ROBBINS GELLER RUDMAN
& DOWD LLP
SHAWN A. WILLIAMS (213113)
DANIEL J. PFEFFERBAUM (248631)
Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: 415/288-4545
415/288-4534 (fax)
shawnw@rgrdlaw.com
dpfefferbaum@rgrdlaw.com
– and –
ELLEN GUSIKOFF STEWART (144892)
PATTON L. JOHNSON (320631)
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)
elleng@rgrdlaw.com
pjohnson@rgrdlaw.com

Lead Counsel for Plaintiffs

[Additional counsel appear on signature page.]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

LOGAN HESSEFORT, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. SUPER MICRO COMPUTER, INC., et al., Defendants.	Lead Case No. 4:18-cv-00838-JST CLASS ACTION LEAD COUNSEL'S NOTICE OF MOTION AND MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF JUDGE: Hon. Jon S. Tigar DATE: March 2, 2023 TIME: 2:00 P.M. (via videoconference)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

Page

Page

Page

Page

STATUTES, RULES AND REGULATIONS

SECONDARY AUTHORITIES

NOTICE OF MOTION AND MOTION

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that on March 2, 2023, at 2:00 p.m., via teleconference, in the courtroom of the Honorable Jon S. Tigar, in the United States District Court for the Northern District of California, 1301 Clay Street, Oakland, California, Lead Counsel Robbins Geller Rudman & Dowd LLP ("Robbins Geller") will move the Court for an Order awarding attorneys' fees and providing for payment of litigation expenses.

This Motion is based on the following Memorandum of Points and Authorities, the accompanying Declaration of Daniel J. Pfefferbaum in Support of Motions for: (1) Final Approval of Class Action Settlement; (2) Approval of Plan of Allocation; and (3) Award of Attorneys' Fees and Expenses ("Pfefferbaum Declaration" or "Pfefferbaum Decl.") and its exhibits, the Declaration of Daniel J. Pfefferbaum Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Robbins Geller Declaration" or "Robbins Geller Decl."), the Declaration of Christine M. Fox Filed on Behalf of Labaton Sucharow LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Labaton Declaration" or "Labaton Decl."), all prior pleadings and papers in this Action, the 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 February 23, 2023, after the February 9, 2023 deadline for 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 Plaintiff's Counsel in the amount of 25% of the Settlement Fund (the Settlement Amount, plus all interest accrued thereon).

2. Whether the Court should approve Lead Counsel's request for payment of $304,937.06 in litigation costs and expenses incurred by Plaintiff's Counsel in the Litigation, plus all interest accrued thereon.[1]

[1] "Plaintiff's Counsel" refers collectively to Lead Counsel Robbins Geller and Additional Counsel Labaton Sucharow LLP ("Labaton Sucharow").

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After nearly four years of hard-fought litigation, Lead Counsel secured a cash settlement of $18.25 million on behalf of the Class (the "Settlement"). It yields an exceptional recovery of approximately 22% of the Class's estimated recoverable damages – many multiples of the median ratio of recovery-to-investor losses obtained in securities class action settlements between 2012 and 2021. *See* Janeen McIntosh and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2021 Full-Year Review* (NERA Jan. 25, 2022) ("NERA Report") at 24, Fig. 22, attached as Exhibit D to the Pfefferbaum Declaration.

The Settlement would not have been achieved without Lead Counsel's skill, dogged pursuit, and refusal to accept a result that was not in the Class's best interest. Lead Counsel expended substantial resources – approximately 7,325 hours in professional time and over $292,000 of expenses – all without any assurance of recovery.[2] Given the size of the Settlement's approximately 22% recovery, the result is an excellent one.

As compensation for their efforts, Lead Counsel requests that the Court award the Ninth Circuit's fee percentage benchmark of 25% of the Settlement Amount, plus the interest earned thereon. Lead Counsel's fee request is reasonable, particularly considering the extent of counsel's efforts and the *ex-ante* risks of this case. *See generally* Pfefferbaum Decl. Defendants were represented by experienced securities litigators who exhausted every litigation strategy in an effort to end the Action without any recovery for the Class. Lead Counsel overcame each of these challenges.

Lead Counsel conducted a thorough investigation and drafted a consolidated complaint and multiple amended complaints to incorporate post-Class Period events that affected Class Period conduct, and ultimately defeated in part, Defendants' motions to dismiss. Lead Counsel undertook over a year of exhaustive discovery efforts and moved for class certification, which Defendants ultimately elected not to oppose after completing discovery of Lead Plaintiff, its investment advisor

[2] Additional Counsel Labaton Sucharow also spent an additional 2,659 hours resulting in a lodestar of $1,251,663.00, or $1,193,253.50 at historical rates. *See* Labaton Decl., ¶¶6-12.

and market efficiency expert. Lead Counsel, among other things, conducted a review and analysis of over a million of pages of documents produced by Defendants and third parties, including deposition transcripts obtained from the Securities and Exchange Commission, and defended depositions taken in connection with class certification. Lead Counsel also negotiated with Defendants and a number of third parties, including the Company's auditors and accounting consultants, with respect to an array of discovery disputes. At all stages of the Action, Lead Counsel exhibited diligence, hard work, and skill.

