47 (1998)).

For reasons more fully set out in the Final Approval Brief, the Settlement Fund created here consisting $1,425,000 (plus interest) is an excellent result. First, this amount, representing approximately 13.6% of the Defendants' total estimated liability (Rosen Dec. ¶ 16), is a significant recovery. Second, Defendants are a small audit firm and one of its partners. Their largest asset is an insurance policy that diminishes dollar-for-dollar as it pays out Defendants' attorneys' fees. The Settlement recovers 75% of the $1.9 million that remained of the policy at the time of the Mediation. And third, the Settlement will be divided only between Class Members who file a claim.

B. Risks and burdens class counsel experienced and whether the case was handled on a contingency basis

Many cases have recognized that the risk of litigation is an important factor in determining a fee award. *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *21 (C.D. Cal. June 10, 2005); *see also Stanger*, 2016 WL 191986, at *4 (in the context of lodestar enhancement, "[t]he district court ***must*** apply a risk multiplier to the lodestar 'when (1) attorneys take a case with the expectation they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence the case was risky'") (emphasis added). As more fully set out in the Final Approval Brief, the claims in this case, while meritorious, were difficult. Exceptionally high risk warrants a higher fee. *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 590 (E.D. Pa. 2005) (awarding high fee because claims were against auditor, and noting that auditors were named defendants in only 6% securities class actions filed in 2003 and 2004).

The pitfalls that still await the Class are described at greater length in the Final Approval Brief. But Plaintiffs have already surmounted many of the obstacles that made this case exceptionally risky. First, the PSLRA imposes staggering pleading burdens. *In re BP p.l.c. Sec. Litig.*, 852 F. Supp. 2d 767, 820 (S.D. Tex. 2012) ("The Court is acutely aware that federal legislation and authoritative precedents have created for plaintiffs in all securities actions formidable challenges to successful pleading.")[9] Indeed, 59% of securities class actions filed in each of 2010 and 2011 were dismissed.[10] This warrants a higher fee. *See Ikon*, 194 F.R.D. at 194-95 (taking into account pleading burdens imposed by PSLRA in awarding attorneys' fees).

Cases against auditors are even more difficult. *New Mexico State Inv. Council v. Ernst & Young LLP*, 641 F.3d 1089, 1097 (9th Cir. 2011) ("Typically, pleading sufficient facts to support a strong inference of scienter by an outside auditor is difficult because outsider auditors have more limited information than, for example, the company executives who oversee the audit.") Moreover, courts sometimes find that when an auditor misses deliberate fraud committed by management, the auditor's false statements did not cause the plaintiffs' losses because management's statements are "much more consequential and numerous." *In re AOL Time Warner, Inc. Sec. Litig.*, 503 F. Supp. 2d 666, 680 (S.D.N.Y. 2007). Indeed, Defendant GKM was sued for fraud by investors in two other companies it audited, and both cases were dismissed on the pleadings. *Campbell v. Weihe Yu*, 25 F. Supp. 3d 472, 476, 485-86 (S.D.N.Y. 2014); *Blitz v. AgFeed*

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[9] *See also Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) ("We need to bear in mind that we are not operating in the world of notice pleadings. In this technical and demanding corner of the law, the drafting of a cognizable complaint can be a matter of trial and error.")

[10] Cornerstone Research, Securities Class Action Filings: 2015 Year in Review, at 12, available at < https://goo.gl/5opvMV>.

Indus., Inc., No. 3-11-0992, 2014 WL 4792917, at *1 (M.D. Tenn. Sept. 25, 2014). Thus, surviving Defendants' challenge to the pleading was a significant achievement.

Second, claims with a low probability of success will sometimes be attractive if the potential payoff for class members is large. But here, as more fully set out in the Final Approval Brief, though class members' damages were substantial, it was plain that Defendants would not be able to pay a significant judgment – dramatically limiting the potential payoff. This extreme collectability risks supports a higher award. *Rieckborn v. Velti PLC*, No. 13-CV-03889-WHO, 2015 WL 468329, at *21 (N.D. Cal. Feb. 3, 2015) (defendant's precarious financial condition justified risk enhancement); *In re Diamond Foods, Inc., Sec. Litig.*, No. C 11-05386 WHA, 2014 WL 106826, at *3 (N.D. Cal. Jan. 10, 2014) (same).

