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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LOU BAKER, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

vs.

SEAWORLD ENTERTAINMENT, INC., et al.,

Defendants.

Case No. 3:14-cv-02129-MMA-AGS

CLASS ACTION

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

Hearing Date: July 22, 2020
Time: 10:00 a.m. PDT
Courtroom: 3D
Judge: Hon. Michael M. Anello

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 22, 2020 at 10:00 a.m., in Courtroom 3D of the United States District Court for the Southern District of California, Edward J. Schwartz United States Courthouse, 221 West Broadway, San Diego, CA 92101, the Honorable Michael M. Anello presiding, Kessler Topaz Meltzer & Check, LLP and Nix Patterson, LLP (together, Court-appointed "Class Counsel"), counsel for plaintiffs Arkansas Public Employees Retirement System and Pensionskassen For Børne-Og Ungdomspædagoger (together, Court-appointed "Class Representatives") and the certified Class, will and hereby do move, pursuant to Rule 23(h) of the Federal Rules of Civil Procedure, for an Order granting an award of attorneys' fees and litigation expenses in the above-captioned securities class action.

This motion is made pursuant to the Court's February 19, 2020 Order Granting Class Representatives' Unopposed Motion for Preliminary Approval of Class Action Settlement and Authorizing Dissemination of Notice of the Settlement to the Class (ECF No. 518) ("Preliminary Approval Order") and is based on (i) this Notice of Motion; (ii) the supporting Memorandum of Points and Authorities in Support of Class Counsel's Motion for an Award of Attorneys' Fees and Litigation Expenses submitted herewith; (iii) the accompanying Joint Declaration of Joshua E. D'Ancona and Jeffery J. Angelovich in Support of (A) Class Representatives' Motion for Final Approval of Settlement and Plan of Allocation; and (B) Class Counsel's Motion for an Award of Attorneys' Fees and Litigation Expenses, and the exhibits attached thereto; (iv) the pleadings and records on file in this action; and (v) other such matters and argument as the Court may consider at the hearing of this motion.

Class Counsel are not aware of any opposition to the motion. Pursuant to the Preliminary Approval Order, any objection to the request for attorneys' fees and litigation expenses must be filed on or before July 1, 2020. A proposed Order will be submitted with Class Counsel's reply brief, which will be filed on July 15, 2020, after the deadline for objections has passed.

DATED: June 17, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2020, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system. Based upon the records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Joshua E. D'Ancona
Joshua E. D'Ancona

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LOU BAKER, Individually and on Behalf of All Others Similarly Situated,

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SEAWORLD ENTERTAINMENT, INC., et al.,

Defendants.

Case No. 3:14-cv-02129-MMA-AGS

CLASS ACTION

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND LITIGATION EXPENSES

Hearing Date: July 22, 2020
Time: 10:00 a.m. PDT
Courtroom: 3D
Judge: Hon. Michael M. Anello

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I. PRELIMINARY STATEMENT

Following more than five years of litigation and just days before a rare securities class action trial was scheduled to commence, Class Counsel successfully negotiated a settlement of the above-captioned action ("Action") with SeaWorld Entertainment, Inc. ("SeaWorld" or the "Company"), The Blackstone Group L.P., now known as The Blackstone Group Inc. ("Blackstone"), James Atchison, James M. Heaney, and Marc Swanson (collectively, "Defendants").[1] If approved by the Court, the Settlement will resolve this contentious and complex case in its entirety in exchange for $65 million in cash for the Class. The Settlement not only eliminates the substantial risks Class Representatives faced in taking the Action to trial, but also represents approximately 14% of the Class's estimated potential aggregate damages—a percentage exceeding the median recovery in recent securities class actions with similar damages by nearly ***three times***.[2] By any measure, the Settlement is an excellent result for the Class.

As detailed in the Joint Declaration, Class Counsel vigorously pursued this Action from its outset and were fully prepared to go to trial when the Settlement was reached. Among their efforts, Class Counsel directed a far-ranging investigation, resulting in two detailed complaints (and two rounds of motion to dismiss briefing), pursued myriad sources for document discovery, including propounding at least 23

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[1] All capitalized terms used herein have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated February 10, 2020 (ECF No. 516-3) ("Stipulation") or in the Joint Declaration of Joshua E. D'Ancona and Jeffrey J. Angelovich in Support of (A) Class Representatives' Motion for Final Approval of Settlement and Plan of Allocation; and (B) Class Counsel's Motion for an Award of Attorneys' Fees and Litigation Expenses ("Joint Declaration" or "Joint Decl."), filed herewith. Citations to "¶ __" herein refer to paragraphs in the Joint Declaration and citations to "Ex. __" herein refer to exhibits to the Joint Declaration.

[2] As set forth in § II.D.1 below, Class Representatives' damages expert estimated potential aggregate damages in the Action to be $465 million. *See* Laarni T. Bulan & Laura E. Simmons, *Securities Class Action Settlements: 2019 Review and Analysis*, Cornerstone Research, at 6 (2020), www.cornerstone.com/Publications/Reports/Securities-Class-ActionSettlements-2019-Review-and-Analysis (reporting median securities class action settlement amount for 2019 was 4.8% of estimated damages for cases with estimated damages between $250 and $499 million).

document subpoenas on third parties, and litigated as many as eight fact discovery-related disputes with Defendants through briefing and, in some cases, oral argument. As a result of these efforts, Class Counsel received over 750,000 pages of documents (in addition to significant amounts of electronic data) that were reviewed and analyzed in connection with the Action. Class Counsel also: (i) took the depositions of 27 fact witnesses—including the depositions of all three individual Defendants, a Blackstone executive and former SeaWorld director, and two corporate representatives of SeaWorld under Federal Rule 30(b)(6); (ii) participated in additional depositions of third parties noticed by Defendants; and (iii) defended the depositions of both Class Representatives. Class Counsel consulted extensively with experts and consultants in the areas of market efficiency, damages, loss causation, and issues of data analysis related to attendance drivers performed (or not performed) by Defendants, assisted in the preparation of five expert reports, and took or defended a total of seven expert depositions. ¶¶ 19-48.

