IN THE CIRCUIT COURT FOR THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

IN RE RENTRAK CORPORATION SHAREHOLDERS LITIGATION,	CONSOLIDATED LEAD CASE NO. 15CV27429 Assigned to Judge Litzenberger **MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ATTORNEY FEES, EXPENSES, COSTS, AND DISBURSEMENTS FOR CLASS COUNSEL**

Plaintiffs John Hulme and Andrew B. Nathan, as Trustee for the Ira S. Nathan Revocable Trust ("Plaintiffs"), move for an award of $6,270,000 in attorney fees and $196,728.42 in expenses for a total of $6,466,728.42 to be allocated by Class Counsel.

I. Introduction

Lawyers who work on contingency can invest thousands of hours and millions of dollars in a losing effort and receive no pay for their time or reimbursement for their expenses. When they succeed, against long odds, they deserve to be fairly compensated.

Here, Class Counsel incurred extreme risks in litigating novel questions of Oregon law. Because discovery proceeded before a decision on the motion to dismiss, Class Counsel had to spend thousands of hours on the discovery process and incur hundreds of thousands of dollars in expenses, knowing that the Court could have potentially dismissed the Action with prejudice at any time. Indeed, after several months of litigation and discovery, comScore's motion to dismiss was, in fact, granted.

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Class Counsel seek a fee award of 33% of the common fund. This request is amply supported by Oregon Supreme Court authority because counsel spent significant time and money, at extraordinary contingent risk, to achieve an exceptional result.

II. Facts

The background of the Action is set forward in the accompanying Motion for Final Approval, which Plaintiffs hereby incorporate by reference.

III. Argument

A. Fees Should Be Calculated As A Percentage Of The Common Fund

When a class action "successfully recovers a fund for the benefit of a class, it is long settled that the attorneys who created that class recovery are entitled to be reimbursed from the common fund for their reasonable litigation expenses, including reasonable attorney's fees." Alba Conte & Herbert B. Newberg, 4 NEWBERG ON CLASS ACTIONS § 14:2, 512 (4th ed 2002). In Oregon, ORCP 32 M(1)(c) codifies the common-fund doctrine "by authorizing a reasonable fee award to be paid from any recovery awarded to the class when the judgment can be divided for that purpose." *Strawn v. Farmers Ins. Co. of Oregon*, 353 Or 210, 216 (2013) (citing ORCP 32 M(1)(c) ("If the prevailing class recovers a judgment that can be divided for the purpose, the court may order reasonable attorney fees and litigation expenses of the class to be paid from the recovery.")).

As the Supreme Court discussed in *Strawn*, "[i]n determining what amount of fee is reasonable, two basic methods of calculation are generally available. One is the so-called 'lodestar' method, by which the attorney is awarded a fee based on a reasonable hourly rate, multiplied by a reasonable number of hours devoted to work on the case, with certain adjustments potentially made to that amount for factors such as the risk of loss and the quality of the attorney's work. The other is the so-called 'percentage method' (percent-of-fund) method, which sets the fees by calculating the total recovery secured by the attorneys and awarding them a reasonable percentage of that recovery." *Id.* at 217. While courts have used both methods,

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"[t]raditionally, in both state and federal courts, the percent-of-fund method has been the prevalent means of calculating the reasonable fee award in common fund cases" *Id.*; *see also id.* at 219 ("[i]n common fund cases … federal and state courts alike have increasingly returned to the percent-of-fund approach" after a brief experiment with the lodestar method in the 1970s).[1]

The percentage method is preferable to the lodestar method in common-fund cases for several reasons, "including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation." *Laffitte* 1 Cal 5th at 503. In *Strawn*, the Oregon Supreme Court identified many of the same factors as supporting the use of the percentage method in common-fund cases. 353 Or at 218 (noting that a Third Circuit task force found that "calculating a lodestar and adjusting it for factors such as quality of representation and risk undertaken created an unwarranted 'sense of mathematical precision,' was insufficiently objective, was burdensome and unmanageable for courts, and encouraged lawyers to devote excessive or unnecessary hours to the litigation.").