Third, Deer was not as widely known to investors as name-brand companies like General Motors. Indeed, investors alleged that Wey was able to prevent its stock price from falling for almost two weeks following an article claiming that Deer had committed astounding fraud. SAC ¶ 255. Plaintiffs thus risked being unable to show that Deer's stock " traded in an efficient market reflects all public, material information" permitting class certification. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2405, 189 L. Ed. 2d 339 (2014).

Fourth, the Court should take into account the risk of litigating this case on contingency. *Willner v. Manpower Inc.*, No. 11-CV-02846-JST, 2015 WL 3863625, at *6 (N.D. Cal. June 22, 2015). This case has been ongoing for almost 3 years, and counsel has spent 460.8 hours thus far. Rosen Fee Dec. ¶6. Counsel has not been paid for their efforts. And counsel has spent $79,762.41 litigating the case. Rosen Fee Dec. ¶7. Here, the risk was not just that the case would be dismissed. When a law firm takes on a case on contingency, it incurs the

obligation to continue with representation even if it becomes clear that the case will never be profitable. Thus, Lead Counsel risked that it would not be able to secure a substantial settlement until the eve of trial, or would spend three or four thousand hours of time and hundreds of thousands of dollars of litigation costs taking this case through to trial to obtain a judgment no better than the Settlement they have today.

Yet the best evidence that the case was risky and undesirable was that it was not desired, in that no other class member or law firm was willing to take on the burdens of appointment as lead plaintiffs and class counsel. Indeed, at least one class member specifically declined to seek appointment because of the risk. Lead Counsel was contacted by a law firm representing a different class member whose losses reportedly substantially exceeded Mr. de Sejournet's. But the law firm later informed Lead Counsel that the class member reconsidered his decision to move for appointment as lead plaintiff, because any recovery seemed "remote," Rosen Dec. ¶4 – even though the class member stood to recover even more than Lead Plaintiffs.

C. The Skill Required, the complexity of the issues, and The Quality And Efficiency Of The Work

Lead Counsel has extensive experience in securities class actions. Moreover, Counsel prosecuted this action efficiently and with great skill.

The "prosecution and management of a complex national class action requires unique legal skills and abilities." *Knight v. Red Door Salons, Inc.*, No. 08-01520 SC, 2009 WL 248367, at *6 (N.D. Cal. Feb. 2, 2009). The standing and prior experience of Lead Counsel are relevant in determining fair compensation. *See, e.g., City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974); *Eltman v. Grandma Lee's Inc.*, 1986 WL 53400, at *9 (E.D.N.Y. May 28, 1986). Lead Counsel's firm's fee declaration includes a description of the background

and experience of Lead Counsel. *See* Rosen Fee Dec. Ex. A. As that submission demonstrates, Lead Counsel has extensive and significant experience in the highly specialized field of securities class action litigation. "The Rosen Law Firm has appeared before this Court several times before, and the Court is confident that it has the necessary skill and knowledge to effectively prosecute this action." *Pace v. Quintanilla*, No. SACV 14-2067-DOC, 2014 WL 4180766, at *3 (C.D. Cal. Aug. 19, 2014). Further, Lead Counsel has extensive experience with cases involving misconduct in China. *Khunt v. Alibaba Grp. Holding Ltd.*, 102 F. Supp. 3d 523, 540 (S.D.N.Y. 2015) ("[T]he Rosen firm has extensive experience navigating the particular complexities of litigation with Chinese companies that may claim a state secrets privilege. Moreover, in contrast to every other firm that appeared before this Court at the April 24, 2015 conference, the Rosen firm employs fluent Chinese speakers.") And the quality of Lead Counsel's work is reflected in the excellent result obtained.

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); *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Colo. 1976); *Arenson v. Bd. of Trade*, 372 F. Supp. 1349, 1354 (N.D. Ill. 1974). Plaintiffs were opposed in this litigation by very skilled, highly respected, and nationally recognized defense counsel who specializes in the complex field of professional liability. Rosen Dec. ¶12.

Given, the complexity of the issues presented in this Action, including the hotly contested issues of loss causation, scienter, and damages, only highly skilled counsel could have successfully represented the Class and obtained such a favorable recovery. Rosen Dec. ¶14. In fact, in order to effectively plead and prosecute the Litigation, Lead Counsel was required to become familiar with Chinese Accounting issues and probe complex issues regarding the pleading and

proof of scienter. Moreover, it is particularly important to reward attorneys with skill and standing for pursuing such cases as "the stated goal in percentage fee-award cases [is] 'ensuring that competent counsel continue to be willing to undertake risky, complex and novel litigation.'" *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000).

