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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

IN RE FIREEYE, INC. SECURITIES LITIGATION	Lead Case No.: 1-14-cv-266866 (Consolidated with Case No. 1-14-CV-268110)
This Document Relates To: ALL ACTIONS.	**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES, AND OF LEAD PLAINTIFF'S REQUEST FOR A SERVICE AWARD** Date: August 4, 2017 Time: 9:00 a.m. Judge: Hon. Peter H. Kirwan Dep't.: 19 Date Actions Filed: June 20, 2014 July 17, 2014

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I. PRELIMINARY STATEMENT[1]

Through their diligence and hard work, Plaintiff's Counsel have obtained a $10,250,000 settlement for the Class. The Settlement – as further detailed in Plaintiff's Memorandum in Support of Motion for Final Approval of the Settlement ("Final Approval Brief") – represents an excellent recovery obtained after years of hard-fought litigation in a complex case and in the face of substantial litigation risk. Plaintiff's Counsel, who litigated this action on an entirely contingent basis, now move this Court for an award of attorneys' fees equal to 33⅓% of the Settlement Fund (or $3,416,667), plus reimbursement of expenses in the amount of $415,306.60.

The quality of the result achieved and the existence of real litigation risk are among the key factors that California courts consider in awarding fees. Just as these factors weigh strongly in favor of approving the Settlement (*see* Final Approval Brief), they weigh just as strongly in favor of approving the requested fee.[2] Equally important, the amount of work that counsel spent in successfully litigating this action from start to finish – navigating it past multiple dispositive motions, through significant discovery and class certification, and ultimately to an excellent $10.25 million recovery (and all in the face of determined opposition by Defendants' nationally renowned law firms) – also strongly favors approval of the requested fee. For example, Plaintiff's Counsel's extensive work on this case included:

(a) researching and preparing the initial and amended consolidated complaints;

(b) briefing and successfully defeating both the FireEye and Underwriter Defendants' respective demurrers;

(c) successfully opposing FireEye's following motion to require posting of an undertaking;

(d) identifying, retaining, and consulting with their liability expert to help successfully navigate a case involving an exceptionally complex cybersecurity product;

(e) obtaining and reviewing over a million pages of documents from the Defendants;

(f) successfully arguing several important discovery disputes before the Court;

(g) responding to Defendants' written discovery requests, which included (i) searching for, reviewing and producing over 2000 pages of documents from the files of Lead Plaintiff DeKalb County, and (ii) responding to Defendants' multiple sets of interrogatories;

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[1] Unless otherwise defined herein, capitalized terms have the meanings given them in the Stipulation and Agreement of Settlement ("Stipulation" or "Settlement") dated February 6, 2017.

[2] Because most of the factors supporting final approval of the Settlement also support the requested fee award, Plaintiff's Counsel incorporate herein the concurrently filed Final Approval Brief.

(h) preparing for and defending the Lead Plaintiff's PMK deposition;

(i) preparing for and participating in nearly 20 IDCs and/or CMCs before the Court;

(j) preparing opening, reply and supplemental briefs, and working with multiple experts in conjunction with their affidavits, in support of Plaintiff's Motion for Class Certification;

(k) deposing FireEye's CEO (defendant DeWalt) and its co-founder and former Chief Technology Officer (defendant Aziz);

(l) briefing and defeating the Defendants' Motion for Judgment on the Pleadings;

(m) preserving this Court's ruling denying Defendants' Motion for Judgment on the Pleadings in subsequent appellate proceedings in (i) the California Court of Appeal, (ii) the California Supreme Court, and (iii) the United States Supreme Court;

(n) drafting comprehensive mediation briefs and otherwise preparing to mediate before Judge Layn Phillips (Ret.) and engaging in the full-day, face-to-face mediation;

(o) negotiating and drafting the terms of the "long-form" Stipulation of Settlement papers;

(p) developing the terms of the Notice Plan and the Proof of Claim form with KCC Class Action Services LLC (the Court-appointed Claims Administrator in this matter);

(q) preparing all the papers in support of preliminary approval of the Settlement; and

(r) preparing all the papers in support of final approval of the Settlement.

See Declaration of William C. Fredericks in Support of Motion for Final Approval of Settlement and Award of Attorneys' Fees, dated June 29, 2017 ("Fredericks Decl."), ¶¶14-45.

Based on the results obtained, work performed, and all other factors discussed below, a 33⅓% fee is fair, reasonable, and fully consistent with percentage fees awarded in class actions by courts in California and across the nation. The requested fee (equal to $3,416,667) is also plainly reasonable under the "lodestar/multiplier" method, as it is only a fraction of the value of the time (11,951.5 hours) and resulting lodestar ($7,220,988.50) that Plaintiff's Counsel spent litigating the case on behalf of the Class. *Cf. Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5th 480, 488 (2016) (affirming 33⅓% fee on $19 million recovery that equated to 2.03 to 2.13 multiplier on counsel's time, compared to negative multiplier of approximately .47 here).[3] That the requested fee is fair under either method (and under the hybrid percentage/cross-check approach) only further justifies its approval.

