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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 COUNTY OF SAN FRANCISCO

12 JOHN R. SWITZER, Individually and on ) Lead Case No. CGC-18-564904  
13 Behalf of All Others Similarly Situated, ) (Consolidated with No. CGC-18-565324)  
14 Plaintiff, ) CLASS ACTION  
15 vs. )  
16 W.R. HAMBRECHT & CO., LLC, et al., ) PLAINTIFFS' COUNSEL'S  
17 Defendants. ) MEMORANDUM OF POINTS AND  
AND EXPENSES

18 DATE: March 13, 2020  
19 TIME: 10:30 a.m.  
DEPT: 613

20 Assigned for all purposes to  
21 Judge Teri L. Jackson, Dept. 613  
22 Date Action Filed: 03/09/18

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**FILED**

Superior Court of California,  
County of San Francisco

**12/23/2019**  
Clerk of the Court

BY: JUDITH NUNEZ  
Deputy Clerk

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**SECONDARY AUTHORITIES**

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1 **I. INTRODUCTION**

2 Before this Court for approval is an all-cash settlement of \$2,450,000 for the benefit of the  
3 Class.<sup>1</sup> This recovery was obtained in the face of substantial risk and is the product of hard-fought  
4 litigation and arm’s-length settlement negotiations. Plaintiffs’ Counsel now respectfully move this  
5 Court for an award of attorneys’ fees in the amount of 33-1/3% of the Settlement Amount (or  
6 \$816,658), as well as payment of the litigation expenses they incurred in prosecuting the Action in the  
7 amount of \$52,393.03, and interest on both amounts. Finally, Plaintiffs John R. Switzer and Jay  
8 Mendelson seek an award of \$5,000 each for their efforts on behalf of the Class. To date, there have  
9 been no objections lodged to any of these requests.

10 As explained below, and in Plaintiffs’ Memorandum of Points and Authorities in Support of  
11 Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation (“Settlement  
12 Memorandum”), submitted herewith,<sup>2</sup> as well as in the Joint Decl., and in the entire record, this  
13 Settlement represents a significant recovery for the Class in view of the risks, costs, and duration of  
14 continued litigation, as well as the percentage recovery relative to maximum estimated recoverable  
15 damages. Absent settlement, this litigation would likely have continued for years, through the  
16 completion of fact discovery, expert discovery, summary judgment, trial, and likely appeals. Plaintiffs  
17 and their counsel faced substantial obstacles in proving liability and damages, yet nevertheless reached  
18 a very good resolution for the Class. The requested fee is fair and reasonable under the applicable  
19 standards, is within the range of fees awarded by California Superior Courts, and is supported by  
20 California Supreme Court precedent. *See, e.g., Laffitte v. Robert Half Int’l Inc.*, 1 Cal. 5th 480 (2016)  
21 (“*Laffitte II*”) (affirming a one-third percentage-based fee award to class counsel); *In re Sunrun, Inc.*  
22

23 \_\_\_\_\_  
24 <sup>1</sup> Unless otherwise defined herein, all capitalized terms have the meanings ascribed to them in the  
25 Amended Stipulation of Settlement, dated August 2, 2019 (“Stipulation” or “Settlement”), or in the  
26 previously-filed Joint Declaration of James I. Jaconette and Phong L. Tran in Support of Plaintiffs’  
27 Unopposed Motion for Preliminary Approval of Class Action Settlement, dated May 8, 2019 (“Joint  
28 Decl.”).

26 <sup>2</sup> Because many of the factors supporting final approval of the Settlement also buttress the requested  
27 award of attorneys’ fees and expenses, Plaintiffs’ Counsel incorporate herein the concurrently filed  
28 Settlement Memorandum.

