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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN JOSE DIVISION

15 In re UTSTARCOM, INC. SECURITIES)
16 LITIGATION)

Master File No. C-04-4908-JW(PVT)

) CLASS ACTION

17 _____)
18 This Document Relates To:)

ALL ACTIONS.)

) PLAINTIFFS' NOTICE OF MOTION AND
) MOTION FOR AN AWARD OF
) ATTORNEYS' FEES AND EXPENSES AND
) PLAINTIFFS' EXPENSES AND
) MEMORANDUM OF POINTS AND
) AUTHORITIES IN SUPPORT THEREOF

21 DATE: February 7, 2011

22 TIME: 9:00 a.m.

COURTROOM: The Honorable James Ware

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1 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

2 PLEASE TAKE NOTICE that on February 7, 2011, at 9:00 a.m., or as soon thereafter as
3 counsel may be heard before the Honorable James Ware, United States District Judge, at the United
4 States Courthouse, Courtroom 8, 280 South First Street, San Jose, California, Plaintiffs will and
5 hereby move for an award of attorneys' fees and expenses and Plaintiffs' expenses. This motion is
6 based upon the attached Memorandum of Points and Authorities in Support of Plaintiffs' Motion for
7 an Award of Attorneys' Fees and Expenses and Plaintiffs' Expenses, the Declaration of Shawn A.
8 Williams in Support of Plaintiffs' Motion for (1) Final Approval of Class Action Settlement; (2)
9 Approval of the Plan of Allocation of Settlement Proceeds; and (3) Attorneys' Fees and Expenses
10 and Plaintiffs' Expenses ("Williams Decl."), the Declaration of Keith F. Park Filed on Behalf of
11 Robbins Geller Rudman & Dowd LLP in Support of Award of Attorneys' Fees and Expenses ("Park
12 Decl."), and the Declarations of Malcolm J. Auble (the Declaration of Mr. Auble is in transmit and
13 will be submitted when received), Erwin L. DeBruycker, and Robert Lee Weese, the Stipulation of
14 Settlement dated as of September 8, 2010 (Dkt. No. 445) (the "Stipulation"),¹ all other pleadings and
15 matters of record, and such additional evidence or argument as may be presented at the hearing.

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **I. INTRODUCTION**

18 Lead Counsel have negotiated, and Plaintiffs support, a settlement with the SoftBank
19 Defendants consisting of \$2,900,000 in cash. For their efforts in achieving this result, Lead Counsel
20 seek a fee² of 24.5% of the gross Settlement Amount, slightly below the Ninth Circuit "benchmark"
21 of 25%, plus expenses of \$190,000.00 (and interest thereon).

22
23
24 ¹ Capitalized terms not otherwise defined in this memorandum have the same meanings set
25 forth in the Stipulation.

26 ² The amount awarded will compensate Lead Counsel and may also be used to compensate
27 counsel who have advised or worked with the Plaintiffs for the benefit of the Class or contributed to
28 the institution, prosecution or resolution of the litigation. The amount requested includes all such
payments.

1 The Williams Declaration details the work performed over nearly 6 years for the benefit of
2 the Class, including an extensive pre-filing investigation, locating and interviewing potential
3 witnesses, ultimately succeeding in overcoming Defendants’ multiple motions to dismiss, obtaining
4 class certification, conducting substantial class and merits discovery, including the review and
5 analysis of over 4 million pages of documents produced by the SoftBank Defendants and
6 UTStarcom, Inc. (“UTSI” or the “Company”) and an additional 1.3 million pages of documents
7 produced by third parties, taking the depositions of key high-ranking current and former employees
8 of UTSI and the SoftBank Defendants, and preparing expert reports. Lead Counsel spent
9 considerable time and resources to develop a case that would survive the pleading requirements of
10 the Private Securities Litigation Reform Act of 1995 (“PSLRA”) and convince the SoftBank
11 Defendants that the Plaintiffs were prepared to pursue this matter to trial if necessary. A description
12 of the claims asserted by the Plaintiffs as well as the efforts expended by Lead Counsel are set forth
13 in the Williams Declaration.

14 The 24.5% fee requested is more than fair and reasonable when considered under the
15 applicable standards and, as discussed below, is well within the normal range of percentage awards
16 made in contingent fee matters of this type, particularly in view of the result achieved and the
17 considerable risk attendant in bringing and pursuing this litigation. This case involved complex
18 issues, including compliance with technical accounting and financial reporting issues, proof of
19 scienter, loss causation and damages, and corporate control. The legal issues presented a significant
20 risk that, absent this settlement, Plaintiffs would spend several more years litigating with the
21 SoftBank Defendants at sizable cost and would not obtain a better recovery (or any recovery at all)
22 for the Class. Significantly, the requested fee is substantially *less* than that portion of Lead
23 Counsel’s “lodestar” generated after the settlement was reached with the UTStarcom Defendants.
24 As important, the application is supported by all three Plaintiffs.

25 For the reasons set forth herein, and in the Williams Declaration, we respectfully submit that
26 the requested attorneys’ fees and expenses are fair and reasonable under the applicable legal
27 standards and, in light of the significant risks faced and the result achieved, should be awarded by
28 this Court.

1 **II. FACTUAL AND PROCEDURAL HISTORY OF THE LITIGATION**

2 The Williams Declaration is an integral part of this submission. The Court is respectfully
3 referred to it for a detailed description of the factual and procedural history of the litigation, the
4 claims asserted, the extensive investigation and discovery undertaken, the settlement negotiations, as
5 well as the numerous risks and uncertainties presented in this litigation.

6 **III. AWARD OF ATTORNEYS' FEES**

7 **A. The Legal Standards Governing the Award of Attorneys' Fees in**
8 **Common Fund Cases Support the Requested Award**

9 **1. A Reasonable Percentage of the Fund Recovered Is the**
10 **Appropriate Method for Awarding Attorneys' Fees in**
11 **Common Fund Cases**

12 For their efforts in creating a common fund for the benefit of the Class, Lead Counsel seek a
13 reasonable percentage of the fund recovered as attorneys' fees. The percentage method of awarding
14 fees has become an accepted, if not the prevailing method, for awarding fees in common fund cases
15 in this Circuit and throughout the United States.

