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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ATUL SINGH DEORA, *et al.*,

Plaintiffs,

v.

NANTHEALTH, *et al.*,

Defendants.

Case No. 2:17-cv-01825-TJH-MRWx

MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT AND FOR AWARD OF ATTORNEYS' FEES, LITIGATION COSTS, AND COMPENSATORY AWARD

Date: June 15, 2020
Time: 10:00 a.m.
Judge: The Hon. Terry J. Hatter, Jr.
Courtroom: 9B

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INTRODUCTION

The parties first presented this proposed settlement to the Court in December of last year. At that time, they asked the Court to grant preliminary approval by finding that it would likely be able to approve the settlement as fair, reasonable, and adequate. The Court made those findings, granted preliminary approval, and directed notice to the nationwide settlement class. With that notice having been delivered, Lead Plaintiff now formally requests that the Court grant final approval of the settlement, and Class Counsel request reimbursement of their litigation expenses and attorneys' fees, and a compensatory award to the Lead Plaintiff.

The settlement fully resolves the Classes' claims that NantHealth and several of its officers and directors misled investors about the demand for the company's genetic sequencing services in violation of federal securities laws.[1] To resolve the litigation, NantHealth has agreed to pay $16.5 million in cash for the benefit of the Classes. That payment will constitute more than 40% of what Lead Plaintiff calculates the Classes may have recovered at trial had they prevailed. The proceeds from the fund will compensate Class members and will also cover the costs of settlement administration, class notice, litigation costs and attorneys' fees, and a compensatory award for the Lead Plaintiff. The parties believe the settlement compensates the Classes fairly, taking into account the strengths of their legal claims and the risk and delay that would lie ahead but for the settlement. The parties therefore request that the Court approve the settlement.

With the litigation resolving, Class Counsel also request to be compensated for achieving this result for the Classes. Class Counsel vigorously prosecuted this case during the past three years: opposing Defendants' motion to dismiss; obtaining class certification; defending the certification order on appeal; and engaging in discovery that featured over one million pages of documents, depositions across the country, and subpoenas to 24 third parties. Class Counsel undertook these efforts on

[1] NantHealth has consistently denied these allegations.

a purely contingent basis. Now, consistent with the Ninth Circuit's benchmark, Class Counsel request attorneys' fees equal to 25% of the common fund and seek reimbursement of their out-of-pocket expenses. The requested fee provides a lodestar multiplier of 1.38, less than fee enhancements commonly awarded under Ninth Circuit law. In support, counsel have provided declarations describing the work performed over the course of the litigation, as well as information about their hourly rates and litigation costs.

HISTORY OF THE LITIGATION

Plaintiff alleges that beginning with NantHealth's 2016 IPO, Defendants misled investors about the demand for NantHealth's flagship genetic-sequencing product, GPS Cancer. (ECF No. 38, ¶¶ 35–40.) Plaintiff alleges that Defendants' misstatements artificially inflated NantHealth's share price and violated Sections 11, 12(a)(2), and 15 of the Securities Act, and Sections 10(b) and 20(a) of the Exchange Act. (*Id.*, ¶¶ 165–201.)

Several of the alleged misstatements stem from a contract between NantHealth and the University of Utah. In its IPO prospectus, NantHealth told investors that a research university—later revealed to be the University of Utah—had contracted to buy $10 million worth of its sequencing services. (*Id.*, ¶ 70.) The prospectus said that although the contract was "partially" funded by nonprofit organizations affiliated with NantHealth CEO, Dr. Soon-Shiong, the "university was not contractually or otherwise required to use our molecular profiling solution . . . as part of the charitable gift." (*Id.*) Plaintiff alleges that in public statements following the IPO, NantHealth and its executives continued to discuss the University contract in a manner intended to suggest demand for NantHealth's services. (*Id.*, ¶¶ 87–92, 94–98, 99–102, 106–08, 110–12.)

Plaintiff alleges that a series of corrective disclosures later revealed: 1) all—not some—of the funds came from Dr. Soon-Shiong's charitable contributions; 2) the University was obligated to select NantHealth to perform the sequencing; 3) the

University did not actually purchase the whole suite of services that comprise GPS Cancer; and 4) NantHealth not only received fewer GPS Cancer orders than it suggested, but the company was deeply discounting the price of the tests that were ordered, if not giving them away for free. (*See id.*, ¶¶ 4, 69, 78, 92–94, 115.) Plaintiff's expert concluded that four of these disclosures caused statistically significant drops in NantHealth's share price, equal to $40,935,148 in classwide damages. (ECF No. 112, ¶ 6.)

Defendants have consistently denied Plaintiff's allegations and contested Plaintiff's legal theories. Defendants moved to dismiss Plaintiff's complaint; opposed class certification; and petitioned the Ninth Circuit to review this Court's order certifying the Classes. (ECF Nos. 39; 79); *Atul Singh Deora v. NantHealth, et al.*, Case No. 19-80106 (9th Cir.). Had the litigation continued, Defendants would have challenged the effect of each alleged disclosure, and the resulting damages, at summary judgment and trial, supported by their own expert. Defendants would also have challenged Plaintiff's expert's methodology under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

The parties engaged in protracted discovery over the course of the litigation. Plaintiff served three sets of document requests, five sets of interrogatories, and two sets of requests for admission on NantHealth, as well as additional discovery on the officer and director Defendants. (ECF No. 112, ¶ 4.) Plaintiff also sought documents or testimony from 24 third parties through subpoenas, including the University of Utah and four non-profit entities associated with Dr. Soon-Shiong, as well as through a public-records request to the State of Utah. (*Id.*) Plaintiff then deposed witnesses from the University of Utah and NantHealth, including NantHealth's former president. (*Id.*) Defendants produced over one million pages of documents and served document requests, interrogatories, and requests for admission of their own; deposed current Lead Plaintiff SEPTA and former Lead-Plaintiff Michael

Fontaine; and sought documents from numerous third parties. (*Id.*; ECF Nos. 88-91; 102-105.)

