

THE HONORABLE RICHARD A. JONES
(On Reference to the Honorable S. Kate Vaughn)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

CHRIS HUNICHEN, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

ATONOMI LLC, a Delaware LLC, CENTRI
TECHNOLOGY, INC., a Delaware
Corporation, VAUGHAN EMERY, DAVID
FRAGALE, ROB STRICKLAND, DON
DELOACH, WAYNE WISEHART, WOODY
BENSON, MICHAEL MACKEY, and JAMES
SALTER,

Defendants.

No. 2:19-cv-00615-RAJ-SKV

ATONOMI LLC, a Delaware LLC,

Counterclaimant,

v.

CHRIS HUNICHEN,

Counter-Defendant.

CLASS REPRESENTATIVES' MOTION
FOR:

- (1) AN AWARD OF ATTORNEYS' FEES;
- (2) REIMBURSEMENT OF LITIGATION EXPENSES; AND
- (3) INCENTIVE AWARD FOR THE CLASS REPRESENTATIVE

Final Approval Hearing: March 22, 2023

ATONOMI LLC, a Delaware LLC,

Third Party Plaintiff,

v.

DAVID PATRICK PETERS, SEAN
GETZWILLER, DAVID CUTLER, CHANCE
KORNUTH, and DENNIS SAMUEL
BLIEDEN,

Counter-Defendants.

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1 **I. INTRODUCTION AND RELIEF REQUESTED**

2 Having vigorously prosecuted this case for over three years without compensation, and
3 with no guarantee of being paid or having their out-of-pocket costs reimbursed, Class Counsel¹ seek
4 an award of attorneys' fees and reimbursement of out of pocket expenses incurred in the
5 prosecution of this action, and an incentive award for the Class Representative. The Notice² to the
6 Class informed them that:

7 Class Counsel will ask the Court to approve payment of a maximum of one third of the
8 Settlement Fund (\$1,992,375) for attorneys' fees and litigation expenses to be paid from
the Settlement Fund.

9 Class Counsel will also ask the Court to approve a payment of a maximum of \$10,000 to
the Plaintiff for his assistance in prosecuting the lawsuit on behalf of the Class.

10 Consistent with that Notice, Class Counsel now seek reimbursement of \$31,201.98 in litigation
11 expenses that were reasonably and necessarily incurred in prosecuting and resolving this Action
12 and an award of attorneys' fees in the amount of \$1,961,173.02. They also ask the Court to approve
13 a payment of \$10,000 for Class Representative Chris Hunichen to compensate him for his time
14 and attention to this action.³

15 The Partial Settlement against just three of the Defendants in this class action lawsuit
16 provides for an all cash, non-reversionary fund of \$6,037,500. This is a substantial and certain
17 recovery representing nearly 20% of the damages of the Settlement Class identified by Defendants
18 in their discovery responses. This recovery was obtained through the skill, experience, and
19

20 _____
21 ¹ In its August 8, 2022 Order, the Court appointed the undersigned counsel as Class Counsel for a subset
22 of the Settlement Class, and in its September 22, 2022 Order, appointed the undersigned counsel as Class
Counsel for the Settlement Class. *See* Dkt Nos. 246 and 252.

23 ² *See* Long Form Notice, at 6 “Class Counsel will ask the Court to approve payment of a maximum of one
24 third of the Settlement Fund (\$1,992,375) for attorneys' fees and litigation expenses to be paid from the
Settlement Fund.”; <https://www.atonomisecuritiessettlement.com/faq> at *Do I Have A Lawyer In The Case
And How Will They Be Paid?*

25 ³ As the Court knows in light of the pending Motions for Summary Judgment, Plaintiff's counsel continue
26 to vigorously prosecute this action against the remaining defendants, and fully intend to pursue judgment
27 against them, jointly and severally, for the balance of damages owed to the Class. For the reasons given in
this Motion, Plaintiff's counsel intend to seek the same percentage of recovery fee award from any
subsequent amounts recovered on behalf of the Class certified in this case.

1 effective advocacy of Class Counsel in the face of considerable risk and opposition. Class Counsel's
2 efforts to date have been without compensation of any kind and the fee has been wholly contingent
3 upon the result achieved.

4 The Notice identified that Class Counsel would seek "one third of the Settlement Fund
5 (\$1,992,375) for attorneys' fees and litigation expenses."⁴ As detailed below, Class Counsel
6 request that the Court approve payment of \$31,201.98 in expenses and \$1,961,173.02, as payment
7 for attorneys' fees. This fee, 32.5% of the Settlement Fund, is reasonable and appropriate here for
8 at least three reasons:

9 **First**, to compensate Plaintiff's counsel for the quality of their legal work, which required
10 the application of their significant experience litigating securities class actions under both federal
11 and state law to a new and emerging area of law related to cryptocurrency.

