GLANCY PRONGAY & MURRAY LLP
JOSHUA L. CROWELL (295411)
1925 Century Park East
Suite 2100
Los Angeles, CA 90067
Telephone: (310) 201-9150
Facsimile: (310) 432-1495
jcrowell@glancylaw.com

Liaison Counsel for Lead Plaintiff the Public School Retirement System of the School District of Kansas City, Missouri and Liaison Counsel for the Proposed Class

LABATON SUCHAROW LLP
JAMES W. JOHNSON (*pro hac vice*)
MICHAEL H. ROGERS (*pro hac vice*)
IRINA VASILCHENKO (*pro hac vice*)
JAMES T. CHRISTIE (*pro hac vice*)
140 Broadway
New York, NY 10005
Telephone: (212) 907-0700
Facsimile: (212) 818-0477
jjohnson@labaton.com
mrogers@labaton.com
ivasilchenko@labaton.com
jchristie@labaton.com

Attorneys for Lead Plaintiff the Public School Retirement System of the School District of Kansas City, Missouri and Lead Counsel for the Proposed Class

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VANCOUVER ALUMNI ASSET HOLDINGS INC., Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. DAIMLER AG, DIETER ZETSCHE, BODO UEBBER, and THOMAS WEBER, Defendants.	Master File No. 16-cv-02942-DSF-KS Judge: Hon. Dale S. Fischer **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND PAYMENT OF EXPENSES**
MARIA MUNRO, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. DAIMLER AG, DIETER ZETSCHE, BODO UEBBER, and THOMAS WEBER, Defendants.	Case No. 16-cv-03412-DSF-KS Date: December 14, 2020 Time: 1:30 p.m. Place: Courtroom 7D Judge: Hon. Dale S. Fischer

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Docketed Cases

Statutes

Other Authorities

Lead Counsel respectfully submits this memorandum of points and authorities in support of its application, on behalf of all Plaintiffs' Counsel, for an Order: (i) awarding attorneys' fees of 25% of the $19 million Settlement Fund; (ii) approving payment of Plaintiffs' Counsel's litigation expenses in the amount of $150,686.35; and (iii) approving Lead Plaintiff's request for reimbursement related to its representation of the Settlement Class, pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(a)(4), in the amount of $4,000.00.[1]

PRELIMINARY STATEMENT

As detailed in the Stipulation, Lead Plaintiff, on behalf of itself and all others similarly situated, has agreed to settle all claims in the Action, and related claims, in exchange for a payment of $19,000,000 (the "Settlement"). Lead Plaintiff entered into the Settlement with all of the defendants in the Action: Daimler AG ("Daimler" or the "Company"), and Dieter Zetsche ("Zetsche"), Bodo Uebber ("Uebber"), and Thomas Weber ("Weber") (collectively, the "Individual Defendants" and, with Daimler, the "Defendants"). This recovery is a very favorable result for the Settlement Class and avoids the substantial risks and expenses of continued litigation, including the risk of recovering less than the Settlement Amount, or nothing at all.

Plaintiffs' Counsel have not received any compensation for their litigation of this case, which required four years of vigorous advocacy. Lead Counsel respectfully requests that Plaintiffs' Counsel be awarded an attorneys' fee of 25%,

[1] All capitalized terms not otherwise defined herein shall have the same meanings as those set forth in the Stipulation and Agreement of Settlement, dated April 20, 2020 (the "Stipulation"), as amended, previously filed with the Court. *See* ECF No. 310-3. Lead Counsel was assisted in this case by Liaison Counsel Glancy Prongay & Murray LLP and Mark Flaherty, Kansas City's outside counsel (collectively with Labaton Sucharow, "Plaintiffs' Counsel"). Any attorneys' fees awarded by the Court to Lead Counsel will be allocated by Lead Counsel to itself, Glancy Prongay & Murray LLP, and Mark Flaherty.

which would be reasonable under the circumstances presented and is the Ninth Circuit's "benchmark" for contingent fees. *See, e.g., In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) ("Twenty-five percent is the 'benchmark' that district courts should award in common fund cases.").[2]

As discussed herein, as well as in the accompanying Declaration of James W. Johnson in Support of (I) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation, and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses ("Johnson Declaration"),[3] it is respectfully submitted that the requested fees and expenses are fair and reasonable when considered under the applicable standards in the Ninth Circuit. The fee is also well within the range of awards in class actions within the Ninth Circuit and courts nationwide, particularly in view of the substantial risks of pursuing the claims, the litigation efforts, and the results achieved for the Settlement Class. Lead Plaintiff, a sophisticated institutional investor, was actively involved in the litigation and believes that the Fee and Expense Application is reasonable. Ex. 1 at ¶6.

For all the following reasons, it is respectfully submitted that the requested fees and expenses should be awarded in full.

---

[2] All internal quotations and citations are omitted unless otherwise stated.

[3] The Johnson Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action; the nature of the claims asserted; the negotiations leading to the Settlement; and the risks and uncertainties of continued litigation; among other things. Citations to "¶" in this memorandum refer to paragraphs in the Johnson Declaration.

All exhibits referenced herein are annexed to the Johnson Declaration. For clarity, citations to exhibits that themselves have attached exhibits, will be referenced herein as "Ex.__-__." The first numerical reference is to the designation of the entire exhibit attached to the Declaration and the second alphabetical reference is to the exhibit designation within the exhibit itself.

