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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

NECA-IBEW PENSION TRUST FUND (The Decatur Plan), and ANN F. LYNCH, AS TRUSTEE FOR THE ANGELA LOHMANN REVOCABLE TRUST, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, vs. PRECISION CASTPARTS CORP., MARK DONEGAN, DON R. GRABER, LESTER L. LYLES, DANIEL J. MURPHY, VERNON E. OECHSLE, ULRICH SCHMIDT, RICHARD L. WAMBOLD and TIMOTHY A. WICKS, Defendants.	No. 3:16-cv-01756-YY CLASS ACTION LEAD COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES, AND AWARD OF LEAD PLAINTIFF'S COSTS AND EXPENSES Telephonic Final Approval Hearing Date: May 7, 2021 Time: 1:00 p.m.

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LR 7-1(a) CERTIFICATION

In compliance with Local Rule 7-1(a), Lead Counsel and counsel for Defendants conferred via telephone and email. Defendants take no position on this motion.

MOTION

Lead Counsel Berger Montague PC ("Berger Montague") and Robbins Geller Rudman & Dowd LLP ("RGRD;" together, "Lead Counsel"), respectfully move the Court for an order (i) approving an award of attorneys' fees and expenses to Lead Counsel; and (ii) approving an award to Lead Plaintiff Ann F. Lynch pursuant to 15 U.S.C. §78u-4(a)(4).[1]

This Motion is based on the Stipulation of Settlement; the accompanying Memorandum in Support of Motion; the Joint Declaration of Lawrence Deutsch and A. Rick Atwood, Jr. in Support of the Motion ("Joint Declaration" or "Joint Decl."); the concurrently filed Unopposed Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation, and memorandum in support thereof ("Final Approval Brief"); the pleadings and other papers on file in this action; any oral argument the Court may hear; and on any matters that may be considered by this Court.

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

In the face of long odds and a vigorous defense, Lead Plaintiffs and Lead Counsel have achieved a proposed settlement of $21 million plus interest for the benefit of the Class. The $21 million Settlement is a highly favorable result and is a credit to Lead Plaintiffs' and Lead Counsel's determined, creative, and detailed investigation and litigation effort. Lead Plaintiffs and Lead Counsel therefore respectfully submit this memorandum in support of their motion for

[1] All capitalized terms not otherwise defined herein shall have the same meanings as set forth in the Stipulation of Settlement (ECF No. 154). Unless otherwise noted, citations are omitted and emphasis is added throughout.

attorneys' fees and expenses, and request for reimbursement of Lead Plaintiff Lynch's costs and expenses.[2]

Lead Counsel undertook a substantial risk to pursue this case and litigated this case for more than four years without compensation. Over those four years, Lead Counsel dedicated significant resources to investigate and pursue complex claims against sophisticated defendants with substantial litigation resources. Lead Counsel were highly successful and ultimately negotiated a significant settlement for the benefit of the Class. The case, although strong and meritorious, was not without risk, as explained in detail herein, in the Final Approval Brief and in the Joint Declaration. Despite those risks and the disappointing post-Acquisition results of Precision Castparts, to Lead Counsel's knowledge, the settlement achieved is larger than that in any pure §14(a) negligence claim case challenging a merger proxy (with no open market securities fraud component), in any jurisdiction, since at least 2016. In fact, studies have identified monetary recoveries on post-merger litigation like this case as "relatively rare." *See* Joint Decl., ¶ 61, Ex. 2 at 5.

For this exceptional result, and the time and effort dedicated to achieving it, Lead Counsel seek an award of attorneys' fees in the amount of 33.33% of the Settlement Fund plus reasonable and necessarily incurred expenses. While the attorneys' fees request is above the Ninth Circuit's 25% benchmark, for the reasons explained herein, Lead Counsel's request meets the factors considered for a departure from the benchmark and is in line with attorneys' fees in other

[2] To avoid repetition, the Court is respectfully referred to the accompanying Joint Declaration, along with Lead Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement (ECF No. 152) for a more detailed history of the Litigation, the efforts undertaken by Lead Counsel and Lead Plaintiffs, and the factors bearing on the reasonableness of counsel's request for an award of attorneys' fees and expenses, and reimbursement of Lead Plaintiff's costs and expenses.

settlements approved in the Ninth Circuit. Furthermore, a 33.33% fee represents a negative multiplier of 0.796, meaning that counsel's collective lodestar exceeds the fee requested. Both Lead Plaintiffs have approved the fee request.[3] Finally, Lead Counsel also request that Lead Plaintiff Ann F. Lynch, as Trustee for the Angela Lohmann Revocable Trust, be reimbursed for reasonable costs and expenses attributable to the Trust's prosecution of the case on behalf of the Class.