The 25% fee is consistent with the Ninth Circuit's 25% fee benchmark in common-fund litigation as well as the usual and customary range that clients pay lawyers to handle complex commercial cases in the private market. A 25% fee award is merited here because of the recovery obtained for the Class in the face of risks that Lead Counsel faced in the Action. *See* Pfefferbaum Decl., ¶¶65-74. A lodestar cross-check also confirms the reasonableness of the requested fee. The lodestar multiplier of approximately 1.05 of Lead Counsel's time here falls well within the range of multipliers awarded in the Ninth Circuit, particularly in cases (as here) where the risk was substantial and a favorable recovery was reached. The fee request is also supported by Lead Plaintiff, a sophisticated institution, a fact that is afforded significant weight in the analysis. *See* §III.C.6, *infra*; Declaration of John Heim in Support of Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Award of Attorneys' Fees and Expenses ("New York Pension Fund Decl."), attached as Exhibit A to the Pfefferbaum Declaration.

Likewise, Plaintiff's Counsel's litigation costs, charges, and expenses of $304,937.06 (plus interest accrued thereon) should be awarded in full as they were reasonably and necessarily incurred in the prosecution of the Action. Robbins Geller Decl., Ex. 7; Labaton Decl., Ex. 7.

In accordance with the Preliminary Approval Order, over 20,500 copies of the Notice have been mailed to potential Class Members and their nominees through January 25, 2023, and the Summary Notice was published in *The Wall Street Journal* and transmitted over *Business Wire*. *See* Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Murray Decl."), ¶¶11, 13, attached as Exhibit B to the Pfefferbaum Declaration. The Notice advised potential Class Members that Lead Counsel would apply for an

award of attorneys' fees in an amount not to exceed 25% of the Settlement Fund, payment of litigation expenses not to exceed $310,000. Murray Decl., Ex. A, Notice at 2. The fees and expenses sought do not exceed the amounts projected in the Notice. The deadline set by the Court to object to the requested attorneys' fees and expenses has not yet passed, but, to date, no objections to the requested attorneys' fees and expenses have been received. Pfefferbaum Decl., ¶¶77-78.[3]

In short, Lead Counsel respectfully submits that the requested fee is fair and reasonable.

II. HISTORY OF THE LITIGATION

As set forth in this District's Procedural Guidance for Class Action Settlements ("Northern District Guidelines"), Final Approval, §2, the Court is directed to "the history and facts set out in the motion for final approval" regarding "the case history and background facts" relevant to the Settlement, which will not be repeated here.[4] Suffice it to say, Lead Counsel has invested substantial time and money in the prosecution of the Action, including investigating background facts, drafting complaints, briefing motions to dismiss, conducting discovery, reviewing documents, working with consultants and an expert, participating in depositions, and engaging in mediation, all in furtherance of, and resulting in, the Settlement now before this Court.

III. THE REQUESTED FEE IS FAIR AND REASONABLE

A. The Court Should Award Attorneys' Fees Using the Percentage-of-the-Fund Method

The Supreme Court has long 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 (1980). The Ninth Circuit similarly holds that "a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees." *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769

[3] The deadline for the filing of objections is February 9, 2023. Should any objections be received, Lead Counsel will address them in their reply papers, due on February 23, 2023.

[4] Specifically, *see* (i) Lead Plaintiff's Memorandum of Points and Authorities in Support of Motion for Final Approval of Class Action Settlement and Plan of Allocation, as well as (ii) the Pfefferbaum Declaration both filed contemporaneously herewith.

(9th Cir. 1977); *accord In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig.*, 768 F. App'x. 651, 653 (9th Cir. 2019). Courts correctly recognize that fee awards incentivize attorneys to represent class clients who might otherwise be denied access to counsel on a contingency basis. *See Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 741 (9th Cir. 2016). An award of reasonable attorneys' fees in securities class actions thus serves the public interest. As the Supreme Court has repeatedly emphasized, private securities actions are "an essential supplement to criminal prosecutions and civil enforcement actions" brought by the United States Securities Exchange Commission ("SEC"). *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313 (2007). *See also Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 478 (2013) ("'meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions'").[5]

Although courts have discretion to employ either the percentage of recovery or lodestar method (*In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011)), "[t]he use of the percentage-of-the-fund method in common-fund cases is the prevailing practice in the Ninth Circuit for awarding attorneys' fees and permits the Court to focus on a showing that a fund conferring benefits on a class was created through the efforts of plaintiffs' counsel." *In re Korean Air Lines Co., Antitrust Litig.*, 2013 WL 7985367, at *1 (C.D. Cal. Dec. 23, 2013); *see also In re Amkor Tech., Inc. Sec. Litig.*, 2009 WL 10708030, at *1 (D. Ariz. Nov. 19, 2009) (stating percentage-of-recovery method most appropriate to award attorneys' fees in securities class action); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) ("[U]se of the percentage method in common fund cases appears to be dominant."). Thus, the Ninth Circuit has expressly and consistently approved the use of the percentage method in common fund cases. *See, e.g.*, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-48 (9th Cir. 2002).

The PSLRA likewise contemplates that fees be awarded on a percentage basis, authorizing attorneys' fees and expenses to counsel that do not exceed "a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." 15 U.S.C. §78u-4(a)(6); *see also*

[5] Citations are omitted and emphasis is added throughout unless otherwise indicated.

In re Am.-Apparel, Inc. S'holder Litig., 2014 WL 10212865, at *20 (C.D. Cal. July 28, 2014) ("'Congress plainly contemplated that percentage-of-recovery would be the primary measure of attorneys' fee awards in federal securities class actions.'").