12 **Second**, to account for the serious risk undertaken by Plaintiff's counsel in taking on this
13 action and the excellent result achieved, which result exceeds by multiples the typical recovery in
14 securities class actions, as calculated on a percentage of total investment loss.

15 **Third**, even a 32.5% fee award still results in a negative multiplier against the time spent
16 collectively by Class Counsel litigating this action, which fact is illustrative of the sheer effort
17 counsel has devoted to this case over more than three years of intense litigation.

18 In light of the excellent recovery obtained, the time and effort devoted by Class Counsel to
19 the Action, the skill, quality, and expertise required, the wholly contingent nature of the
20 representation, and the considerable risks they undertook, and the continued work to recover
21 additional funds for the certified Class, Class Counsel respectfully submit that the requested fee
22 award is fair and reasonable and should be approved by the Court.

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27 ⁴ The Court will notice that this amount is actually equal to \$6,037,500*0.33, slightly less than 1/3 of the Settlement Fund.

II. ARGUMENT

A. Class Counsel's Work Justify A Fee Award.

Class Counsel vigorously pursued this litigation from its outset by conducting, among other things: (i) an extensive investigation into the allegations surrounding Atonomi's 2018 "Initial Coin Offering" ("ICO"); (ii) a thorough review of public information such as interviews, videos, Telegram chat channels, news articles, and Atonomi marketing materials to draft the complaint; (iii) prevailing on defendants' motion to dismiss seeking arbitration; (iv) prevailing against defendants' motion to bifurcate proceedings; (v) through written discovery, investigating and pursuing claims against the Settling Defendants; (vi) engaging in a full day's mediation followed by weeks of subsequent settlement discussions, both discussions facilitated by the mediator and between counsel; (vii) prevailing on motions to secure preliminary approval of the Partial Settlement over objections by the remaining defendants; (viii) extensive work to prepare the settlement class notice; (ix) certifying a litigation class against the Non-Settling Defendants; and (x) briefing summary judgment against the Non-Settling Defendants on behalf of a significant portion of the Settlement Class.

The Partial Settlement is the result counsel's efforts and experience. Illustratively, this case is the first to develop a substantial body of law interpreting the Washington State Securities Act in the emerging area of cryptocurrency.

B. The Common Fund Doctrine Applies Here

The Supreme Court has long recognized the "common fund" exception to the general rule that a litigant bears his or her own attorneys' fees. *Trustees v. Greenough*, 105 U.S. 527 (1882). The rationale for the common fund principle was explained as follows:

[T]his 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. Jurisdiction over the fund involved in the litigation allows a court to prevent inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

1 *Boeing Co. v. Van Gernert*, 444 U.S. 472, 478 (1980) (cleaned up). The purpose of this doctrine is
2 to avoid unjust enrichment so that “those who benefit from the creation of the fund should share
3 the wealth with the lawyers whose skill and effort helped create it.” *In re Wash Pub. Power Supply*
4 *Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994). The Supreme Court has emphasized that private
5 actions provide “‘a most effective weapon in the enforcement’ of the securities laws and are ‘a
6 necessary supplement to [Securities and Exchange] Commission action.’” *Bateman Eichler, Hill*
7 *Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432
8 (1964)).

9 Federal courts therefore have long recognized that fee awards in successful cases, such this
10 case, promote private enforcement of, and compliance with, important areas of law, including the
11 securities laws. Fee awards, such as those requested here, encourage “capable attorneys, who
12 otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time-
13 consuming cases for which they may never be paid.” *Armes v. Hot Pizzas, LLC*, 2017 U.S. Dist.
14 LEXIS 89920, at *12-13 (D. Ariz. June 9, 2017).

15 **C. The Court Should Award A Percentage Of The Recovery.**

16 The Supreme Court has consistently calculated attorneys’ fees in common fund cases on a
17 percentage-of-the-fund basis. *See, e.g., Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 165-67 (1939);
18 *Boeing*, 444 U.S. at 478-79; *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). Since *Blum*, in which
19 the Supreme Court recognized that under the “common fund doctrine” a reasonable fee may be
20 based “on a percentage of the fund bestowed on the class,” virtually every Circuit Court of
21 Appeals has joined the Supreme Court in affirmatively endorsing the percentage of recovery
22 method as an appropriate method for determining an amount of attorneys’ fees in common fund
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1 cases.⁵ In addition, the *Manual for Complex Litigation* also endorses the use of the percentage-of-
 2 the-fund method in awarding attorneys' fees in common fund cases.⁶

3 It is well established in the Ninth Circuit that, in a common fund case, the court has
 4 discretion to apply the percentage of the fund method in calculating a fee award. *See Fischel v.*
 5 *Equitable Life Assurance Society of the U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002); *In re Wash Pub.*
 6 *Power Supply Sys.*, 19 F.3d at 1295-96; *In re Omnivision Technologies Inc.*, 559 F. Supp. 2d 1036, 1046
 7 (N.D. Cal. 2008) (“use of the percentage method in common fund cases appears to be dominant.”)

