BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Salvatore Graziano (*pro hac vice*)
Salvatore@blbglaw.com
Adam Wierzbowski (*pro hac vice*)
Adam@blbglaw.com
Rebecca E. Boon (*pro hac vice*)
Rebecca.Boon@blbglaw.com
1251 Avenue of the Americas, 44th Floor
New York, NY 10020
Telephone: (212) 554-1400
Facsimile: (212) 554-1444

Lead Counsel for Lead Plaintiff and the Settlement Class

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GARY HEFLER, MARCELO MIZUKI, GUY SOLOMONOV, UNION ASSET MANAGEMENT HOLDING AG, and CITY OF HIALEAH EMPLOYEES' RETIREMENT SYSTEM, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

WELLS FARGO & COMPANY, JOHN G. STUMPF, JOHN R. SHREWSBERRY, CARRIE L. TOLSTEDT, TIMOTHY J. SLOAN, DAVID M. CARROLL, DAVID JULIAN, HOPE A. HARDISON, MICHAEL J. LOUGHLIN, AVID MODJTABAI, JAMES M. STROTHER, JOHN D. BAKER II, JOHN S. CHEN, LLOYD H. DEAN, ELIZABETH A. DUKE, SUSAN E. ENGEL, ENRIQUE HERNANDEZ JR., DONALD M. JAMES, CYNTHIA H. MILLIGAN, FEDERICO F. PEÑA, JAMES H. QUIGLEY, JUDITH M. RUNSTAD, STEPHEN W. SANGER, SUSAN G. SWENSON, and SUZANNE M. VAUTRINOT,

Defendants.

Case No. 3:16-cv-05479-JST

CLASS ACTION

LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND LITIGATION EXPENSES

Judge:	Hon. Jon S. Tigar
Courtroom:	9
Date:	December 18, 2018
Time:	2:00 p.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

SECONDARY AUTHORITIES

NOTICE OF MOTION FOR AN AWARD OF ATTORNEYS' FEES AND LITIGATION EXPENSES

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, pursuant to Rule 23(h) of the Federal Rules of Civil Procedure and the Court's Order Granting Preliminary Approval of Class Action Settlement and Granting Motion to Seal ("Preliminary Approval Order," ECF No. 234), on December 18, 2018, at 2:00 p.m., Lead Counsel Bernstein Litowitz Berger & Grossmann LLP ("Lead Counsel" or "BLB&G"), will move the Court, before the Honorable Jon S. Tigar, for an Order awarding attorneys' fees and providing for payment of litigation expenses in the above-captioned securities class action.

This Motion is based on the following Memorandum of Points and Authorities, the accompanying Declaration of Salvatore J. Graziano in Support of (I) Lead Plaintiff's Motion for Final Approval of Settlement and Plan of Allocation, and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Litigation Expenses ("Graziano Declaration" or "Graziano Decl.") and its exhibits, all other prior pleadings and papers in this Action, arguments of counsel, and such additional information or argument as may be required by the Court.

A proposed Order will be submitted with Lead Counsel's reply submission on December 11, 2018, after the November 27, 2018 deadline for Settlement Class Members to object to the motion for fees and expenses has passed.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Court should approve as fair and reasonable Lead Counsel's application for an attorneys' fee award for all Plaintiffs' Counsel in the amount of 20% of the Settlement Fund (the Settlement Amount, plus all interest accrued thereon), net of Plaintiffs' Counsel's litigation expenses.

2. Whether the Court should approve Lead Counsel's request for payment of $469,795.22 in litigation expenses incurred by Plaintiffs' Counsel in this Action.

MEMORANDUM OF POINTS AND AUTHORITIES

Lead Counsel for the Court-appointed Lead Plaintiff, Union Asset Management Holding, AG ("Union" or "Lead Plaintiff") and the Court-appointed class counsel for the Settlement Class, respectfully submits this memorandum of law in support of its motion for (a) an award of attorneys' fees for all Plaintiffs' Counsel[1] in the amount of 20% of the Settlement Fund, net of counsel's expenses awarded by the Court, and (b) payment of $469,795.22 in litigation expenses that were reasonably and necessarily incurred by Plaintiffs' Counsel in prosecuting and resolving the Action.[2]

PRELIMINARY STATEMENT

Lead Plaintiff, as a result of its own efforts and through the work of Lead Counsel and the other Plaintiffs' Counsel, has achieved a Settlement of the Action for $480 million for the benefit of the Settlement Class. The proposed Settlement is an excellent result for the Settlement Class. The Settlement is extremely favorable because the $480 million cash Settlement Amount represents a substantial percentage of the maximum damages that the Settlement Class would be able to recover at trial, notwithstanding the significant challenges that Plaintiffs faced in prevailing, including challenges in proving that Defendants' alleged false statements were material and made with scienter and in establishing loss causation and damages.[3] The Settlement provides a substantial and certain recovery to Settlement Class Members, and eliminates these significant risks, as well as the delays and expense that would result from years of continued litigation through the conclusion of discovery, trial, and appeals. The $480 million Settlement Amount was deposited into an escrow account on or about September 20, 2018 and has been earning interest for the benefit of the Settlement Class. ¶102.

[1] Plaintiffs' Counsel are: (i) Lead Counsel BLB&G; (ii) Motley Rice LLC ("Motley Rice"), former counsel for Lead Plaintiff Union and former lead counsel in the Action; (iii) Robbins Geller Rudman & Dowd LLP ("Robbins Geller"), liaison counsel for Lead Plaintiff Union throughout the Action and counsel to Plaintiffs Gary Hefler, Marcelo Mizuki and Guy Solomonov; and (iv) Klausner, Kaufman, Jensen & Levinson, counsel for Plaintiff City of Hialeah Employees' Retirement System.

[2] Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated July 30, 2018 (ECF No. 225-1) (the "Stipulation") or the Graziano Declaration. Citations to "¶" in this memorandum refer to paragraphs in the Graziano Declaration.

[3] As discussed in the Graziano Declaration, there is a range of maximum potential damages, based on the outcome of several disputes between the Parties on loss causation and damages. ¶¶144-67, 175.

Plaintiffs' Counsel have dedicated more than 73,000 hours of attorney and other professional staff time to bring the Action to this successful conclusion and have not yet received any compensation for these efforts. ¶208. As detailed in the accompanying Graziano Declaration,[4] Plaintiffs' Counsel's extensive efforts included (i) conducting a comprehensive investigation of the allegedly fraudulent misrepresentations and omissions concerning Wells Fargo's fake and unauthorized account scandal that were made during the Class Period, including consulting with experts and reviewing the voluminous public record that included SEC filings, news articles, research reports by securities analysts, transcripts of Wells Fargo investor calls, Congressional testimony, and information concerning executives' stock sales; (ii) researching and drafting a detailed Consolidated Complaint based on that investigation; (iii) successfully opposing (in large part) Defendants' eight motions to dismiss; (iv) researching and drafting the Amended Complaint; (v) consulting with several damages experts and consultants on the challenging loss causation and damages issues presented by the Action; (vi) engaging in intensive document discovery that included drafting and serving extensive discovery requests and the review and analysis of over 3.5 million pages of documents produced to Lead Plaintiff; and (vii) preparing for and participating in two mediation sessions and additional negotiations with Defendants on an arm's-length basis to resolve the Action. ¶¶11, 31-99.