The rationale for compensating counsel in common fund cases on a percentage basis is sound. First, it is consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated by a percentage of the recovery. *See Vinh Nguyen v. Radient Pharms. Corp.*, 2014 WL 1802293, at *9 (C.D. Cal. May 6, 2014). Second, the percentage approach more closely aligns "the lawyers' interests with achieving the highest award for the class members" in the shortest amount of time. *Id.* "[C]ourts try to . . . [tie] together the interests of class members and class counsel" by "tether[ing] the value of an attorneys' fees award to the value of the class recovery . . . [t]he more valuable the class recovery, the greater the fees award . . . [a]nd vice versa." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013). In fact, the percentage of the fund method so closely harmonizes the interests of class counsel and the absent plaintiffs, that a "consensus" has developed that includes "leading academics, researchers at the RAND Institute for Civil Justice, and many judges . . . [i]ndeed, it is difficult to find anyone who contends otherwise." Charles Silver, *Due Process and the Lodestar Method: You Can't Get There from Here*, 74 Tul. L. Rev. 1809, 1819-20 (June, 2000). On the other hand, the Ninth Circuit has recognized that the lodestar method creates the perverse incentive for counsel to "expend more hours than may be necessary on litigating a case." *Vizcaino*, 290 F.3d at 1050 n.5.

B. A Fee of 25% of the Settlement Fund Is Reasonable Under Either the Percentage or Lodestar Method

Whether assessed under the percentage-of-recovery or lodestar approach, the fee request of 25% of the Settlement Fund – representing a multiplier of approximately 1.05 of Lead Counsel's time – is fair and reasonable.

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

Lead Counsel seeks a benchmark fee of 25% of the Settlement Fund. In fact, "in most common fund cases, the award exceeds that benchmark." *Omnivision*, 559 F. Supp. 2d at 1047.

This request is also within the range of percentage fees that courts in this Circuit have awarded in other complex class actions. *See, e.g.*, *Andrews v. Plains All Am. Pipeline L.P.*, 2022 WL 4453864, at *4 (C.D. Cal. Sept. 20, 2022) (awarding 32% of $230 million settlement); *In re Bofl Holding, Inc. Sec. Litig.*, 2022 WL 9497235, at *43-*44 (S.D. Cal. Oct. 14, 2022) (awarding fee of 25% of $14.1 million settlement fund, plus interest); *Longo v. OSI Sys., Inc.*, 2022 U.S. Dist. LEXIS 158606, at *22 (C.D. Cal. Aug. 31, 2022) (awarding fee of 25% of $12.5 million settlement, plus interest); *Fleming v. Impax Labs. Inc.*, 2022 WL 2789496, at *29 (N.D. Cal. July 15, 2022) (awarding fee of 30% of $33 million settlement, plus interest); *Kendall v. Odonate Therapeutics, Inc.*, 2022 WL 1997530, at *26 (S.D. Cal. June 6, 2022) (awarding fee of 33-1/3% of $12,750,000 settlement); *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, 2016 WL 4126533, at *1 (N.D. Cal. Aug. 3, 2016) (awarding 27.5% of $576 million settlement); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL 1365900, at *8 (N.D. Cal. Apr. 3, 2013) (awarding 28.5% fee on $1.08 billion settlement).

As discussed in §III.C. below, the various factors to be considered by the Court, including the outstanding result achieved and the substantial risks, support the reasonableness of a requested 25% fee award in this case.

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

To assess the reasonableness of a fee awarded under the percentage-of-the-fund method, courts may (but are not obligated to) cross-check the proposed award against counsel's lodestar. *Farrell v. Bank of Am. Corp., N.A.*, 827 F. App'x 628, 630 (9th Cir. 2020) (refusing to mandate "a [cross-check] requirement"); *Plains All Am.*, 2022 WL 4453864, at *2 (finding a cross-check unnecessary given the circumstances); *In re Amgen Inc. Sec. Litig.*, 2016 WL 10571773, at *9 (C.D. Cal. Oct. 25, 2016) (noting that "analysis of the lodestar is not required for an award of attorneys' fees in the Ninth Circuit"). A lodestar cross check is "neither mathematical precision nor bean counting." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 264 (N.D. Cal. 2015); *accord Hefler v. Wells Fargo & Co.*, 2018 WL 6619983, at *14 (N.D. Cal. Dec. 18, 2018) (Tigar, J.), *aff'd sub nom. Hefler v. Pekoc*, 802 F. App'x 285 (9th Cir. 2020) (confirming that "'trial courts need not,

and indeed should not, become green-eyeshade accountants'" in context of lodestar crosscheck, and noting that "the Court seeks to 'do rough justice, not to achieve auditing perfection'").

When the lodestar is used as a cross-check, "the focus is not on the 'necessity and reasonableness of every hour' of the lodestar, but on the broader question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys." *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 270 (D.N.H. 2007).[6]

"Courts 'calculate[] the fee award by multiplying the number of hours reasonably spent by a reasonable hourly rate and then enhancing that figure, if necessary, to account for the risks associated with the representation.'" *Cheng Jiangchen v. Rentech, Inc.*, 2019 WL 5173771, at *10 (C.D. Cal. Oct. 10, 2019) (alteration in original) (quoting *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989)). Moreover, it is appropriate to use counsel's current hourly rates, rather than historical ones, which compensates for the delay in payment and the loss of interest on the funds. *See Mo. v. Jenkins by Agyei*, 491 U.S. 274, 284 (1989); *Fischel v. Equitable Life Assurance Soc'y of the United States*, 307 F.3d 997, 1010 (9th Cir. 2002).[7] This Court has previously applied current rates when evaluating lodestars. *See Hefler*, 2018 WL 6619983, at *14 n.17.

