Salvatore Graziano (admitted *pro hac vice*)
Hannah Ross (admitted *pro hac vice*)
Adam Wierzbowski (admitted *pro hac vice*)
Abe Alexander (admitted *pro hac vice*)
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1251 Avenue of the Americas
New York, NY 10020
Telephone: (212) 554-1400
Facsimile: (212) 554-1444
salvatore@blbglaw.com
hannah@blbglaw.com
adam@blbglaw.com
abe.alexander@blbglaw.com

Counsel for Lead Plaintiff Los Angeles Fire and Police Pensions and Lead Counsel for the Class

[Additional counsel on signature pages]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

IN RE MYRIAD GENETICS, INC. SECURITIES LITIGATION	Case No. 2:19-cv-00707-JNP-DBP **LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND LITIGATION EXPENSES, AND MEMORANDUM OF LAW IN SUPPORT THEREOF** District Judge Jill N. Parrish

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Court-appointed Lead Counsel, Bernstein Litowitz Berger & Grossmann LLP ("Lead Counsel"), respectfully moves this Court, and submits this Memorandum of Law in support of its Motion, on behalf of Plaintiffs' Counsel, for an award of attorneys' fees in the amount of 19% of the Settlement Fund.[1] Lead Counsel also seeks payment of $1,488,313.23 in Litigation Expenses that were incurred in prosecuting and resolving the Action and $43,320.41 for costs incurred by Lead Plaintiff and Class Representative Los Angeles Fire and Police Pensions ("Los Angeles") directly related to its representation of the Class, as authorized by the Private Securities Litigation Reform Act of 1995 (the "PSLRA").

I. PRELIMINARY STATEMENT

The proposed Settlement resolves all claims in the Action in exchange for a total settlement value of $77,500,000 consisting of cash and shares of Myriad Genetic, Inc. ("Myriad") common stock. As noted in the accompanying Settlement Motion, this Settlement, if approved, would be the largest securities class action recovery ever achieved in Utah and among the top ten such recoveries in Tenth Circuit history. This recovery was achieved after extensive, highly-contested litigation, including significant document and deposition discovery, against highly skilled defense counsel. Working on a fully contingent basis, Plaintiff's Counsel faced numerous challenges to proving liability, loss causation, and damages, as well as significant "ability to pay" issues that injected an additional level of uncertainty into the Class's ability to

[1] Unless otherwise defined herein, all capitalized terms have the meanings set forth in the Stipulation and Agreement of Settlement dated August 3, 2023 (ECF No. 283-1) or in the Declaration of Abe Alexander in Support of (A) Lead Plaintiff's Motion for Final Approval of Settlement and Plan of Allocation and (B) Lead Counsel's Motion for an Award of Attorney's Fees and Litigation Expenses (the "Alexander Declaration" or "Alexander Decl."), filed herewith. Citations to "¶" in this memorandum refer to paragraphs in the Alexander Declaration and citations to "Ex." in this memorandum refer to exhibits to the Alexander Declaration.

recover on its claims, all of which raised serious risks that there would be no recovery or a significantly lesser recovery than the Settlement.

The litigation's prosecution and settlement required extensive efforts on the part of Plaintiff's Counsel. As detailed in the Alexander Declaration,[2] Plaintiff's Counsel, among other things: conducted a comprehensive investigation into the alleged fraud and prepared a detailed 143-page amended Complaint based on it; successfully opposed Defendants' motion to dismiss; obtained class certification through a contested class certification motion; completed extensive fact discovery, which included contested discovery motions, the analysis of over 1.7 million pages of documents, and the depositions of 22 fact witnesses, including Myriad's top executives, senior scientists, and key third-parties; consulted extensively with prominent experts in the fields of psychiatry, pharmacogenomics, statistics, financial economics, and accounting; and engaged in extensive settlement negotiations, including a full-day mediation session and weeks of follow-up discussions under the guidance of two experienced mediators, former District Court Judge Layn R. Phillips and Michelle Yoshida.

As compensation for Plaintiff's Counsel's considerable efforts on behalf of the Class on a fully contingent basis, Lead Counsel seeks attorneys' fees in the amount of 19% of the Settlement Fund (in cash and stock in the same proportion of cash and stock as received in the Settlement). As demonstrated below, the request is well within the range of percentage attorneys' fees awarded in securities class actions in this Circuit—indeed it is on the low end of the range—and is otherwise well supported in the case law and by the facts of this case. The requested fee

[2] The Alexander 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 (¶19); the nature of the claims asserted (¶¶12-18); the risks and uncertainties of continued litigation (¶¶97-127); and the services Plaintiff's Counsel provided for the benefit of the Class (¶¶20-96).

also represents a "negative" multiplier of 0.93 on Plaintiff's Counsel's lodestar, which means that, if awarded, the requested 19% fee will result in a discount on Plaintiff's Counsel's time which further supports the reasonableness of the requested fee. In addition, the expenses for which Plaintiff's Counsel seek payment were reasonable and necessary for the Action's successful prosecution.

The reasonableness of the fee request is confirmed by the fact that it is made pursuant to a written retainer agreement entered into between Los Angeles and Lead Counsel at the outset of the litigation. ¶¶19, 168. Los Angeles is the quintessential type of sophisticated investor that, in drafting the PSLRA, Congress suggested should lead securities class actions. It actively supervised the Action through its litigation and settlement, it observed first-hand the enormous efforts made by Lead Counsel, and it fully supports the requested fee because it is consistent with the terms of its written contract with Lead Counsel and because it is fair and reasonable in light of the quality of the result obtained, amount of work counsel performed in litigating the Action, the high-quality work counsel performed, and the risks inherent in the litigation. *See* Declaration of Joseph Salazar, Ex. 2, at ¶¶6, 7, 9.

