UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE AMERICAN APPAREL, INC. SHAREHOLDER LITIGATION.	CASE NO. CV 10-06352 MMM (JCGx) CLASS ACTION ORDER GRANTING PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; GRANTING MOTION FOR ATTORNEYS' FEES, EXPENSES, AND INCENTIVE AWARD

This is a consolidated putative securities class action against defendants American Apparel, Inc. ("American Apparel"), Dov Charney, Adrian Kowalewski, and Lion Capital, Inc. ("Lion Capital"). Plaintiffs allege that during the class period, defendants misled the public concerning the immigration status of workers American Apparel employed in its Los Angeles factory. They assert that defendants hired numerous undocumented workers in violation of the Immigration and Nationality Act ("INA"); that they failed to comply with the INA's reporting requirements; and that they tried to conceal from investors the results of ongoing federal investigations concerning the company's hiring practices. Plaintiffs contend that when American Apparel's misconduct came to light, it was forced to terminate a large number of factory workers, and that it subsequently misled the public about the effect the staffing reduction would have on its finances.

Plaintiffs allege that defendants' misrepresentations and omissions violated section 10(b) of the Securities Exchange Act of 1934 (the "1934 Act") and Securities and Exchange Commission ("SEC") Rule 10b-5 during a class period that extended from November 28, 2007 to August 17, 2010. They also assert that defendants Charney, Kowalewski, and Lion Capital violated § 20(a) of the 1934 Act because they were controlling persons of American Apparel.[1]

On March 15, 2011, the court granted plaintiff Charles Rendelmann's motion for appointment as lead plaintiff and appointed Kessler Topaz Meltzer & Check, LLP as lead counsel.[2] On January 13, 2012, the court granted a motion to dismiss the consolidated class action complaint.[3] Rendelman filed a first amended complaint on February 27, 2012.[4] The court granted in part and denied in part defendants' motions to dismiss that pleading.[5] Rendelman filed then a second amended complaint.[6] On August 8, 2013, the court granted in part and denied in part defendants' motions to dismiss the second amended complaint.[7] The court denied leave to amend

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[1]Consolidated Class Action Complaint ("Complaint"), Docket No. 66 (Apr. 29, 2011), ¶¶ 157-72.

[2]Order re: Motions for Appointment as Lead Plaintiff and Lead Counsel, Docket No. 59 (Mar. 15, 2011).

[3]Order Granting Defendants' Motion to Dismiss ("MTD Order"), Docket No. 105 (Jan. 13, 2012). Subsequent citations to this order will be to the published decision: *In re American Apparel, Inc. Shareholder Litig.* ("*In re American Apparel I*"), 855 F.Supp.2d 1043 (C.D. Cal. 2012).

[4]First Amended Class Action Complaint for Violation of Federal Securities Laws ("FAC"), Docket No. 106 (Feb. 27, 2012).

[5]Order Granting in Part and Denying in Part Defendants' Motions to Dismiss ("2nd MTD Order"), Docket No. 142 (Jan. 16, 2013). Subsequent citations to this order will be to the Westlaw version of the decision: *In re American Apparel, Inc. Shareholder Litig.* ("*In re American Apparel II*"), No. CV 10–06352 MMM (JCGx), 2013 WL 174119 (C.D. Cal. Jan. 16, 2013).

[6]Second Amended Complaint ("SAC"), Docket No. 144 (Feb. 15, 2013).

[7]Order Granting in Party and Denying in Part Defendants' Motions to Dismiss ("3rd MTD Order"), Docket No. 169 (Aug. 8, 2013).

those aspects of the claims it dismissed and directed defendants to file answers to the amended complaint within twenty days,[8] which they did.[9]

On November 5, 2013, the court granted a joint stipulation to stay the action following the parties' fruitful mediation so that Rendelman could file a motion for preliminary approval of the settlement.[10] Rendelman filed the motion on January 17, 2014,[11] and the court approved it on April 16, 2014.[12] The court set a final approval hearing for July 28, 2014 at 10 a.m. On June 23, 2014, Rendelman filed a motion for final approval of the settlement[13] and a motion for an award of attorneys' fees.[14] Defendants have not opposed the motions.

I. FACTUAL BACKGROUND

A. Facts Alleged in the Second Amended Complaint

1. Background Concerning American Apparel

Charney founded American Apparel in 1998 as a California limited liability company.[15] In September 2002, PR Week ran a profile of American Apparel, observing that "[e]verything about [the company], including its internal and external PR practices, has been an organic

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[8] *Id.* at 86-87.

[9] Lion Capital's Answer to Amended Complaint, Docket No. 172 (Sept. 27, 2013); Dov Charney's and Adrian Kowalewski's Answer to Second Amended Class Action Complaint, Docket No. 173 (Sept. 27, 2013); American Apparel's Answer to Amended Complaint, Docket No. 174 (Sept. 27, 2013).

[10] Stipulation and Order Staying Action Post Mediation, Docket No. 177 (Nov. 5, 2013).

