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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 COUNTY OF SAN FRANCISCO

14 BEAVER COUNTY EMPLOYEES	)	Lead Case No. CGC-14-538355
15 RETIREMENT FUND, et al., Individually and	)	(Consolidated with No. CGC-14-539008)
on Behalf of All Others Similarly Situated,	)	
16	)	<u>CLASS ACTION</u>
Plaintiffs,	)	
17	)	Assigned to: Judge A.C. Massullo
vs.	)	
18	)	LEAD COUNSEL’S MEMORANDUM OF
19 CYAN, INC., et al.,	)	POINTS AND AUTHORITIES IN SUPPORT
	)	OF MOTION FOR AN AWARD OF
Defendants.	)	ATTORNEYS’ FEES AND EXPENSES
20	)	

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21 DATE: June 5, 2019  
22 TIME: 9:00 a.m.  
DEPT: 304  
23 DATE ACTION FILED: 04/01/14  
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1 **I. INTRODUCTION**

2 Before this Court for approval is an all-cash settlement of \$15,000,000 for the benefit of the  
3 Class.<sup>1</sup> This is an excellent recovery obtained in the face of substantial risk and is the product of hard-  
4 fought litigation and arm's-length settlement negotiations. Lead Counsel now respectfully moves this  
5 Court for an award of attorneys' fees in the amount of 33-1/3% of the Settlement Amount (or  
6 \$5,000,000), as well as payment of the litigation expenses it incurred in prosecuting the Action in the  
7 amount of \$854,771.78, and interest accrued on both amounts. To date, there have been no objections  
8 lodged to these requests.

9 As explained below, and in Plaintiffs' Memorandum of Points and Authorities in Support of  
10 Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation ("Settlement  
11 Memorandum"), submitted herewith,<sup>2</sup> as well as in the Grant Declaration, and in the entire record, this  
12 Settlement represents an outstanding recovery for the Class in view of the risks, costs, and duration of  
13 continued litigation, which has already been pending for nearly five years and has been vigorously  
14 litigated since its inception. Plaintiffs and their counsel faced substantial obstacles in proving liability  
15 and damages, yet nevertheless reached a substantial resolution for the Class. The requested fee is fair  
16 and reasonable under the applicable standards and is well within the range of fees awarded by  
17 California Superior Courts and is supported by recent California Supreme Court precedent. On August  
18 11, 2016, the California Supreme Court affirmed a one-third percentage-based fee award to class  
19 counsel in *Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5th 480 (2016); and on December 14, 2018, the  
20 Honorable Marie S. Weiner granted a one-third percentage-based fee award to class counsel. *See In re*  
21 *Sunrun, Inc. Shareholder Litig.*, No. CIV538215, slip op. (San Mateo Super. Ct. Dec. 14, 2018).<sup>3</sup>

22 \_\_\_\_\_  
23 <sup>1</sup> Unless otherwise defined herein, all capitalized terms have the meanings ascribed to them in the  
24 Amended Stipulation of Settlement, dated December 6, 2018 ("Stipulation" or "Settlement"), or in the  
previously-filed Declaration of John K. Grant in Support of Motion for Preliminary Approval of Class  
Action Settlement, dated November 5, 2018 ("Grant Decl.").

25 <sup>2</sup> Because many of the factors supporting final approval of the Settlement also buttress the requested  
26 award of attorneys' fees and expenses, Lead Counsel incorporates herein the concurrently filed  
Settlement Memorandum.

27 <sup>3</sup> All unreported authorities cited herein are attached to the Declaration of Ellen Gusikoff Stewart in  
28 Support of Motion for an Award of Attorneys' Fees and Expenses, submitted herewith.