8 Compensating counsel in common fund cases based on a percentage makes good sense.
 9 *First*, it is consistent with the private marketplace where contingent fee attorneys are customarily
 10 compensated by a percentage of the recovery. *Second*, it more closely aligns the lawyers' interest
 11 in being paid a fair fee with the interest of the class in achieving the maximum possible recovery in
 12 the shortest amount of time. *Third*, use of the percentage method decreases the burden imposed
 13 on the court by eliminating the detailed and time-consuming lodestar analysis while assuring that
 14 the beneficiaries do not experience undue delay in receiving their share of the settlement. *Fourth*,
 15 consistently applying the percentage-of-recovery method removes perverse negative incentives for
 16

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 18 ⁵ *See e.g.*, *O'Connor v. Oakhurst Dairy*, No. 2:14-00192-NT, 2018 WL 3041388, at *4 (D. Me. June 19,
 19 2018) (“The First Circuit has approved of the [percentage of fund] method as the prevailing approach used
 20 in common fund cases.”) (*citing In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire*
 21 *Litig.*, 56 F.3d 295, 307 (1st Cir. 1995)); *Cassese v. Williams*, 503 F. App'x 55, 59 (2d Cir. 2012) (affirming
 22 the district court's decision to employ a “‘percentage of the recovery’ approach as a starting point in
 23 calculating the fee award.”) (*citing Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 45 (2d Cir. 2000)); *In re*
 24 *GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821-22 (3d Cir. 1995); *Rawlings v. Prudential-*
 25 *Bache Prods., Inc.*, 9 F.3d 513, 515-16 (6th Cir. 1993); *In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d
 26 935, 942 (9th Cir. 2011) (“Where a settlement produces a common fund for the benefit of the entire class,
 27 courts have discretion to employ either the lodestar method or the percentage-of-recovery method. Because
 the benefit to the class is easily quantified in common-fund settlements, we have allowed courts to award
 attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the
 lodestar.”) (citations omitted); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994); *Muransky v. Godiva*
Chocolatier, Inc., 905 F.3d 1200 (11th Cir. 2018); *In re VA Data Theft Litig.*, 653 F. Supp. 2d 58, 60 (D.D.C.
 2009) (*citing Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1268-70 (D.C. Cir. 1993)).

⁶ *See* MANUAL COMPLEX LITIG., Percentage-Fee Awards, § 14.121 (4th ed.) (stating that “the vast
 majority of courts of appeals now permit or direct district courts to use the percentage-fee method in
 common-fund cases”) (footnotes omitted); *see also* 32 *Moore's Federal Practice - Civil* 14.1 (2020).

1 counsel to engage in unnecessary and inefficient work to “goose” lodestar numbers. *See In re*
2 *Activision Sec. Litig.*, 723 F. Supp. 1373, 1375 (N.D. Cal. 1989).

3 **D. The Requested Fee is Reasonable.**

4 For their efforts in creating a common fund for the benefit of the Settlement Class, Class
5 Counsel seek a reasonable percentage of the fund recovered as attorneys’ fees. Class Counsel
6 request fees representing 32.5% of the Settlement Fund, after paying the reasonably necessary
7 expenses Class Counsel incurred in the prosecution of this action. These requests are fair and
8 reasonable under the relevant standards.

9 Courts in this circuit have determined that 30 percent awards are common. *See In re Nexus*
10 *6P Prod. Liab. Litig.*, No. 17-CV-02185-BLF, 2019 WL 6622842, at *13 (N.D. Cal. Nov. 12, 2019)
11 (quoting *Activision*, 723 F. Supp. at 1377 (“This court’s review of recent reported cases discloses
12 that nearly all common fund awards range around 30% . . .”)); *In re Heritage Bond Litig.*, 2005 WL
13 1594403, at *19 & n.14 (C.D. Cal. June 10, 2005) (noting that “courts in this circuit, as well as
14 other circuits, have awarded attorneys’ fees of 30% or more in complex class actions[,]” and
15 granting fees of one-third of fund). The Ninth Circuit has routinely affirmed 33% awards. *See In re*
16 *Pac. Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming 33% fee award); *In re Meگو*
17 *Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (affirming a 33.33 percent of the fund fee
18 award).