B. The Results Here Justify The Requested Percentage Fee Award

"Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." *Chavez v. Netflix, Inc.*, 162 Cal App 4th 43, 66 (2008) (quoting *Shaw v. Toshiba America Information Systems, Inc.*, 91 FSupp2d 942, 972 (ED Tex 2000)); *see also* Alba Conte & Herbert B.

[1] In a recent decision, California's Supreme Court provided a lengthy history of the two methods and an extensive analysis of their relative merits and demerits. As in *Strawn*, the California Supreme Court noted that "all the circuit courts either mandate or allow their district courts to use the percentage method in common fund cases; none require sole use of the lodestar method. Most state courts to consider the question in recent decades have also concluded the percentage method of calculating a fee award is either preferred or within the trial court's discretion in a common fund case." *Laffitte v. Robert Half Int'l Inc.*, 1 Cal 5th 480, 493–94 (2016). "The American Law Institute has also endorsed the percentage method's use in common fund cases, with the lodestar method reserved mainly for awards under fee shifting statutes and where the percentage method cannot be applied or would be unfair due to specific circumstances of the case." *Id.* at 494.

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Newberg, 4 NEWBERG ON CLASS ACTIONS § 14.6 (4th ed 2002) ("[F]ee awards in class actions average around one-third of the recovery[.]").

That benchmark is amply supported by precedents from across the country:

- *Furman v. At Home Stores LLC*, No. 1:16-CV-08190, 2017 WL 1730995, at *4 (ND Ill May 1, 2017) ("[c]ourts routinely hold that one-third of a common fund is an appropriate attorneys' fees award in class action settlement.") (collecting cases);
- *Beckman v. KeyBank, N.A.*, 293 FRD 467, 477 (SDNY 2013) (approving "class counsel's request for one-third of the fund because reasonable, paying client[s] ... typically pay one-third of their recoveries under private retainer agreements.") (internal quotations omitted);
- *Smith v. CRST Van Expedited, Inc.*, 2013 WL 163293, *5 (SD Cal 2013) ("Under the percentage method … most fee awards based on either a lodestar or percentage calculation are 33 percent[.]");
- *Deem v. Ames True Temper, Inc.*, No. 6:10-CV-01339, 2013 WL 2285972, at *6 (SD W Va May 23, 2013) ("the one-third fee requested by counsel is very much in line with fee awards in similar common-fund cases.") (collecting cases);
- *Febus v. Guardian First Funding Grp., LLC*, 870 F Supp 2d 337, 340 (SDNY 2012) ("a fee that is one-third of the fund is typical, and courts in this district have awarded 33% of substantially larger settlement funds");
- *Burford v. Cargill, Inc.*, No. CIV.A. 05-0283, 2012 WL 5471985, at *5 (WD La Nov 8, 2012) ("a review of analogous precedent indicates that an award of one-third of the common fund is reasonable and typical.") (collecting cases);
- *Bennett v. Roark Capital Grp., Inc.*, No. 2:09-CV-00421-GZS, 2011 WL 1703447, at *2 (D Me May 4, 2011) ("the request for an award of one-third of the common fund reflects a fee that is customary");
- *Flournoy v. Honeywell Int'l, Inc.*, No. CIVA CV205-184, 2007 WL 1087279, at *2 (SD Ga Apr 6, 2007) ("The most common contingent fee is one third of the recovery. Forty percent fee contracts are common for complex and difficult litigation such as this.").[2]

In determining whether a 33% award is appropriate here, this Court generally considers the factors set out in ORCP 32 M(1)(e), which include:

- The results achieved and benefits conferred upon the class;

[2] *Strawn* approved an award of 42% of the common fund (*Strawn*, 353 Or at 231) and *Laffitte* approved an award of one-third of the common fund in a case where, like this one, the gross settlement amount was $19 million. *Laffitte*, 1 Cal 5th at 488 (affirming "an award of one-third [of] the common fund," or $6,333,333.33, which "was in the range set by other class action lawsuits").

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- The contingent nature of success;
- The magnitude, complexity, and uniqueness of the litigation;
- The time and effort expended by the attorney in the litigation, including the nature, extent, and quality of the services rendered; and
- Other appropriate criteria identified in Rule 1.5 of the Oregon Rules of Professional Conduct.

