

1 BRODSKY & SMITH, LLC
2 Evan Smith (No. 242352)
3 esmith@brodskysmith.com
4 9595 Wilshire Boulevard, Suite 900
5 Beverly Hills, California 90212
6 Telephone: (877) 534-2590
7 Facsimile: (310) 247-0160

8 *Attorneys for Plaintiffs*

9 [Additional counsel appear on signature page]

10
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF SANTA CLARA**

13 _____) Lead Case No. 16-CV-294288
14 In re: Hansen Medical, Inc. Shareholder Litigation)
15 _____) [Consolidated with Case Nos.
16 This Document Relates To:) 16-CV-294554, 16-CV-294858 and 16-CV-
17) 294862]
18)
19 ALL ACTIONS)
20) **MEMORANDUM OF POINTS AND**
21) **AUTHORITIES IN SUPPORT OF**
22) **PLAINTIFFS' COUNSEL'S**
23) **APPLICATION FOR AN AWARD OF**
24) **ATTORNEYS' FEES AND EXPENSES**
25)
26 Judge: Hon. Brian C. Walsh
27)
28 Dept.: 1
Date: July 12, 2019
Time: 9:00 A.M.

TABLE OF CONTENTS

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. THE COURT SHOULD AWARD PLAINTIFFS’ COUNSEL REASONABLE ATTORNEY’S FEES USING the PERCENTAGE METHOD.....	3
A. The Common Fund Doctrine Allows the Court to Compensate Attorneys for Their Efforts in Creating a Common Fund.....	3
B. The Requested Fee of One Third is Reasonable in This Case	5
1. The Result Achieved in This Action.....	6
2. Time and Effort Required	6
3. The Contingent Nature of Representation	8
III. THE REQUESTED EXPENSES ARE REASONABLE, WERE NECESSARY FOR PROSECUTING THE ACTION, AND SHOULD BE APPROVED	10
IV. THE REQUESTED SERVICE AWARDS ARE REASONABLE	11
V. CONCLUSION.....	12

TABLE OF AUTHORITIES

CASES

Beasley v. Wells Fargo Bank
235 Cal. App. 3d 1407 (1991) 10

Blum v. Stenson
465 U.S. 886, (1984)..... 4

Cazares v. Saenz
208 Cal. App. 3d 279 (1989) 9

Chavez v. Netflix, Inc.
162 Cal. App. 4th 43 (2008) 7

Dunk v. Ford Motor Co.
48 Cal. App. 4th 1794 (1996) 5

Franklin Balance Sheet Inv. Fund v. Crowley
No. Civ. A. 888-VCP, 2007 WL 2495018 (Del. Ch. Aug. 30, 2007)..... 4

Glendora Cmty. Redevelopment Agency v. Demeter
155 Cal. App. 3d 465 (1984) 8

Goldberger v. Integrated Res., Inc.
209 F.3d 43 (2d Cir. 2000)..... 8

Harris v. Marhoefer
24 F.3d 16 (9th Cir. 1994) 10

Hensley v. Eckerhart
461 U.S. 424 (1983)..... 6

In re Am. Bus. Fin. Servs. Noteholders Litig.
No. 05-232, 2008 U.S. Dist. LEXIS 95437 (E.D. Pa. Nov. 21, 2008) 11

In re American Capital Shareholder Litigation
Case No. 422598-V (Montgomery Cir. Ct., MD 2018)..... 6

In re Avalanche Biotechnologies, Inc. S'holder Litig.
No. CIV536488, slip op. (San Mateo County Super. Ct. Jan. 19, 2018)..... 5

In re Cal. Indirect Purchaser X-Ray Film Antitrust Litig.
No. 960886, 1998 WL 1031494 (Alameda Super. Ct. Oct. 22, 1998) 5

In re Epicor Software Corp. S'holder Litig.
No. 30-2011-00465495-CU-BT-CXC, slip op. (Orange County Super. Ct. Oct. 24, 2014) 6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

In re Hansen Med., Inc. S'holders Litig.
2018 Del. Ch. LEXIS 197 (Del. Ch. June 18, 2018) 7

In re ITC Holdings Corp. S 'holder Litig.
No. 2016-151852-CB, slip op. (Oakland County Cir. Ct. Sept. 25, 2017)..... 6

In re JDS Uniphase Corp. Sec. Litig.
No. C-02-1486 CW (EDL), 2007 WL4788556 (N.D. Cal. Nov. 27, 2007) 10