19 When assessing the reasonableness of the percentage fee award, Ninth Circuit courts
20 typically consider the following factors: (1) the results achieved, (2) the risks of litigation, (3) the
21 skill required and the quality of work, (4) the contingent nature of the fee and the financial burden
22 carried by the plaintiffs, and (5) awards made in similar cases. *See Omnivision Tech.*, 559 F. Supp.
23 2d at 1046-48 (*citing Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-51 (9th Cir. 2002)). Here, as
24 set forth below, Class Counsel achieved an excellent result, against significant risks, by applying
25 their skill and experience to a new and novel area of the law, on a completely contingent basis. All
26 factors support a 32.5% award.

27

1 **1. The Partial Settlement Reflects An Outstanding Preliminary Result.**

2 Courts in this Circuit have assigned the greatest weight to the benefit achieved in litigation.
 3 *See Jenson v. First Trust Corp.*, No. 05-cv-3124 ABC, 2008 WL 11338161, at *12 (C.D. Cal. June 9,
 4 2008) (awarding one-third fee request where counsel achieved “highly-favorable outcome”);
 5 *Heritage Bond*, 2005 WL 1594403, at *19 (“significant results achieved” weighed “strongly in
 6 favor” of one-third fee award); *Nexus 6P*, 2019 WL 6622842, at *12 (noting that the “most critical
 7 factor is the results achieved for the class” and awarding 30% fee request); *Bickley v. Schneider Nat’l*
 8 *Carriers, Inc.*, 2016 WL 6910261, at *4 (N.D. Cal. Oct. 13, 2016) (awarding one-third for attorneys’
 9 fees for “substantial monetary recovery”); *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, No.
 10 1917, 2016 WL 4126533, at *4 (N.D. Cal. Aug. 3, 2016) (granting 30% fee request where
 11 “[o]utstanding results merit a higher fee”); *Vedachalam v. Tata Consultancy Services, Ltd.*, No. 06-
 12 cv-0963 CW, 2013 WL 3941319, at *2 (N.D. Cal. July 18, 2013) (30% fee request warranted due to
 13 “excellent results obtained”).

14 Defendants’ discovery responses identified potential damages of just over \$31.5 million.
 15 Thus, the partial settlement, a recovery of 19.1% of the value, makes this settlement absolutely top
 16 of class. A recent analysis by NERA found the median recovery percentage in cases of this size was
 17 only 5.2%. *See* McIntosh and Starykh, *Recent Trends in Securities Class Action Litigation: 2021 Full-*
 18 *Year Review* (NERA 2022), at 23.⁷ Importantly, the 5.2% recovery figure is for *full settlements*. This
 19 *partial* settlement here is therefore *four times* as high, calculated as a percentage of defendants’
 20 disclosed damages to the Class, as the typical *complete and final* settlement. While counsel
 21 continues to pursue the Non-Settling Defendants, this Partial Settlement already far exceeds the
 22 typical securities litigation settlement.

23 **2. The Substantial Risks of the Litigation Support the Fee Request.**

24 The Ninth Circuit has also confirmed that a determination of a fair and reasonable fee must
 25 include consideration of the contingent nature of the fee and the obstacles surmounted:
 26

27 ⁷ [PUB 2021 Full-Year Trends 012022.pdf \(nera.com\)](#) (Last accessed December 10, 2022)

1 Contingent fees that may far exceed the market value of the services if rendered on a
2 non-contingent basis are accepted in the legal profession as a legitimate way of assuring
3 competent representation for plaintiffs who could not afford to pay on an hourly basis
4 regardless whether they win or lose.

5 *In re Wash Pub. Power Supply Sys.*, 19 F.3d at 1299; *see also Omnivision Tech.*, 559 F. Supp. 2d at
6 1047; *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M:02-cv-01486-PJH,
7 2007 WL 2416513, at *1 (N.D. Cal. Aug. 16, 2007).

8 Here, Class Counsel received no compensation during this litigation, invested 3,645.2
9 hours for a total lodestar of approximately \$2,549,871.70, and incurred expenses totaling
10 \$31,201.98 in prosecuting the case. Ard Decl., ¶¶ 5-6 (1,152 attorney hours, equaling \$892,800 in
11 lodestar, and \$6,788.21 in incurred costs); Ni Decl., ¶¶ 5-7 (1,109.1 attorney hours, equaling
12 \$613,590.20 in lodestar, and \$17,204.47 in incurred costs); Restis Decl., ¶¶ 5-7 (1,384.1 attorney
13 and paralegal hours equaling \$1,043,481.50 in lodestar, and \$7,209.30 in incurred costs). Any fee
14 award and expense reimbursement have always been at risk and contingent on the result achieved,
15 and on this Court's discretion in awarding fees and expenses.