Here, these factors all support a fee award of $6,270,000, which is 33% of the gross common fund.

1. Plaintiffs Achieved Outstanding Results For The Class

As set forth in detail in the accompanying Motion for Final Approval, Class Counsel achieved extraordinary results against long odds, reaching what counsel believe to be the largest-ever settlement of merger litigation in Oregon history. Or R Prof Cond 1.5(b)(4) (court should consider "the amount involved and the results obtained.")

Without repeating the detailed analysis set forth in the Motion for Final Approval, a $19,000,000 common fund for shareholders is an extraordinary result in any merger litigation, whether in Oregon or anywhere else. But the patterns shown in Appendix A to the Motion for Final Approval demonstrate three reasons that the Settlement amount is particularly impressive.

First, in evaluating a settlement, the Court must "assess[] the reasonableness of the 'give' and the 'get[.]'" *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A3d 1025, 1043 (Del Ch 2015); And here, unlike **every** other settlement identified by Cornerstone Research (other than *Rural Metro*), the "give" is **not** a complete release of all claims against all Defendants. So the $19,000,000 common fund is just a starting point.

The Settlement releases all claims against the Rentrak Defendants—because it effectively exhausts the Rentrak Defendants' insurance coverage. But the **only** claims released against comScore (and its agents) are claims for aiding-and-abetting the Rentrak Defendants. Critically, Plaintiffs have preserved Rentrak shareholders' ability to continue to litigate direct claims

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against comScore, its officers, and directors, and its auditor for violation of the federal securities laws.

Second, the size of settlements is driven in significant part by the size of the transaction being challenged. The Transaction here was (relatively speaking) small. At the time it was announced, it was valued at $732 million. The Settlement Amount, therefore, represents 2.6% of the total transaction value. Only seven other settlements identified by Cornerstone achieved a higher percentage of the overall Transaction size. And this was the fourth-largest settlement arising from a transaction with an announced value of less than $1 billion.

Third, as the Cornerstone data shows, the largest settlements in merger litigation usually involve either (1) an acquisition by a controlling stockholder or disproportionate consideration paid to a controlling stockholder; or (2) a sale to a private equity firm.

Neither factor was present here, making the Settlement even more remarkable. Indeed, this appears to be the **only** cash settlement since 2010 of litigation arising from a transaction valued at less than $1 billion that did not involve either a controlling stockholder, management buyout or sale to a private equity firm. The Settlement also appears to be the **only** cash settlement of litigation involving an all-stock merger where there was not a controlling stockholder present.[3]

2. Plaintiffs' Counsel Faced Extraordinary Contingent Risk

Because of the significant risk that lawyers will receive no compensation for their work, "[a] contingent fee must be higher than a fee for the same legal services paid as they are

[3] Counsel also achieved a valuable benefit for the Class in forcing Defendants to make material supplemental disclosures prior to the shareholder vote regarding cash flow projections and conflicts related to Rentrak's financial advisor, Goldman Sachs. In a recent Oregon decision, counsel were awarded $365,000, inclusive of expenses, for similar supplemental disclosures. *Solak v. Cascade Microtech et al.*, Case No. 16CV11809 (Class Counsel Fee Declaration, Exhibit K); *see also* Rosen, et al., Awarding Attorneys' Fees, SETTLEMENT AGREEMENTS IN COM. DISPUTES § 27.10 (2016) ("[d]uring the years 2005 through 2014, the fees and expenses awarded in connection with disclosure-only settlements averaged approximately $415,000. … [N]early 80 percent of the awards ranged from $200,000 and $650,000, and half of the awards ranged from $280,000 and $500,000. The most common amount awarded was $450,000.").

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performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans." *Ketchum v. Moses*, 24 Cal 4th 1122, 1132–33 (2001) (quoting Richard Posner, ECONOMIC ANALYSIS OF LAW 534, 567 (4th ed 1992)). "A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." *Id.* at 1133 (quoting John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE LJ 473, 480 (1981)).

While there is always significant risk present in contingent-fee representations of shareholder classes—justifying a significant premium when those representations are successful—the degree of risk in this case was unusually high for no less than two reasons.

