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Co-Lead Class Counsel

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE ANIMATION WORKERS ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: ALL ACTIONS	Master Docket No. 14-CV-4062-LHK NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS Date: May 18, 2017 Time: 1:30 p.m. Courtroom: 8, 4th Floor Judge: The Honorable Lucy H. Koh

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on May 18, 2017 at 1:30 pm or as soon thereafter as the matter may be heard by the Honorable Lucy H. Koh of the United States District Court of the Northern District of California, San Jose Division, located at 280 South 1st Street, San Jose, CA 95113, plaintiffs and class counsel will, and hereby do, move for an award of attorneys' fees, expenses, and service awards to the named plaintiffs. This motion is based on this Notice of Motion and Motion, the following memorandum of points and authorities, the pleadings and papers on file in this action, and such other matters as the Court may consider.

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I. INTRODUCTION

The $168,950,000 recovery achieved through class counsel's efforts and risk-taking translates into an average gross recovery for each of the approximately 10,043 class members of $16,823. Net of the attorneys' fees requested herein, class members would each receive on average $13,214, *more than double* the per-class-member net result in *High-Tech*. Class counsel's fee request, for 21% of the $150,000,000 in settlements before the Court, is not only well below the Ninth Circuit's benchmark of 25% (approximately 20% below the benchmark), it would leave class members far better off than their counterparts in *High-Tech*.

The requested fees, combined with the fees previously awarded in this case, would provide class counsel with a multiplier of their lodestar of 3.91. (The requested fees alone would be a 3.40 multiplier.) As this Court has stated, the "foremost" consideration in determining a reasonable multiplier is the benefit obtained for the class,[1] and here the benefit was excellent. The requested multiplier also falls within the range of the majority of multipliers surveyed by the Ninth Circuit in *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052-54 (9th Cir. 2002) (*Vizcaino II*). While it is at the high end of the range, that is warranted not only by the results obtained, but also by class counsel's efficiency and risk-taking. At the outset of the case, this Court requested that class counsel be efficient,[2] and we were, aggressively litigating this case for nearly three years for about $9 million in lodestar.

And there can be no doubt that many in the legal market assessing risk in deciding whether to even bring this case judged it to be too risky to try to pursue. Both the United States Department of Justice and the plaintiffs' attorneys in *High-Tech* did not pursue claims against most of the defendants here. And as to Pixar and Lucasfilm, there was little value placed in those claims (based on the settlement amounts there).

In addition to the legal market participants viewing these claims as being too risky or small in value to pursue, the claims presented other challenges at the outset, and in fact the original

[1] Order Granting in Part and Denying in Part Motions for Attorney's Fees, Reimbursement of Expenses, and Service Awards ("*High-Tech*. Order") at 19, *In re High-Tech Employee Antitrust Litig*., No. 11-cv-2509, N.D. Cal. Sept. 2, 2015), ECF No. 1112.

[2] *See* Case Management Conference Hearing Tr. ("CMC Tr."), at 10, Nov. 5, 2014.

Complaint was dismissed as time barred. Class counsel were not even aware of the possibility of bringing this case until one of its lawyers read an article in July 2014 discussing some of the documents unsealed in *High-Tech*. They filed this case less than two months later, after interviewing dozens of witnesses, being retained, and drafting a complaint.[3] While plaintiffs were able to amend the complaint to survive a second motion to dismiss (while other plaintiffs in cases against Microsoft and Oracle were dismissed), the statute of limitations remained an over-hanging threat throughout and would have been a central issue at trial and on appeal, delaying payment to class members (at the least) and potentially jeopardizing meaningful payment completely.

To be sure, *High-Tech* provided a roadmap for class certification, mitigating some of the risk on *that* issue. But of course, certification was far from the only issue in the case. Plaintiffs faced a panoply of hurdles, including proving the amount of damages (compared to some far lower amount presented to the jury at trial by defendants), proving that Sony and Blue Sky were co-conspirators, and convincing a jury that restraining cold calls to a limited number of class members would suppress the pay of all (or nearly all) 10,000+ class members. And even as to class certification, *High Tech* did not help plaintiffs obtain the necessary data, analyze it, and respond to defendants' numerous and unique attacks on Prof. Ashenfelter's work, mounted by talented and aggressive defense counsel and their expert witness. Nor did *High Tech* help plaintiffs establish Rule 23(b)(3) predominance despite alleged individual issues raised by the statute of limitations defense.

Given the excellent result achieved for the class, the real risks class counsel faced, and the efficiency with which they litigated the case, there is a reasonable argument to be made for the Ninth

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[3] To be clear, no plaintiffs' counsel in this case had any involvement in the *High-Tech* litigation, and no plaintiffs' counsel was aware at the time that the Court unsealed various documents in that case in 2013. *See* Declaration of Jeff D. Friedman in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards (Apr. 7, 2017) ("Friedman Decl."), ¶ 2; Declaration of Steven G. Sklaver in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards (Apr. 7, 2017) ("Sklaver Decl."), ¶ 16; Declaration of Daniel A. Small in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards (Apr. 7, 2017) ("Small Decl.'), ¶ 36, In July 2014, an online publication, *Pando Daily*, published an article discussing evidence of conspiratorial activity among animation studios revealed by the unsealed documents. An attorney at class counsel, Cohen Milstein Sellers & Toll, read the article that month, and the firm promptly began an investigation that involved interviewing dozens of witnesses. Plaintiff Robert Nitsch, represented by Cohen Milstein, filed the first complaint in this case on September 8, 2014, less than two months after Cohen Milstein read the *Pando Daily* article. *See* Small Decl., ¶¶ 36-37.

1 Circuit's 25% benchmark. Notwithstanding, class counsel surveyed the vast and variable terrain of
2 fee awards, including the updated fee study this Court relied on in *High-Tech*, and respectfully
3 submit that a 21% attorney fee award is reasonable and supported by the lodestar cross-check.

4 ## II. ARGUMENT

5 ### A. Plaintiffs Request a Reasonable Amount of Attorneys' Fees

6 When awarding attorneys' fees under Federal Rule of Civil Procedure 23(h), "courts have an
7 independent obligation to ensure that the award, like the settlement itself, is reasonable." *In re*
8 *Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). Considering all of the
9 circumstances of this case, a fee of 21 percent of the settlement funds before the Court, or $31.5
10 million, is reasonable.[4]

11 Under the "common fund" doctrine, "a litigant or a lawyer who recovers a common fund for
12 the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from
13 the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). "The doctrine rests on
14 the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are
15 unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the
16 litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund,
17 thus spreading fees proportionately among those benefited by the suit." *Id.* (internal citations
18 omitted).

19 "The procedures used to determine the amount of reasonable attorneys' fees differ
20 concomitantly in cases involving a common fund from those in which attorneys' fees are sought
21 under a fee-shifting statute." *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003). Unlike the
22 calculation of fees under a fee-shifting statute, where "a reasonable fee . . . reflects the amount of
23 attorney time reasonably expended on the litigation," "under the 'common fund doctrine,'" "a
24 reasonable fee is based on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465
25 U.S. 886, 900 n.16 (1984). "Indeed, every Supreme Court case addressing the computation of a

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27 [4] This Court previously awarded class counsel 25 percent of the $18.95 million settlement fund created by the Blue Sky and Sony settlements. *See* Order Granting Plaintiffs' Motion for Attorneys' Fees, Expenses and Service Awards for Settlements with Sony Pictures Imageworks Inc., Sony Pictures animation Inc., and Blue Sky Studios Inc. ("Order"), Nov. 11, 2016, ECF No. 347.
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common fund fee award has determined such fees on a percentage of the fund basis." *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 773 (11th Cir. 1991).