As the parties prepared for summary judgement briefing, Plaintiff's economic expert worked to calculate classwide damages. At the time of settlement, the close of fact discovery was days away, and Plaintiff was working to meet the then-upcoming deadline to serve expert reports. (*See* ECF No. 101.)

In early 2019, the parties mediated with the help of Robert A. Meyer of JAMS. (ECF No. 112, ¶ 7.) Although the parties did not settle at the first mediation, they continued to engage with Mr. Meyer and later participated in another mediation on September 11, 2019. (*Id.*) Again, the parties did not reach agreement, but they continued to work with Mr. Meyer over the next month, and ultimately came to terms to resolve the litigation in October 2019. (*Id.*)

After reaching an agreement in principle, the parties prepared the stipulation of settlement before the Court. (*Id.*, ¶ 8 & Ex. A.) In December 2019, Plaintiff filed a motion requesting that the Court preliminarily approve the settlement and direct notice to the Classes. (ECF No. 111.) The Court granted the motion, concluding that notice was warranted because the Court would likely be able to grant final approval. (ECF No. 117.) Notice to the Classes was then disseminated.[2]

OVERVIEW OF THE SETTLEMENT

I. Benefits of the settlement

As noted, the proposed settlement delivers a fund of $16,500,000. (ECF No. 112, Ex. A, § I.EE.) To distribute that fund among Class members, Plaintiff's expert devised a plan of allocation to compensate Class members on a pro rata basis for any losses they allegedly sustained. (*Id.*, Ex. A-2, at 10-15). The fund will also cover settlement administration and class notice costs, attorneys' fees and litigation-cost

[2] Consistent with the Preliminary Approval Order, no later than 10 days before the final approval hearing, the Settlement Administrator will file an affidavit attesting that notice was disseminated. (ECF No. 117, ¶ 8.)

reimbursements, and Lead Plaintiff's compensatory award. (*Id.*, Ex. A, § III.A.) The fund is nonreversionary, meaning Defendants will not retain any of the fund for any reason. (*Id.*, Ex. A, § III.E.)

To help Class members make claims, Plaintiff developed a simple, user-friendly claim form, and retained the services of JND Legal Administration. (*Id.*, Ex. A-4.) JND has established a settlement website and sent notice to the Classes. (ECF No. 117, ¶¶ 5–7.) The deadline for Class members to opt out or object to the settlement is May 22, 2020. (*Id.*, ¶ 10.) Plaintiff will therefore wait for its reply brief (due May 26, 2020), to address the Classes' reaction to the settlement.

II. The scope of Class members' release of claims

In exchange for the settlement benefits, Plaintiff and Class members will release "all claims, rights, demands, obligations, damages, actions or causes of action, or liabilities whatsoever, of every nature and description, whether known or unknown" against the Released Parties. (ECF No. 112, Ex. A, § I.AA.) The release encompasses claims "(i) that were, could have been, or could in the future be asserted in any complaint based on the facts alleged in the operative complaint in this Action, or (ii) that arise out of, are based on, or relate in any way to the acts, facts, statements, or omissions alleged in the operative complaint in this Action, and that were, could have been, or could in the future be asserted in any forum, case, or action, including, without limitation, all claims that arise out of, are based on, or relate in any way to the purchase, other acquisition, holding, sale, or other disposition of NantHealth, Inc. securities by the Classes or Class Members." (*Id.*, Ex. A, § I.BB.) The release is consistent with the scope of releases typically approved in class settlements. *See Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010).

III. The provision for attorneys' fees, cost reimbursements, and a compensatory award for the Lead Plaintiff

Class Counsel have litigated this case for over three years and advanced hundreds of thousands of dollars in litigation expenses, and have yet to be

compensated. As discussed below, Class Counsel now request reimbursement of their $349,073.67 in litigation expenses, an award of 25% of the settlement fund ($4.125 million) to pay their attorneys' fees, and a compensatory award of $25,000 for Lead Plaintiff SEPTA for its time and effort advancing this litigation. Consistent with the PSLRA, the notice disseminated to the Classes referenced these fees, expenses, and compensatory award (on both an aggregate and per share basis). (ECF No. 112, Ex. A-2 at 1, 8 & Ex. A-5; 15 U.S.C. § 78u–4(a)(7)(c).)

THE PROPOSED SETTLEMENT MERITS APPROVAL

The Rule 23(e) standard for approving class action settlements was updated in December 2018. Under the updated rule, at the initial or "preliminary" stage, courts decide whether they "will likely be able" to approve a settlement. Fed. R. Civ. P. 23(e)(1)(B). If so, settlement notice is sent to the class and final approval follows several months later. Here, the Court granted Plaintiff's December 2019 motion to preliminarily approve the settlement, concluding the settlement was fair, reasonable, and adequate, and that the Court would likely be able to grant final approval. (ECF No. 117.) With class notice disseminated, the parties now request that the Court grant final settlement approval.

When Plaintiff moved for preliminary approval, it analyzed each factor under Rule 23(e)(2) to discuss how the settlement merits approval. The Court agreed, concluding that "the Court will likely be able to approve the proposed settlement as fair, reasonable, and adequate under Rule 23(e)(2)." (ECF No. 117.) The applicable factors continue to weigh in favor of final approval, as addressed below.