1 *S'holder Litig.*, No. CIV538215, slip op. (San Mateo Super. Ct. Dec. 14, 2018) (awarding 33-1/3% to  
2 class counsel).<sup>3</sup>

3 As detailed in the Joint Decl., Plaintiffs' Counsel vigorously pursued the Class' claims and  
4 fought back against Defendants' efforts to keep this litigation from reaching a successful conclusion.  
5 As a result, Plaintiffs' Counsel and their paraprofessionals spent 1,435 hours prosecuting the Action,  
6 resulting in a lodestar of \$887,891.00. The requested fee represents a negative (or fractional) multiplier  
7 of counsel's lodestar. *See In re Veeco Instruments Sec. Litig.*, No. 04 MDL 01695 (CM), 2007 U.S.  
8 Dist. LEXIS 85554, at \*30-\*23 (S.D.N.Y. Nov. 7, 2007) ("Not only is Plaintiffs' Counsel not receiving  
9 a premium on their lodestar to compensate them for the contingent risk factor, their fee request amounts  
10 to a deep discount from their lodestar."). A positive multiplier here would be eminently reasonable.  
11 *See Wershba v. Apple Comput., Inc.*, 91 Cal. App. 4th 224, 255 (2001), *overruled on other grounds by*  
12 *Hernandez v. Restoration Hardware, Inc.*, 4 Cal. 5th 260 (2018) ("[m]ultipliers can range from 2 to 4 or  
13 even higher").<sup>4</sup>

14 The Court should also consider the Class' reaction to the attorneys' fees and expenses which  
15 counsel seek. Pursuant to the Court's August 9, 2019 Order Granting Plaintiffs' Motion for Preliminary  
16 Approval of Class Action Settlement (the "Preliminary Approval Order"), 6,969 copies of the Notice of  
17 Proposed Class Action Settlement ("Notice"), in the form approved by the Court, have been mailed to  
18 potential Class Members and their nominees.<sup>5</sup> In addition, the Summary Notice of Proposed Class  
19 Action Settlement was published once in *The Wall Street Journal* and transmitted once over the  
20 *Business Wire*. Mailing Decl., ¶13. The Notice advises Class Members that Plaintiffs' Counsel would  
21 apply to the Court for an award of attorneys' fees in an amount not to exceed 33-1/3% of the Settlement

22 <sup>3</sup> All unreported authorities cited herein are attached to the Declaration of Ellen Gusikoff Stewart in  
23 Support of Motion for: (1) Final Approval of Class Action Settlement and Approval of Plan of  
Allocation; and (2) an Award of Attorneys' Fees and Expenses ("Stewart Decl."), submitted herewith.

24 <sup>4</sup> While a lodestar cross-check fully supports the requested fee, a lodestar cross-check is not required.  
25 *Laffitte II*, 1 Cal. 5th at 506 ("We hold further that trial courts have discretion to conduct a lodestar  
26 cross-check on a percentage fee, as the court did here; they also retain the discretion to forego a lodestar  
cross-check and use other means to evaluate the reasonableness of a requested percentage fee.").

27 <sup>5</sup> *See* paragraphs 4-12 to the Declaration of Mishka Ferguson Regarding Notice Dissemination,  
28 Publication, and Requests for Exclusion Received to Date ("Mailing Decl."), submitted herewith.



1 Fund, plus expenses not to exceed \$75,000, plus interest on both amounts. While the deadline for  
2 objecting to the requested attorneys' fees and expenses – January 6, 2020 – has not passed, to date, not a  
3 single objection to Plaintiffs' Counsel's fee and expense request has been received. In addition, no  
4 objections have been received to Plaintiffs' request for an award of \$10,000 in the aggregate for their  
5 active participation in prosecuting this litigation, which request was set forth in the Notice.

6 For their diligence and unwavering efforts in obtaining this recovery on behalf of the Class,  
7 Plaintiffs' Counsel respectfully request an award of attorneys' fees of 33-1/3% of the Settlement  
8 Amount and payment of expenses in the amount of \$52,393.03, plus interest on both amounts.  
9 Plaintiffs' Counsel's costs and expenses are likewise reasonable in amount, and were necessarily  
10 incurred in the successful prosecution of the Action. Finally, the requested awards for Messrs. Switzer  
11 and Mendelson are reasonable and supported by their declarations.<sup>6</sup>

12 **II. ATTORNEYS' FEES SHOULD BE AWARDED USING THE PERCENTAGE**  
13 **METHOD**

14 **A. The Common Fund Doctrine Allows Courts to Assess the Beneficiaries of**  
15 **the Fund with the Costs of Creating that Fund**