In re King Res. Co. Sec. Litig.
420 F. Supp. 610 (D. Colo. 1976)..... 6

In re Oracle Corp. Sec. Litig.,
No. C 01-00988 SI, 2009 U.S. Dist. LEXIS 50995 (N.D. Cal. June 16, 2009), *aff'd*, 627 F.3d
376 (9th Cir. 2010)..... 9, 10

In re Syntroleum Corp. Shareholder Litigation
No. CJ-2013-5807 (Tulsa Cnty. Okla. Dist. Ct. 2016) 6

In re Xcel Energy, Inc.
364 F. Supp. 2d 980 (D. Minn. 2005)..... 9,12

Ketchum v. Moses,
24 Cal. 4th 1122 (2001) 5, 7

Laffitte v. Robert Half Int 'l Inc.
1 Cal. 5th 480 (2016) *passim*

Laffitte v. Robert Half Int'l, Inc.
231 Cal. App. 4th 860 (2014) 3, 5, 10, 12

Missouri v. Jenkins
491 U.S. 274 (1989)..... 11

Nat. Gas Anti-Trust Cases
No. 4221, 2006 WL 5377849 (San Diego Super. Ct. Dec. 11, 2006) 5, 8

Rader v. Thrasher
57 Cal. 2d 244 (1962) 8

Rider v. Cty. of San Diego
11 Cal. App. 4th 1410 (1992) 10

Salton Bay Marina, Inc. v. Imperial Irrigation Dist.
172 Cal. App. 3d 914(1985) 8

1	<i>Serrano v. Priest</i>	
2	20 Cal. 3d 25 (1977)	5, 7
3	<i>Sternwest Corp. v. Ash</i>	
4	183 Cal. App. 3d 74 (1986)	8
5	<i>Varljen v. HJ Meyers & Co.</i>	
6	No. 97 CIV. 6742 (DLC), 2000 U.S. Dist. LEXIS 16205 (S.D.N.Y. Nov. 8, 2000).....	11
7	<i>Wershba v. Apple Comput., Inc.</i>	
8	91 Cal. App. 4th 224 (2001)	8
9	<i>Williams, Inc. v. Kaiser Sand & Gravel Co.</i>	
10	No. C914028 MHP, 1995 U.S. Dist. LEXIS 14262 (N.D. Cal. Sept. 19, 1995)	12
11	OTHER AUTHORITIES	
12	Report of the Third Circuit Task Force, Court Awarded Attorney Fees	
13	108 F.R.D. 237, 258 (Oct. 8, 1985)	4
14	TREATISES	
15	Ravi Sinha, Shareholder Litigation Involving Acquisitions of Public Companies	
16	(Cornerstone Research 21 2016).....	1
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 Plaintiffs Melvin Lax, David Simonsen, Joseph Liu, and Howard Huggins, on behalf of
2 themselves and each member of the Class,¹ (collectively referred to herein as “Plaintiffs”) in
3 accompanying submissions move for final approval of the proposed class action settlement in this
4 consolidated action (the “Consolidated California Action”),² which arose out of a cash out merger
5 of Hansen Medical Inc. (“Hansen” or the “Company”) to Auris Surgical Robotics, Inc. and Pineco
6 Acquisition Corp. (collectively, “Auris”).

7 Plaintiffs and their counsel (“Plaintiffs’ Counsel”) submit this memorandum in support of
8 their application for an award of attorneys’ fees and expenses to be shared with counsel for
9 plaintiffs in the Consolidated Delaware Action, including awards to Plaintiffs and the plaintiffs in
10 the Consolidated Delaware Action for their representation of the Class.

11 **I. INTRODUCTION**

12 After almost three years of hard-fought litigation, which included the filing of three
13 complaints (including an amended complaint in the Consolidated California Action and two
14 amended complaints in the Consolidated Delaware Action), two dispositive motions, a motion for
15 preliminary injunction, document discovery, the deposition of Defendant Christopher P. Lowe,
16 who was at that time Hansen’s interim Chief Financial Officer and a member of the Company’s
17 Board of Directors, and two full days of mediation, Plaintiffs’ Counsel secured an all-cash
18 Settlement of \$7.5 million on behalf of the Class. This is a tremendous result for stockholders,
19 given Defendants’ position at the outset, which maintained that Hansen stockholders were lucky
20 to receive the consideration negotiated for them in 2016. In a recent study by Cornerstone
21 Research, out of hundreds of merger-related class action cases filed during 2015 and the first half
22 of 2016, only six resulted in a monetary recovery for stockholders. Ravi Sinha, Shareholder
23 Litigation Involving Acquisitions of Public Companies, at 5 (Cornerstone Research 21 2016),
24

25 _____
26 ¹ Capitalized terms not otherwise defined herein shall have the meaning set forth in the Stipulation
and Agreement of Settlement, Compromise, and Release, dated February 5, 2019.