From the outset of this litigation, Plaintiffs' Counsel faced numerous challenges to proving liability and damages that posed a serious risk of no recovery, or a substantially lesser recovery than the Settlement, for the Settlement Class. ¶¶103-74. For example, Plaintiffs faced challenges in proving that Defendants' alleged misstatements about Wells Fargo's cross-selling business model and their failure to disclose widespread misconduct concerning employees' opening of unauthorized accounts for bank customers were materially false and misleading. ¶¶111-22. Defendants would have argued that the alleged fake-account fraud had only a small impact on the Company's reported cross-selling metrics, and that the employee misconduct never required the Company to restate its cross-

[4] The Graziano Declaration is an integral part of this submission and, for the sake of brevity herein, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action (¶¶24-102); the nature of the claims asserted (¶¶18-23); the negotiations leading to the Settlement (¶¶61-66, 91-99); the risks and uncertainties of continued litigation (¶¶103-74); and a description of the services Lead Counsel provided for the benefit of the Settlement Class (¶¶11, 24-102, 206-26).

selling metrics or its reported financial results. *Id*. Plaintiffs also would have faced hurdles in showing that Defendants acted with an intent to defraud investors. ¶¶123-43. Defendants would have contended that Wells Fargo's senior management believed that the sales misconduct at the Company was not widespread (particularly in comparison to Wells Fargo's size), and that Defendants took extensive affirmative measures to monitor and reduce the sales misconduct at issue – which they would argue is contrary to any fraudulent intent. *Id*.

Plaintiffs also faced significant challenges in proving loss causation and demonstrating damages. ¶¶144-67. Defendants would likely contend that the fact that Wells Fargo's stock price did not promptly decline in response to the initial announcements of alleged account fraud at Wells Fargo on September 8, 2016 confirmed that investors were already aware of the issue or did not consider the disclosures material. ¶¶147-49. While the price of Wells Fargo common stock declined significantly in subsequent days, Defendants had substantial arguments that these declines were not in response to corrective disclosures and could not be used to claim damages. ¶¶150-52. Defendants also had a potentially powerful "truth on the market" defense, based on a December 2013 *Los Angeles Times* article concerning fake accounts at Wells Fargo, which they contended revealed the existence of the fraud before the Class Period, and that investors could not subsequently be misled. ¶¶168-70. If Plaintiffs had failed to establish one of the elements of their claims or Defendants succeeded in any of their defenses, the Settlement Class might have received nothing (or substantially less than $480 million). ¶¶175-77. Plaintiffs' Counsel, who prosecuted the Action on an entirely contingent basis, also faced the risk that they would receive no compensation for their efforts on behalf of the Settlement Class. ¶¶228-31. Nonetheless, and at significant risk, Plaintiffs' Counsel approached the settlement meetings with Defendants' Counsel as if they would win on all elements and demanded an extraordinary result for the Class. ¶¶65, 93. Plaintiffs' Counsel did so at a first mediation session even before the Court ruled on Defendants' eight pending motions to dismiss and then did so again in the presence of Lead Plaintiff Union, demonstrating that they were prepared to fully risk any payment for their substantial efforts on behalf of the Class. *Id*.

As compensation for Plaintiffs' Counsel's extensive efforts and for the risks of non-payment they faced in bringing the Action on a fully contingent basis, Lead Counsel seeks an award of 20% of

the Settlement Fund, to be paid from the Settlement Fund. Union, having the opportunity to supervise Plaintiffs' Counsel and directly witness the substantial risks Plaintiffs' Counsel undertook in demanding a very strong recovery for the Class, fully supports Plaintiffs' Counsel's fee request.

Lead Counsel's requested 20% fee is substantially lower than the Ninth Circuit's 25% "benchmark" for percentage fees in common fund cases such as this one. As the Court noted in its Preliminary Approval Order, percentage fee awards typically decline as the size of the common fund increases. At a substantial discount to the Ninth Circuit's 25% "benchmark," Lead Counsel believes that its 20% fee request is within the range of fees that courts have awarded in securities class actions and other similar cases of comparable size and that a 20% award is appropriate here because of the extraordinary quality of the recovery obtained for the Settlement Class and the substantial risks that Plaintiffs' Counsel faced in the Action. *See Rodman v. Safeway, Inc.*, 2018 WL 4030558, at *5 (N.D. Cal. Aug. 23, 2018) (Tigar, J.) (including data demonstrating a median percentage fee award of 19-22.3% for settlements in the highest reported decile of settlement recoveries).

The lodestar cross-check also confirms the reasonableness of the fee. Here, the requested fee represents a multiplier of 3.2 of Plaintiffs' Counsel's lodestar, which is within the range of multipliers awarded in the Ninth Circuit, particularly in cases with significant risks such as this one.

Approval of the requested fee is also supported by the fact that the fee requested is based on the terms of a written agreement entered into between Lead Counsel and Lead Plaintiff at the outset of Lead Counsel's involvement in the litigation. *See* Declaration of Andreas Zubrod, attached as Exhibit 2 to the Graziano Declaration ("Zubrod Decl.") ¶8. Indeed, at the time that Union (with the Court's approval) substituted BLB&G for Motley Rice as its counsel and Lead Counsel in this Action, Union considered several potential firms as proposed Lead Counsel for the Class and negotiated a fee agreement with BLB&G that ***reduced*** the fee that could be sought in the Action from 30% plus expenses as established in a previous agreement with Motley Rice, to allow for a fee request of only 20% net of expenses. *Id.* After the agreement to settle the Action was reached, Union again considered the proposed fee in light of the result obtained and the work performed by Plaintiffs' Counsel which Union directly oversaw, and Union again endorsed it. *Id.* Union is a sophisticated institutional investor that actively participated in and closely supervised the Action, including by

attending and directly participating in the mediation. *Id*. ¶¶9-10. Its endorsement of the requested fee as fair and reasonable should be given substantial weight in the Court's consideration of the fee award.

In addition, pursuant to the Preliminary Approval Order, 1,866,302 copies of the Notice have been mailed to potential Settlement Class Members and their nominees through November 9, 2018, and the Summary Notice was published in *The Wall Street Journal* and the *Los Angeles Times* and transmitted over the *PR Newswire*. *See* Declaration of Alexander Villanova, attached as Exhibit 3 to the Graziano Decl. ("Villanova Decl.") ¶¶8-9. The Notice advised potential Settlement Class Members that Lead Counsel would apply for an award of attorneys' fees in an amount not to exceed 20% of the Settlement Fund and payment of litigation expenses in an amount not to exceed $750,000. *See* Villanova Decl., Ex. A ¶¶5, 73. The fees and expenses sought by Lead Counsel do not exceed the amounts set forth in the Notice. The deadline set by the Court for Settlement Class Members to object to the requested attorneys' fees and expenses has not yet passed, but, to date, no objections to the requests for fees and expenses have been received. ¶¶234, 244.[5]

In short, Lead Counsel respectfully submits that the requested fee is fair and reasonable in light of the outstanding result achieved for the Settlement Class, the considerable risks in the litigation, the skill, quality and amount of counsel's work, the wholly contingent nature of the representation and its discount to the Ninth Circuit's 25% "benchmark."

ARGUMENT

I. Lead Counsel's Request for Attorneys' Fees of 20% of the Settlement Fund Net of Expenses Is Reasonable and Should Be Approved

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

It is well settled that attorneys who represent a class and are successful in recovering a "common fund" for the benefit of class members are entitled to a reasonable fee paid from the fund as compensation for their services. The U.S. Supreme Court has recognized 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

[5] The deadline for the submission of objections is November 27, 2018. Should any objections be received, Lead Counsel will address them in its reply papers, due on or before December 11, 2018.

(1980). Similarly, the Ninth Circuit has held that "a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees." *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *accord Stetson v. Grissom*, 821 F.3d 1157, 1165 (9th Cir. 2016).