16 It has long been recognized in equity that "a private plaintiff, or his attorney, whose efforts
17 create, discover, increase or preserve a fund to which others also have a claim is entitled to recover
18 from the fund the costs of his litigation, including attorneys' fees." *Vincent v. Hughes Air West, Inc.*,
19 557 F.2d 759, 769 (9th Cir. 1977). The purpose of this doctrine is to avoid unjust enrichment so that
20 "those who benefit from the creation of the fund should share the wealth with the lawyers whose
21 skill and effort helped create it." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300
22 (9th Cir. 1994) ("*WPPSS*"). This rule, known as the common fund doctrine, is firmly rooted in
23 American case law. *See, e.g., Trustees v. Greenough*, 105 U.S. 527 (1882); *Cent. R.R. & Banking*
24 *Co. v. Pettus*, 113 U.S. 116 (1885).³

25 ³ In *Paul, Johnson, Alston & Hunt v. Graulity*, 886 F.2d 268 (9th Cir. 1989), the Ninth Circuit
26 explained the principle underlying fee awards in common fund cases:

27 Since the Supreme Court's 1885 decision in [*Central R.R. & Banking Co. v. Pettus*,
28 113 U.S. 116 (1885)], it is well settled that the lawyer who creates a common fund is
allowed an *extra* reward, beyond that which he has arranged with his client, so that
he might share the wealth of those upon whom he has conferred a benefit. The

1 In *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), the Supreme Court recognized that under
2 the “common fund doctrine” a reasonable fee may be based “on a percentage of the fund bestowed
3 on the class.” In this Circuit, the district court has discretion to award fees in common fund cases
4 based on either the so-called lodestar/multiplier method or the percentage-of-the-fund method.
5 *WPPSS*, 19 F.3d at 1296. In *Paul, Johnson*, 886 F.2d 268, *Six Mexican Workers v. Ariz. Citrus*
6 *Growers*, 904 F.2d 1301 (9th Cir. 1990), *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir.
7 1993), and *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002), the Ninth Circuit expressly
8 approved the use of the percentage method in common fund cases. Moreover, supporting authority
9 for the percentage method in other circuits is overwhelming.⁴

10 Since *Paul, Johnson* and its progeny, district courts in this Circuit have almost uniformly
11 shifted to the percentage method in awarding fees in representative actions. The rationale for
12 compensating counsel in common fund cases on a percentage basis is sound. First, it is consistent
13 with the practice in the private marketplace where contingent fee attorneys are customarily
14 compensated by a percentage of the recovery.⁵ Second, it more closely aligns the lawyers’ interest

16 amount of such a reward is that which is deemed “reasonable” under the
17 circumstances.

18 *Id.* at 271 (citations omitted, emphasis in original).

19 ⁴ Courts in other circuits favor the percentage-of-recovery approach for the award of attorneys’
20 fees in common fund cases. Two circuits have ruled that the **percentage method is mandatory in**
21 **common fund cases**. *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993); *Camden I*
22 *Condo. Ass’n v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991). Other circuits and commentators
23 have expressly approved the use of the percentage method. *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir.
1994); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) (citing footnote 16 of
Blum recognizing both “implicitly” and “explicitly” that a percentage recovery is reasonable in
common fund cases); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Goldberger v.*
Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000); and Report of the Third Circuit Task Force, *Court*
Awarded Attorney Fees, 108 F.R.D. 237, 254 (Oct. 8, 1985).

24 ⁵ Courts are encouraged to look to the private marketplace in setting a percentage fee:

25 The judicial task might be simplified if the judge and the lawyers [spent] their
26 efforts on finding out what the market in fact pays not for the individual hours but for
27 the ensemble of services rendered in a case of this character. This was a contingent
28 fee suit that yielded a recovery for the “clients” (the class members) of \$45 million.
The class counsel are entitled to the fee they would have received had they handled a
similar suit on a contingent fee basis, with a similar outcome, for a paying client.

1 in being paid a fair fee with the interest of the class in achieving the maximum possible recovery in
2 the shortest amount of time.⁶ Indeed, one of the nation's leading scholars in the field of class actions
3 and attorneys' fees, Professor Charles Silver of the University of Texas School of Law, has
4 concluded that the percentage method of awarding fees is the only method of fee awards that is
5 consistent with class members' due process rights. Professor Silver notes:

6 ***The consensus that the contingent percentage approach creates a closer***
7 ***harmony of interests between class counsel and absent plaintiffs than the lodestar***
8 ***method is strikingly broad.*** It includes leading academics, researchers at the RAND
9 Institute for Civil Justice, and many judges, including those who contributed to the
10 Manual for Complex Litigation, the Report of the Federal Courts Study Committee,
11 and the report of the Third Circuit Task Force. Indeed, it is difficult to find anyone
12 who contends otherwise. No one writing in the field today is defending the lodestar
13 on the ground that it minimizes conflicts between class counsel and absent claimants.

14 ***In view of this, it is as clear as it possibly can be that judges should not***
15 ***apply the lodestar method in common fund class actions.*** The Due Process Clause
16 requires them to minimize conflicts between absent claimants and their
17 representatives. The contingent percentage approach accomplishes this.

18 Suppose a large investor had sued Continental for securities fraud, and won \$45
19 million. What would its lawyers have gotten pursuant to their contingent fee
20 contract?

21 *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992). See also *Phemister v. Harcourt Brace*
22 *Jovanovich, Inc.*, No. 77 C 39, 1984 U.S. Dist. LEXIS 23595, at *40-*41 (N.D. Ill. Sept. 14, 1984).

23 ⁶ In *Kirchoff v. Flynn*, 786 F.2d 320, 325, 326 (7th Cir. 1986), the court stated:

24 The contingent fee uses private incentives rather than careful monitoring to
25 align the interests of lawyer and client. The lawyer gains only to the extent his client
26 gains. . . . The unscrupulous lawyer paid by the hour may be willing to settle for a
27 lower recovery coupled with a payment for more hours. Contingent fees eliminate
28 this incentive and also ensure a reasonable proportion between the recovery and the
fees assessed to defendants. . . .

At the same time as it automatically aligns interests of lawyer and client,
rewards exceptional success, and penalizes failure, the contingent fee automatically
handles compensation for the uncertainty of litigation.

1 Charles Silver, *CLASS ACTIONS IN THE GULF SOUTH SYMPOSIUM: Due Process and the*
2 *Lodestar Method: You Can't Get There from Here*, 74 Tul. L. Rev. 1809, 1819-20 (2000) (emphasis
3 added, footnotes omitted).⁷ This is particularly appropriate in PSLRA cases where Congress
4 recognized the propriety of the percentage method of fee awards.⁸

5 **2. A Fee of 24.5 Percent of the Fund Created Is Reasonable**

6 In *Paul, Johnson*, the Ninth Circuit established 25% of the fund as the “benchmark” award
7 for attorneys’ fees. 886 F.2d at 272; *see also Torrissi*, 8 F.3d at 1376 (reaffirming 25% benchmark);
8 *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000) (same). The guiding principle in this Circuit
9 is that a fee award be “reasonable under the circumstances.” *WPPSS*, 19 F.3d at 1296 (citation and
10 emphasis omitted). In view of the result obtained, the contingent fee risk, and the financial
11 commitment of Lead Counsel, an award of 24.5%, slightly below this benchmark, of the recovery
12 obtained for the Class is appropriate.