For the reasons set forth herein and in the Joint Declaration, Lead Counsel respectfully request that the Court approve Lead Counsel's motion for attorneys' fees and expenses, and reimbursement of Lead Plaintiff's costs and expenses.

II. LEAD COUNSEL'S REQUEST FOR ATTORNEYS' FEES SHOULD BE APPROVED IN FULL BY THE COURT

In achieving the Settlement in this Action, Lead Counsel and Local Counsel expended more than 13,800 hours of time correlating to a lodestar of $8,788,820.93. For this work, Lead Counsel respectfully request that the Court grant their request for attorneys' fees of 33.33% of the Settlement Fund.

As a preliminary matter, the requirement in *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993 (9th Cir. 2010) that the deadline for class members to object to requested fees be set for a time after the motion for the fees and documents supporting the motion have been filed is satisfied here. *See Arnett v. Bank of America, N.A.*, No. 3:11-cv-1372–SI, 2014 WL 4672458

[3] *See* Joint Decl. Ex. 3, Declaration of Kevin Cope in Support of (I) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation, and (II) Lead Counsel's Motion for Award of Attorneys' Fees and Expenses, and Award of Lead Plaintiff's Costs and Expenses ("Cope Decl.") ¶¶ 6-7; Joint Decl. Ex. 4, Declaration of Ann F. Lynch in Support of (I) Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation, and (II) Lead Counsel's Motion for Award of Attorneys' Fees and Expenses, and Award of Lead Plaintiff's Costs and Expenses ("Lynch Decl.") ¶¶ 9-10.

(D. Or. Sept. 18, 2014). The Notice and filing of this Motion complied with *In re Mercury* by giving the Class the necessary details about Lead Counsel's request for attorneys' fees in advance of the April 16, 2021 deadline to object to the requested fees. ECF No. 157 ("Preliminary Approval Order") ¶ 24.

A. The Requested Fee Is Reasonable And Appropriate As A Percentage Of The Common Fund, And The Circumstances Justify A Departure From The Ninth Circuit's Benchmark

The Supreme Court recognizes that "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). "In considering the amount of attorney's fees for class counsel where there is a common fund, 'courts have discretion to employ either the lodestar method or the percentage-of-recovery method.'" *Bell v. Consumer Cellular, Inc.*, Case No. 3:15-cv-941-SI, 2017 WL 2672073, at *9 (D. Or. June 21, 2017) (quoting *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011). Typically, courts use the "percentage approach when awarding attorney's fees with the lodestar serving as a 'cross check' on the reasonableness of the percentage." *Id.*

The Court has discretion to "award plaintiffs' attorneys a percentage of the common fund, so long as that percentage represents a reasonable fee." *In re Galena Biopharma, Inc. Secs. Litig.*, No. 3:14-cv-00367-SI, 2016 WL 3457165, *5 (D. Or. June 24, 2016). "The Ninth Circuit has set 25% of the fund as a 'benchmark' award under the percentage-of-the fund method." *Id.* (quoting *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 738 (9th Cir. 2016)); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998), *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). When "special circumstances" warrant a departure, the benchmark amount "may be adjusted." *In re Bluetooth*, 654 F.3d at 942. "Factors that a court may consider

in making such a departure include: (1) the result obtained; (2) the effort expended by counsel; (3) counsel's experience; (4) counsel's skill; (5) the complexity of the issues; (6) the risks of nonpayment assumed by counsel; (7) the reaction of the class; (8) non-monetary or incidental benefits, including helping similarly situated persons nationwide by clarifying certain laws; and (9) comparison with counsel's lodestar." *Azar v. Blount International, Inc.*, 2019 WL 7372658, at *2 (D. Or. Dec. 31, 2019) (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002); *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *18 (C.D. Cal. June 10, 2005)).