As detailed here and in the accompanying Pfefferbaum Declaration, 7,326 hours of attorney and para-professional time were expended prosecuting the Action for the benefit of the Class over a four year period. Lead Counsel's lodestar, derived by multiplying the hours spent on the Action by each attorney and litigation professional by their current hourly rates, is $4,315,767.50. At historical rates, Lead Counsel's lodestar is $4,092,287.75. Accordingly, the requested fee of 25% represents a multiplier of 1.05 on Lead Counsel's lodestar at current rates and 1.11 at historical rates.[8] Here, the

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[6] *See also Am. Apparel*, 2014 WL 10212865, at *23 ("'In contrast to the use of the lodestar method as a primary tool for setting a fee award, the lodestar cross-check can be performed with a less exhaustive cataloging and review of counsel's hours.'").

[7] In any event, the differences here between the lodestars under current or historical rates is not material, and under either approach the resulting multiplier is within the range of court-approved multipliers.

[8] If assessed using Plaintiff's Counsel's lodestar, the multiplier would be further reduced.

hours spent to obtain the results are more than reasonable. As detailed in the Pfefferbaum Declaration, there is no question that the hours expended were necessary.[9]

Lead Counsel's hourly rates, too, are reasonable. Lead Counsel's rates have recent judicial approval by Judge Gilliam. *See Fleming*, 2022 WL 2789496, at *9 (approving hourly rates of $760 to $1,325 for partners, $895 to $1,150 for counsel, and $175 to $520 for associates, and finding Robbins Geller's "billing rates in line with prevailing rates in this district for personnel of comparable experience, skill, and reputation").

The last piece of the cross-check analysis is the risk multiplier. "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) (citing *Vizcaino*, 290 F.3d at 1052-54); *Craft v. Cnty. of San Bernardino*, 624 F. Supp. 2d 1113, 1125 (C.D. Cal. 2008) (noting "ample authority" for multiplier of 5.2 and collecting cases with substantially higher multipliers); *see also In re Facebook Biometric Info. Priv. Litig.*, 522 F. Supp. 3d 617, 633 (N.D. Cal. 2021) (awarding fee in $650 million common fund settlement representing 4.71 multiplier, finding that "the results obtained and the risks at trial warrant a higher-end multiplier"), *aff'd*, 2022 WL 822923 (9th Cir. Mar. 17, 2022); *McKnight v. Uber Techs., Inc.*, 2021 WL 4205055, at *7 (N.D. Cal. Sept. 2, 2021) (Tigar, J.), *aff'd sub nom. McKnight v. Hinojosa*, 54 F.4th 1069 (9th Cir. 2022) (noting that a "fee award [that] results in a multiplier of 4.14" is not "remarkable" when "the settlement represented an 'excellent result' for the class"); *Kang v. Wells Fargo Bank, N.A.*, 2021 WL 5826230, at *18 (N.D. Cal. Aug. 12, 2021), *aff'd sub nom. Kang v. Fyson*, 2022 WL 6943174 (9th Cir. Oct. 12, 2022) (awarding class counsel 22% of the Settlement Fund with a resulting multiplier of 5.2); *Perez v. Rash Curtis & Assocs.*, 2021 WL 4503314, at *5 (N.D. Cal. Oct. 1, 2021) (approving a multiplier of 4.8); *Thompson v. Transamerica Life Ins. Co.*, 2020 WL 6145104, at *4 (C.D. Cal. Sept. 16, 2020) ("The Court's lodestar cross-check analysis of the fee award yields a current multiplier of 4.2, which is within the range of appropriate multipliers recognized by this Court and

[9] The actual realized multiplier has already, and will continue to decline over time as Lead Counsel devotes additional attorney time to preparing final approval materials as well as overseeing processing of claims by the Claims Administrator and the distribution of the Settlement funds to Class Members with valid claims. No additional counsel fees will be sought for such work.

by other courts within the Ninth Circuit."); *Gutierrez v. Wells Fargo Bank, N.A.*, 2015 WL 2438274, at *7 (N.D. Cal. May 21, 2015) (approving a 5.5 multiplier in a $203 million settlement); *In re Verifone Holdings, Inc. Sec. Litig.*, 2014 WL 12646027, at *2 (N.D. Cal. Feb. 18, 2014) ("[A]lthough the lodestar cross-check . . . reveals a high multiplier – 4.3 . . . the Court finds that the multiplier here is acceptable in light of the very substantial risks involved."). Moreover, the Ninth Circuit has determined in the context of a cross-check that a multiplier of 6.85 was "well within the range of multipliers that courts have allowed." *Steiner v. Am. Broad. Co., Inc.*, 248 F. Appx 780, 783 (9th Cir. 2007).

As more fully explained in the Pfefferbaum Declaration, given the risk undertaken by Lead Counsel and the results achieved for the Class, a modest risk multiplier of 1.05 is reasonable under the circumstances.

C. The Factors Considered by Courts in the Ninth Circuit Support the Requested Fee

Application of the factors that courts in this Circuit consider when determining whether a fee is fair also strongly support the reasonableness of the requested benchmark 25% fee. These include: (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) a lodestar cross-check. *Vizcaino*, 290 F.3d at 1048-50.

1. Lead Counsel Achieved an Excellent Result for the Class

Courts have consistently recognized that the result achieved is "the most critical factor" to consider in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983); *Hefler*, 2018 WL 6619983, at *13. Here, against substantial risks, Lead Counsel obtained an excellent recovery for the Class, both in terms of overall amount ($18.25 million) and as a percentage of the estimated recoverable damages (22%). *See, e.g.*, *In re Charles Schwab Corp. Sec. Litig.*, 2011 WL 1481424, at *4 (N.D. Cal. Apr. 19, 2011) (observing that when "a substantial percentage of [the class's] requested damages" was obtained, "this is a good settlement for the class"). Indeed, this recovery is

more than three times the median percentage recovery for cases settled with estimated damages of between $75 and $149 million.[10]

In the end, the Class cares most about getting a great result. This outstanding result obtained for the Class here supports Lead Counsel's fee request and merits an appropriate fee that encourages counsel to seek excellent results.