27 ² Also encompassed and settled by the Stipulation is the action of *In re Hansen, Inc. Stockholders*
28 *Litigation*, C.A. No. 12316-VCMR (the “Consolidated Delaware Action”).

1 attached as Exhibit F to the Declaration of Evan J. Smith in support of Plaintiffs’ Motion for Final
2 Approval of Settlement and Award of Attorneys’ Fees and Expenses (“Smith Decl.”) submitted
3 herewith. The study noted that in merger-related litigation, “[m]onetary consideration paid to
4 shareholders has remained relatively rare.” *Id.* Hence, the mere existence of the recovery in this
5 Settlement demonstrates the outstanding results obtained by Plaintiffs’ Counsel. Moreover, the
6 \$7.5 million recovery represents a significant percentage of what Plaintiffs’ Counsel believed was
7 the maximum obtainable recovery.

8 Having secured this substantial monetary benefit for the Class, Plaintiffs’ Counsel now
9 respectfully move for: (i) an award of attorneys' fees in the amount of one third of the Settlement
10 Amount, (ii) payment of \$62,199.64 for expenses that were necessary to the prosecution of this
11 Action, and (iii) service awards of \$1,000 each for the four Plaintiff here and the two plaintiffs in
12 the Consolidated Delaware Action in connection with their time spent prosecuting this Action on
13 behalf of the Class. Counsel and their paraprofessionals spent 3240 hours prosecuting this Action
14 with a resulting lodestar of \$2,078,475. This reflects a lodestar multiplier, after costs incurred in
15 the prosecution and administrative costs, of just 1.18.

16 California Supreme Court precedent supports these awards, and this Court has already
17 noted that awards of 1/3 of a common funds for attorneys’ fees are generally considered
18 reasonable. *See* Order After Hearing On March 8, 2019, entered March 8, 2019 (the “March 8
19 Order”, filed herewith as Smith Decl., Ex. B) at 12. In *Laffitte v. Robert Half Int 'l Inc.*, 1 Cal. 5th
20 480 (2016) (“*Laffitte*”), the California Supreme Court affirmed a one-third percentage-based fee
21 award to class counsel as part of a \$19 million settlement in a wage and hour class action. The
22 following aspects of *Laffitte* support the fees, expenses and service awards requested here:

- 23 • The Court approved a fee to class counsel of just over 33%. *Id.* at 485. Here,
24 Plaintiffs' Counsel requested a fee of one third.
- 25 • The lodestar multiplier cross-check in *Laffitte* was 2.13, excluding work performed
26 on the appeal. *Id.* at 487. Here, Plaintiffs' Counsel's lodestar multiplier is only 1.18.
- 27 • The court awarded *Laffitte* class counsel their litigation expenses, in addition to the
28 one-third award of attorneys' fees, representing a combined fee and expense award

1 of over 34% of the common fund. See *Laffitte v. Robert Half Int'l, Inc.*, 231 Cal.
2 App. 4th 860, 871 (2014) ("*Laffitte App.*"). Here, the combined total of requested
3 fees and litigation expenses is just 33.6% of the Settlement Aid.

- 4 • The *Laffitte* class representatives were awarded individual payments not to exceed
5 \$80,000. *Id.* at 866. Here, service awards for a far less amount of \$1,000 for each
6 named Plaintiff here and each named plaintiff in the Delaware Consolidated Action
7 - for a total of \$6,000- is being requested.
- 8 • The Court noted with approval that the settlement provided no reversion to
9 defendants. *Laffitte*, 1 Cal. 5th at 486. Here, if approved, the Settlement also
10 provides no reversion to Defendants and any unclaimed funds is requested to
11 go to a *cy pres* – Bay Area Legal Aid.
- 12 • The *Laffitte* case, like the present Action, was settled before trial. *Id.* at 487.

13 For the reasons set forth herein, in Plaintiffs' Memorandum of Points and Authorities in
14 Support of Motion for Final Approval of Class Action Settlement and Approval of Plan of
15 Allocation (the "Final Approval Memorandum"), submitted herewith, and in the Smith Decl.,
16 Plaintiffs' Counsel respectfully submit that the requested attorneys' fees are fair and reasonable,
17 and, in light of the risks undertaken, the diligent efforts of counsel, and the outstanding result
18 obtained, should be approved by the Court. The expenses requested by Plaintiffs' Counsel are
19 similarly reasonable, were necessary for the successful prosecution of the Action, and should also
20 be awarded. Finally, given their active involvement in and supervision of this multi-year litigation
21 and their essential role in effectuating the Settlement, the service awards requested for the named
22 Plaintiffs are reasonable and should be granted.