Moreover, Court-approved notice regarding the fee and expense request was provided to the Class. To date, not a single Class member has objected to the request.

For all the reasons set forth above and more fully below, Lead Counsel respectfully submits that the requested fees and expenses are more than justified in light of Plaintiff's Counsel's substantial commitment of effort and resources on a contingency basis to this challenging case and the result it achieved for the benefit of the Class.

II. ARGUMENT

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

The Supreme Court has emphasized that private securities actions are "an essential supplement to criminal prosecutions and civil enforcement actions brought . . . by the . . . SEC. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *accord Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (private securities actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'") (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).

In addition, the Supreme Court has stated that "a litigant or 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 Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). The Tenth Circuit agrees and has repeatedly held that a court may award attorneys' fees from a common fund in situations where, as here, that fund is the result of the attorneys' successful prosecution of the action. *See, e.g.*, *Law v. NCAA*, No. 99-3353, 2001 WL 194048, at *2 (10th Cir. 2001); *Gottlieb v. Barry*, 43 F.3d 474, 482 (10th Cir. 1994); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988); *see also Rosenbaum v. MacAllister*, 64 F.3d 1439, 1444 (10th Cir. 1995) ("The common fund doctrine 'rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense.'").

Courts in this district regularly award attorneys' fees in securities class actions pursuant to the common fund doctrine. This is because "[f]ederal securities class actions require plaintiffs' counsel to expend substantial time and effort with no guarantee of success" and "[i]n light of these difficulties, 'public policy supports granting attorneys' fees that are sufficient to encourage

plaintiffs' counsel to bring securities class actions that supplement the efforts of the SEC.'" *In re Crocs, Inc. Sec. Litig.*, No. 07-cv-02351, 2014 WL 4670886, at *5 (D. Colo. Sept. 18, 2014). Compensating plaintiffs' counsel for bringing these actions is essential, because "[s]uch actions could not be sustained if plaintiffs' counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class." *Hicks v. Morgan Stanley*, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005).

B. The Requested Attorneys' Fees Are Reasonable as a Percentage of the Common Fund

As compensation for their efforts and achievements in this Action, Lead Counsel seeks a reasonable 19% of the common fund. Awarding attorneys' fees as a percentage of a common fund is commonplace in the Tenth Circuit. In *Brown*, the Tenth Circuit affirmed the propriety of awarding attorneys' fees on a percentage basis in a common fund case. 838 F.2d at 454. Similarly, in *Gottlieb v. Barry*, the Tenth Circuit stated that although either the percentage or the "lodestar" method can be used in appropriate cases, "*Uselton* ***implies a preference for the percentage of the fund method***." 43 F.3d 474, 483 (10th Circuit 1994) (emphasis added) (citing *Uselton v. Commercial Lovelace Motor Freight*, 9 F.3d 849, 853 (10th Cir. 1993)); *see also Millsap v. McDonnell Douglas Corp.*, No. 94-CV-633-H(M), 2003WL 21277124, at *12 (N.D. Okla. May 28, 2003) ("Attorneys must have an incentive to take undesirable cases in order to assure access to the courts for all people; awarding fees based on a reasonable percentage of the recovered fund provides such an incentive"); *see also Vaszlavik v. Storage Tech. Corp.*, No. 95-cv-2525, 2000 U.S. Dist. LEXIS1268824, at *1 (D. Colo. Mar. 9, 2000) ("the Tenth Circuit has expressed 'a preference for the percentage of the fund method'").[3]

[3] The text of the PSLRA also supports awarding attorneys' fees in securities cases using the percentage method, providing that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount . . . actually

Here, the 19% fee requested by Lead Counsel pursuant to its written contract with Los Angeles is below the range of percentage fees that are regularly awarded in securities class actions and other class actions in this Circuit—even in cases that do not involve the type of technical and complex issues present here. *See, e.g.*, *Brown*, 838 F.2d at 455 n.2 (recognizing that a typical percentage award in a common fund case can be 33% of the recovery or more); *In re Molycorp, Inc. Sec. Litig.* 1:12-cv-00292-RM-KMT, slip op. at 1 (D. Colo. June 16, 2017), ECF No. 263 (awarding 30% of settlement amount) (Ex. 7); *Crocs*, 2014 WL 4670886, at *5 (awarding 30% of settlement fund); *Vaszlavik v. Storage Tech. Corp.,* No. 95-B-2525, 2000 WL 1268824, at *2 (D. Colo. Mar. 9, 2000) ("[C]lass action fee awards are typically 30% of the fund created by the settlement."); *Lucken Family Ltd. P'ship, LLLP v. Ultra Res., Inc.*, No. 09-cv-01543-REB-KMT, 2010 WL 5387559, at *5 (D. Colo. Dec. 22, 2010) ("The customary fee awarded to class counsel in a common fund settlement is approximately one third of the total economic benefit bestowed on the class."); *Anderson v. Merit Energy Co.*, 2009 WL 3378526, at *3 (D. Colo. Oct. 20, 2009) (same).