16 Where, as here, litigation has created a common fund for the benefit of the named plaintiffs as  
17 well as others, courts have the power to award plaintiffs' counsel their reasonable attorneys' fees and  
18 expenses out of the fund created. The California Supreme Court has expressly affirmed ““the historic  
19 power of equity to permit . . . a party preserving or recovering a fund for the benefit of others in  
20 addition to himself, to recover his costs, including his attorneys' fees, from the fund of property itself or  
21 directly from the other parties enjoying the benefit.” *Serrano v. Priest*, 20 Cal. 3d 25, 35 (1977).<sup>7</sup>

22 The common fund doctrine rests on two premises. The first one is the prevention of unjust  
23 enrichment – ““that all who will participate in the fund should pay the cost of its creation or protection  
24 and that this is best achieved by taxing the fund itself for attorney's fees.” *Id.* at 35 n.5; *see also*  
25 *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 27 (2000). The second is a “salvage” rationale –

26 <sup>6</sup> See accompanying Declaration of John R. Switzer in Support of Plaintiffs' Motion for Final  
27 Approval of Class Action Settlement (“Switzer Decl.”), and Declaration of Jay Mendelson in Support of  
28 Final Approval of Settlement and Request for Service Award (“Mendelson Decl.”).

<sup>7</sup> Unless otherwise noted, citations are omitted throughout.

1 “encouragement of the attorney for the successful litigant, who will be more willing to undertake and  
2 diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he  
3 will be promptly and directly compensated should his efforts be successful.” *Estate of Stauffer*, 53 Cal.  
4 2d 124, 132 (1959). The salvage purpose requires ““a flavor of generosity . . . in order that an appetite  
5 for efforts may be stimulated.”” *Melendres v. Los Angeles*, 45 Cal. App. 3d 267, 273 (1975).

6 While “[c]ourts recognize two methods for calculating attorney fees in civil class actions: the  
7 lodestar/multiplier method and the percentage of recovery method,” *Wershba*, 91 Cal. App. 4th at 254,  
8 the United States Supreme Court has consistently held that where a common fund has been created for  
9 the benefit of a class as a result of counsel’s efforts, the award of counsel’s fee should be determined on  
10 a percentage-of-the-fund basis. *See, e.g., Trs. v. Greenough*, 105 U.S. 527, 532 (1882); *Boeing Co. v.*  
11 *Van Gemert*, 444 U.S. 472, 478-79 (1980).

12 California courts have also accepted the percentage of recovery method as the preferred  
13 approach for awarding fees in common fund cases. For example, in *Laffitte II*, the Supreme Court of  
14 California clarified:

15 . . . that use of the percentage method to calculate a fee in a common fund case, where  
16 the award serves to spread the attorney fee among all beneficiaries of the fund, does not  
17 in itself constitute an abuse of discretion. We join the overwhelming majority of federal  
18 and state courts in holding that when class action litigation establishes a monetary fund  
for the benefit of the class members, and the trial court in its equitable powers awards  
class counsel a fee out of that fund, the court may determine the amount of a reasonable  
fee by choosing an appropriate percentage of the fund created.

19 *Laffitte II*, 1 Cal. 5th at 503. In *Laffitte II*, the Supreme Court recognized the advantages of using the  
20 percentage method of awarding attorneys’ fees as a percentage of the common fund, including the  
21 “relative ease of calculation, alignment of incentives between counsel and the class, a better  
22 approximation of market conditions in a contingency case, and the encouragement it provides counsel  
23 to seek an early settlement and avoid unnecessarily prolonging the litigation.” *Id.* The *Laffitte II* ruling  
24 is consistent with the United States Supreme Court’s decision in *Blum v. Stenson*, 465 U.S. 886 (1984),  
25 where the Supreme Court recognized that under the common fund doctrine a reasonable fee may be  
26 based “on a percentage of the fund bestowed on the class.” *Id.* at 900 n.16. *See also Beaver Cnty.*  
27 *Emps. Ret. Fund, et al. v. Cyan, Inc., et al.*, No. CGC-14-538355, slip op., ¶15 (S.F. Super. Ct. Aug. 8,

1 2019) (Massullo, J.) (“The Court also finds that placing overmuch weight on the lodestar is not in this  
2 case appropriate, as it is in the interest of the courts and the parties to encourage early settlement  
3 without the felt need to bill a large number of hours in order to justify a lodestar amount. Rather, it is  
4 appropriate to place significant weight on the percentage-of-recovery method in order to encourage  
5 early settlement, and to encourage suits which result in benefits to [t]he class which would no[t]  
6 otherwise have been obtained.”).