I. Lead Plaintiff and Class Counsel adequately represent the Classes.

The first Rule 23(e)(2)(A) factor to be considered is the adequacy of representation. This analysis includes "the nature and amount of discovery" undertaken. Fed. R. Civ. P. 23(e)(2)(A) advisory committee's note to 2018 amendment.

To begin, Lead Plaintiff diligently represented the Classes. SEPTA's representative, Gino Benedetti, actively participated in the litigation over a period of years, including by responding to over a dozen written discovery requests, conducting ESI searches, producing documents, responding to interrogatories, and testifying as SEPTA's Rule 30(b)(6) designee. (Benedetti Decl., ¶ 8.) Throughout, Mr. Benedetti, an attorney himself, remained in contact with Class Counsel, stayed apprised of the litigation, and acted with the interests of the Classes in mind. (*Id.*)

Class Counsel also represented the Classes adequately. They vigorously prosecuted this case, opposing Defendants' motion to dismiss, moving for class certification, and defending the certification order on appeal. (*See* ECF Nos. 40, 64, 93; *Deora v. NantHealth, Inc.*, No. 19-80106 (9th Cir.), ECF No. 2.) They engaged in protracted discovery, serving three sets of document requests, five sets of interrogatories, and two sets of requests for admission on NantHealth, and still more discovery on the officer and director Defendants. (ECF No. 112, ¶ 4.) They also sought documents and testimony from 24 third parties through subpoenas and made a public-records request to the State of Utah. (*Id.*) They then deposed witnesses from both the University of Utah and NantHealth, including NantHealth's former president. (*Id.*) They also engaged the services of a damages and market-efficiency expert who assisted in certifying the Classes, calculated damages, and crafted the plan of allocation. (*Id.*, ¶ 6.) These efforts led counsel to advance nearly $350,000 in litigation expenses on behalf of the class, with no assurance that those expenses would be reimbursed. (Joint Decl., ¶¶ 48-52; Bleichmar Decl., ¶ 9.)

Finally, Class Counsel's adequacy stems from their experience successfully litigating many prior complex class actions, including securities actions. (Joint Decl., ¶¶ 41, 47 & Exs. A & B.) As this Court recognized when appointing Lead Counsel, "[b]oth [Gibbs Law Group LLP and Kehoe Law Firm, P.C.,] have significant securities class action litigation experience and have achieved highly

favorable settlements for plaintiffs in previous actions." (ECF No. 33.) Class Counsel have brought that experience to bear on behalf of the Classes here.

II. The parties negotiated the proposed settlement at arm's length.

The second Rule 23(e)(2) factor asks the Court to confirm that the proposed settlement was negotiated at arm's length. Fed. R. Civ. P. 23(e)(2)(B).

There are multiple indicia here of the arm's length negotiations. First, the parties did not begin discussing negotiating or holding an initial mediation until after the case had been pending for many months. (ECF No. 112, ¶ 7.) By the time they reached agreement, the parties had engaged in significant pretrial motion practice, conducted extensive discovery, worked with consultants and experts, and the Court had certified the two Classes. *Cf. In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (heightened scrutiny of class settlements required where settlement *precedes* certification of a litigation class).

Second, the parties resolved the litigation with the assistance of experienced JAMS mediator, Robert A. Meyer. (ECF No. 112, ¶ 7.) "[T]he involvement of a neutral or court-affiliated mediator or facilitator in [the parties'] negotiations may bear on whether they were conducted in a manner that would protect and further the class interests." Rule 23(e)(2)(B) advisory committee's note to 2018 amendment; *accord Pederson v. Airport Terminal Servs.*, No. 15-cv-02400, 2018 WL 2138457, at *7 (C.D. Cal. April 5, 2018) (the oversight "of an experienced mediator" reflected noncollusive negotiations). Even after two mediations, the parties were not able to reach agreement, and were only able to resolve the litigation through further conversations with (and under the supervision of) Mr. Meyer. (ECF No. 112, ¶ 7.)

Third and finally, several potential warning signs for collusion are absent here: the requested attorneys' fee is proportional to Class member compensation, there is no "clear sailing" arrangement whereby Defendants agree not to contest the fee motion, and no unawarded money will revert to Defendants. *See In re Volkswagen*

"Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig., 895 F.3d 597, 611 & n.19 (9th Cir. 2018).

III. The quality of relief to the Classes weighs in favor of approval.

The third factor to be considered is whether "the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorneys' fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C). Under this factor, the relief "to class members is a central concern." Fed. R. Civ. P. 23(e)(2)(C) advisory committee's note to 2018 amendment.

A. The settlement provides strong relief to the Classes.

The settlement will reimburse millions of dollars in investment losses to purchasers of NantHealth common stock. The settlement represents a sizeable portion of what the Classes could have recovered at trial. Class Counsel worked with an experienced and well-qualified expert to calculate classwide damages, who analyzed the effect of each alleged misrepresentation and corrective disclosure on NantHealth's share price, adjusting for market and industry forces. (ECF No. 112, ¶ 6.) Plaintiff's expert estimated that—were the Classes to prevail at trial and on any subsequent appeal—the recovery would likely be approximately $40.9 million. (*Id.*) Of course, that estimate is subject to downward pressure due to the continued litigation risks remaining: Defendants could prevail on their Rule 23(f) appeal, on summary judgment, at trial, or on appeal, reducing or eliminating the Classes' recovery.