The requested fee is also lower than fee awards in securities class actions in other circuits, again, even in cases that were far less complex and challenging than here. *See, e.g.*, *Klein v. Altria Grp., Inc.*, No. 3:20cv75 at 10 (E.D. Va. Mar. 31, 2022) (ECF 320) Ex. 6 (awarding 30% of $90 million settlement); *San Antonio Fire & Police Pension Fund v. Dole Food Co.*, No. 15-CV-1140, at 2 (D. Del. July 18, 2017), ECF No. 100 (Ex. 8) (awarding 25% of

---

paid to the class." 15 U.S.C. §78u-4(a)(6). Other courts have noted that using the percentage method for determining a fee "is less subjective than the lodestar plus multiplier approach," and provides a better incentive to counsel where class counsel "was initially retained on a contingent fee basis." *Gottlieb*, 43 F.3d at 484; *see also In re N.M. Indirect Purchasers Microsoft Corp., Antitrust Litig.,* 149 P.3d 976, 993 (N.M. Ct. App. Nov. 15, 2006) ("The percentage method is preferred in some jurisdictions, including the Tenth Circuit, because this method rewards efficient and prompt resolutions of class actions.").

$74 million settlement); *Minneapolis Firefighters' Relief Ass'n v. Medtronic, Inc.*, 2012 WL 12903758, at *1 (D. Minn. Nov. 8, 2012) (awarding 25% of $85 million settlement); *Freudenberg v. E*Trade Fin. Corp.*, at 6 (S.D.N.Y. Oct. 20, 2012), ECF No. 154 (Ex. 9) (awarding 28% of $79 million settlement); *Billitteri v. Sec. Am., Inc.*, 2011 WL 3585983, at *9 (N.D. Tex. Aug. 4, 2011) (awarding 25% of $80 million settlement); *In re Merrill Lynch & Co. Sec., Derivative & ERISA Litig.*, No. 07-cv-09633 at 6 (S.D.N.Y. Aug. 21, 2009), ECF No. 272 (Ex. 10) (awarding 25% of $75 million settlement).

C. The Johnson Factors Support the Fee Requested Here

The Tenth Circuit has stated that in determining the appropriate percentage of attorneys' fees in common fund cases, the Court should consider the factors set forth in the Fifth Circuit's decision in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). *See Gottlieb*, 43 F.3d at 483 ("the court must consider the twelve *Johnson* factors" to determine the reasonableness of a common fund fee award); *see also Brown*, 838 F.2d at 454-55; *Uselton,* 9 F.3d at 853; *Lane v. Page*, 862 F. Supp. 2d 1182, 1251 (D.N.M. 2012) (the Tenth Circuit "has adopted" the Fifth Circuit Test in *Johnson*). The *Johnson* factors consist of the following:

> (1) The time and labor required. . . . (2) The novelty and difficulty of the questions. . . . (3) The skill requisite to perform the legal service properly. . . . (4) The preclusion of other employment. . . . (5) The customary fee. . . . (6) Whether the fee is fixed or contingent. . . . (7) Time limitations imposed by the client or the circumstances. . . . (8) The amount involved and the results obtained. . . . (9) The experience, reputation, and ability of the attorneys. . . . (10) The "undesirability" of the case. . . . (11) The nature and length of the professional relationship with the client. . . . [and] (12) Awards in similar cases.

488 F.2d at 717-19. The Tenth Circuit also has recognized that "rarely are all of the *Johnson* factors applicable" in a common fund case. *Brown*, 838 F.2d at 456; *see also Uselton*, 9 F.3d at 853. Recognizing that the relevance of each of the *Johnson* factors will vary in any particular case, the Tenth Circuit has left it to the lower courts' discretion to apply the factors in view of the

circumstances of the case. *Brown*, 838 F.2d at 456. As set forth below, application of the relevant *Johnson* factors supports Lead Counsel's fee request.[4]

1. The Amount Involved and Results Obtained

The result achieved for the class (*Johnson* factor 5) is often cited as the most important factor when assessing an appropriate fee award. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"); *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 630 (D. Colo. 1976) ("the amount of the recovery, and end result achieved are of primary importance, for these are the true benefit to the client").

There can be no question that in this case the result obtained for the Class is outstanding. As noted above, this Settlement, if approved, would be the largest securities class action recovery ever achieved in Utah and among the top ten such recoveries in Tenth Circuit history. The size of this recovery is particularly noteworthy in the context of this case where there have been no admissions of wrongdoing by the Company, no restatements of prior financial filings, and no criminal charges against any Defendant.

Furthermore, the $77.5 million recovery represents approximately 17% of the Class's estimated damages, conservatively assuming that investors prevailed on ***every*** aspect of ***every*** claim, and approximately 34% of the Class's damages if Defendants successfully challenged just ***one*** of the five corrective disclosures alleged here (one they had already challenged at an earlier stage of the case). These estimates far exceed the median securities class action settlement, which between 2013 and 2022 recovered 5% of estimated damages. ¶129. The substantial

[4] The customary fee (*Johnson* factor 5) and awards in similar cases (*Johnson* factor 12) are two factors that are often assessed in tandem (*see Crocs*, 2014 WL 4670886, at *3) and are addressed *supra* in §II.B. In addition, the following *Johnson* factors are not relevant to this Action, and, therefore, are not addressed herein: preclusion of other employment (*Johnson* factor 4), time limitations imposed by the client or the circumstances (*Johnson* factor 7), and the nature and length of the professional relationship with the client (*Johnson* factor 11).

percentage of damages recovered in this case further supports Lead Counsel's fee request. *See, e.g., In re Giant Interactive Grp., Inc.*, 279 F.R.D. 151, 162-63 (S.D.N.Y. 2011) (finding 16.5% recovery to be "in excess of the average percentage of recovery in many securities class-actions" as "the average . . . ranges from 3% to 7% of the class' total estimated losses"); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) ("The [$40.3 million] settlement . . . represents a recovery of approximately 6.25% of estimated damages. This is at the higher end of the range of reasonableness of recovery in class actions securities litigations.").