2. The Litigation Was Uncertain and Highly Complex

The "complexity of the issues and the risks" undertaken are also important factors in determining a fee award. *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995); *see also Vizcaino*, 290 F.3d at 1048 ("Risk is a relevant circumstance."). "'[I]n general, securities actions are highly complex and . . . securities class litigation is notably difficult and notoriously uncertain.'" *Hefler*, 2018 WL 6619983, at *13. Indeed, "[t]o be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action." *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009). For these reasons, in securities class actions, fee awards often exceed the 25% benchmark recognized in the Ninth Circuit. *Omnivision*, 559 F. Supp. 2d at 1047.

This Action was complex and risky. Lead Plaintiff's claims involved alleged misrepresentations and omissions of information concerning Super Micro's accounting, internal controls, operations, financial performance and prospects, and a fraudulent scheme, acts, practices and course of business by Defendants that deceived investors. *See* Pfefferbaum Decl., ¶7. The accounting issues raised were complex, requiring Lead Plaintiff to utilize forensic accountants to assist in determining whether Generally Accepted Accounting Principles ("GAAP") were violated, and whether any of the alleged violations were material, and made with scienter. And, the Defendants had reached settlements with the SEC that contained no finding of fraudulent intent.

[10] *See* Laarni T. Bulan & Laura E. Simmons, *Securities Class Action Settlements – 2021 Review and Analysis* at 6, 14 (Cornerstone Research 2022) (finding median settlements as a percentage of estimated damages was 5.9% in 2021 for Rule 10b-5 cases settled after a ruling on a motion to dismiss but prior to a ruling on a motion for summary judgment, and 7.4% for cases involving estimated damages of between $75 and $149 million); NERA Report at 24, Fig. 22 (noting median ratio of settlements to investor losses was 1.8% in 2021), attached as Exhibits C and D, respectively, to the Pfefferbaum Declaration.

Despite their ultimate success, Lead Counsel assumed significant risk at every procedural step of the litigation. *See generally* Pfefferbaum Decl. Defendants argued emphatically in their motions to dismiss that Lead Plaintiff had not established materiality, or scienter, or control person liability with respect to the Individual Defendants. ECFs 62-63, 75-76, 99.[11] In March 2020, despite the announcement that more than four years of financial statements would be restated, the Court granted Defendants' initial motions to dismiss (with leave to amend) on the basis that its overall impact was insufficiently material. ECF 95. Following the filing of two additional amended complaints to address intervening events, and additional briefing on Defendants' motions to dismiss, on March 29, 2021, the Court granted in part and denied in part the motions to dismiss. ECF 124.

At trial, the case would have turned largely on expert testimony concerning highly technical accounting and internal control matters and the credibility of fact witnesses – nearly all of whom would likely be represented by defense counsel (or were still employed at Super Micro). Defendants needed only to defeat one element of Lead Plaintiff's claims to prevail, and there was a significant risk the jury would agree with Defendants' experts and find no liability, no damages, or award far less than Lead Plaintiff sought to recover. *See, e.g.*, *Vinh Nguyen*, 2014 WL 1802293, at *2 (noting, in securities class action, that "[p]roving and calculating damages required a complex analysis, requiring the jury to parse divergent positions of expert witnesses in a complex area of the law. The outcome of that analysis is inherently difficult to predict and risky").

Moreover, even if Lead Plaintiff survived summary judgment and obtained a favorable verdict at the liability phase of trial, at the second phase of trial, Defendants would have sought the opportunity to challenge each Class Member's presumption of reliance and damages due them.

Had the Class's claims survived the second phase of trial, they would ***still*** have faced the risk of partial or complete reversal in post-trial proceedings. *See, e.g.*, *In re Apollo Grp., Inc. Sec. Litig.*, 2008 U.S. Dist. LEXIS 61995 (D. Ariz. Aug. 4, 2008) (granting motion for a judgment as a matter of law, overturning $277 million verdict in favor of plaintiffs based on insufficient evidence of loss causation); *Rentech, Inc.*, 2019 WL 5173771, at *9 ("'The risk that further litigation might result in

[11] Defendants earlier abandoned their argument that the alleged statements were false. ECF 75-76.

Plaintiffs not recovering at all, particularly a case involving complicated legal issues, is a significant factor in the award of fees.'"); *Amkor*, 2009 WL 10708030, at *2 (approving fee award of 25% where class counsel had "borne all the ensuing risk – including the risk of affirmance on Plaintiffs' appeal, surviving dispositive motions, obtaining class certification, proving liability, causation and damages, prevailing in a 'battle of the experts,' and litigating the Action through trial and possible appeals").

Thus, there existed a significant risk that class-wide recoverable damages would have been far less than $18.25 million. Therefore, the $18.25 million Settlement, achieved in the face of these significant risks, amply supports the requested 25% fee award.

3. The Skill Required and Quality of Work

The quality of Lead Counsel's representation further supports the reasonableness of the requested fee. Lead Counsel successfully litigated the case through several potentially dispositive motions, including a dismissal without prejudice. Moreover, Lead Counsel is a nationally recognized leader in securities class actions and complex litigation. *See* www.rgrdlaw.com. The firm has a track record of trying cases, or settling cases at a premium. Clients retain Lead Counsel to benefit from its experience and resources in order to obtain the largest possible recovery for the class in question. Here, Lead Counsel's skill and experience brought about an exceptional result, further supporting the requested fee award.