Plaintiff's Counsel's request for $415,306.60 in litigation expenses should also be

[3] Where (as here) the requested fee is *less than* the lodestar value of the attorney time that plaintiffs' counsel devoted to the case, the resulting multiple (of less than 1.0) is referred to as a negative multiplier. *See, e.g., Rogel v. Lynwood Redevelopment Agency,* 194 Cal. App. 4th 1319, 1328 (2011).

approved, as it seeks reimbursement for costs (such as travel costs and expert, court reporter and mediator fees) that were reasonably incurred and are customarily reimbursed. *See* §III below. Finally, the requested $7,500 award to Lead Plaintiff DeKalb County for its work on behalf of the Class should also be approved as fair, reasonable, and consistent with awards in other cases. *See* §IV below.

II. THE REQUESTED ATTORNEYS' FEE AWARD IS FULLY JUSTIFIED UNDER BOTH THE PERCENTAGE AND LODESTAR/MULTIPLIER METHODS, AS WELL AS UNDER THE HYBRID PERCENTAGE/CROSS-CHECK APPROACH

A. Under the Common Fund Doctrine, Courts Should Award Attorneys' Fees to Counsel Whose Efforts Have Resulted in a Common Fund

Where a case results in a common fund for the benefit of a class, courts award plaintiffs' counsel reasonable fees and expenses out of that fund. *Serrano v. Priest*, 20 Cal. 3d 25, 35 (1977) (citing the "historic power of equity to permit . . . a party preserving or recovering a fund for the benefit of others . . . to recover his costs, including his attorneys' fees, from the fund").[4]

B. The Three Customary Methods for Awarding Attorneys' Fees

Historically, there have been two basic methods to calculate attorney fees in class actions: "the lodestar/multiplier method and the percentage of recovery method." *Wershba v. Apple Computer*, *Inc.*, 91 Cal. App. 4th 224, 254 (2001). Courts may also apply a hybrid approach, under which a court first decides upon a reasonable percentage fee and can then adjust it up or down based on whether a "lodestar crosscheck" results in a disproportionately low or high "implied multiplier." *Laffitte,* 1 Cal. 5th at 496, 505. Under all approaches, courts also consider various important qualitative factors (*e.g.,* litigation risk, results obtained, complexity of issues). *Id.* at 489, 504; *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 26 (2000); *see also* §§C, C.1-C.5 below. Trial courts have discretion to decide which method to apply in common fund cases. *Laffitt,* 1 Cal. 5th at 505-06; *Glendora Cmty. Redevelopment Agency v. Demeter*, 155 Cal. App. 3d 465, 474 (1984).

Under the ***percentage method***, courts award a specified percentage of the common fund. As discussed below at §II.C, a 33⅓% fee is well within the range that courts routinely find is reasonable and fair. Commonly cited reasons for using this method are that it (1) directly "align[s]

[4] Unless otherwise noted, all citations are omitted and emphasis is added.

incentives between counsel and the class," as it incentivizes plaintiffs' counsel to try to obtain the maximum possible recovery in the shortest time and by the most efficient means (*Laffitte,* 1 Cal. 5th at 503); (2) provides predictability consistent with counsel's and clients' reasonable expectations (*see Kirchoff v. Flynn,* 786 F.2d 320, 325-26 (7th Cir. 1986)); and (3) is consistent with fees in the private legal marketplace, where clients who cannot pay an hourly fee on a current basis often enter into contingent percentage fee arrangements (*Laffitte*, 1 Cal. 5th at 503 (percentage method "better approximat[es] market conditions" in contingency cases); *see also Blum v. Stenson*, 465 U.S. 886, 903 (1984) ("[i]n tort suits, an attorney might receive one-third of whatever . . . plaintiff recovers").[5] Significantly, this approach also conserves scarce judicial resources, as it avoids the "enervating" and time-consuming review of detailed attorney time records associated with the lodestar method. *Laffitte*, 1 Cal. 5th at 493, 503.[6]

Under the ***lodestar/multiplier method***, one calculates the fee "by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate." Then, as *Laffitte* notes:

> [O]nce the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative 'multiplier' to take into account a variety of other factors, including [1] the quality of the representation, [2] the novelty and complexity of the issues, [3] the results obtained, and [4] the contingent risk presented.

1 Cal. 5th at 489. Thus, "[t]he lodestar method better accounts for the amount of work done . . . and has been praised as providing better accountability and encouraging plaintiffs' attorneys to pursue marginal increases in recovery," but has been "criticized for discouraging early settlement and consuming too large an amount of judicial resources in its application." *Id.* at 489-90.