First, the most common type of shareholder class action litigation is brought in federal court under the federal securities laws. In those cases, discovery is automatically stayed until the motion to dismiss is denied. *See, e.g.*, 15 USC 78u-4(b)(3)(B). Thus, plaintiffs' counsel are not required to invest significant time, effort, and resources in the discovery process until after a motion to dismiss is denied. Their efforts are typically limited to investigating and drafting a complaint and briefing the motion to dismiss. And once a motion to dismiss has been denied in an action under the federal securities laws, it becomes quite likely that the case will settle, making an investment of significant resources less risky. See, e.g., Lisa L. Casey, Twenty-Eight Words: Enforcing Corporate Fiduciary Duties Through Criminal Prosecution Of Honest Services Fraud, 35 Del J Corp L 1, 36 (2010) (in securities cases, "[i]f plaintiffs' complaint survives defendants' motions to dismiss and the trial court certifies the shareholder class, defendants almost always settle rather than proceed to trial."); Elliott J. Weiss and John S. Beckerman, Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions, 104 Yale LJ 2053, 2064 (June 1995) ("virtually all [securities class]

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actions not dismissed on motion are settled.").

Here, by contrast, discovery proceeded before a decision on the motions to dismiss. So Class Counsel were required to invest thousands of hours—representing millions of dollars of lodestar—knowing that, at any time, the Court could have dismissed the Action in its entirety and left Class Counsel empty-handed. Indeed, following a significant amount of discovery, the Court did dismiss the aiding-and-abetting claim against comScore.

Second, Class Counsel are both small firms.4 While larger firms can reduce risk by developing a large, diversified portfolio of cases, for smaller firms, a "strategy of investing heavily in a few … cases" means that "a single defeat could produce a cash flow crisis." John C. Coffee, Jr., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 66 (2015); *see also In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A3d 1025, 1074 (Del Ch 2015) (litigation "involved true contingency risk" justifying fee award "at the higher end of the range" where litigation was a "largely undiversified, entrepreneurial undertaking" led by "small firms, with two partners and three partners respectively.").

Here, the extensive time devoted to this Action limited Class Counsel's ability to take on other work. *See* Class Counsel Fee Dec. ¶ 67; *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A3d 1025, 1074 (Del Ch 2015) ("Both firms had limited ability to work on other cases and turned away potential new business."). Plaintiffs' Counsel also made significant monetary investments in the action, incurring $196,728.42 in expenses with no guarantee of future reimbursements.

3. The Action Was Complex And Presented Novel Questions Of Oregon Law

As a general rule, shareholder litigation is "notoriously difficult and unpredictable." *In re Fab Universal Corp. S'holder Derivative Litig.*, 148 F Supp 3d 277, 281 (SDNY 2015) (internal quotations omitted); *Gilbert v. Abercrombie & Fitch, Co.*, No. 2:15-CV-2854, 2016 WL

[4] Block & Leviton has three equity partners and nine other full-time attorneys; Andrews & Springer has two equity partners and one other full-time attorney.

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4159682, at *18 (SD Ohio Aug 5, 2016) ("stockholder class action litigation is inherently complex and the prosecution of such actions typically requires specialized skill."). This Action was even more complex than the typical stockholder action for two reasons.

First, unlike most of the other merger litigation actions, this Action was not litigated under Delaware law, but rather under the law of Oregon. And there are simply not that many cases decided under Oregon law that address the fiduciary duties of corporate officers and directors in the merger and acquisition context. Thus, to a large extent, the parties were litigating novel questions of law that were guided—but not constrained—by Delaware precedents. The lack of binding Oregon authority created additional uncertainty and complexity for Class Counsel (as well as the other parties).

Second, there was related, overlapping litigation in the Southern District of New York. This meant that Class Counsel were forced to litigate the question of a discovery stay in both this Court and the Southern District of New York and to defend against arguments that the pendency of the Federal Action required the dismissal of this Action or that the pendency of the Federal Action prevented certification of a class in this Action.