Finally, as detailed in the Alexander Declaration, Lead Counsel overcame significant challenges to obtain this result, both as to ability to pay and underlying liability. ¶¶97-127. In the face of these risks, Lead Counsel obtained this Settlement without unnecessary delay, thereby providing the Class with a real benefit without having to wait untold additional years with no assurances of recovering as much or anything at all, particularly in light of the risks and hard limits to recovery posed by Myriad's financial condition. ¶¶106-108. In short, the result achieved by the Settlement—at least $20 million in cash and $55.5 million in either additional cash or shares of freely-tradable Myriad common stock—is an excellent result favoring the requested fees.

2. The Novelty and Difficulty of Questions Raised by the Litigation

The novelty and difficulty of the issues in a case (*Johnson* factor 2) is a significant factor in determining a fee award. As noted above, securities class actions are inherently difficult. *See, e.g.*, *Crocs*, 2014 WL 4670886, at *3 ("[l]itigating an action under the PSLRA is not a simple undertaking"); *Qwest Commc'ns*, 625 F. Supp. 2d at 1149 ("There are few simple class action cases involving securities law. This area of law may not be novel, but it generally is complex and difficult"); *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999) ("'[C]lass action

suits' in general 'have a well-deserved reputation as being most complex.'… [F]ederal courts, including this Court, 'have long recognized that [securities class actions are] notably difficult and notoriously uncertain.'") (internal citations omitted); *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 263 (E.D. Va. 2009) ("The very nature of a securities fraud case demands a difficult level of proof to establish liability. Elements such as scienter, reliance, and materiality of misrepresentation are notoriously difficult to establish."); *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA").

In addition to the complexities present in all securities class actions generally, this Action involved a set of unique challenges and risks elevating it beyond the typical case. For example, this Action involved incredibly complex and technical issues relating to psychiatry, pharmacogenomics, statistics, financial economics, and accounting, and involved questions of scientific and financial judgment that are difficult to establish at trial. Therefore, in order to prevail on its allegations, Los Angeles needed to obtain and develop evidence—including expert evidence—on a multitude of complex medical, statistical, financial, accounting, and other issues. As discussed in the Alexander Declaration and the Settlement Motion, these complexities made it far from certain that any recovery, let alone an outstanding recovery of $77.5 million, would ultimately be achieved.

Los Angeles and the Class also faced significant risks in establishing Defendants' liability, including challenges in establishing that Defendants' statements were false and in establishing scienter. With respect to Defendants' statements concerning GeneSight's efficacy and the results of the GUIDED clinical trial, Defendants put forth credible arguments that Myriad had, in fact, accurately reported the GUIDED trial results, and their statements about

GeneSight's benefit were statements of scientific judgment and opinion and were supported by available empirical research. Further, Defendants argued that these defenses were borne out by the fact that GeneSight, including the ADHD Panel, is currently on the market and the FDA has not taken steps to remove it. Defendants also had credible arguments that Myriad had exercised appropriate accounting judgment in reporting its hereditary cancer test revenue and would have argued that the Company's judgment was vindicated by an outside auditor.

Finally, this case involved significant "ability to pay" issues that injected an additional level of uncertainty into the Class's ability to recover on its claims. As discussed in the Alexander Declaration, Myriad is "small cap" life sciences company that has operated at a combined loss of over $700 million over the past four years, reporting either negative operating cash flow or a net loss in every quarter during that period. Thus, there was a substantial risk that even if the Class prevailed at trial, Myriad might declare bankruptcy, making any recovery against the Company difficult and delaying any such recovery for years.

In sum, the risk that Plaintiff's Counsel would invest additional substantial financial resources and receive nothing from this complex and risky litigation weighs in favor of the fee request.

3. The Skill Required to Perform the Legal Services Properly and the Experience, Reputation, and Ability of the Attorneys

Two other *Johnson* factors—the skill required to properly perform the legal services (*Johnson* factor 3) and the experience, reputation, and ability of counsel (*Johnson* factor 9) – also support the requested fee award. *Qwest Commc'ns Int'l, Inc. Sec. Litig.*, No. 01-1451-REB-CBS, 2006 WL 8429707, at *4 (D. Colo. Sept. 29, 2006) ("Particularly in a case as complex as this [securities class action]. . . [t]his factor carries significant weight because the plaintiff class likely would not have obtained any relief without the assistance of counsel with a high level of skill

and expertise."). Lead Counsel has extensive experience prosecuting securities class actions and other complex litigation. ¶158; *see also* firm resume of Lead Counsel attached as Ex. C to Ex. 4A of the Alexander Decl. That experience and skill was demonstrated during the prosecution and resolution of this Litigation. *See In re Checking Account*, 830 F. Supp. 2d 1330, 1359 (S.D. Fla. 2011) ("Class Counsel took on a great deal of risk in bringing this case, and turned a potentially empty well into a significant judgment. That kind of ***initiative and skill must be adequately compensated*** to insure that counsel of this caliber is available to undertake these kinds of risky but important cases in the future.").