1 As detailed in the Grant Declaration, Lead Counsel vigorously pursued the Class' claims and  
2 fought back against each of Defendants' relentless efforts to keep this litigation from reaching a  
3 successful conclusion. The case ended up in the United States Supreme Court, which resulted in an  
4 important decision regarding state court subject matter jurisdiction over cases alleging §11 of the  
5 Securities Act of 1933 ("Securities Act"). As a result, Lead Counsel and its paraprofessionals spent  
6 approximately 9,080 hours prosecuting the Action, resulting in a lodestar of over \$6.2 million. Thus,  
7 the requested fee represents a negative (or fractional) multiplier of counsel's lodestar.<sup>4</sup> *In re Veeco*  
8 *Instruments Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 U.S. Dist. LEXIS 85554, at \*30-\*32 (S.D.N.Y.  
9 Nov. 7, 2007) ("Not only is Plaintiffs' Counsel not receiving a premium on their lodestar to compensate  
10 them for the contingent risk factor, their fee request amounts to a deep discount from their lodestar.")<sup>5</sup>

11 Further, the Court should consider the Class' reaction to the attorneys' fees and expenses sought.  
12 Pursuant to the Court's Order Granting Preliminary Approval of Class Action Settlement (the "Notice  
13 Order"), over 13,300 copies of the Notice of Proposed Settlement of Class Action ("Notice"), in the  
14 form approved by the Court, have been mailed to potential Class Members and their nominees.<sup>6</sup> In  
15 addition, the Summary Notice was published once in *The Wall Street Journal* and transmitted once over  
16 *Business Wire*. Sylvester Decl., ¶13. The Notice advises Class Members that Lead Counsel would  
17 apply to the Court for an award of attorneys' fees in an amount not to exceed 33-1/3% of the Settlement  
18 Fund, plus expenses not to exceed \$1,100,000. While the deadline for objecting to the requested  
19 attorneys' fees and expenses – April 25, 2019 – has not passed, to date, not a single objection to Lead  
20 Counsel's fee and expense request has been received.

21 \_\_\_\_\_  
22 <sup>4</sup> Such a multiplier is eminently reasonable. Courts have recognized that positive "[m]ultipliers can  
23 range from 2 to 4 or even higher." *Wershba v. Apple Comput., Inc.*, 91 Cal. App. 4th 224, 255 (2001),  
24 *overruled on other grounds by Hernandez v. Restoration Hardware, Inc.*, 4 Cal. 5th 260 (2018). Here,  
25 counsel's fee request is *less* than their lodestar.

26 <sup>5</sup> While a lodestar cross-check fully supports the requested fee, a lodestar cross-check is not required.  
27 *Laffitte*, 1 Cal. 5th at 506 ("We hold further that trial courts have discretion to conduct a lodestar cross-  
28 check on a percentage fee, as the court did here; they also retain the discretion to forego a lodestar  
cross-check and use other means to evaluate the reasonableness of a requested percentage fee.")

<sup>6</sup> See ¶¶4-12 to the Declaration of Carole K. Sylvester Regarding Notice Dissemination, Publication,  
and Requests for Exclusion Received ("Sylvester Decl."), submitted herewith.

1 For its diligence and unwavering efforts in obtaining this outstanding recovery on behalf of the  
2 Class, Lead Counsel respectfully requests an award of attorneys' fees of 33-1/3% of the Settlement  
3 Amount and payment of expenses in the amount of \$854,771.78, plus any accrued interest on both  
4 amounts. These costs and expenses are reasonable in amount, and were necessarily incurred in the  
5 successful prosecution of the Action.

6 **II. THE COURT SHOULD AWARD ATTORNEYS' FEES USING THE**  
7 **PERCENTAGE METHOD**

8 **A. The Common Fund Doctrine Allows Courts to Assess the Beneficiaries of**  
9 **the Fund with the Costs of Creating that Fund**

10 Where, as here, litigation has created a common fund for the benefit of the named plaintiffs as  
11 well as others, courts have the power to award plaintiffs' counsel their reasonable attorneys' fees and  
12 expenses out of the fund created. The California Supreme Court has expressly affirmed "the historic  
13 power of equity to permit . . . a party preserving or recovering a fund for the benefit of others in  
14 addition to himself, to recover his costs, including his attorneys' fees, from the fund of property itself or  
15 directly from the other parties enjoying the benefit." *Serrano v. Priest*, 20 Cal. 3d 25, 35 (1977).<sup>7</sup>

16 The common fund doctrine rests on two premises. The first one is the prevention of unjust  
17 enrichment – "that all who will participate in the fund should pay the cost of its creation or protection  
18 and that this is best achieved by taxing the fund itself for attorney's fees." *Id.* at 35 n.5; *see also*  
19 *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 27 (2000). The second is a "salvage" rationale –  
20 "encouragement of the attorney for the successful litigant, who will be more willing to undertake and  
21 diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he  
22 will be promptly and directly compensated should his efforts be successful." *Estate of Stauffer*, 53 Cal.  
23 2d 124, 132 (1959). The salvage purpose requires "a flavor of generosity . . . in order that an appetite  
24 for efforts may be stimulated." *Melendres v. Los Angeles*, 45 Cal. App. 3d 267, 273 (1975).