Further, Lead Counsel litigated this Action efficiently. The lodestar of $262,403.10, Rosen Fee Dec. ¶ 6, to take this case through motions to dismiss, class certification, and much of discovery, is much lower than with other cases arising out of the PSLRA that did not even proceed beyond the pleadings. *In re Am. Apparel, Inc. S'holder Litig.*, No. CV1006352MMMJCGX, 2014 WL 10212865, at *27 (C.D. Cal. July 28, 2014) (lodestar of $2.0 million for case that settled before discovery began); *Rieckborn v. Velti PLC*, No. 13-CV-03889-WHO, 2015 WL 468329, at *21 (N.D. Cal. Feb. 3, 2015) (lodestar of $1.9 million before significant motion practice).

And Plaintiffs evaluated the merits and risks presented, negotiated a very favorable amount for the Class, and settled the litigation on an excellent basis for the Class. Such quality, efficiency, and dedication should be rewarded.

D. The Customary Fee

If this were not a class action, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery. *See, e.g.*, *Blum*, 465 U.S. at 903 n.20 ("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"); *In re M.D.C. Holdings Sec. Litig.*, No. CV89-0090 E (M), 1990 WL 454747, at *7 (S.D. Cal. Aug. 30, 1990) ("In private contingent litigation, fee contracts have traditionally ranged between 30% and 40% of the total recovery"); *Kirchoff*, 786 F.2d at 323 (40% contractual award if case had gone to trial). Thus, as the customary contingent fee in the private

marketplace – 30% to 40% of the fund recovered – is even greater than the percentage-of-recovery fee requested in this case, Counsel's request is quite reasonable.

Lead Counsel's efforts were performed and the result was achieved on a wholly contingent basis, despite significant risk and in the face of determined opposition. Under these circumstances, it necessarily follows that Counsel is justly entitled to the award of a reasonable percentage fee based on the benefit conferred and the common fund obtained. Under all of the circumstances present here, a $33^{1/3}$% fee plus expenses is fair and reasonable.

E. A Lodestar Cross-Check Shows the Fee Request Is Reasonable

Courts often compare an attorney's lodestar with a fee request made under the percentage of the fund method as a "cross-check" on the reasonableness of the requested fee. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002); *Fischel v. Equitable Life Assur.*, 307 F.3d 997, 1007 (9th Cir. 2002). "[T]he lodestar calculation can be helpful in suggesting a higher percentage when litigation has been protracted [and] may provide a useful perspective on the reasonableness of a given percentage award." *Vizcaino*, 290 F. 3d at 1050. Significantly, in securities class actions it is common for a counsel's lodestar figure to be adjusted upward by some multiplier reflecting a variety of factors such as the effort expended by counsel, the complexity of the case, and the risks assumed by counsel.

The lodestar can be performed by "relying on sworn statements of qualified attorneys regarding the hours reasonably expended and their customary billing rates." *Aichele*, 2015 WL 5286028, at *6 (*citing Fernandez v. Victoria Secret Stores, LLC*, No. CV 06-04149 MMM SHX, 2008 WL 8150856, at *9 (C.D. Cal. July 21, 2008)). Here, the total lodestar for The Rosen Law Firm, P.A. is $262,403.10 *See* Rosen Fee Dec. ¶6. Thus, counsel's fee request is equal to

approximately 1.8 times the lodestar. Such a multiplier is "well within the range approved by the Ninth Circuit." *Adoma v. Univ. of Phoenix, Inc.*, 913 F. Supp. 2d 964, 984 (E.D. Cal. 2012) (1.45 multiplier "well within" range); *In re TracFone Unlimited Serv. Plan Litig.*, 112 F. Supp. 3d 993 (N.D. Cal. 2015) (similar, 1.7 multiplier); *Zynga*, 2016 WL 537946, at *21 (1.7 multiplier "towards the lower end of the Ninth Circuit's scale"). [11]

Lead Counsel charged their customary billing rates. And Lead Counsel's rates are reasonable. Lead Counsel's hourly rates are $650-775 for partners, and up to $570 for associates. In May 2014, Judge Carter approved Lead Counsel's partner hourly rates of $750 and associate rates of up to $550. *Vinh Nguyen v. Radient Pharm. Corp.*, No. SACV 11-00406 DOC, 2014 WL 1802293, at *11 (C.D. Cal. May 6, 2014). The rates requested here are only slightly higher to account for Lead Counsel's attorneys' increased experience.