"[A] fee award of one-third is within the range of awards in this Circuit." *In re Lidoderm Antitrust Litig.*, No. 14-MD-02521-WHO, 2018 WL 4620695, at *4 (N.D. Cal. Sept. 20, 2018); *see also In re Heritage*, 2005 WL 1594403, at *19 ("[C]ourts in this circuit, as well as other circuits, have awarded attorneys' fees of 30% or more in complex class actions."). Lead Counsel's fee request is in line with other settlements approved in the Ninth Circuit and this District. *See, e.g., In re Heritage*, 2005 WL 1594403, at *23 (awarding one-third of $27.78 million settlement fund); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (no abuse of discretion where the "$4 million award (thirty-three percent [of the class's $12 million recovery]) for attorneys' fees is justified because of the complexity of the issues and the risks"); *Singer v. Becton Dickinson & Co.*, No. 08-CV-821-IEG (BLM), 2010 WL 2196104, at *9 (S.D. Cal. June 1, 2010) (approving an attorneys' fee award of 33.33%); *Razilov v. Nationwide Mut. Ins. Co.*, No. 01-CV-1466-BR, 2006 WL 3312024, at *3 (D. Or. Nov. 13, 2006) (awarding 30% of the class settlement fund); *Gustafson v. Valley Ins. Co.*, No. CV 01-1575-BR, 2004 WL 2260605 (D. Or. Oct. 6, 2004) (same); *Vizcaino*, 290 F.3d at 1047-48 (no abuse of discretion to award fees constituting 28% of the class's recovery given "risk" assumed in litigating). And, such a fee is "well within the range of

percentages which courts have upheld as reasonable in other class action lawsuits" where, as here, there is no potential reversion to the defendant. *Stuart v. Radioshack Corp.*, No. C-07-4499 EMC, 2010 WL 3155645, at *6 (N.D. Cal. Aug. 9, 2010).

Applying the factors relevant for a departure from the Ninth Circuit's benchmark to the facts and circumstances of this litigation illustrates that "a fee award of 33⅓% of the common fund is warranted." *Id.*

1. The Result Obtained for the Class

"The most critical factor in granting attorney's fees is the overall result and benefit to the class." *Bell*, 2017 WL 2672073, at *10 (citing *Richardson v. THD At-Home Servs., Inc.*, No. 1:14-CV-0273-BAM, 2016 WL 1366952, at *8 (E.D. Cal. Apr. 6, 2016)). Here, the non-reversionary $21 million cash fund is itself an excellent recovery for the members of the Class, as it represents a substantial cash recovery, believed to be the largest monetary recovery in any case, in any jurisdiction since at least 2016, that alleged a pure §14(a) negligence claim challenging a merger proxy. *See* Joint Decl. ¶ 70.

The recovery is exceptional given the risks associated with the litigation. Throughout the litigation, Defendants challenged virtually every aspect of Lead Plaintiffs' claims, culminating in Defendants filing motions for summary judgment on the issues of both (i) liability, and (ii) damages and loss causation. Even if Lead Plaintiffs' case survived summary judgment and their motion for class certification was granted, it was far from certain that Lead Plaintiffs could prove at trial that the statements made in the Proxy were both objectively and subjectively false, or that the Class was damaged thereby, especially given Precision Castparts' disappointing post-Acquisition results and Berkshire's subsequent write-down of its Precision Castparts business value. *See In re Trados Inc. S'holder Litig.*, 73 A.3d 17 (Del. Ch. 2013) (plaintiffs proved liability

in a merger trial, but the court found that the price was fair and damages were zero).[4] *See also* Section II.A.3, *infra*; Final Approval Brief Section II.B.1.; Joint Decl. at ¶¶ 62-69.

2. Counsel's Efforts, Experience and Skill, and the Complexity of the Issues

The efforts, experience and skill of Lead Counsel and their counterparts further militate in favor of the request and departure from the benchmark. "The 'prosecution and management of a complex national class action requires unique legal skills and abilities.'" *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1021 (E.D. Cal. 2019), *appeal dismissed sub nom. Carlin v. Spooner*, 808 F. App'x 571 (9th Cir. 2020) (quoting *In re Heritage*, 2005 WL 1594403 at *19). "Thus, if Counsel has represented 'intimate knowledge of the case,' and applied their unique skills to obtain favorable results, this factor should weigh in favor of an increase in the benchmark rate." *Id.*; *Bell*, 2017 WL 2672073, at *11 ("The complexity of issues and skills required may weigh in favor of a departure from the benchmark fee award.").