16 Despite the most vigorous and competent efforts, Class Counsel know that the
17 commencement of a securities class action and denial of motions to dismiss are no guarantee of
18 success. Hard, diligent work by skilled counsel is required to develop facts and theories to
19 prosecute a case or persuade defendants to settle on favorable terms. A review of the 300+ docket
20 entries filed in this case demonstrates the many substantial challenges to the successful result and
21 \$6,037,500 common fund obtained from the Partial Settlement. Defendants challenged virtually
22 every legal theory and fact issue, contesting whether the case could be brought in court at all,
23 whether they sold securities, and even the propriety of this Partial Settlement. While Class Counsel
24 believe strongly in the merits of the claims, and continue to pursue the Non-Settling Defendants
25 for the balance of the rescissory damages, Defendants put up significant challenges, which have
26 not evaporated. The arguments raised by defendants could have materially reduced the amount of
27 recoverable damages available and adversely affected any potential recovery. The recovery
obtained in the face of these substantial risks supports the requested fee.

1 **3. The Skill Required and Quality of Work Performed Support the Fee Request.**

2 “All else equal, litigation that is challenging and complex supports a higher fee award.” *In*
3 *re Activision Blizzard, Inc. S’holder Litig.*, 124 A.3d 1025, 1072 (Del. Ch. 2015), as revised (May 21,
4 2015); *see also Omnivision Tech.*, 559 F. Supp. 2d at 1047 (“The ‘prosecution and management of
5 a complex national class action requires unique legal skills and abilities.”); *Ams. Mining Corp. v.*
6 *Theriault*, 51 A.3d 1213, 1256 (Del. 2012) (complexity of the case “supports a substantial award of
7 attorneys’ fees”). Here, Class Counsel are experienced and skilled practitioners in the corporate
8 and securities litigation fields, as well as highly experienced and well regarded in complex litigation.
9 *See* Ard, Ni and Restis Decls., Exhs. A (*Curriculum Vitae*s of Class Counsel). They raised new and
10 unique claims under Washington state law, as this case is the first-ever cryptocurrency litigation
11 under the Washington State Securities Act. Class Counsel’s persistent work is directly responsible
12 for the Partial Settlement result.

13 Class Counsel’s skills and experience first came into play early in this case, when they
14 successfully defeated a motion to compel arbitration filed by the Perkins Coie firm—a motion
15 based on a purported contractual obligation arising from offering documents created by Perkins
16 itself. Class Counsel pleaded the claims of the class in successive, detailed complaints, then
17 opposed Defendants’ motions to dismiss. Class Counsel engaged extensively in discovery,
18 including serving and responding to document requests and interrogatories, and combatted
19 Defendants in numerous discovery disputes. In addition to the extensive investigatory and
20 discovery efforts, the parties exchanged dozens of letters and had dozens of (formal and informal)
21 meet-and-confer exchanges.

22 Class Counsel participated in vigorous, arm’s-length settlement negotiations, including a
23 full day mediation session with an experienced mediator, followed by continued negotiations, both
24 with the mediator’s facilitation and counsel-to-counsel. *See* Dkt 205, Mot. Prelim Approval, at
25 9:25-11-8. The mediation session involved extensive briefing by Plaintiffs and Defendants
26 analyzing the legal and factual nuances of the case in depth. Class Counsel’s extensive efforts and
27 skill leading to the Settlement strongly support the requested percentage fee. Class Counsel also

1 successfully certified a litigation class, and filed and defended cross motions for summary
2 judgment.

3 Throughout, Class Counsel brought their significant experience to bear on a new and novel
4 area involving an “initial coin offering” of cryptocurrency. This is the first-ever case applying the
5 Washington State Securities Act to the newly developed field of cryptocurrency. The novelty and
6 complexity of the case is reflected in the fact that this Court’s decisions in the matter now reflect
7 almost one third of published and unpublished decisions under the WSSA, and the only ones
8 concerning cryptocurrency offerings.

9 The work opposing counsel is also important in evaluating the caliber of Plaintiff’s
10 counsel’s work. *See, e.g., In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal.
11 1977) (“plaintiffs’ attorneys in this class action have been up against established and skillful
12 defense lawyers, and should be compensated accordingly”); *Theriault*, 51 A.3d at 1256 (noting
13 Plaintiffs faced off “against major league, first-rate legal talent”). Defendants are each represented
14 by counsel who vigorously represented their clients.