[11] Motion for Preliminary Approval of Proposed Settlement ("Prelim. Approval Motion"), Docket No. 181 (Jan. 17, 2014).

[12] Order Preliminarily Approving Settlement and Providing Notice ("Prelim. Approval Order"), Docket No. 184 (Apr. 16, 2014).

[13] Motion for Settlement Approval ("Motion"), Docket No. 186 (June 23, 2014).

[14] Motion for Award of Attorneys' Fees ("Fees Motion"), Docket No. 187 (June 23, 2014).

[15] SAC, ¶ 98.

extension of Charney's beliefs, visions, and personality."[16] The company's SEC filings confirmed that Charney was "considered intimately connected to American Apparel's brand identity."[17] American Apparel opened its first retail store in Los Angeles in October 2003.[18]

Because he desired to retain full control of the company's affairs, Charney initially did not want to take American Apparel public.[19] In January 2006, the *Guardian* reported that "Charney seems to relish too much the control and the flexibility guaranteed by the absence of shareholders to go public."[20] By December 2006, however, Charney was nearly broke from financing the 150-store company from its inception and took the company public to gain much needed capital. On December 19, 2006, the *New York Times* reported that "[t]he decision to sell the privately held company, . . . [was] a surprise move by the company's eccentric founder, Dov Charney, who is known for exercising strict, and at times controversial, control over the retailer's operations."[21] Plaintiffs allege that, in line with his desire for control, Charney structured the transaction in a manner that maximized the benefit to him.[22] Charney has served as chairman, CEO, president, and director of American Apparel since the company went public; his net worth has been valued at $580 million.[23]

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[16] *Id.*

[17] *Id.*

[18] *Id.*, ¶ 99.

[19] *Id.*, ¶ 100.

[20] *Id.*

[21] *Id.*

[22] *Id.*, ¶¶ 101-02

[23] *Id.*, ¶ 102. The court takes judicial notice of the fact that on June 18, 2014, American Apparel issued a press release stating that its Board of Directors had voted to replace Charney as Chairman and notified him of its intent to terminate his employment as President and CEO for cause, effective thirty days from the date of the press release. (See June 18, 2014 Press Release: American Apparel Board Suspends Dov Charney as CEO and Declares Intent to Terminate Him for Cause; Names John Luttrell as Interim CEO, http://investors.americanapparel.net/

The complaint alleges that American Apparel's 'vertically integrated" operations and its public positions on immigration reform are "integral to the [c]ompany brand," which it has described in SEC filings as one of its "core business strengths."[24] The company consistently draws attention to the fact that its products are "Made in the USA," by legal immigrant workers.[25] This pro-immigrant brand is purportedly tied closely to Charney himself, who has long espoused immigration reform, allegedly in order to "market the [c]ompany's 'edgy' brand."[26]

2. Defendants' Allegedly False and Misleading Statements During the Class Period

Plaintiffs' allegations regarding defendants' false statements and their scienter during the class period are of three primary types. First, plaintiffs assert that although American Apparel touted its progressive labor policies and represented that it was in full compliance with U.S. immigration laws, an audit by the Department of Homeland Security's ("DHS") Immigration and Customs Enforcement division ("ICE") revealed that a substantial portion of American Apparel's manufacturing employees were not authorized to work in the United States. Plaintiffs assert that Charney and other defendants knew this fact during the class period, and materially misrepresented the company's compliance with the immigration laws.

Second, they contend that defendants misrepresented the consequences of the reduction in workforce that was necessary to bring the company into immigration compliance. Plaintiffs allege that given the company's structure and the individual defendants' intimate knowledge of its operations, defendants knew that terminating so many employees would have a significant adverse impact on American Apparel's ability to maintain inventory levels, which in turn would affect its

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releasedetail.cfm?ReleaseID=855505 (accessed on July 16, 2014).)

[24]SAC, ¶ 8.

[25]*Id.*

[26]*Id.*

profitability. They assert that defendants nonetheless minimized the effect of the work force reduction.

Third, plaintiffs contend that American Apparel and the individual defendants repeatedly misrepresented the company's financial health not only to investors via conference calls, press releases, and SEC filings, but also to its independent auditors. Plaintiffs assert that defendants repeatedly affirmed the strength of American Apparel's internal controls and its commitment to conservative financial practices and in this way misled the public and the company's auditors about the myriad financial problems the company experienced during the class period.

B. The Settlement Agreement

1. Settlement Negotiations

The parties began settlement negotiations after the court granted in part and denied in part defendants' motions to dismiss the second amended complaint.[27] Class counsel states that the settlement process was "intensive and hard fought."[28] Counsel had an in-person mediation before JAMS mediator Jed Melnick on October 11, 2013.[29] In advance of the mediation, they prepared and submitted mediation briefs setting forth their respective views on the relevant law and facts.[30] Although the mediation was fruitful, the parties reached impasses on "several key issues," which they were unable to resolve at that time.[31] On October 22, 2013, Melnick sent the parties a mediator's proposal, in which he made recommendations for a settlement of the action, including that class counsel engage in informal discovery to confirm the reasonableness of any settlement

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[27]Declaration of Stacey M. Kaplan in Support of (A) Final Approval of Class Action Settlement; and (B) Lead Counsel's Application for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Kaplan Decl."), Docket No. 188 (June 23, 2014), ¶ 81.