Courts have repeatedly recognized that the quality of the opposition faced by plaintiffs' counsel should also be taken into consideration in assessing the quality of the counsel's performance. *See Qwest*, 2006 WL 8429707, at *4 (finding that counsel for defendants were also "represented by lawyers of similar expertise and experience"); *see also In re Veeco Instruments Inc. Sec. Litig.,* No. 05 MDL 01695 (CM), 2007 WL 4115808, at *7 (S.D.N.Y. Nov. 7, 2007) (among factors supporting 30% award of attorneys' fees was that defendants were represented by "one of the country's largest law firms"); *In re Adelphia Commc'ns Corp. Sec. 8 Derivative Litig.*, No. 03 MDL 1529 LMM, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006) ("The fact that the settlements were obtained from defendants represented by 'formidable opposing counsel from some of the best defense firms in the country' also evidences the high quality of lead counsels' work") (citation omitted), *aff'd*, 272 F. App'x 9 (2d Cir. 2008).

Here, Defendants were represented by counsel that included the law firms of Mintz Levin Cohn Ferris Glovsky and Popeo, P.C.; O'Melveny & Myers LLP; Greenberg Traurig, LLP; Wilmer Cutler Pickering Hale and Dorr LLP; and Skadden, Arps, Slate, Meagher, and Flom LLP, some of the country's most prestigious and experienced defense firms, which vigorously

represented their clients. Notwithstanding this capable opposition, Lead Counsel's thorough investigation, ability to present a strong case, successful opposition of Defendants' motion to dismiss, successful motion to certify the Class, and demonstrated willingness to vigorously prosecute the Action through a lengthy and highly contested discovery process, enabled it to achieve the favorable Settlement.

Moreover, the complex and technical nature of this Action required Lead Counsel to immerse itself in complex subject matter not typically attending securities class action cases, such as psychiatry, pharmacogenomics, and statistics. For instance, Lead Counsel conducted a thorough review and analysis of the voluminous and complex document production (including reams of raw clinical trial data); analyzed those documents with the aid of prominent experts in the fields of psychiatry, pharmacogenomics, statistics, financial economics, and accounting; and deposed numerous doctors and scientists regarding these complex issues.

4. The Contingent Nature of the Fee

A determination of a fair fee must include consideration of the contingent nature of the fee (*Johnson* factor 6). *See Vaszlavik*, 2000 WL 1268824, at *4; *see also Tuten v. United Airlines, Inc.*, 41 F. Supp. 3d 1003, 1009 (D. Colo. 2014) ("Class Counsel took the case on a contingent basis, which permits a higher recovery to compensate for the risk of recovering nothing for their work."); *Qwest*, 2006 WL 8429707, at *5 (a contingent fee "is designed to reward counsel for taking the risk of prosecuting a case without payment during the litigation, and the risk that the litigation may be unsuccessful").

Lead Counsel prosecuted this Action on a wholly contingent basis and bore all risks of litigating the case through trial and appeals. From the outset of this case, Lead Counsel understood that they were embarking on a complex, risky, and potentially lengthy litigation, which could (and did) require the expenditure of many thousands of hours of attorney time and

the investment of hundreds of thousands of dollars in litigation expenses, with no guarantee of ever being compensated for their investment of time or resources.

The risks of contingent litigation are particularly stark in the context of securities class actions. Recent data show that securities class actions are dismissed approximately half of the time. ¶98. Indeed, securities class actions are increasingly dismissed at the class certification stage, in connection with *Daubert* motions, or at summary judgment, after counsel have sometimes expended millions of dollars out-of-pocket and spent thousands of attorney hours working on the case. ¶¶99-104; *see also In re Barclays Bank PLC Sec. Litig.,* No. 09-01989, 2017 WL 4082305 (S.D.N.Y. Sept. 13, 2017) (summary judgment granted after eight years of litigation); *Omnicom Grp., Inc. Sec. Litig.*, 541 F. Supp. 2d 546, 554-55 (S.D.N.Y. 2008), *aff'd* 597 F.3d 501 (2d Cir. 2010) (summary judgment granted after 6 years of litigation and millions of dollars spent by plaintiffs' counsel).

Even when securities class action plaintiffs prevail at summary judgment, overcome *Daubert* motions, and go to trial, there remain very real risks that there will be no recovery or substantially less recovery for class members. For example, in *In re BankAtlantic Bancorp, Inc.*, a jury rendered a verdict in plaintiffs' favor on liability in 2010. In 2011, the district court granted defendants' motion for judgment as a matter of law and entered judgment in favor of the defendants on all claims. 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011). In 2012, the Eleventh Circuit affirmed the district court's ruling, finding that there was insufficient evidence to support a finding of loss causation. *Hubbard v. BankAtlantic Bancorp, Inc.,* 688 F.3d 713 (11th Cir. 2012).