25 While "[c]ourts recognize two methods for calculating attorney fees in civil class actions: the  
26 lodestar/multiplier method and the percentage of recovery method," *Wershba*, 91 Cal. App. 4th at 254,  
27 the United States Supreme Court has consistently held that where a common fund has been created for

28 <sup>7</sup> Unless otherwise noted, citations are omitted throughout.



1 the benefit of a class as a result of counsel’s efforts, the award of counsel’s fee should be determined on  
2 a percentage-of-the-fund basis. *See, e.g., Trs. v. Greenough*, 105 U.S. 527, 532 (1882); *Boeing Co. v.*  
3 *Van Gemert*, 444 U.S. 472, 478-79 (1980). California courts have long accepted the percentage  
4 approach for awarding fees in common fund cases as well.

5 If there was any doubt that the percentage method of awarding attorneys’ fees in a common fund  
6 case in California courts was proper, the Supreme Court of California recently

7 clarif[ied] . . . that use of the percentage method to calculate a fee in a common fund  
8 case, where the award serves to spread the attorney fee among all beneficiaries of the  
9 fund, does not in itself constitute an abuse of discretion. We join the overwhelming  
10 majority of federal and state courts in holding that when class action litigation  
11 establishes a monetary fund for the benefit of the class members, and the trial court in its  
12 equitable powers awards class counsel a fee out of that fund, the court may determine  
13 the amount of a reasonable fee by choosing an appropriate percentage of the fund  
14 created.

15 *Laffitte*, 1 Cal. 5th at 503. In so doing, the California Supreme Court recognized the advantages of  
16 using the percentage method of awarding attorneys’ fees as a percentage of the common fund, including  
17 the “relative ease of calculation, alignment of incentives between counsel and the class, a better  
18 approximation of market conditions in a contingency case, and the encouragement it provides counsel  
19 to seek an early settlement and avoid unnecessarily prolonging the litigation.” *Id.*

20 The *Laffitte* ruling is consistent with the United States Supreme Court’s decision in *Blum v.*  
21 *Stenson*, 465 U.S. 886 (1984), where the Supreme Court recognized that under the common fund  
22 doctrine a reasonable fee may be based “on a percentage of the fund bestowed on the class.” *Id.* at 900  
23 n.16. In the Ninth Circuit, the district court has discretion to award fees in common fund cases based on  
24 either the percentage-of-the-fund method or the so-called lodestar/multiplier method. *In re Wash. Pub.*  
25 *Power Supply Sys.*, 19 F.3d 1291, 1296 (9th Cir. 1994). The Ninth Circuit has expressly and repeatedly  
26 approved the use of the percentage method in common fund cases. *Paul, Johnson, Alston & Hunt v.*  
27 *Grauly*, 886 F.2d 268 (9th Cir. 1989); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301  
(9th Cir. 1990); *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir. 1993); and *Vizcaino v.*  
*Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002).<sup>8</sup> Indeed, the *Laffitte* court recognized that “[c]urrently,

<sup>8</sup> Since *Paul, Johnson* and its progeny, district courts in the Ninth Circuit have almost uniformly shifted to the percentage method in awarding fees in common fund representative actions. *See, e.g., In*

1 all the circuit courts either mandate or allow their district courts to use the percentage method in  
2 common fund cases; none require sole use of the lodestar method [and] [m]ost state courts to consider  
3 the question in recent decades have also concluded the percentage method of calculating a fee award is  
4 either preferred or within the trial court’s discretion in a common fund case.” *Laffitte*, 1 Cal. 5th at 493-  
5 94. As a result, Lead Counsel respectfully submits that an award should be made here on a percentage  
6 basis.