13 **B. Consideration of the Relevant Factors Used by Courts in the Ninth**
14 **Circuit Justifies a Fee Award of 24.5 Percent in This Case**

15 Lead Counsel submit that, as the factors discussed below demonstrate, attorneys’ fees of
16 24.5% of the fund recovered for the Class are reasonable under the circumstances of this case and
17 should be approved.

18
19 ⁷ Professor Coffee also argues that a percentage of the recovery is the only reasonable method of
20 awarding fees in common fund cases:

21 If one wishes to economize on the judicial time that is today invested in monitoring
22 class and derivative litigation, the highest priority should be given to those reforms
23 that restrict collusion and are essentially self-policing. The percentage of the
recovery fee award formula is such a “deregulatory” reform because it relies on
incentives rather than costly monitoring. Ultimately, this “deregulatory” approach is
the only alternative

24 John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory*
25 *for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 724-
25 (1986).

26 ⁸ “Total attorneys’ fees and expenses awarded by the court to counsel for the plaintiff class
27 shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest
28 actually paid to the class.” 15 U.S.C. §78u-4(a)(6).

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1. The Result Achieved

Courts have consistently recognized that the result achieved is an important factor to be considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (“most critical factor is the degree of success obtained”); *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 630 (D. Colo. 1976) (“the amount of the recovery, and end result achieved are of primary importance, for these are the true benefit to the client”); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 547-48 (S.D. Fla. 1988) (“The quality of work performed in a case that settles before trial is best measured by the benefit obtained.”), *aff’d*, 899 F.2d 21 (11th Cir. 1990).

A Settlement Amount of \$2.9 million has been obtained through the efforts of Lead Counsel without the necessity and risk of summary judgment, trial, and appeals. Williams Decl., ¶¶60-68. This recovery is particularly noteworthy in light of the difficulties presented to a recovery against the SoftBank Defendants. The sole claim asserted against the SoftBank Defendants was for a violation of the “control” provisions of §20(a) of the Securities Exchange Act of 1934. To prevail, Lead Counsel would have to have established not only the elements of a §20(a) claim but also prove each element of the §10(b) claim asserted against the UTStarcom Defendants. To accomplish this would have required, among other things, extremely expensive offshore discovery and the use of multiple experts.

There is no doubt that Lead Counsel achieved a good recovery for Class Members in this case and should be awarded the fee requested to compensate them for the result obtained.

2. The Risks of Litigation

Numerous cases have recognized that risk is an important factor in determining a fair fee award. *See, e.g., WPPSS*, 19 F.3d at 1299-1301; *Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117 (3d Cir. 1976). Uncertainty that an ultimate recovery would be obtained is highly relevant in determining risk. *WPPSS*, 19 F.3d at 1300; *Lindy*, 540 F.2d at 117. As the court aptly observed in *King Resources*:

The litigation also involved unique and substantial issues of law in the technical area of SEC Rule 10b-5, . . . difficult, complex and oft-disputed class action questions, and difficult questions regarding computation of damages.

* * *

1 In evaluating the services rendered in this case, appropriate consideration
2 must be given to the risks assumed by plaintiffs' counsel in undertaking the
3 litigation. The prospects of success were by no means certain at the outset, and
4 indeed, the chances of success were highly speculative and problematical.

5 420 F. Supp. at 632, 636-37. See also *In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, No.
6 02-ML-1475-DT(RCx), 2005 U.S. Dist. LEXIS 13627, at *44 (C.D. Cal. June 10, 2005) ("The risks
7 assumed by Class Counsel, particularly the risk of non-payment or reimbursement of expenses, is a
8 factor in determining counsel's proper fee award.").

9 As set forth in the Williams Declaration, substantial risks and uncertainties were present from
10 the outset of this litigation that made it far from certain that any recovery for the Class would be
11 obtained. Williams Decl., ¶¶60-68, 78. While courts have always recognized that securities class
12 actions carry significant risks, post-PSLRA rulings make it clear that the risk of no recovery (and
13 hence no fee) has increased exponentially. Courts have noted that "securities actions have become
14 more difficult from a plaintiff's perspective in the wake of the PSLRA." *In re Ikon Office Solutions,*
15 *Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000). According to an April 2006 NERA study,
16 dismissal rates have doubled since the PSLRA, accounting for 40.3% of dispositions. See Ronald I.
17 Miller, Ph.D., Todd Foster, Elaine Buckberg, Ph.D., *Recent Trends in Shareholder Class Action*
18 *Litigation: Beyond the Mega-Settlements, is Stabilization Ahead?*, at 4 (NERA 2006).

19 When cases are dismissed, the typical result is a large loss for the plaintiffs' firms involved.
20 There is no question that, if not settled, Lead Counsel in this case faced the substantial risk of years
21 of additional litigation with no guarantee of any compensation, even if they prevailed on the merits.
22 Williams Decl., ¶¶89-93. Lead Counsel achieved a significant recovery for the Class in the face of
23 very substantial risks. Under these circumstances the requested fee is fully justified.

24 **3. The Skill Required and the Quality of the Work**

25 The successful prosecution of these complex claims required the participation of highly
26 skilled and specialized attorneys. *Heritage Bond*, 2005 U.S. Dist. LEXIS 13627, at *38 ("The
27 experience of counsel is also a factor in determining the appropriate fee award."). From the outset,
28 Lead Counsel engaged in a concerted effort to obtain the maximum recovery for the Class. Lead
Counsel demonstrated that, notwithstanding the barriers erected by the PSLRA and other recent

1 developments in the law, they would work to develop sufficient evidence to support a convincing
2 case.

3 Lead Counsel’s thorough investigation and other litigation efforts ultimately defeated, in the
4 main, Defendants’ motions to dismiss. As a result of surviving the multiple attacks on the adequacy
5 of the complaint and subsequent, substantial discovery efforts, Lead Counsel were able to negotiate
6 a settlement with the SoftBank Defendants they believe is fair under all the circumstances. Williams
7 Decl., ¶¶7, 9, 35-52. The skill demonstrated by Lead Counsel supports the requested fee. *See, e.g.,*
8 *J.N. Futia Co. v. Phelps Dodge Indus., Inc.*, No. 78 Civ. 4547, 1982 U.S. Dist. LEXIS 15261
9 (S.D.N.Y. Sept. 17, 1982).

10 The quality of opposing counsel is also important in evaluating the quality of the work done
11 by plaintiffs’ counsel. *See, e.g., In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337
12 (C.D. Cal. 1977); *King Res.*, 420 F. Supp. at 634; *Arenson v. Bd. of Trade*, 372 F. Supp. 1349, 1354
13 (N.D. Ill. 1974). The SoftBank Defendants were represented by counsel from Sullivan & Cromwell
14 LLP, a law firm with a well-deserved nationwide reputation for vigorous advocacy of their clients’
15 interests. Williams Decl., ¶74.