"This circuit has established 25% of the common fund as a benchmark award for attorney fees." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998). "That percentage amount can then be adjusted upward or downward depending on the circumstances of the case." *de Mira v. Heartland Emp't Serv., LLC*, No. 12-CV-04092 LHK, 2014 WL 1026282, at *1 (N.D. Cal. Mar. 13, 2014). As this Court and others have recognized, "'in most common fund cases, the award exceeds the benchmark.'" *Id.* (alteration omitted) (quoting *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008)).

But the hallmark remains the reasonableness of the fee: "[w]hether the Court awards the benchmark amount or some other rate, the award must be supported by findings that take into account all of the circumstances of the case," (*id.*) – which may include "[c]alculation of the lodestar, which measures the lawyer's investment of time in the litigation." *Vizcaino II*, 290 F.3d at 1050. "[W]hile the primary basis of the fee award remains the percentage method, the lodestar may provide a useful perspective on the reasonableness of a given percentage award." *Id*. Here, consideration of all circumstances demonstrates that a 21 percent fee is reasonable.

1. The 25 Percent Benchmark Award Is Presumptively Reasonable – Reflecting a Market Based Fee Amount

Notably, class counsel are asking for fees well under the 25 percent benchmark – $6 million under, to be precise. And "[w]hile the benchmark is not per se valid," the Ninth Circuit has recognized that requesting "the 25% benchmark award only" demonstrates the reasonableness of a fee request. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 955 (9th Cir. 2015). This Court has held similarly. *See Buccellato v. AT & T Operations, Inc.*, No. C10-00463-LHK, 2011 WL 3348055, at *1 (N.D. Cal. June 30, 2011) (holding that fee request was "reasonable under the percentage of the common fund method, as it is equal to this Circuit's benchmark of 25 percent.").

To help arrive at class counsel's fee request, we canvassed fee awards, particularly focusing on large dollar settlements. In doing so, our 21 percent fee request is supported by an updated attorneys' fees study relied upon by this Court in *High-Tech*, conducted by three law professors,

analyzing awards in 458 class actions during 2009-2013.[5] The study looked at fee award percentages and found that they decreased as the recovery increased. *See* EMG Study at 1. For the highest decile of recoveries in the study, above $67.5 million, the average percentage awarded was 22.3%. *See id.* at 9-10. The largest recoveries in the study, above $100 million, had mean and median fee percentages that ranged from 16.6% to 25.5%, depending on the year. *See id.* at 8. The midpoint of the study period for recoveries exceeding $100 million is 21% - our request here.

Moreover, a lodestar cross-check confirms the reasonableness of class counsel's request: "[i]f the multiplier is within an acceptable range, this adds further support to the conclusion that the fees sought are reasonable." *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 WL 496358, at *4 (N.D. Cal. Feb. 6, 2013). Multiplying class counsel's reasonable hours by their prevailing market rates yields a lodestar of $9.27 million.[6] The resulting multiplier of 3.40 (3.91 including the prior fee award) is in line with multipliers that this Court and others have deemed "reasonable":

> The resulting multiplier of 4.3 is reasonable in light of the time and labor required, the difficulty of the issues involved, the requisite legal skill and experience necessary, the excellent and quick results obtained for the Class, the contingent nature of the fee and risk of no payment, and the range of fees that are customary. *Vizcaino,* 290 F.3d at 1052-54; *Steiner v. Am. Broad. Co.,* 248 Fed. Appx. 780, 783 (9th Cir. 2007) (affirming award with multiplier of 6.85); *see also* Newberg, *Attorney Fee Awards,* § 14.03 at 14–5 (1987) ("multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied."); *Rabin v. Concord Assets Group, Inc.,* No. No. 89 Civ. 6130(LBS), 1991 WL 275757 (S.D.N.Y. 1991) (4.4 multiplier) ("In recent years multipliers of between 3 and 4.5 have become

[5] *See* Friedman Decl., Ex. B (Theodore Eisenberg, Geoffrey P. Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, NYU Law and Economics Research Paper no. 17-02; Cornell Legal Studies Research paper No. 17-05 at 8 (December 1, 2016) ("EMG Study")). This as-yet unpublished working paper is available at https://ssrn.com/abstract=2904194. In *High-Tech*, the Court relied on an earlier study by Eisenberg and Miller covering 68 class action settlements during 1993-2008. *See In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730, at *13 (N.D. Cal. Sept. 2, 2015).

[6] *See* Friedman Decl., ¶ 13; Sklaver Decl., ¶ 12; Small Decl., ¶ 30. While class counsel have provided their detailed billing,"[i]t is well established that the lodestar cross-check calculation need entail neither mathematical precision nor bean counting . . . courts may rely on summaries submitted by the attorneys and need not review actual billing records." *Perkins v. LinkedIn Corp.*, No. 13-CV-04303-LHK, 2016 WL 613255, at *17 (N.D. Cal. Feb. 16, 2016) (alterations, quotation marks, and internal citations omitted). Class counsel are reporting their lodestar through February 2017. The reported lodestar thus omits work class counsel have done and will do since, including drafting a motion for final approval of the pending settlements, arguing at the fairness hearing, and if the settlements are approved, administering distribution of the settlement fund. At the end of the day, the requested fee award would generate a multiplier well under 4.

> common.") (internal quotations and citations omitted); *In re Xcel Energy, Inc., Securities, Derivative & " 'ERISA" Litig.,* 364 F.Supp.2d 980, 998-99 (D. Minn. 2005) (approving 25% fee, resulting in 4.7 multiplier); *In re Aremissoft Corp. Sec. Litig.,* 210 F.R.D. 109, 134-35 (D.N.J. 2002) (approving 28% fee, resulting in 4.3 multiplier); *Maley v. Del Global Techs. Corp.,* 186 F. Supp. 2d 358, 371 (S.D.N.Y. 2002) (approving 33.3% fee, resulting in "modest multiplier of 4.65"); *Di Giacomo v. Plains All Am. Pipeline,* Nos. 99-4137 & 99-4212, 2001 WL 34633373, at *10-11 (S.D. Fla. Dec. 19, 2001) (approving 30% fee, resulting in 5.3 multiplier); *Roberts v. Texaco, Inc.,* 979 F. Supp. 185, 198 (S.D.N.Y. 1997) (5.5 multiplier); *Roberts v. Texaco,* 979 F.Supp. 185 (S.D.N.Y. 1997) (approving multiplier of 5.5); *Weiss v. Mercedez-Benz,* 899 F.Supp. 1297 (D.N.J. 1995) (approving multiplier of 9.3); *Weiss v. Mercedes-Benz of N. Am., Inc.,* 899 F. Supp. 1297, 1304 (D.N.J. 1995) (9.3 multiplier), *aff'd,* 66 F.3d 314 (3d Cir. 1995).

Buccellato, 2011 WL 3348055 at *2. Indeed, "Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers." *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) (collecting cases); *accord, e.g.*, *In re Aremissoft Corp. Secs. Litig.*, 210 F.R.D. 109, 134–35 (D.N.J. 2002) (awarding 28% of a $194 million settlement, resulting in a lodestar multiplier of 4.3). The Ninth Circuit, for example, has explicitly affirmed a multiplier of 6.85, holding that it "falls well within the range of multipliers that courts have allowed." *Steiner v. Am. Broad. Co.*, 248 F. App'x 780, 783 (9th Cir. 2007).