7 **B. The Requested Fee Is Reasonable in This Case**

8 The California Court of Appeals has observed that “the trial court’s use of a percentage of 33  
9 1/3 percent of the common fund is consistent with, and in the range of, awards in other class action  
10 lawsuits.” *Laffitte v. Robert Half Int’l Inc.*, 231 Cal. App. 4th 860, 878 (2014). That court also quoted  
11 authority noting that “[e]mpirical studies show that, regardless whether the percentage method or the  
12 lodestar method is used, fee awards in class actions average around one-third of the recovery.” *Id.*  
13 The requested fee here is consistent with that “average” and is an appropriate fee in this case under the  
14 circumstances. *Id.*

15 In determining the reasonableness of a fee request, California courts typically consider the  
16 following “basic factors”: (1) the result class counsel obtained; (2) the time and labor required of the  
17 attorneys; (3) the contingent nature of the case and the delay in payment to class counsel; (4) the extent  
18 to which the nature of the litigation precluded other employment by class counsel; (5) the experience,  
19 reputation, and ability of the attorneys who performed the services, the skill they displayed in the  
20 litigation, and the novelty, complexity and difficulty of the case; and (6) the informed consent of the  
21 clients to the fee agreement. *See, e.g., Serrano*, 20 Cal. 3d at 49; *Dunk v. Ford Motor Co.*, 48 Cal. App.  
22 4th 1794, 1810 n.21 (1996).

23 “However, no rigid formula applies and each factor should be considered only ‘where  
24 appropriate.’” *Nat. Gas Anti-Trust Cases*, No. 4221, 2006 WL 5377849, at \*3 (San Diego Super. Ct.  
25 *re Apollo Grp. Sec. Litig.*, No. CV 04-2147-PHX-JAT, 2012 U.S. Dist. LEXIS 55622, at \*20 (D. Ariz.  
26 Apr. 20, 2012) (“‘Because the benefit to the class is easily quantified in common-fund settlements,’  
27 courts can award attorneys a percentage of the common fund ‘in lieu of the more often time-consuming  
28 task of calculating the lodestar.’”) (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935,  
942 (9th Cir. 2011)).

1 Dec. 11, 2006); *see also In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2007)  
2 (“The Ninth Circuit has approved a number of factors which may be relevant to the district court’s  
3 determination: . . . (2) the risk of litigation; . . . and (5) awards made in similar cases.”); *In re Heritage*  
4 *Bond Litig.*, No. 02-ML-1475 DT, 2005 U.S. Dist. LEXIS 13555, at \*70-\*71 (C.D. Cal. June 10, 2005)  
5 (reaction of the class is a factor to be considered). An analysis of the relevant factors supports the  
6 requested fee award.

7 **1. The Result Achieved**

8 Courts have consistently recognized that the result achieved is an important factor to be  
9 considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (“most critical  
10 factor is the degree of success obtained”); *Omnivision*, 559 F. Supp. 2d at 1046 (“The overall result and  
11 benefit to the class from the litigation is the most critical factor in granting a fee award.”).

12 Here, the \$15,000,000 Settlement Amount recovered for the Class solely through the efforts of  
13 counsel for Plaintiffs is an outstanding result given the risks of proving liability, causation, and  
14 damages, and the similarly vigorous efforts of Defendants, and provides an immediate and certain  
15 recovery for Class Members without the risk, expense, and delay of summary judgment, trial, and  
16 appeals.

17 **2. The Time and Labor Required**

18 Lead Counsel vigorously investigated and prosecuted this litigation for over four years, and  
19 counsel, among other things:

20 (a) Conducted an extensive factual investigation of the events underlying  
21 Cyan’s May 9, 2013 IPO;

22 (b) Retained an investigator to identify, locate, contact and interview  
23 potential witnesses, including former Cyan and Cyan customer employees;

24 (c) Supervised the investigation and participated in select interviews and  
25 reviewed interview memoranda prepared by the investigator;

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1 (d) Reviewed and analyzed the representations made by the Company in the  
2 Registration Statement and Prospectus (“Registration Statement”), as well as subsequent U.S. Securities  
3 and Exchange Commission (“SEC”) filings;