23 **II. THE COURT SHOULD AWARD PLAINTIFFS' COUNSEL REASONABLE** 24 **ATTORNEY'S FEES USING THE PERCENTAGE METHOD**

25 **A. The Common Fund Doctrine Allows the Court to Compensate Attorneys for** 26 **Their Efforts in Creating a Common Fund**

27 Where, as here, the litigation created a common fund for the benefit of a class, courts have
28 the power to award plaintiffs' counsel their reasonable attorneys' fees and expenses out of that
fund. In *Laffitte*, the California Supreme Court held that the trial court may award class counsel a
fee from a common fund based on a percentage of the fund created. 1 Cal. 5th at 503. In so doing,
the Court recognized the advantages of using the percentage method of awarding attorneys' fees

1 as a percentage of the common fund, including the "relative ease of calculation, alignment of
2 incentives between counsel and the class, a better approximation of market conditions in a
3 contingency case, and the encouragement it provides counsel to seek an early settlement and avoid
4 unnecessarily prolonging the litigation." *Id.* The *Laffitte* ruling is consistent with decisions from
5 courts throughout the country, including the United States Supreme Court. *See Blum v. Stenson*,
6 465 U.S. 886, 900 n.16 (1984) (holding under common fund doctrine a reasonable fee may be
7 based "on a percentage of the fund bestowed on the class"). In fact, the California Supreme Court
8 recognized that "[c]urrently, all the circuit courts either mandate or allow their district courts to
9 use the percentage method in common fund cases; none require sole use of the lodestar method
10 [and] [m]ost state courts to consider the question in recent decades have also concluded the
11 percentage method of calculating a fee award is either preferred or within the trial court's discretion
12 in a common fund case." *Laffitte*, 1 Cal. 5th at 493-94 (citation omitted).

13 Compensating counsel with a percentage of the common fund is not only fair, but it also
14 incentivizes efficient and effective litigation. *Id.* at 503 (finding that percentage awards align the
15 incentives of counsel with those of the class). As noted by a task force charged by the Third Circuit
16 to investigate court-awarded attorneys' fees, "any and all inducement or inclination to increase the
17 number of . . . hours will be reduced, since the amount of work performed will not . . . alter the
18 contingent fee." Report of the Third Circuit Task Force, Court Awarded Attorney Fees, 108 F.R.D.
19 237, 258 (Oct. 8, 1985). Utilizing a percentage fee creates "a substantial inducement" for plaintiffs'
20 counsel to work efficiently, since "counsel's compensation will not be enhanced by a delay." *Id.*

21 An appropriately determined contingency fee further reflects the lost opportunities to
22 develop other clients and the foregone ability to accept competing engagements. *See Franklin*
23 *Balance Sheet Inv. Fund v. Crowley*, No. Civ. A. 888-VCP, 2007 WL 2495018, at *12 (Del. Ch.
24 Aug. 30, 2007) (holding that the court should compensate "plaintiffs' attorneys for their lost
25 opportunity cost . . . , the risks associated with the litigation, and a premium"). Courts have also
26 noted that "[a] contingent fee must be higher than a fee for the same legal services paid as they
27 are performed. The contingent fee compensates the lawyer not only for the legal services he
28

1 renders but for the loan of those services. The implicit interest rate on such a loan is higher because
2 the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much
3 higher than that of conventional loans.” *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132-33 (2001)
4 (citation omitted).

5 **B. The Requested Fee of One Third is Reasonable in This Case**

6 In determining the reasonableness of a fee request, California courts typically consider the
7 following “basic factors”: (1) the result obtained; (2) the time and labor required; (3) the contingent
8 nature of the case and the delay in payment; (4) the extent to which the nature of the litigation
9 precluded other employment; (5) the experience, reputation, and ability of class counsel, the skill
10 they displayed in the litigation, and the complexity and difficulty of the case; and (6) the informed
11 consent of the clients to the fee agreement. *In re Cal. Indirect Purchaser X-Ray Film Antitrust*
12 *Litig.*, No. 960886, 1998 WL 1031494, at *3 (Alameda Super. Ct. Oct. 22, 1998); *see also Serrano*
13 *v. Priest*, 20 Cal. 3d 25, 49 (1977); *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1810 n.21
14 (1996). “However, no rigid formula applies and each factor should be considered only ‘where
15 appropriate.’” *Nat. Gas Anti-Trust Cases*, No. 4221, 2006 WL 5377849, at *3 (San Diego Super.
16 Ct. Dec. 11, 2006) (citation omitted). Providing guidance as to an appropriate range for a
17 reasonable fee, the Court of Appeals observed in *Laffitte* that “the trial court’s use of a percentage
18 of 33-1/3 percent of the common fund is consistent with, and in the range of, awards in other class
19 action lawsuits.” *Laffitte App.*, 231 Cal. App. 4th at 878. The court also explained that
20 “[e]mpirical studies show that, regardless whether the percentage method or the lodestar method
21 is used, fee awards in class actions average around one-third of the recovery.” *Id.* (citations
22 omitted).