In addition to obtaining certification of the Class and defeating Defendants' subsequent Rule 23(f) petition to the Ninth Circuit, Class Counsel defeated in its entirety Defendants' motion for summary judgment, which challenged every substantive element of the Class's claims. Class Counsel also opposed three *Daubert* motions seeking to exclude Class Representatives' expert witnesses, defeating two. Finally, Class Counsel undertook exhaustive preparations for trial, including conducting a two-day mock jury and focus group in December 2019 that provided vital insight into the strengths and weaknesses of Class Representatives' claims. As trial drew near, Class Counsel worked closely with a jury consultant to prepare and exchange witness and exhibit lists, prepare direct and cross-examinations of all potential trial witnesses, create numerous demonstratives to be used at trial, and craft questions for inclusion in a jury questionnaire. In the midst of these efforts, Class Counsel continued their settlement discussions with Defendants' Counsel in a final attempt to resolve the Action before trial and participated in a second formal mediation

with Mr. Jed D. Melnick, Esq. of JAMS and The Weinstein Melnick Team in January 2020. *See* ¶¶ 49-77. The Settlement was reached shortly thereafter.[3]

Class Counsel assumed all risks in litigating the Action by taking this case on a fully contingent basis and devoted substantial resources to prosecuting the Action against well-resourced opposing counsel in order to achieve the Settlement. Class Counsel deployed a large, extremely dedicated group of professionals to develop, support, and aggressively pursue the Action, including not only skilled litigators in the area of securities litigation, but also highly experienced investigators, paralegals, administrative staff, and others. In total, Class Counsel collectively worked nearly 49,000 hours over the course of more than five years on this complex litigation and laid out over $2.1 million of their own money, with no guarantee of ever being paid.

The amount of quality legal work Class Counsel dedicated to the prosecution of this Action—and the significant risk they took on by prosecuting and funding this Action with no guarantee of recovery—justifies a fee of 22% of the Settlement Fund. As discussed below, this fee request is: (i) below the 25% "benchmark" for attorneys' fee awards in the Ninth Circuit; (ii) consistent with or below fees awarded in other securities and complex class actions; (iii) consistent with the agreements Class Representatives entered into with Class Counsel at the outset of the Action; and (iv) well below Plaintiffs' Counsel's[4] lodestar, resulting in a fractional or "negative" multiplier of 0.60. Thus, despite the substantial contingency risks Class Counsel faced (which would otherwise justify a substantial positive multiplier on their lodestar), they

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[3] The Joint Declaration is an integral part of this submission and, for the sake of brevity herein, the Court is respectfully referred to it for a detailed description of, among other things: the nature of the claims asserted (¶¶ 13-18); the procedural history of the Action (¶¶ 19-72); the Settlement negotiations (¶¶ 73-80); the risks of continued litigation (¶¶ 81-96); and the services Plaintiffs' Counsel provided for the benefit of the Class (¶¶ 6, 19-80).

[4] Plaintiffs' Counsel refers collectively to: (i) Class Counsel Kessler Topaz Meltzer & Check, LLP and Nix Patterson, LLP; (ii) Liaison Counsel Noonan Lance Boyer & Banach LLP; and (iii) additional counsel for Class Representatives, Keil & Goodson P.A. and Grant & Eisenhofer P.A.

are only requesting a fee equal to 60% of the value of the time Plaintiffs' Counsel devoted to the case—a significant discount to their lodestar.

Class Representatives Arkansas Public Employees Retirement System ("APERS") and Pensionskassen For Børne-Og Ungdomspædagoger ("PBU"), two sophisticated institutional investors that have actively supervised this Action since their appointment as Lead Plaintiffs in December 2014, have evaluated Class Counsel's fee request—a request made pursuant to retention agreements they entered into with Class Counsel at the outset of the Action—and have endorsed it as fair and reasonable.[5] The reaction of the Class to date also supports the requests for attorneys' fees and Litigation Expenses. Pursuant to the Court's Preliminary Approval Order and March 16 Notice Order (ECF Nos. 518 & 520), 16,597 Postcard Notices and 4,244 Notices have been disseminated to potential Class Members and Nominees, and the Summary Notice was published in *Investor's Business Daily* and transmitted over *PR Newswire*.[6] The Postcard Notice, along with the long-form Notice posted on the Settlement Website, advises recipients that Class Counsel would be applying to the Court for an award of attorneys' fees in an amount not to exceed 22% of the Settlement Fund, plus Litigation Expenses in an amount not to exceed $2.8 million, plus interest. Barrero Decl., Exs. A & B. The notices further inform Class Members that they can object to these requests until July 1, 2020. *Id*. While the deadline to object has not yet passed, to date, no objections to the attorneys' fees or Litigation Expenses set forth in the notices have been filed. ¶¶ 12, 109.[7]

[5] *See* Declaration of Laura Mack Gilson submitted on behalf of APERS ("APERS Decl."), at ¶¶ 5-8; and Declaration of Carsten Warren Petersen submitted on behalf of PBU ("PBU Decl."), at ¶¶ 5-8, attached as Exhibits 1 and 2 to the Joint Declaration.

[6] *See* Declaration of Ed Barrero on behalf of the Court-authorized Claims Administrator Epiq Class Action & Claims Solutions, Inc. ("Epiq"), at ¶¶ 12, 14, attached as Exhibit 3 to the Joint Declaration.

[7] Class Counsel will address any objections received in their reply, to be filed on July 15, 2020.