4 (e) Reviewed and analyzed industry and securities analyst reports and  
5 comprehensive news reports, press releases and other media files concerning Cyan;

6 (f) Researched and filed initial and consolidated complaints;

7 (g) Briefed, opposed and prevailed against Defendants’ demurrer seeking to  
8 dismiss this Action for failure to state a claim;

9 (h) Briefed, opposed and prevailed against Defendants’ motion for judgment  
10 on the pleadings seeking to dismiss this Action for failure to state a claim;

11 (i) Researched and prepared to respond to Defendants’ writ of mandate to the  
12 California First Appellate District and Defendants’ petition for review to the California Supreme Court  
13 seeking to overturn Judge Munter’s order denying Defendants’ motion for judgment on the pleadings  
14 for lack of subject matter jurisdiction;

15 (j) Retained and consulted with specialist counsel with experience before the  
16 United States Supreme Court to assist in preparing briefs for that Court and arguing the matter;

17 (k) Prepared and filed a brief in opposition to Defendants’ petition for writ of  
18 certiorari to the United States Supreme Court;

19 (l) Prepared and submitted a brief to the United States Solicitor’s office  
20 opposing granting Defendants’ petition for writ of certiorari, and met with representatives of the  
21 Solicitor’s office to discuss the merits of granting or denying certiorari;

22 (m) Prepared and filed papers with the United States Supreme Court opposing  
23 the appeal to the Supreme Court;

24 (n) Prepared for and argued before the United States Supreme Court, through  
25 specially retained counsel, the hearing addressing the subject matter jurisdiction of state courts to  
26 entertain cases brought pursuant to §11 of the Securities Act;

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1 (o) Responded to Defendants' discovery requests and defended Plaintiffs'  
2 depositions;

3 (p) Retained and consulted with a damages expert regarding the calculation  
4 of damages under the Securities Act;

5 (q) Moved for and obtained class certification and provided notice of the  
6 pendency of this litigation to Class Members;

7 (r) Obtained and reviewed over 500,000 pages of document discovery  
8 produced by Defendants pursuant to Plaintiffs' requests;

9 (s) Took 22 depositions of Defendants, Cyan employees and other non-party  
10 witnesses;

11 (t) Prepared witnesses and defended four Plaintiff depositions;

12 (u) Retained two expert witnesses to provide expert opinions on the subjects  
13 of loss causation and underwriter due diligence;

14 (v) Analyzed the reports of and deposed Defendants' two expert witnesses on  
15 the same subjects;

16 (w) Prepared for and defended the depositions of Plaintiffs' expert witnesses;

17 (x) Prepared for and participated in two arm's-length mediation sessions with  
18 the substantial assistance of the Hon. Layn Phillips (Ret.);

19 (y) Prepared and filed an affirmative motion for summary judgment against  
20 Defendants;

21 (z) Prepared and filed opposition briefs in response to Defendants' motions  
22 for summary judgment; and

23 (aa) Prepared reply briefs in support of Plaintiffs' motion for summary  
24 judgment. Grant Decl., ¶5.

25 Although Lead Counsel makes this application on a percentage-of-recovery basis, using the  
26 lodestar approach as a cross-check (although not required by the California Supreme Court per *Laffitte*)  
27 on the reasonableness of the requested fee further demonstrates that it is fair and should be awarded. In  
28

1 total, Lead Counsel and its paraprofessionals expended more than 9,080 hours in the prosecution of this  
2 Action, resulting in a lodestar of over \$6.2 million.<sup>9</sup> The requested fee of 33-1/3%, or \$5,000,000,  
3 represents a negative multiplier of approximately 0.80. A “lodestar cross-check . . . provides a  
4 mechanism for bringing an objective measure of the work performed into the calculation of a  
5 reasonable attorney fee. If a comparison between the percentage and lodestar calculations produces an  
6 imputed multiplier far outside the normal range, indicating that the percentage fee will reward counsel  
7 for their services at an extraordinary rate even accounting for the factors customarily used to enhance a  
8 lodestar fee, the trial court will have reason to reexamine its choice of a percentage.” *Laffitte*, 1 Cal. 5th  
9 at 504. That is not the case here. The requested fee results in no multiplier.