7 Similarly, the Ninth Circuit has expressly and repeatedly approved the use of the percentage  
8 method in common fund cases. *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268 (9th Cir. 1989);  
9 *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990); *Torrissi v. Tucson*  
10 *Elec. Power Co.*, 8 F.3d 1370 (9th Cir. 1993); and *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir.  
11 2002).<sup>8</sup> Accordingly, Plaintiffs’ Counsel respectfully submit that an award should be made here using  
12 the percentage method.

13 **B. The Requested Fee Is Reasonable**

14 As a general matter, “use of a percentage of 33 1/3 percent of the common fund is consistent  
15 with, and in the range of, awards in other class action lawsuits.” *Laffitte v. Robert Half Int’l Inc.*, 231  
16 Cal. App. 4th 860, 878 (2014) (“*Laffitte I*”). In *Laffitte I*, the court noted that “[e]mpirical studies show  
17 that, regardless whether the percentage method or the lodestar method is used, fee awards in class  
18 actions average around one-third of the recovery.” *Id.* The requested fee here is consistent with that  
19 “average” (*id.*) and is an appropriate fee in this case under the circumstances.

20 In determining the reasonableness of a fee request, California courts typically consider the  
21 following factors: (1) the quality of the representation; (2) the novelty and complexity of the issues; (3)  
22 the results obtained; and (4) the contingent risk presented. *Lafitte II*, 1 Cal. 5th at 489 (citing *Lealao*, 82  
23 Cal. App. 4th at 26). See *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2007)

24 <sup>8</sup> District courts in the Ninth Circuit have almost uniformly shifted to the percentage method in  
25 awarding fees in common fund representative actions. See, e.g., *Booth v. Strategic Realty Trust, Inc.*,  
26 No. 13-cv-04921-JST, 2015 WL 6002919, at \*7 (N.D. Cal. Oct. 15, 2015) (“‘Because the benefit to the  
27 class is easily quantified in common-fund settlements,’ the Ninth Circuit permits district courts ‘to  
award attorneys a percentage of the common fund in lieu of the often more time-consuming task of  
calculating the lodestar.’”) (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th  
Cir. 2011)).

1 (“The Ninth Circuit has approved a number of factors which may be relevant to the district court’s  
2 determination: . . . (2) the risk of litigation; . . . and (5) awards made in similar cases.”); *In re Heritage*  
3 *Bond Litig.*, No. 02-ML-1475 DT, 2005 U.S. Dist. LEXIS 13555, at \*70-\*71 (C.D. Cal. June 10, 2005)  
4 (reaction of the class is a factor to be considered). An analysis of the relevant factors supports the  
5 requested fee award.

### 6 **1. The Result Achieved**

7 Courts have consistently recognized that the result achieved is an important factor to be  
8 considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (“most critical  
9 factor is the degree of success obtained”); *Omnivision*, 559 F. Supp. 2d at 1046 (“The overall result and  
10 benefit to the class from the litigation is the most critical factor in granting a fee award.”).

11 Here, the \$2,450,000 Settlement Amount is an excellent result given the risks of proving  
12 liability and damages, and the similarly vigorous efforts of Defendants, and provides an immediate and  
13 certain recovery for Class Members without the risk, expense, and delay of the completion of discovery,  
14 summary judgment, trial, and appeals. Maximum estimated damages are \$7.75 million. *See*  
15 Declaration of Bjorn I. Steinholt, CFA, dated June 24, 2019, at ¶12, attached as Exhibit 1 to the Stewart  
16 Decl. Therefore, this Settlement represents a recovery of approximately 31% of maximum estimated  
17 recoverable damages, a result that far exceeds the average recovery. *See* Stefan Boettrich and Svetlana  
18 Starykh, *Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review* at 35, fig. 27  
19 (NERA Jan. 29, 2019) (median settlement value as a percentage of investor losses in cases where  
20 damages are less than \$20 million is 19.4%).