16 **4. The Novelty and Difficulty of the Questions Presented**

17 Courts have recognized that the novelty and difficulty of the issues in a case are significant
18 factors to be considered in making a fee award. *See, e.g., Vizcaino v. Microsoft Corp.*, 142 F. Supp.
19 2d 1299, 1306 (W.D. Wash. 2001); *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir.
20 1974). As the *Johnson* court stated:

21 Cases of first impression generally require more time and effort on the attorney’s
22 part. Although this greater expenditure of time in research and preparation is an
23 investment by counsel in obtaining knowledge which can be used in similar later
cases, he should not be penalized for undertaking a case which may “make new law.”
Instead, he should be appropriately compensated for accepting the challenge.

24 488 F.2d at 718.

25 In addition to being factually and technically complex, this case also involved numerous
26 complex questions of law under the PSLRA, in particular the application of *Dura Pharms., Inc. v.*
27 *Broudo*, 544 U.S. 336 (2005) to the facts of this case. The application of *Dura* and subsequent cases
28 that interpret it posed significant risks to Plaintiffs’ ability to prevail on such issues as loss causation.

1 Moreover, it is Lead Counsel's belief that securities cases asserting only claims for control person
2 liability are extremely rare.

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

5 A determination of a fair fee must include consideration of the contingent nature of the fee.
6 It is an established practice in the private legal market to reward attorneys for taking the risk of non-
7 payment by paying them a premium over their normal hourly rates for winning contingency cases.⁹
8 See Richard Posner, *Economic Analysis of Law* §21.9, at 534-35 (3d ed. 1986). Contingent fees that
9 may far exceed the market value of the services if rendered on a non-contingent basis are accepted in
10 the legal profession as a legitimate way of assuring competent representation for plaintiffs who could
11 not afford to pay on an hourly basis regardless whether they win or lose. *WPPSS*, 19 F.3d at 1299.

12 Courts have consistently recognized that the risk of receiving little or no recovery is a major
13 factor in considering an award of attorneys' fees. For example, in awarding counsel's attorneys' fees
14 in *Prudential*, the court noted the risks that plaintiffs' counsel had taken:

15 Although today it might appear that risk was not great based on Prudential
16 Securities' global settlement with the Securities and Exchange Commission, such
17 was not the case when the action was commenced and throughout most of the
18 litigation. Counsel's contingent fee risk is an important factor in determining the fee
19 award. Success is never guaranteed and counsel faced serious risks since both trial
20 and judicial review are unpredictable. Counsel advanced all of the costs of litigation,
21 a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

22 *In re Prudential-Bache Energy Income P'ships Sec. Litig.*, No. 888, 1994 WL 202394, at *6 (E.D.
23 La. May 18, 1994).

24 Before plaintiffs' counsel commit to prosecute a securities class action on a contingent fee
25 basis, an assessment of the strength of the case, the likelihood of a recovery, the probable size of
26 damages, and the costs of litigating the case are weighed against the expectation of payment if
27 successful. In this Circuit, plaintiffs' counsel expect to be paid a reasonable percentage of any
28 recovery, usually in the range of 25% (absent a fee agreement with the client to seek a different

27 ⁹ As noted above, the requested fee here is substantially less than Lead Counsel's straight
28 hourly "lodestar."

1 amount). Our expectation about the likely fee, if successful, is part of the equation when
2 determining whether to pursue a case.

3 Moreover, there are numerous class actions in which plaintiffs' counsel took the risk,
4 expended thousands of hours, and yet received no remuneration whatsoever despite their diligence
5 and expertise. Williams Decl., ¶¶90-93. Subsequent to the passage of the PSLRA, a high
6 percentage of cases in this Circuit have been dismissed at the pleading stage in response to
7 defendants' arguments that the complaints do not meet the PSLRA's pleading standards.

8 Indeed, because the fee in this matter was entirely contingent, the only certainty was that
9 there would be no fee without a successful result and that such result would only be realized after
10 significant amounts of time, effort and expense had been expended. Lead Counsel have not received
11 any compensation for their efforts in prosecuting the litigation against the SoftBank Defendants and
12 the requested award will only partially compensate them for these expenditures. Lead Counsel for
13 Plaintiffs have risked non-payment of \$496,410.09 in expenses and approximately \$2.63 million in
14 time committed to the prosecution of the case against the SoftBank Defendants. Williams Decl.,
15 ¶86; Park Decl., ¶¶4-5. *See, e.g., Winkler v. NRD Mining, Ltd.*, 198 F.R.D. 355 (E.D.N.Y.) (granting
16 defendants' motion for judgment as a matter of law after jury verdict for plaintiffs), *aff'd sub nom.*
17 *Winkler v. Wigley*, 242 F.3d 369 (2d Cir. 2000).

18 **6. A 24.5 Percent Fee Award Is Below the Average Fee Awarded**
19 **in Similar Complex Class Action Litigation**

20 A Federal Judiciary Center study released in 1996, which covered all class actions in four
21 selected federal district courts with a high number of class actions, including this District, found that
22 as to the size of attorneys' fees: "Median rates ranged from 27% to 30%." Thomas E. Willging,
23 Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District*
24 *Courts: Final Report to the Advisory Committee on Civil Rules*, at 69 (Federal Judicial Center
25 1996). This finding is in line with an analysis of fee awards in class actions conducted in 1996 by
26 National Economic Research Associates, an economics consulting firm. Using data from 433
27 shareholder class actions, the study concludes: "Regardless of case size, fees average approximately
28 32 percent of the settlement." Denise N. Martin, Vinita M. Juneja, Todd S. Foster, Frederick C.

1 Dunbar, *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions?* at
2 12-13 (NERA 1996). More recently, in *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 298 (3d Cir.
3 2005), the Third Circuit recently cited with approval an analysis submitted by Professor John C.
4 Coffee of Columbia University, in which he considered statistical data regarding fee awards from
5 other securities class actions and found (1) a 27%-30% median fee range over the course of a two-
6 year period in selected federal district courts; and (2) 25%-30% fees were “fairly standard” even in
7 “mega fund” class actions. *Id.* at 298 (citation omitted). The fee requested is less than the average
8 paid in these shareholder class actions.