F. The Reaction Of The Class Supports The Requested Award

Over 33,404 Claim Packets were mailed to potential Settlement Class Members and a Summary Notice was published in *Investor's Business Daily* and made available to the public on the Claims Administrator's website. Bravata Dec, ¶¶ 1, 7, 10. Settlement Class Members were informed in the Notice that Plaintiffs' Counsel would apply for attorneys' fees of up to 33 $^{1/3}$% of the Settlement Fund, plus reimbursement of litigation costs and expenses, plus interest, and were advised of their right to object to Plaintiffs' Counsel's fee request. To date, no

[11] *See In re Ravisent Sec. Litig.*, 2005 WL 906361, *12 (E.D. Pa. April 18, 2005)(fee represented a multiplier of 3.1 of the lodestar); *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, *16 (E.D. Pa. June 2, 2004)(noting that from 2001 through 2003, the average multiplier approved in common fund cases was 4.35).

objections and only two requests for exclusion have been received. *See* Bravata Dec, ¶ 10-11.

V. LEAD COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARY TO ACHIEVE THE BENEFIT OBTAINED

The Notice informed Class Members that Lead Counsel would seek reimbursement of litigation expenses of no more than $100,000. Bravata Dec. Ex. A. Lead Counsel's expenses are reasonable and were necessarily incurred as a part of Counsel's efforts to achieve an excellent recovery for the Class. Lead Counsel has incurred unreimbursed out-of-pocket expenses in an amount of $79,762.41 in prosecuting this litigation since inception. Rosen Fee Dec. ¶7.

The Court should approve Plaintiffs' request for reimbursement of Plaintiffs' Counsel's expenses. Courts have found that counsel for the Class are entitled to reimbursement for those types of out-of-pocket expenses that an attorney would normally expect the client to pay. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("[plaintiff] 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); *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 a client); *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995) (same); *MiltlandRaleigh-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 are the type of expenses routinely charged to paying clients and, therefore, should be reimbursed out of the common fund. A breakdown of the expenses is listed on

page 2 (¶7) of Exhibit 2 to the Rosen Declaration. The largest expenses are expert fees of $53,533. An accounting expert was necessary to plead this accounting fraud case, both to advise on relevant accounting standards and assist Plaintiffs in their discussions with employees of the accounting firm Defendants employed to conduct their Chinese audits. A financial expert was necessary to establish that Deer's stock trades on an efficient market, permitting this case to proceed as a class action. *Wal-Mart*, 131 S. Ct. at 2552, n.6 (suggesting that proving market efficiency is essential to maintaining a securities class action based on misrepresentations). The expert fees are reasonable and, indeed, relatively small. *Nguyen*, 2014 WL 1802293, at *11 (total costs of $420,000, of which "vast majority" were expert opinions and testimony, were reasonable). The remaining costs, which account for another $26,176.97, consist of the costs of online legal research, mediation, postage, service of process and filing, travel, and photocopying, which are customarily reimbursed in class settlements. Courts have recognized that these are expenses that should be reimbursed. *In re UnitedHealth Grp. Inc. S'holder Derivative Litig.*, 631 F.3d 913, 919 (8th Cir. 2011) (citing *InvesSys, Inc. v. McGraw-Hill Companies, Ltd.*, 369 F.3d 16, 22 (1st Cir. 2004); *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany*, 369 F.3d 91, 98 (2d Cir. 2004) and *Matter of Cont'l Illinois Sec. Litig.*, 962 F.2d 566, 570 (7th Cir. 1992)) (all recognizing that similar expenses are reimbursable); *Immune Response*, 2007 WL 2071566, at *10.

The retention of a professional mediator was necessary for the successful prosecution and resolution of the Action on behalf of the Class. *American Apparel*, 2014 WL 10212865, at *29; *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1177 (S.D. Cal. 2007). Travel and lodging expenses were necessary to the prosecution of the action, were reasonable in amount and are properly charged

against the fund created. *Harris*, 24 F.3d at 19; *Immune Response*, 497 F. Supp. 2d at 1177. Similarly, photocopying and scanning costs associated with document production and ECF filings and comparable costs are customarily reimbursed in common fund cases. *See Harris*, 24 F.3d at 19; *Immune Response*, 497 F. Supp. 2d at 1177; *In re McDonnell Douglas Equip. Leasing Sec. Litig.*, 842 F. Supp. 733, 746 (S.D.N.Y. 1994).