An overall multiplier of 3.40 is within the range of multipliers surveyed by the Ninth Circuit in *Vizcaino*. *See High-Tech*. Order (relying on *Vizcano* survey). *Vizcano* found that in 20 of the 24 cases it surveyed, the multiplier was between 1.0 and 4.0. *See Vizcano II*, 290 F.3d at 1051 n.6. Significantly, the cases *Vizcano* surveyed involved common funds of $50-200 million. *Id.* at 1052-54. The settlements in this case total in the high end of this range. Given that the EMG Study shows that ***multipliers increase as the size of the recovery increases*** (*see* EMG Study at 1), a multiplier in this case at the high end of the *Vizcano* range is appropriate for this reason alone, even putting aside the excellent results achieved and significant risks borne by class counsel.

Having been shown to be presumptively reasonable under a percentage-of-the-fund calculation, a lodestar cross-check, and a large study of class action fee awards, the question becomes whether there are "any 'special circumstances' justifying a departure" (*Bluetooth*, 654 F.3d at 942) from the requested 21 percent. For the reasons that follow, the answer is "no."

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2. All Relevant Circumstances Confirm a 21 Percent Award Is Reasonable

Though no exhaustive list of relevant factors exists, the Ninth Circuit has endorsed a number of factors which may be relevant to determining the reasonableness of a fee, including the results achieved, the risks faced, the non-monetary benefits conferred, the contingent nature of the representation, the market rates for similar cases, and the risk of any windfall profits. *See, e.g.*, *In re Online DVD-Rental*, 779 F.3d at 954 (listing factors).

a. A 21 percent fee is justified by the exceptional results achieved

"The most important factor is the results achieved for the class." *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, No. 1917, 2016 WL 4126533, at *4 (N.D. Cal. Aug. 3, 2016). Here, those results are exceptional. Taking all approved and preliminarily-approved settlements into account, counsel's efforts created a $168.95 million fund for the class. Notably, the class will recover 30.5 percent of an antitrust injury estimated to be $553 million before trebling.[7] Lesser results have justified ***upward departures*** from the 25% benchmark. *See, e.g.*, *CRT*, 2016 WL 4126533, at *4-*5 (holding that 20 percent antitrust recovery in a megafund case warranted "a modest increase over the Ninth Circuit benchmark"); *Omnivision*, 559 F. Supp. 2d at 1046 (holding that "a total award of approximately 9% of the possible damages" "weighs in favor of granting the requested 28% fee").[8]

The results achieved are even more substantial when considered as a function of the average ***cash*** recovery to each class member, which is $16,823 before accounting for fees and expenses. *Cf. In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2013 WL 1365900, at *7 (N.D. Cal. Apr. 3, 2013) (awarding 28.5% fee because "the amount that individual claimants will receive is

[7] *See* Friedman Decl., ¶ 17.

[8] *See also In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *19 (C.D. Cal. June 10, 2005) ("When the requested fee and expense award is deducted, the net amount of the settlement represented approximately 23% of the class' claimed loss. As Lead Counsel maintains, such a recovery percentage is considerable, and is greater than those obtained in cases where class counsel was awarded one-third of a common fund. *See Med. X–Ray* 1998 WL 661515, at *7-*8 (increasing 25% benchmark to 33.3% where counsel recovered 17% of damages); *Crazy Eddie*, 824 F. Supp. at 326 (increasing 25% benchmark to 33.8% where counsel recovered 10% of damages); *In re Gen. Instruments Sec. Litig.*, 209 F. Supp. 2d 423, 431, 434 (E.D. Pa. 2001) (awarding one-third fee from $48 million settlement fund that was approximately 11% of the plaintiffs' estimated damages); *Corel*, 293 F. Supp. 2d at 489-90, 498 (permitting one-third fee award from $48 million settlement fund which represented approximately 15% of class' total net damages); *Cullen*, 197 F.R.D. at 148 (awarding one-third in fees from settlement of class consisting of defrauded vocational students that was 17% of the tuition that class members paid))."

excellent" and "in the range of $64 per monitor or laptop, or $128 per TV."). Importantly, class counsel also negotiated an allocation and payment method whereby, at the time of disbursement, each non-opt out class member will receive his or her substantial cash payment directly in the mail, without needing to make any showing, or do anything further.

And if one were to use the *High-Tech* recovery per class member to help assess counsel's achievement for the class, the results appear even more impressive.Whereas the settlements in *High-Tech* totaled only 14% of the proposed single damages estimate, the settlements here totaled 30.5%. More importantly, whereas the settlements in *High-Tech* amounted to approximately $6,753 per class member, the settlements here amounted to approximately $16,823. In fact, were this Court to award all fees, expenses, and service awards requested herein, the average class member recovery after accounting for all fees and expenses will still be $13,637.36 – which is 2.4 times more than the equivalent *High-Tech* recovery of approximately $5,770 per person. Indeed, the assumed average recovery in this case after accounting for all requested fees and expenses, would be two times greater than the average recovery in *High-Tech* ***had High-Tech counsel worked for free and paid their own expenses*****,** $6,753.61.[9]

As noted at the outset, moreover, these exceptional results were achieved "in absence of supporting precedents" (*Vizcaino II*, 290 F.3d at 1048) – really, in the face of superficially *contrary* precedents –"and against [defendants'] vigorous opposition throughout the litigation." *Id.* At the first hearing in this matter, DreamWorks told this Court that plaintiffs had asserted "slim to not existent" allegations against defendants "that, frankly, they do not appear to have any basis to have filed lawsuits against."[10] Of course, DreamWorks ended up settling for $50,000,000 and cooperation. And the Disney defendants agreed to pay $100,000,000 even though "the House of Mouse is

[9] The favorable comparisons to the results achieved in *High-Tech* hold on a more granular level too: whereas Pixar and Lucasfilm settled for just $9 million in *High-Tech*, they and the other Disney defendants settled for $100 million here, despite being represented by the same counsel, and despite the fact that the *High-Tech* settlement likely released many of the claims at issue in this case. *See Vizcaino II*, 290 F.3d at 1048 (noting exceptional results achieved "in the face of agreements signed by the class members forsaking benefits").

[10] *See* CMC Tr. at 19.

1 infamous for almost never settling lawsuits."[11] Finally, class counsel achieved these exceptional raw-
2 dollar, percentage, and per capita results despite facing off against some of the best, and most well-
3 resourced, defense lawyers, from Covington & Burling; Gibson, Dunn & Crutcher; Jones Day; Keker
4 & Van Nest; Orrick Herrington & Sutcliffe; and Williams & Connolly. *See de Mira*, 2014 WL
5 1026282 at *2 (justifying 28% fee award in part because "Defendant was represented by an
6 experienced and well-resourced defense firm. Had Class Counsel failed to vigorously prosecute this
7 case, it is unlikely that this settlement could have been achieved").

8 **b.** A 21 percent fee is justified by the significant risk borne by counsel

9 "The risk that further litigation might result in Plaintiffs not recovering at all, particularly a
10 case involving complicated legal issues, is a significant factor in the award of fees." *In re*
11 *Omnivision*, 559 F. Supp. 2d at 1046-47; *accord In re Pac. Enter. Secs. Litig.*, 47 F.3d 373, 379 (9th
12 Cir. 1995) (holding fees justified "because of the complexity of the issues and the risks").