Finally, under the ***hybrid "***percentage fee/lodestar cross-check" method, courts "blend" the above approaches so that "one method is used to confirm or question the reasonableness of the other's result." *Id.* at 496. Under this method, the court first "compute[s] a fee using the percentage method," and then determines the extent to which that fee would represent a positive or "negative" multiplier on the base (unmultiplied) value of counsel's aggregate lodestar:

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[5] *See also In re Prudential-Bache Energy Inc. P'ships Sec. Litig.*, No. 888, 1994 WL 202394, at *2 (E.D. La. May 18, 1994)(if not a class case "attorney's fees would range between 30% and 40%, the percentages commonly contracted for in contingent cases."); *Pinto v. Princess Cruise Lines, Ltd.,* 513 F. Supp. 2d 1334, 1341 (S.D. Fla. 2007) ("percentages [in non-class cases] vary, with one-third being particularly common").

[6] *See also In re Calif. Indirect Purchaser X-Ray Film Antitrust Litig.*, No. 960886, 1998 WL 1031494, at *9 (Alameda Super. Ct. Oct. 22, 1998) (California courts are not required to undertake "the time-consuming effort of examining the details of the services provided in order to award Class Counsel attorney's fees.").

> Stated another way, the ratio of the percentage-based fee to the lodestar-based fee implies a multiplier, and that implied multiplier can be evaluated for reasonableness. *If the implied multiplier is unreasonable … the court should revisit its assumptions.*

Id.; *see also id.* at 505 (court may adjust adjust fee up or down based on lodestar crosscheck). Some have worried that using a lodestar cross-check might reintroduce the worst drawback of the lodestar method – the "undue consumption of judicial resources." *Laffitte,* 1 Cal. at 504. However, if properly used, the lodestar cross-check will not impose such burdens, as it does *not* require courts to "closely scrutinize each claimed attorney hour," but instead permits them to rely on *summaries* of attorney time in order to determine whether the percentage fee "'appropriately reflects' the degree of time and effort spent by the attorneys." *Id.* at 505; *Barbosa v. Cargill Meat Solutions Corp.,* 297 F.R.D. 431, 451 (E.D. Cal. 2013) (use of lodestar as a "cross-check" involves less exhaustive review of counsel's time).

As the requested 33⅓% fee here is amply warranted under all three methods, the choice of method does not materially affect the result. However, Plaintiff's Counsel suggest that the Court should adopt the hybrid approach here, as it combines the best features of both the percentage-based method (which "more accurately reflects the results achieved") and lodestar/multiplier method (which "better accounts for the amount of work done") (*Laffitte,* 1 Cal. 5th at 504), while avoiding the burdens of having to "exhaustively scrutiniz[e]" detailed time entries. *Id.* at 505.

C. The Percentage-Based Approach and Related Multi-Factor Considerations Strongly Support the Requested 33⅓% Fee

As discussed below at §II.C.5, a 33⅓% fee request falls well within the range of percentage-based fees customarily awarded in class actions in California state courts. *See California Indirect Purchaser*, 1998 WL 1031494, at *9 (collecting cases awarding between 30% and 45%); *Laffitte*, 1 Cal. 5th at 506 (affirming fee award of 33⅓% of $19 million settlement); *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 (2008) (citing empirical studies showing that, regardless of the method used, "fee awards in class actions ***average*** around one-third of the recovery").

In determining if a requested percentage fee is fair, California courts also usually consider the following factors: (1) quality of the result obtained; (2) risks and complexity of action; (3) contingent nature of the representation; (4) time and labor expended by counsel; (5) counsel's

experience and reputation, and the skill they showed in the litigation; (6) awards in similar cases; and (7) the client's consent to the fee request and the reaction of the Class. *See Laffitte,* 1 Cal 5th at 504; *Calif. Indirect Purchaser*, 1998 WL 1031494, at *3; *In re Omnivision Techs., Inc.*, No. C-04-2297-SC, 2007 WL 4293467, at *9 (N.D. Cal. Dec. 6, 2007). As shown below, these factors support a percentage fee at the high end of the "reasonable percentage fee range" here – and *a fortiori* fully support the "average" one third fee requested here. *Cf. Chavez,* 162 Cal. App. 4th at 66 n.11.

1. The Result Achieved

"Results achieved" is a key factor, and weighs strongly in favor of approval here. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("degree of success obtained" is "critical factor"); *Laffitte,* 1 Cal. 5th at 504 (percentage method is meant to align fee with quality of result obtained).

As detailed in the Final Approval Brief, counsel here achieved more than a merely "reasonable" settlement; instead, they achieved a superior result. Based on published data, the $10.25 million recovery is 40% higher than the median recovery ($7.3 million) for all securities class actions in 2015 (the figure was $6.8 million in 2014),[7] and it appears to be the *second* largest recovery ever in a 1933 Act case filed in California state court. Fredericks Decl., ¶46. The $10.25 million Settlement also represents roughly 15% of the Class's estimated reasonably recoverable damages of $68 million (after taking into account this Court's narrowing of the original Class definition to include only those who bought directly "in" the Secondary Offering). *Id.* By contrast, the NERA Report (at 33) found that the median settlement in cases involving $50 million to $200 million in estimated damages recovered only 3.4% to 4.5% of investor losses.