ARGUMENT

I. LEAD COUNSEL'S REQUEST FOR ATTORNEYS' FEES OF 25% OF THE COMMON FUND SHOULD BE APPROVED

A. Counsel Are Entitled to an Award of Attorneys' Fees from the Common Fund

It is well settled that attorneys who represent a class and achieve a benefit for class members are entitled to a reasonable fee as compensation for their services. The Supreme Court has recognized 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); *see also Vincent v. Reser*, No. C-11-03572 CRB, 2013 WL 621865, at *4 (N.D. Cal. Feb. 19, 2013) (quoting *Boeing*, 444 U.S. at 478). Indeed, the Ninth Circuit has expressly reasoned that "a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees." *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977).

The purpose of this rule, known as the "common fund doctrine," is to prevent unjust enrichment so that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Wash. Pub. Power Supply Sys. Sec. Litig. (WPPSS)*, 19 F.3d 1291, 1300 (9th Cir. 1994), *aff'd in part, Class Plaintiffs v. Jaffe Schlesinger, P.A.*, 19 F.3d 1306 (9th Cir. 1994).

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

In *Blum v. Stenson*, 465 U.S. 886 (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. . . ." *Id.* at 900 n.16. Within the Ninth Circuit, a district court has discretion to award fees in common fund cases

based on either the lodestar/multiplier method or the percentage-of-the-fund method. *WPPSS*, 19 F.3d at 1296. In *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-48 (9th Cir. 2002), the Ninth Circuit expressly approved the use of the percentage method in common fund cases, and supporting authority for the percentage method in other circuits is overwhelming.

Moreover, this Court has recognized that the percentage method is the appropriate method in a common fund case. *See, e.g., Diaz v. Albertson's LLC*, No. CV 16-257 DSF (JEMx), 2018 WL 6118556, at *1 (C.D. Cal. Apr. 2, 2018) (awarding 30% fee and finding that since percentage method was the appropriate method in common fund case, the Court need not calculate a lodestar figure.); *Nader v. Capital One Bank (USA)*, N.A. No. CV12-1265 DSF (RZx), 2014 WL 12584442 (C.D. Cal Nov. 17, 2014) (approving 25% benchmark and ruling that lodestar analysis was not required in the common fund settlement).

The rationale for compensating counsel in common fund cases on a percentage basis is sound. Principally, 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. Indeed, one of the nation's leading scholars in the field of class actions and attorneys' fees, Professor Charles Silver of the University of Texas School of Law, has concluded that the percentage method of awarding fees is the only method of fee awards that is consistent with class members' due process rights. Professor Silver notes:

> ***The consensus that the contingent percentage approach creates a closer harmony of interests between class counsel and absent plaintiffs than the lodestar method is strikingly broad.*** It includes leading academics, researchers at the RAND Institute for Civil Justice, and many judges, including those who contributed to the Manual for Complex Litigation, the Report of the Federal Courts Study Committee, and the report of the Third Circuit Task Force. Indeed, it is difficult to find anyone who contends otherwise. No one writing in the field today is defending the lodestar on the ground that it minimizes conflicts between class counsel and absent claimants.

> ***In view of this, it is as clear as it possibly can be that judges should not apply the lodestar method in common fund class actions.*** The Due Process Clause requires them to minimize conflicts between absent claimants and their representatives. The contingent percentage approach accomplishes this.

Charles Silver, Class Actions In The Gulf South Symposium, *Due Process and the Lodestar Method: You Can't Get There From Here*, 74 Tul. L. Rev. 1809, 1819-20 (2000). This is particularly appropriate in cases under the Private Securities Litigation Reform Act's ("PSLRA") where Congress recognized the propriety of the percentage method of fee awards. *See* 15 U.S.C. § 78u-4(a)(6) ("Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class").

C. Analysis Under the Percentage Method and the *Vizcaino* Factors Justify a Fee Award of 25% in this Case

As this Court has recognized, the Ninth Circuit has established 25% of a common fund as the "benchmark" award for attorneys' fees. *See Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268 (9th Cir. 1989); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376-77 (9th Cir. 1993) (reaffirming 25% benchmark); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000) (same); *Destefano v. Zynga Inc.*, No. 12-cv-04007-JSC, 2016 WL 537946, at *17 (N.D. Cal. Feb. 11, 2016) (same).

The guiding principle in this Circuit is that a fee award must be "reasonable under the circumstances." *WPPSS*, 19 F.3d at 1296. In employing the percentage method, courts may perform a lodestar cross-check to confirm the reasonableness of the requested fee. *Vizcaino*, 290 F.3d at 1047 (affirming use of percentage method and applying the lodestar method as a cross-check). Here, although the 25% fee request is reasonable standing alone, as discussed below, Plaintiffs' Counsel have dedicated more than 5,600 hours to the prosecution of the case, with

a lodestar value at current rates of $3,426,932.00 and at historical rates of $3,176,033.75. *See* Ex. 5. Accordingly, the requested fee, if granted, would provide a reasonable and modest multiplier of approximately 1.5 on counsel's lodestar in the case.

The fee request readily satisfies the five *Vizcaino* factors that are used by courts within the Ninth Circuit to evaluate the reasonableness of a requested fee: (1) the result achieved; (2) the risk of litigation; (3) the skill required and quality of the work; (4) awards made in similar cases; and (5) the contingent nature of the fee and financial burden carried by counsel. *Vizcaino*, 290 F.3d at 1048-50. The Ninth Circuit has explained that these factors should not be used as a rigid checklist or weighed individually, but, rather, should be evaluated in light of the totality of the circumstances. *Id.* As set forth below, all of the *Vizcaino* factors militate in favor of approving the requested fee.