13 Here, class counsel faced real risks in pursuing this case, not the least of which was being
14 initially dismissed on the pleadings as a matter of law. *See Vizcaino II*, 290 F.3d at 1048 (finding
15 case "extremely risky" where "[t]wice plaintiffs lost in the district court"). Indeed, defendants'
16 statute of limitations defense reared its head over this case every step of the way. Although class
17 counsel were able to survive a second motion to dismiss, two related cases were not so fortunate –
18 and ended in ***zero*** recovery. *See Garrison v. Oracle Corp.*, 159 F. Supp. 3d 1044 (N.D. Cal. 2016)
19 (distinguishing this case, and granting motion to dismiss plaintiffs' time-barred claims with
20 prejudice); *Ryan v. Microsoft Corp.*, 147 F. Supp. 3d 868 (N.D. Cal. 2015) (same).

21 Stating a timely claim was only the first step on the road to recovery, as failing to obtain class
22 certification would have all but eliminated the chances of any recovery, much less the meaningful
23 recovery obtained here. While class counsel was able to obtain class certification, it did so without
24 the support of "any case in which the Ninth Circuit ha[d] considered . . . whether certification is
25 permissible when the plaintiff class must prove fraudulent concealment to overcome the statute of
26

27 [11] Dominic Patten, *It's Over! Disney Ends Animation Anti-Poaching Suit with $100M Deal*,
Deadline Hollywood, Feb. 1, 2017, http://deadline. com/2017/02/disney-pixar-dreamworks-
28 animation-settlement-lawsuit-class-action-dreamworks-1201899625.

1 limitations," and notwithstanding a Fourth Circuit decision reversing a $390 million class-action
2 judgment on the theory that tolling analyses implicated individual questions. *See* ECF No. 289 at 64-
3 65.
4 Although class counsel and this Court got those decisions right, surviving a motion to dismiss
5 and certifying the class by no means eliminated the risks posed by defendants' statute of limitations
6 defense. Because fraudulent concealment presents classic jury questions, there remained a significant
7 chance of the class not recovering at trial, if counsel failed to convince the jury that defendants had
8 fraudulently concealed their conduct, or if defendants were able to convince the jury that some or all
9 of the class members had actual or constructive knowledge of their claims. And even if plaintiffs'
10 fraudulent concealment allegations, and all others, carried the day at trial, defendants would have
11 undoubtedly appealed any jury verdict to the Ninth Circuit, and possibly even the Supreme Court.
12 And here again, because the statute of limitations question was one of law, a Ninth Circuit reversal
13 as to the pleadings or class certification could have resulted in zero recovery.
14 The significant risks borne by counsel extended beyond the statute of limitations issue too.
15 As other courts have recognized, "[a]n antitrust class action is arguably the most complex action to
16 prosecute. The legal and factual issues involved are always numerous and uncertain in outcome." *In*
17 *re Optical Disk Drive Prod. Antitrust Litig.*, No. 3:10-MD-2143 RS, 2016 WL 7364803, at *4 (N.D.
18 Cal. Dec. 19, 2016) (quotation marks and ellipses omitted).
19 Although the DOJ investigation certainly paved some ground here – as to the alleged
20 illegality of the restraint for example – the scope of the DOJ investigation and consent decree also
21 cut against pursuing this suit. Here's how Blue Sky's counsel framed those risks at the first hearing
22 in this case, a sentiment which was echoed by DreamWorks and Sony alike:
23
> DOJ filed no action against us. We were not part of the consent decree. We were never added to the *High-Tech Employees Litigation* and the like. Given that, there is really the, frankly, flimsiest bases to have included Blue Sky in this lawsuit.[12]

24
25
26 *High-Tech* more directly piggy-backed onto the DOJ investigation. While similar, in the end, most of
27 the overlap between the two cases boils down to both involving no-poach agreements and Steve Jobs
28

[12] *See* CMC Tr. at 28.

being at the epicenter of both conspiracies, as CEO of Apple and President of Pixar. Indeed, were the legal and factual issues – and attendant risks – one and the same, *High-Tech* counsel never would have carved out and left behind the *Animation Workers* conspiracy.

To be sure, this class has benefitted from the Court's unsealing of the facts in *High-Tech*, and class counsel was guided by this Court's class certification analyses in *High-Tech*. But those realities did not eliminate the risks or complexities class counsel faced in achieving this recovery in a case that neither the DOJ nor *High-Tech* counsel decided to pursue. One significant difference was the statute of limitations defense (which engendered different risks and required different analyses and strategies at the pleadings and class certification stages, and at trial), but others existed as well. Indeed, a second important legal issue in this case was also still open from *High-Tech*: namely, whether a "no poach" restraint is *per se* illegal, or whether it requires a rule of reason analysis. Furthermore, the conspiracy here included a compensation coordination component that was not present in *High-Tech*.

And putting aside the legal classification of the restraint, *High-Tech* never tested any theory of that restraint to a jury, or any theory of impact or damages resulting from that restraint to a jury. *Cf. Omnivision*, 559 F. Supp. 2d at 1047 (risks faced by plaintiffs supported 28 percent fee, where "[t]he parties' estimates of possible damages varied dramatically, such that if Plaintiffs prevailed on liability but Defendants prevailed on damages, the reward could have been even smaller"). In particular, the basic theory of causation in both cases – that suppression of cold calls to a fraction of the class would suppress the pay of every one of thousands of class members – was untested in *High-Tech*. Factual differences between the two cases affecting complexity and risk were also abound, including that: many of the defendants here were not pursued by the DOJ; the conspiracy evidence against Sony and Blue Sky was weaker than it was for the other defendants; and a *High-Tech* settlement released a large number of claims in this case.

Finally, it is also worth noting that the EMG Study looked at average fee awards based on risk, according to the type of litigation. The average fee award for ***low-medium risk*** antitrust cases between 2009-2013 was ***24.91%***. This data looking at the risk dimension in antitrust cases reinforces the reasonableness of counsel's 21% fee request.

c. <u>A 21 percent fee is justified by the incidental benefits flowing to the public</u>

"Incidental or non-monetary benefits conferred by the litigation are a relevant circumstance." *Vizcaino II*, 290 F.3d at 1049; *accord Bebchick v. Washington Metro. Area Transit Comm'n*, 805 F.2d 396, 408 (D.C. Cir. 1986) ("we think that an upward adjustment to the lodestar is appropriate to reflect the benefits to the public flowing from this litigation."). Here, class counsel's efforts as private attorneys general conferred at least two types of non-monetary benefits on the public.

First, their high-profile and successful pursuit of this powerful cartel put other employers on notice of the illegality of "no poach" agreements, benefiting workers nationwide. *Accord Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299, 1304 (W.D. Wash. 2001) ("As a result of this case and the large amount of publicity surrounding it, many employers have been advised to carefully ensure their workers are properly classified so that they will not get into the same trouble as Microsoft."); *In re Linerboard Antitrust Litig.*, MDL No. 1261, 2004 WL 1221350, at *17 (E.D. Pa. June 2, 2004) ("As the Second Circuit has explained, the incentive for 'the private attorney general' is particularly important in the area of antitrust enforcement because public policy relies so heavily on such private action for enforcement of the antitrust laws." (Internal citation omitted.)