The standing of opposing counsel should also be weighed because such standing reflects the challenge faced by Lead Counsel. *See, e.g.*, *Wing v. Asarco Inc.*, 114 F.3d 986, 989 (9th Cir. 1997). Defendants chose nationally known and highly capable representation from Jones Day, Paul Hastings LLP and Bergeson LLP, all well-regarded and prestigious firms. These firms spared no effort or expense on behalf of Defendants in their zealous defense. Lead Plaintiff's ability to obtain a favorable result for the Class while litigating against these formidable defense firms and their well-financed clients further evidences the quality of Lead Counsel's work and weighs in favor of awarding the requested fee.

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

It has long been recognized that attorneys are entitled to an enhanced fee when their compensation is contingent in nature. *See, e.g.*, *Omnivision*, 559 F. Supp. 2d at 1047 ("The importance of assuring adequate representation for plaintiffs who could not otherwise afford competent attorneys justifies providing those attorneys who do accept matters on a contingent-fee basis a larger fee than if they were billing by the hour or on a flat fee."); *Stanger*, 812 F.3d at 741 ("Risk multipliers incentivize attorneys to represent class clients, who might otherwise be denied access to counsel, on a contingency basis. This incentive is especially important in securities cases."). Indeed, there have been many class actions in which counsel for the plaintiffs took on the risk of pursuing claims on a contingency basis, expended thousands of hours and dollars, yet received no remuneration whatsoever despite their diligence and expertise. *See Savani v. URS Pro. Sols. LLC*, 2014 WL 172503, at *5 (D.S.C. Jan. 15, 2014) ("In complex and multi-year class action cases, the risks of the litigation are immense and the risk of receiving little or no recovery is a major factor in awarding attorney's fees. ***The risk of no recovery in complex cases of this sort is not merely hypothetical***."). Even a plaintiff who evades summary judgment and succeeds at trial may find a favorable verdict in its favor overturned on appeal or on a post-trial motion.

The risk of no recovery for a class and its counsel in complex cases of this type is very real. For example, in *In re Oracle Corp. Sec. Litig.*, 2009 WL 1709050 (N.D. Cal. June 19, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010), a case that Robbins Geller prosecuted, the court granted summary judgment to defendants after eight years of litigation, after plaintiff's counsel incurred over $7 million in out-of-pocket expenses, and worked over 100,000 hours, representing a lodestar of approximately $40 million (in 2010 dollars). In another Ninth Circuit PSLRA case, after a lengthy trial involving securities claims against JDS Uniphase Corporation, the jury reached a verdict in defendants' favor. *See In re JDS Uniphase Corp. Sec. Litig.*, 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007).

Here, Lead Counsel has received no compensation during the course of the Action and invested over 7,300 hours for a total lodestar of approximately $4,315,000 and incurred substantial

expenses in prosecuting this case. Additional (uncompensated) work in connection with the Settlement and claims administration already has been undertaken, and will be required going forward. Any fee award has always been contingent on the result achieved and on this Court's discretion. *See Hefler*, 2018 WL 6619983, at *13 ("Plaintiffs' Counsel bore a heavy financial burden in expending substantial resources – a claimed lodestar of over $29 million – on a contingency basis.").

Because the fee in this matter was entirely contingent, the only certainty was that there would be no fee without a successful result. Nevertheless, Lead Counsel committed significant resources of both time and money to vigorously prosecute this Action, and successfully brought it to a highly favorable conclusion for the Class's benefit. *See generally* Pfefferbaum Declaration. The contingent nature of counsel's representation thus supports approval of the requested fee.

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 §III.B.1., the 25% benchmark fee request is within the range of fee percentages awarded in comparable settlements. As further addressed in §III.B.2., the resulting multiplier of 1.05 on Lead Counsel's lodestar is also within the range of lodestar multipliers applied in cases of this nature with substantial contingency fee risks.

6. The Class's Reaction to Date Supports the Fee Request

Courts within the Ninth Circuit also consider the reaction of the class when deciding whether to award the requested fee. *See, e.g.*, *In re Wash. Mutual, Inc. Sec. Litig*, 2011 WL 8190466, at *2 (W.D. Wash. Nov. 4, 2011) (noting, in approving fee request, that "no substantive objections to the amount of fees and expenses requested were filed"); *accord* Northern District Guidelines, Final Approval, §1. While a certain number of objections are to be expected in a large class action such as this, "the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class action settlement . . . are favorable to the class members." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004); *Hefler*, 2018 WL 6619983, at *15 ("As with the Settlement itself, the lack of objections from

institutional investors 'who presumably had the means, the motive, and the sophistication to raise objections' [to the attorneys' fee] weighs in favor of approval.").

Class Members were informed in the Notice that Lead Counsel would move the Court for an award of attorneys' fees in an amount not to exceed 25% of the Settlement Fund, for payment of litigation expenses not to exceed $310,000. Class Members were also advised of their right to object to the fee and expense request, and that such objections are to be filed with the Court no later than February 9, 2023.

While the February 9, 2023 deadline to object to the fee and expense application has not yet passed, to date, not a ***single*** objection has been received. Should any objections be received, Lead Counsel will address them in its reply papers. Finally, Lead Plaintiff, an institution with a substantial stake in the litigation, has approved the percentage sought here. New York Pension Fund Decl., ¶5. *See also Hatamian v. Advanced Micro Devices, Inc.*, 2018 WL 8950656, at *2 (N.D. Cal. Mar. 2, 2018) (approving fee where request "reviewed and approved as fair and reasonable by Class Representatives, sophisticated institutional investors"). This is as Congress intended when it enacted the PSLRA. *In re Cendant Corp. Litig.*, 264 F.3d 201, 220 (3d Cir. 2001).