4. Plaintiffs' Counsel Expended Significant Time and Energy Prosecuting The Action, And Provided A High Caliber Of Representation

In *Strawn*, the Supreme Court recognized that courts applying the percentage method will often perform a lodestar cross-check—in other words, "calculate the fee based on the percent-of-fund method and then … compar[e] that fee to what the lodestar approach would produce" to "check the reasonableness of the result." *Strawn*, 353 Or at 219. Here, a lodestar cross-check supports the reasonableness of the requested fee award. As set forth in the Fee Declarations attached to this brief, Plaintiffs' Counsel collectively spent 7,302.95 hours in the prosecution of this Action. At their current billing rates, this would reflect a lodestar of $3,625,678.50. The requested fee of $6,270,000 would, therefore, reflect a so-called "multiplier" of 1.73.

This is well within the scope of multipliers that have been approved in other actions.

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"[C]ourts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases." *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F3d 1291, 1300 (9th Cir 1994). "In shareholder litigation, courts [routinely] apply a multiplier of 3 to 5 to compensate counsel for the risk of contingent representation." *Cohn v. Nelson*, 375 F Supp 2d 844, 862 (ED Mo 2005); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 FRD 465, 489 (SDNY 1998) ("In recent years multipliers of between 3 and 4.5 have become common.") (internal quotation omitted; collecting cases).[5]

Moreover, Class Counsel provided a high caliber of representation throughout the Action, made possible by their specialized experience and training. *See* Or R. Prof. Cond. 1.5(7) (court may consider "the experience, reputation, and ability of the lawyer or lawyers performing the services"). Class Counsel's experience and training facilitated the result achieved. *See* Joint Declaration of Jason M. Leviton and Peter B. Andrews (Block & Leviton Firm Resume, Exhibit I, and Andrew & Springer Firm Resume, Exhibit J).

5. The Remaining Factors Identified By Rule 1.5 Support The Requested Award

ORCP 32 M(1)(e)(v) requires the Court to consider "[o]ther appropriate criteria identified in Rule 1.5 of the Oregon Rules of Professional Conduct." Many of the criteria identified in Rule 1.5(b) of the Oregon Rules of Professional Conduct as "factors to be considered as guides in determining the reasonableness of a fee" overlap with the criteria already identified in ORCP 32 M(1)(e)(i)-(iv) and discussed above.[6]

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[5] In *Vizcaino v. Microsoft Corp.*, the Ninth Circuit compiled an appendix of 34 common-fund settlements and found that a majority of multipliers fell within the 1.5–3.0 range. 290 F3d 1043, 1051 n.6 (9th Cir 2002).

[6] Rule 1.5(b)(1) requires the Court to consider "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly," which are addressed in subsections (3) and (4) above. Rule 1.5(b)(2) requires the Court to consider "the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer," which is addressed in subsection (2) above. Rule 1.5(b)(4) requires the Court to consider "the amount involved and the results obtained," which is addressed in subsection (1) above. Rule 1.5(b)(7) requires the Court to consider "the experience, reputation, and ability of the lawyer or lawyers performing the services," which is addressed in subsection (4) above. And Rule 1.5(b)(8) requires the Court to consider "whether the fee is fixed or contingent," which is addressed in subsection (2) above.

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The remaining Rule 1.5(b) factors support the requested award.

(i) Class Counsel's Hourly Rates Are Reasonable and In Line With Market Rates

Rule 1.5(b)(3) requires the Court to consider "the fee customarily charged in the locality for similar legal services." Here, when looking at Class Counsel's rates for the purposes of a lodestar cross-check, it is clear that Class Counsel's rates are reasonable for several reasons.

First, although this action was filed in Oregon, the class of Rentrak shareholders includes investors from across the country. It is typical in this type of case for investors to be represented by class action firms, such as Class Counsel, that maintain a national practice. Rates for these firms are typically set by reference to their home state. As demonstrated by the memorandum attached to the Class Counsel Fee Declaration as Exhibit D; Block & Leviton's rates are set by reference to the rates charged by similar Boston-based firms with a national practice and are charged to hourly paying clients as well. Similarly, Andrews & Springer's rates are set by reference to other Delaware firms with a national practice, and those rates are routinely reviewed by the Courts in Delaware in assessing the reasonableness of fee requests made by Andrews & Springer when representing stockholders of public companies who live across the country. *See* Joint Declaration of Jason M. Leviton and Peter B. Andrews, Exhibit J.[7]