9 Further, the fee requested is supported by fee awards at or above the Ninth Circuit
10 benchmark in other class action cases:

- 11 • *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454 (9th Cir. 2000) (upheld fee award of
12 33.3% of \$1.725 million settlement);
- 13 • *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (affirming 28% fee
14 award);
- 15 • *In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, No. 02-ML-1475-DT(RCx),
16 2005 U.S. Dist. LEXIS 13627, at *61 (C.D. Cal. June 10, 2005) (awarding one-third of
17 \$27.783 million settlement);
- 18 • *In re Terayon Commc'n Sys., Inc. Sec. Litig.*, No. C-00-1967-MHP, slip op. (N.D. Cal.
19 Oct. 3, 2007) (awarded 30% of recovery, plus expenses);
- 20 • *In re AMERCO Sec. Litig.*, No. 04-2182-PHX-RJB, slip op. (D. Ariz. Nov. 2, 2006)
21 (awarded 30% of recovery, plus expenses);
- 22 • *Broderick v. Mazur (PHP Healthcare)*, No. CV-98-1658-MRP(AJWx), slip op. (C.D.
23 Cal. Apr. 26, 2004) (fee equal to 30% of recovery, plus expenses);
- 24 • *In re THQ, Inc. Sec. Litig.*, No. CV-00-01783-JFW(Ex), slip op. (C.D. Cal. June 30,
25 2003) (fee equal to 30% of recovery, plus expenses);
- 26 • *Harris v. Intel Corp.*, No. C-00-1528-CW(EMC), slip op. (N.D. Cal. July 15, 2003) (fee
27 equal to 30% of recovery, plus expenses);
- 28

- 1 • *In re HI/FN, Inc. Sec. Litig.*, No. C-99-4531-SI, slip op. (N.D. Cal. May 20, 2003) (fee
2 equal to 30% of recovery, plus expenses);
- 3 • *In re Sunterra Corp. Sec. Litig.*, No. 2:06-cv-00844-BES-RJJ, slip op. (D. Nev. Feb. 10,
4 2009) (awarded 25% of the recovery, plus expenses);
- 5 • *In re Brocade Sec. Litig.*, No. C 05-02042 CRB, slip op. (N.D. Cal. Jan. 26, 2009)
6 (awarded 25% of the recovery, plus expenses);
- 7 • *In re Wireless Facilities, Inc. Sec. Litig.*, No. 04cv1589 NLS, slip op. (S.D. Cal. Jan. 13,
8 2009) (awarded 25% of the recovery, plus expenses);
- 9 • *In re PETCO Corp. Sec. Litig.*, No. 05-CV-0823 H(RBB), slip op. (S.D. Cal. Sept. 2,
10 2008) (awarded 25% of the recovery, plus expenses);
- 11 • *In re SeraCare Life Sciences, Inc. Sec. Litig.*, No. 05-CV-2335-H(CAB), slip op. (S.D.
12 Cal. Sept. 4, 2007) (awarding 25% of the recovery, plus expenses);
- 13 • *In re Watchguard Sec. Litig.*, No. 2:05-cv-00678-JLR, slip op. (W.D. Wash. Aug. 6,
14 2007) (awarded 25% of the recovery, plus expenses);
- 15 • *In re Alliance Gaming Corp. Sec. Litig.*, No. CV-S-04-0821-BES-PAL, slip op. (D. Nev.
16 June 28, 2007) (awarding 25% of the recovery, plus expenses);
- 17 • *In re Verisign, Inc. Sec. Litig.*, No. C-02-2270-JW(PVT), slip op. (N.D. Cal. Apr. 24,
18 2007) (awarding 25% of the recovery, plus expenses);
- 19 • *In re Charlotte Russe Holding, Inc. Sec. Litig.*, No. 04cv2528BTM(WMc), slip op. (S.D.
20 Cal. Aug. 30, 2006) (awarded 25% of the recovery, plus expenses);
- 21 • *In re Surebeam Corp. Sec. Litig.*, No. 03-CV-01721-JM(POR), slip op. (S.D. Cal. July
22 17, 2006) (awarded 25% of the recovery, plus expenses);
- 23 • *In re U.S. Aggregates, Inc. Sec. Litig.*, No. C-01-1688-CW, slip op. (N.D. Cal. April 6,
24 2006) (awarding fee of 25% of the recovery, plus expenses);
- 25 • *In re Titan, Inc. Sec. Litig.*, No. 04-CV-0676-LAB(NLS), slip op. (S.D. Cal. Dec. 20,
26 2005) (fee award equal to 25% of the recovery, plus expenses);
27
28

- 1 • *In re Intermune, Inc. Sec. Litig.*, No. C-03-2954-SI, slip op. (N.D. Cal. Aug. 26, 2005)
- 2 (fee award equal to 25% of the recovery, plus expenses);
- 3 • *In re Ventro Corp. Sec. Litig.*, No. C-01-1287-SBA, slip op. (N.D. Cal. Mar. 29, 2005)
- 4 (fee award equal to 25% of the recovery, plus expenses);
- 5 • *In re Intershop Commc'ns AG Sec. Litig.*, No. C-01-20333-JW, slip op. (N.D. Cal. Dec.
- 6 5, 2005) (fee award equal to 25% of the recovery, plus expenses);
- 7 • *In re M&A West, Inc. Sec. Litig.*, No. C-01-0033-SBA, slip op. (N.D. Cal. Feb. 10, 2004)
- 8 (fee equal to 25% of the recovery, plus expenses);
- 9 • *In re TUT Systems, Inc. Sec. Litig.*, No. C-01-2659-CW, slip op. (N.D. Cal. May 14,
- 10 2004) (fee equal to 25% of the recovery, plus expenses);
- 11 • *In re Specialty Labs., Inc. Sec. Litig.*, No. CV 02-04352-DDP(RCx), slip op. (C.D. Cal.
- 12 Dec. 22, 2004) (fee award equal to 25% of the recovery, plus expenses);
- 13 • *In re Accelerated Networks, Inc. Sec. Litig.*, No. CV-01-3585-SJO(MANx), slip op.
- 14 (C.D. Cal. June 28, 2004) (awarded 25% of the fund recovered, plus expenses);
- 15 • *In re Infonet Servs. Corp. Sec. Litig.*, No. CV-01-10456-NM(CWx), slip op. (C.D. Cal.
- 16 July 26, 2004) (fee equal to 25% of the fund recovered, plus expenses);
- 17 • *In re Mutual Risk Mgmt. Ltd. Sec. Litig.*, No. 02CV1110K(POR), slip op. (S.D. Cal. July
- 18 22, 2004) (fee equal to 25% of the fund recovered, plus expenses);
- 19 • *In re DJ Orthopedics, Inc. Sec. Litig.*, No. 01-CV-2238-K(RBB), slip op. (S.D. Cal. June
- 20 21, 2004) (fee equal to 25% of the fund recovered, plus expenses);
- 21 • *In re Sagent Tech. Inc. Sec. Litig.*, No. C-01-20081-JW(RS), slip op. (N.D. Cal. Apr. 28,
- 22 2003) (fee equal to 25% of the recovery, plus expenses); and
- 23 • *In re Versata, Inc. Sec. Litig.*, No. C-01-1439-SI, slip op. (N.D. Cal. Feb. 25, 2003) (fee
- 24 equal to 25% of the recovery, plus expenses).