For the reasons discussed herein, Class Counsel respectfully submit that the requested fee is fair and reasonable, particularly in light of the favorable recovery obtained for the Class and the fact that the requested fee is less than the Ninth Circuit's "benchmark" fee award, as well as considerably less than the lodestar incurred by Plaintiffs' Counsel in litigating the Action. Class Counsel also respectfully submit that the Litigation Expenses for which they seek reimbursement were reasonable and necessary for the successful prosecution of the Action and that the requests for reimbursement to Class Representatives APERS and PBU pursuant to the PSLRA for the time they dedicated to the Action on behalf of the Class are likewise reasonable and appropriate. Accordingly, Class Counsel request that their Motion for an Award of Attorneys' Fees and Litigation Expenses be granted in full.

II. CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES IS REASONABLE AND SHOULD BE APPROVED

A. Class Counsel are Entitled to a Reasonable Fee from the Common Fund Created by the Settlement

Courts in this Circuit recognize 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 (9th Cir. 1977); *accord Stetson v. Grissom*, 821 F.3d 1157, 1165 (9th Cir. 2016).[8] Further, the Supreme Court "has recognized consistently 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 policy rationale for awarding attorneys' fees from a common fund is that "those who benefit from the creation of the fund should share the wealth with the lawyers

[8] Unless otherwise noted, all internal citations and quotations have been omitted and emphasis has been added.

whose skill and effort helped create it." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("*WPPSS*").

Courts have also recognized that, in addition to providing just compensation, awards of fair attorneys' fees from a common fund ensure that "competent counsel continue to be willing to undertake risky, complex, and novel litigation." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000). Fee awards in meritorious cases promote private enforcement of, and compliance with, the federal securities laws, which "seek to maintain public confidence in the marketplace. They do so by deterring fraud, in part, through the availability of private securities fraud actions." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345 (2005).

B. The Court Should Calculate Attorneys' Fees as a Percentage of the Common Fund

Where a settlement produces a common fund, courts in this Circuit have discretion to employ either the percentage-of-recovery method or the lodestar method in awarding attorneys' fees. *See WPPSS*, 19 F.3d at 1296; *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). However, the percentage-of-recovery method has become the prevailing method used in this Circuit. *See, e.g., Glass v. UBS Fin. Servs., Inc.*, 331 F. App'x 452, 456-57 (9th Cir. 2009) (affirming district court's use of percentage-of-recovery method to award 25% fee); *Ellison v. Steven Madden, Ltd.*, 2013 WL 12124432, at *8 (C.D. Cal. May 7, 2013) (finding "use of the percentage method" to be the "dominant approach in common fund cases"); *In re OmniVision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2007) (same).

Courts have found the percentage-of-recovery method for awarding attorneys' fees preferable in cases with a common-fund recovery because it: (i) parallels the use of percentage-based contingency fee contracts, which are the norm in private litigation; (ii) aligns the lawyers' interests with those of the class in achieving the maximum possible recovery; and (iii) reduces the burden on the court by eliminating the detailed and time-consuming lodestar analysis. *See OmniVision*, 559 F. Supp. 2d at 1046; *Vinh*

Nguyen v. Radient Pharm. Corp., 2014 WL 1802293, at *9 (C.D. Cal. May 6, 2014). In addition, the use of the percentage-of-recovery method comports with the language of the PSLRA, which states that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff shall 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 In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 188 n.7 (3d Cir. 2005) ("[T]he PSLRA has made percentage-of-recovery the standard for determining whether attorney's fees are reasonable").

C. A Fee of 22% of the Settlement Fund Is Reasonable Under Either the Percentage-of-Recovery Method or Lodestar Method

In this case, whether assessed under the prevailing percentage-of-recovery method or the lodestar method, the 22% fee request—which represents a "negative" lodestar multiplier of approximately 0.60—is fair and reasonable.

1. The Fee Request Is Reasonable Under the Percentage Method

Class Counsel respectfully submit that the Court should award a fee based on a percentage of the common fund obtained. The Ninth Circuit has established 25% as the "benchmark" for percentage fee awards in common-fund cases, such as this one. *See HCL Partners Ltd. P'ship v. Leap Wireless Int'l, Inc.*, 2010 WL 4156342, at *2 (S.D. Cal. Oct. 15, 2010) (Anello, J.); *see also Fischel v. Equitable Life Assurance Soc'y*, 307 F.3d 997, 1006 (9th Cir. 2002); *Vizcaino*, 290 F.3d at 1047-48; *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). The 25% percentage fee benchmark can "be adjusted upward or downward to account for any unusual circumstances involved in [the] case," *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989), and, indeed, "in most common fund cases, the award exceeds that benchmark." *OmniVision*, 559 F. Supp. 2d at 1047; *accord Jiangchen v. Rentech, Inc.*, 2019 WL 5173771, at *9 (C.D. Cal. Oct. 10, 2019) ("The actual percentage varies depending on the facts of each case, but in most common fund cases, the award exceeds that benchmark.").