Second, the rates charged by defense counsel—and Defendants' decision to hire out-of-state counsel—are further evidence of the reasonableness of Class Counsel's rates. *See EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 432 (Del. 2012) ($2.5 million award to plaintiffs' counsel was reasonable where defendant had "not hesitated to pay its own counsel and [individual defendant's] counsel over $5 million to litigate against the plaintiffs."); *Chrapliwy v. Uniroyal,*

[7] In addition, Andrews & Springer has previously litigated and settled class action litigation in Multnomah County, and its rates were implicitly approved by the Hon. Cheryl A. Albrecht when the Court granted final approval of the class action settlement and awarded the requested attorney's fees and expenses, based in part on the submission of the declaration of Peter B. Andrews which reflected the hours worked by Andrews & Springer and used the same rate structure per attorney and paralegal as set forth in the present case. *See* Leviton and Andrews Joint Dec., Exhibit K (*Solak v. Cascade Microtech et al.*, Case No. 16CV11809, Hon. Cheryl A. Albrecht - Order Granting Final Approval of Class Action Settlement).

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Inc., 670 F2d 760, 768 n.18 (7th Cir 1982) ("The rates charged by the defendant's attorneys provide a useful guide to rates customarily charged in this type of case. Also, when the defendant has hired expensive, out of town counsel, the plaintiffs seem justified in saying that the nature of the case required the skills of out of town specialists.").

Here, the Rentrak Defendants were represented at all times by the Perkins Coie firm; comScore was represented by Quinn Emanuel and later by Jones Day. Fee applications submitted by those firms in other cases demonstrate that Class Counsel's hourly rates are almost certainly lower than the rates that Defendants paid:

	Partners	**Associates**	**Paralegals**
Jones Day[8]	$1,350 - $600	$925 - $325	$425 - $250
Quinn Emanuel[9]	$1,200 - $865	$1,030 - $550	$370 - $305
Perkins Coie[10]	$985 - $650	$725 - $420	$335 - $250

(ii) Class Counsel Were Required To Work Under Significant Time Pressures

Rule 1.5(b)(5) requires the Court to consider "the time limitations imposed by the client or by the circumstances." Here, Defendants were able to delay significant document productions until late October 2016—about a year before trial and seven months before the close of fact discovery. As a result, Class Counsel were required to work long hours on an extremely compressed schedule in order to prepare the case for trial.

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[8] Ninth Supplemental Declaration Of Joshua M. Mester In Support Of Application Of The Official Committee Of Second Priority Noteholders To Employ And Retain Jones Day As Counsel Nunc Pro Tunc To February 5, 2015, filed in *In re Caesars Entertainment Operating Company, Inc.*, No. 15-00145, Dkt 6603 (ND Ill Bankr Feb 27, 2017).

[9] Application Of The Debtors And Debtors In Possession, Pursuant To Section 327(E) Of The Bankruptcy Code, Bankruptcy Rules 2014(A) And 2016(B) And Local Bankruptcy Rules 2014(A) And 2016-1, For An Order Authorizing The Debtors And Debtors In Possession To Retain And Employ Quinn Emanuel Urquhart & Sullivan, LLP As Special Litigation Counsel, Nunc Pro Tunc To The Petition Date, filed in *In re Peabody Energy Corporation*, No. 16-42529-399, Dkt 359 (ED Mo Bankr May 6, 2016).

[10] Application To Employ Perkins Coie LLP As Attorneys For The Official Committee Of Unsecured Creditors Nunc Pro Tunc To April 19, 2017 filed in *In re: Ciber, Inc.*, No. 17-10772, Dkt 160 (D Del Bankr. May 5, 2017).

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(iii) Class Counsel Are Unlikely To Benefit From Repeat Business From Plaintiffs

Finally, Rule 1.5(b)(6) requires the Court to consider "the nature and length of the professional relationship with the client." Here, Plaintiffs are individual retail investors who had not previously served as clients of Class Counsel and will be unlikely to need their services in future. Therefore, the prospect of future business does not provide any reason to discount counsel's fees.