The Court should also consider that this decidedly above-average result was obtained in the face of above-average risk in a complex case involving a purportedly cutting edge product in the ultra-high tech cybersecurity industry. *See* §II.C.2 below. Superior results obtained in the face of above-average risk should logically support a *larger* than average percentage fee award – yet here, the requested 33⅓% fee is well within what is regularly approved in securities class actions. *See*

[7] *See* S. Starykh & S. Boettrich, *Recent Trends in Securities Class Action Litigation*, NERA Economic Consulting (Jan. 25, 2016) ("NERA Report"), at 28 [www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf.].

§C.5 below. Accordingly, the "results achieved" factor strongly supports the requested fee.

2. The Risks of Continued Litigation and the Complexity of the Case

Securities litigation in general is both complex and high risk,[8] and this case was certainly no exception. *See also* Fredericks Decl., ¶¶48-59; Final Approval Brief at §II.B.2.

First, Defendants vigorously denied that Lead Plaintiff could show that challenged statements in the Offering Materials were false, denied that FireEye products generated more than a "non-negligible" numbers of "false positives," and argued that statements to the effect that FireEye products offered "complete" and "comprehensive" solutions were inactionable "puffery." Defendants also argued that they did not and could not have known that an independent firm would give FireEye technology dismal ratings just a few weeks after the Offering, and that they lacked sufficient information as of the March 6, 2014 Offering date to conclude that FireEye product revenue was declining (as full first-quarter data would not be in until after March 30, when the quarter ended). Fredericks Decl., ¶¶49-52.

Based on the discovery taken, Plaintiff's Counsel believe they could have won on liability, but knew that success at trial was far from certain. For example, matters relating the scope of the "puffery" defense and the limits on companies' obligations to disclose claimed trends and likely contingencies that have not fully materialized involve unsettled legal questions. Moreover, given the technical nature of the cybersecurity products at issue, liability issues were likely to boil down to a hotly contested and inherently unpredictable "battle of the experts." *See, e.g., In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744 - 45 (S.D.N.Y 1985) ("it is virtually impossible to predict with any certainty which [expert] testimony would be credited"). Counsel believe that they would have been able to offer persuasive expert testimony to support their claims – but Defendants plainly had the resources to put forward highly qualified and persuasive experts of their own.

Similarly, loss causation and damages issues would have turned on a battle of experts, as Defendants would have offered experts to show that the post-Offering price declines in FireEye

[8] *See, e.g., Maley v. Del Global Techs. Corp.,* 186 F. Supp. 2d 358, 372 (S.D.N.Y. 2002) (a securities case "by its very nature is a complex animal", and awarding 33⅓% fee on $11.5 million recovery in securities case that settled prior to decision on motions to dismiss and before commencement of formal discovery).

shares were due to factors unrelated to any alleged misstatements or omissions.[9] For example, although FireEye stock fell sharply on May 7, 2014 when it disclosed a decline in reported product revenue, Defendants had strong arguments that the stock's decline was unrelated to the prior concealment of problems with their product, and was instead due to a negative market reaction to a corporate deal that FireEye had also announced that day. In short, even if Plaintiff prevailed on liability, there was no assurance that it could have recovered damages as large as – let alone larger than – the $10.25 million obtained under the proposed Settlement. Fredericks Decl., ¶¶54-55.

In addition, as to class certification issues, Defendants have continued to push their novel argument that the "commingling" (prior to their distribution) of the Offered Shares by the lead underwriter defeated "traceability" even for investors who bought "in" the Secondary Offering. Although Plaintiff's Counsel believe that this argument is baseless, the Court's July 11, 2016 class certification Order stated that the Court might revisit the issue at summary judgment – thereby raising the risk that even the narrowed Class that the Court certified (which excluded "aftermarket" purchasers) would ultimately be decertified. Fredericks Decl., ¶56.

Moreover, although Plaintiff's Counsel reviewed a million pages of FireEye documents and had begun deposing senior FireEye officers prior to the mediation, the credibility of as-yet un-deposed defendants remained as a major risk factor. Expert discovery on liability, causation, and damages issues had also not yet begun – and the risks of complex summary judgment motions, trial, post-trial motions, and likely appeals still loomed. In this regard, it is worth noting that even after Plaintiff defeated FireEye's post-demurrer Motion for Judgment on the Pleadings, Defendants pursued *literally every avenue* to reverse this Court's order on that Motion (which Plaintiff then had to oppose) – which included filing interlocutory petitions for writ relief in (1) the California Court of Appeals, (2) the California Supreme Court, and (3) the U.S Supreme Court.

Given the myriad legal and factual complexities of the case and related risks – particularly when combined with the zealousness of Defendants and their counsel in contesting virtually every

[9] *See Mallen v. Alphatec Holdings, Inc.*, 861 F. Supp. 2d 1111, 1131 (S.D. Cal. 2012) ("Absence of loss causation, or 'negative causation,' is an affirmative defense to a §11 or §12(a)(2) claim where a portion of the stock price decline is not attributable to the alleged misrepresentation or omission."); *see also Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (overturning jury verdict of $81 million for plaintiffs against an accounting firm on loss causation grounds, and entering judgment for defendant).

possible issue – the "litigation risk and complexity" factor also strongly supports the requested fee.