There is also the increasing risk that an intervening change in the law can result in the dismissal of a case after significant effort has been expended. For example, in *Precision*

Castparts, a district court in Oregon reconsidered its order denying defendants' motion for summary judgment and granted the motion more than a year later based on a new decision by the Ninth Circuit. *See Murphy v. Precision Castparts*, No. 3:16-cv-00521-SB, 2021 WL 2080016, at *6 (D. Or. May 24, 2021). The Supreme Court has heard several securities cases in recent years, often announcing holdings that dramatically changed the law in the midst of long-running cases. *See Goldman Sachs Grp., Inc. v. Arkansas Teacher Ret. Sys.*, 141 S. Ct. 1951 (2021); *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014); *Comcast Corp. v Behrend*, 569 U.S. 27 (2013); *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010). As a result, many cases have been lost after thousands of hours have been invested in briefing and discovery. For example, in *In re Vivendi Universal, S.A. Securities Litigation*, after a verdict for class plaintiffs finding Vivendi acted recklessly with respect to 57 statements, the district court granted judgment for defendants following a change in the law announced in *Morrison*. 765 F. Supp. 2d 512, 525, 533-34 (S.D.N.Y. 2011).

In each of these cases, the underlying lawsuits were perceived as strong and the actions were litigated for several years with the investment of significant resources, but investors (and their attorneys) ultimately recovered nothing.

Thus, the risk that Lead Counsel would invest significant financial resources and receive nothing due to the contingent nature of the fee weighs in favor of the fee request.

5. The Time and Labor Expended by Plaintiff's Counsel

The Tenth Circuit has found this *Johnson* factor to be of less importance in a common fund case. *Brown*, 838 F. 3d at 456. Nonetheless, this factor strongly favors the requested fee here. The enormous amount of work performed by Plaintiff's Counsel throughout the litigation

of this case is exhaustively detailed in the Alexander Declaration. *See, e.g.*, ¶¶20-96. This work, which was all done on a contingent basis, required a total of 30,057.80 hours of attorney and other professional support time. ¶156. Plaintiff's Counsel's lodestar, derived by multiplying the hours spent by each attorney and professional support staff by their current hourly rates, is $15,861,117.50. *See id*. The requested fee of 19% of the Settlement Fund, or $14,725,000 (in cash and stock in the same proportion of cash and stock as received in the Settlement, plus interest accrued at the same rate as earned on the cash settlement proceeds), therefore represents a "negative" multiplier of approximately 0.93 of Plaintiff's Counsel's total lodestar. This multiplier is significantly below the range of multipliers commonly awarded in securities class actions and other comparable litigation. Indeed, in cases of this nature, fees representing multiples above the lodestar are regularly awarded to reflect the contingency fee risk and other relevant factors. *See., e.g., Qwest,* 2006 WL 8429707, at *21 ("[L]ead counsel who create a common fund for the benefit of a class are rewarded with fees that often are at least two times the reasonable lodestar figure, ***and in some cases reach as high as five to ten times the lodestar figure***."); *Vaszlavik*, 2000 WL 1268824, at *3 (noting that "[c]ourts in common fund cases regularly award multipliers of two to three times the lodestar or more to compensate for risk and to reflect the quality of the work performed").

A "negative" multiplier is additional evidence that the requested fee is reasonable. *See In re Lithium Ion Batteries Antitrust Litig.*, 2019 WL 3856413, at *8 (N.D. Cal. Aug. 16, 2019) (finding requested fee "particularly appropriate where the lodestar cross-check results in a negative multiplier"); *In re Bear Stearns Cos., Inc. Sec., Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 271 (S.D.N.Y. 2012) (negative multiplier was a "strong indication of the reasonableness of the [requested] fee").

D. The Fee Request is Entitled to a Presumption of Reasonableness Because it is Based on a Fee Agreement Entered into with Lead Plaintiff at the Outset of the Litigation

In addition to the *Johnson* factors discussed above, another factor favoring the reasonableness of Lead Counsel's fee application under the percentage-of-the-fund method is that the fee is based on an agreement Lead Counsel entered into with a sophisticated Lead Plaintiff at the outset of the litigation, and, therefore, should be afforded a presumption of reasonableness.

The PSLRA was intended to encourage sophisticated investors like Los Angeles to assume control of securities class actions in order to "increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel." H.R. Conf. Rep. No. 104-369, at *32 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 731. Congress believed that these institutions would be in the best position to monitor the ongoing prosecution of the litigation and to assess the reasonableness of counsel's fee request. Accordingly, fees negotiated between a properly selected PSLRA Lead Plaintiff and their counsel should be accorded a presumption of reasonableness. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 282 (3d Cir. 2001) (*ex ante* fee agreements in securities class actions enjoy "a presumption of reasonableness"); *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *15 (S.D.N.Y. Dec. 23, 2009) ("Since the passage of the PSLRA, courts have found such an agreement between fully informed lead plaintiffs and their counsel to be presumptively reasonable"); *City of St. Clair Shores Gen. Emps.' Ret. Sys. v. Lender Processing Servs., Inc.*, No. 3:10–cv–01073–TJC–JBT, 2014 WL 12621611, at *2 (M.D. Fla. Mar. 4, 2014) *In re Mills Corp. Sec. Litig*., 265 F.R.D. 246, 261 (E.D. Va. 2009) ("in a PSLRA case . . . a fee request that has been approved and endorsed by properly-appointed lead plaintiffs .

. . enjoys a presumption of reasonableness"). This presumption helps "ensure that the lead plaintiff, not the court, functions as the class's primary agent vis-a-vis its lawyers." *Cendant*, 264 F.3d at 282.