15 **4. The Contingent Nature of the Fee Supports the Fee Request.**

16 Class Counsel undertook this litigation on a contingent fee basis, assuming a significant risk
17 that the litigation would yield no recovery and leave them uncompensated. Unlike counsel for
18 Defendants, who are paid an hourly rate and paid for their expenses on a regular basis, Class
19 Counsel have not been compensated for any time or expense since commencing an investigation
20 into this case in 2018.

21 Courts have consistently recognized that the risk of receiving little or no recovery is a major
22 factor in considering an award of attorneys’ fees. For example, in awarding counsel’s attorneys’
23 fees in *Nat’l Fed’n of the Blind v. Target Corp.*, 2009 WL 2390261 at *7 (N.D. Cal. Aug. 3, 2009),
24 the court noted that counsel should be compensated for the risk taken:

25 Risk of non-payment is also an issue to be considered. A contingent fee must be
26 higher than a fee for the same legal services paid as they are performed. The
27 contingent fee compensates the lawyer not only for the legal services he renders but
for the loan of those services. The purpose of a fee enhancement, or so-called
multiplier, for contingent risk is to bring the financial incentives for attorneys

1 enforcing important constitutional rights into line with incentives they have to
2 undertake claims for which they are paid on a fee-for-services basis.

3 *Id.* (cleaned up).

4 The risk of no recovery in complex cases of this type is very real. A study of federal
5 securities class actions filed between 1997 and 2018 found that 43% of the cases filed were dismissed
6 in defendants' favor. *See Securities Class Action Case Filings, 2019 Year in Review* at 16 (Cornerstone
7 Research 2020). Further, in 2021, about one-quarter of securities cases reached a settlement, but
8 dismissals greatly outnumbered settlements. *NERA 2021 Full-Year Review* at 11 Figure 11. While
9 these statistics are based on federal securities litigation under the PSLRA, typically involving
10 securities traded on the public markets, there were no state law precedents applying the WSSA to
11 cryptocurrency. This increased the risk to Class Counsel, who were paving new ground in litigating
12 this action.

13 There are numerous cases where plaintiffs' counsel in contingent cases such as this, after
14 the expenditure of thousands of hours, have received no compensation. Class Counsel are aware
15 of many hard-fought lawsuits where excellent professional efforts of the plaintiffs' counsel
16 produced no fee. Even plaintiffs who get past summary judgment and succeed at trial may find a
17 judgment in their favor overturned on appeal or on a post-trial motion. Because the fee in this
18 matter was entirely contingent, the only certainties were that there would be no fee without a
19 successful result and that such a result would be realized only after considerable and difficult effort.
20 Class Counsel committed enormous resources of both time and money to the vigorous and
21 successful prosecution of this litigation for the benefit of the Settlement Class, and continue to do
22 so. The contingent nature of counsel's representation strongly favors approval of the requested
23 fee.

24 **5. A 32.5% Fee Award Is Consistent with the Market Rate in Similar Complex,
25 Contingent Litigation.**

26 Courts often look to fees awarded in comparable cases to determine if the fee requested is
27 reasonable. *See Vizcaino*, 290 F.3d at 1050 n.4. A one-third fee has been repeatedly awarded by the

1 courts in this Circuit and District and in numerous other courts throughout the country. *See, e.g.*,
2 *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454 (9th Cir. 2000), as amended (June 19, 2000)
3 (affirming award of one-third of the total recovery); *Pac. Enterprises*, 47 F.3d at 379 (affirming 33%
4 fee award); *Bickley*, 2016 WL 6910261, at *4 (approving one-third fee award); *Jenson*, 2008 WL
5 11338161, at *11 (approving 33% fee award). Class Counsel’s present fee request is therefore
6 consistent with fee award percentages routinely granted in this Circuit.

7 Moreover, if this were a non-representative litigation, the customary fee management
8 would be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery. *See Scott*
9 *v. ZST Dig. Networks, Inc.*, No. CV 11-3531 GAF (JCx), 2013 U.S. Dist. LEXIS 197940, at *28
10 (C.D. Cal. Aug. 5, 2013) (“[i]n private contingent litigation, fee contracts have traditionally ranged
11 between 30 percent and 40 percent of the total recovery.”) (*quoting In re M.D.C. Holdings Sec.*
12 *Litig.*, Master File No. CV 89-0090 E (M), 1990 U.S. Dist. LEXIS 15488, at *22 (S.D. Cal. Aug.
13 30, 1990)).