B. The Court Should Calculate the Fee as a Percentage of the Common Fund

Where a settlement produces a common fund, courts in the Ninth Circuit have discretion to employ either the percentage-of-recovery method or the lodestar method. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). Notwithstanding that discretion, where there is an easily quantifiable benefit to the class – such as a cash common fund – the percentage of the fund approach is the prevailing method used. *See, e.g.*, *Ellison v. Steven Madden, Ltd.*, 2013 WL 12124432, at *8 (C.D. Cal. May 7, 2013) (finding "use of the percentage method" to be the "dominant approach in common fund cases"); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) (same).

Most courts have found the percentage approach superior in cases with a common-fund recovery because it parallels the use of percentage-based contingency fee contracts, which are the norm in private litigation; aligns the lawyers' interests with that of the class in achieving the maximum possible recovery; and reduces the burden on the court by eliminating the detailed and time-consuming lodestar analysis. *See Omnivision*, 559 F. Supp. 2d at 1046; *Vinh Nguyen v. Radient Pharm. Corp.*, 2014 WL 1802293, at *9 (C.D. Cal. May 6, 2014) ("There are significant benefits to the percentage approach, including consistency with contingency fee calculations in the private market, aligning the lawyers' interests with achieving the highest award for the class members, and reducing the burden on the courts that a complex lodestar calculation requires").

C. A Fee of 20% of the Settlement Fund Net of Expenses is Reasonable Under Either the Percentage or Lodestar Method

Whether assessed under the percentage-of-recovery or lodestar approach, the fee request of 20% of the Settlement Fund – representing a multiplier of approximately 3.2 – is fair and reasonable.

1. The Requested Attorneys' Fees Are Reasonable Under the Percentage Method

Lead Counsel seeks a fee of 20% of the Settlement Fund, net of Plaintiffs' Counsel's Court-

awarded litigation expenses. This is significantly less than the Ninth Circuit's well-established 25% "benchmark" for percentage fees in common fund cases. *See, e.g.*, *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015); *Bluetooth*, 645 F.3d at 942; *Fischel v. Equitable Life Assurance Soc'y of U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002); *Vizcaino*, 290 F.3d at 1047-48; *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998).

While the 25% benchmark can "be adjusted upward or downward to account for any unusual circumstances," *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989), courts have found fee awards in the amount of the 25% benchmark to be "presumptively reasonable." *In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, at *4 (N.D. Cal. Aug. 17, 2018); *Booth v. Strategic Realty Tr., Inc.*, 2015 WL 6002919, at *7 (N.D. Cal. Oct. 15, 2015). Courts have also found that, "in most common fund cases, the award exceeds that benchmark." *Omnivision*, 559 F. Supp. 2d at 1047; *accord In re Heritage Bond Litig.*, 2005 WL 1594403, at *19 & n.14 (C.D. Cal. June 10, 2005).

The 20% fee requested by Lead Counsel, which is made pursuant to a retainer agreement with a sophisticated institutional investor Lead Plaintiff, is also within the range of percentage fees that have been awarded in securities class actions and other complex class actions in the Ninth Circuit with recoveries of comparable size. *See, e.g.*, *In re Broadcom Corp. Sec. Litig.*, 2005 WL 8153006, at *4 (C.D. Cal. Sept. 12, 2005) (applying 25% benchmark to $150 million settlement); *Anthem*, 2018 WL 3960068, at *16 (applying 25% benchmark to $115 million settlement and, after concluding that an upward departure was warranted, awarding 27% fee); *In re Allergan, Inc. Proxy Violation Sec. Litig.*, No. 8:14-cv-02004-DOC-KES, slip op. at 2 (C.D. Cal. Aug. 14, 2018), ECF No. 637 (Graziano Decl. Ex. 9) (awarding fee of 21% on $250 million settlement); *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 2017 WL 6040065, at *3-*7 (N.D. Cal. Dec. 6, 2017) (awarding 20% of $208.7 million settlement fund); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 WL 4126533, at *1 (N.D. Cal. Aug. 3, 2016) (awarding 27.5% of $576.75 million common fund); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL 1365900, at *8 (N.D. Cal. Apr. 3, 2013) (awarding 28.5% fee on a $1.08 billion settlement); *In re Washington Mut., Inc. Sec. Litig.*, 2011 WL 8190466, at *1 (W.D. Wash. Nov. 4, 2011) (awarding 21% of $208.5 total million settlement).

The 20% fee is also within the range of fees typically awarded in settlements of this size in

securities class actions in other Circuits. *See, e.g.*, *In re Pfizer Sec. Litig.*, No. 1:04-cv-09866-LTS-HBP, slip op. at 2 (S.D.N.Y. Dec. 21, 2016), ECF No. 727 (Graziano Decl. Ex. 10) (awarding 28% of $486 million settlement); *In re Merck & Co., Inc. Sec., Deriv. & "ERISA" Litig.*, Civil Action No. 2:05-cv-02367, slip op. at 10-11 (D.N.J. June 28, 2016), ECF No. 1039 (Graziano Decl. Ex. 11) (awarding 20% of $1.062 billion settlement); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 & n.354 (S.D.N.Y. 2009) (awarding 33.3% of $586 million settlement, net of expenses); *In re Adelphia Commc'ns Corp. Sec. & Deriv. Litig.*, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006) (awarding 21.4% of $455 million settlement), *aff'd*, 272 F. App'x 9 (2d Cir. 2008); *Ohio Pub. Emps. Ret. Sys. v. Freddie Mac*, 2006 U.S. Dist. LEXIS 98380, at *4 (S.D.N.Y. Oct. 26, 2006) (awarding 21% of $410 million settlement); *New Jersey Carpenters Health Fund v. Residential Capital LLC*, No. 1:08-cv-08781-KPF-DCF, slip op. at 2 (S.D.N.Y. July 31, 2015), ECF No. 353 (Graziano Decl. Ex. 12) (awarding 20.75% of $335 million settlement); *In re Rite Aid Corp. Sec. Litig.*, No. MDL 1360 (E.D. Pa. 2001 and 2005) (awarding 25% of $319.6 million combined total of two related settlements)[6]; *In re Williams Sec. Litig.*, No. 4:02-cv-00072-SPF-FHM, slip op. at 2 (N.D. Okla. Feb. 12, 2007), ECF No. 1638 (Graziano Decl. Ex. 13) (awarding 25% of $311 million settlement); *In re DaimlerChrysler AG Sec. Litig.*, No. 00-0993 (KAJ), slip op. at 1 (D. Del. Feb. 5, 2004), ECF No. 973 (Graziano Decl. Ex. 14) (awarding 22.5% of $300 million settlement); *In re Oxford Health Plans, Inc. Sec. Litig.*, 2003 U.S. Dist. LEXIS 26795, at *13 (S.D.N.Y. June 12, 2003) (awarding 28% of $300 million settlement).

The reasonableness of the 20% fee request is also supported by an analysis of the median percentage fee awards in securities class actions since the enactment of the PSLRA conducted by NERA Economic Consulting, a consulting firm typically retained by corporate defendants in securities litigation. That analysis found that, in securities class actions settlements ranging from $100 million to under $500 million, the median fee award is 22% and that in settlements ranging from $500 million to under $1 billion, the median award is 17%. *See* NERA, *Recent Trends in Securities Class Action*

[6] *See In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735-36 (E.D. Pa. 2001) (awarding 25% of $193 million with multiplier of 4.5 to 8.5); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. Mar. 24, 2005) (reaffirming award of 25% of $126.6 million settlement with 6.96 multiplier).

Litigation: 2017 Full Year Review (2018) (Graziano Decl. Ex. 7) ("NERA Report") at 42.