### 21 **2. The Time and Labor Required**

22 Plaintiffs’ Counsel vigorously investigated and prosecuted this litigation, and among other  
23 things: (a) conducted an extensive factual investigation of the events underlying Arcimoto’s September  
24 2017 IPO, including witness investigation and interviews, reviewing and analyzing the representations  
25 made by the Company in the Registration Statement and roadshow videos, as well as in subsequent  
26 public filings and statements concerning the Company; (b) drafted the initial and amended complaints;  
27 (c) briefed, argued, and successfully opposed, in part, the Defendants’ demurrers; (d) briefed, argued,  
28

1 and successfully opposed Defendants’ motion to stay this Action; (e) drafted and propounded discovery  
2 on all Defendants, including document requests and special interrogatories; (f) met and conferred  
3 extensively with Defendants concerning the appropriate scope of their responses to Plaintiffs’ discovery  
4 requests, including conferral over search terms and custodians for capturing relevant, responsive  
5 electronically-stored information and documents; (g) obtained and reviewed over 107,000 pages of  
6 documents produced by Arcimoto and Hambrecht; (h) retained and consulted with a forensic damages  
7 consultant regarding the calculation of damages under the Securities Act; (i) responded to discovery  
8 propounded by Defendants; (j) prepared mediation materials in advance of the January 25, 2019  
9 mediation before Michelle Yoshida, Esq. of Phillips ADR; and (k) negotiated the settlement with  
10 Defendants. Joint Decl., ¶6.

11 Although Plaintiffs’ Counsel make this application on a percentage-of-recovery basis, using the  
12 lodestar approach as a cross-check (although not required by the California Supreme Court per *Laffitte*  
13 *II*) on the reasonableness of the requested fee further demonstrates that it is fair and should be awarded.  
14 In total, Plaintiffs’ Counsel and their paraprofessionals expended 1,435 hours in the prosecution of this  
15 Action, resulting in a lodestar of \$887,891.00.<sup>9</sup> The requested fee of 33-1/3%, or \$816,658, represents  
16 a negative multiplier of 0.92. A “lodestar cross-check . . . provides a mechanism for bringing an  
17 objective measure of the work performed into the calculation of a reasonable attorney fee. If a  
18 comparison between the percentage and lodestar calculations produces an imputed multiplier far outside  
19 the normal range, indicating that the percentage fee will reward counsel for their services at an  
20 extraordinary rate even accounting for the factors customarily used to enhance a lodestar fee, the trial  
21 court will have reason to reexamine its choice of a percentage.” *Laffitte II*, 1 Cal. 5th at 504. That is  
22 not the case here. The requested fee results in a multiplier that is far below the range of multipliers that  
23 have been deemed reasonable by courts in California and nationwide.

24 \_\_\_\_\_  
25 <sup>9</sup> The time and expenses devoted to the Action are set forth in the accompanying Declaration of  
26 James I. Jaconette Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application  
27 for Award of Attorneys’ Fees and Expenses, the Declaration of Frank J. Johnson Filed on Behalf of  
28 Johnson Fistel, LLP in Support of Application for Award of Attorneys’ Fees and Expenses, and the  
Declaration of Stephen J. Oddo Filed on Behalf of Robbins LLP in Support of Application for Award of  
Attorneys’ Fees and Expenses (the “Fee and Expense Declarations”).

1 “Multipliers can range from 2 to 4 or even higher.” *Wershba*, 91 Cal. App. 4th at 255. *See also*  
2 *Sternwest Corp. v. Ash*, 183 Cal. App. 3d 74, 76 (1986) (remanding for a lodestar enhancement of “two,  
3 three, four or otherwise”). In *Lealao*, the Court of Appeal reversed the trial court for its failure to  
4 enhance the lodestar as part of the fee award, and remanded the matter for the trial court to reconsider  
5 counsel’s request for a 3.5 multiplier while not ruling out counsel’s original request for a multiplier of  
6 8. 82 Cal. App. 4th at 24-25, 50-52.

7 **3. The Contingent Nature of the Case, Risk of Loss, and the Delay in**  
8 **Payment to Plaintiffs’ Counsel**