1. The Result Achieved

Courts have consistently recognized that the result achieved is an important factor to be considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (noting "the most critical factor is the degree of success obtained"). Lead Counsel submits that the $19 million proposed Settlement is a very favorable result for the Settlement Class, both quantitatively and when considering the risk of a lesser (or no) recovery if the case proceeded through a contested class certification motion, summary judgment and trial.

As discussed in the Johnson Declaration, if liability were established with respect to all claims, it is estimated that the maximum aggregate damages recoverable at trial based on the full stock price declines on the alleged disclosure dates would be approximately $150 million. Accordingly, the Settlement recovers approximately 13% of maximum damages. Since the passage of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), courts have regularly approved settlements that recover far smaller percentages of maximum damages.

See, e.g., Int'l Bhd. of Elec. Workers Local 697 Pension Fund v. Int'l Game Tech., Inc., No. 3:09-cv-00419-MMD-WGC, 2012 WL 5199742, at *3 (D. Nev. Oct. 19, 2012) (approving $12.5 million settlement recovering approximately 3.5% of the maximum damages estimated by plaintiffs and noting that the amount is within the median recovery in securities class actions settled in the last few years); *McPhail v. First Command Fin. Planning, Inc.*, No. 05-cv-179-IEG-JMA, 2009 WL 839841, at *5 (S.D. Cal. Mar. 30, 2009) (finding a $12 million settlement recovering 7% of estimated damages was fair and adequate); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) ($13.75 million settlement yielding 6% of potential damages after deducting fees and costs was "higher than the median percentage of investor losses recovered in recent shareholder class action settlements").

However, this maximum estimate assumes that Lead Plaintiff would be able to prove damages based on both alleged corrective disclosures in the Action and that it would not need to disaggregate, or parse out, confounding non-fraud related information on those dates. However, had the case proceeded, Defendants likely would have strenuously argued for the exclusion of each of the alleged corrective disclosures on the grounds, among others, that Lead Plaintiff could not sufficiently link each to Defendants' alleged fraud. *See* Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation and Memorandum of Points and Authorities in Support Thereof ("Settlement Brief"), §I.C.4.; Johnson Decl. ¶¶66-71. If these arguments prevailed at class certification, summary judgment, trial, or on appeal, the Settlement Class could have recovered significantly less or, indeed, nothing.

The $19 million recovery is also well above the median securities case settlement amount of $12.4 million for 2019, as reported by NERA Economic Consulting. *See* Janeen McIntosh and Svetlana Starykh, *Recent Trends in*

Securities Class Action Litigation: 2019 Full-Year Review (NERA 2020), Ex. 7 at 1.

In sum, the Settlement provides a very favorable percentage of recovery for the Settlement Class, which supports approval of the requested fee.

2. The Risks of Litigation

The risk involved in a litigation is also an important factor in determining a fair fee award. *Vizcaino*, 290 F.3d at 1048 (noting "[r]isk is a relevant circumstance" in awarding attorneys' fees); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379, n.10 (9th Cir. 1995) (finding that attorneys' fees were justified "because of the complexity of the issues and the risks"); *see also Zynga*, 2016 WL 537946, at *17 (approving requested fee and noting that "as to the second factor . . . the risks associated with the case were substantial given the challenges of obtaining class certification and establishing the falsity of the misrepresentations and loss causation"); *In re Omnivision Techs. Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. Jan. 9, 2008) (noting that the risk of litigation, including the ability to prove loss causation and the risk that Defendants prevail on damages, support the requested fee). As set forth in Section VII. of the Johnson Declaration, Lead Counsel confronted, and would continue to do so if the litigation had continued, a number of significant legal and factual challenges during the course of the litigation.

The most immediate risk faced by Lead Plaintiff was the challenge involved in certifying the class in a contested certification proceeding, and then retaining certification through summary judgment and trial. Most notably, in connection with class certification, Lead Counsel would have had to argue, and the Court would be called to rule on, the complex loss causation and price impact arguments at issue in this case, and the motion would have led to a difficult contested "battle of the experts." Johnson Decl. ¶¶55-58.

Defendants likely would have continued to advance the argument that purchases of the Daimler Securities at issue here—particularly the Daimler GRS,

which are arguably connected to the U.S. only by their trading on the U.S. OTC market—did not qualify as domestic transactions under *Morrison v. Nat'l Austl. Bank*, 561 U.S. 247 (2010) and the guidance set forth in *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 937 n.1 (9th Cir. 2018), and, therefore the class's trading was not protected by the Exchange Act or appropriate for class certification. Accordingly, Lead Counsel had confronted, and would have continued to face, novel and complex challenges under *Morrison*. Johnson Decl. ¶ 56.

Lead Counsel also faced obstacles in its ability to prove materiality, falsity, or scienter within the unique factual context of this case, both in connection with Defendants' anticipated summary judgment challenges and at trial. For example, Defendants would have likely maintained their arguments that statements touting, *e.g.*, Daimler's compliance with "the strictest emissions standards," were not false because its diesel vehicles met the applicable regulatory standards in place at the time. Falsity and scienter would have been difficult to establish given the lack of clear regulatory guidance and the existence of competing interpretations as to whether or not an emissions control system that shuts off to protect the vehicle's engine (such as the BlueTEC emissions control system) were permissible under the applicable regulations. The alleged misstatements denying that Daimler used "defeat devices" came down to complex factual issues concerning Daimler's technology, its functionality, and comparisons with what occurred at VW. Johnson Decl. ¶¶59-65. Accordingly, Lead Counsel was required to navigate and master extremely complex, difficult, and expert-driven technical issues.