Thus, 20% is well within the range of fees that courts have awarded on settlements in the vicinity of a $480 million settlement. More importantly, the facts and risks of a particular case should be considered in any such analysis. Cases with subsequently admitted fraud or financial restatements and unquestionable loss causation and damages compel the award of a lower percentage fee, whereas cases such as this one with serious risks in terms of proving falsity, materiality, scienter and loss causation and damages compel awards at the higher end of the established range. Indeed, when Lead Plaintiff Union first established a proposed fee agreement with prior Lead Counsel, the fee percentage was set at 30% in recognition of the substantial risks of this case. Zubrod Decl. ¶8. Only after Union met with several additional firms and determined to substitute BLB&G as Lead Counsel, did Union establish a lower fee agreement of 20%, net of expenses. *Id*. That action demonstrates a form of "market check" on fees in this case, subject, of course, to Court approval.

In its Preliminary Approval Order, the Court invited the parties to consider its recent decision in *Rodman v. Safeway Inc.*, 2018 WL 4030558, at *4 (N.D. Cal. Aug. 23, 2018), discussing the relationship between total recovery by the class and the appropriate percentage of that recovery to be allocated to attorneys' fees. As the Court observed in *Safeway*, as an empirical matter, once settlements reach a certain magnitude, the percentage fees awarded generally decline as the size of the fund increases. *Id*. The requested fee here is within that reduced 19-22.3% range. *Id.* at *5.

Lead Counsel agrees that the size of the settlement fund (and the size of the resulting fee award in relation to counsel's lodestar) should be considered among factors in determining the appropriate percentage fee. For example, in *Bluetooth*, the Ninth Circuit noted that, if awarding the benchmark 25% fee in a "megafund" case would lead to "windfall profits" for counsel in light of the hours spent on the case, then the District Court should adjust the fee percentage (or consider the lodestar approach) to achieve a reasonable result. *See Bluetooth*, 654 F.3d at 942-43. However, the Ninth Circuit has not endorsed a strict application of a "sliding scale" approach or "increase-decrease" rule that would require a mechanical approach of decreasing percentage fee awards based on the size of the settlement fund. On the contrary, in *Vizcaino*, the Ninth Circuit rejected a fee objection based on the "increase-decrease" rule and stated that it did not adopt the observation that "the percentage of an award generally

decreases as the amount of the fund increases" as a "principle governing fee awards." 290 F.3d at 1047. Rather, the Ninth Circuit merely noted that "in cases of that magnitude, fund size is one relevant circumstance to which courts must refer." *Id.*; *see also*, *e.g.*, *NCAA Grant-in-Aid Cap Antitrust Litig.*, 2017 WL 6040065, at *7 ("To . . . apply the increase-decrease principle and reduce an otherwise reasonable fee simply because this is a 'megafund' case would be unreasonable."); *TFT-LCD*, 2013 WL 1365900, at *8 (rejecting argument that it must "use a sliding scale model due to the size of the Settlement Fund" and awarding 28.5% fee award on a $1.08 billion settlement recovery).

Even putting aside the particular risks of this Action, Lead Counsel believes that its fee request in this Action is reasonable in light of the size of the recovery, because the 20% fee requested is already substantially below the 25% benchmark and within the median range of 19-22.3% fees awarded in large settlements of over $100 million. *Safeway*, 2018 WL 4030558, at *5.[7] Moreover, the requested 20% fee net of expenses represents a multiplier of 3.2 on Plaintiffs' Counsel's lodestar. As discussed below, this multiplier is well within the range of lodestar multipliers awarded in class actions with substantial contingency fee risks, and thus the requested fee here would not lead to extreme "windfall profits" for counsel. *See Cathode Ray Tube*, 2016 WL 4126533, at *6 (Tigar, J.) (finding that "the best way to guard against a windfall [from the application of the benchmark to a mega fund] is first to

[7] When the fee was set by Lead Plaintiff at 20% net of expenses, Union already was viewing this case as a potential "megafund" case and incentivizing Lead Counsel to obtain a strong result, notwithstanding the substantial risks. In this regard, many courts and commentators have rejected or questioned the merits of a rule that percentage fee awards should automatically decline as the size of recoveries increase, concluding that it might undermine the basic incentives created by the percentage method of aligning counsel's interest in achieving the largest possible recovery for the class. *See Sullivan v. DB Invs.*, 667 F.3d 273, 331 n.64 (3d Cir. 2011) ("[T]here is no rule that a district court must apply a declining percentage reduction in every settlement involving a sizable fund"); *In re Cendant Corp. Litig.*, 264 F.3d 201, 284 & n.55 (3d Cir. 2001) (finding that such a rule "has been criticized by respected courts and commentators, who contend that such a fee scale often gives counsel an incentive to settle cases too early and too cheaply"); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1213 (S.D. Fla. 2006) (finding such an approach "antithetical to the percentage of the recovery method . . . the whole purpose of which is to align the interests of Class Counsel and the Class by rewarding counsel in proportion to the result obtained"); *In re Ikon Office Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 197 (E.D. Pa. 2000) ("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.").

examine whether a given percentage represents too high a multiplier of counsel's lodestar"). Finally, as discussed in Part I.E below, the various factors to be considered by the Court, including the outstanding result achieved and the substantial risks, support the reasonableness of a 20% fee award in this case.

2. The Requested Attorneys' Fees Are Reasonable Under the Lodestar Method

To ensure the reasonableness of a fee awarded under the percentage-of-the-fund method, courts in the Ninth Circuit typically cross-check the proposed award against counsel's lodestar, although such a cross-check is not required. *See In re Amgen Inc. Sec. Litig.*, 2016 WL 10571773, at *9 (C.D. Cal. Oct. 25, 2016) ("Although an analysis of the lodestar is not required for an award of attorneys' fees in the Ninth Circuit, a cross-check of the fee request with a lodestar amount can demonstrate the fee request's reasonableness."); *HCL Partners Ltd. P'ship v. Leap Wireless Int'l, Inc.*, 2010 WL 4156342, at *2 (S.D. Cal. Oct. 15, 2010) ("Courts have found that a lodestar analysis is not necessary when the requested fee is within the accepted benchmark.").

As detailed here and in the attached Declarations, Plaintiffs' Counsel spent 73,309.65 hours of attorney and other professional time prosecuting the Action for the benefit of the Settlement Class through October 15, 2018. ¶208. Plaintiffs' Counsel's lodestar, derived by multiplying the hours spent on the litigation by each attorney and professional by their current hourly rates, is $29,760,536.50. Plaintiffs' Counsel's lodestar based on the hourly rates in effect at the time the work was performed ("historical rates") is $29,504,271.25. *See id*. Accordingly, the requested fee of 20% net of expenses, which equates to approximately $95.9 million, plus interest earned, represents a multiplier of 3.22 of Plaintiffs' Counsel lodestar at current rates and 3.25 at historical rates.[8]

It is common and appropriate to calculate counsel's lodestar based on current, rather than historical rates, as a method of compensating for the delay in payment and the loss of interest on the funds. *See Missouri v. Jenkins*, 491 U.S. 274, 284 (1989); *Fischel*, 307 F.3d at 1010 (9th Cir. 2002);

[8] The actual realized multiplier will decline over time as Lead Counsel will devote additional attorney time to preparing for the final approval hearing, overseeing processing of claims by the Claims Administrator, and overseeing the distribution of the settlement funds to Settlement Class Members with valid claims. There will not be any additional counsel fees charged for such work.

In re Washington Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1305 (9th Cir. 1994) ("*WPPSS*"); *White v. Experian Info. Solutions, Inc.*, 2018 WL 1989514, at *15 (C.D. Cal. Apr. 6, 2018) ("Courts in this Circuit regularly apply current billing rates in evaluating fee requests in multi-year litigation to account for the delay in payment."). In any event, the differences between the lodestars under current or historical rates is relatively minimal here, and under either approach the resulting multiplier is well within the range of multipliers that courts have approved.