Second, class counsel's efforts further benefited the public, and future classes, by clarifying the law in the Ninth Circuit in many important respects, including by clarifying what is required to adequately plead fraudulent concealment (ECF No. 147); that pleading fraudulent concealment is not a *per se* bar to class certification (ECF No. 289); and in a case of first impression in the Ninth Circuit, that a civil antitrust violation can fall within the "crime-fraud" exception to the attorney-client privilege (ECF No. 236 at 3). *See Vizcaino II*, 290 F.3d at 1049 (upholding 28 percent fee where "the litigation also benefitted employers and workers nationwide by clarifying the law of temporary worker classification"). These incidental benefits provide further support for a 21 percent fee.

d. <u>A 21 percent fee is justified by the contingent nature of the representation</u>

Class counsel's 21 percent fee request is also reasonable in light of the contingent nature of class counsel's representation—that is, that they would only get paid if the class recovered, and only out of the class's recovery at that. "Courts have long recognized that the public interest is served by

rewarding attorneys who assume representation on a contingent basis with an ***enhanced fee*** to compensate them for the risk that they might be paid nothing at all for their work." *Ching v. Siemens Indus., Inc.*, No. 11-CV-04838-MEJ, 2014 WL 2926210, at *8 (N.D. Cal. June 27, 2014) (emphasis added). "This mirrors the established practice in the private legal market of rewarding attorneys for taking the risk of nonpayment by paying them ***a premium*** over their normal hourly rates for winning contingency cases." *Vizcaino II*, 290 F.3d at 1051 (emphasis added). "Contingent fees that may ***far exceed*** the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose." *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994) (emphasis added).

Contingent fees, in short, are good for clients and the public alike. In exchange for increased predictability, decreased bean counting, and unlimited protection against downside risks—including the risk of a zero dollar recovery—a client agrees to pay its attorneys an enhanced fee ***if and only if*** the client recovers. And because contingent fees are almost always determined as a percentage of the client's recovery, such fees are necessarily aligned with and proportional to the results achieved for that client—in short, you only pay for what you get. *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 887 (1987) ("[E]ven uninformed clients can align their attorney's interests with their own by compensating them through a percentage-of-recovery fee formula."). Lest contingent fees disappear altogether, however, the law must continue to recognize both sides of the bargain – namely, a significant upside fee for successful contingent representations. If it instead becomes that lawyers must not only bear all of the downside risk, but must also do so only for the prospect of being paid what they would have been paid by the hour, win or lose, had they not taken the case on a contingency, the law will at the very least discourage sophisticated counsel from pursuing risky representations on behalf of non-wealthy clients. *See Vizcaino II*, 290 F.3d at 1051 ("In common fund cases, 'attorneys whose compensation depends on their winning the case must make up in compensation in the cases they win for the lack of compensation in the cases they lose.'").

Here, class counsel have spent nearly three years and nearly 18,500 hours investigating and

litigating this case, while foregoing other paid work, without receiving any compensation to do so. Such burdens are significant, even for law firms of class counsel's stature. For instance, the fact that no money was coming in did not relieve class counsel from having to pay the salaries of the associates and staff working on this case, or from having to cover non-reimbursable overhead expenses like rent. Class counsel not only floated these financial burdens, but they did so while assuming the class's risk that there might never be ***any*** repayment. *See Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376–77 (9th Cir. 1993) ("Class counsel, however, have the case on a contingency. Moreover, it is a double contingency; first, they must prevail on the class claims, and then they must find some way to collect what they win."). They also advanced over $2,067,288.06 in expenses, interest-free, prosecuting this action, including all expert fees and expenses, which are a substantial but necessary burden in any antitrust action. "This substantial outlay, when there is a risk that none of it will be recovered, further supports the award of the requested fees." *In re Omnivision*, 559 F. Supp. 2d at 1047.

A 21 percent benchmark award reasonably compensates class counsel for carrying the financial burdens of this risky case. *See Torrisi*, 8 F.3d at 1377 ("The 25% contingent fee rewarded class counsel not only for the hours they had in the case to the date of the settlement, but for carrying the financial burden of the case, effectively prosecuting it and, by reason of their expert handling of the case, achieving a just settlement for the class."); *accord, e.g.*, *Hopkins*, 2013 WL 496358, at *3 (awarding 30 percent fee in part because "case was conducted on an entirely contingent fee basis against a well-represented Defendant."). The 21 percent rate is actually below the standard market contingency rate of 33 percent,[13] which further demonstrates the reasonableness of class counsel's request. *See In re Online DVD*, 779 F.3d at 955 (reasonableness factors include "the market rate for

[13] *See, e.g.*, Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 Fordham L. Rev. 247, 248 (1996) (noting that "standard contingency fees" are "usually thirty-three percent to forty percent of gross recoveries" (emphasis omitted)); F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: "Morals Without Technique"?*, 60 Fla. L. Rev. 349, 383 (2008) (mentioning "the usual 33-40 percent contingent fee" (quoting *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003))); Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DePaul L. Rev. 267, 286 (1998) (reporting the results of a survey of Wisconsin lawyers, which found that "[o]f the cases with a [fee calculated as a] fixed percentage [of the recovery], a contingency fee of 33% was by far the most common, accounting for 92% of those cases").

the particular field of law in some circumstances"); *Vizcaino II*, 290 F.3d at 1049-50 (evidence of market rate may be probative of the fee award's reasonableness).

e. A 21 percent fee accords with fee awards in analogous cases

An award of 21 percent of the common fund is consistent with, and within the range of, fee awards out of common funds of comparable size – which is not surprising since the "benchmark for an attorneys' fee award in a successful class action is twenty-five percent of the entire common fund." *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997). Of course, because "the percentage may be adjusted to account for any unusual circumstances" (*id.*), it is possible to cite many examples of percentage-of-the-fund awards falling on either side of that benchmark. But this Court has correctly recognized that "[p]ercentage awards of between 20% and 30% are common," and that, "'in most common fund cases, the award exceeds the benchmark'" *de Mira*, 2014 WL 1026282, at *1.

In fact, of the three common funds of equivalent or greater size cited by the Ninth Circuit in *Vizcaino II*, ***all three cases awarded fees at or above the 25 percent benchmark***, and ***two of the three awards*** resulted in multipliers exceeding the 3.91 multiplier requested here:

Case	Fund	Fee (%)	Fee ($)	Multiplier
In re Rite Aid Corp. Sec. Litig., 146 F. Supp. 2d 706 (E.D. Pa. 2001)	$193M	25.0%	$48M	4.5-8.5
In re Lease Oil Antitrust Litig., 186 F.R.D. 403 (S.D. Tex. 1999)	$190M	25.0%	$47M	1.4
In re Merry–Go–Round Enter., Inc., 244 B.R. 327 (Bankr. D. Md. 2000)	$185M	40.0%	$71M	19.6

Vizcaino II, 290 F.3d at 1052 (upholding 28% fee on $97 million settlement fund, resulting in a 3.65 multiplier). Indeed, ***"federal district courts across the country have, in the class action settlement context, routinely awarded class counsel fees in excess of the 25% 'benchmark,' even in so-called 'mega-fund' cases.***" *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1210 (S.D. Fla. 2006) (emphasis added) (awarding 31.33% fee on $1.075 billion settlement fund); *accord In re Urethane Antitrust Litig.*, No. 04-1616-JWL (D. Kan. July 29, 2016), ECF No. 2373 (awarding 33.33% fee on $835 million settlement; "Counsel's expert has identified 34 megafund cases with

settlements of at least $100 million in which the court awarded fees of 30 percent or higher").[14]