14 **E. A Lodestar Crosscheck Confirms the Reasonableness of the Fees Sought.**

15 In cases where attorneys’ fees are sought based on a percent of the common fund, courts
16 in this Circuit frequently employ a lodestar crosscheck to assess the reasonableness of the fees
17 sought. *See, e.g., Vizcaino*, 290 F.3d at 1050 (“[W]hile the primary basis of the fee award remains
18 the percentage method, the lodestar may provide a useful perspective on the reasonableness of a
19 given percentage award.”). In the Ninth Circuit, “multiples ranging from one to four are
20 frequently awarded in common fund cases when the lodestar method is applied.” *Id.* at 1050, n.6
21 (28% fee award represented a multiplier of 3.65); *see also Buccellato v. AT&T Operations, Inc.*, 2011
22 WL 3348055, at *2 (N.D. Cal. June 30, 2011) (awarded 4.3 lodestar multiplier as part of a 25% fee
23 award); *In re Brocade Sec. Litig.*, No. 3:05-cv-02042-CRB, slip op. at 13 (N.D. Cal. Jan. 26, 2009)
24 (awarding 25% of \$160 million common fund, representing a 3.5 multiplier).

25 As set forth in the attached declarations, Plaintiff’s counsel has expended a total of 3645.2
26 hours since 2018 for investigation, litigation, and negotiation of the monetary payment reflected in
27 the Partial Settlement. Class Counsel’s lodestar, derived by multiplying the hours spent on the

1 litigation by each attorney and professional by their current hourly rates, is \$2,549,871.70. Ard
 2 Decl., ¶ 5; Ni Decl., ¶¶ 5-6; Restis Decl., ¶¶5-6. Accordingly, the requested fee of 32.65% of the
 3 cash recovery, net of expenses, which equates to approximately \$1.9 million, represents a negative
 4 multiplier of 0.77—*i.e.*, it would not fully compensate counsel for their hourly rates. This is well
 5 below the multiplier range of one to three frequently used as a crosscheck. Given the extraordinary
 6 results achieved in an untested and risky Securities Act action, Class Counsel’s three thousand
 7 plus hours support the reasonableness of the fee request.⁸

8 Class Counsel’s rates are between \$150 to \$425 for law clerks and associates, \$750 to 850
 9 per hour for partners, and \$195 per hour for senior paralegal work. Ard Decl., ¶ 5; Ni Decl., ¶ 6;
 10 Restis Decl., ¶ 6. These are “reasonable hourly rate[s] for the region and for the experience of the
 11 lawyer[,]” *Bluetooth Headset*, 654 F.3d at 941; *see also In re Volkswagen “Clean Diesel” Mktg., Sales*
 12 *Practices, and Prod. Liab. Litig.*, No. 3:15-md-02672-CRB, 2017 WL 1047834, at *5 (N.D. Cal. Mar.
 13 17, 2017) (Iodestar cross-check supported the reasonableness of the requested fee award where
 14 “[t]he blended average hourly billing rate is \$529 per hour for all work performed and projected,
 15 with billing rates ranging from \$275 to \$1600 for partners, \$150 to \$790 for associates, and \$80 to
 16 \$490 for paralegals[]”); *Roberti v. OSI Systems, Inc.*, 2015 WL 8329916, at *7 (C.D. Cal. Dec. 8,
 17 2015) (“Lead Counsel’s attorney rates—between \$525 to \$975—are reasonable given that each
 18 has at least 15 years of litigation experience”).

19 **F. Plaintiff’s Counsel’s Expenses are Reasonable and Should be Approved.**

20 Class Counsel also request that the Court grant their application for reimbursement of
 21 litigation expenses incurred in prosecuting and resolving this litigation. Expenses are reimbursable
 22 in a common-fund case where they are of the type typically billed by attorneys to paying clients in
 23 the marketplace. *See, e.g., Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (plaintiff may recover
 24 “those out-of-pocket expenses that ‘would normally be charged to a fee paying client’”);
 25
 26

27 ⁸ These Iodestar amounts do *not* include the time Class Counsel spent preparing this motion for fees.

1 *Omnivision Tech.*, 559 F. Supp. 2d at 1048 (“Attorneys may recover their reasonable expenses that
2 would typically be billed to paying clients in non-contingency matters.”).

3 From the beginning of the case, Class Counsel were aware that they might not recover any
4 of their expenses and would not recover anything unless and until the Action was successfully
5 resolved. Class Counsel also understood that, even assuming the case was ultimately successful,
6 an award of expenses would not compensate for the lost use of the funds advanced to prosecute
7 this Action. Thus, Class Counsel were motivated to take significant steps to minimize expenses
8 whenever practicable without jeopardizing the vigorous and efficient prosecution of the Action.
9 Ard Decl., ¶ 7; Ni Decl., ¶ 7; Restis Decl., ¶ 7.