Fee awards in class actions with substantial contingency risks generally represent positive multipliers of counsel's lodestar, often ranging to up to four times the lodestar or even higher. *See Vizcaino*, 290 F.3d at 1051-52 (finding that "courts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases," and that, when the lodestar is used as a cross-check, "most" multipliers were in the range of 1 to 4, but citing numerous examples of even higher multipliers); *see also Hopkins v. Stryker Sales Corp.*, 2013 WL 496358, at *4 (N.D. Cal. Feb. 6, 2013) ("Multipliers of 1 to 4 are commonly found to be appropriate in complex class action cases.").

Accordingly, the 3.2 multiplier sought is well within the range of multipliers typically awarded. *See, e.g.*, *Vizcaino*, 290 F.3d at 1047-48 (affirming a 28% fee on a $97 million settlement, representing a **3.65** multiplier); *NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 2017 WL 6040065, at *1 (awarding 20% of $208.7 million settlement fund, representing a **3.66** multiplier); *In re Brocade Sec. Litig.*, No. 3:05-cv-02042-CRB, slip op. at 13 (N.D. Cal. Jan. 26, 2009), ECF No. 496-1 (Graziano Decl. Ex. 15) (awarding 25% of $160 million settlement, representing a **3.5** multiplier); *In re 3Com Corp. Sec. Litig.*, No. C-97-21083-EAI, slip op. at 12 (N.D. Cal. Mar. 9, 2001), ECF No. 180 (Graziano Decl. Ex. 16) (awarding 18% of $259 million settlement, representing a **6.67** multiplier); *see also Buccellato v. AT&T Operations, Inc.*, 2011 WL 3348055, at *2 (N.D. Cal. June 30, 2011) (**4.3** multiplier).[9]

[9] The same holds true in securities class actions in other Circuits. *See Woburn Ret. Sys. v. Salix Pharms. Ltd.*, 2017 WL 3579892, at *5-*7 (S.D.N.Y. Aug. 18, 2017) (awarding 21.2% of $210 million settlement, representing a **3.14** multiplier); *Fort Worth Emps. Ret. Fund v. JPMorgan Chase & Co.*, No. 1:09-cv-03701-JPO-JCF, slip op. at 2 (S.D.N.Y. Dec. 4, 2015), ECF No. 379 (Graziano Decl. Ex. 17) (awarding 18% of $388 million settlement, representing a **4.57** multiplier); *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006) (awarding 21.4% of $455 million settlement, representing a **2.89** multiplier); *In re Cardinal Health,*

Indeed, Courts have found that, because attorneys' normal hourly rates do not reflect compensation for contingency fee risk, counsel in cases such as this one, with substantial risks, are entitled to a multiplier. *See Moore v. Verizon Commc'ns Inc.*, 2014 WL 588035, at *6 (N.D. Cal. Feb. 14, 2014) ("because there is ample evidence in the record establishing that this case was risky and that recovery was far from certain, Class Counsel is entitled to a risk multiplier"); *Hopkins*, 2013 WL 496358, at *4; *see also In re Comverse Tech., Inc. Sec. Litig.*, 2010 WL 2653354, at *5 (E.D.N.Y. June 24, 2010) (counsel who litigated a complex case on a contingent basis held "entitled to a fee in excess of the lodestar"). Plaintiffs' Counsel demanded and obtained an extraordinary recovery for the Class in this Action, notwithstanding the substantial risks it faced. That created a real risk that Plaintiffs' Counsel would receive no recovery for its efforts and while (fortunately) this case was successfully resolved, many similar cases are not, demonstrating why multipliers are appropriate.

Plaintiffs' Counsel's lodestar is supported by Declarations from a partner or member of each of the Plaintiffs' Counsel firms (Graziano Decl. Exs. 4A, 4B, 4C, and 4D). Consistent with the Court's instructions to plaintiffs' counsel in the *Safeway* case, these Declarations include statements about each firm's timekeeping and hourly rates for its personnel, as well as detailed exhibits showing the hours worked by each of the professionals who worked on the matter, broken down by month and by 11 different substantive categories of work, and various summaries of that information. In addition, for each attorney or other professional whose time is included in the lodestar, a summary of the principal tasks that he or she worked on in the litigation and a brief biography with relevant information about his or her education and experience have been attached.

The current hourly rates for Plaintiffs' Counsel range from $650 to $1,250 for partners or senior counsel, from $400 to $650 for associates, and from $245 to $350 for paralegals. The rates of BLB&G's staff attorneys, who were integrally involved in the review of documents obtained from

Inc. Sec. Litig., 528 F. Supp. 2d 752, 770 (S.D. Ohio 2007) (awarding 18% of $600 million settlement, representing a **5.9** multiplier) *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735-36 & n.44 (E.D. Pa. 2001) (awarding 25% of $193 million with **4.5 to 8.5** multiplier); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. Mar. 24, 2005) (reaffirming fee award of 25% of $126.6 million settlement with **6.96** multiplier); *In re DaimlerChrysler AG Sec. Litig.*, No. 00-0993 (KAJ), slip op. at 1 (D. Del. Feb. 5, 2004), ECF No. 973 (Graziano Decl. Ex. 14) (awarding 22.5% of $300 million settlement, representing a **4.2** multiplier).

Wells Fargo, are $340, $375 or $395 per hour depending on their number of years out of law school. The blended hourly rate for all timekeepers in the application (at current rates) is $406. Lead Counsel believes these rates are within the range of reasonable fees for attorneys working on sophisticated class action litigation in this District. *See, e.g.*, *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 2017 WL 1047834, at *5 (N.D. Cal. Mar. 17, 2017) (approving fee award following a lodestar cross-check in which the court found that: "The blended average hourly billing rate is $529 per hour for all work performed and projected, with billing rates ranging from $275 to $1600 for partners, $150 to $790 for associates, and $80 to $490 for paralegals."); *Gutierrez v. Wells Fargo Bank, N.A.*, 2015 WL 2438274, at *5 (N.D. Cal. May 21, 2015) (finding reasonable rates for Bay Area attorneys in 2015 of between $475-$975 for partners, $300-$490 for associates, and $150-$430 for litigation support and paralegals).

In sum, Lead Counsel's requested fee award is reasonable, justified, and within the range of what courts in this Circuit award in class actions such as this one, whether calculated as a percentage of the fund or as a cross-check on counsel's lodestar. As discussed below, each of the factors considered by courts in the Ninth Circuit also strongly supports that the requested fee is reasonable.

D. Lead Plaintiff's *Ex Ante* Fee Agreement with Lead Counsel, and Lead Plaintiff's Subsequent Endorsement of the Requested Fee After Observing Counsel's Substantial Efforts, Support its Approval

The fact that the requested fee is based on an agreement that Lead Counsel entered into with a sophisticated institutional Lead Plaintiff at the outset of Lead Counsel's involvement in the litigation (at a time when the Lead Plaintiff was in discussions with several other potential lead law firms), and the fact that Lead Plaintiff, which was actively involved in the prosecution and settlement of the Action and directly observed counsel's substantial efforts, has also supported the fee at the conclusion of the Action, provide strong support for approval of the fee.