[28]*Id.*

[29]*Id.*, ¶ 82.

[30]*Id.*

[31]*Id.*

amount.[32] The parties accepted the proposal, thereby reaching an agreement in principle subject to the outcome of the informal discovery.[33] For the next two-and-a-half months, the parties negotiated the specific terms of the settlement and drafted a settlement agreement.[34] They exchanged multiple drafts.[35] In December 2013, defendants produced more than 1.5 million pages of documents to class counsel, which counsel reviewed and analyzed over the next month.[36]

As noted, on October 28, 2013, the parties advised the court they had reached a settlement in principle. Following class counsel's review of the informal discovery, Rendelman filed a motion for preliminary approval.[37] With the motion, he filed a stipulation for settlement reflecting the terms of the settlement agreement, a proposed notice form, and a proposed claims form.[38] The court preliminarily approved the settlement and directed the parties to send notice of the proposed settlement and the final fairness hearing to settlement class members.[39] For settlement purposes, the court certified a class comprised of "all persons and entities who purchased or otherwise acquired the publicly traded common stock of American Apparel between November 28, 2007 and August 17, 2010, inclusive (the 'Class'). Excluded from the Class are [d]efendants, the directors and officers of American Apparel and their families and affiliates."[40] The court provisionally

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[32] *Id.*, ¶ 83.

[33] *Id.*

[34] *Id.*, ¶ 84.

[35] *Id.*

[36] *Id.*, ¶ 86.

[37] Prelim. Approval Motion.

[38] Stipulation and Agreement of Settlement ("Settlement Agreement"), Docket No. 182 (Jan. 17, 2014).

[39] Prelim. Approval Order.

[40] *Id.*, ¶ 2.

appointed Rendelman as class representative and Kessler Topaz as class counsel.[41] After the approved notice and a copy of the claims form was sent to 35,767 potential class members or their nominees, a toll-free telephone hotline and a website at www.americanapparelshareholderssettlement.com were created, and the approved summary notice form was published on May 13, 2014 in *Investor's Business Daily* and over the *PR Newswire*, Rendelman filed this motion for final approval of the settlement.[42]

2. The Terms of the Settlement Agreement and Plan of Allocation

The settlement agreement provides that settlement class members will release all claims against defendants that either were or could have been asserted in the complaint because they arose out of the allegations made in the complaint and relate to the purchase or acquisition of the publicly traded common stock of American Apparel during the Class Period.[43] Defendants also agree to release Rendelman and the class from any claims they may have against them.[44] In exchange for class members' release, American Apparel, Charney, and Kowalewski agree to pay $4,800,000.00 to an escrow account to be used for (1) taxes, (2) notice and administration costs; (2) attorneys' fees; (3) litigation expenses awarded by the court; and (4) other costs, expenses, or amounts approved by the court.[45] The remaining balance is to be distributed pro rata to authorized claimant class members based on a plan of allocation created by Rendelman's damages expert.[46]

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[41] *Id.*, ¶ 3.

[42] Motion at 2; Kaplan Decl., Exh. B (Declaration of Nashira Washington Regarding (A) Mailing of the Notice and Proof of Claim, (B) Publication of the Summary Notice, and (C) Requests for Exclusion Received to Date ("Washington Decl."), ¶¶ 10-13); Supplemental Declaration of Carole K. Sylvester Regarding (A) Mailing of the Notice and Proof of Claim, (B) Requests for Exclusion Received, and (C) Proofs of Claims Received to Date ("Sylvester Decl."), Docket No. 190-1 (July 14, 2014).

[43] Settlement Agreement, ¶ 4.

[44] *Id.*, ¶ 5.

[45] *Id.*, ¶¶ 6, 8.

[46] *Id.*, ¶¶ 8, 22, 24; Kaplan Decl., ¶ 98.

In order for a claim to be approved, the class member must submit a proof of claim by September 2, 2014.[47] If a claim is rejected, the claimant may contest the decision.[48] If the claimant and the claims administrator cannot resolve the dispute, lead counsel will present the request to the court for review,[49] which will refer all such claims to Magistrate Judge Jay C. Gandhi. No class member is eligible to receive a distribution if his or her pro rata share under the plan of allocation would be less than $10.00.[50]

Under the plan of allocation, a class member's pro rata share depends on his or her "Recognized Loss Amount."[51] The loss amount is calculated by determining when the class member purchased, acquired, and/or sold his or her shares in relation to American Apparel's allegedly misleading disclosures on June 30, 2009, March 25, May 19, July 28, and August 16, 2010. The loss amount must also be compared to the value of the shares 90 days following the end of the class period.[52] A settlement class member will be eligible to receive a distribution from the net settlement fund only if he or she suffered a net loss, after all profits from transactions in American Apparel common stock during the settlement class period are subtracted from all losses. Accordingly, only class members who suffered an overall net loss will be entitled to receive a

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[47]Settlement Agreement, ¶ 24(a)-(b); Prelim. Approval Order, ¶ 15.