10 “Multipliers can range from 2 to 4 or even higher.” *Wershba*, 91 Cal. App. 4th at 255. Indeed,  
11 “numerous cases have applied multipliers of between 4 and 12 to counsel’s lodestar in awarding fees.”  
12 *Nat. Gas Anti-Trust Cases*, 2006 WL 5377849, at \*4; *Sternwest Corp. v. Ash*, 183 Cal. App. 3d 74, 76  
13 (1986) (remanding for a lodestar enhancement of “two, three, four or otherwise”). In *Lealao*, the court  
14 held that a trial court’s refusal to enhance the lodestar as a part of a fee award was an abuse of  
15 discretion, opining that a multiplier in excess of 3.5 was reasonable and not ruling out class counsel’s  
16 original request for a multiplier of 8. 82 Cal. App. 4th at 24, 52.

### 17 **3. The Contingent Nature of the Case, Risk of Loss, and the Delay in** 18 **Payment to Lead Counsel**

19 Lead Counsel undertook this litigation on a contingent-fee basis, assuming a significant risk that  
20 the litigation would yield no recovery and leave it uncompensated. Unlike counsel for Defendants, who  
21 are ordinarily paid an hourly rate and paid for their expenses on a regular basis, Lead Counsel has not  
22 been compensated for any time or expense since this case began in April 2014. Courts have  
23 consistently recognized that the risk of receiving little or no recovery is a major factor in considering an  
24 award of attorneys’ fees. *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 54 (2d Cir. 2000) (the  
25 level of risk taken by plaintiff’s counsel is “perhaps the foremost’ factor” in considering the

26 <sup>9</sup> The time and expenses devoted to the Action are set forth in the accompanying Declaration of  
27 James I. Jaconette in Support of Application for Award of Attorneys’ Fees and Expenses (the “Jaconette  
28 Decl.”).

1 appropriate percentage award). This makes sense because in the legal marketplace, an attorney who  
2 takes a case on contingency reasonably expects a higher fee than an attorney who is paid as the case  
3 goes along, win or lose. *See Rader v. Thrasher*, 57 Cal. 2d 244, 253 (1962); *Salton Bay Marina, Inc. v.*  
4 *Imperial Irrigation Dist.*, 172 Cal. App. 3d 914, 955 (1985) (“‘riskiness,’ difficulty or contingent nature  
5 of the litigation is a relevant factor in determining a reasonable attorney fee award”). As the Court of  
6 Appeals explained in *Cazares v. Saenz*, 208 Cal. App. 3d 279 (1989):

7           In addition to compensation for the legal services rendered, there is the *raison*  
8 *d’etre* for the contingent fee: the contingency. The lawyer on a contingent fee contract  
9 receives nothing unless the plaintiff obtains a recovery. Thus, in theory, a contingent  
10 fee in a case with a 50 percent chance of success should be twice the amount of a  
11 noncontingent fee for the same case. . . .

12           Finally, even putting aside the contingent nature of the fee, the lawyer under  
13 such an arrangement agrees to delay receiving his fee until the conclusion of the case,  
14 which is often years in the future. The lawyer in effect finances the case for the client  
15 during the pendency of the lawsuit. If a lawyer was forced to borrow against the legal  
16 services already performed on a case which took five years to complete, the cost of such  
17 a financing arrangement could be significant.

18 *Id.* at 288.

19           As discussed in more detail in the Settlement Memorandum and the Grant Declaration, Plaintiffs  
20 faced significant risk concerning their ability to establish both liability and damages. While Plaintiffs  
21 believe they could have proven their claims, success at trial was far from certain. Defendants have  
22 vigorously argued that Plaintiffs cannot demonstrate the falsity or materiality of the challenged  
23 statements made in, or the omissions from, the Registration Statement issued in connection with Cyan’s  
24 IPO. Grant Decl., ¶¶49-51.