6. Counsel's Expenses Were Reasonable and Should Be Reimbursed

Attorneys who have successfully created a common fund should also be reimbursed for out-of-pocket expenses incurred in the prosecution of the litigation, separate and apart from the award of fees. *See Strawn*, 353 Or at 238 (approving separate award of "expenses that are not part of his attorneys' hourly rates, such as internal photocopying and computerized legal research); *In re Galena Biopharma, Inc. Sec. Litig.*, No. 314CV00367SILEAD, 2016 WL 3457165, at *1 n.4 (D Or June 24, 2016) ("Because the Court has determined the appropriate award of attorney's fees is $4.5 million, the Court further awards counsel's expenses separately."); *In re Par Pharm. Sec. Litig.*, No. CIV.A. 06-3226 ES, 2013 WL 3930091, at *11 (DNJ July 29, 2013) ("Counsel in common fund cases is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case. … Expenses are generally considered and reimbursed separately from attorneys' fees.") (internal quotations omitted); *In re Businessland Sec. Litig.*, No. C-90-20476-RFP, 1991 WL 427887, at *2 (ND Cal June 14, 1991) ("courts have awarded expenses from the litigation, in addition to a percentage of the fund.") (collecting cases separately reimbursing out-of-pocket expenses).

Here, as set forth in Exhibit 1 to the Motion, Plaintiffs' Counsel incurred a total of $196,728.42 in expenses. The most significant expenses included expert fees, mediator fees, fees for maintaining a document review platform, and travel expenses for Class Counsel (all of whom

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are based on the East Coast). All expenses were reasonably and necessarily incurred in the prosecution of this Action and should be reimbursed.

C. Plaintiffs Have Complied With ORCP 32 M(2)

Here Plaintiffs have submitted the additional documents required by ORCP 32 M(2).[11] *First*, Counsel have not yet been paid anything for their services rendered in connection with the Action and will not be paid except as ordered by the Court. Exhibit 1 details the expenses incurred by counsel in prosecuting the Action (ORCP M(2)(a)). *Second*, copies of the Plaintiffs' retention agreements are attached as Exhibits A, B, and C to the Joint Declaration of Jason M. Leviton and Peter B. Andrews (ORCP M(2)(b)). *Finally*, copies of emails documenting Class Counsel's agreements with local counsel and supporting counsel are attached as Exhibits E and F to the Joint Declaration of Jason M. Leviton and Peter B. Andrews (ORCP 32 M(2)(c)).[12] The emails reflect the agreements of Class Counsel with respect to the allocation of fees to local counsel and the supporting firms. [13]

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[11] Pursuant to ORCP 32 M(2), a motion for an award of attorneys' fees to class counsel must be supported by:

(a) A statement showing any amount paid or promised them by any person for the services rendered or to be rendered in connection with the action or for the costs and expenses of the litigation and the source of all of the amounts;

(b) A copy of any written agreement, or a summary of any oral agreement, between the representative parties and their attorney concerning financial arrangement or fees; and

(c) A copy of any written agreement, or a summary of any oral agreement, by the representative parties or the attorney to share these amounts with any person other than a member, regular associate, or an attorney regularly of counsel with the law firm of the representative parties' attorney. This statement shall be supplemented promptly if additional arrangements are made.

[12] Consistent with the agreement among counsel, Pomerantz LLP was offered the opportunity to perform work in connection with the Action. Leviton and Andrews Joint Dec., Exhibit G. After requesting a copy of the order on the motion to dismiss and learning that no order had been entered, the Pomerantz firm declined to provide assistance when needed. *Id.*, Ex. G, H. Therefore, Class Counsel do not propose to allocate any fees to the Pomerantz firm.

[13] Class Counsel expect that supporting counsel may, in turn, reallocate some portion of their fee to their respective Oregon counsel but are not privy to the fee arrangements between supporting counsel and their Oregon counsel.

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IV. Conclusion

For all the foregoing reasons, the Court should award $6,270,000 in attorneys' fees and $196,728.42 in expenses for a total of $6,466,728.42 to be allocated by Class Counsel.

Dated this 8th day of August 2017.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.

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