9 Plaintiffs’ Counsel undertook this litigation on a contingent-fee basis, assuming a significant  
10 risk that the litigation would yield no recovery and leave them uncompensated. Unlike counsel for  
11 Defendants, who are ordinarily paid an hourly rate and paid for their expenses on a regular basis,  
12 Plaintiffs’ Counsel have not been compensated for any time or expense since this case began in March  
13 2018. Courts have consistently recognized that the risk of receiving little or no recovery is a major  
14 factor in considering an award of attorneys’ fees. *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43,  
15 54 (2d Cir. 2000) (the level of risk taken by plaintiff’s counsel is “perhaps the foremost’ factor” in  
16 considering the appropriate percentage award). This makes sense because in the legal marketplace, as  
17 an attorney who takes a case on contingency reasonably expects a higher fee than an attorney who is  
18 paid as the case goes along, win or lose. *See Rader v. Thrasher*, 57 Cal. 2d 244, 253 (1962); *Salton Bay*  
19 *Marina, Inc. v. Imperial Irrigation Dist.*, 172 Cal. App. 3d 914, 955 (1985) (“‘riskiness,’ difficulty or  
20 contingent nature of the litigation is a relevant factor in determining a reasonable attorney fee award”).  
21 As the Court of Appeals explained in *Cazares v. Saenz*, 208 Cal. App. 3d 279 (1989):

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

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

1 *Id.* at 288.

2 As discussed in more detail in the Settlement Memorandum and Joint Decl., Plaintiffs faced  
3 significant risk concerning their ability to establish both liability and damages. While Plaintiffs believe  
4 they could have proven their claims, success at trial and beyond was far from certain. Defendants have  
5 vigorously argued that Plaintiffs cannot demonstrate the falsity or materiality of the challenged  
6 statements made in connection and omissions from the Registration Statement issued in connection with  
7 the Company’s IPO. More specifically, Defendants contended that the majority of the statements in  
8 Arcimoto’s offering materials are either forward-looking statements qualified by detailed risk  
9 disclosures or general statements of corporate optimism, which are not material and therefore, not  
10 actionable. Defendants also maintained that Plaintiffs would be unable to establish that Defendants  
11 Frohnmayer or Campoli “actually solicited” their purchase of Arcimoto stock in the IPO, as required by  
12 §12(a)(2) of the Securities Act. Hambrecht likewise argued that it was not a “statutory seller.” There is  
13 no guarantee that the Court would deny the Defendants’ motion for summary judgment at the close of  
14 discovery, resulting in zero recovery for the Class.

15 Moreover, even assuming that Plaintiffs demonstrated liability, there was no guarantee they  
16 would prevail on the issue of damages. At summary judgment and trial, Defendants’ experts would  
17 likely assert a negative causation defense and contend that any losses sustained by the Class were due to  
18 factors completely unrelated to Defendants’ alleged false and misleading statements in the Registration  
19 Statement, thereby eliminating any potential recovery. There was, therefore, a substantial risk that the  
20 finder of fact could agree with Defendants’ contention that no damages could be linked to the  
21 Defendants’ statements or omissions at issue, or that damages were substantially less than the amount  
22 Plaintiffs have asserted. *See In re Warner Commc’ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y.  
23 1985) (“it is virtually impossible to predict with any certainty which testimony would be credited, and  
24 ultimately, which damages would be found to have been caused by actionable, rather than the myriad  
25 nonactionable factors such as general market conditions”), *aff’d*, 798 F.2d 35 (2d Cir. 1986). Finally,  
26 even if Plaintiffs succeeded on liability, and proved damages, there was still a risk that a successful  
27 verdict in their favor could be overturned by motion after trial or on appeal.

1 In light of these risks, Plaintiffs' Counsel committed the time and resources necessary to  
2 successfully take the case to trial. Indeed, more than 1,400 hours of attorney and paraprofessional time  
3 and more than \$52,000 in expenses have been incurred. This was time and money well spent. While  
4 Plaintiffs and their counsel believe that the Class would prevail at trial, the complexity of this case made  
5 the outcome at trial uncertain. The contingent nature of counsel's representation and the sizable  
6 financial risks borne by Plaintiffs' Counsel support the percentage fee requested. As the court in *Xcel*  
7 *Energy* recognized, "[p]recedent is replete with situations in which attorneys representing a class have  
8 devoted substantial resources in terms of time and advanced costs yet have lost the case despite their  
9 advocacy." *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 994 (D. Minn. 2005); *see also Hubbard v.*  
10 *BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012) (affirming ruling that granted defendants'  
11 post-trial motion for summary judgment as a matter of law based on failure to prove loss causation,  
12 thereby overturning a jury verdict in plaintiff's favor).