25           Moreover, even assuming that Plaintiffs demonstrated liability, there was no guarantee they  
26 would prevail on the issues of loss causation and damages. Grant Decl., ¶52. At summary judgment  
27 and trial, Defendants’ experts intended to assert a negative causation defense and contend that all of the  
28 losses sustained by the Class were due to factors completely unrelated to Defendants’ alleged false and  
misleading statements in the Registration Statement, thereby eliminating any potential recovery. There  
was, therefore, a substantial risk that the finder of fact could agree with Defendants’ contention that no  
damages could be linked to the Defendants’ statements or omissions at issue, or that damages were  
substantially less than the amount Plaintiffs have asserted. *See In re Warner Commc’ns Sec. Litig.*, 618

1 F. Supp. 735, 744-45 (S.D.N.Y. 1985) (“it is virtually impossible to predict with any certainty which  
2 testimony would be credited, and ultimately, which damages would be found to have been caused by  
3 actionable, rather than the myriad nonactionable factors such as general market conditions”), *aff’d*, 798  
4 F.2d 35 (2d Cir. 1986).

5 In light of these risks, as well as Defendants’ countless efforts from day one to dismiss this case,  
6 Lead Counsel committed the time and resources necessary to successfully take the case to trial. Indeed,  
7 more than 9,080 hours of attorney and paraprofessional time and more than \$850,000 in expenses have  
8 been incurred. This was time and money well spent. While Plaintiffs and their counsel believe that the  
9 Class would prevail at trial, the complexity of this case made the outcome at trial uncertain. The  
10 contingent nature of counsel’s representation and the sizable financial risks borne by Lead Counsel  
11 support the percentage fee requested. As the court in *Xcel Energy* recognized, “[p]recedent is replete  
12 with situations in which attorneys representing a class have devoted substantial resources in terms of  
13 time and advanced costs yet have lost the case despite their advocacy.” *In re Xcel Energy, Inc.*, 364 F.  
14 Supp. 2d 980, 994 (D. Minn. 2005); *see also Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713  
15 (11th Cir. 2012) (affirming ruling that granted defendants’ post-trial motion for summary judgment as a  
16 matter of law based on failure to prove loss causation, thereby overturning a jury verdict in plaintiff’s  
17 favor).

#### 18 4. Awards Made in Similar Cases

19 Lead Counsel is applying for a fee award of 33-1/3% of the Settlement Fund. This request falls  
20 squarely within the parameters of percentage fees awarded in other class action litigation in California.  
21 ““Empirical studies show that, regardless whether the percentage method or the lodestar method is used,  
22 fee awards in class actions average around one-third of the recovery.”” *Chavez v. Netflix, Inc.*, 162 Cal.  
23 App. 4th 43, 66 n.11 (2008).

24 Courts have awarded fees as high as 33-1/3% in complex litigations such as this. *See, e.g.*,  
25 *Sunrun*, slip op. at 6 (awarding 33-1/3% fee award); *Brooks v. Capitol Valley Elec. Inc.*, No. CIV  
26 536903, slip op. at 2 (San Mateo Super. Ct. Mar. 7, 2017) (awarding 33% fee award); *W. Palm Beach*  
27 *Police Pension Fund v. CardioNet, Inc.*, No. 37-2010-00086836-CU-SL-CTL, slip op. at 7 (San Diego  
28



1 Super. Ct. June 28, 2012) (approving 33-1/3% fee award). The fee requested is, therefore, consistent  
2 with the fees awarded in other shareholder class actions.

3 **5. Experience, Reputation, Ability, and Quality of Counsel, and the**  
4 **Skill They Displayed in Litigation**

5 The skill, experience, reputation, quality, and ability of the attorneys who prosecuted this case  
6 also support the requested fee award. Lead Counsel Robbins Geller Rudman & Dowd LLP has earned a  
7 national reputation for excellence through many years of litigating complex civil actions, particularly  
8 the prosecution of securities class actions. As set forth in the firm résumé attached to the Jaconette  
9 Declaration, Lead Counsel’s experience, resources, and high-quality attorneys has allowed it to obtain  
10 significant recoveries throughout the country on behalf of its clients. *See* Jaconette Decl., Ex. H; Grant  
11 Decl., ¶57.

12 The quality of opposing counsel is also important in evaluating the quality of the work done by  
13 Lead Counsel. *See, e.g., In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal.  
14 1977). Counsel was opposed in this litigation by experienced and skilled counsel from large law firms  
15 with well-deserved reputations for vigorous advocacy on behalf of their clients. In the face of such  
16 knowledgeable and experienced opposition, counsel were able to develop a case that was sufficiently  
17 strong to persuade Defendants to settle the case for an amount that counsel believes is highly favorable  
18 to the Class. As a result, this factor weighs strongly in favor of the requested fee.