Here, Los Angeles is precisely the type of sophisticated and financially interested investor that Congress envisioned serving as a fiduciary for the Class when it enacted the PSLRA. At the outset of the litigation, the Los Angeles Board, in its role as a fiduciary for the Class, engaged in arms-length negotiations with Lead Counsel and negotiated a reduction in the maximum fee request that Lead Counsel could seek in in the event of a recovery on behalf of the Class. *See* Ex. 2 at ¶4. The final fee agreement between the Board and Lead Counsel, which allows for a maximum fee request of 19% of the Class recovery for a resolution of the case following the close of fact discovery, was formalized in Los Angeles' contract with Lead Counsel that was entered into at the beginning of the litigation. *Id.* at ¶9. After the agreement to settle the Action was reached, Los Angeles has approved the proposed fee as consistent with the written retainer agreement and believes it is fair and reasonable in light of the quality of the result obtained, the work counsel performed, and the risks of the litigation. *Id*. Accordingly, the endorsement of the fee as reasonable by Los Angeles supports approval of the fee.

E. The Reaction of the Class to Date Supports the Requested Fee

The reaction of the Class to date also supports the requested fee. Through November 2, 2023, the Claims Administrator has disseminated 104,280 copies of the Settlement Notice to potential Class Members and nominees informing them, among other things, that Lead Counsel intends to apply to the Court for an award of attorneys' fees in an amount not to exceed 19% of the Settlement Fund and up to $1,700,000 in Litigation Expenses. *See* ¶176. While the time to object to the Fee and Expense Application does not expire until November 17, 2023, to date, no

objections have been received. *Id*. Should any objections be received, Lead Counsel will address them in its reply papers.

F. Lead Counsel's Expenses Are Reasonable and Were Necessarily Incurred to Achieve the Benefit Obtained

Lead Counsel are also applying for payment of Plaintiff's Counsel's Litigation Expenses, which were reasonably incurred and necessary to the prosecution and settlement of the Action. *See* ¶¶169-174. These expenses are properly recovered by counsel. *Vaszlavik,* 2000 WL 1268824, at *4 ("As with attorneys' fees, an attorney who creates or preserves a common fund for the benefit of a class is entitled to receive reimbursement of all reasonable costs incurred."). As set forth in detail in the Alexander Declaration, Plaintiff's Counsel incurred $1,488,313.23 in Litigation Expenses in the prosecution of the Action. ¶175. Payment of these expenses from the Settlement Fund is fair and reasonable.

The expenses for which reimbursement are sought are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the hour. *See Bratcher v. Bray-Doyle Indep. Sch. Dis.*, 8 F.3d 722, 725-26 (10th Cir. 1993) (holding that expenses reimbursable if such charges would normally be billed to client) (citing *Bee v. Greaves*, 910 F.2d 686, 690 (10th Cir. 1990)); *Kelley v. City of Albuquerque*, No. Civ. 03-507 JBACT, 2005 WL 3663515, at *17-18 (D.N.M. Oct. 24, 2005) (awarding reasonable expenses that would normally be billed to paying client.). These expenses include, among others, charges for experts, online research, mediation, court reporting and transcripts, service of process, photocopying, out-of-town travel,[5] copying, and postage, express mail, and delivery. In order to reduce costs, Los

[5] Consistent with Lead Counsel's firm policies regarding expense applications in securities class action settlements, Lead Counsel's out-of-town travel costs are capped based on the following criteria: (i) airfare is capped at coach/economy rates; (ii) hotel charges per night are capped at $350 for "high cost" locations and $250 for "lower cost" locations; and (iii) meals while

Angeles and Lead Counsel bid out work for retained experts and vendors, as appropriate, for the benefit of the Class.

A complete breakdown by category of the expenses incurred by Plaintiff's Counsel is set forth in Ex. 5 to the Alexander Declaration. These expense items are billed separately by Plaintiff's Counsel, and such charges are not duplicated in the firms' hourly billing rates. As set forth in Ex. 5 to the Alexander Declaration, the largest expense is for retention of Los Angeles' experts, in the amount of $999,353.50, or approximately 67% of the total Litigation Expenses. ¶172.

The Settlement Notice informed potential Class Members that Lead Counsel would apply for payment of Litigation Expenses in an amount not to exceed $1,700,000, which might include the reasonable costs and expenses of Los Angeles directly related to its representation of the Class. The total amount of expenses requested by Lead Counsel is $1,531,633.64, which includes payment of $1,488,313.23 for expenses incurred by Plaintiff's Counsel and $43,320.41 in reimbursement of costs and expenses incurred by Los Angeles, an amount below the amount listed in the Settlement Notice. To date, there has been no objection to the request for expenses.

G. Los Angeles Should Be Awarded its Reasonable Costs and Expenses Under 15 U.S.C. §78u-4(a)(4)

In connection with its request for reimbursement of Litigation Expenses, Lead Counsel also seeks reimbursement of the costs and expenses incurred directly by Los Angeles, the Court-appointed Lead Plaintiff and Class Representative. The PSLRA specifically provides that an "award of reasonable costs and expenses (including lost wages) directly relating to the

---

traveling are capped at $20 per person for breakfast, $25 per person for lunch, and $50 per person for dinner.

representation of the class" may be made to "any representative party serving on behalf of a class." 15 U.S.C. § 78u-4(a)(4).