As it stands, the settlement recovers over 40% of what Plaintiff estimates the Classes may have recovered had they prevailed at trial. This is a strong result, particularly in a securities class action, where recoveries are often far less. *See, e.g.*, *In re Biolase, Inc. Sec. Litig.*, No. 13-cv-1300, 2015 WL 12697736, at *8 (C.D. Cal. June

5, 2015) (finding recovery of 8% of maximum recoverable damages a "substantial benefit to the class" noting it "equals or surpasses the recovery in many other securities class actions" and collecting cases); *In re Mego Financial Corp. Sec. Litig.*, 213 F.3d 254, 459 (9th Cir. 2000) (holding that a settlement worth one-sixth of the class's potential recovery was fair "given the difficulties in proving the case").

Having recovered over 40% through settlement of what may have been recovered at trial, Lead Plaintiff and Class Counsel have no reservation in recommending that the Court approve this settlement on behalf of the Classes. (ECF No. 112, ¶ 12; ECF No. 111-2, ¶ 9; Benedetti Decl., ¶ 21.)

B. Continued litigation would entail more risk, cost, and delay.

Almost all class actions are expensive, risky, and lengthy, which supports the Ninth Circuit's "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1238 (9th Cir. 1998). Here, had the parties not settled, the litigation would have been risky, protracted, and costly.

Although the parties already completed much discovery, additional depositions would have been forthcoming (including both parties' experts). (ECF No. 112, ¶ 13.) The parties would also have briefed summary judgment, *Daubert* issues, motions in limine, a possible decertification motion, and then conducted a trial, each stage adding risk and delay. (*Id.*) And if the Ninth Circuit granted Defendants' Rule 23(f) petition, which was pending at the time of settlement, the parties may have faced multiple years of delay during the appeal. The settlement ensures the Classes will receive immediate relief and avoids the risks and attendant delay at each additional stage of the litigation.

As to the merits of the case, Plaintiff believes the Classes had a strong case. But Class Counsel also recognize, based on their experience and the record, that the case faced challenges at summary judgment and trial, where the case could either fail on liability, or at least be whittled down. Defendants strenuously denied that any

of their statements were false or misleading. They also denied any intent to mislead, an additional hurdle for the Classes' Exchange Act claims. And while the Classes alleged several misstatements and corrective disclosures, Defendants would likely challenge the statistical significance of each at summary judgment and trial. Defendants were also likely to continue challenging this Court's class certification order, or at least attempting to narrow the Class definitions, based on the discovery Defendants were seeking from international parties.

While Plaintiff believes it had strong prospects of overcoming these arguments and defenses, and that the evidence would support a finding of liability, there can be little doubt that those defenses presented the possibility that the Classes would recover nothing if the case persisted, or at least far less than Plaintiff was seeking. Of course, even if Plaintiff prevailed on each of these issues through trial, an appeal would likely follow, taking another two-plus years to resolve.

As this Court has emphasized, the "Court shall consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004). So, while there were prospects for a greater recovery following a trial and appeals, that victory would have entailed substantial risk, cost, and delay. These considerations all favor settlement.

C. The settlement provides for an effective distribution of proceeds to the Classes.

The settlement contemplates an efficient distribution process. *See* Rule 23(e)(2)(C)(ii). Although the entire fund will be exhausted, with no money reverting to Defendants, Class members must submit claims so that the Settlement Administrator can identify them and determine the amounts owed to each, since Defendants do not possess information identifying everyone that bought and sold shares of NantHealth stock, on what dates, and at what prices. To facilitate the

claims process, Plaintiff created a simple claim form that requires minimal information. (ECF No. 112, Ex. A-4.) Class members can submit claims by mail or on the settlement website. The website also allows Class members to download the claim form, the Mailed and Summary Notices, the stipulation of settlement, and other case documents, and provides contact information for Class Counsel.

The Settlement Administrator will evaluate claims submitted by Class members, and will determine which claims shall be allowed, subject to appeal to the Court. (*Id.*, ¶ 10 & Ex. A-2 at 12-13.) The Settlement Administrator will also oversee distribution of the settlement fund pursuant to the plan of allocation discussed below. (*Id.*, ¶ 6 & Ex. A-2 at 10-15.)

D. The terms of the proposed award of attorneys' fees, including timing of payment, also support settlement approval.

Class Counsel are seeking compensation from the settlement fund, proportional to the Classes' recovery. Plaintiff's motion for preliminary approval and the Mailed and Summary Notices gave notice of the requested fee, (*see id.*, Exs. A-2 & A-5), and Plaintiff will post this Final Approval and Fee Motion and the supporting materials on the settlement website. As discussed below, the requested fee is appropriate under Ninth Circuit precedent and the circumstances of the case, so nothing about the proposed fee detracts from the settlement's fairness.

E. The settlement agreement, including exhibits and documents incorporated by reference, is the only extant agreement.

The Court also must evaluate any agreement made in connection with the proposed settlement. *See* Fed. R. Civ. P. 23(e)(2)(C)(iv), (e)(3). As reflected in the parties' settlement agreement, they entered into a supplemental agreement that provides that if Class member opt-outs reach a certain threshold, Defendants may terminate the settlement. Plaintiff filed the stipulation of settlement, including all exhibits, and the supplemental agreement, with its motion for preliminary approval. (ECF No. 112, Ex. A; ECF Nos. 110, 114, 115.) This type of supplemental

agreement is standard in class action settlements and has no negative impact on the fairness of the settlement. *See In re Carrier IQ, Inc. Consumer Privacy Litig.*, No. 12-md-02330, 2016 WL 4474366, at *5 (N.D. Cal. Aug. 25, 2016) ("[O]pt-out deals are not uncommon as they are designed to ensure than an objector cannot try to hijack a settlement in his or her own self-interest.").

IV. The settlement treats all Class members equitably.

The final Rule 23(e)(2) factor turns on whether the proposed settlement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). "Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23(e)(2)(D) advisory committee's note to 2018 amendment.