Here, Lead Counsel are skilled litigators with vast experience in prosecuting securities class actions and other complex cases. *See* Declaration of Lawrence Deutsch Filed on Behalf of Berger Montague PC in Support of Application for Award of Attorneys' Fees and Expenses ("Deutsch Decl."), Ex. C; Declaration of A. Rick Atwood, Jr. Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Atwood Decl."), Ex. G (attaching firm résumés of Lead Counsel); *see also, e.g.*, *In re Hot Topic,*

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[4] "Courts experienced with securities fraud litigation routinely recognize that securities class actions present hurdles to proving liability that are difficult for plaintiffs to clear." *Redwen v. Sino Clean Energy, Inc.*, No. CV 11-3936 PA (SSx), 2013 WL 12303367, at *6 (C.D. Cal. July 9, 2013). Securities class actions "are often long, hard-fought, complicated, and extremely difficult to win." *In re Extreme Networks, Inc. Sec. Litig.*, No. 15-CV-04883-BLF, 2019 WL 3290770, at *8 (N.D. Cal. July 22, 2019).

Inc. Sec. Litig., No. CV13-02939 SJO (JCx), 2014 WL 12462472, at *5 (C.D. Cal. Nov. 3, 2014) (finding Robbins Geller "both qualified and competent," noting that courts have found the firm "'comprised of probably the most prominent securities class action attorneys in the country'"); *In re Cooper Cos. Inc. Sec. Litig.*, 254 F.R.D. 628, 636 (C.D. Cal. 2009) ("It is undisputable that class counsel in this case has extensive experience prosecuting suits of this nature."); *In re CIGNA Corp. Sec. Litig.*, No. 02-8088, 2007 WL 2071898, at *5 (E.D. Pa. July 13, 2007) ("The Court is aware of and attests to the skill and efficiency of class counsel [Berger Montague]: they have been diligent in every respect, and their briefs and arguments before the Court were of the highest quality."); *In re Melridge, Inc. Secs. Litig.*, No. CV 87-1426-FR, Order Regarding Fees and Costs at 2 (D. Or. Apr. 15, 1996) ("Throughout the course of their representation, the attorneys at Berger & Montague and Stoll, Stoll, Berne, Lokting & Shlachter who have worked on this case have exhibited an unusual degree of skill and diligence"). In addition, Local Counsel, Stoll Stoll Berne Lokting & Shlachter P.C., has its own extensive history in the prosecution of class actions and securities litigation within this District and elsewhere. *See* Declaration of Jennifer Wagner Filed on Behalf of Stoll Berne in Support of Application for Award of Attorneys' Fees and Expenses ("Wagner Decl."), Ex. E (attaching firm résumé of Local Counsel).

Lead and Local Counsel have spent to date more than 13,800 hours, constituting a collective lodestar of over $8.75 million in the prosecution of this case. Joint Decl. ¶ 81. That commitment to this litigation has resulted in many foregone opportunities to pursue other litigations. To achieve the recovery for the Class here, Lead Counsel had to navigate the numerous complex and highly disputed legal and factual questions at issue for over four years. Among other things, this included defeating Defendants' motion to dismiss; conducting extensive fact discovery, including reviewing nearly 400,000 pages of documents produced by Defendant and third parties

and taking fourteen (14) depositions; filing the Second Amended Complaint, which incorporated the evidence learned during fact discovery; engaging in extensive expert discovery, including serving four expert reports, defending three expert depositions, addressing eight rebuttal and sur-rebuttal expert reports from Defendants, and taking five depositions of Defendants' experts; and finally filing a motion for class certification and motions to exclude Defendants' experts pursuant to *Daubert*. *See* Joint Decl. ¶¶ 10-45. The breadth of expert discovery needed to prosecute and defend the litigation demonstrates the complexity of the issues involved.