3. The Contingent Nature of the Case

Plaintiff's Counsel undertook this case on a fully contingent basis. Unlike defense counsel who are paid their hourly rates on a regular basis, Plaintiff's Counsel have therefore received *nothing* for their work since this case was filed three years ago, and assumed a real risk that the action would produce no recovery and leave them entirely uncompensated for their efforts.

Courts consistently recognize that the risk of receiving little or no recovery is a major factor in considering attorneys' fee awards. *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 54 (2d Cir. 2000) (level of risk taken by plaintiffs' counsel is "perhaps the foremost factor" in considering fair percentage award); *Prudential-Bache,* 1994 WL 202394, at *6 ("contingent fee risk is an important factor. . . . Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable.").[10] This is only logical, because in the legal marketplace, an attorney who takes a case on contingency expects a materially higher fee than an attorney who (regardless of their success) is regularly paid as the case proceeds. For example, as the Court of Appeals stated in *Cazares v. Saenz*:

> In addition to compensation for the legal services rendered, there is the raison d'etre for the contingent fee: the contingency. [A contingent fee] lawyer … receives nothing unless the plaintiff obtains a recovery. *Thus, in theory, a contingent fee in a case with a 50 percent chance of success should be twice the amount of a noncontingent fee for the same case. . . .*

208 Cal. App. 3d 279, 288 (1989).[11] Thus, this factor also strongly supports the requested fee.

4. Time and Labor Required (and Lodestar "Crosscheck")

Collectively, Plaintiff's Counsel spent 11,951.5 hours litigating this hard-fought case. Counsel's work included, *inter alia,* (a) conducting a pre-filing investigation; (b) drafting the

[10] Case law and counsel's own experience confirm that the risk of no recovery in securities cases is all too real. The many reported examples of such cases where plaintiffs' counsel expended thousands of hours but received no compensation include: *Robbins,* 116 F.3d 1441 ($81 million jury verdict against accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant); *Eisenstadt v. Centel Corp.*, 113 F.3d 738 (7th Cir. 1997) (affirming grant of summary judgment for defendants); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning, in 1996, securities class action jury verdict for plaintiffs in case *filed in 1973* and ultimately tried in 1988, citing post-trial 1994 U.S. Supreme Court opinion); *In re Apple Computer Sec. Litig.*, No. C-84-20148, 1991 WL 238298 (N.D. Cal. Sept. 6, 1991) (after class won jury verdict against two individual defendants, court vacated judgment on motion for judgment n.o.v.).

[11] As *Cazares* also aptly noted, the lawyer in a contingent-fee case also "agrees to delay receiving his fee until [it concludes] . . . which is often years in the future, [and thus] finances the case for the client. . . . If a lawyer was forced to borrow against the legal services already performed on a case which took five years to complete, the cost of such [] financing [] could be significant." 208 Cal. App. 3d at 288.

complaint; (c) defeating two demurrers; (d) defeating Defendants' motion to require posting of an undertaking; (e) defeating Defendants' efforts to "phase" (limit) discovery; (f) obtaining and reviewing over a million documents in discovery; (g) defeating Defendants' motion for judgment on the pleadings (and preserving that victory from writ review in California's appellate courts and the U.S. Supreme Court); (h) certifying a class in contested proceedings, and (i) deposing two of FireEye's most senior officers (defendants DeWalt and Aziz). It was only then that (j) Plaintiff engaged in the mediation, which involved preparing additional briefs and evidentiary submissions for Judge Phillips, followed by (k) negotiating and documenting all the details of the Settlement and related paperwork. For more details on the work performed, s*ee* Fredericks Decl., ¶¶14-45.

When (as here) the attorney time has been expended on a fully contingent basis, in applying this factor courts often consider whether counsel's total lodestar time (*i.e.,* the total number of hours spent multiplied by the relevant attorneys' and paraprofessionals' customary hourly rate[12]) bears a reasonable relationship to the amount of the percentage fee requested.

Here, the requested 33⅓% fee equals $3,416,667 – compared to Plaintiff's Counsel's combined lodestar of $7,220,988.50. *See* Fredericks Decl., ¶68 and counsel's accompanying respective Fee and Expense Declarations.[13] The requested fee thus results in a highly *negative* multiplier of only 47. By contrast, "numerous cases have applied multipliers of between 4 and 12 to counsel's lodestar in awarding fees," *see Natural Gas AntiTrust Cases*, No. 4221, 2006 WL 5377849, at *4, (San Diego Super Ct. Dec. 11, 2006) and multipliers between 2 and 4 are unremarkable. *See Sternwest Corp. v. Ash*, 183 Cal. App. 3d 74, 76 (1986) (remanding for lodestar enhancement of "two, three, four or otherwise").[14] In sum, a lodestar cross-check also strongly

[12] As their respective Fee and Expense Declarations show, the billing rates used by Plaintiff's Counsel to calculate their lodestar are their standard and customary rates, which have been routinely submitted to (and used by) other courts in California and across the country to calculate their lodestar. In this regard, Plaintiff's Counsel also note that their hourly rates are consistent with, if not substantially lower than, the rates charged by securities defense firms. For example, an article from over a year ago reported that billing rates at a sample of eight defense firms ranged from $600-$935 for junior partners to $1,290 to $1,475 for senior partners. *See* "Legal Fees Cross New Mark: $1,500 an Hour," *The Wall Street Journal,* Feb. 9, 2016 (available at www.wsj.com/articles/legal-fees-reach-new-pinnacle-1-500-an-hour-1454960708.