IV. COUNSEL'S EXPENSES ARE REASONABLE AND SHOULD BE APPROVED

Plaintiff's Counsel further request an award of their litigation expenses in the amount of $304,937.06. These expenses were incurred in prosecuting and resolving the Action on behalf of the Class. Robbins Geller Decl., Ex. 7; Labaton Decl., Ex. 7.

"Attorneys who create a common fund are entitled to the reimbursement of expenses they advanced for the benefit of the class." *Vincent v. Reser*, 2013 WL 621865, at *5 (N.D. Cal. Feb. 19, 2013). In assessing whether counsel's expenses are compensable in a common fund case, courts look to whether the particular costs are of the type typically billed by attorneys to paying clients in the marketplace. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee-paying client.'"); *Hefler*, 2018 WL 6619983, at *44. Here, the expenses sought by Plaintiff's Counsel are of the type that are routinely charged to hourly paying clients and, therefore, should be

reimbursed out of the common fund.[12] *See Vincent*, 2013 WL 621865, at *5 (granting award of costs and expenses for "'three experts and the mediator, photocopying and mailing expenses, travel expenses, and other reasonable litigation related expenses'"); *Redwen v. Sino Clean Energy, Inc.*, 2013 WL 12303367, at *9 (C.D. Cal. July 9, 2013) (reimbursing "expenses for mediation fees, copying, telephone calls, expert expenses, research costs, travel, postage, messengers, and filing fees"); *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 454 (E.D. Cal. 2013) ("[T]ravel, mediation fees, photocopying, [a] private investigator to locate missing Class Members, and delivery and mail charges . . . are routinely reimbursed.").

The Notice informed Class Members that Lead Counsel would apply for payment of litigation expenses in an amount not to exceed $310,000. *See* Murray Decl., Ex. A, Notice at 2. The amount of expenses for which payment is now sought, $304,937.06, is less than the amount published in the Notice, to which no Class Member has objected.

V. COUNSEL'S AWARDED FEES AND EXPENSES SHOULD BE PAID UPON THE COURT'S ORDER GRANTING THE AWARD

Lead Counsel respectfully requests that the entirety of Lead Counsel's awarded fees and expenses be paid upon the Court's order granting such award, as provided in the Stipulation of Settlement ("Stipulation"). *See* Stipulation, ¶6.2. ECF 154. Nonetheless, if the Court opts to defer any attorneys' fees, Lead Counsel requests that the Court defer no more than ten percent of the awarded fees.

The Stipulation provides that Lead Counsel will receive their fees upon award by the Court. Federal courts across the country regularly approve such payment provisions in complex class actions. *See, e.g.*, *In re Optical Disk Drive Prod. Antitrust Litig.*, 2016 WL 7364803, at *13 (N.D. Cal. Dec. 19, 2016) (stating such "provisions are common practice in the Ninth Circuit"), *vacated*

[12] These include expenses associated with, among other things, experts and consultants, service of process, online legal and factual research, travel, and mediation. A large component of Lead Counsel's expenses is for the costs of experts and consultants, all of whom were qualified and necessary to litigate this Action. Courts in this Circuit regularly approve reimbursements for expert fees. *See, e.g.*, *Franco v. Ruiz Food Prods., Inc.*, 2012 WL 5941801, at *22 (E.D. Cal. Nov. 27, 2012) (noting expert fees are among the "types of fees . . . routinely reimbursed"); *Ontiveros v. Zamora*, 303 F.R.D. 356, 375 (E.D. Cal. 2014) (granting expense reimbursement to class counsel and noting "itemized costs relating to . . . expert fees" were "reasonable litigation expenses").

and remanded on other grounds, 959 F.3d 922 (9th Cir. 2020); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 7575004, at *1 (N.D. Cal. Dec. 27, 2011) (noting that federal "routinely approve settlements that provide for payment of attorneys' fees prior to final disposition") (collecting cases); *Verifone*, 2014 WL 12646027, at *2 (noting that payment upon fee approval provisions pose no problem under the PSLRA); *Mauss v. NuVasive, Inc.*, 2018 WL 6421623, at *13 (S.D. Cal. Dec. 6, 2018) (approving payment of fee award in PSLRA case within 10 days of judgment).

Nonetheless, this Court's recently amended Standing Order provides that it will "typically withhold between 10% and 25% of the attorney's fees granted at final approval until after the post-distribution accounting has been filed." This provision parallels the Advisory Committee's Notes to Rule 23, which provide that in some cases deferral is appropriate. None of the concerns that undergird this suggestion, however, are present here. *See* Fed. R. Civ. P. 23(h), Advisory Committee's Notes to 2003 Amendment.

The Notes, for example, suggest deferral "may be appropriate" where the relief to the class is composed of "future payments" or is otherwise variable in nature. *See id*. In such a case, deferral allows a court to better assess the actual value of the payments the Class receives and, in turn, measure the fairness of counsel's fee. That concern is of no moment here, because the value of the Class's claims are neither variable nor dependent upon future events. The Settlement Fund is non-revisionary. Once approved, the Plan of Allocation sets each Authorized Claimant's recognized loss, and the Class will receive the entirety of the Net Settlement Fund. A deferral could also be appropriate if there is a concern that, once paid, Lead Counsel is no longer incentivized to serve the Class through final distribution. Here again, in this case no such concern exists. Lead Counsel is a well-funded, experienced securities fraud litigation firm. *See* www.rgrdlaw.com. In scores of other past cases, it has served the Class's interests through final distribution with no need for the deferral of fees. The same will be true here – Lead Counsel will devote whatever time is necessary to ensure the distribution is completed accurately and in a timely fashion.