Also important in evaluating the quality of Lead Counsel's work is "the quality of opposing counsel." *In re Heritage*, 2005 WL 1594403, at *20 (citing *In re Equity Funding Corp. of Am. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977)). There can be "no dispute that the plaintiffs in this litigation were opposed by highly skilled and respected counsel with well-deserved local and nationwide reputations for vigorous advocacy in the defense of their clients." *Id.* Here, Lead Plaintiffs were vigorously opposed at every stage of the litigation by Cravath, Swaine & Moore LLP and Stoel Rives LLP, prominent national law firms that frequently defend public companies in securities class actions and other complex litigation, who staffed the case with top-flight legal talent at all levels. Lead Counsel were required to perform with a high level of skill, efficiency, and professionalism to assemble a case that was strong enough to encourage Defendants and their counsel to compensate the Class for their alleged losses.

This case was robustly and appropriately litigated by both sides, as reflected in the extensive docket entries and the Joint Declaration. There is a comprehensive record of the fact and expert discovery and motion practice in this hard-fought litigation spanning the past four-plus years. The quality of representation of Lead Plaintiffs and the Class in this complex case by Lead

Counsel is reflected in the exemplary Settlement and favors the fee request and its upward departure from the benchmark.

3. The Risks of Nonpayment Assumed by Counsel

"In cases taken on contingency, courts tend to find above-market-value fee awards appropriate to encourage counsel to take on contingency-fee cases for plaintiffs who otherwise could not afford to pay hourly fees and to compensate counsel for the risk of non-payment that they assume." *Bell*, 2017 WL 2672073, at *11. "This is especially true when class counsel has significant experience in the particular type of litigation at issue; indeed, in such contexts, courts have awarded [a] 33 percent benchmark percentage." *Id.* (quoting *Deaver v. Compass Bank*, No. 13-CV-00222-JSC, 2015 WL 8526982, at *11 (N.D. Cal. Dec. 11, 2015)).

As demonstrated herein, in the Final Approval Brief and in the Joint Declaration, Lead Counsel, who have extensive experience in securities litigation, assumed a significant risk in undertaking this case on a pure contingency basis; invested time, effort and money over more than four years of litigation with no guarantee of recovery; and were wholly prepared to continue prosecuting the litigation until conclusion.

Accordingly, "[t]his factor considers 'the burdens class counsel experienced while litigating the case (*e.g.*, cost, duration, foregoing other work).'" *Carlin*, 380 F. Supp. 3d at 1021 (quoting *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 955 (9th Cir. 2015)); *Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1264 (C.D. Cal. 2016) ("[t]he contingent nature of the work performed by class counsel here, including the risk they took in advancing costs, also weighs in favor of granting the fee request."). "A higher-than-benchmark award exists to reward counsel for investing 'substantial time, effort, and money, especially in light of the risks of recovering nothing.'" *Carlin*, 380 F. Supp. 3d at 1021 (quoting *In re Wash. Pub. Power Supply Sys. Sec.*

Litig., 19 F.3d 1291, 1299-300 (9th Cir. 1994)); *Vizcaino*, 290 F.3d at 1051 ("[C]ourts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases."); *accord In re Heritage*, 2005 WL 1594403, at *4 ("the lawyer who creates a common fund is allowed an extra reward, beyond that which he has arranged with his client, so that he might share the wealth of those upon whom he has conferred a benefit").

From the outset, Lead Counsel accepted the responsibility of prosecuting this class action on a contingent fee basis and without any guarantee of success or award. *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 281 (3d Cir. 2009) ("Class Counsel invested a substantial amount of time and effort to reach this point and obtain the favorable Settlement."). Indeed, unlike counsel for Defendants, who are paid an hourly rate and paid for their expenses on a regular basis, Lead Counsel have not been compensated for over $8.75 million in time or over $850,000 in expenses since this case began. *See* Joint Decl. ¶¶ 78, 81-82. While Defendants ultimately agreed to settle, they had significant defenses to liability and damages, and likely class certification, and recovery otherwise would remain uncertain.

When committing thousands of hours of attorney time and incurring hundreds of thousands of dollars in expenses in litigating this action, Lead Counsel fully assumed the risk of an unsuccessful result. In recognizing the significant challenges investors face under the PSLRA, in a per curiam opinion written by retired Supreme Court Justice Sandra Day O'Connor (sitting by designation), the Fifth Circuit recognized that, "[t]o be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action." *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009).