[48]Settlement Agreement, ¶ 24(e).

[49]*Id.*

[50]*Id.*, Exh. A(1) (Notice at 12, Appendix A (Proposed Plan of Allocation of the Net Settlement Fund ("Allocation Plan"))).

[51]Allocation Plan, ¶¶ 2-3.

[52]Kaplan Decl., ¶¶ 21-23, 101. Under the PSLRA, a plaintiff in a securities fraud case may not recover more than the difference between the purchase price and the mean trading price of the stock 90 days after the end of the class period. See 15 U.S.C. § 78u-4(e)(2) ("Except as provided in paragraph (2), in any private action arising under this chapter in which the plaintiff seeks to establish damages by reference to the market price of a security, the award of damages to the plaintiff shall not exceed the difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the subject security and the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market").

portion of the settlement fund. Finally, claims based on stock ownership during the period between June 30, 2009 and March 30, 2010 are to be reduced by 10% to reflect the fact that it is unlikely Rendelman and the class would have prevailed on claims based on alleged misrepresentations made between these dates; the court in fact dismissed claims based on these misrepresentations in its order on defendants' motions to dismiss the second amended complaint.[53] Any remaining funds after subsequent redistributions have become economically infeasible will be donated to a non-profit charitable organization selected by class counsel and approved by the court.[54]

The settlement agreement also provides that following final approval by the court, American Apparel's general counsel and CFO will meet with Rendelman in good faith, so that Rendelman can discuss his views of the company's retail operations.[55] The general counsel and CFO will then report Rendelman's views to the company's CEO and Head of Retail Operations "for their review and, in their sole discretion, possible implementation."[56]

As noted, class counsel have also filed a motion for attorneys' fees; they seek an award of 25% of the settlement fund and reimbursement of $217,452.85 in out-of-pocket expenses. They also request that the court approve a $6,600 incentive award to Rendelman to compensate him for the hours he spent on the litigation.[57]

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[53]Kaplan Decl., ¶ 100 n. 7.

[54]*Id.*, ¶ 103.

[55]Settlement Agreement, ¶ 7.

[56]*Id.*

[57]Fees Motion at 1.

II. DISCUSSION

A. Whether the Court Should Finally Approve the Parties' Settlement

As noted, the court certified one class for settlement purposes.[58] Rule 23(e)(1)(A) of the Federal Rules of Civil Procedure requires that the court "approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class." Approval under Rule 23(e) involves a two-step process "in which the [c]ourt first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." *National Rural Telecommunications Cooperative v. DIRECTV, Inc.* ("*NRTC*"), 221 F.R.D. 523, 525 (C.D. Cal. 2004) (citing MANUAL FOR COMPLEX LITIGATION, THIRD, § 30.14, at 236-37 (1995)). The Ninth Circuit has noted that, in considering whether finally to approve a class settlement, "there is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Synocor ERISA Litigation*, 516 F.3d 1095, 1101 (9th Cir. 2008); see *id.* ("This policy is also evident in the Federal Rules of Civil Procedure and the Local Rules of the United States District Court, Central District of California, which encourage facilitating the settlement of cases"); *Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 625 (9th Cir. 1982) ("[I]t must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation"), cert. denied, 459 U.S. 1217 (1983).

1. Whether the Parties Complied with Applicable Notice Requirements

a. Rule 23(e)

Rule 23(e) requires that "notice of the proposed dismissal or compromise [of a class action] shall be given to all members of the class in such manner as the court directs." FED.R.CIV.PROC. 23(e). The notice given must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); see also

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[58]Prelim. Approval Order, ¶ 2.

Mandujano v. Basic Vegetable Products, Inc., 541 F.2d 832, 835 (9th Cir. 1976) ("To comply with the spirit of [Rule 23(e)], it is necessary that the notice be given in a form and manner that does not systematically leave an identifiable group without notice").

The court's role in reviewing a proposed settlement is to represent those class members who were not parties to the settlement negotiations and agreement. See *San Francisco NAACP v. San Francisco Unified School District*, 59 F.Supp.2d 1021, 1027 (N.D. Cal. 1999) ("The purpose of Rule 23(e) is to protect 'unnamed class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are unable to secure satisfaction of the individual claims by a compromise,'" quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). One aspect of the court's role is to ensure that all class members receive adequate notice of the proposed settlement.