[13] As noted above, when conducting a lodestar "cross-check," courts rely on "declarations summarizing overall time spent, rather than demanding and scrutinizing daily time sheets in which the work performed was broken down by individual task." *Laffitte*, 1 Cal. 5th at 505. Moreover, Plaintiff's Counsel rely only on the combined lodestar of Lead Counsel (Scott+Scott) and Liaison Counsel (the Bottini firm), which *excludes* the lodestar of two other firms whose work also contributed to the case. Fredericks Decl., ¶73.

[14] *See also, e.g., Maley*, 186 F. Supp. 2d at 371 (approving 4.65 multiplier as "modest"); Logan, *et al., Attorneys' Fees Awards in Common Fund Class Actions*, 24 CLASS ACTION REP'TS 169 (2003) (***average***

supports the reasonableness of the requested fee (if not an upward adjustment had one been sought). *See Laffitte*, 1 Cal. 5th at 505 (approving 33⅓% fee with multiplier of 2.03 to 2.13, and noting that "[i]f the multiplier . . . is extraordinarily high *or low*, the trial court should consider whether the percentage used be adjusted").

5. Fee Awards in Similar Cases

As noted earlier, the 33⅓% requested fee is amply supported by case law, as California courts regularly award attorneys' fees of 33% or more in class cases. *See*, *e.g.*, *Laffitte*, 1 Cal. 5th at 506 (33⅓% fee on $19 million recovery); *Paton v. Advanced Micro Devices, Inc.*, No. 1-07-CV-084838, slip op. (Santa Clara Super. Ct., Aug. 22, 2014) (33⅓% fee on $5.2 million recovery) (Ex. 1); *West Palm Beach Pension Fund v. CardioNet*, No. 37-2010-00086836-CU-SL-CTL, Final Approval Order (San Diego Super. Ct. June 28, 2012) (33⅓% fee on $7.25 million recovery) (Ex. 2); *Cal. Indirect Purchaser,* 1998 WL 1031494, at 9 (collecting cases awarding between 30% and 45%).[15] Awards equal to 33⅓% of the recovery are also regularly approved by courts within the Ninth Circuit.[16]

Similarly, empirical studies have confirmed that, regardless of method used, "fee awards in class actions average around one-third of the recovery.'" *Chavez*, 162 Cal. App. 4th at 66; *see also Lealao*, 82 Cal. App. 4th at 31 ('whatever method is used and no matter what billing records are submitted . . . the result is an award that almost always hovers around 30% of the fund created by

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multiplier in 64 case sample was ***4.5***); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052-54 (9th Cir. 2002) (***average*** implied multiplier in 24 case sample was ***3.32***).

[15] *See also Abzug v. Kerkorian*, No. CA000981, at 41 (Los Angeles Super. Ct. Nov. 19, 1990) (45% of settlement fund) (Ex. 3);*Haitz v. Meyer*, No. 572968-3, Transcript (Alameda Super. Ct. Aug. 20, 1990) (40% of $2.67 million settlement fund) (Ex. 4); *Albert v. Walter Fletcher, Inc.*, No. BC136761 (Los Angeles Super. Ct. Mar. 22, 2001) (35% of $15 million settlement) (Ex. 5); *Steiner v. Whittaker Corp., Etc.*, No. CA000817, Tr. at 4 (Los Angeles Super. Ct. Mar. 23, 1989) (35% of securities class action recovery) (Ex. 6); *Bonilla v. Regis Corp.*, No. 30-2009-00329724, 2010 WL 6509279, at *1 (Orange Co. Super. Ct. Nov. 23, 2010) (33⅓% fee); *Elkin v. Six Flags, Inc.*, No. BC342633 (Los Angeles Super. Ct. April 29, 2008) (33⅓% fee) (Ex. 7); *Hattan v. Restoration Hardware, Inc.*, Case No. CV 075563, slip op. at 2 (Marin Super. Sept. 24, 2008) (33% fee) (Ex. 8); *Ochoa v. Haralambos Beverage Co.*, No. BC319588 (Los Angeles Super. Ct. Feb. 1, 2007) (33⅓% fee) (Ex. 9); *Jones v. Alliance Imaging, Inc.*, No. RG05210418, 2006 WL 5403115 (Alameda Super. Ct., Nov. 27, 2006) (33⅓% fee); *Terrell v. Ocean's 11 Casino. Inc.*, No. GIC795732, 2004 WL 5214496 (San Diego Super. Ct. Feb. 10, 2004) (33⅓% fee); *Garcia v. Save Mart Supermarkets*, No. 312026, 2004 WL 4964171(Stanislaus Super. Ct. Aug. 3, 2004) (33⅓% fee); *Adams v. Blockbuster, Inc.*, Case No. 809069 (Los Angeles Super. Ct. Feb. 28, 2002) (33⅓% fee) (Ex. 10). Exs. Attached to Jasnoch Decl.