Lastly, the level of risk when pursuing a post-merger damages case under §14(a) is extreme. As noted, Lead Counsel are aware of no other case since at least 2016, in any jurisdiction, where plaintiffs obtained a larger monetary recovery on a pure §14(a) negligence claim challenging a merger proxy (with no open market securities fraud component). *See* Joint Decl. ¶ 70. In the same regard, Cornerstone Research published a report regarding "Shareholder Litigation Involving Acquisitions of Public Companies" for 2015 and the first half of 2016. *See* Joint Decl. ¶ 61, Ex. 2. After identifying hundreds of merger-related lawsuits in both state and federal court during that time, according to the study, only six such cases resulted in any monetary recovery for stockholders. *Id.* at 5. Of even those six cases, only one arose in federal court on a §14(a) proxy claim. *Id.* The study noted that in merger-related litigation, "[m]onetary consideration paid to shareholders has remained relatively rare." *Id.* This case's standing against such few others highlights the favorable nature of this result, relative to the extreme risk in litigating post-merger securities cases.

The contingent nature of this litigation, and the very real risk that Lead Counsel would receive zero payment for their efforts, further supports the requested fee.

4. The Reaction of the Class

The Notice mailed and otherwise distributed to members of the Class advised that Lead Counsel would "apply to the Court for an award of attorneys' fees of 33.33% of the Settlement Amount and expenses in an amount not to exceed $936,700.00, plus interest earned from the date the Settlement is funded on both amounts, at the same rate as earned on the Settlement Fund." Joint Decl. Ex. 1, Murray Decl. Ex. A, Notice at 2. As of the filing of this memorandum, although the deadline remains open, not one recipient of the Notice has objected to these requests or any

aspect of the Settlement. Joint Decl. ¶ 73. The lack of dissent to Lead Counsel's request for attorneys' fees and expenses, to date, weighs in favor of Lead Counsel's fee request.

In sum,[5] it is clear that these factors present special circumstances that warrant a departure from the Ninth Circuit's benchmark and support Lead Plaintiffs request for attorneys' fees equal to 33.33% of the Settlement Fund.

B. Lodestar Cross-Check Confirms Counsel's Expenses Are Reasonable And Further Supports Departure From The Ninth Circuit Benchmark

The reasonableness of a fee request is confirmed by a cross-check against counsel's lodestar. *In re Galena Biopharma*, 2016 WL 3457165, at *11; *see Vizcaino*, 290 F.3d at 1050 ("Calculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award."). The Ninth Circuit has held that "the lodestar calculation can be helpful in suggesting a higher percentage [than the benchmark] when litigation has been protracted." *Vizcaino*, 290 F.3d at 1050 (upholding 3.65 lodestar multiple, even though it was an upward departure from the benchmark). As this District has recognized, "[m]ultipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation." *Bell*, 2017 WL 2672073, at *12 (finding a multiplier of 2.9, with an upward departure from the benchmark, to be reasonable).

> In doing the lodestar cross check, the Court is not performing the detailed lodestar analysis it would have performed if it used the lodestar method to calculate [a p]laintiff's attorney's fees. For example, the Court will not analyze counsel's time entries in detail for duplicative billing, billing for administrative tasks, or block billing. The cross check is performed at higher level, to ensure the percentage-of-recovery method does not result in a fee that is unreasonable. But it does not require spending the time that is required when performing the lodestar method of fee calculation—otherwise using the percentage-of-recovery method would not allow

[5] See Section II.B., *infra*, for an analysis of the "comparison with counsel's lodestar" factor.

> for the time-savings the Ninth Circuit anticipated when allowing the method "in lieu of the often more time consuming task of calculating the lodestar."

Azar, 2019 WL 7372658, at *12 (quoting *In re Bluetooth*, 654 F.3d at 942).