23 Here, the requested fee is consistent with recent awards from this Court, as well as other
24 courts in California and nationwide in similar shareholder class actions. *See, e.g., In re Avalanche*
25 *Biotechnologies, Inc. S'holder Litig.*, No. CIV536488, slip op. (San Mateo County Super. Ct. Jan.
26 19, 2018) (awarding 33% fee in securities class action) (Smith Decl., Ex. G); *In re ITC Holdings*
27 *Corp. S'holder Litig.*, No. 2016-151852-CB, slip op. (Oakland County Cir. Ct. Sept. 25, 2017)
28

1 (awarding 30% fee in merger-related shareholder class action) (Smith Decl., Ex. H); *In re Epicor*
2 *Software Corp. S'holder Litig.*, No. 30-2011-00465495-CU-BT-CXC, slip op. (Orange County
3 Super. Ct. Oct. 24, 2014) (awarding 30% fee in merger-related shareholder class action) (Smith
4 Decl., Ex. I).³ Moreover, as discussed below, the requested fee award for Plaintiffs' Counsel is
5 also supported by: (1) the result they achieved; (2) the time and effort they put into the litigation;
6 and (3) the contingent nature of the representation and associated risk of loss.

7 **1. The Result Achieved in This Action**

8 Courts have consistently recognized that the result achieved is an important factor to be
9 considered in making a fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (“most
10 critical factor is the degree of success obtained”); *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610,
11 630 (D. Colo. 1976) (“the amount of the recovery, and end result achieved are of primary
12 importance, for these are the true benefit to the client”). In this case, a Settlement Amount of \$7.5
13 million in cash, has been obtained through the efforts of Plaintiffs' Counsel here and in the
14 Delaware Consolidated Action. This is a highly favorable result given the risks of proving liability
15 and damages, while providing an immediate and certain recovery for Class Members without the
16 risk, expense and delay of the completion of discovery, summary judgment, trial and appeals. As
17 emphasized herein, this is a rare monetary settlement in shareholder class action challenging the
18 merger of a public company, which underscores the uniquely favorable outcome of this Action.
19 Moreover, the \$7.5 million recovery represents a significant percentage of what Plaintiffs' Counsel
20 believed was the maximum obtainable recovery.

21 **2. Time and Effort Required**

22 This Court has directed that “counsel shall submit lodestar information prior to the final
23 approval hearing in this matter so the Court can compare the lodestar information with the
24

25 ³ *See also, In re Syntroleum Corp. Shareholder Litigation*, No. CJ-2013-5807 (Tulsa Cnty. Okla.
26 Dist. Ct. 2016) (approving a fee award of 1/3 of the common fund plus expenses of \$66,427.94,
27 together representing 35.7% of the \$2.8 million settlement fund) (attached as Exhibit J); *In re*
28 *American Capital Shareholder Litigation*, Case No. 422598-V (Montgomery Cir. Ct., MD 2018)
(approving a fee and expense award in the amount of \$5,895,270.00, representing 1/3 of the
\$17.5 million common fund plus expenses) (attached as Exhibit K).

1 requested fees.” March 8 Order at 12. Plaintiffs’ Counsel are providing that information herewith.
2 *See* Smith Decl., Ex. E-1 to E-8, respectively.

3 As noted above, Plaintiffs’ Counsel invested 3240 hours of time in aggressively litigating
4 the Action for more than three years before the Settlement was reached. Smith Decl. ¶ 71. During
5 this time, Plaintiffs’ Counsel, among other things: researched, drafted and filed four complaints
6 (including a separate complaint for the Consolidated California Action and Consolidated Delaware
7 action, and two amendments to these pleadings); filed a motion for preliminary injunction in
8 attempt to enjoin the closing of the Transaction; obtained expedited discovery, including obtaining
9 documents and a key deposition of the Company’s CFO; successfully opposed a motion to dismiss
10 in the Delaware Consolidated Action (*see In re Hansen Med., Inc. S’holders Litig.*, 2018 Del. Ch.
11 LEXIS 197 (Del. Ch. June 18, 2018)); obtained additional discovery documents; deposed a
12 representative of Perella Weinberg Partners LP; and engaged in two full days of mediation in front
13 of two different mediators. *See* Smith Decl. ¶ 72. This was all time well spent, as the \$7.5 million
14 Settlement could not have been secured but for these efforts.