[16] *See, e.g., In re Pacific Enter. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (33% fee on $12 million securities settlement); *In re Heritage Bond Litig.*, No. 02-ML-1475, 2005 WL 1594389, at *20 (C.D. Cal. June 10, 2005) (33⅓% fee on $27.8 million securities settlement).

the settlement"). The same results hold true for securities class actions. For example, a 1996 study reviewed data from 433 securities class actions and found that "[r]egardless of case size, fees average approximately 32% of the settlement." Denise Martin, *et al.*, *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions?* at 12-13 (NERA Nov. 1996) (Ex. 11). The 33⅓% requested fee is thus well within the "range of reasonableness" for class actions of all types brought in California courts, and for securities cases in particular (whether brought in federal or California state courts).

6. Experience and Reputation of Plaintiff's Counsel, and the Skill They Displayed in the Litigation

The skill, experience and reputation of the attorneys who prosecuted this case also support the fee request. Lead Counsel, Scott+Scott, respectfully submits that it has a national reputation for excellence in litigating complex class actions, and that its Liaison Counsel, the Bottini firm, has particular experience litigating such actions in California. *See* Fredericks Decl., ¶72; the Scott+Scott and Bottini firm résumés are attached to their respective Fee and Expense Declarations. Moreover, it is respectfully submitted that this Court has had the opportunity to directly assess the quality of Plaintiff's Counsel's work based on the Court's own review of counsel's briefing on numerous motions, and the Court's dealings with counsel at the nearly 20 CMCs and IDCs that counsel have appeared at, over the three-year course of this litigation.

Courts may also consider the quality of opposing counsel when considering the quality of plaintiffs' counsel's work. *See In re Equity Funding Corp. of Am. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977). Here, Plaintiff was opposed by two pre-eminent law firms that litigated this action fiercely on behalf of the Defendants. Nonetheless, Plaintiff's Counsel succeeded in developing the case to the point where they were ultimately able to obtain an excellent recovery on behalf of the Class. *Cf. In re Delphi Corp. Sec., Deriv. & ERISA Litig.*, 248 F.R.D. 483, 504 (E.D. Mich. 2008) (ability of plaintiffs' counsel to negotiate a favorable settlement in the face of "formidable" legal opposition further supported reasonableness of requested fee).

7. Lead Plaintiff's Informed Consent and the Reaction of the Class

The named plaintiff's consent "is another factor supporting the requested attorney fee award." *California Indirect Purchaser*, 1998 WL 1031494, at *8 (citing *Glendora*, 155 Cal. App.

3d at 472). Here, Lead Plaintiff DeKalb County has agreed to the requested 33⅓% fee and its proposed allocation. Given that DeKalb County is an institutional investor, it is respectfully suggested that its approval of the requested fee is entitled to even greater weight than might be appropriate in the case of a less-sophisticated client. Fredericks Decl., ¶58.

Moreover, to date, no class member has objected to the requested fee award. *Id.*, ¶¶6, 86; *see also In re Flag Telecom Hld'gs, Ltd. Sec. Litig.*, No. 02-CV-3400, 2010 WL 4537550, at *29 (S.D.N.Y. Nov. 8, 2010) (lack of objection from class members "is one of the most important factors in determining the reasonableness of a requested fee"). The deadline for objections has not yet passed, but Plaintiff's Counsel will address them on reply if any are received.

8. Additional Important Public Policy Considerations Also Support the Requested Award of Fees

The federal securities laws are remedial in nature and, to effectuate their purpose of protecting investors, private lawsuits should be encouraged. *See Basic Inc. v. Levinson,* 485 U.S. 224, 231 (1988); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983) (same). Indeed,

> In complex securities class actions [. . .], able counsel for plaintiffs can be retained ***only*** on a contingent basis. A large segment of the investing public would be denied a remedy for violations of the securities laws [. . .] by public companies and those entrusted with their stewardship if contingent fees awarded by the courts did not fairly and adequately compensate counsel for services provided, the serious risks undertaken, and the delay before any compensation is received.

Prudential, 1994 WL 202394, at *8. Given the U.S. Supreme Court's repeated statements that private securities actions provide "a 'most effective weapon in the enforcement' of securities laws" and are a "necessary supplement to [SEC] action," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 318-19 (2007) (quoting *J.I. Case Co. v. Borak,* 377 U.S. 426, 432 (1964)), the requested fee here is plainly consistent with important public policy considerations.

D. The Hybrid Percentage/Lodestar Cross-Check Method Strongly Supports the Requested Fee

As discussed at §II.C.4 above, a lodestar cross-check here only further supports the requested percentage fee, as a 33⅓% fee results in significantly negative implied multiplier.