Another principal risk of continued the litigation was the difficulty of proving loss causation and damages, which required significant effort on the part of Lead Counsel and would continue to do so. ¶¶66-71. As set forth in the Johnson Declaration, Defendants likely would have continued to argue that the stock declines on the two corrective disclosure dates were not in fact attributable to disclosures related to the alleged fraud and wrongdoing at Daimler and that,

even if they were corrective, the difficult process of disaggregating the non-fraud related information would reveal no damages resulting from Lead Plaintiff's theory of the case. ¶¶66-68. There were substantial challenges inherent in Lead Plaintiff's expert's efforts to isolate the proportion of the stock price declines on the corrective disclosure dates attributable specifically to the alleged fraud. *Id*. Because of these challenges, Lead Plaintiff's proposed damages methodology would have come under sustained attack by Defendants, and issues relating to damages would have been an ongoing "battle of the experts."

In addition, Lead Plaintiff would have had to move for and argue, and the Court would need to rule on, class certification, summary judgment, and pre-trial motions – requiring significant effort on Lead Counsel's part. Regardless of who would ultimately be successful at trial, there is no doubt that both sides would have had to present complex and nuanced information to the Court and a jury concerning, among other things, European and U.S. emissions regulations, the auto industry, diesel emissions and defeat devices, as well as damages and loss causation to a jury with no certainty as to the outcome.

Lead Counsel worked diligently to achieve a significant result for the Settlement Class in the face of these very real risks. Under these circumstances, the requested fee is fully appropriate.

3. The Skill Required and the Quality of Work

Courts have recognized that the "prosecution and management of a complex national class action requires unique legal skills and abilities." *In re Heritage Bond Litig.*, No. 02-ML-1475-DT (RCX), 2005 WL 1594389, at *12 (C.D. Cal. June 10, 2005); *see also Vizcaino*, 290 F.3d at 1048. "This is particularly true in securities cases because the Private Securities Litigation Reform Act makes it much more difficult for securities plaintiffs to get past a motion to dismiss." *Zynga*, 2016 WL 537946, at *17 (quoting *Omnivision*, 559 F. Supp. 2d at 1047).

Here, in addition to the complexities of this being a securities case, as discussed above the claims centered on Defendants' allegedly false and misleading statements and omissions implicating European and U.S. emissions regulations, the auto industry, diesel emissions and defeat devices. Lead Counsel conducted its own proprietary investigation to formulate its theory of the case and support the allegations. Among other efforts, Lead Counsel identified approximately 103 former Daimler and Mercedes-Benz employees and other persons with relevant knowledge and interviewed 30 of them. Lead Counsel also reviewed and analyzed: (i) documents filed publicly by the Company with the U.S. Securities and Exchange Commission ("SEC"); (ii) publicly available information, including press releases, news articles, and other public statements issued by or concerning the Company and Defendants; (iii) research reports issued by financial analysts concerning the Company; (iv) other publicly available information and data concerning the Company, including European and domestic emissions regulations, regulatory submissions by Daimler and other auto manufacturers, investigative reports regarding diesel emissions and defeat devices, and engineering analyses; and (v) documents produced in response to Freedom of Information Act ("FOIA") requests issued to emissions regulators, including the Environmental Protection Agency ("EPA") and California Air Resources Board ("CARB"). Lead Counsel also consulted with experts on damages, diesel emissions, privacy, and regulatory issues. *See generally* Johnson Decl. at §§II - IV.

Lead Counsel has extensive and significant experience in the highly specialized field of securities class action litigation and is known as a leader in the field. Ex. 3-D. Lead Counsel has not only used its knowledge and skill from prior cases but also developed specific expertise in the issues presented here. The favorable Settlement is attributable in large part to the diligence, determination,

hard work, and skill of Lead Counsel, who developed, litigated, and successfully settled the Action.

The quality of opposing counsel is also important in evaluating the quality of the work done by Lead Counsel. *See, e.g.*, *Heritage Bond*, 2005 WL 1594389, at *12; *In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977). Lead Counsel was opposed in this Action by very skilled and highly respected lawyers at Latham & Watkins LLP with a well-deserved reputation for vigorous advocacy in the defense of complex civil cases such as this. In the face of this opposition, Lead Counsel was able to develop the Lead Plaintiff's case so as to obtain a very favorable recovery for the Settlement Class.

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

It has long been recognized that attorneys are entitled to a larger fee when their compensation is contingent in nature. *See Vizcaino*, 290 F.3d at 1048-50; *Omnivision*, 559 F. Supp. 2d at 1047 ("The importance of assuring adequate representation for plaintiffs who could not otherwise afford competent attorneys justifies providing those attorneys who do accept matters on a contingent-fee basis a larger fee than if they were billing by the hour or on a flat fee."); *see also Zynga*, 2016 WL 537946, at *18 (noting that "when counsel takes on a contingency fee case and the litigation is protracted, the risk of non-payment after years of litigation justifies a significant fee award").