#### 13 4. Awards Made in Similar Cases

14 Plaintiffs' Counsel are applying for a fee award of 33-1/3% of the Settlement Fund. This  
15 request falls squarely within the range of percentage fees awarded in other class action litigation in  
16 California. "Empirical studies show that, regardless whether the percentage method or the lodestar  
17 method is used, fee awards in class actions average around one-third of the recovery." *Chavez v.*  
18 *Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008). The fee requested is consistent with the fees  
19 awarded in other recent Securities Act shareholder class actions. *Cyan*, slip op. at 3 (Massullo, J.)  
20 (awarding 33-1/3% fee award); *Brooks v. Capitol Valley Elec. Inc.*, No. CIV536903, slip op. at 2 (San  
21 Mateo Super. Ct. Mar. 7, 2017) (Weiner, J.) (awarding 33% fee award); *Sunrun*, slip op. at 6 (Weiner,  
22 J.) (approving 33-1/3% fee award).

#### 23 5. Experience, Reputation, Ability, and Quality of Counsel, and the 24 Skill They Displayed in Litigation

25 The skill, experience, reputation, quality, and ability of the attorneys who prosecuted this case  
26 also support the requested fee award. Plaintiffs' Counsel have national reputations for excellence  
27 through many years of litigating complex civil actions, particularly the prosecution of securities class  
28 actions. As set forth in the firm résumés attached to the Fee and Expense Declarations, Plaintiffs'



1 Counsel's experience, resources, and high-quality attorneys have allowed them to obtain significant  
2 recoveries throughout the country on behalf of their clients.

3 The quality of opposing counsel is also important in evaluating the quality of the work done by  
4 Plaintiffs' Counsel. *See, e.g., In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D.  
5 Cal. 1977). Counsel were opposed in this litigation by experienced and skilled counsel with a well-  
6 deserved reputation for vigorous advocacy on behalf of its clients. In the face of such knowledgeable  
7 and experienced opposition, counsel were able to develop a case that was sufficiently strong to persuade  
8 Defendants to settle the case for an amount that counsel believe is highly favorable to the Class. As a  
9 result, this factor weighs strongly in favor of the requested fee.

#### 10 **6. Continuing Obligations of Plaintiffs' Counsel**

11 Plaintiffs' Counsel's work does not end with the approval of the Settlement. Continuing work  
12 will include supervising the claims process, answering shareholder calls and, if necessary, litigating  
13 appeals.

#### 14 **7. The Reaction of the Class**

15 While the January 6, 2020 deadline for objecting to counsel's fee and expenses has not passed,  
16 to date, Plaintiffs' Counsel are not aware of a single Class Member who has objected to the fee and  
17 expense request. "The absence of objections or disapproval by class members to Class Counsel's fee  
18 request further supports finding the fee request reasonable." *Heritage Bond*, 2005 U.S. Dist. LEXIS  
19 13555, at \*71.<sup>10</sup>

### 20 **III. PLAINTIFFS' COUNSEL'S LITIGATION EXPENSES ARE REASONABLE 21 AND SHOULD BE APPROVED**

22 Attorneys who create a common fund for the benefit of a class are entitled to payment from the  
23 fund of reasonable litigation expenses and costs. Common fund fee and expense awards include  
24 counsel's incurred expenses because those who benefit from their effort should share in the cost. *See*  
25 *Laffitte I*, 231 Cal. App. 4th at 871; *Rider v. Cty. of San Diego*, 11 Cal. App. 4th 1410, 1423 n.6 (1992).  
26 The appropriate analysis in making a determination if particular expenses are compensable is whether

27 <sup>10</sup> Plaintiffs' Counsel will address any objections in their supplemental memorandum, which will be  
28 filed on or before February 20, 2020. *See* Preliminary Approval Order, ¶22.

1 the costs are of the type typically billed by attorneys to paying clients in the marketplace. *See Ashraf v.*  
2 *Fortinet, Inc.*, No. 1-10-cv-188571, 2012 CA Sup. Ct. Motions LEXIS 18099, at \*25 (Santa Clara  
3 County Dec. 7, 2012) (“The expenses for which Plaintiff’s Counsel seek reimbursement are those which  
4 are normally charged to paying clients, over and above hourly fees. Further, the expenses which have  
5 been incurred and for which reimbursement is sought were necessary for the conduct of the Litigation,  
6 are reasonable in amount and thus should be reimbursed to the extent requested.”).