The settlement will be distributed among Class members with compensable damages on a pro rata basis per the plan of allocation developed by Plaintiff's expert. (*See* ECF No. 112, ¶ 6 & Ex. A-2 at 10-15.) "A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable. It is also reasonable to allocate more of the settlement to class members with stronger claims on the merits." *In re Heritage Bond Litig.*, No. 02-ml-1475, 2005 WL 1594403, at *11 (C.D. Cal. June 10, 2005) (citations omitted). Therefore, a plan of allocation treats class members fairly by awarding pro rata shares to Class members who make valid claims, even as it sensibly makes distinctions based upon the relative strengths and weaknesses of their individual claims and the timing of purchases of the securities at issue. *See id.*

Under the proposed plan of allocation, Class members' pro rata shares of the settlement fund will be calculated using a formula based on the timing of their purchases and sales of NantHealth common stock. (*See* ECF No. 112, ¶ 6 & Ex. A-2 at 10-15.) The formula accounts for the alleged artificial share-price inflation at

various points during the Class Period, and is tied to the difference between the estimated inflation on the date shares were purchased and sold. (*Id.*)

Given the higher burden for claims under the Exchange Act, the plan of allocation calls for an enhancement (by 26%) of Class members' recoveries under the Securities Act. (*Id.*, ¶ 6 & Ex. A-2 at 12.) This proposed "apportionment of relief among class members" therefore "takes appropriate account of differences among their claims," and allows for equitable compensation to the Classes. *See* Fed. R. Civ. P. 23(e)(2)(D) advisory committee's note to 2018 amendment. The proposed allocation here is appropriate given the relative strengths and weaknesses of the claims. *See In re Countrywide Financial Corp. Sec. Litig.*, Order Granting Preliminary Approval and Directing Notice, No 07-cv-05295, ECF No. 976 at 48 (C.D. Cal. Aug. 2, 2010) (approving 25% enhancement for securities with Section 11 claims, in recognition of the higher burden under Section 10(b)); ECF 112, Ex. D (citing L.T. Bulan, et al., Securities Class Actions Settlements, 2018 Review and Analysis, Cornerstone Research (2019), at 7, Fig. 6 (analyzing settlements from 2009-2018, and estimating a 26% increase in damages for securities class actions that involve Section 11 claims in addition to Section 10(b), versus Section 10(b) only)).

The proposed plan of allocation also complies with Section 21D(e)(1) of the Exchange Act, in that the Recognized Loss Amount for Class members who held shares on or after April 26, 2017, will not exceed the difference between the purchase or sale price paid or received, and the mean trading price of the Class member's shares during the 90-day period after the date of the last alleged corrective disclosure. (ECF No. 112, Ex. A-2, Table B.) The plan of allocation was detailed in the notice sent to the Classes. (*Id.*, Ex. A-2 at 10-15.)

Finally, although Class Counsel ask the Court for a compensatory award for the Lead Plaintiff, as explained below, that award will not go beyond the reasonable costs and expenses directly relating to Lead Plaintiff's representation of the Classes.

V. The settlement provided the best method of notice practicable.

Before approving a class settlement, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Here, the Court approved two forms of notice: a long form notice (Mailed Notice) and a summary publication notice (Summary Notice). (ECF No. 112, Exs. A-2 & A-5.) The Mailed Notice informed Class members of the nature of the case; the Class definitions; the claims that will be released; the binding effect of a judgment on Class members under Rule 23(c)(3); that Class members may enter an appearance through counsel if desired; the procedures and deadlines for objecting; the procedures and deadline to opt out of the Classes; the procedures and deadline for submitting a claim; and the date, time and location of the Final Approval Hearing. (*Id.*, Ex. A-2.) Consistent with the PSLRA, the Mailed Notice also provided the relevant statement of recovery, potential case outcomes, awards for reimbursement, attorneys' fees, and expenses sought, attorney information, and the reasons for the settlement. (*Id.*); *see* 15 U.S.C. § 78u-4(a)(7).

The Settlement Administrator mailed the Mailed Notice by first class mail to every Class member who could be identified through reasonable effort within 21 days after entry of the Preliminary Approval Order.[3] (ECF No. 112, ¶ 10.) The Mailed and Summary Notices are also available on the settlement website. In addition, the Settlement Administrator published the Summary Notice twice on a national business newswire at approximately 10 days and again at approximately 20 days after Mailed Notice was distributed. (*Id.*) The parties and the Settlement Administrator are confident that the notice plan ensured the vast majority of Class members have the opportunity to learn of the settlement.

Notice of the proposed settlement was also provided as required by the Class Action Fairness Act, 28 U.S.C. § 1715, so that the states and federal government

[3] As noted above, JND will file an affidavit attesting to the notice provided no later than 10 days before the final approval hearing. (ECF No. 117, ¶ 8.)

may evaluate the settlement and bring any concerns to the Court's attention prior to final approval. (ECF No. 112, Ex. A, § XIV.)

CLASS COUNSEL SEEK REASONABLE ATTORNEYS' FEES AND COSTS

After three years of hard-fought litigation, Class Counsel now formally request to be compensated for their efforts securing the successful resolution of the Classes' claims. As detailed in the supporting declarations, Class Counsel and additional counsel have expended 5159.25 hours litigating this case on the Classes' behalf, and incurred $349,073.67 in out-of-pocket expenses. (Joint Decl., ¶¶ 35-37, 48-52; Bleichmar Decl., ¶¶ 3-4, 9.) In recognition of these efforts, Class Counsel seek attorneys' fees of 25% of the common fund ($4.125 million), and reimbursement of their litigation costs.