The Supreme Court has also emphasized that private securities actions such as this provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (noting that the court has long recognized that meritorious private actions to enforce federal antifraud securities

laws are an essential supplement to criminal prosecutions and civil enforcement actions).[4]

Indeed, there have been many class actions in which plaintiffs' counsel took on the risk of pursuing claims on a contingency basis, expended thousands of hours and dollars, yet received no remuneration whatsoever despite their diligence and expertise. For example, Lead Counsel tried *In re JDS Uniphase Securities Litigation*, Case No. C-02-1486 CW (EDL) (N.D. Cal. Nov. 27, 2007), through to a disappointing verdict for the defendants, receiving no compensation and expending millions of dollars in time and expenses. *See also In re Oracle Corp. Sec. Litig.*, No. C 01-00988 SI, 2009 WL 1709050 (N.D. Cal. June 19, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010) (granting summary judgment to defendants after eight years of litigation, and after plaintiff's counsel incurred over $6 million in expenses and worked over 100,000 hours, representing a lodestar of approximately $48 million). *See also* Johnson Decl. ¶¶84-93.

Lead Counsel is aware of many other hard-fought lawsuits where, because of the discovery of facts unknown when the case was commenced, changes in the law during the pendency of the case, or a decision of a judge or jury following a trial on the merits, excellent professional efforts by members of the plaintiff's bar produced no fee for counsel. *See, e.g., Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1998) (reversing plaintiffs' jury verdict for securities fraud); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (reversing $81 million jury verdict and dismissing case with prejudice); *Anixter v. Home-Stake Prod. Co.*, 77

[4] Additionally, vigorous private enforcement of the federal securities laws and state corporation laws can only occur if private plaintiffs can obtain some semblance of parity in representation with that available to large corporate defendants. If this important public policy is to be carried out, courts should award fees that will adequately compensate private plaintiffs' counsel, taking into account the enormous risks undertaken with a clear view of the economics of a securities class action.

F.3d 1215 (10th Cir. 1996) (overturning plaintiffs' verdict obtained after two decades of litigation). As the court in *In re Xcel Energy, Inc. Securities, Derivative & "ERISA" Litigation*, 364 F. Supp. 2d 980 (D. Minn. 2005) recognized, "[p]recedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy." *Id.* at 994. Even plaintiffs who get past summary judgment and succeed at trial may find a judgment in their favor overturned on appeal or on a post-trial motion. *See, e.g., Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408 (7th Cir. 2015) (reversing and remanding jury verdict of $2.46 billion after 13 years of litigation on loss causation grounds and error in jury instruction under *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011)).

Here, because Plaintiffs' Counsel's fee was entirely contingent, the only certainty was that there would be no fee without a successful result and that such result would only be realized after significant amounts of time, effort, and expense had been expended. Unlike counsel for defendants, who are paid and reimbursed for their expenses on a current basis, Plaintiffs' Counsel have received no compensation for their efforts during the course of the Action. Plaintiffs' Counsel have risked non-payment of $150,000 in expenses and more than $3 million in time worked on this matter, knowing that if their efforts were not successful, no fees or expenses would be paid.

5. A 25% Fee Award Is the Ninth Circuit's Benchmark and Comparable to Awards in Similar Cases

In requesting a 25% fee, Lead Counsel seeks the benchmark fee that has been established by the Ninth Circuit. *Eichen*, 229 F.3d at 1256 ("We have also established twenty-five percent of the recovery as a 'benchmark' for attorneys' fees calculations under the percentage-of-recovery approach."); *Zynga*, 2016 WL 537946, at *18 ("As to the fifth factor and awards in similar cases, several other

courts—including courts in this District—have concluded that a 25 percent award was appropriate in complex securities class actions."). The fee request is therefore appropriate, and "'unusual circumstances' are required to justify a departure" – of which there are none. *Diaz*, 2018 WL 6118556, at * 1.

Fee awards of 25%, or more, have been awarded in numerous securities settlements with comparable, and greater settlements, in district courts throughout the Ninth Circuit. *See, e.g., Milbeck v. TrueCar, Inc.*, et.al., Case No. 2:18-cv-02612-SVW-AGR, slip op. at 2 (C.D. Cal. Jan. 27, 2020) (awarding fees of 25% of $28.25 million settlement) (Ex. 8);[5] *In re Banc of Calif. Sec. Litig.*, No. SA CV 17-118 DMG (DFMx), slip op. at 1 (C.D. Cal. Mar. 16, 2020) (awarding fees of 33% of $19.75 million settlement) (Ex. 8); *In re Extreme Networks, Inc. Sec. Litig.*, No. 15-CV-04883-BLF, 2019 WL 3290770, at *11 (N.D. Cal. July 22, 2019) (awarding fees of 25% of $7 million settlement); *Jiangchen v. Rentech, Inc.*, No. CV 17-1490-GW-FFMx, 2019 WL 6001562, at *1 (C.D. Cal. Nov. 8, 2019) (awarding fees of 33.3% fee of $2.05 million settlement); *Rieckborn v. Velti PLC*, No. 13-CV-03889, 2015 WL 468329, at *21-22 (N.D. Cal. Feb. 3, 2015) (awarding fees of 25% of $9.5 million partial settlement); *In re Vocera Comm'cns, Inc.*, No. 3:13-cv-03567-EMC, slip op. at 4 (N.D. Cal. July 29, 2016) (awarding fees of 25% of $9 million settlement) (Ex. 8) *Mulligan v. Impax Labs, Inc.*, Case No. 13-cv-01037-EMC, slip op. at 7 (N.D. Cal. July 23, 2015) (awarding fees of 29% of $8 million settlement) (Ex. 8); *In re Nuvelo, Inc. Sec. Litig.*, No. C07-0405 CRB, 2011 WL 2650592, at *3 (N.D. Cal. July 6, 2011) (awarding 30% of $8.9 million settlement); *In re Gilead Sci. Sec. Litig.*, No. C-03-4999-SI, slip op. at 1 (N.D. Cal. Nov. 5, 2010) (awarding fees of 30% of $8.25 million settlement) (Ex. 8); *cf. In re Hewlett-Packard Co. Sec. Litig.*, Case No.