Here, the 22% fee requested by Class Counsel is below the 25% benchmark and well within the range of percentage fees that have been awarded in securities class actions and other complex litigation in this Circuit and this Court. *See, e.g.*, *HCL Partners*, 2010 WL 4156342, at *4 (awarding 25% of $13.75 million settlement fund) (Anello, J.); *In re Apollo Grp. Inc. Sec. Litig.*, 2012 WL 1378677, at *7 (D. Ariz. Apr. 20, 2012) (awarding 33.3% of $145 million settlement fund); *In re Mercury Interactive Corp. Sec. Litig.*, 2011 WL 826797, at *3 (N.D. Cal. Mar. 3, 2011) (awarding 22% of $117.5 million settlement fund); *Vizcaino*, 290 F.3d at 1051 (affirming award of 28% of $97 million settlement fund); *Connecticut Retirement v. Amgen, Inc. et al.*, No. 2:07-cv-02536-PS-PLA, ECF No. 602 (C.D. Cal. Apr. 27, 2016) (awarding 25% of $95 million settlement fund); *In re Verisign, Inc. Sec. Litig.*, C 02-2270-JW (PVT), ECF No. 528 (N.D. Cal. Apr. 24, 2007) (awarding 25% of $78 million settlement fund); *In re Hewlett-Packard Co. Sec. Litig.*, CV 11-1404 AG (RNBx), ECF No. 167 (C.D. Cal. Sept. 15, 2014) (awarding 25% of $57 million settlement fund); *In re: SanDisk LLC Secs. Litig.*, No. 3:15-cv-01455-VC, ECF No. 284 (N.D. Cal. Oct. 23, 2019) (awarding 25% of $50 million settlement fund); *In re Questcor Secs. Litig.*, No. 8:12-cv-01623-DMG-JPR, ECF No. 255 (C.D. Cal. Sept. 21, 2015) (awarding 22% of $38 million settlement fund); *Schulein, et al. v. Petroleum Development Corp., et al.*, No. 8:11-cv-01891-AG-AN, ECF No. 265 (C.D. Cal. Mar. 16, 2015) (awarding 30% of $37.5 million settlement fund); *Franke v. Bridgeport Education, Inc., et al.*, No. 3:12-cv-01737-JM-JLB, ECF No. 107 (S.D. Cal. April 27, 2016) (awarding 25% of $15.5 million settlement fund).

2. The Fee Request is Reasonable Under a Lodestar Cross-Check

To ensure the reasonableness of a fee awarded under the percentage-of-recovery method, courts in this Circuit may cross-check the proposed fee award against counsel's lodestar, although such a cross-check is not required. *See In re Amgen Inc. Sec. Litig.*, 2016 WL 10571773, at *9 (C.D. Cal. Oct. 25, 2016) ("Although an analysis of the lodestar is not required for an award of attorneys' fees in the Ninth Circuit, a

cross-check of the fee request with a lodestar amount can demonstrate the fee request's reasonableness."); *HCL Partners*, 2010 WL 4156342, at *2 (noting that "lodestar analysis is not necessary when the requested fee is within the accepted benchmark").

As detailed herein and in the Joint Declaration, Plaintiffs' Counsel exerted a tremendous amount of effort in advancing this Action over the past five-plus years in the face of an aggressive and determined defense. In total, Plaintiffs' Counsel have spent over 49,185 hours of attorney and other professional support staff time prosecuting the Action for the benefit of the Class through May 31, 2020. ¶¶ 110, 121. Plaintiffs' Counsel's lodestar, derived by multiplying the hours spent on the Action by each attorney and professional support staff employee by their hourly rates, is $23,765,584.25. *See id*.[9]

Accordingly, the requested fee of 22% of the Settlement Fund, which equates to $14,300,000 (before interest), represents a multiplier of 0.60 on Plaintiffs' Counsel's total lodestar. In other words, the requested fee represents only 60% of the lodestar value of the time that Plaintiffs' Counsel dedicated to the Action. This "negative" or fractional multiplier is well below the range of multipliers—often between one and

[9] It is well established and appropriate to calculate counsel's lodestar based on current, rather than historical rates, as a method of compensating for the delay in payment and the loss of interest on the funds. *See Missouri v. Jenkins*, 491 U.S. 274, 284 (1989); *Fischel*, 307 F.3d at 1010; *WPPSS*, 19 F.3d at 1305; *White v. Experian Info. Solutions, Inc.*, 2018 WL 1989514, at *15 (C.D. Cal. Apr. 6, 2018) ("Courts in this Circuit regularly apply current billing rates in evaluating fee requests in multi-year litigation to account for the delay in payment."). The Fee and Expenses Declarations submitted on behalf of the Plaintiffs' Counsel firms (*see* Exs. 4 through 8 to the Joint Declaration) include a description of the legal background and experience of Plaintiffs' Counsel, which support the hourly rates submitted. Plaintiffs' Counsel's hourly rates are fair and reasonable for this legal market. *See, e.g., In re Banc of California Secs. Litig.*, No. SACV 17-00118 AG (DFMx), ECF Nos. 603 & 613 (C.D. Cal. Mar. 16, 2020) (approving fee request reporting hourly rates of $800 to $1,150 per hour for partners and $360 to $1,030 per hour for other attorneys). By way of comparison, Simpson Thacher & Bartlett LLP, one of the Defendants' Counsel firms in this Action, reported hourly rates ranging from $540 to $1,085 per hour for associates and as high as $1,550 per hour for partners in a recent bankruptcy filing. *See In re: Orchard Acquisition Co., LLC, et al.*, Case No. 17-12914 (KG), ECF No. 194, (Bankr. Del. Mar. 16, 2018). These rates are in line with, or exceed, Plaintiffs' Counsel's rates.

four—commonly awarded in comparable litigation. *See Vizcaino*, 290 F.3d at 1051 n.6 (finding that lodestar multipliers ranging from 1 to 4 are common); *Hopkins v. Stryker Sales Corp.*, 2013 WL 496358, at *4 (N.D. Cal. Feb. 6, 2013) ("Multipliers of 1 to 4 are commonly found to be appropriate in complex class action cases.").