25 The percentage fees paid in these cases support the 24.5% fee award requested.

26 **7. The Customary Fee**

27 Some circuit courts and scholars have encouraged the “mimic the market” approach in setting
28 fees in common fund class action cases. The Seventh Circuit, for example, has consistently taken

1 this approach. *See Cont'l Ill.*, 962 F.2d at 568 (“[I]t is not the function of judges in fee litigation to
2 determine the equivalent of the medieval just price. It is to determine what the lawyer would receive
3 if he were selling his services in the market rather than being paid by court order.”); *In re Synthroid*
4 *Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) (“[W]hen deciding on appropriate fee levels in
5 common-fund cases, courts must do their best to award counsel the market price for legal services, in
6 light of the risk of nonpayment and the normal rate of compensation in the market at the time.”); *In*
7 *re Synthroid Mktg. Litig.*, 325 F.3d 974, 975 (7th Cir. 2003) (“A court must give counsel the market
8 rate for legal services.”).

9 Courts often look at fees awarded in comparable cases to determine if the fee requested is
10 reasonable. *Vizcaino*, 290 F.3d at 1050 n.4. If this were a non-representative litigation, the
11 customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to
12 40% of the recovery. *Blum*, 465 U.S. at 903* (“In tort suits, an attorney might receive one-third of
13 whatever amount the plaintiff recovers.”) (concurring); *In re M.D.C. Holdings Sec. Litig.*, No. CV
14 89-0090 E (M), 1990 U.S. Dist. LEXIS 15488, at *22 (S.D. Cal. Aug. 30, 1990) (“In private
15 contingent litigation, fee contracts have traditionally ranged between 30% and 40% of the total
16 recovery.”); *Ikon*, 194 F.R.D. at 194 (same). Thus, the customary contingent fee in the private
17 marketplace – 30% to 40% of the fund recovered – is much higher than the percentage fee requested
18 in this case.¹⁰

19 The customary fee in contingent litigation supports a fee award of 24.5% as fair and
20 reasonable.

21
22 ¹⁰ Professor Conte acknowledged the propriety of adequately compensating counsel based on the
result obtained in common fund cases:

23 [C]ourts have been careful to award a fully compensable reasonable fee based on the
24 underlying economic inducement for class action lawyers to pursue potentially
25 expensive or complex common fund class litigation. These lawyers assume the risk
26 of no compensation unless they successfully confer common fund benefits on the
class, based on their reasonable expectation that they will share in the recovery in a
fair proportion, in contrast to receiving a fee based initially on time-expended criteria
that fail to give the **results obtained** factor primary consideration.

27 1 Alba Conte, *Attorney Fee Awards* §1.09, at 16 (2d ed. 1993) (emphasis in original).

1 **8. Reaction of the Class and the Approval of the Requested**
2 **Percentage by Each of the Plaintiffs Supports the Award of a**
3 **24.5 Percent Attorneys’ Fee**

4 As of this date, the Court-approved notice was sent to over 300,000 potential Class Members
5 and nominees and the Court-approved summary notice was published in *Investor’s Business Daily*.
6 See the Declaration of Carole K. Sylvester Re A) Mailing of the Notice of Proposed Settlement of
7 Class Action, B) Publication of the Summary Notice, and C) Internet Posting, ¶¶6, 9, submitted
8 herewith. To date, no objections to the requested amount of attorneys’ fees and expenses have been
9 received.¹¹ The Third Circuit recently noted that a low level of objections is a “rare phenomenon.”
10 *Rite Aid*, 396 F.3d at 305. Moreover, a small number of objections do not stand in the way of
11 approval of a reasonable fee. See *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir.
12 2000); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977).

13 At least as important as the reaction of the Class is the fact that this request has been
14 approved by the Court-appointed Plaintiffs. See Declaration of Malcolm J. Auble as Representative
15 of Locals 302 and 612 of the International Union of Operating Engineers-Employers Construction
16 Industry Retirement Trust in Support of Plaintiffs’ Motion for (1) Final Approval of Class Action
17 Settlement and Plan of Allocation of Settlement Proceeds; and (2) Award of Attorneys’ Fees and
18 Expenses and Plaintiffs’ Expenses (the Declaration of Mr. Auble is in transit and will be submitted
19 when received); Declaration of Erwin L. DeBruycker in Support of Plaintiffs’ Motion for (1) Final
20 Approval of Class Action Settlement and Plan of Allocation of Settlement Proceeds; and (2) Award
21 of Attorneys’ Fees and Expenses and Plaintiffs’ Expenses; and Declaration of Robert Lee Weese in
22 Support of Plaintiffs’ Motion for (1) Final Approval of Class Action Settlement and Plan of
23 Allocation of Settlement Proceeds; and (2) Award of Attorneys’ Fees and Expenses and Plaintiffs’
24 Expenses. The request is thus presumptively reasonable. The Plaintiffs, consisting of one
25 institutional investor and two individuals, all with significant financial stakes in the outcome of the
26 litigation, are paradigm fiduciaries for the Class as envisioned by Congress when it enacted the

27 ¹¹ The last day to file an objection is January 10, 2011. If any objections are received, Lead
28 Counsel will address them in a reply brief to be filed on or before January 24, 2011.

1 PSLRA.¹² “[C]ourts should afford a presumption of reasonableness to fee requests submitted
2 pursuant to an agreement between a properly-selected lead plaintiff and properly-selected lead
3 counsel.” *In re Cendant Corp. Litig.*, 264 F.3d 201, 220 (3d Cir. 2001); *In re Global Crossing Sec.*
4 *& ERISA Litig.*, 225 F.R.D. 436, 466 (S.D.N.Y. 2004) (“[I]n class action cases under the PSLRA,
5 courts presume fee requests submitted pursuant to a retainer agreement negotiated at arm’s length
6 between lead plaintiff and lead counsel are reasonable.”). Here, each of the Plaintiffs have approved
7 the requested fee and expenses. The fact that the fee has been approved should be given significant
8 weight. *Cendant*, 264 F.3d at 282. This concept was recently reiterated: “In *Cendant*, 264 F.3d 201,
9 we noted, under the Private Securities Litigation Reform Act, the aim of the fee award analysis ‘is
10 not to assess whether the fee request is reasonable,’ but ‘to determine whether the presumption of
11 reasonableness has been rebutted.’” *Rite Aid*, 396 F.3d at 301 n.10 (quoting *Cendant*, 264 F.3d at
12 284).

13 **IV. THE REQUESTED FEE IS REASONABLE UNDER A LODESTAR**
14 **CROSS-CHECK**

15 The first step in applying the lodestar cross-check is to determine the dollar value of the
16 requested percentage fee award. Here, counsel request a fee of 24.5% of the gross Settlement Fund,
17 or \$710,500.00. To ascertain the lodestar figure, the reasonable number of hours worked are
18 multiplied by reasonable hourly rates of counsel. In a “common fund” case such as this, the court
19 then can determine an implied multiplier that may be assessed for reasonableness by taking into
20 account such factors as the contingent nature and risks of the litigation, the results obtained, and the
21 nature and quality of the services rendered by plaintiffs’ counsel. *See, e.g., Hensley*, 461 U.S. 424.