[5] A compendium of unreported slip opinions is submitted as Exhibit 8 to the Johnson Declaration.

SACV 11-1404-AG (RNBx), slip op. at 2-3 (C.D. Cal. Sept. 15, 2014) (awarding 25% fee of $57 million settlement) (Ex. 8); *Stanley v. Safeskin Corp*., No. 99CV454 BTM (LSP), slip op. at 9 (S.D. Cal. Apr. 2, 2003) (awarding 26% of $55 million settlement) (Ex. 8).

The fee request is also in line with awards made by this Court in class action common fund cases. *See, e.g., Diaz*, 2018 WL 6118556, at *1 (awarding 30% fee); *Nader*, 2014 WL 12584442, at *2 (approving 25% fee).

An examination of fee decisions in other federal jurisdictions in securities class actions with comparable settlements also shows that an award of 25% would be reasonable. *See, e.g., W. Palm Beach Police Pension Fund v. DFC Glob. Corp*., No. CV 13-6731, 2017 WL 4167440, at *8 (E.D. Pa. Sept. 20, 2017) (awarding 25% of $30 million settlement and noting, "a fee award of 25% of the total settlement here is reasonable and in keeping with similar precedent"); *City of Sterling Heights Gen. Emps.' Ret. Sys. v. Hospira, Inc.*, No. 1:11-cv-08332-AJS, 2014 WL 12767763, at *1 (N.D. Ill. Aug. 5, 2014) (awarding 30% of $60 million settlement); *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM)(GWG), 2014 WL 1883494, at *12-13 (S.D.N.Y. May 9, 2014) (awarding 33% of $15 million settlement fund), *aff'd, Arbuthnot v. Pierson*, 607 F. App'x. 73 (2d Cir. 2015).

Additionally, a recent analysis by NERA Economic Consulting of securities class action settlements found that from 2010-2019, the median attorneys' fee award for settlements of between $10 million and $25 million was 25%. *See* Janeen McIntosh and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2019 Full-Year Review* (NERA 2020), Ex. 7 at 25.

Accordingly, it is respectfully submitted that the attorneys' fee requested here is well within the range of fees awarded by district courts within the Ninth Circuit and in comparable securities settlements nationwide.

6. Reaction of the Settlement Class

Although not articulated specifically in *Vizcaino*, district courts in the Ninth Circuit also consider the reaction of the class when deciding whether to award the requested fee. *See Heritage Bond*, 2005 WL 1594389, at *15 ("The presence or absence of objections . . . is also a factor in determining the proper fee award."). A total of 158,139 copies of the Notice and Claim Form have been sent to potential Class Members and the Court-approved Summary Notice was published in *The Wall Street Journal* and transmitted over the internet using *PR Newswire*. Ex. 2 at ¶¶7-8. In addition, the Settlement Agreement and Notice, among other documents, were posted to a website dedicated to the Settlement. *Id*. at ¶10. Although the objection deadline will not run until November 23, 2020, to date no objections to the requested amount of attorneys' fees and expenses have been received.[6]

7. Lodestar Cross-Check

Although an analysis of counsel's lodestar is not required for an award of attorneys' fees in the Ninth Circuit, as recognized by the Court, it is respectfully submitted that a cross-check of the fee request with Plaintiffs' Counsel's lodestar also demonstrates its reasonableness. *See Vizcaino*, 290 F.3d at 1048-50.

Plaintiffs' Counsel's combined "lodestar" (hours worked multiplied by hourly rates) is $3,426,932.00 at counsel's current rates[7] and $3,176,033.75 at counsel's historical rates over the course of the litigation. *See* Exs. 3-A, 4-A, and

---

[6] Lead Counsel will address any future objections in its reply papers, which will be filed with the Court on or before December 7, 2020.

[7] The Supreme Court and other courts have held that the use of current rates is proper since such rates compensate for inflation and the loss of use of funds. *See Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989); *Rutti v. Lojack Corp. Inc.*, No. SACV 06-350 DOC JCX, 2012 WL 3151077, at *11 (C.D. Cal. July 31, 2012) ("it is well-established that counsel is entitled to current, not historic, hourly rates") (citing *Jenkins*, 491 U.S. at 284). However, we understand that the Court considers historical rates when assessing lodestar.

5. Plaintiffs' Counsel's lodestar represents 5,619 hours of work at counsel's hourly rates. Time related to preparing this fee motion, as well as other time in the exercise of billing judgment, has been removed from these figures. Exs. 3 ¶3, 4 ¶3. Exhibit B to Plaintiffs' Counsel's fee and expense declarations are tables showing counsel's time broken down by category of work. Ex. 3 - B, 4 - B. The requested fee, if awarded, would represent a "multiplier" of approximately 1.5 of Plaintiffs' Counsel's combined lodestars. *Id.*

Counsel's current rates here range from $775 to $1,075 for partners, $775 to $795 for of counsels, and $425 to $625 for associates and staff attorneys. *See* Exs. 3-A, 4-A.. Lead Counsel submits that these rates are comparable or less than those used by peer defense-side law firms litigating matters of similar magnitude and complexity. Sample defense firm rates in 2019, gathered by Labaton Sucharow annually from bankruptcy court filings nationwide, often exceeded these rates. Ex. 6; ¶98.