Indeed, in cases of this nature, fees representing multiples well above the lodestar are regularly awarded to reflect the contingency fee risk and other relevant factors. *See Vizcaino*, 290 F.3d at 1051 (noting "courts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases" and affirming a fee representing a 3.65 multiplier); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *26 (S.D.N.Y. Nov. 8, 2010) ("a positive multiplier is typically applied to the lodestar in recognition of the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors"). Here, despite the existence of numerous substantial litigation risks from the outset, Class Counsel are seeking a fee that is substantially less than the lodestar value of their time. Courts repeatedly recognize that a percentage fee request that is less than counsel's lodestar provides strong confirmation of the reasonableness of the award. *See, e.g.*, *Amgen*, 2016 WL 10571773, at *9 ("Courts have recognized that a percentage fee that falls below counsel's lodestar strongly supports the reasonableness of the award"); *Flag Telecom*, 2010 WL 4537550, at *26 ("Lead Counsel's request for a percentage fee representing a significant discount from their lodestar provides additional support for the reasonableness of the fee request."); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 515 (S.D.N.Y. 2009) (finding "no real danger of overcompensation" given that the requested fee represented a discount to counsel's lodestar).

In sum, Class Counsel's requested fee award is reasonable, justified, and well within the range of what courts in this Circuit regularly award in class actions, whether calculated as a percentage-of-recovery or as a cross-check on counsel's lodestar.

Moreover, as discussed below, each of the additional factors considered by courts in the Ninth Circuit also weighs in favor of finding the requested fee reasonable.

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

Courts in this Circuit also consider the following factors when determining whether a fee is fair and reasonable: (1) results achieved; (2) risks of litigation; (3) skill required and quality of work; (4) contingent nature of the fee and financial burden carried by the plaintiffs; (5) awards made in similar cases; and (6) reaction of the class. *See Vizcaino*, 290 F.3d at 1048-50.[10] Each of the *Vizcaino* factors confirms that the requested 22% fee is fair and reasonable.

1. Results Achieved

Courts consistently recognize that the result achieved is an important factor in determining an appropriate fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (noting "the most critical factor is the degree of success obtained"); *Vizcaino*, 290 F.3d at 1048 (noting "[e]xceptional results are a relevant circumstance" in awarding attorneys' fees); *In re DJ Orthopedics, Inc. Sec. Litig.*, 2004 WL 1445101, at *7 (S.D. Cal. June 21, 2004) (same).

Here, the Settlement represents a material portion of the Class's potential aggregate damages in the Action. As estimated by Class Representatives' damages expert, the maximum class-wide damages in the Action are approximately $465 million (assuming full liability and damages). ¶¶ 11, 112. Thus, the $65 million Settlement represents a recovery of approximately 14% of estimated potential maximum damages. This result far exceeds the median securities class action recovery as a percentage of damages, which was 4.8% in 2019. *See supra* n.2; *see also Rentech*, 2019 WL 5173771, at *9 (finding "10% recovery of estimated damages [to be] a

[10] "The relative degree of importance to be attached to any particular factor will depend upon…the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Atlas v. Accredited Home Lenders Holding Co.*, 2009 WL 3698393, at *3 (S.D. Cal. Nov. 4, 2009).

favorable outcome in light of the challenging nature of securities class action cases"); *OmniVision*, 559 F. Supp. 2d at 1046 (finding settlement with a recovery of "approximately 9% of the possible damages, which is more than triple the average recovery in securities class action settlements . . . weighs in favor of granting the requested 28% fee").[11] Had the Action continued to trial, Defendants would have challenged damages, arguing they were significantly less than $465 million, or even zero. If Defendants' challenges prevailed, the Class's damages would be substantially reduced or eliminated entirely. Any appeal following a win by Class Representatives at trial similarly would have threatened to reduce any damages awarded.

It also bears noting the numerous interim successes achieved by Class Counsel throughout the course of this Action, which paved the way for the Settlement. As noted above and detailed in the Joint Declaration, Class Counsel defeated Defendants' motion to dismiss the operative Second Amended Complaint, as well as successfully obtained certification of the Class over Defendants' vigorous opposition (and defended that certification win by fending off Defendants' Rule 23(f) petition to the Ninth Circuit). ¶¶ 29-31, 49-55. In addition, based on their discovery efforts, Class Counsel were able to marshal a compelling evidentiary record at summary judgment which provided the foundation for opposing (and defeating) Defendants' comprehensive Rule 56 motion. ¶¶ 32-42, 59-63. Put simply, Class Counsel devoted an enormous amount of effort to prosecuting this case.

[11] *See also In re Biolase, Inc. Sec. Litig.*, 2015 WL 12720318, at *4 (C.D. Cal. Oct. 13, 2015) (finding settlement representing "approximately 8% of the maximum recoverable damages . . . .equals or surpasses the recovery in many other securities class actions"); *Destefano v. Zynga, Inc.*, 2016 WL 537946, at *11 (N.D. Cal. Feb. 11, 2016) ("Settlement Amount represent[ing] approximately 14 percent of likely recoverable aggregate damages at trial" was "well within the range of percentages approved in other securities-fraud related actions . . ."); *McPhail v. First Command Fin. Planning, Inc.*, 2009 WL 839841, at *5 (S.D. Cal. Mar. 30, 2009) (finding $12 million settlement recovering 7% of estimated damages fair and adequate).

Accordingly, the recovery obtained for the Class in the face of the significant litigation risks described below and in the Joint Declaration strongly supports approval of the fee request.

2. Risks of Litigation

Another factor for courts to consider in determining an appropriate fee award is the risks of litigation. *Vizcaino*, 290 F.3d at 1048 (noting "[r]isk is a relevant circumstance" in awarding attorneys' fees); *Rentech*, 2019 WL 5173771, at *9 ("The risk that further litigation might result in Plaintiffs not recovering at all, particularly a case involving complicated legal issues, is a significant factor in the award of fees."); *Destefano*, 2016 WL 537946, at *17 (approving fee request and noting "as to the second factor . . . the risks associated with this case were substantial given the challenges of obtaining class certification and establishing the falsity of the misrepresentations and loss causation").[12] As the Court is well aware, this Action involved a number of complex and disputed questions of law and fact. While Class Representatives and Class Counsel believe in the merits of their claims, there were unquestionably substantial challenges to succeeding at trial. ¶¶ 81-96. *See generally In re Portal Software, Inc. Sec. Litig.*, 2007 WL 4171201, at *3 (N.D. Cal. Nov. 26, 2007) (noting "significant risks" the PSLRA poses "to plaintiffs' ability to survive . . . summary judgment and prevail[] at trial[.]").