The PSLRA was intended to encourage institutional investors with a substantial financial interest in the action, like Union, to "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. A number of courts have found, in light of Congress's intent to empower lead plaintiffs under the PSLRA to select and supervise attorneys on behalf of the class, that a fee agreement entered into by a PSLRA lead plaintiff and its counsel at the outset of the litigation should either be considered presumptively reasonable or, at very least, given considerable weight by the Court. *See Cendant*, 264 F.3d at 282 (*ex ante* fee agreements in securities class actions should be given "a presumption of reasonableness"); *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133-34 (2d Cir. 2008) ("We expect . . . that district courts will give serious consideration to negotiated fees because PSLRA lead plaintiffs often have a significant financial stake in the settlement, providing a powerful incentive to ensure that any fees resulting from that settlement are reasonable. In many cases, the agreed-upon fee will offer the best indication of a market rate, thus providing a good starting position for a district court's fee analysis"); *Comverse*, 2010 WL 2653354, at *4 ("an *ex ante* fee agreement is the best indication of the actual market value of counsel's services"); *Cardinal Health*, 528 F. Supp. 2d at 759 (strongly endorsing presumption of reasonableness for *ex-ante* fee agreements).

Lead Counsel respectfully submits that the fact that the fee is based on the *ex ante* agreement with Lead Plaintiff should, at a minimum, be given substantial weight when evaluating the reasonableness of Lead Counsel's fee request. That is particularly true here because Union 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. Union took an active role in the litigation and closely supervised the work of Lead Counsel and negotiated the fee agreement after talking with several firms, setting it at lower than the Ninth Circuit's 25% benchmark, while incentivizing counsel to obtain a substantial result in a case with meaningful challenges and substantial risks. *See* Zubrod Decl. ¶¶ 8-10, 14, 16. Accordingly, its endorsement of the fee as reasonable supports its approval.

E. The Factors Considered by Courts in the Ninth Circuit Support Approval of the Requested Fee

Courts in this Circuit consider the following factors when determining whether a fee is fair and reasonable or if the benchmark 25% percentage fee should be adjusted: (1) the results achieved; (2) the risks of litigation; (3) the skill required and quality of work; (4) the contingent nature of the fee and financial burden carried by the plaintiffs; (5) awards made in similar cases; (6) the reaction of the class;

and (7) the amount of a lodestar cross-check. *See Vizcaino*, 290 F.3d at 1048-50; *Omnivision,* 559 F. Supp. 2d at 1046-48. The application of the lodestar cross-check (set forth above in Section I.C.2) and each of the other factors also confirms that the requested fee is fair and reasonable.

1. The Quality of the Results Achieved Supports the Fee Request

Courts have recognized that the quality of the results achieved is the most important factor in determining an appropriate fee award. *See Safeway*, 2018 WL 4030558, at *3; *Cathode Ray Tube*, 2016 WL 4126533, at *4; *Anthem,* 2018 WL 3960068, at *9; *Omnivision*, 559 F. Supp. 2d at 1046. Here, Plaintiffs' Counsel succeeded in obtaining a $480 million cash Settlement for the Settlement Class, notwithstanding the substantial risks Plaintiffs faced in establishing falsity, materiality, scienter and loss causation and damages. ¶¶103-74. The Settlement resulted from Plaintiffs' Counsel's thorough investigation of the claims, drafting a Consolidated Complaint that substantially survived Defendants' motions to dismiss, conducting extensive document discovery and vigorous arm's-length settlement negotiations – including Lead Counsel's insistence that it approach settlement negotiations as if it would overcome all of the substantial risks Plaintiffs faced in litigating their claims. ¶¶31-99. As a result of this Settlement, numerous Settlement Class Members will receive substantial compensation for the injuries resulting from Defendants' alleged federal securities violations.

The Settlement achieved by Plaintiffs' Counsel, as a percentage of possible damages that could be proven at trial is ***far higher*** than typically achieved in securities class actions. The $480 million Settlement represents a recovery of more than 15% of the maximum potential damages for the Settlement Class, based on the most optimistic assumptions about the outcome of numerous disputed loss causation and damages issues, and as much as 137% of damages, based on a more conservative damages estimate. ¶¶175-76. In light of the very significant risks of establishing liability that are entirely separate from the difficult loss causation and damages issues plaintiffs faced in this case, this level of recovery represents a truly excellent result for the Settlement Class. For example, an analysis by Cornerstone Research has found that median settlements in securities class actions from 2008-16 recovered 2.5% of a simplified measure of damages, where damages were estimated to be above $1 billion, and 3.8% where damages were estimated to be between $500 million and $1 billion. *See* Cornerstone Research, *Securities Class Action Settlements: 2017 Review and Analysis*, at 8 (Graziano

Decl. Ex. 8); *see also* NERA Report at 37 (finding settlements in this size range to recover 1.2% to 1.7% based on NERA's estimate of investor's losses); *In re Biolase, Inc. Sec. Litig.*, 2015 WL 12720318, at *4 (C.D. Cal. Oct. 13, 2015) (settlement representing "approximately 8% of the maximum recoverable damages . . . equals or surpasses the recovery in many other securities class actions"); *Omnivision*, 559 F. Supp. 2d at 1042 (settlement representing 9% of maximum damages fair and reasonable and "higher than the median percentage of investor losses recovered in recent shareholder class action settlements").

Courts have recognized that, when counsel achieve a result for the class that is superior to the norm in comparable cases (as measured by the percentage of the class's possible damages recovered or other means), it is appropriate to increase the fee above the benchmark to reflect the quality of the result that counsel obtained. *See, e.g.*, *Omnivision,* 559 F. Supp. 2d at 1046 (finding that a settlement with a recovery of "approximately 9% of the possible damages, which is more than triple the average recovery in securities class action settlements . . . weighs in favor of granting the requested 28% fee"); *Heritage Bond,* 2005 WL 1594403, at *19; *see also Cathode Ray Tube*, 2016 WL 4126533, at *5 (finding, in an antitrust case, that recovery of 20% of possible damages warranted "a modest increase over the Ninth Circuit benchmark," and awarding fees of 27.5% of a $576.75 million common fund).

In light of these circumstances, the amount obtained is a substantial achievement on behalf of the Settlement Class, and weighs in favor of granting the requested 20% fee net of expenses.

2. The Substantial Risks of the Litigation Support the Fee Request

The risk of non-payment assumed by counsel is an important factor in determining a fair fee award.[10] While courts have always recognized that securities class actions carry significant risks, post-PSLRA rulings make it clear that the risk of no recovery has increased significantly. ¶¶104-09. Courts have noted that "securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA." *Ikon Office Sols.*, 194 F.R.D. at 194.

As discussed in greater detail in the Graziano Declaration, there were many substantial

[10] *See, e.g., Omnivision*, 559 F. Supp. 2d at 1047; *WPPSS*, 19 F.3d at 1299-1301; *Heritage Bond*, 2005 WL 1594389, at *14 ("The risks assumed by Class Counsel, particularly the risk of non-payment or reimbursement of expenses, is a factor in determining counsel's proper fee award.").

challenges to succeeding in the litigation. To prevail at trial Lead Plaintiff would have to prove not only that Defendants' statements about Wells Fargo's cross-selling metrics and related practices were false or misleading, but that those statements were material; that the Individual Defendants knew or were reckless in not knowing that their statements were false when made; and that those statements were corrected and caused recoverable damages. While Lead Plaintiff and Plaintiffs' Counsel believed in the merits of the claims, it was apparent that there would be many challenges in establishing all of these elements and substantial risk that Plaintiffs might not be able to do so.

For example, Defendants contended that accounts involved in the fake account fraud only inflated Wells Fargo's reported cross-sell metrics by comparatively small amounts and that investors would not consider that material. ¶¶112-22. Proof of scienter would have also been challenged here as the Individual Defendants would argue that the Company actively took steps to prevent employees from opening unauthorized accounts and that they believed any alleged sales misconduct was under control. ¶¶123-32. Defendants contended that they would never have instituted reviews and monitoring methods to identify and deal with sales misconduct if they initiated those improper sales practices to inflate the stock price. ¶123. Defendants would argue that even if their conduct was "mismanagement" or a lack of effective oversight, it was, at worst, negligence, not intentional securities fraud. ¶41. If Defendants successfully convinced the Court or a jury that their misstatements were immaterial or that they did not act with scienter, this would have resulted in zero recovery for the Settlement Class.