While *Vizcaino II* alone demonstrates that both the requested fee and resultant multiplier is well within the reasonable range, additional market information further bolsters that a 21 percent award is reasonable and within the range of fee awards from analogous cases. For example, as discussed above, the EMG Study reports that the highest decile of recoveries in the study, above $67.5 million, averaged a 22.3 percent fee award. *See* EMG Study at 9-10. The largest recoveries in the study, above $100 million, had mean and median fee percentages that ranged from 16.6% to 25.5%, depending on the year. *See id.* at 8. Across all settlements in the study, the report finds that "[o]n average, fees were 27% of gross recovery during the 2009-2013 period, which is higher than the average fee percentage of 23% that we reported in our analyses of the 1993-2008 period." *Id.* The study further reports that, of the 53 settlements in the Northern District of California, the mean and median percentages awarded were 26% and 25% respectively (*id.* at 11), and that, of the 144 settlements in the Ninth Circuit, the mean and median percentages awarded were also 26% and 25% respectively (*id.* at 12). Looking at case subject matter, the study further reports that of the 19 antitrust settlements between 2009-2013, with a mean recovery of $501.09 million and a median recovery of $37.3 million, the mean and median percentages awarded were 27% and 30%

[14] *See also, e.g.*, *In re Optical Disk Drive*, 2016 WL 7364803 at *6 (awarding 25% fee on $124.5 million settlement fund); *CRT.*, 2016 WL 4126533 at *1 (awarding 27.5% fee on $576.75 million settlement fund); *In re Polyurethane Foam Antitrust Litig.*, No. 1:10 MD 2196, 2015 WL 1639269, at *7 (N.D. Ohio Feb. 26, 2015) (awarding 30% fee on $147.8 million settlement fund); *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 170 (D. Mass. 2014) (awarding 28% fee on $325 million settlement fund); *TFT-LCD*, 2013 WL 1365900, at *3 (awarding 28.6% fee on $571 million settlement fund); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1366 (S.D. Fla. 2011) (awarding 33.3% fee on $510 million settlement fund); *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-CV-1825 (NGG), 2010 WL 2653354, at *6 (E.D.N.Y. June 24, 2010) (awarding 25% fee on $225 million settlement fund); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (awarding 25% fee on $126 million settlement fund, resulting in multiplier of 6.96); *Linerboard*, 2004 WL 1221350, at *1(awarding 30% fee on $202.5 million settlement fund); *In re Buspirone Antitrust Litig.*, No. 01-MD-1410 (S.D.N.Y. Apr. 11, 2003), at 4, 42-45 (awarding 33.3% of a $220 million dollar fund, which produced a multiplier of 8.46); *In re Cardizem CD Antitrust Litig.*, No. 99-MD-1278 (E.D.Mich. Nov. 26, 2002), at 18-20 (awarding 30% of a $110 million dollar fund, which produced a multiplier of 3.7); *In re Vitamins Antitrust Litig.*, No. MDL 1285, 2001 WL 34312839, at *9 (D.D.C. July 16, 2001) (awarding 34.6% fee on $365 million settlement fund); *In re Ikon Office Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 170 (E.D. Pa. 2000) (awarding 30% fee on $111 million settlement fund); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 2000 WL 204112, at *2 (N.D. Ill. Feb. 10, 2000) (awarding 25.4% fee on $696 million settlement fund); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 395 (S.D.N.Y. 1999) (awarding 27.5% fee on $116 million settlement fund).

1 respectively. *Id.* at 13; s*ee also, e.g.*, *In re Auto. Refinishing Paint Antitrust Litig.*, MDL No.1426,
2 2008 WL 63269, at *5 (E.D. Pa. Jan. 3, 2008) ("We have previously noted that is not unusual in
3 antitrust class actions for the attorneys to receive awards for fees in the 30% range."). In addition, the
4 study reports that "the fee-to-recovery ratio tends to be lower in cases with very large recoveries."
5 EMG Study at 8. Conversely, the study at the same time reports that "higher multipliers are
6 associated with higher recoveries." *Id.* at 27.

7 Here again, that the average award in megafund cases across all subject matters and all
8 locales in 2011 was ***greater than*** the 21 percent fee requested here confirms, like *Vizcaino II* does,
9 that a 21 percent fee on a recovery of this size is reasonable and well inside the range of fee awards
10 in comparable common fund cases.

11 **f.** A 21 percent fee does not award windfall profits to counsel

12 In reiterating in *In re Bluetooth Headset Prod. Liab. Litig.* that any fee award must be
13 reasonable, the Ninth Circuit remarked, in dicta, "for example, where awarding 25% of a 'megafund'
14 would yield windfall profits for class counsel in light of the hours spent on the case, courts should
15 adjust the benchmark percentage or employ the lodestar method instead." 654 F.3d at 942; *but see,*
16 *e.g.*, *Linerboard*, 2004 WL 1221350, at *17 ("the sliding scale approach is economically unsound.")
17 As an initial matter, counsel are not seeking the benchmark 25% fee here, notwithstanding the
18 representative cases and studies cited in the previous section that could support such a request.
19 Again, courts in this district and across the country have routinely awarded above the 25%
20 benchmark in megafund cases.

21 As the successive, increasing settlements obtained in this action underscore, the size of the
22 common fund is directly related to the efforts of counsel. After class counsel defeated defendants'
23 motion to dismiss and filed a motion for class certification, Blue Sky settled for $5.95 million; after
24 class counsel replied to defendants' opposition to class certification, Sony settled for $13 million;
25 after the Court certified the class and class counsel defeated defendants' Rule 23(f) petition,
26 DreamWorks settled for $50 million; after class counsel staved off absent class member discovery,
27 served their merits expert reports, and presented their case to an impartial mediator, the Disney
28 defendants settled for $100 million.

Simply put, this is not a mass tort or fraud case where the mere disclosure of a government investigation all but guarantees the creation of a megafund, notwithstanding what counsel does or does not do; instead, this case went from ***zero*** recovery to megafund precisely because of counsel's efforts. *Accord, e.g.*, *Linerboard*, 2004 WL 1221350, at *17 (rejecting application of the increase-decrease principle "because the highly favorable settlement was attributable to the petitioners' skill and it is inappropriate to penalize them for their success."); *Vitamins*, 2001 WL 34312839, at *12 ("This Court agrees that it is not fair to penalize counsel for obtaining fine results for their clients.").

Relatedly, the size of the common fund obtained in this case is not "merely a factor of the size of the class." *Bluetooth*, 654 F.3d at 943. In truth, a megafund was created in this case despite the size of the class, not because of it. An analysis of the megafund cases cited at *supra* note 8 reveals that, with one exception, the number of class members sharing in the megafund in this case (approximately 10,043 class members) is ***one-fourth*** the number of class members sharing in the next smallest by-member megafund case; in fact, above-benchmark fees are often awarded where megafunds must be shared by hundreds of thousands, if not millions, of class members.[15] Here again, a comparison to *High-Tech* is also instructive. There, counsel's efforts were on behalf of approximately 64,410 non-opt-out class members, or nearly ***6.5 times*** as many class members as have claims here. And yet, despite representing class members who number less than 16 percent of the *High-Tech* class, class counsel created a common fund that is nearly 39 percent of the *High-Tech* common fund. Class counsel were able to do so, moreover, even though average class member salaries were lower than in *High-Tech*, and even though *High-Tech* released many overlapping