Throughout the Action, Class Representatives faced significant risks with respect to establishing Defendants' liability. At trial, Defendants would have argued, as they did at the motion to dismiss and summary judgment stages, that the statements at issue in the Action were not false at the time they were made and that Class

[12] For purposes of reviewing the reasonableness of a fee award, the Court should also consider all risks the litigation presented from the outset. *See Fischel*, 307 F.3d at 1009 ("there is no dispute that a court should consider risk at the 'outset' of litigation," which the Ninth Circuit has determined to be the point in time "when an attorney determines that there is merit to the client's claim and elects to pursue the claim on the client's behalf").

Representatives would be unable to establish that Defendants did not legitimately believe the truth of such statements. ¶¶ 89-90. At trial, a jury would be asked to evaluate Class Representatives' claims that the alleged misstatements were materially false or misleading based on internally-recognized business impacts and a failure to test for *Blackfish* impact and were not, as Defendants would argue, a normal feature of SeaWorld's existence as a longstanding target of animal activists. *Id*. Defendants would also claim that the asserted impacts were small or immaterial relative to the overall size of the Company, and that the business partnerships and consumer communications Class Representatives point to in further support of their claims were mere noisy outliers. *Id*. Defendants would further emphasize that the SeaWorld-branded parks set revenue records in the middle of the Class Period, seemingly contradicting Class Representatives' theory of clear and sustained impact. *Id*. With respect to scienter, Defendants would continue to assert that their conduct was not reckless and deny that they downplayed or ignored anything of significance, especially relating to impact from *Blackfish*. ¶ 90.

In addition, there were considerable challenges to Class Representatives' ability to prove loss causation and damages. For example, Defendants would continue to assert that the price decline in SeaWorld common stock on the alleged corrective disclosure date was caused by factors unrelated to the alleged fraud. ¶ 93. Defendants also would argue the "truth" regarding their alleged fraud was understood prior to the end of the Class Period, and, alternatively, that the disclosure at issue addressed only the final few months of the Class Period, not the full 11.5 months and thus, did not "correct" the alleged misstatements from the entire Class Period. *Id*. Of course, to establish the Class's full claimed amount of damages, Class Representatives would need to show that Defendants' alleged fraud affected SeaWorld common stock throughout the entire Class Period. ¶ 94. Ultimately, the Parties' arguments on loss causation and damages would have hinged upon extensive expert testimony at trial. As the Court is doubtless aware, one can never comfortably predict how a jury or court

will weigh the testimony of competing experts. *See Cendant*, 264 F.3d at 239 ("establishing damages at trial would lead to a 'battle of experts' . . . with no guarantee whom the jury would believe"); *see also Radient Pharm.*, 2014 WL 1802293, at *2 (approving requested attorneys' fees and noting particular challenges of proving and calculating damages).

Finally, Class Representatives faced additional risks in taking the Action to trial such as: (i) the fact that every witness at trial—aside from Class Representatives' own experts—would be hostile; (ii) the difficulties in explaining to a jury complex concepts related to securities fraud, stock markets, and economic damages; and (iii) the unique risk of litigating against a well-regarded San Diego entity in San Diego. ¶¶ 81, 95. Moreover, a single juror with entrenched sympathies to SeaWorld or antipathies toward, e.g., class action lawsuits in general, could defeat a unanimous jury verdict in favor of Class Representatives. ¶ 95.

Even if all of these significant obstacles to proving liability and damages at trial had been surmounted, Class Representatives would have faced inevitable appellate proceedings, which would have tied up any recovery for years and could have eliminated it entirely. The Settlement avoids all of the foregoing risks (and others) and secures a substantial recovery for the Class. Thus, this factor supports the fee request.

3. Skill Required and Quality of Work

"The experience of counsel is also a factor in determining the appropriate fee award." *In re Heritage Bond Litig.*, 2005 WL 1594389, at *12 (C.D. Cal. June 10, 2005). Indeed, "[t]he prosecution and management of a complex national class action requires unique legal skills and abilities." *OmniVision*, 559 F. Supp. 2d at 1047.

Class Counsel have extensive experience prosecuting securities class actions and other complex litigation throughout the country.[13] Their experience and skill was

[13] *See* firm resumes for Kessler Topaz and Nix Patterson at Exs. 4-D and 5-C to the Joint Declaration, respectively. The additional law firms comprising Plaintiffs'

critical to the prosecution of this Action for more than five years to a successful resolution. Defendants prevailed entirely on their first motion to dismiss. ¶ 27. Despite this, Class Counsel amended their claims and defeated Defendants' second motion to dismiss and went on to, among other successes, obtain certification of the Class, defeat Defendants' motion for summary judgment in its entirety, and secure a favorable recovery for the Class.

The quality of opposing counsel is also important in evaluating the quality of services rendered by Class Counsel. *See, e.g., Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 449 (E.D. Cal. 2013). Defendants in this case were represented by Simpson Thacher & Bartlett LLP and Katten Muchin Rosenman LLP, both nationally prominent defense firms that spared no effort or cost in vigorously defending their clients. ¶ 123. Notwithstanding this formidable opposition, Class Counsel's ability to present a strong case and to demonstrate their willingness and ability to prosecute the Action through trial and inevitable appeals helped secure the Settlement. Accordingly, this factor supports Class Counsel's fee request.