19 **6. Continuing Obligations of Lead Counsel**

20 Lead Counsel’s work does not end with the approval of the Settlement. Continuing work will  
21 include supervising the claims process, answering shareholder calls and, if necessary, litigating appeals.

22 **7. The Reaction of the Class**

23 While the April 25, 2019 deadline for objecting to counsel’s fee and expenses has not passed, to  
24 date, Lead Counsel is not aware of a single Class Member who has objected to the fee and expense  
25 request. “The absence of objections or disapproval by class members to Class Counsel’s fee request  
26  
27  
28

1 further supports finding the fee request reasonable.” *Heritage Bond*, 2005 U.S. Dist. LEXIS 13555, at  
2 \*71.<sup>10</sup>

3 **III. LEAD COUNSEL’S LITIGATION EXPENSES ARE REASONABLE AND**  
4 **SHOULD BE APPROVED**

5 Attorneys who create a common fund for the benefit of a class are entitled to payment from the  
6 fund of reasonable litigation expenses and costs. Common fund fee and expense awards include  
7 counsel’s incurred expenses because those who benefit from their effort should share in the cost. *See*  
8 *Laffitte*, 231 Cal. App. 4th at 871; *Rider v. Cty. of San Diego*, 11 Cal. App. 4th 1410, 1423 n.6 (1992).  
9 The appropriate analysis in making a determination if particular costs are compensable is whether the  
10 costs are of the type typically billed by attorneys to paying clients in the marketplace. *See Harris v.*  
11 *Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994).

12 Here, Lead Counsel is seeking payment of costs and expenses in an aggregate amount of  
13 \$854,771.78. As itemized in the Jaconette Declaration, counsel’s expenses include: (1) expert and  
14 consultant fees; (2) investigators’ fees; (3) mediator’s fees; (4) on-line legal, financial, and factual  
15 research; (5) transportation, meals, and hotels; (6) photocopying; (7) transcript preparation fees; (8)  
16 outside appellate counsel fees; (9) class action notice fees; and (10) document hosting charges. The  
17 expenses for which Lead Counsel seek payment are those which are normally charged to paying clients,  
18 over and above hourly fees. *Harris*, 24 F.3d at 19 (“Harris may recover as part of the award of  
19 attorneys’ fees those out-of-pocket expenses that ‘would normally be charged to a fee paying client.’”).  
20 Further, the expenses which have been incurred and for which payment is sought were necessary for the  
21 successful prosecution of the litigation, are reasonable in amount, and thus should be paid. *See Vincent*  
22 *v. Reser*, No. C 11-03572 CRB, 2013 WL 621865, at \*5 (N.D. Cal. Feb. 19, 2013) (“Attorneys who  
23 create a common fund are entitled to the reimbursement of expenses they advanced for the benefit of  
24 the class.”).

25  
26  
27 <sup>10</sup> Lead Counsel will address any objections in its reply memorandum, which will be filed on or before  
28 May 29, 2019, in accordance with the Notice Order.

1 **IV. CONCLUSION**

2 For the reasons set forth herein, in the Settlement Memorandum and all documents filed in  
3 support of preliminary approval, Lead Counsel respectfully submits that the motion for an award of  
4 attorneys' fees and expenses is fair, reasonable, and appropriate under all the circumstances of this case  
5 and it should therefore be granted.

6 DATED: March 25, 2019

Respectfully submitted,

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DECLARATION OF SERVICE BY LEXIS FILE AND SERVE XPRESS

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant’s business address is 655 West Broadway, Suite 1900, San Diego, California 92101.

2. That on March 25, 2019, declarant served LEAD COUNSEL’S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS’ FEES AND EXPENSES by serving electronically via Lexis File & Serve Xpress to the parties listed on the attached Service List.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 25, 2019, at San Diego, California.

  
\_\_\_\_\_  
JACLYN STARK

CYAN

Service List - 3/25/2019 (14-0050)

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