As set forth in the Joint Declaration and accompanying Deutsch, Atwood and Wagner Declarations, Lead and Local Counsel collectively expended 13,879.4 hours in this litigation through March 26, 2021, including 5,429.4 hours by Berger Montague, 8,352.7 hours by RGRD and 97.3 by Stoll Berne, representing a collective lodestar of $8,788,820.93. Joint Decl. ¶ 81; Ex. 5, Deutsch Decl. ¶ 4; Ex. 6, Atwood Decl. ¶ 4; Ex. 7, Wagner Decl. ¶ 4. The work performed by the firms is also summarized in the Joint Declaration. *See* Joint Decl. ¶¶ 10-45. Applying the Ninth Circuit's 25% benchmark would result in a *negative* multiplier of 0.597. Lead Counsel's requested upward departure to 33.33% still results in a negative multiplier of 0.796 on Lead and Local Counsel's collective lodestar, well below the 3-plus positive multipliers upheld and recognized in this Circuit and District. Consequently, the lodestar cross-check "supports an upward departure from the benchmark." *Id.*

III. COUNSEL'S EXPENSES ARE REASONABLE AND SHOULD BE REIMBURSED

Lead and Local Counsel expended a total of $867,891.13 in expenses, charges and costs in this litigation through March 26, 2021. Joint Decl. ¶¶ 82; Ex. 5, Deutsch Decl. ¶ 5; Ex. 6, Atwood Decl. ¶ 5; Ex. 7, Wagner Decl. ¶ 5. Those expenses consist primarily of costs for experts and consultants; mediation fees; travel to depositions and for court hearings; computerized research and database hosting and processing; and court reporter and videographer fees. Joint Decl. Ex. 5, Deutsch Decl. ¶¶ 5-6; Ex. 6, Atwood Decl. ¶¶ 5-6; Ex. 7, Wagner Decl. ¶¶ 5-6. Lead Counsel request payment of these expenses, which were "reasonably and necessarily incurred and are recoverable from the proceeds of the common fund." *In re Galena Biopharma, Inc. Secs. Litig.*,

2016 WL 3457165, at *15 (citing *Wininger v. SI Mgmt., L.P.*, 301 F.3d 1115, 1120–21 (9th Cir. 2002) (noting that "jurisdiction over a fund allows for the district court to spread the costs of the litigation among the recipients of the common benefit"); *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996) ("Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit by the settlement.")).

From the beginning of the case, Lead and Local Counsel funded this litigation aware that they might not obtain any recovery or payment of the costs they advanced and, at the very least, would not recover anything until the litigation concluded and was successful in producing a recovery. Counsel also understood that, even if the case was ultimately successful, an award of expenses would not compensate counsel for the lost use of the funds advanced. The expenses incurred are reasonable in the circumstances of this case and should be approved.

IV. LEAD PLAINTIFF LYNCH SHOULD BE REIMBURSED FOR REASONABLE COSTS AND EXPENSES INCURRED IN THE REPRESENTATION OF THE CLASS

The PSLRA provides that a lead plaintiff may be awarded the reimbursement "of reasonable costs and expenses (including lost wages) directly relating to the representation of the class." 15 U.S.C. § 78u-4(a)(4); *Azar*, 2019 WL 7372658, at *13. Lead Counsel request the reimbursement of the reasonable costs and expenses incurred by Lead Plaintiff Ann F. Lynch, as Trustee for the Angela Lohmann Revocable Trust, and by Angela Lohmann, the former trustee for the Trust,[6] attributable to the Trust's prosecution of the case on behalf of the Class. These costs

[6] Ms. Lohmann passed away during the pendency of the litigation. The Court granted Lead Plaintiffs' unopposed motion to substitute her daughter, Ms. Lynch, the successor trustee, as Lead Plaintiff on May 13, 2020. Joint Decl. ¶¶ 29-30.

and expenses include lost wages and mileage, and total $349.80. *See* Joint Decl. Ex. 4, Lynch Decl. ¶¶ 3-6, 11-13. This request is not for a "general incentive or service award[]," *see Azar*, 2019 WL 7372658, at *13, and should granted.

V. CONCLUSION

For all the reasons stated herein, in Lead Plaintiffs' Memorandum in Support of their Unopposed Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation, and in the Deutsch Declaration, Lead Counsel submit that their motion for an order (i) approving an award of attorneys' fees and expenses to Lead Counsel; and (ii) approving reimbursement of costs and expenses to Lead Plaintiff should be granted.

DATED: April 2, 2021

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on April 2, 2021, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

s/ A. Rick Atwood, Jr.
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