4. Contingent Nature of the Fee and Financial Burden Carried by the Plaintiffs

Class Counsel undertook this Action on a contingent fee basis, assuming a substantial risk that the Action would yield no recovery and leave counsel uncompensated. The Ninth Circuit has confirmed that a determination of a fair and reasonable fee must include consideration of the contingent nature of the fee.[14] It is an established practice in the private legal market to reward attorneys for taking on the serious risk of non-payment by permitting a fee award that reflects a premium to normal hourly billing rates. *See In re Nuvelo, Inc. Sec. Litig.*, 2011 WL 2650592, at *2;

Counsel are also experienced in complex litigation. *See* Exs. 6-C, 7-C, and 8-C to the Joint Declaration.

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

Destefano, 2016 WL 537946, at *18 (noting that "when counsel takes on a contingency fee case and the litigation is protracted, the risk of non-payment after years of litigation justifies a significant fee award"). That is not the case here, given that the requested fee represents a *discount* to counsel's lodestar. *See, e.g., Flag Telecom*, 2010 WL 4537550, at *26.

Class Counsel received no compensation during the more than five years in which this Action has been pending. During that time, Plaintiffs' Counsel invested over 49,185 hours for a total lodestar of $23,765,584.25, and incurred expenses of over $2.1 million in prosecuting the case. *See* ¶¶ 113-17, 121. Additional further work in connection with the Settlement and claims administration will still be required. Any fee award has always been at risk, and completely contingent on the result achieved and on this Court's discretion in awarding fees and expenses. Unlike defense counsel—who typically receive payment on a timely and regular basis throughout a case, whether they win or lose—Class Counsel carried the significant risk of not only funding the expenses of this Action, but also the risk that they would receive no compensation whatsoever unless they prevailed at trial. Accordingly, the contingent nature of the representation, and the burden carried by Class Counsel, support the requested fee.

5. The Requested Fee Is Consistent with Or Less Than Awards Made in Similar Cases

Class Counsel's fee request is well within the range of what courts in this Circuit commonly award in complex securities class actions. To avoid repetition, Class Counsel refer the Court to Part II.C.1, *supra*, which explains that the 22% fee request is below the Ninth Circuit's 25% "benchmark" as well as fee percentages regularly awarded in comparable complex litigation; and Part II.C.2, *supra*, which explains that the 22% fee request represents a multiplier of 0.60 on Plaintiffs' Counsel's lodestar, well below the typical lodestar multiplier in cases of this nature.

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

The reaction of the Class to date also supports the requested fee. To date, 16,597 Postcard Notices and 4,244 Notices have been mailed to those potential Class Members who originally received the Class Notice and who did not opt out as well as Nominees, and any new potential Class Members that were identified by Nominees. The Postcard Notice and Notice posted on wwwSeaWorldSecuritiesLitigation.com inform potential Class Members of Class Counsel's intent to apply to the Court for an award of attorneys' fees in an amount not to exceed 22% of the Settlement Fund and reimbursement of Litigation Expenses in an amount not to exceed $2.8 million, plus interest. *See* Ex. 3, Ex. A & Ex. B. While the time to object to Class Counsel's request for attorneys' fees and Litigation Expenses does not expire until July 1, 2020, to date, no objections have been filed. ¶¶ 12, 109. Should any objections be received, Class Counsel will address them in their reply.

In addition, as noted above, the two large institutional investor Class Representatives have approved Class Counsel's request for attorneys' fees and Litigation Expenses. *See* APERS Decl. ¶ 10; PBU Decl. ¶ 10. *See In re Lucent Techs. Inc. Sec. Litig.*, 327 F. Supp. 2d 426, 442 (D.N.J. 2004) ("Significantly, the Lead Plaintiffs, both of whom are institutional investors with great financial stakes in the outcome of the litigation, have reviewed and approved Lead Counsel's fees and expenses request."); *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 272 (S.D.N.Y. 2012) ("[W]hen class counsel in a securities lawsuit have negotiated an arm's-length agreement with a sophisticated lead plaintiff possessing a large stake in the litigation, and when that lead plaintiff endorses the application following close supervision of the litigation, the court should give the terms of that agreement great weight."). This fact provides additional support for the fee.

III. PLAINTIFFS' COUNSEL'S LITIGATION EXPENSES ARE REASONABLE AND SHOULD BE APPROVED

Class Counsel also request reimbursement of $2,104,370.19 from the Settlement Fund for expenses Plaintiffs' Counsel reasonably incurred in initiating, prosecuting, and resolving the Action. These expenses are properly recovered by counsel. *See HCL Partners*, 2010 WL 4156342, at *2 ("Expenses are compensable in a common fund case where the particular costs are of the type that 'would normally be charged to a fee paying client.'") (citing *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)); *see also Destefano*, 2016 WL 537946, at *22 ("[C]ourts throughout the Ninth Circuit regularly award litigation costs and expenses – including photocopying, printing, postage, court costs, research on online databases, experts and consultants, and reasonable travel expenses – in securities class actions, as attorneys routinely bill private clients for such expenses in non-contingent litigation."). Plaintiffs' Counsel's expenses are set forth by category in Exhibit 9 to the Joint Declaration.[15]

The largest component of Plaintiffs' Counsel's expenses is the costs of experts and consultants in the total amount of $1,143,882.92, or approximately 54% of total expenses. ¶ 128. As detailed in the Joint Declaration, Class Counsel worked extensively with Class Representatives' experts and consultants at different stages of the Action. These experts and consultants were critical to the prosecution and resolution of the Action as their expertise allowed Class Counsel to fully frame the issues, gather relevant evidence, make a realistic assessment of provable damages, structure resolution of the claims, and develop a fair and reasonable plan for allocating the settlement proceeds to the Class. ¶¶ 43-48. Also included in this expense category is the costs of Class Representatives' jury/trial consultants retained by Class Counsel to provide jury pool analysis, conduct a mock trial, analyze the results of mock juror

[15] *See also* Exs. 4 through 8 to the Joint Declaration for expenses by category for each Plaintiffs' Counsel firm.

deliberations, advise with respect to jury questionnaire matters, and assist in trial preparation. ¶¶ 64-72, 128.