VI. AWARD TO LEAD AND NAMED PLAINTIFFS SHOULD BE APPROVED

The PSLRA provides that courts may approve awards to reimburse lead plaintiffs for reasonable costs and expenses, including lost wages, related to representing the class. *See* 15 U.S.C. §78u-4(a)(4). The payments requested by Lead Plaintiffs here fall well within the range that courts typically award. *E.g. American Apparel*, 2014 WL 10212865, at *31 ($6,600); *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 1000 (D. Minn. 2005) ($100,000 between 8 lead plaintiffs); *In re Charter Commc'ns, Inc., Sec. Litig.*, No. 4:02-CV-1186 CAS, 2005 WL 4045741, at *25 (E.D. Mo. June 30, 2005) ($26,625); *In re Evergreen Ultra Short Opportunities Fund Sec. Litig.*, No. CIV.A. 08-11064-NMG, 2012 WL 6184269, at *2 (D. Mass. Dec. 10, 2012) (up to $20,000).

Plaintiffs were actively involved in every step of the litigation, from moving for appointment as Lead Plaintiffs, to reviewing the Complaints, to moving for appointment as Class Representatives, to producing documents in response to Defendants' motions to dismiss and responding to interrogatories and requests for admission. Lead Plaintiffs also oversaw settlement discussions, personally awarding Lead Counsel settlement authority before the Mediation, and personally approving the Settlement before its consummation. Henick Dec. ¶4; de Sejournet

Dec. ¶4; Holder Dec. ¶4. Messrs. Henick and de Sejournet request an amount that is less than the value of the time they have spent on this case. Henick Dec. ¶5; de Sejournet Dec. ¶5.

And Lead Plaintiffs incurred some notoriety in prosecuting this Action. *Rose* began with a threat of Rule 11 sanctions, and in the course of litigation, Benjamin Wey personally called Mr. de Sejournet to threaten him. Rosen Dec. ¶18. And Wey uses a blog which he routinely uses to defame his enemies. *E.g. Bouveng v. NYG Capital LLC*, No. 14 CIV. 5474 PGG, 2015 WL 3503947, at *3 (S.D.N.Y. June 2, 2015); Roddy Boyd, Meet Benjamin Wey, Media Mogul, Southern Investigative Reporting Foundation, February 3, 2014 (available at <http://sirf-online.org/2014/02/03/249/>). By prosecuting this lawsuit, Lead Plaintiffs incurred the risk that Wey would devote his considerable time to defaming them. And Lead Plaintiffs were the only class members willing to take on the job; the class owes them their recovery. They should be rewarded.

VII. CONCLUSION

Securities class actions are complex and laden with risk. In many cases no different than this one, after incurring thousands of hours of attorney time and hundreds of thousands of dollars in expenses, Lead Counsel received no compensation whatsoever. As demonstrated above, this complex litigation has been extremely hard-fought. Plaintiffs were faced with determined adversaries represented by experienced and equally determined defense counsel. Without any assurance of success, Plaintiffs and Lead Counsel pursued this Litigation to an excellent conclusion. The Settlement represents a fair recovery on behalf of the class and reflects the skill and dedication of Plaintiffs' Counsel. It is respectfully requested that the Court approve the fee and expense application and enter the Order submitted herewith awarding Lead Counsel 33 $^{1/3}$% of the Settlement Fund

plus reimbursement of expenses, plus interest earned thereon at the same rate and for the same period as that earned on the Settlement Fund until paid, reimbursement of expenses of $79,762.41, and a collective award to Lead Plaintiffs in the amount of $30,000 in total (or $10,000 to each of them).

DATED: February 12, 2016

Respectfully submitted,

THE ROSEN LAW FIRM P.A.

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Counsel for Lead Plaintiffs

CERTIFICATE OF SERVICE

I, Laurence M. 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 February 12, 2016, I caused to be electronically filed the following **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES, AND AWARDS TO LEAD PLAINTIFFS** with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to counsel of record.

Executed on February 12, 2016

/s/ Laurence M. Rosen