I. Class Counsel seek a reasonable percentage of the fund.

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). In the Ninth Circuit, the percentage-of-recovery method is the prevailing standard for calculating a reasonable attorney's fee in a common fund settlement like this one, *see Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002), and the PSLRA itself expressly codified the percentage-of-recovery approach for awarding fees. *See* 15 U.S.C. § 78u-4(a)(6) ("Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class."). Class Counsel therefore request that the Court award a reasonable percentage of the fund as attorneys' fees.

In the Ninth Circuit, "courts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award," adjusting upwards or downwards as warranted. *In re Bluetooth*, 654 F.3d at 942. Whether the Court awards the benchmark amount or some other rate, the award must be supported "by findings

that take into account all of the circumstances of the case." *Vizcaino*, 290 F.3d at 1048.

In making those findings, courts in the Ninth Circuit consider the following factors: 1) the results achieved; 2) the risk of litigation; 3) the skill required and the quality of the work; 4) the contingent nature of the fee; 5) awards in similar cases; and 6) whether the percentage appears reasonable in light of a lodestar cross-check.[4] *Id.* at 1048-52). Each of these factors supports Class Counsel's request here.

II. The relevant factors support the requested fee.

A. Class Counsel achieved an excellent result for the Classes.

The benefit secured for the class is the single most important factor in evaluating the reasonableness of a requested fee. *In re Bluetooth*, 654 F.3d at 942. Here, it weighs heavily in favor of approving Class Counsel's requested fees.

As explained above, the proposed settlement delivers $16.5 million, constituting over 40% of the best-case outcome for the Classes had they prevailed at trial. (ECF No. 112, ¶ 12.) Such a recovery is laudable in any class action, and especially so in the securities context, where settlement percentages are often in the single digits. *See* Cornerstone Research, Securities Class Actions Settlements, 2018 Review and Analysis[5] (examining 127 securities class action settlements from 2009-2018, and finding the median settlement value for cases involving both Rule 10(b)(5) and Section 11 to be 5.8%); *see also In re Heritage Bond Litig.*, 2005 WL 1594403, at *19 (settlement representing 36-38% of the class's total net loss "an exceptional result").

[4] Class Counsel will address the final factor—the Classes' reaction to the fee and expense request—on reply, after the time for Class members to request exclusion or object to the proposed settlement has passed. *See Vizcaino*, 290 F.3d at 1048-50.

[5] Available at https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2018-Review-and-Analysis

B. The risks justify the requested fee award.

The result achieved here must be viewed alongside the risk overcome. *In re Heritage Bond Litig.*, 2005 WL 1594403, at *8 ("[T]he risk of non-payment or reimbursement of expenses is a factor in determining the appropriateness of counsel's fee award."). All class actions are risky, and securities class cases are particularly so, given the high pleading standard imposed by the PSLRA and the burdens plaintiffs face at summary judgment and trial. Those risks were substantial here, given Defendants' denial of any wrongdoing and challenges to every aspect of Plaintiff's case.

While Class Counsel overcame several hurdles in the three years this action has been pending, a number of significant obstacles still stood between the Classes and any recovery. Plaintiff alleged multiple misstatements and corrective disclosures, each with its own risks. Defendants would have challenged each at summary judgment and trial. Even if Plaintiff succeeded in establishing liability, Defendants would have disputed the Classes' entitlement to damages, and armed with their own experts, would have challenged—or sought to exclude entirely—Plaintiff's expert's methodology under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Defendants likewise opposed class certification. Even after the Court certified the Classes, Defendants sought to appeal through a Rule 23(f) petition, raising novel issues regarding traceability. *See Atul Singh Deora v. NantHealth, et al.*, No. 19-80106 (9th Cir.). Defendants' post-certification requests for discovery from international parties reveal that Defendants were not through challenging Plaintiff's ability to proceed on a classwide basis, and had the case continued, would likely have sought to decertify the Classes, or at least narrow the class definitions. (*See* ECF Nos. 102-05.)

These hurdles—which are but a few of the challenges Plaintiff faced at the outset of the litigation and at its resolution—weigh in favor of the requested fee.

C. Class Counsel's skill litigating and settling the Classes' claims further supports the requested fee award.

Courts in the Ninth Circuit recognize that litigating complicated matters favors awarding a larger fee. *See, e.g.*, *In re Heritage Bond Litig.*, 2005 WL 1594403, at *20-21 (33 1/3% fee award appropriate given counsel's skill and experience). The "prosecution and management of a complex national class action requires unique legal skills and abilities." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008) (citation omitted). "This is particularly true in securities cases because the Private Securities Litigation Reform Act makes it much more difficult for securities plaintiffs to get past a motion to dismiss." *Id.* (citation omitted). Here, the Classes were represented by firms recognized as highly skilled in complex litigation. (Joint Decl., ¶¶ 41, 47 & Exs. A & B; Bleichmar Decl., Ex. A.)

Counsel brought their skill, experience, and knowledge to bear for the Classes. This case presented not only difficult issues on the merits, but complex and technical underlying subject matter. Discovery posed unique challenges, too, as much of the key evidence was in the hands of third parties, necessitating a creative discovery plan that featured 24 third-party subpoenas and a public-records request to the state of Utah. (ECF No. 112, ¶ 4.)

The quality of opposing counsel is also relevant to evaluating Class Counsel's skill. *See Wing v. Asarco*, 114 F.3d 986, 989 (9th Cir. 1997) (affirming fee award and noting that the court's evaluation of class counsel's work considered "the quality of opposition counsel and [defendant's] record of success in this type of litigation"). Here, Class Counsel faced Defendants represented by a law firm recognized as among the best nationally for securities litigation. *See In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977) ("[P]laintiffs' attorneys in this class action have been up against established and skillful defense lawyers, and should be compensated accordingly.").