To provide notice to the class, class counsel worked with Gilardi & Co. LLC ("Gilardi") to mail copies of the notice and proof of claim form by first-class mail, postage prepaid to potential members of the class and their nominees. Gilardi identified class members by, *inter alia*, using shareholder data received from American Apparel concerning the 2,853 persons and entities that purchased American Apparel common stock between November 28, 2007 and August 17, 2010. Gilardi also used its own proprietary database, which lists 250 banks, brokerage firms, and other nominees; the SEC's list of 4,364 active brokers and dealers; and 450 registered electronic filers. In response to these initial mailings, nominees gave Gilardi the names and addresses of 24,144 additional potential class members.[59] Gilardi also mailed an additional 2,430 claim packages to nine institutions for distribution to clients.[60] In all, Gilardi mailed copies of the notice and proof of claim to 35,767 potential class members or their nominees.[61]

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[59]Washington Decl., ¶¶ 4-10.

[60]*Id.*, ¶ 9.

[61]Sylvester Decl., ¶ 3.

On May 5, 2014, Gilardi created a toll-free telephone number (1-877-263-8642) to field class member inquiries.[62] It also set up a website,[63] on which it posted copies of the notice, the summary notice, and the claim form, along with other documents pertaining to the action.[64] Finally, on May 13, 2014, Gilardi caused the summary notice to be published in *Investor's Business Daily* and over the *PR Newswire*.[65]

The court is satisfied that these efforts were effective in providing notice of the settlement to potential class members. See *Mullane*, 339 U.S. at 318-19 (stating that "the mails today are recognized as an efficient and inexpensive means of communication" that is reasonably calculated to provide notice). Gilardi not only mailed notice to a list of known class members but also sought out other class members by mailing notice to their nominees; once the nominees provided information concerning their principals, Gilardi mailed notice to them. The company also established a toll-free telephone line class members could call to pose questions concerning the settlement, and set up a website that provided access to information concerning the case, the proposed settlement, and the steps class members had to take to opt out of or object to the settlement. Finally, Gilardi published a summary notice of the proposed settlement in *Investor's Business Daily* and over the *PR Newswire*. The notice form that was mailed to class members clearly apprised them of the action and of their legal options. The court believes that in combination, the various forms of notice provided were reasonably calculated to apprise interested parties of the lawsuit and proposed settlement.

b. The PSLRA

The PSLRA creates additional requirements as to the information that must be provided in a notice of settlement in a securities class action. It states:

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[62] *Id.*, ¶ 11.

[63] The web address of the website is www.americanapparelshareholderssettlement.com.

[64] *Id.*, ¶ 12.

[65] Washington Decl., ¶ 13.

"Any proposed or final settlement agreement that is published or otherwise disseminated to the class shall include each of the following statements, along with a cover page summarizing the information contained in such statements:

(A) Statement of plaintiff recovery

The amount of the settlement proposed to be distributed to the parties to the action, determined in the aggregate and on an average per share basis.

(B) Statement of potential outcome of case

(I) Agreement on amount of damages

If the settling parties agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this chapter, a statement concerning the average amount of such potential damages per share.

(ii) Disagreement on amount of damages

If the parties do not agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this chapter, a statement from each settling party concerning the issue or issues on which the parties disagree.

. . .

(C) Statement of attorneys' fees or costs sought

If any of the settling parties or their counsel intend to apply to the court for an award of attorneys' fees or costs from any fund established as part of the settlement, a statement indicating which parties or counsel intend to make such an application, the amount of fees and costs that will be sought (including the amount of such fees and costs determined on an average per share basis), and a brief explanation supporting the fees and costs sought. Such information shall be clearly summarized on the cover page of any notice to a party of any proposed or final settlement agreement.

(D) Identification of lawyers' representatives

> The name, telephone number, and address of one or more representatives of counsel for the plaintiff class who will be reasonably available to answer questions from class members concerning any matter contained in any notice of settlement published or otherwise disseminated to the class.
>
> (E) Reasons for settlement
>
> A brief statement explaining the reasons why the parties are proposing the settlement.
>
> (F) Other information
>
> Such other information as may be required by the court." 15 U.S.C. § 78u-4.

The notice form mailed to class members complied with the requirements of the PSLRA by including a cover page that summarized the settlement. The cover page explains, in clear language, the amount of the settlement – both in the aggregate ($4.8 million) and on an estimated, average per-share basis ($0.16 per share) – the settling parties' statements regarding the issues as to which they disagree (whether, *inter alia*, the alleged statements were material or misleading and whether defendants are liable for them), the identification and contact information for Kessler Topaz, the amount of the attorneys' fees and costs award the firm intended to seek (25% of the settlement fund as well as expenses not to exceed $300,000, or an estimated $.05 per share), and a statement as to why Rendelman decided to settle the case (because of "the substantial cash benefit payable to the Class now, without further risk or the delays inherent in further litigation").[66]

c. Conclusion Regarding Notice Requirements

Based on the notice provided, the court finds that unnamed class members had adequate notice of the settlement and adequate opportunity to file a valid claim form, opt out, or object to the settlement. The notice requirements of Rule 23(e) and § 78u-4 have thus been satisfied.