10 As discussed in detail in the attached declarations, Class Counsel incurred \$31,201.98 in
11 litigation expenses prosecuting the Action. Ard Decl., ¶ 6 (\$6,788.21 in expenses) Ni Decl., ¶ 7
12 (\$17,204 in expenses); Restis Decl., ¶ 7 (\$7,209.30 in expenses). The litigation expenses were
13 reasonable and necessary for the prosecution and resolution of the litigation and are of the type
14 routinely charged to hourly paying clients. These include mediator fees, court reporter fees,
15 document-management costs, service of process expenses, deposition support, legal research and
16 court fees. A complete breakdown by category of the expenses incurred by Plaintiff’s counsel are
17 presented for the Court’s review. *See* Ard Decl., ¶ 6; Ni Decl., ¶ 7; Restis Decl., ¶ 7. These expense
18 items are incurred separately by Class Counsel and are not duplicated in the firms’ rates.

19 The Notice provided to Settlement Class members informed them that Plaintiff’s counsel
20 intends to apply for the reimbursement of fees and litigation expenses up to \$1,992,375.00. As
21 ordered by the Court, this fee, expense, and incentive fee application will be posted on the
22 settlement website immediately after filing. The amount of expenses now sought by Class Counsel
23 is \$31,201.98.

24 **G. An Award Should Be Granted to Lead Plaintiff.**

25 Class Counsel request that the Court approve an award in the amount of \$10,000 for Class
26 Representative Chris Hunichen, to be deducted from the Settlement Fund. *See Staton v. Boeing*
27 *Co.*, 327 F.3d 938, 977 (9th Cir. 2003) (holding that named plaintiffs are eligible for “reasonable”

1 payments as part of class-action settlement). An award “compensates Plaintiffs for the services
2 they performed on behalf of the Settlement Class and the risk they undertook bringing this action.”
3 *Rinky Dink, Inc. v. Elec. Merch. Sys.*, 2016 U.S. Dist. LEXIS 72915, at *15 (W.D. Wash. Apr. 19,
4 2016). The Court should consider whether the requested incentive award is appropriate in light of
5 “the proportion of the payments relative to the settlement amount,” “the size of the payment,”
6 “the actions the plaintiff has taken to protect the interests of the class, the degree to which the
7 class has benefitted from those actions,” and “the amount of time and effort the plaintiff expended
8 in pursuing the litigation.” *Staton*, 327 F.3d at 952.

9 The Settlement Agreement did not provide for any incentive payment, obviating any
10 concerns of conflict or inadequacy. *See Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1164 (9th
11 Cir. 2013) (“district courts must be vigilant in scrutinizing all incentive awards to determine
12 whether they destroy the adequacy of the class representatives”). The Notice informed the
13 Settlement Class that Class Counsel would seek an award of up to \$10,000 for Lead Plaintiff. An
14 award of \$10,000 represents approximately 0.16% of the total Settlement Fund, rendering it
15 presumptively approvable. *See, e.g., In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 947
16 (9th Cir. 2015) (approving awards constituting “a mere .17% of the total settlement fund”).

17 Here, the Class Representative spent a significant amount of time contributing to the
18 litigation and benefiting the Settlement Class by reviewing the relevant documents; staying
19 apprised of developments in the case and making himself available to Class Counsel; providing
20 Class Counsel with extensive information and materials regarding his investment and
21 communications with defendants; conferring with counsel throughout the litigation, being deposed
22 by defendants, and even defending related counterclaims. *See Hunichen Decl.*, ¶¶ 9-16. This award
23 is consistent with service awards in other cases. *See, e.g., Todd v. STAAR Surgical Co.*, 2017 WL
24 4877417, at *6 (C.D. Cal. Oct. 24, 2017) (\$10,000 award); *Rausch v. Hartford Fin. Servs. Grp.*, No.
25 01-cv-1529-BR, 2007 U.S. Dist. LEXIS 14740, at *9 (D. Or. Feb. 26, 2007) (\$10,000 award).

26
27

III. CONCLUSION.

The Court should approve the fee and expense application and order (a) reimbursement of \$31,201.98 in litigation expenses that were reasonably and necessarily incurred by Class Counsel in prosecuting and resolving this Action; an award of \$1,961,173.02 in attorneys' fees; and an award of \$10,000 for Class Representative Hunichen to compensate him for his time and hardship spent litigating this action.⁹

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⁹ A generic Proposed Order accompanies this filing. Counsel will prepare a complete Proposed Order incorporating both the Settlement Approval and this Motion, in light of any objections, with the Motion for Final Approval on March 10, 2023.

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December 13, 2022.

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