[15] *See, e.g.*, *Optical Disk Drive*, 2016 WL 7364803, at *6 ($124.5 million settlement fund for "millions of class members"); *CRT*, 2016 WL 4126533, at *1 ($576.75 million settlement fund for "millions" of class members, *Polyurethane Foam*, 2015 WL 1639269, at *7 ($147.8 million settlement fund for more than "48,000" class members); *Neurontin*, 58 F. Supp. 3d at 170 ($325 million settlement fund for "more than 40,000 class members"); *TFT-LCD*, 2013 WL 1365900, at *3 ($571 million settlement fund for more than "235,808" class members); *In re Checking*, 830 F. Supp. 2d 1330 at 1366 ($510 million settlement fund for "approximately 13 million" class members); *Comverse Tech*, 2010 WL 2653354, at *6 ($225 million settlement fund for "more than 204,000 potential class members"); *Linerboard*, 2004 WL 1221350, at *1 ($202.5 million settlement fund for "approximately 80,000 companies"); *Ikon*, 194 F.R.D. at 170 ($111 million settlement fund for more than 200,000 class members); *Brand Name Prescription Drugs*, 2000 WL 204112, at *2 ($696 million settlement fund for "approximately 40,000 retail pharmacies"); *but see Vitamins*, 2001 WL 34312839, at *9 ($365 million settlement fund for 4,000 class members).

claims.

Thus, while application of the so-called increase-decrease principle may be appropriate in certain cases,[16] it is tenuous here, where the size of the fund is not merely a factor of the size of the class but is instead directly related to the efforts of class counsel. In the end, the facts are these: class counsel achieved exceptional, megafund results for a relatively small class of plaintiffs who had been left behind by the government and *High-Tech* alike. In doing so, they overcame adverse decisions, obtained incidental benefits for the public, expended huge amounts of their own time and money, and faced considerable risks of non-recovery (and thus non-payment) in pursuing this complex antitrust class action against well-financed corporate defendants, with top-notch counsel. Their 21 percent fee request is below the market contingency rate, below the Ninth Circuit benchmark rate, below the rates awarded in other megafund cases, and results in a lodestar cross-check multiplier within the range of multipliers that both this Court and the Ninth Circuit have previously deemed "reasonable." Class counsel's fee request, in short, is eminently reasonable, fair, and justified based on all the circumstances of this case. To nonetheless apply the increase-decrease principle and reduce

[16] Many courts are not so sure. As Judge Katz put it in oft-quoted language:

> The court will not reduce the requested award simply for the sake of doing so when every other factor ordinarily considered weighs in favor of approving class counsel's request of thirty percent. In so ruling, the court is well aware that most decisions addressing similar settlement amounts have adopted some variant of a sliding fee scale, by which counsel is awarded ever diminishing percentages of ever increasing common funds. This court respectfully concludes that such an approach tends to penalize attorneys who recover large settlements. More importantly, it casts doubt on the whole process by which courts award fees by creating a separate, largely unarticulated set of rules for cases in which the recovery is particularly sizable. It is difficult to discern any consistent principle in reducing large awards other than an inchoate feeling that it is simply inappropriate to award attorneys' fees above some unspecified dollar amount, even if all of the other factors ordinarily considered relevant in determining the percentage would support a higher percentage. Such an approach also fails to appreciate the immense risks undertaken by attorneys in prosecuting complex cases in which there is a great risk of no recovery. Nor does it give sufficient weight to the fact that large attorneys' fees serve to motivate capable counsel to undertake these actions.

Ikon, 194 F.R.D. at 196-97 (quotations marks and citations omitted). Others, like Judge Easterbrook, have criticized the principle as economically unsound, highlighting its perverse outcomes and incentives. *See In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) (where megafunds were defined as greater than $75 million: "This means that counsel for the consumer class could have received $22 million in fees had they settled for $74 million but were limited to $8.2 million in fees because they obtained an extra $14 million for their clients.").

an otherwise reasonable fee simply because this is a "megafund" case, would be to ignore the foregoing *Vizcaino II* factors and sanction an arbitrary, formulaic, and unreasonable result.

3. Class Counsel's Efficiencies Should Be Rewarded and Incentivized

Although class counsel's fee request is reasonable, and checks out as so under a lodestar cross-check (*see supra* § II.A.1), the efficiency with which class counsel achieved such exceptional results is laudable because it benefits the class. Had class counsel's lodestar been significantly higher, a stronger case would exist for a benchmark award of 25 percent (or more). Thus, class counsel's efficiency should be considered favorably in evaluating the reasonableness of our fee request. *See Vizcaino II*, 290 F.3d at 1043 & n.5 ("The lodestar method is merely a cross-check on the reasonableness of a percentage figure, and it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee").

Class counsel spent many hours investigating and litigating this case over the last three years, but keeping good on a promise they made at the outset,[17] they litigated strategically and efficiently throughout – placing their utmost focus on the most efficient path to results, not devoting resources to "nice to have" belt and suspender litigation. Rather than boiling the ocean, class counsel took a number of actions to circumscribe their lodestar:

- Class counsel divided categories of tasks (e.g., briefing, expert work) among the three firms, eliminating overlap and catch-up work as much as possible;
- Class counsel also worked to divide discovery tasks among the firms by defendant: for example, rather than having one lawyer from each firm on a meet and confer call, one firm would handle the call for their respective defendant and report back to all others; for maximum efficiency, the same lawyer would generally handle any follow up;
- In a time when this Court and others have been forced to issue orders encouraging law firms to give their junior lawyers standup time in court, class counsel did so willingly (with accompanying lower hourly rates). Associate-level attorneys were often the sole or primary representatives at hearings in this case. For example, at the Case Management Conference held on December 9, 2015, plaintiffs sent a mid-level Associate as the sole representative; defendants sent seven partners, with two attorneys representing each defendant (except for Williams & Connolly, an East Coast firm);[18]

[17] *See* Plaintiffs' Statement in Further Support of Plaintiffs' Unopposed Motion for Appointment of Plaintiffs' Interim Co-Lead Class Counsel at 1-2, Nov. 12, 2014, ECF No. 44.

[18] *See* ECF No. 172.

- While courts often place a two-attorney limit on depositions, with one exception, class counsel, in sharp contrast to defendants, sent only one attorney to each deposition they took in this case. As a practice, deposition preparation was also so limited: the attorney who prepared for the deposition generally took the deposition;
- Speaking of depositions: class counsel only took 25 of them, strategically focusing solely on depositions that were necessary with which to go to trial. Counsel also noticed some depositions – including of at least one top executive – but cancelled them based on the evidence developed during discovery. By way of comparison, *High-Tech* counsel took 93 depositions.[19] This saved the class significant expenses, in addition to fees; and
- Class counsel submitted monthly billings records and exchanged those records with one of the other co-lead firms, allowing the three firms to cross-check each other's time records and write off any duplicative or inefficient time.[20]

Again, each one of these actions reduced class counsel's lodestar, resulting in a higher multiplier when cross-checking counsel's percentage-of-the-fund award. But that's a good thing. *See In re Xcel Energy, Inc., Secs., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 996 (D. Minn. 2005) ("But for the cooperation and efficiency of counsel, the lodestar of plaintiffs' counsel would have been substantially more and would have required this court to devote significant judicial resources to its management of the case. Instead, counsel moved the case along expeditiously, and the court determines that the time and labor spent to be reasonable and fully supportive of the 25% attorney fee."). Strategic and efficient lawyering not only encourages "the just, speedy, and inexpensive determination of every action and proceeding" (Fed. R. Civ. P. 1), it is also directly correlated with obtaining superb results. One-on-one meet and confers tend to be more productive; oral arguments tend to go better when the person who wrote the motion also argues the motion; and depositions are more effective when the person taking the deposition drafted the questions for the deposition.