23 ¹² Congress enacted the PSLRA in large part to encourage institutional investors (among
24 others) to assume control of securities class actions and “increase the likelihood that parties with
25 significant holdings in issuers, whose interests are more strongly aligned with the class of
26 shareholders, will participate in the litigation and exercise control over the selection and actions of
27 plaintiff’s counsel.” *See* H.R. Conf. Rep. No. 104-369, at 731 (1995), 1995 WL 709276, at *32
28 (1995); *see also In re Network Assocs. Sec. Litig.*, 76 F. Supp. 2d 1017, 1020 (N.D. Cal. 1999).
Congress believed that institutions and other investors with a significant financial stake in the
outcome of a securities class action would be in the best position to monitor the ongoing prosecution
of the litigation, select counsel, and to assess the reasonableness of counsel’s fee request.

1 Indeed, “courts have routinely enhanced the lodestar to reflect the risk of non-payment in common
2 fund cases.” *Vizcaino*, 290 F.3d at 1051 (citation omitted).

3 The hours expended by Lead Counsel and their paraprofessionals in the prosecution of the
4 litigation against the SoftBank Defendants are 6,674.25 and the resulting lodestar for the services
5 performed is \$2,633,407.50. Park Decl., ¶4. Thus, the requested fee (\$710,500.00) is approximately
6 27% of Lead Counsel’s lodestar, *i.e.*, it results in a substantial **negative** multiplier.

7 In other complex litigation, it is common for courts to enhance the lodestar by multipliers
8 between 3.0 and 4.5 and many courts have awarded higher multipliers. *See, e.g., In re Sumitomo*
9 *Copper Litig.*, 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999) (“In recent years multipliers of between 3
10 and 4.5 have been common’ in federal securities cases.”) (citation omitted); *Rabin v. Concord Assets*
11 *Group*, No. 89 CIV 6130 (LBS), 1991 U.S. Dist. LEXIS 18273, at *4 (S.D.N.Y. Dec. 19, 1991)
12 (multipliers between 3 and 4.5 have been common in recent years); *Vizcaino*, 290 F.3d at 1051
13 (finding multipliers ranged as high as 19.6, though most run from 1.0 to 4.0); *In re Xcel Energy, Inc.*,
14 364 F. Supp. 2d 980, 998-99 (D. Minn. 2005) (awarding 25% of \$80 million settlement fund,
15 representing a 4.7 multiplier); *In re Charter Commc’ns, Inc., Sec. Litig.*, No. MDL 1506, 2005 U.S.
16 Dist. LEXIS 14772, at *56 (E.D. Mo. June 30, 2005) (awarding 20% of \$146 million settlement
17 fund, representing a 5.6 multiplier); *In re Rite Aid Corp. Sec. Litig.*, 269 F. Supp. 2d 603, 611 (E.D.
18 Pa. 2003) (awarding fee equal to a multiplier of 4.07 and recognizing that “multipliers in this range
19 are fairly common”) (citation omitted), *vacated on other grounds*, 396 F.3d 294 (3d Cir. 2005); *In*
20 *re Aetna Inc. Sec. Litig.*, No. MDL 1219, 2001 U.S. Dist. LEXIS 68, at *59 (E.D. Pa. Jan. 4, 2001)
21 (awarding 30% of \$82.5 million settlement fund, representing a 3.6 multiplier); *In re*
22 *DaimlerChrysler Sec. Litig.*, No. 00-993/00-984/01-004 (JJF), slip op. (D. Del. Feb. 5, 2004)
23 (awarding 22.5% of \$300 million settlement fund, representing a 3.2508 multiplier); *In re CVS Corp.*
24 *Sec. Litig.*, No. 01-11464 (JLT), slip op. (D. Mass. Sept. 7, 2005) (awarding 25% of \$110 million
25 settlement fund, representing a 3.27 multiplier); *In re Buspirone Antitrust Litig.*, No. MDL 1413
26 (JGK), slip op. (S.D.N.Y. Apr. 17, 2003) (awarding a multiplier of 8.46); *Roberts v. Texaco, Inc.*,
27 979 F. Supp. 185, 198 (S.D.N.Y. 1997) (awarding a multiplier of 5.5); *Weiss v. Mercedes-Benz of N.*
28 *Am.*, 899 F. Supp. 1297, 1304 (D.N.J. 1995) (awarding fee equal to a multiplier of 9.3); *In re RJR*

1 *Nabisco, Inc. Sec. Litig.*, No. MDL 818 (MBM), 1992 U.S. Dist. LEXIS 12702 (S.D.N.Y. Aug. 24,
2 1992) (awarding fee equal to a multiplier of 6.0). *See also In re Shell Oil Refinery*, 155 F.R.D. 552,
3 573-74 (E.D. La. 1993) (multiplier of 3.25); *Keith v. Volpe*, 501 F. Supp. 403, 414 (C.D. Cal. 1980)
4 (multiplier of 3.5); *Brewer v. S. Union Co.*, 607 F. Supp. 1511 (D. Colo. 1984) (multipliers of 3 and
5 3.5); *Mun. Auth. of Bloomsburg v. Pennsylvania*, 527 F. Supp. 982, 999-1000 (M.D. Pa. 1981) (4.5
6 multiplier); *In re Cenco, Inc. Sec. Litig.*, 519 F. Supp. 322, 326-28 (N.D. Ill. 1981) (4 multiplier).
7 Consequently, the attorneys' fee sought, which represents a negative multiplier, is plainly reasonable
8 using a lodestar cross-check.

9 **V. THE FEE AWARD SHOULD BE 24.5 PERCENT OF THE GROSS**
10 **SETTLEMENT FUND**

11 The overarching principle in this Circuit regarding fees is that the fee award must be
12 reasonable under all of the circumstances of a case, not whether it is calculated on the gross or net
13 settlement fund. *WPPSS*, 19 F.3d at 1296; *Vizcaino*, 290 F.3d at 1048. Moreover, the Ninth Circuit
14 has approved calculation of a fee award using the gross settlement amount. *Powers*, 229 F.3d at
15 1258 (“the district court may calculate the fee award using the gross settlement amount”).

16 As explained above, 24.5% of the gross Settlement Fund (\$710,500.00) is a reasonable fee
17 under all of the circumstances of this case. Consideration of the nearly 6 year length of the case, the
18 contingent risk taken by Lead Counsel, the result achieved, the awards in similar cases where fees
19 were based on the gross amount of the fund (*see, e.g.*, the cases cited at pp.12-14), the support of the
20 Plaintiffs for the amount requested, and the negative multiplier all support the fee requested.
21 Deducting expenses before calculating a fee award would result in a fee that represents an even
22 further downward departure from the Ninth Circuit benchmark, which is, itself, based on the gross
23 settlement fund. *See Vizcaino*, 290 F.3d at 1052 n.14, 1053 n.21.