D. Class Counsel carried significant financial burden in prosecuting this case on contingency.

It is an established practice to reward attorneys who assume representation on a contingent basis to compensate them for the risk that they might be paid nothing at all. *See In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994). As noted above, Plaintiff and the Classes faced substantial risk of nonpayment, both at the time of filing and at the time of settlement. In spite of these risks, Class Counsel devoted thousands of hours and advanced whatever expenses necessary to see the case through to a successful outcome—with no guarantee of reimbursement. (Joint Decl., ¶¶ 35-37, 48-52.) In so doing, Class Counsel turned down opportunities to work on other cases to devote the appropriate amount of time, resources, and energy to bring this case to a successful resolution. (*Id.*, ¶ 8.) This factor therefore weighs in favor of the requested fee.

E. Awards in similar cases support the requested fee.

While the Ninth Circuit recognizes a 25% benchmark for common fund settlements, that percentage is on the low end of the attorneys' fees commonly awarded in such cases. Indeed, "in most common fund cases, the award exceeds [the 25%] benchmark." *In re Omnivision*, 559 F. Supp. 2d at 1047; *Cunha v. Hansen Nat. Corp.*, No. 08-cv-1249, 2015 WL 12697627, at *6 (C.D. Cal. Jan. 29, 2015) ("[T]here is reason to conclude that in most common fund cases the award actually *exceeds* th[e 25%] benchmark, at least in securities fraud cases."). Likewise, "typical contingency fee agreements generally provide that class counsel will recover 33% if the case is resolved before trial and 40% if the case is tried." *Fernandez v. Victoria Secret Stores, LLC*, No. 06-cv-4149, 2008 WL 8150856, at *16 n.59 (C.D. Cal. 2008).

Recent securities class actions in this district also show courts awarding 25% (or higher) in fees, often in settlements that deliver a smaller percentage of the alleged damages than the Classes are poised to recover here. For example, in a recent action alleging violations of Section 11 against one of NantHealth's sister

companies, Judge Fitzgerald awarded 25% of the fund in fees, finding the "fee amount [] reasonable and fair, especially considering the high recovery of $12 million." *Sudunagunta v. Nantkwest*, Order on Final Approval and Attorneys' Fees, No. 16-cv-1947, ECF No. 187 at 10 (C.D. Cal. May 13, 2019). Notably, the fund there comprised only 10.5% of the certified class's alleged damages, whereas here, the Classes stand to recover over 40% of their alleged damages. *See* Memorandum in Support of Preliminary Approval, No. 16-cv-1947, ECF No. 172 at 16 (C.D. Cal. Nov. 9, 2018).

F. A lodestar cross-check confirms the reasonableness of the fee request.

Even when primarily relying on the percentage-of-recovery method, a lodestar cross-check may provide additional support for the reasonableness of the fee. *See Vizcaino*, 290 F.3d at 1047. In performing the lodestar cross-check, a lodestar figure is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. *In re Bluetooth*, 654 F.3d at 941. Particularly when used as a cross-check, the Court "need not be as exhaustive as a pure lodestar calculation," but can instead focus on the general question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys. *Fernandez*, 2008 WL 8150856 at *14.

1. Class Counsel reasonably devoted over 5000 hours to prosecuting this case over the last three years.

As counsel's declarations attest, Class Counsel and additional counsel devoted 5159.25 hours to this case over the past three years. (*See* Joint Decl., ¶¶ 35, 42; Bleichmar Decl., ¶ 3.) By way of high-level overview only, counsel's time included:

- A rigorous pre-filing investigation followed by preparation of a detailed consolidated pleading;
- Opposing Defendants' 12(b)(6) motion (on which Plaintiff largely prevailed);
- Preparation of written discovery requests (including multiple sets of document requests, interrogatories, requests for admission, and a 30(b)(6) notice), supported by numerous telephonic and written meet-and-confer efforts;

- Preparation, service, and negotiation of 24 third-party subpoenas;
- Responding to Defendants' discovery requests, producing documents, and preparing both initial Lead Plaintiffs for deposition;
- Taking depositions of Defendants and third parties across the U.S.;
- Reviewing hundreds of thousands of pages of discovery documents produced by Defendants, as well as additional documents produced by third parties;
- Preparing a motion for class certification and working with an expert to provide a report concerning market efficiency;
- Opposing Defendants' Rule 23(f) petition;
- Attending two mediation sessions with Robert A. Meyer, and engaging in numerous, protracted follow-up negotiations under Mr. Meyer's supervision;
- Preparing a comprehensive settlement agreement and exhibits (including the Mailed and Summary Notices) and developing the class notice plan and the plan of allocation; and
- Drafting the preliminary and final approval briefs and supporting papers.

2. Class Counsel's rates are within the prevailing range in the community and have been approved by courts across the country.

In assessing the reasonableness of an attorney's hourly rate, the Court should consider whether the rate is "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *See Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008).

The hourly rates used to calculate counsel's lodestar range from $710 to $910 for partners, $415 to $655 for associates, and $200 to $495 for staff attorneys and summer associates. (Joint Decl., ¶¶ 37, 43; Bleichmar Decl., ¶ 4.) These rates, which are based on a periodic review of the rates charged by other attorneys involved in complex litigation, fall within the range of rates prevailing in the relevant community, and have repeatedly been approved by courts in this district and across the country. (Joint Decl., ¶¶ 40, 46; Bleichmar Decl., ¶¶ 6-7.) The supporting declarations and firm resumes provide additional information on counsel's background and experience. (Joint Decl., Exs. A & B; Bleichmar Decl., Ex. A.)