[66]Notice at 1.

2. Fairness of the Proposed Settlement

"The role of a court . . . reviewing the proposed settlement of a class action under Fed.R.Civ.P. 23(e) is to assure that the procedures followed meet the requirements of the rule and comport with due process and to examine the settlement for fairness and adequacy." *Vaughns v. Board of Education of Prince George's County*, 18 F.Supp.2d 569, 578 (D. Md. 1998). The district court's role, in reviewing "what is otherwise a private consensual agreement negotiated between the parties to a lawsuit, must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d at 625.

Rendelman asserts that the settlement is presumptively fair because it is the result of a well-informed, arms-length negotiation.[67] See *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution"); *NRTC*, 221 F.R.D. at 528 ("A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair," citing *City Partnership Co. v. Atlantic Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996)). The parties negotiated the settlement only after the court decided three sets of motions to dismiss that were exhaustively briefed. They reached an agreement in principle with the assistance of an experienced mediator following an in-person mediation at which the parties were initially unable to come to agreement. After they agreed the outlines of a settlement in principle, the parties negotiated the specific terms of the settlement over a period of two-and-a-half months. To aid in this process and ensure the reasonableness of the settlement, class counsel reviewed 1.5 million documents defendants produced. Class counsel contend the settlement was negotiated by "experienced" lawyers, who had "a firm understanding of both the strengths and weaknesses of their respective cases."[68] It

[67]Motion at 22-23; Kaplan Decl., ¶ 4.

[68]Kaplan Decl., ¶ 5.

appears, therefore, that the agreement was reached in good faith after a well-informed, arms-length negotiation, and that it is therefore entitled to a presumption of fairness.

Nonetheless, the court must examine the terms of the settlement, considering relevant factors, to determine whether it is indeed fair. In making this assessment, the court balances:

> "(1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement." *Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 575 (9th Cir. 2004) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).

This list of factors is not exclusive, "and different factors may predominate in different factual contexts." *Torrisi v. Tuscon Electric Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). See also *Churchill Village*, 361 F.3d at 576 n. 7 ("Because the settlement evaluation factors are non-exclusive, discussion of those factors not relevant to this case has been omitted"); *Young v. Polo Retail, LLC*, No. C-02-4546 VRW, 2007 WL 951821, *3 (N.D. Cal. Mar. 28, 2007) (adding as relevant factors "(9) the procedure by which the settlements were arrived at, see MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.6 (2004), and (10) the role taken by the plaintiff in that process").

a. Strength of Plaintiffs' Case

While asserting that they believe the class could ultimately have prevailed on the claims that survived dismissal, class counsel state there was a "significant risk" Rendelman would not have prevailed at trial in showing, *inter alia*, that defendants made false statements with the requisite scienter and that these statements caused loss to the class.[69] Specifically, Stacey M. Kaplan, an attorney at Kessler Topaz who worked extensively on the case, notes that in order to prove

[69] *Id.*, ¶ 105.

scienter, Rendelman would have had to prove that American Apparel's most senior executives were aware or deliberately and recklessly disregarded that many of the company's employees had submitted incorrect, incomplete, or fictitious information regarding their immigration status and social security numbers at the time they were hired.[70] See *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2009) (noting that scienter in this context means "'an extreme departure from the standards of ordinary care [that] presents a danger of misleading buyers that is either known to the defendant or so obvious that the actor must have been aware of it,'" quoting *In re Silicon Graphics Inc. Securities Litigation*, 183 F.3d 970, 984 (9th Cir. 1999)). Proving this level of scienter might have been difficult, in part because Charney and Kowalewski did not sell any stock during the class period and therefore did not profit from the inflated stock price that resulted from their alleged misrepresentations. In fact, Charney purchased 855,000 shares of stock in 2009, which he then did not sell. Charney and Kowalewski could therefore have argued that their actions were not those of individuals who had a financial motive purposefully to lie about these occurrences.

Kaplan also notes that since the court dismissed allegations regarding the withholding of financial information from Deloitte against Charney and Kowalewski, Rendelman would have had to prove that a lower-level employee of American Apparel acted with the requisite scienter in causing American Apparel to withhold the information, and also that it was possible he would have been unable to prove liability under *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011). The *Janus* Court held that only the individual or entity making the statement, not aiders and abettors, can be held liable for securities fraud under Rule 10b-5.[71] See *In re Immune Response Securities Litigation*, 497 F.Supp.2d 1166, 1171 (S.D. Cal. 2007) ("The Court [ ] recognizes that the issues of scienter and causation are complex and difficult to establish at trial. . . . [R]ecognizing the apparent complexity of the case, the Court CONCLUDES that settlement is a prudent course").

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[70] *Id.*, ¶ 72.

[71] *Id.*, ¶ 73.