The Settlement Class would have also recovered nothing if Defendants successfully convinced the Court or a jury that Plaintiffs' claims were barred by a "truth-on-the-market" or statute of limitations defense. These arguments were based on the publication of two articles in the *Los Angeles Times* in late 2013 that, Defendants contended, informed investors of the alleged cross-selling fraud more than two years before investors filed suit in September 2016. ¶¶168-70.

Plaintiffs' Counsel also faced very significant challenges in proving that the revelation of the truth about Defendants' false and misleading statements caused the declines in the price of Wells Fargo's stock, and establishing the amount of class-wide damages. ¶¶144-67. Defendants had substantial arguments that the price declines on many of Plaintiffs' alleged corrective disclosure dates

were not due to revelation of the alleged misstatements or omissions. For example, Defendants could point to the fact that on September 8, 2016, when Wells Fargo first disclosed that it had settled regulators' claims of creating fake or unauthorized accounts and the truth was allegedly revealed to investors, Wells Fargo's stock price did not decline in value, but, in fact, increased from the prior day's close. ¶148. Defendants would also argue that: the decline in Wells Fargo's stock price the following day was not statistically significant (¶151), and subsequent stock price declines were not caused by the revelation of new, actionable information because the alleged fraud was already disclosed on September 8. ¶150. Defendants would argue that subsequent actions taken by the government and any admissions by Wells Fargo did not materially add to the mix of information already in the market as of September 8, 2016, and thus the price declines following those actions and admissions were not caused by revelation of the alleged fraud. ¶¶154, 156, 163. These substantial risks facing the Class and Lead Counsel further support the requested fee.

3. The Skill Required and Quality of the Work Performed Support the Fee Request

The third factor to consider in determining what fee to award is the skill required and quality of work performed. *See Gustafson v. Valley Ins. Co.*, 2004 WL 2260605, at *2 (D. Or. Oct. 6, 2004). "The 'prosecution and management of a complex national class action requires unique legal skills and abilities.' [citation omitted]. This is particularly true in securities cases because the [PSLRA] makes it much more difficult for securities plaintiffs to get past a motion to dismiss."[11]

Here, the attorneys at BLB&G are among the most experienced and skilled practitioners in the securities litigation field, and the firm has a long and successful track record in securities cases throughout the country – including within this Circuit.[12] Lead Counsel's reputation as experienced

[11] *Omnivision*, 559 F. Supp. 2d at 1047; *see also Heritage Bond*, 2005 WL 1594389, at *12 ("The experience of counsel is also a factor in determining the appropriate fee award.").

[12] *See, e.g.*, *In re Allergan, Inc. Proxy Violation Sec. Litig.*, No. 8:14-cv-02004 (C.D. Cal.) (BLB&G, as Co-Lead Counsel, successfully obtained approval of $250 million settlement); *In re Maxim Integrated Prods., Inc. Sec. Litig.*, 08-00832 (N.D. Cal.) (BLB&G, as Co-Lead Counsel, successfully obtained approval of $173 million settlement); *In re New Century,* 07-cv-00931 (C.D. Cal.) (BLB&G, as Lead Counsel, successfully obtained approval of $125 million settlements); *In re Int'l Rectifier*

counsel in complex cases, both willing and able to litigate a case to resolution, facilitated Lead Counsel's ability to negotiate the Settlement, ultimately resulting in the $480 million recovery.

From the outset, Plaintiffs' Counsel engaged in a concerted effort to obtain the maximum recovery for the Class. Through Lead Counsel's persistent work, Lead Plaintiff was able to plead detailed allegations based on its extensive investigation, largely defeat Defendants' eight motions to dismiss, work with experts and consultants to present strong counter-arguments to Defendants' mediation positions (including, particularly on loss causation and damages) and to efficiently and effectively review over 3.5 million pages of discovery to confirm the reasonableness of the proposed settlement before the Settlement Agreement was signed. ¶¶11, 31-99. Lead Counsel's extensive efforts and skill leading to the Settlement strongly support the requested percentage fee.

The quality and vigor of opposing counsel is also important in evaluating the services rendered by Plaintiffs' Counsel. *See, e.g.*, *In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977). Wells Fargo was represented in this Action by Sullivan & Cromwell LLP, one of the country's most prestigious and experienced defense firms, which vigorously represented its client. The Individual Defendants were represented by similarly prestigious and experienced defense firms.[13] The fact that Plaintiffs' Counsel achieved this outstanding Settlement for the Settlement Class in the face of this formidable legal opposition further evidences the quality of their work.

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

The Ninth Circuit has confirmed that a determination of a fair and reasonable fee must include consideration of the contingent nature of the fee and the obstacles surmounted:

> It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. *See* Richard Posner,

Corp. Sec. Litig., 07-02544 (C.D. Cal.) (BLB&G, as Co-Lead Counsel, successfully obtained approval of $90 million settlement); *see also* Firm Resume of BLB&G (Graziano Decl. Ex. 4A-12).

[13] The Individual Defendants were represented by Goodwin Procter LLP, Clarence Dyer & Cohen LLP, Ramsey & Ehrlich LLP, Williams & Connolly LLP, Skaggs Faucette LLP, Arguedas, Cassman & Headley LLP, Coblentz Patch Duffy & Bass LLP, Farella Braun & Martel LLP, Swanson & McNamara LLP, Orrick, Herrington & Sutcliffe LLP, and Morrison & Foerster LLP. ¶227.

> *Economic Analysis of Law* § 21.9, at 534-35 (3d ed. 1986). 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.

WPPSS, 19 F.3d at 1299; *see In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2007 WL 2416513, at *1 (N.D. Cal. Aug. 16, 2007); *see also Omnivision*, 559 F. Supp. 2d at 1047.

Here, Plaintiffs' Counsel received no compensation during the course of this litigation and invested over 73,300 hours for a total lodestar of approximately $30 million and incurred expenses totaling just under $500,000 in prosecuting the case. ¶¶208, 236. Additional work in connection with the Settlement and claims administration will also be required. Any fee award has always been at risk, and contingent on the result achieved and on this Court's discretion in awarding fees and expenses.

Indeed, the risk of no recovery in complex cases is very real. ¶¶104-09. Lead Counsel knows from personal experience that, despite the most vigorous and competent efforts, their success in contingent litigation such as this is never guaranteed. The commencement of a class action and denial of motions to dismiss are no guarantee of success. These cases are not always settled, nor are plaintiffs' lawyers always successful.[14] Hard, diligent work by skilled counsel is required to develop facts and theories to prosecute a case or persuade defendants to settle on terms favorable to the Class.

5. Awards Made in Similar Cases Support the Fee Request

Lead Counsel's fee request is also supported by awards made in similar cases. As discussed in Part I.C.1, the 20% fee request is below the Ninth Circuit's 25% benchmark and within the range of fee percentages awarded in comparable settlements. As discussed in Part I.C.2, the resulting multiplier of 3.2 on Plaintiffs' Counsel's lodestar is also within the typical range of lodestar multiplier applied in cases of this nature with substantial contingency fee risks.