15 The requested award of attorneys’ fees is also reasonable in comparison to the lodestar for
16 Plaintiffs’ Counsel. Lodestar is determined by multiplying the number of hours worked by the
17 hourly rates of the attorneys and paraprofessionals. *Serrano*, 20 Cal. 3d at 48-49. An appropriate
18 fee award will generally be a multiple of counsel’s lodestar because “the unadorned lodestar
19 reflects the general local hourly rate for a fee-bearing case; it does not include any compensation
20 for contingent risk, extraordinary skill, or any other factors a trial court may consider.” *Ketchum*,
21 24 Cal. 4th at 1138 (emphasis in original); *see also Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43,
22 61 (2008) (“[A] lodestar enhancement based on “quality of representation” by definition involves
23 considerations not captured by counsel’s hourly rates.”) (citation omitted). Although a comparison
24 of lodestar to the requested fees is not required, “[a] lodestar cross-check” will provide the court
25 with “a mechanism for bringing an objective measure of the work performed into the calculation
26
27
28

1 of a reasonable attorney fee.” *Laffitte*, 1 Cal. 5th at 504.⁴

2 Here, the requested fees for Plaintiffs’ Counsel result in a low multiplier of approximately
3 1.18, after litigation expenses and administrative expenses, which is well below the range of
4 multipliers that have been deemed reasonable by California courts. *See Wershba v. Apple*
5 *Comput., Inc.*, 91 Cal. App. 4th 224, 255 (2001) (recognizing that “[m]ultipliers can range from 2
6 to 4 or even higher”). Indeed, “numerous cases have applied multipliers of between 4 and 12 to
7 counsel's lodestar in awarding fees.” *Nat. Gas Anti-Trust Cases*, 2006 WL 5377849, at *4;
8 *Sternwest Corp. v. Ash*, 183 Cal. App. 3d 74, 76 (1986) (remanding for a lodestar enhancement of
9 “two, three, four or otherwise”); *Glendora Cmty. Redevelopment Agency v. Demeter*, 155 Cal.
10 App. 3d 465 (1984) (affirming a 12-times multiplier of counsel’s hourly rate and expressly
11 rejecting the argument that the requested fee was exorbitant or unconscionable). Accordingly, the
12 lodestar for Plaintiffs’ Counsel and the applicable multiplier reinforces the fairness of the requested
13 fee award.

14 **3. The Contingent Nature of Representation**

15 Courts have consistently recognized that the risk of receiving little or no recovery is a major
16 factor in considering an award of attorneys' fees. *See Goldberger v. Integrated Res., Inc.*, 209 F
17 .3d 43, 54 (2d Cir. 2000) (the level of risk taken by plaintiff’s counsel is “perhaps the foremost’
18 factor” in considering the appropriate percentage award) (citation omitted). This makes sense
19 because in the legal marketplace, an attorney who takes a case on contingency expects a higher fee
20 than an attorney who is paid as the case goes along, win or lose. *See Rader v. Thrasher*, 57 Cal.
21 2d 244, 253 (1962); *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.*, 172 Cal. App. 3d 914,
22

23 _____
24 ⁴ In *Laffitte*, the Court observed: “With regard to expenditure of judicial resources, we note that
25 trial courts conducting lodestar cross-checks have generally not been required to closely scrutinize
26 each claimed attorney-hour, but have instead used information on attorney time spent to ‘focus on
27 the general question of whether the fee award appropriately reflects the degree of time and effort
28 expended by the attorneys.’ . . . The trial court in the present case exercised its discretion in this
manner, performing the cross-check using counsel declarations summarizing overall time spent,
rather than demanding and scrutinizing daily time sheets in which the work performed was broken
down by individual task.” *Id.* (citations omitted).

1 955 (1985) (“‘riskiness,’ difficulty or contingent nature of the litigation is a relevant factor in
2 determining a reasonable attorney fee award”). As the Court of Appeals explained in *Cazares v.*
3 *Saenz*, 208 Cal. App. 3d 279 (1989):

4 In addition to compensation for the legal services rendered, there is the *raison*
5 *d'etre* for the contingent fee: the contingency. The lawyer on a contingent fee
6 contract receives nothing unless the plaintiff obtains a recovery. Thus, in theory,
7 a contingent fee in a case with a 50 percent chance of success should be twice
8 the amount of a noncontingent fee for the same case

9 Finally, even putting aside the contingent nature of the fee, the lawyer under
10 such an arrangement agrees to delay receiving his fee until the conclusion of
11 the case, which is often years in the future. The lawyer in effect finances the
12 case for the client during the pendency of the lawsuit. If a lawyer was forced to
13 borrow against the legal services already performed on a case which took five
14 years to complete, the cost of such a financing arrangement could be significant.