7 Here, Plaintiffs’ Counsel are seeking payment of costs and expenses of \$52,393.03. As itemized  
8 and described in the Fee and Expense Declarations, counsel’s expenses include: (1) consultant fees;  
9 (2) mediator’s fees; (3) on-line legal, financial, and factual research; (4) transportation, meals, and  
10 hotels; (5) photocopying; and (6) transcript preparation fees. The expenses for which Plaintiffs’  
11 Counsel seek payment are those which are normally charged to paying clients, over and above hourly  
12 fees. *Fortinet*, 2012 CA Sup. Ct. Motions LEXIS 18099, at \*23-\*24 (approving awards of expenses  
13 including: “(1) telephone, photocopying and facsimile charges; (2) overnight delivery and messenger  
14 services; (3) legal filing and court reporter fees; (4) on-line legal and factual research; (5) transportation,  
15 meals and hotels; (6) significant expenses incurred by consultants and experts; and (7) Claims  
16 Administrator”). As detailed in the Fee and Expense Declarations, all of Plaintiffs’ Counsel’s expenses  
17 are reasonable in amount and were necessary for the successful prosecution of the litigation and  
18 therefore should be paid.

19 **IV. THE AWARDS TO PLAINTIFFS ARE REASONABLE**

20 Plaintiffs’ Counsel also seek awards for Plaintiffs Switzer and Mendelson pursuant to 15 U.S.C.  
21 §77z-1(a)(4) in the amount of \$5,000 each for their time and service in representing the Class. Such  
22 awards are reasonable and merited in this case. The service and time devoted to the litigation by each  
23 plaintiff is set forth in his declaration filed concurrently with this motion. *See Switzer Decl.*, ¶¶3-4,  
24 *Mendelson Decl.*, ¶3. Plaintiffs performed a public service through their willingness to step forward,  
25 remain in the case, move for appointment and serve as Class representatives. Courts routinely grant  
26 awards to plaintiffs who, through their efforts, brought a case and pursued it to a successful conclusion  
27 for the benefit of a class of people, as Plaintiffs have. Approval of this award is warranted as a matter  
28

1 of public policy and appropriate under applicable precedents. *See Chicago Laborers Pension Fund v.*  
2 *Alibaba Grp. Holding Ltd., et al.*, No. CIV535692, slip op. at 6 (San Mateo Super. Ct. May 17, 2019)  
3 (awarding \$20,000, \$12,000, \$12,000 and \$12,000 to plaintiffs); *Sunrun*, slip op. at 6 (awarding  
4 plaintiffs \$16,000 and \$15,000); *In re Ooma, Inc. S'holder Litig.*, No. CIV536959, slip op. at 6 (San  
5 Mateo Super. Ct. Oct. 18, 2019) (awarding plaintiff \$10,000).

6 **V. CONCLUSION**

7 For the reasons set forth herein, in the Settlement Memorandum, the declarations submitted  
8 herewith, and all documents filed in support of preliminary approval, Plaintiffs' Counsel respectfully  
9 submit that the motion for an award of attorneys' fees and expenses is fair, reasonable, and appropriate  
10 under all the circumstances of this case and it should therefore be granted. Additionally, the awards  
11 requested by Plaintiffs Switzer and Mendelson are reasonable in amount and supported by their  
12 declarations, and should be approved in their entirety.

13 DATED: December 23, 2019

Respectfully submitted,

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16 ELLEN GUSIKOFF STEWART  
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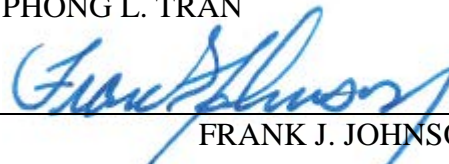
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DECLARATION OF SERVICE BY MAIL AND EMAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway, Suite 1900, San Diego, California 92101.

2. That on December 23, 2019, declarant served the PLAINTIFFS' COUNSEL'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

4. This document was also served via email on all parties listed on the attached Service List.

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 23, 2019, at San Diego, California.

  
\_\_\_\_\_  
JACLYN WILLIAMS

## SERVICE LIST

*Switzer v. W.R. Hambrecht & Co., LLC*, Lead Case No. CGC-18-564904 (Super. Ct., S.F. Cty.)  
(Consolidated with No. CGC-18-565324)

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