Thus, as a matter of policy, the law should reward results achieved through efficiency and incentivize similar future litigation conduct:

[19] *See High-Tech*, 2015 WL 5158730, at *10.

[20] Friedman Decl., ¶ 5; *accord* Sandra R. McCandless et al., Tort Trial & Ins. Practice Section of the Am. Bar Ass'n, *Report on Contingent Fees in Class Action Litigation*, 25 Rev. Litig. 459, 468 (2006) ("the lodestar method encourages lawyers to ensure that the number of hours in the case is high": "They might do duplicative or otherwise unnecessary work. They might send two lawyers rather than one to a deposition, or three rather than two to a discovery hearing. Work that could be done by an associate or a paralegal might be done by a partner and billed at the partner's higher rate.").

> There are strong policy reasons behind the judicial and legislative preference for the percentage of recovery method of determining attorney fees in these cases. Under the percentage method, the more the attorney succeeds in recovering money for the client, and the fewer legal hours expended to reach that result, the higher dollar amount of fees the lawyer earns. Thus, one of the primary advantages of the percentage of recovery method is that it is thought to equate the interests of class counsel with those of the class members and encourage class counsel to prosecute the case in an efficient manner.

In re Xcel Energy, 364 F. Supp. 2d at 991 (footnotes, alterations, quotations, and citations omitted).

In recommending that courts employ a percentage-of-the-fund method, a Third Circuit Task Force added that lodestar methods "increase[] the workload of an already overtaxed judicial system;" are "insufficiently objective and produce results that are far from homogenous;" "create[] a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law;" are "subject to manipulation;" "encourage[] lawyers to expend excessive hours, and, in the case of attorneys presenting fee petitions, engage in duplicative and unjustified work, inflate their 'normal' billing rate, and include fictitious hours or hours already billed on other matters;" "create[] a disincentive for the early settlement of cases;" "do[] not provide the district court with enough flexibility to reward or deter lawyers;" "work[] to the particular disadvantage of the public interest bar;" and "despite the apparent simplicity . . . considerable confusion and lack of predictability remain in its administration." Court Awarded Attorney Fees, 108 F.R.D. 237, 248 (1986); *accord*, *e.g.*, Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 139-46 (2006) ("[T]he major villain here is the lodestar cross-check, which undermines deterrence by driving attorneys to settle cases at settlement-incentive breakpoints that fall short of true settlement values.").

Although modification of fee award based on a lodestar cross-check may serve some utility in cases at the fringes (such as cases far outside the main), routine recourse to it threatens to swallow the benefits that the percentage-of-the-fund method provides, for "if a court sometimes employs a lodestar cross-check, then self-interested entrepreneurial lawyers will conduct their affairs accordingly." Gilles & Friedman at 145-146; *see also* McCandless, et al. at 471 ("The lodestar cross-check re-introduces the problems of the lodestar method. If the attorneys in the previous example know that their fee, when calculated as a percentage, will be 'crosschecked' by the lodestar, they

have every financial incentive to put as many hours into the file as possible. They may do unnecessary work or delay settlement to make sure that the multiplier needed to get to their percentage fee does not appear to be out of line."). In sum, in order to maximize recoveries, promote optimal deterrence, incentivize efficient, speedy, and inexpensive dispute resolution, and conserve judicial resources, this Court should exercise its discretion here and award attorneys' fees at 21 percent of the fund recovered for the class.

B. Plaintiffs' Expenses Are Reasonable and Were Necessarily Incurred

In addition to the $31,500,000 in fees sought, plaintiffs seek reimbursement of $490,040.13 in expenses necessarily incurred in connection with the prosecution of this action.[21] All expenses that are typically billed by attorneys to paying clients in the marketplace are compensable. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994). With this motion, plaintiffs provide an accounting of the expenses incurred by class counsel.[22] The primary expense in this case is for experts, which accounts for nearly $1.6 million, or about 77 percent, of the total. Several additional categories account for the remainder, including filing fees, travel expenses, costs of court and deposition transcripts, and computer research expenses. All of these costs were necessarily and reasonably incurred to achieve the megafund recovery, and they reflect market rates for the various categories of expenses incurred. Further, class counsel advanced these necessary expenses, interest-free, without assurance that they would even be recouped. Plaintiffs' request for expenses is reasonable.

C. Plaintiffs Request Service Awards in the Amount of $90,000

Finally, plaintiffs also request that the Court approve service awards in the amount of $90,000 for each of the three named plaintiffs, to be deducted from the settlement fund.[23] "Service awards for class representatives are routinely provided to encourage individuals to undertake the

[21] This Court previously reimbursed counsel $1,561,700.47 in expenses necessarily incurred, in connection with the Blue Sky and Sony settlements. *See* Order at 13-14.

[22] *See* Friedman Decl., ¶ 15; Sklaver Decl., ¶ 14; Small Decl., ¶ 33. As reflected in the Sklaver Declaration, there is a positive balance of $15,547.55 in the joint expense account. That amount was subtracted from the total expenses paid ($505,587.68) to calculate the net unreimbursed expenses. *See* Sklaver Decl., ¶ 15.

[23] This Court previously awarded each of the named plaintiffs $10,000, in connection with the Blue Sky and Sony settlements. *See* Order at 14-15.

responsibilities and risks of representing the class and recognize the time and effort spent in the case." Order at 14. In the Ninth Circuit, service awards "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009). "Courts have discretion to approve service awards based on, *inter alia*, the amount of time and effort spent, the duration of the litigation, and the personal benefit (or lack thereof) as a result of the litigation." Order at 14.

Here, the three named plaintiffs, Robert Nitsch, David Wentworth, and Georgia Cano have spent a significant amount of time assisting the litigation of this case. Each plaintiff responded to written discovery and produced documents relating to their claims; they were each deposed by defense counsel for a full day regarding their claims; they reviewed the SAC and other substantive pleadings; and they reviewed and approved the settlements.[24] Maybe most importantly, despite the tight-knit and fluid nature of the animation and visual effects industry, each of the named plaintiffs was willing to put his or her name on this employment lawsuit for the benefit of all absent class members despite a very real fear of "workplace retaliation" (*Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)), or being viewed as "troublemakers" within the industry (*High-Tech*, 2015 WL 5158730, at *17).[25] In fact, defendants subpoenaed their employment records from current and former employers. Finally, the service awards of a total of $100,000 for the case are in line with awards in other megafund cases, and the ratio between the services awards and the average class member recovery is not unreasonable. *High-Tech*, 2015 WL 5158730, at *18.

III. CONCLUSION

For the foregoing reasons, plaintiffs respectfully submit that plaintiffs' requests for fees, expenses, and service awards are reasonable and should be granted.

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[24] *See* Declaration of Robert Nitsch in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards ("Nitsch Decl."), ¶¶ 6-11; Declaration of David Wentworth in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards ("Wentworth Decl."), ¶¶ 6-9; Declaration of Georgia Cano in Support of Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Awards ("Cano Decl."), ¶¶ 6-11.

[25] *See* Nitsch Decl., ¶ 12; Wentworth Decl., ¶ 10; Cano Decl., ¶ 12.

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I, Jeff D. Friedman, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that each of the signatories identified above has concurred in this filing.

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