Finally, Kaplan contends that Rendelman faced hurdles proving that the statements as to which the court held that he had adequately pled scienter were the cause of some or all of class members' losses, as opposed to statements as to which the court held that he had not sufficiently alleged scienter.[72] See *McGuire v. Dendreon Corp.*, C 07-800 MJP, 2008 WL 1791381, *10 (W.D. Wash. Apr. 18, 2008) ("Under Rule 10b-5, a plaintiff shows loss causation by illustrating a 'causal connection between the material misrepresentation and the loss,'" quoting *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 342 (2005)); see also *International Brotherhood of Electrical Workers Local 697 Pension Fund v. International Game Technology, Inc.*, No. 3:09–cv–00419–MMD–WGC, 2012 WL 5199742, *2 (D. Nev. Oct. 19, 2012) (approving a settlement where "[p]laintiffs . . . demonstrated that there [were] risks associated with continued litigation, given the factual and legal issues involved in the liability phase and the challenges in proving loss causation damages"). Whether Rendelman would have been able to prove loss causation would have turned on expert testimony presented by both sides, making his ability to prevail uncertain. See *Weeks v. Kellogg Co.*, No. CV 09–08102(MMM) (RZx), 2013 WL 6531177, *13 (C.D. Cal. Nov. 23, 2013) ("The fact that this issue, which is at the heart of plaintiffs' case, would have been the subject of competing expert testimony suggests that plaintiffs' ability to prove liability was somewhat unclear; this favors a finding that the settlement is fair"); see also *In re Cendant Corp. Litigation*, 264 F.3d 201, 239 (3d Cir. 2001) ("[T]he damages determination proffered by Lead Plaintiff's expert is complex and hard to follow, freighted with involved calculations and conceptually difficult issues. Were a jury confronted with competing expert opinions of corresponding complexity, there is no compelling reason to think that it would accept Lead Plaintiff's determination rather than Cendant's, which would posit a much lower figure for the Class's damages. This risk in establishing damages means that this factor weighs in favor of approval of the Settlement").

The court agrees with class counsel that the risks Rendelman faced at the summary judgment and trial stages favor a finding that the settlement is fair. See *In re Portal Software, Inc.*

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[72] *Id.*, ¶¶ 76-78.

Securities Litigation, No. C-03-5138 VRW, 2007 WL 4171201, *3 (N.D. Cal. Nov. 26, 2007) ("Factor (1), the strength of plaintiffs' case, somewhat favors settlement because plaintiffs' remaining claims are tenuous. Plaintiffs assert that establishing liability and damages at trial would be difficult because of the uncertainties associated with proving its claims, which are 'exacerbated by the unpredictability of a lengthy and complex jury trial'"). The court therefore concludes that this factor weighs in favor of final approval of the settlement.

b. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

Rendelman contends that had the case not been resolved through settlement, continued litigation would have been risky, expensive, and lengthy. Aside from the risks he faced proving liability, causation, and damages, Rendelman argues, he faced the risk inherent in any trial: difficulty predicting how a trier of fact would construe the evidence and testimony.[73] Moreover, he contends, the costs associated with formal discovery, expert discovery, trial preparation and trial, as well as briefing motions for summary judgment, *Daubert* motions, motions in limine, and post-trial appeals would have been "extraordinarily" high.[74] Finally, Rendelman asserts, given the complexity of the case, the action would have required immense preparation and the expenditure of substantial resources by both parties and the court had it gone to trial; any appeals, moreover, would have resulted in a long delay before the class saw any recovery.[75]

The court agrees with Rendelman's assessment of the risks, cost, and length of future litigation. Given the amount of motion practice that had already occurred in the case, and the contested issues that remained, it is likely that a motion or motions for summary judgment would have been filed, which would have focused, *inter alia*, on complex questions of loss causation. Had the case thereafter proceeded to trial, it is virtually certain that, whatever the outcome of a trial, the losing party or parties would have appealed.

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[73] Motion at 16.

[74] *Id.*

[75] *Id.* at 17.

This case has been pending almost four years, since August 2010, and it is likely that further proceedings would have been protracted, given the complexity of the remaining claims and the need for expert testimony concerning loss causation. As the court stated in *Glass v. UBS Financial Services, Inc.*, No. C-06-4068 MMC, 2007 WL 221862 (N.D. Cal. Jan. 26, 2007):

> "In light of the above-referenced uncertainty in the law, the risk, expense, complexity, and likely duration of further litigation likewise favors the settlement. Regardless of how this Court might have ruled on the merits of the legal issues, the losing party likely would have appealed, and the parties would have faced the expense and uncertainty of litigating an appeal. 'The expense and possible duration of the litigation should be considered in evaluating the reasonableness of [a] settlement.' See *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000). Here, the risk of further litigation is substantial." *Id.* at *4.

See also *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 489 (E.D. Cal. 2010) (in weighing the risk of future litigation, "a court may consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation" (internal quotation marks omitted)); *Young*, 2007 WL 951821 at *3 ("Because this litigation has terminated before the commencement of trial preparation, factor (2) also militates in favor of the settlement"); see also *Officers for Justice*, 688 F.2d at 626; *Milstein v. Huck*, 600 F.Supp. 254, 267 (E.D.N.Y. 1984) ("The expense and possible duration of the litigation are major factors to be considered in evaluating the reasonableness of this settlement").