15 *Id.* at 288.

16 Here, Plaintiffs’ Counsel undertook this litigation on a contingent fee basis, assuming a
17 significant risk that the litigation would yield no recovery and leave them uncompensated. Unlike
18 counsel for Defendants, who are paid an hourly rate and reimbursed for their expenses on a regular
19 basis, Plaintiffs’ Counsel have not been compensated for any time or expenses since this case began
20 in April 2016. Moreover, Plaintiffs’ Counsel faced significant litigation risk. As discussed in
21 Plaintiffs’ Memorandum of Points and Authorities in Support of Unopposed Motion for Final
22 Approval, filed contemporaneously herewith, and as detailed in the Smith Decl., there was
23 significant risk that Plaintiffs would lose at summary judgment or at trial, or prevail and still
24 recover no (or minimal) damages. Final Approv. Br. at Part IV.B.; Smith Decl. ¶¶ 40-43, 70.

25 The contingent nature of counsel’s representation and the sizable financial risks borne by
26 Plaintiffs’ Counsel further support the percentage fee requested. It simply cannot be disputed that
27 the risk of no recovery (and thus no fees) in complex contingency cases is very real. As the court
28 in *In re Xcel Energy, Inc.* recognized, “The risk of no recovery in complex cases of this sort is not
merely hypothetical . . . [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.” *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 994 (D. Minn. 2005). For

1 example, in *In re Oracle Corp. Sec. Litig.*, No. C 01-00988 SI, 2009 U.S. Dist. LEXIS 50995 (N.D.
2 Cal. June 16, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010), the court granted summary judgment to
3 defendants after eight years of litigation, and after class counsel incurred over \$6 million in
4 expenses, and worked over 100,000 hours, representing a lodestar of approximately \$40 million.
5 Similarly, in a case against JDS Uniphase Corporation, after a lengthy trial involving securities
6 claims, the jury reached a verdict in defendants' favor. *See In re JDS Uniphase Corp. Sec. Litig.*,
7 No. C-02-1486 CW (EDL), 2007 WL4788556 (N.D. Cal. Nov. 27, 2007).

8 Because the fee in this matter was entirely contingent, the only certainties were that there
9 would be no fee without a successful result and that such a successful result would be realized only
10 after considerable and difficult effort. Despite such risks, Plaintiffs' Counsel committed
11 significant resources of both time and money to vigorously and successfully prosecute the Action
12 for the Class's benefit.

13 **III. THE REQUESTED EXPENSES ARE REASONABLE, WERE NECESSARY FOR**
14 **PROSECUTING THE ACTION, AND SHOULD BE APPROVED**

15 Attorneys who create a common fund for the benefit of a class are entitled to payment from
16 the fund of reasonable litigation expenses, because those who benefit from their effort should share
17 in the cost. *See Laffitte App.*, 231 Cal. App. 4th at 871; *Rider v. Cty. of San Diego*, 11 Cal. App.
18 4th 1410, 1423 n.6 (1992). The relevant standard for awarding expenses is whether the costs are
19 of the type typically billed by attorneys to paying clients in the marketplace. *See Beasley v. Wells*
20 *Fargo Bank*, 235 Cal. App. 3d 1407, 1419 (1991); *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir.
21 1994).

22 Here, in order to aggressively and successfully litigate this Action, Plaintiffs' Counsel
23 incurred expenses in the amount of \$62,199.64. These expenses include: (1) fees paid to outside
24 expert consultants; (2) court fees; (3) court reporter fees, videographer fees and transcripts; (4)
25 necessary on-line research; and (5) transportation, hotels, and out-of-town meals associated with
26 attending hearings, depositions and client meetings. *See Smith Decl.* ¶ 71. The expenses are
27
28

1 reasonable in light of the work performed, the legal and factual issues presented, and the vigorous
2 defense.