The Ninth Circuit has recognized that attorneys in common fund cases are frequently awarded a multiple of their lodestar, rewarding them "for taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning contingency cases." *Vizcaino*, 290 F.3d at 1051. For example, the district court in *Vizcaino* approved a fee that reflected a multiple of 3.65 times counsel's lodestar. *Id.* The Ninth Circuit affirmed, holding that the district court correctly considered the range of multiples applied in common fund cases, and noting that a range of lodestar multiples from 1.0 to 4.0 are frequently awarded. *Id.*

Additional work will be required of Lead Counsel on an ongoing basis, including: correspondence with Class Members; preparation for, and participation in, the final approval hearing; supervising the claims administration process being conducted by the Claims Administrator; and supervising the distribution of the Net Settlement Fund to Settlement Class Members who have submitted valid

Claim Forms. However, Lead Counsel will not seek payment for this additional work.

II. PLAINTIFFS' COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARY TO ACHIEVE THE BENEFIT OBTAINED

Plaintiffs' Counsel have incurred expenses in the aggregate amount of $150,686.35 in litigating the Action. Exs. 3-C, 4-C, and 5. These expenses are outlined in Plaintiffs' Counsel's individual fee and expense declarations submitted to the Court concurrently herewith. *Id*.

As the *Vincent* court noted, "[a]ttorneys who created a common fund are entitled to the reimbursement of expenses they advanced for the benefit of the class." *Vincent*, 2013 WL 621865, at *5. In assessing whether counsel's expenses are compensable in a common fund case, courts look to whether the particular costs are of the type typically billed by attorneys to paying clients in the non-contingent marketplace. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'"). Here, the expenses sought by Plaintiffs' Counsel are of the type that are charged to hourly paying clients and, therefore, should be paid out of the common fund.

The main expense here relates to work performed by Lead Plaintiff's experts ($76,592.95 or approximately 51% of total expenses). The services of Lead Plaintiff's consulting damages experts were necessary for preparing estimates of damages; analyzing *Morrison* and loss causation issues; and preparing the Plan of Allocation. Lead Plaintiff's expert on diesel emissions and regulations was key to counsel's investigation, drafting the Complaint, and framing discovery. Finally, Lead Plaintiff retained a data protection and privacy expert to provide advice concerning data and privacy issues, as well as European data privacy regulations and law in connection with a discovery dispute. ¶104. Lead Counsel received crucial advice and assistance from these experts.

Lead Counsel also paid $30,750.00 (or approximately 20% of total costs) in mediation fees assessed by the mediator in this matter. ¶105. Plaintiff's Counsel were also required to travel in connection with court appearances, and to work long hours. Work-related transportation, lodging, and meal costs totaled $19,178.23 or approximately 13% of aggregate expenses. ¶106. All airfare is at coach rates. *See In re Immune Response Sec. Litig*, 497 F. Supp. 2d 1166, 1177 (S.D. Cal. 2007) ("reimbursement for travel expenses . . . is within the broad discretion of the Court").

Computerized research totals $6,028.65 or approximately 4% of total expenses. These are the charges for computerized factual and legal research services, such as PACER and Thomson 1 Research. These services allowed counsel to perform media searches concerning the Company and Defendants, obtain analysts' reports and financial data, and access court dockets. Charges for Westlaw and Lexis/Nexis have not been included.

The other expenses for which Lead Counsel seeks payment are the types of expenses that are necessarily incurred in litigation. These expenses include, among others, duplicating costs, long distance telephone and conference call charges, and court filing fees.

In sum, Plaintiffs' Counsel's expenses, in an aggregate amount of $150,686.35, were reasonable and necessary to the prosecution of the Action and should be approved.

III. LEAD PLAINTIFF'S REQUEST FOR REIMBURSEMENT PURSUANT TO 15 U.S.C. 78u-4(A)(4) IS REASONABLE

The PSLRA, 15 U.S.C. § 78u-4(a)(4), permits an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class." Here, as detailed in Lead Plaintiff's Declaration, attached as Exhibit 1 to the Johnson Declaration, Lead Plaintiff is seeking $4,000.00 in expenses related to the time its

Executive Director dedicated to the Action, which included communicating with Lead Counsel, reviewing pleadings and briefing, and participating in the mediation in New York, NY.

Many cases have approved reasonable payments to compensate class representatives for the time, effort, and expenses devoted by them on behalf of a class. *See, e.g.*, *In re Intuitive Surgical Securities Litigation*, Case No. 5:13-cv-01920, slip op. at 4 (N.D. Cal. Dec. 20, 2018) (awarding $49,754.18 and $9,100.00 to class representatives) (Ex. 8); *Hatamian v. Advanced Micro Devices, Inc.*, Case No. 14-cv-00226-YGR, slip op, at 4 (N.D. Cal. Mar. 2, 2018) (awarding costs and expenses to two class representatives in the amount of $8,348.25 and $14,875.00) (Ex. 8); and *In re Broadcom Corp. Class Action Litig.*, No. CV-06-5036-R (CWx) (C.D. Cal. Dec. 4, 2012), slip op. at 2 (awarding costs and expenses to class representative in the amount of $21,087) (Ex. 8).