3. The 1.38 multiplier is comparable to or below multipliers typically approved by courts in this district.

The final step in a lodestar cross-check is to consider applying a multiplier to the base lodestar. Here, taking into account the base lodestar of $2,978,818, the requested fee would compensate counsel at a multiplier of 1.38. Courts recognize that the lodestar may be "multiplied up to four times to yield an enhanced award," especially in cases like this—where protracted litigation led to a strong recovery for the class. *Vizcaino*, 290 F.3d at 1051 (awarding 3.65 multiplier); *see In re Mannkind Corp. Sec. Litig.*, No. 11-cv-0929, 2012 WL 13008151, at *8 (C.D. Cal. Dec. 21, 2012) (awarding 2.3 multiplier); *Buccellato v. AT&T Operations, Inc.*, No. 10-cv-00463, 2011 WL 3348055, at *2 (N.D. Cal. June 30, 2011) (awarding 4.3 multiplier).

The multiplier is likely to decrease as Class Counsel continue to devote time to final settlement approval and administration, any appeals, and Class member contacts in the coming months. As a result, the lodestar cross-check confirms the reasonableness of the requested fee. *See Vizcaino*, 290 F.3d at 1051.

CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF COSTS IS REASONABLE

In addition to the requested attorneys' fee, Class Counsel seek reimbursement for their $349,073.67 in out-of-pocket costs incurred during the litigation. In common fund cases, "[a]ttorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters." *See In re Omnivision Tech.*, 559 F. Supp. 2d at 1048; Fed. R. Civ. P. 23(h). To that end, courts throughout the Ninth Circuit regularly reimburse litigation expenses—including for photocopying, printing, postage, court costs, research on online databases, experts and consultants, and reasonable travel expenses. *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 10-ml-02151, 2013 WL 12327929, at *36 (C.D. Cal. July 24, 2013).

The attached declarations detail the out-of-pocket litigation costs incurred, broken down by category. (Joint Decl., ¶¶ 48-52; Bleichmar Decl., ¶ 9.) These expenditures were necessary to prosecuting the case, especially given its complex nature, which necessitated retention of an expert to opine on market efficiency, create a classwide damages model, and help devise the plan of allocation for the settlement proceeds. (Joint Decl., ¶ 49); *see In re Am. Apparel, Inc. S'holder Litig.*, No. 10-cv-06352, 2014 WL 10212865, at *29 (C.D. Cal. July 28, 2014) (approving reimbursement of expert and consultant costs after finding "[t]o plead causation and damages adequately, and to arrive at an informed assessment concerning the reasonableness of the settlement and create a plan of allocation, class counsel needed to retain damages and loss causation experts"). Such costs are regularly billed to clients in hourly fee cases, and routinely awarded in contingency fee cases. *In re Toyota Motor Corp.*, 2013 WL 12327929, at *36. The Mailed and Summary Notices informed Class members that Class Counsel would seek up to $375,000 in litigation expenses. (ECF No. 112, Exs. A-2 & A-5.)

THE REQUESTED COMPENSATORY AWARD IS APPROPRIATE

Finally, Class Counsel request that the Court approve a compensatory award for the Lead Plaintiff to recognize the time, effort, and expense it incurred pursuing claims against Defendants, which benefitted all Class members. Such awards are common to "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 463. The PSLRA also expressly authorizes the Court to compensate the Lead Plaintiff for its service to the Classes. 15 U.S.C. § 78u–4(a)(4).

In securities actions, class representatives may be compensated for their "reasonable costs and expenses (including lost wages) directly relating to the representation of the class." *Mauss v. NuVasive, Inc.*, No. 13-cv-2005, 2018 WL

6421623, at *10 (S.D. Cal. Dec. 6, 2018) (quoting 15 U.S.C. § 78u—4(a)(4)). When approving such compensatory awards, courts in the Ninth Circuit consider factors including: the actions the plaintiff has taken to protect the interests of the class; the degree to which those actions benefitted the class; and the time and effort the plaintiff expended. *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003).

Here, as conveyed to the Classes in the Mailed and Summary Notices, Lead Plaintiff seeks a compensatory award of $25,000 for Lead Plaintiff SEPTA. (*See* ECF No. 112, Exs. A-2 & A-5.) The attached declaration from Gino Benedetti sets forth the actions taken, and the hours expended, by SEPTA for the benefit of the Classes. (Benedetti Decl., ¶¶ 8-20.) These actions included: reviewing the pleadings; responding to discovery requests, including ESI searches and producing documents; corresponding with Class Counsel to stay apprised of the litigation; and reviewing the settlement documents. (*Id.*, ¶ 8-9, 18-20.) Over the three years this case has been pending, SEPTA's representatives, Mr. Benedetti and Thomas McFadden, spent over 45 hours pursuing the Classes' claims. (*Id.*, ¶¶ 15-20.)

The requested award accords with payments deemed reasonable and approved by district courts in this circuit. *See, e.g.*, *Beaver v. Tarsadia Hotels*, No. 11-cv-1842, 2017 WL 4310707, at *7-8 (S.D. Cal. Sept. 28, 2017) (finding $50,000 awards to four class representatives fair and reasonable "in light of the extraordinary risks they accepted and the time and effort they expended for the benefit of the Class" and collecting cases).

Given SEPTA's level of engagement throughout the litigation, the requested award is warranted.

CONCLUSION

Plaintiff respectfully requests that the Court grant final approval of the proposed settlement and award the requested fees, costs, and compensatory award.

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Respectfully submitted,

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