E. The Lodestar/Multiplier Approach Strongly Supports the Requested Fee

Should the Court wish to undertake a more comprehensive review of counsel's time under a traditional lodestar approach, Plaintiff's Counsel (in addition to providing summaries) have also

provided copies of their detailed daily time records (as redacted to protect privileged information).

Under the lodestar/multiplier approach, a court (1) calculates the total amount of counsel's lodestar time, and then (2) considers whether to increase or decrease it by applying a positive or negative multiplier based on the same factors (quality of result obtained, litigation risk, etc.) discussed above at §§C.1-C.6. *Laffitte,* 1 Cal. 5th at 489. Here, Plaintiff's Counsel's "base" lodestar is $7,220,988.50, but given the qualitative factors already discussed, an unremarkable multiplier of at least 2.0 would normally be merited. But because even a flat 1.0 multiplier here would produce a much larger fee than what Plaintiff actually requests ($3,416,667), further discussion is moot.

In sum, Plaintiff's Counsel respectfully submit that by any measure (and especially under the lodestar-multiplier method) their requested fee is fair, reasonable, and should be approved.

III. THE REQUEST FOR REIMBURSEMENT OF COUNSEL'S REASONABLE LITIGATION EXPENSES SHOULD BE GRANTED

Counsel who recover a common fund for a class are also entitled to reimbursement of reasonable litigation costs. *Rider v. Cty. of San Diego*, 11 Cal. App. 4th 1410, 1423 n.6 (1992).

Here, Plaintiff's Counsel seek reimbursement of litigation expenses totaling $415,306.60. As shown in their accompanying Fee and Expense Declarations, these expenses primarily include costs of: (1) court reporters and transcripts; (2) liability, damages and class certification experts; (3) the mediator's fees; (4) travel; (5) online legal and financial research; (6) photocopies; (7) private investigators; (8) misc. filing and Court fees; and (9) overnight delivery and phone charges. These expenses were incurred for services reasonably needed to effectively prosecute the case, are reasonable in amount, and are of a type that are customarily reimbursed in class actions, as well as by private clients in private litigation. They should therefore be reimbursed in full. *See In re Am. Bus. Fin. Servs. Inc. Noteholders Litig.*, No. 05-232, 2008 WL 4974782, at *18 (E.D. Pa. Nov. 21, 2008) (approving award of expenses based on counsel's declarations summarizing charges for "delivery and freight, . . . duplication costs, online legal research, travel, meals, experts, telephone, fax services, transcripts, postage, messenger, mediator, filing and court fees, service fees, [and] transportation"); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004) ("investigative and expert witnesses, filing fees, service of process, travel, legal research and

document production and review . . . are properly chargeable to the Settlement fund").[17]

IV. THE REQUESTED SERVICE AWARD OF $7,500 TO LEAD PLAINTIFF DEKALB COUNTY SHOULD BE APPROVED

Finally, the Court should approve Lead Plaintiff's request for an award of $7,500 for its service to the Class. Such awards are customarily granted to lead plaintiffs, both to recognize the public service they perform by stepping forward to represent a class and to compensate them for time spent on the case. Here, DeKalb County employees and/or board members spent time, *inter alia,* (a) considering initial presentations by Lead Counsel concerning the case prior to intervening in the action as a lead plaintiff; (b) reviewing pleadings and motion papers; (c) reviewing and responding to updates and requests for information from, Lead Counsel; (d) working with Lead Counsel to collect over 2,000 pages of documents in response to Defendants' document requests, and to respond to Defendants' interrogatories; (e) preparing and then sitting for (in the case of DeKalb's PMK designee, plan administrator Jelani Hooks) a full-day deposition; and (f) reviewing and approving the material terms of the Settlement. *See* Fredericks Decl., ¶82.

A $7,500 award is also in line with awards in other cases and favored by public policy. *See In re Emachines, Inc. Merger Litig.*, No. 01-CC-00156, slip op. at 2 (Orange Super., July 25, 2007) (awarding $15,000) (Ex. 12); *Restoration Hardware*, slip op. at 2 (awarding $5,000) (Ex. 8). Indeed, the requested $7,500 is modest in light of DeKalb's active role, and far larger awards have been approved**.** *See Allapattah Servs., Inc. v. Exxon Corp.,* 454 F. Supp. 2d 1185, 1218-19 (S.D. Fla. 2006) (collecting cases approving incentive awards from $1,500 to $25,000). Moreover, no Class Member has objected to this request.

V. CONCLUSION

For the foregoing reasons, Plaintiff's Counsel respectfully request that the Court (1) grant their request for a 33⅓% attorneys' fee award and reimbursement of litigation expenses in the amount of $415,306.60, and (2) award DeKalb County $7,500 for its service to the Class.

[17] Plaintiff's Counsel note that, although arguably reimbursable as a cost of the litigation, they are ***not*** seeking reimbursement for any of the out-of-pocket expenses that they have already paid to the McManis Faulkner firm for work that it performed in this case. Instead, the cost of that firm's fees will be wholly absorbed by Plaintiff's Counsel. *See* Fredericks Decl., ¶80, n.9.

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