As explained in one decision, courts "award such costs and expenses to both reimburse named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as provide an incentive for such plaintiffs to remain involved in the litigation and incur such expenses in the first place." *Hicks v. Stanley*, No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *10 (S.D.N.Y. Oct. 24, 2005).

Lead Counsel respectfully submits that the amount sought here is reasonable based on Lead Plaintiff's active involvement in the Action from inception to settlement.

CONCLUSION

For all the foregoing reasons, Lead Counsel respectfully requests that the Court award attorneys' fees of 25% of the Settlement Fund, litigation expenses in the amount of $150,686.35, and an award to Lead Plaintiff, pursuant to the PSLRA, in the amount of $4,000.00.

Dated: November 9, 2020

LABATON SUCHAROW LLP

By: /s/ *James W. Johnson*

JAMES W. JOHNSON (*pro hac vice*)
MICHAEL H. ROGERS (*pro hac vice*)
IRINA VASILCHENKO (*pro hac vice*)
JAMES T. CHRISTIE (*pro hac vice*)
140 Broadway
New York, NY 10005
Telephone: (212) 907-0700
Facsimile: (212) 818-0477
jjohnson@labaton.com
mrogers@labaton.com
ivasilchenko@labaton.com
jchristie@labaton.com

Attorneys for Lead Plaintiff and the Settlement Class

GLANCY PRONGAY & MURRAY LLP
JOSHUA L. CROWELL (295411)
1925 Century Park East
Suite 2100
Los Angeles, CA 90067
Telephone: (310) 201-9150
Facsimile: (310) 432-1495
jcrowell@glancylaw.com

Liaison Counsel for Lead Plaintiff and the Settlement Class

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2020, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List via ECF to all registered participants.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 9, 2020

/s/ *James W. Johnson*
James W. Johnson

Mailing Information for a Case 2:16-cv-02942-DSF-KS Vancouver Alumni Asset Holdings, Inc. v. Daimler AG et al
Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

Eric J Belfi
ebelfi@labaton.com,lpina@labaton.com,4076904420@filings.docketbird.com,electroniccasefiling@labaton.com

James T Christie
jchristie@labaton.com,lpina@labaton.com,smundo@labaton.com,9436348420@filings.docketbird.com,electroniccasefiling@labaton.com

Paul J Collins
pcollins@gibsondunn.com,PLe@gibsondunn.com,eoldiges@gibsondunn.com,mjkahn@gibsondunn.com,JRodriguez@gibsondunn.com,cthomas@gibsondunn.com

Joshua Lon Crowell
jcrowell@glancylaw.com,joshua-crowell-496@ecf.pacerpro.com,info@glancylaw.com

Jenny Lynn Grantz
jenny.grantz@squirepb.com,carrie.takahata@squirepb.com

James W Johnson
jjohnson@labaton.com,7592785420@filings.docketbird.com,lpina@labaton.com,smundo@labaton.com,electroniccasefiling@labaton.com

Michael J Kahn
mjkahn@gibsondunn.com,jrodriguez@gibsondunn.com,SChoi@gibsondunn.com

Christopher J Keller
ckeller@labaton.com,5497918420@filings.docketbird.com,lpina@labaton.com,electroniccasefiling@labaton.com

Matthew J Kemner
matthew.kemner@squirepb.com,Marsi.Allard@SquirePB.com

Francis P McConville
fmcconville@labaton.com,HChang@labaton.com,lpina@labaton.com,drogers@labaton.com,9849246420@filings.docketbird.com,electroniccasefiling@labaton.com

Danny Lam Nguyen
danny.nguyen@usdoj.gov

Jennifer Pafiti
jpafiti@pomlaw.com,jalieberman@pomlaw.com,ahood@pomlaw.com,tcrockett@pomlaw.com,disaacson@pomlaw.com,ashmatkova@pomlaw.com,abarbosa@pomlaw

Robert Vincent Prongay
rprongay@glancylaw.com,CLinehan@glancylaw.com,robert-prongay-0232@ecf.pacerpro.com

Michael H Rogers
mrogers@labaton.com,lpina@labaton.com,8956253420@filings.docketbird.com,electroniccasefiling@labaton.com

Laurence M Rosen
lrosen@rosenlegal.com

Jonathan M Rotter
jrotter@glancylaw.com,jonathan-rotter-5262@ecf.pacerpro.com

Christopher S Turner
christopher.turner@lw.com,washington-dc-litigation-services-5378@ecf.pacerpro.com,christopher-turner-6162@ecf.pacerpro.com,DCECFNotificationsDC@lw.com

Irina Vasilchenko
ivasilchenko@labaton.com,lpina@labaton.com,ElectronicCaseFiling@labaton.com,8032137420@filings.docketbird.com

Peter Allen Wald
peter.wald@lw.com,peter-wald-7073@ecf.pacerpro.com,#sflitigationservices@lw.com

Troy M Yoshino
troy.yoshino@squirepb.com,carrie.takahata@squirepb.com

Meryl L Young
myoung@gibsondunn.com,pmclean@gibsondunn.com

Nicole M Zeiss
NZeiss@labaton.com,5854006420@filings.docketbird.com,lpina@labaton.com,ElectronicCaseFiling@labaton.com,Settlementquestions@labaton.com,cboria@labaton.