Finally, Lead Counsel has not been paid for over four years of work. Thus, any deferred fee is compensation that Lead Counsel has earned, but cannot access and which it will not be able to

access for potentially another year or more. This effectively devalues Lead Counsel's payment. Lead Counsel thus respectfully submits that payment of Lead Counsel's fee and expenses upon Court approval, without deferral, is appropriate. If the Court deems a deferral necessary, it should be a small amount considering the result obtained.

VI. CONCLUSION

Lead Counsel obtained an excellent result for the Class. Based on the foregoing and the entire record, Lead Plaintiff and Lead Counsel respectfully request that the Court: (i) award Lead Counsel attorneys' fees of 25% of the Settlement Amount; and (ii) payment of $304,937.06 in litigation expenses, plus interest on both amounts at the same rate as earned by the Settlement Fund.

DATED: January 26, 2023

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
SHAWN A. WILLIAMS
DANIEL J. PFEFFERBAUM

s/Daniel J. Pfefferbaum
DANIEL J. PFEFFERBAUM

Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: 415/288-4545
415/288-4534 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
ELLEN GUSIKOFF STEWART
PATTON L. JOHNSON
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)
elleng@rgrdlaw.com
pjohnson@rgrdlaw.com

Lead Counsel for Plaintiffs

PITTA LLP
VINCENT F. PITTA
120 Broadway, 28th Floor
New York, NY 10271
Telephone: 212/652-3890
212/652-3891 (fax)

Additional Counsel for Plaintiffs

LABATON SUCHAROW LLP
CHRISTINE M. FOX
140 Broadway, 34th Floor
New York, NY 10005
Telephone: 212/907-0700
212/818-0477 (fax)
cfox@labaton.com

Additional Counsel for the Proposed Class

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on January 26, 2023, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

s/ Daniel J. Pfefferbaum

DANIEL J. PFEFFERBAUM

ROBBINS GELLER RUDMAN
& DOWD LLP
Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: 415/288-4545
415/288-4534 (fax)
Email: dpfefferbaum@rgrdlaw.com

Mailing Information for a Case 4:18-cv-00838-JST Hessefort v. Super Micro Computer, Inc. et al

Electronic Mail Notice List

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

- **Daniel J. Bergeson**
  dbergeson@be-law.com,sbrill@be-law.com
- **Daniel Scott Carlton**
  scottcarlton@paulhastings.com,melmanahan@paulhastings.com,lisavermeulen@paulhastings.com,nicolasmorgan@paulhastings.com
- **Nathaniel Peardon Garrett**
  ngarrett@jonesday.com,DocketPacificWest@jonesday.com,ecf-9d8e07160ff2@ecf.pacerpro.com,mlandsborough@jonesday.com
- **Ellen Anne Gusikoff-Stewart**
  elleng@rgrdlaw.com,e_file_sd@rgrdlaw.com
- **Richard Martin Heimann**
  rheimann@lchb.com,richard-heimann-2279@ecf.pacerpro.com
- **Stephen D. Hibbard**
  powens@jonesday.com,jctang@jonesday.com,cdelacroix@jonesday.com,Californiadockets@jonesday.com,rolivo@jonesday.com,ecf-9d8e07160ff2@ecf.pacerpro.com,sdhibbard@jonesday.com,docketpacificwest@jonesday.com
- **J Alexander Hood , II**
  ahood@pomlaw.com,disaacson@pomlaw.com,abarbosa@pomlaw.com
- **Lester Rene Hooker**
  lhooker@saxenawhite.com,e-file@saxenawhite.com
- **Patton L. Johnson**
  pjohnson@rgrdlaw.com,E_File_SD@rgrdlaw.com,PJohnson2019@ecf.courtdrive.com,tdevries@rgrdlaw.com
- **Jeremy A. Lieberman**
  jalieberman@pomlaw.com,disaacson@pomlaw.com,fgravenson@pomlaw.com,ipareja@pomlaw.com
- **Katherine Collinge Lubin**
  klubin@lchb.com,katherine-benson-5279@ecf.pacerpro.com,rtexier@lchb.com
- **Tricia Lynn McCormick**
  triciam@rgrdlaw.com,e_file_sd@rgrdlaw.com
- **Caroline McIntyre**
  cmcintyre@be-law.com,mflores@be-law.com
- **Nicolas Morgan**
  nicolasmorgan@dlapiper.com,jette.brasher@dlapiper.com
- **Dennis Francis Murphy**
  dennismurphy@jonesday.com,cdelacroix@jonesday.com
- **Jennifer Pafiti**
  jpafiti@pomlaw.com,jalieberman@pomlaw.com,ahood@pomlaw.com,disaacson@pomlaw.com,ashmatkova@pomlaw.com,abarbosa@pomlaw.com,fgravenson@poml
- **Daniel Jacob Pfefferbaum**
  DPfefferbaum@rgrdlaw.com,dpfefferbaumRGRD@ecf.courtdrive.com,e_file_sd@rgrdlaw.com,sbloyd@rgrdlaw.com
- **Laurence Matthew Rosen**
  lrosen@rosenlegal.com,larry.rosen@earthlink.net,lrosen@ecf.courtdrive.com
- **John C. Tang**
  jctang@jonesday.com,mdavis@jonesday.com,californiadockets@jonesday.com
- **Shawn A. Williams**
  shawnw@rgrdlaw.com,ShawnW@ecf.courtdrive.com,e_file_sd@rgrdlaw.com

Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

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