3 Moreover, these expenses are the type that are normally charged to paying clients, and were
4 incurred in accordance with each firm's regular policies. They were entirely necessary for this
5 Action, and, given their reasonable amount when compared with the scale and duration of the
6 Action, should be paid in the amount requested. *See Missouri v. Jenkins*, 491 U.S. 274,287 n.9
7 (1989) (expenses that are billed in accordance with the "prevailing practice" are subject to
8 reimbursement); *In re Am. Bus. Fin. Servs. Noteholders Litig.*, No. 05-232, 2008 U.S. Dist. LEXIS
9 95437, at *53-*54 (E.D. Pa. Nov. 21, 2008) (approving expenses for "delivery and freight, class
10 notice costs, duplication costs, online legal research, travel, meals, experts, telephone, fax services,
11 transcripts, postage, messenger, mediator, filing and court fees, service fees, transportation and
12 press releases" based on declarations of counsel). Finally, the Class Administrator has also
13 incurred, and is required to incur, expenses in the approximate amount of \$69,702 in providing
14 notice to the class and administration of the Settlement Fund if the Settlement received final
15 approval. Lead Counsel requests these reasonable and necessary expenses be approved as well.

16 **IV. THE REQUESTED SERVICE AWARDS ARE REASONABLE**

17 Service awards of \$1,000 each are requested for the four Plaintiffs here and the two
18 plaintiffs in the Delaware Consolidated Action for their time incurred in ensuring that the Class
19 was adequately represented in the Action. The purpose of service awards is to "encourage
20 participation of plaintiffs in the active supervision of their counsel." *Varljen v. HJ Meyers & Co.*,
21 No. 97 CIV. 6742 (DLC), 2000 U.S. Dist. LEXIS 16205, at *14 n.2 (S.D.N.Y. Nov. 8, 2000).
22 Here, Plaintiffs in both actions were extremely dedicated to the prosecution of the Actions, which
23 required them to regularly confer with their counsel, review pleadings and motions, search for
24 and/or collect trading records related to Hansen, and discuss and consider the various settlement
25 proposals that were discussed at the mediations, and, ultimately, the proposed Settlement.
26 Approving service awards to these six plaintiffs is warranted as a public policy consideration and
27 has ample precedent under the law. *See, e.g., Laffitte App.*, 231 Cal. App. 4th at 866 (approving
28

1 up to \$80,000 service awards for named plaintiffs); *Williams, Inc. v. Kaiser Sand & Gravel Co.*,
2 No. C914028 MHP, 1995 U.S. Dist. LEXIS 14262, at *6-*7 (N.D. Cal. Sept. 19, 1995) (granting
3 \$10,000 incentive award to single plaintiff); *Xcel Energy*, 364 F. Supp. 2d at 1000 (\$100,000
4 collectively awarded to lead plaintiff group as reimbursement).

5
6 **V. CONCLUSION**

7 For the reasons set forth herein, in the Final Approval Memorandum, and in the Smith
8 Declaration, Plaintiffs' Counsel respectfully submit that the application for an award of attorney's
9 fees and expenses is fair, reasonable and appropriate, and should therefore be granted.
10 Additionally, the requested awards to the six named plaintiffs for their representation of the Class
11 are fair and reasonable and should also be approved.

12 DATED: June 7, 2019

BRODSKY & SMITH LLC

13
14 By: 

15 Evan J. Smith (SBN 242352)
16 9595 Wilshire Boulevard, Suite 900
17 Beverly Hills, CA 90212
18 Tel: (877) 534-2590
19 Fax: (310) 247-0160

20 *Counsel for Plaintiffs Joseph Liu*
21 *and Howard Huggins*

22 [Additional Counsel Appears Below]
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FARUQI & FARUQI, LLP
Barbara A. Rohr
10866 Wilshire Boulevard, Suite 1470
Los Angeles, CA 90024
Tel: 424-256-2884
Fax: 424-256-2885
Email: brohr@faruqilaw.com

Attorneys for Plaintiffs

FARUQI & FARUQI, LLP
Nadeem Faruqi
685 Third Avenue, 26th Fl.
New York, NY10017
Tel.: (212) 983-9330
Fax: (212) 983-9331
Email: nfaruqi@faruqilaw.com

MONTEVERDE & ASSOCIATES PC
Juan E. Monteverde
The Empire State Building
350 Fifth Avenue, 59th Floor
New York, NY 10118
Tel: (212) 971-1341
Fax: (212) 601-2610
Email: jmonteverde@monteverdelaw.com

Attorneys for Plaintiff

MILBERG LLP
David E. Azar (SBN 218319)
10866 Wilshire Boulevard, Suite 600
Los Angeles, CA 90024
Tel: (213) 915-8870
Fax: (213) 617-1975

MILBERG LLP
Kent A. Bronson
One Pennsylvania Plaza, 19th Floor
New York, NY 10019
Tel: (212) 594-5300
Fax: (212) 868-1229

*Counsel for Plaintiff Melvin Lax and Co-Lead
Counsel for Plaintiffs and the Class*