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1 **VI. THE REQUESTED EXPENSES SHOULD BE AWARDED**

2 **A. Lead Counsel’s Expenses Are Reasonable and Were Necessarily**
3 **Incurred to Achieve the Benefit Obtained**

4 In addition to the expenses awarded in connection with the settlement with the UTStarcom
5 Defendants (\$700,000.00), Lead Counsel have incurred additional expenses of \$496,410.09.¹³ Park
6 Decl., ¶5.

7 The appropriate analysis to apply in deciding which expenses are compensable in a common
8 fund case of this type is whether the particular expenses are of the type typically billed by attorneys
9 to paying clients in the marketplace. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (“Harris
10 may recover as part of the award of attorney’s fees those out-of-pocket expenses that ‘would
11 normally be charged to a fee paying client.’”) (citation omitted). *See also In re Media Vision Tech.*
12 *Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996). Therefore, it is proper to award reasonable
13 expenses even though they are greater than taxable costs. *Id.* *See also Bratcher v. Bray-Doyle*
14 *Indep. Sch. Dist. No. 42*, 8 F.3d 722, 725-26 (10th Cir. 1993) (expenses reimbursable if they would
15 normally be billed to client); *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995) (expenses
16 recoverable if customary to bill clients for them); *Mitland Raleigh-Durham v. Myers*, 840 F. Supp.
17 235, 239 (S.D.N.Y. 1993) (“Attorneys may be compensated for reasonable out-of-pocket expenses
18 incurred and customarily charged to their clients, as long as they ‘were incidental and necessary to
19 the representation’ of those clients.”) (citation omitted). The categories of expenses counsel seek are
20 the type of expenses routinely charged to hourly paying clients and, therefore, should be awarded out
21 of the common fund.

22 Nearly three-fourths of the additional expenses incurred were for investigators, consultants,
23 and/or experts. The use of investigators in the post-PSLRA passage era is simply not optional.
24 Throughout the litigation, investigators were a vital part of the process of identifying, locating, and
25 interviewing potential witnesses. Lead Counsel also retained experts and/or consultants in areas of

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27 ¹³ As noted earlier, Lead Counsel seek only \$190,000.00 for expenses, less than half of this
28 amount.

1 market efficiency, materiality, loss causation and damages, accounting issues, including financial
2 reporting, internal control, financial restatement issues, and control person liability. These experts
3 and/or consultants were important in the process of defending the complaints in response to motions
4 to dismiss, establishing that class certification was appropriate, calculating damages, and
5 establishing the control person liability of the SoftBank Defendants.

6 Another substantial expense was the cost of computerized research. These are the charges
7 for computerized factual and legal research services such as LEXIS/Nexis and Westlaw. It is
8 standard practice for attorneys to use LEXIS/Nexis and Westlaw to assist them in researching legal
9 and factual issues and payment is proper. *See Media Vision*, 913 F. Supp. at 1371. Indeed, courts
10 recognize that these tools create efficiencies in litigation and, ultimately, save clients and the class
11 money. *See Cont'l Ill.*, 962 F.2d at 570. In approving expenses for computerized research, the court
12 in *Gottlieb v. Wiles*, 150 F.R.D. 174, 186 (D. Colo. 1993), *rev'd on other grounds sub nom. Gottlieb*
13 *v. Barry*, 43 F.3d 474 (10th Cir. 1994), underscored the time-saving attributes of computerized
14 research as a reason payment of these expenses should be encouraged. The court also noted that fee-
15 paying clients routinely pay counsel for computerized legal and factual research. *Id.*

16 In addition, certain counsel were required to travel in connection with this case. The
17 expenses in this category are reasonable in amount, and are properly charged against the fund
18 created. *See Thornberry v. Delta Air Lines*, 676 F.2d 1240, 1244 (9th Cir. 1982), *vacated on other*
19 *grounds*, 461 U.S. 952 (1983); *In re McDonnell Douglas Equip. Leasing Sec. Litig.*, 842 F. Supp.
20 733, 746 (S.D.N.Y. 1994); *Genden v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 741 F. Supp. 84,
21 86 (S.D.N.Y. 1990).

22 Photocopying costs are also customarily paid in common fund cases. *See McDonnell*
23 *Douglas*, 842 F. Supp. at 746. Duplication of documents produced in discovery and pleadings was
24 necessary for the effective prosecution of this case.

25 Other categories include expenses for filing, service and witness fees, court/deposition fees,
26 postage, long distance and facsimile fees, overnight delivery services, mediation fees, and the
27 publication of the notice required by the PSLRA. All were necessary and reasonable and should be
28 awarded.

1 **B. Plaintiff Erwin L. DeBruycker’s Expenses in Representing the Class**
2 **Should Be Awarded**

3 Under the PSLRA, the Court may award “reasonable costs and expenses (including lost
4 wages) directly relating to the representation of the class to any representative party serving on
5 behalf of a class.” 15 U.S.C. §78u-4(a)(4). Erwin L. DeBruycker seeks payment for time he spent
6 and expenses incurred representing the Class. He has submitted a declaration supporting payment of
7 \$1,950.00. This amount is reasonable and should be approved.¹⁴

8 **VII. CONCLUSION**

9 From the beginning, Plaintiffs were faced with determined adversaries represented by
10 experienced counsel. Without any assurance of success, Plaintiffs and Lead Counsel pursued this
11 litigation against the SoftBank Defendants to a successful conclusion. Accordingly, for the reasons
12 set forth above and in the Williams Declaration, the Court should award Lead Counsel attorneys’
13 fees of 24.5% of the gross Settlement Fund and expenses of \$190,000.00 and reimbursement to
14 Erwin L. DeBruycker in the amount of \$1,950.00.

15 DATED: December 13, 2010

Respectfully submitted,

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28 JOHN J. RICE

s/ Keith F. Park
KEITH F. PARK

14 As set forth in the notice sent to the Class, this amount is in addition to the \$190,000.00 in
expenses sought by Lead Counsel.

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Lead Counsel for Plaintiffs

1 CERTIFICATE OF SERVICE

2 I hereby certify that on December 13, 2010, I authorized the electronic filing of the foregoing
3 with the Clerk of the Court using the CM/ECF system which will send notification of such filing to
4 the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I
5 caused to be mailed the foregoing document or paper via the United States Postal Service to the non-
6 CM/ECF participants indicated on the attached Manual Notice List.

7 I further certify that I caused this document to be forwarded to the following Designated
8 Internet Site at: <http://securities.stanford.edu>.

9 I certify under penalty of perjury under the laws of the United States of America that the
10 foregoing is true and correct. Executed on December 13, 2010.

11 s/ Keith F. Park
12 KEITH F. PARK

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