The second largest component of Plaintiffs' Counsel's expenses (i.e., $364,426.33, or approximately 17% of their total expenses) was for travel related costs (i.e., lodging, transportation, meals, etc.) incurred in connection with attendance at numerous hearings, status conferences, depositions across numerous states, formal mediation, and preparation for trial in San Diego. ¶ 128. In addition, Plaintiffs' Counsel incurred $191,168.01, or approximately 9% of their total expenses, for the costs of court reporters, videographers, and transcripts in connection with the many depositions they took or defended across the country. *Id*.

Another substantial expense, $141,185.19, reflects the costs for an outside vendor to host the document database that enabled Class Counsel to effectively and efficiently search and review the more than 750,000 pages of documents produced by Defendants and third parties in this Action. ¶¶ 33, 129. The ability to code, search, and pull documents to be utilized as exhibits at depositions or at trial was of the utmost importance to the development of the record of evidence in this Action.

In addition to the forgoing expenses, Plaintiffs' Counsel also incurred: (i) $68,443.59 for out-side investigative services; (ii) $37,506.00 for the Parties' formal mediation sessions and the ongoing settlement negotiations conducted by Mr. Melnick; and (iii) $74,698.80 for the costs of computerized research (e.g., LexisNexis, Westlaw, and PACER). ¶ 129; Ex. 9 to Joint Declaration. The other expenses for which Class Counsel seek payment are the types of expenses necessarily incurred in litigation and routinely charged to clients billed by the hour, including, among others, court fees, process servers, document-reproduction costs, and delivery expenses. *Id*. The foregoing expense items are not duplicated in the firms' hourly rates.

The Postcard and long-form Notices inform recipients that Class Counsel would seek reimbursement of Litigation Expenses (which may include reimbursement of the reasonable costs and expenses incurred by Class Representatives as discussed below)

in an amount not to exceed $2.8 million, plus interest. The total amount of expenses requested is below the amount set forth in the notices and, to date, no objections to the maximum expense request set forth in the notices have been filed. ¶ 109. As such, Class Counsel's request for Litigation Expenses should be approved.

IV. CLASS REPRESENTATIVES SHOULD BE AWARDED THEIR REASONABLE COSTS UNDER THE PSLRA

The PSLRA provides that an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be made to "any representative party serving on behalf of a class." 15 U.S.C. § 78u-4(a)(4). Consistent with that statute, Class Representatives seek awards based on the time dedicated by their employees and representatives in furthering and supervising the Action. Specifically, Class Representatives APERS and PBU seek awards of $10,569.00 and $60,000.00, respectively. *See* APERS Decl., ¶ 14; PBU Decl., ¶ 14.

These requested awards are purely for the time and effort Class Representatives devoted to representing the Class in this Action. Both APERS and PBU took active roles in the Action and have been committed to pursuing the claims on behalf of the Class from the outset of the Action in 2014. During the course of the litigation, both Class Representatives communicated regularly with counsel regarding strategy and developments in the Action, reviewed important pleadings and briefs filed in the Action, assisted Class Counsel in responding to voluminous discovery requests, and prepared for, traveled to, and testified at, depositions in connection with class certification. *See* APERS Decl., ¶¶ 5-7; PBU Decl., ¶¶ 5-7. In addition, both APERS and PBU consulted with Class Counsel during the course of the Parties' settlement negotiations, including the Parties' formal mediations with Mr. Melnick. *See id*. These efforts required employees of Class Representatives to dedicate considerable time and resources to the Action—time and resources they would have otherwise devoted to their regular duties at APERS and PBU.

Numerous courts, including in this Circuit, have approved reasonable awards to compensate representative plaintiffs for the time and effort they spent on behalf of a class. *See, e.g.*, *Amgen*, 2016 WL 10571773, at *10 (awarding institutional class representative $30,983.99 in expenses related to its participation in this litigation, including reimbursement of time for General Counsel, Office of Treasury; Solicitor General, and Assistant Attorney); *In re Bank of Am. Corp. Sec. Litig.*, 772 F.3d 125, 133 (2d Cir. 2014) (affirming award of over $450,000 to representative plaintiffs for time spent by their employees on the action); *In re Cobalt Int'l Energy, Inc. Sec. Litig.*, 2019 WL 6043440, at *3 (S.D. Tex. Feb. 13, 2019) (awarding aggregate of over $56,000 to four institutional plaintiffs); *In re Gilat Satellite Networks, Ltd.*, 2007 WL 2743675, at *19 (E.D.N.Y. Sept. 18, 2007) (granting PSLRA awards where, as here, "the tasks undertaken by employees of Lead Plaintiffs reduced the amount of time those employees would have spent on other work and these tasks and rates appear reasonable to the furtherance of the litigation"). The awards sought by Class Representatives here are reasonable and justified under the PSLRA.

V. CONCLUSION

For the reasons stated herein and in the Joint Declaration, Class Counsel respectfully request the Court: (i) award attorneys' fees in the amount of 22% of the Settlement Fund (i.e., $14,300,000); (ii) approve reimbursement of Plaintiffs' Counsel's Litigation Expenses in the amount of $2,104,370.19; and (iii) approve the proposed awards to Class Representatives in the aggregate amount of $70,569.00 (i.e., $10,569.00 to APERS and $60,000.00 to PBU).

DATED: June 17, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2020, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system. Based upon the records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Joshua E. D'Ancona
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