[14] *See, e.g., In re Omnicom Group, Inc. Sec. Litig.*, 597 F.3d 501, 504 (2d Cir. 2010) (affirming summary judgment in favor of defendant on loss causation grounds); *see also In re BankAtlantic Bancorp, Inc.*, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011) (granting defendants' judgment as a matter of law following plaintiff verdict); *In re Apple Computer Sec. Litig.*, 1991 WL 238298 (N.D. Cal. Sept. 6, 1991) (after the jury rendered a verdict for plaintiffs after an extended trial, the court overturned the verdict); *Robbins v. Koger Props. Inc.*, 116 F.3d 1441 (11th Cir. 1997) (jury verdict of $81 million for plaintiffs against an accounting firm reversed on appeal).

6. The Reaction of the Settlement Class to Date Supports the Fee Request

The reaction of the class to a proposed settlement and fee request is a relevant factor in approving fees. *See Knight v. Red Door Salons, Inc*., 2009 WL 248367, at *6 (N.D. Cal. Feb. 2, 2009); *Omnivision*, 559 F. Supp. 2d at 1048. Here, the Claims Administrator began mailing the Notice Packet to potential Settlement Class Members on September 25, 2018. As of November 9, 2018, the Notice has been mailed to more than 1.866 million potential Settlement Class Members and their nominees. In addition, the Summary Notice was published in *The Wall Street Journal* and the *Los Angeles Times* and transmitted over the *PR Newswire* on October 9, 2018. *See* Villanova Decl. ¶¶8-9. The Notice informed Settlement Class Members that Lead Counsel would seek fees "in an amount not to exceed 20% of the Settlement Fund." *See* Villanova Decl. Ex. A ¶¶5, 73. The Notice further advised Settlement Class Members of their right to object to the request for attorneys' fees and expenses. While the deadline for filing any objections is not until November 27, 2018, to date, no Settlement Class Member has filed an objection to the fees and expenses requested. ¶234.

II. Plaintiffs' Counsel's Expenses Are Reasonable and Should Be Approved

Lead Counsel also requests that the Court grant its application for $469,795.22 in Plaintiffs' Counsel's expenses incurred in connection with the prosecution of this litigation. ¶236. Expenses are reimbursable in a common fund case where they are of the type typically billed by attorneys to paying clients in the marketplace. *See, e.g*., *Omnivision*, 559 F. Supp. 2d at 1048 ("Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters."); *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (plaintiff may recover "those out-of-pocket expenses that 'would normally be charged to a fee paying client'").

From the beginning of the case, Plaintiffs' Counsel were aware that they might not recover any of their expenses, and would not recover anything unless and until the Action was successfully resolved. Plaintiffs' Counsel also understood that, even assuming that the case was ultimately successful, an award of expenses would not compensate them for the lost use of the funds advanced to prosecute this Action. Moreover, the particular nature of the net fee agreement negotiated by Lead Plaintiff Union in this case would reduce or "net" counsel's percentage fee by any awarded expenses.

¶16. Thus, Plaintiffs' Counsel were motivated to, and did, take significant steps to minimize expenses whenever practicable without jeopardizing the vigorous and efficient prosecution of the Action. ¶237.

Plaintiffs' Counsel's expenses are supported by sworn Declarations by each of the Plaintiffs' Counsel. *See* Graziano Decl. Ex. 4A, 4B, 4C, and 4D. As the Court instructed counsel in the *Safeway* case, the Declarations include summaries of expenses by category, a record of all expenses for each firm, and invoices for expenses in certain categories as well as for all individual expenses over $500.

The expenses for which payment is sought were reasonable and necessary for the prosecution of the litigation and are of the type that are routinely charged to hourly paying clients. For example, of the total amount of expenses, $347,348.80, or approximately 74%, was expended on experts, consultants, and other professionals. ¶239. Plaintiffs' Counsel worked extensively with experts and consultants at the different stages of the litigation to advance the claims of Lead Plaintiff and the Class. At the outset of the litigation, Motley Rice and Robbins Geller employed a professional investigative firm, L.R. Hodges & Associates, Ltd., to assist in identifying potential former Wells Fargo employees and other witnesses, and a financial economic expert, Caliber Advisors, Inc. to assist with analysis of damages and loss causation issues. ¶32. Motley Rice also made use of a translation service and Robbins Geller worked with corporate governance consultants from ValueEdge Advisors to obtain a background review of Wells Fargo's Board structure and governance history. *Id*. BLB&G, after it became involved, consulted with two additional experts on damages and loss causation issues – Global Economics Group, as a damages consultant, and NERA, as a possible trial expert. ¶40. Also included within this category were Lead Plaintiff's costs for the services of former judge Layn R. Phillips who served as the mediator for the matter. ¶61.

Plaintiffs' Counsel's expenses also include the costs of on-line legal and factual research services like *Lexis* and *Westlaw* in the amount of $63,925.37 or 13.6% of total expenses. ¶240.

Further, Plaintiffs' Counsel were required to incur modest travel expenses that included travel tickets, meals, parking, and lodging in the amount of $13,594.47. The expenses in this category are reasonable in amount and are properly charged against the fund created. Notably, Plaintiffs' Counsel applied various "caps" to their travel, food and lodging costs, which will benefit the Class. For example, regardless of the actual amounts paid, Plaintiffs' Counsel capped their airfare at coach rates,

capped lodging charges at different rates depending on whether they were located in "high cost" or "low cost" cities (as defined by the IRS), and capped all meals while travelling. Any amounts in excess of these "caps" constitute out of pocket expenses that the Plaintiffs' Counsel firm did in fact pay – but for which reimbursement is not sought.

The other expenses are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the hour. These expenses include publication of certain press releases with information for class members, the costs paid to the CFPB for processing of a FOIA request, court fees, service of process, transcripts, long distance telephone charges, copying, postal and express mail expenses, and similar case-related costs.

The Notice provided to potential Settlement Class Members informed them that Lead Counsel intends to apply for the reimbursement of litigation expenses in an amount not to exceed $750,000. The amount of expenses now sought – $469,795.22 – is significantly *less* than the amount stated in the Notice. The deadline for objecting to the fee and expense application is November 27, 2018. To date, there have been no objections to the request for attorneys' fees and litigation expenses.

CONCLUSION

From the outset of this litigation, Lead Plaintiff faced determined adversaries represented by experienced counsel. With no assurance of success in a significant case, but one presenting substantial risks, Plaintiffs' Counsel pursued the Action, and successfully obtained a $480 million Settlement for the benefit of the Class. The Settlement reflects Lead Counsel's determination and efforts in the face of significant risk. Accordingly, Lead Counsel respectfully submits that the Court should approve the fee and expense application awarding Plaintiffs' Counsel 20% of the Settlement Fund, net of litigation expenses, and award $469,795.22 for Plaintiffs' Counsel's litigation expenses.

Dated: November 13, 2018

Respectfully submitted,

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

/s/ Salvatore Graziano
Salvatore Graziano (*pro hac vice*)
Salvatore@blbglaw.com
Adam Wierzbowski (*pro hac vice*)
Adam@blbglaw.com
Rebecca E. Boon (*pro hac vice*)

Rebecca.Boon@blbglaw.com
1251 Avenue of the Americas, 44th Floor
New York, NY 10020
Telephone: (212) 554-1400
Facsimile: (212) 554-1444

Lead Counsel for Lead Plaintiff and the Class

KLAUSNER KAUFMAN JENSEN & LEVINSON
Robert D. Klausner
bob@robertdklausner.com
Stuart A. Kaufman
stu@robertdklausner.com
780 NW 4th Street
Plantation, FL 33317
Telephone: (954) 916-1202
Facsimile: (954) 916-1232

Counsel for Plaintiff City of Hialeah Employees' Retirement System

ROBBINS GELLER RUDMAN & DOWD LLP
Shawn A. Williams
Aelish M. Baig
Jason C. Davis
Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: (415) 288-4545
Facsimile: (415) 288-4534

Liaison Counsel for Plaintiffs