Here, Los Angeles seeks an award of $43,320.41 for time dedicated by its personnel and time spent by attorneys at the Office of the Los Angeles City Attorney ("City Attorney") to furthering and supervising the Action. *See* Salazar Decl. ¶¶11-12. Los Angeles and City Attorney personnel took an active role throughout the entire litigation. Among other things, these individuals spent a substantial amount of time communicating with Lead Counsel regarding the posture and progress of the case and case strategy; reviewing pleadings and briefs filed in the Action; reviewing discovery requests and receiving updates concerning the progress of discovery, including Defendants' and third parties' document productions, depositions, and expert discovery; gathering and producing documents in response to discovery requests; providing deposition testimony; selecting and approving the relevant experts that were retained in the Action; preparing for, traveling to, and attending the full-day mediation session before Judge Phillips and Ms. Yoshida; and evaluating and approving the proposed Settlement. *See* Salazar Decl. at ¶¶6, 7, 12. The time that Los Angeles and City Attorney personnel spent on these activities was time that they otherwise would have expected to spend on other work for Los Angeles and, thus, represented a cost to Los Angeles.

Numerous courts have approved reasonable awards to compensate lead plaintiffs for the time and effort they spent on behalf of a class. In *Marsh & McLennan*, the court awarded $144,657 to the New Jersey Attorney General's Office and $70,000 to certain Ohio pension funds, to compensate them "for their reasonable costs and expenses incurred in managing this litigation and representing the Class." 2009 WL 5178546, at *21. As the court noted, their efforts in, among other things, communicating with lead counsel, reviewing submissions to the court,

and participating in settlement discussions were "precisely the types of activities that support awarding reimbursement of expenses to class representatives." *Id.*; *see also In re NU Skin Enters., Inc. Sec. Litig.,* No. 2:14-cv-00033-JNP-BCW, 2016 WL 6916486, at *1 (D. Utah Oct. 13, 2016) (approving expense award to lead plaintiff to "reimburse it for the time it dedicated to the prosecution of the Action on behalf of the Settlement Class"); *In re Bank of Am. Corp. Sec., Derivative, & Emp. Ret. Income Sec. Act (ERISA) Litig*., 772 F.3d 125, 133 (2d Cir. 2014) (affirming award of over $450,000 to representative plaintiffs for time spent by their employees on the action); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-3400 (CM) (PED), 2010 WL 4537550, at *31 (S.D.N.Y. Nov. 8, 2010) (approving award of $100,000 to Lead Plaintiff for time spent on the litigation); *In re Gilat Satellite Networks, Ltd.,* No. CV-02-1510 (CPS)(SMG), 2007 WL 2743675, at *19 (E.D.N.Y. Sept. 18, 2007) (granting PSLRA awards where, as here, "the tasks undertaken by employees of Lead Plaintiffs reduced the amount of time those employees would have spent on other work and these tasks and rates appear reasonable to the furtherance of the litigation").

The award sought by Los Angeles is reasonable and fully justified under the PSLRA based on its involvement in the Action and should be granted.

III. CONCLUSION

For the reasons discussed above and in the Alexander Declaration, Lead Counsel respectfully request that the Court award attorneys' fees in the amount of 19% of the Settlement Fund (in cash and stock in the same proportion of cash and stock as received in the Settlement); award payment of $1,488,313.23 to Plaintiff's Counsel for their reasonable Litigation Expenses incurred in prosecuting the Action; and award $43,320.41 in reimbursement of the costs and expenses incurred by Los Angeles directly relating to its representation of the Class.

Dated: November 3, 2023

Respectfully submitted,

/s/ Abe Alexander

Salvatore Graziano (admitted *pro hac vice*)
Hannah Ross (admitted *pro hac vice*)
Adam Wierzbowski (admitted *pro hac vice*)
Abe Alexander (admitted *pro hac vice*)
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1251 Avenue of the Americas
New York, NY 10020
Telephone: (212) 554-1400
Facsimile: (212) 554-1444
salvatore@blbglaw.com
hannah@blbglaw.com
adam@blbglaw.com
abe.alexander@blbglaw.com

Counsel for Lead Plaintiff Los Angeles Fire and Police Pensions and Lead Counsel for the Class

DEISS LAW PC
Andrew G. Deiss, USB #7184
Brenda E. Weinberg, USB #16187
Corey D. Riley, USB #16935
10 West 100 South, Suite 425
Salt Lake City, Utah 84101
Telephone: (801) 433-0226
Facsimile: (801) 386-9894
adeiss@deisslaw.com
bweinberg@deisslaw.com
criley@deisslaw.com

Liaison Counsel for Lead Plaintiff Los Angeles Fire and Police Pensions and Liaison Counsel for the Class

Hydee Feldstein Soto, Los Angeles City Attorney
Anya J. Freedman, Assistant City Attorney
Miguel G. Bahamon, Deputy City Attorney
Public Pensions General Counsel Division
977 North Broadway
Los Angeles, CA 90012-1728
Telephone: (213) 425-4492

Additional Counsel for Lead Plaintiff
Los Angeles Fire and Police Pensions

CERTIFICATE OF SERVICE

I certify that on the 3rd of November, 2023, I caused to be served a true and correct copy of the foregoing **LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND LITIGATION EXPENSES, AND MEMORANDUM OF LAW IN SUPPORT THEREOF**, with the Clerk of the Court using the CM/ECF systems that will send an electronic notification to all counsel of record.

/s/ Abe Alexander
Abe Alexander