Because both parties would have had to engage in extensive, expensive summary judgment and pretrial activities, because both faced the prospect that they would not prevail, and because any outcome would likely have been appealed, this factor supports approval of the settlement. See *In re Portal Software, Inc. Securities Litigation*, 2007 WL 4171210 at *3 (recognizing that the "inherent risks of proceeding to . . . trial and appeal also support the settlement").

c. The Risk of Maintaining Class Action Status Throughout Trial

Whether or not the action would have been tried as a class action is also relevant in assessing the fairness of the settlement. Here, as noted, the court had not yet certified a class at the time the parties agreed to the settlement. Rendelman argues that his ability to obtain certification was unclear at the time the parties agreed on a settlement in principle. He states that the Supreme Court was then reviewing a petition for *writ of certiorari* in *Halliburton Co. v. Erica P. John Fund, Inc.*, 718 F.3d 423 (5th Cir. 2013), see 134 S. Ct. 636 (granting *certiorari* on November 15, 2013), which sought to have it reevaluate the applicability and contours of the fraud-on-the-market presumption recognized in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). See *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014) ("Halliburton also argues that the *Basic* presumption cannot be reconciled with our recent decisions governing class action certification under Federal Rule of Civil Procedure 23. Those decisions have made clear that plaintiffs wishing to proceed through a class action must actually *prove* – not simply plead – that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3). According to Halliburton, *Basic* relieves Rule 10b-5 plaintiffs of that burden, allowing courts to presume that common issues of reliance predominate over individual ones"). Had the Supreme Court not reaffirmed the holding in *Basic* as it ultimately did, Rendelman might well have had difficulty certifying a class, as he would have had to show that whether each class member relied on defendants' alleged misrepresentations – a quintessentially individual question – did not predominate over common questions of law or fact.

Even had the court certified a class, moreover, subsequent facts adduced through discovery might have led to decertification. Avoiding such a risk, especially where there are doubts concerning the viability of the class prior to settlement, favors approval of the settlement. See *McKenzie v. Federal Exp. Corp.*, No. CV 10–02420 GAF (PLAx), 2012 WL 2930201, *4 (C.D. Cal. July 2, 2012) ("[S]ettlement avoids all possible risk [of decertification]. This factor therefore weighs in favor of final approval of the settlement"); *Catala v. Resurgent Capital Services L.P.*, Civil No. 08cv2401 NLS, 2010 WL 2524158, *3 (S.D. Cal. June 22, 2010) ("The avoidance of risk of maintaining class action certification throughout trial favors settlement of this action");

Lane v. Facebook, Inc.,No. C 08–3845 RS, 2010 WL 9013059, *4 (N.D. Cal. Mar. 17, 2010) ("The risk that a class action may be decertified at any time generally weighs in favor of approving a settlement," citing *Rodriguez*, 563 F.3d at 966). Compare *Kim v. Space Pencil, Inc.*, No. C 11–03796 LB, 2012 WL 5948951, *5 (N.D. Cal. Nov. 28, 2012) ("[B]ased on the record presented, the court considers the risk of decertifying the class to be low. This factor, therefore, weighs slightly against approving the Settlement Agreement").

Because there was a risk that the court would not have certified a class in the first place had the parties not settled, and a further risk that, even if it did, that class might later have been decertified, this factor too weighs in favor of approving the settlement.

d. The Amount Offered in Settlement

As the Ninth Circuit has noted, "it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is [thus] not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators." *Officers for Justice*, 688 F.2d at 625 (emphasis original). Rather, "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Id.* at 624 (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). "'The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.'" *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998) (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 & n. 2 (2d Cir. 1974)). Estimates of a fair settlement figure are tempered by factors such as the risk of losing at trial, the expense of litigating the case, and the expected delay in recovery (often measured in years).

Rendelman's damages expert estimated that the class could have recovered approximately $12 million had it been certified and prevailed on its claims.[76] As noted, the settlement agreement provides for the creation of a $4.8 million fund, from which class members with approved claims are to recover their pro rata share once taxes, attorneys' fees and expenses, and administration

[76]Kaplan Decl., ¶ 71.

fees are subtracted. The settlement also provides that American Apparel's general counsel and CFO will meet with Rendelman to get his views on the company's retail operations and communicate them to the CEO and Head of Retail Operations.

Although Rendelman did not achieve all of the results he could have had a class been certified and had it prevailed on all claims at trial, a settlement representing 40% of the potential recovery is fair and adequate given the risks, time, and costs Rendelman faced had the case proceeded to trial. While it is possible that going to trial might have resulted in more compensation for class members, the settlement offers a guaranteed recovery for eligible class members without the risk, time, or further expense of litigation.

Even when the court considers the amount that will actually be paid to the class as opposed to the total amount offered in settlement, the court believes the amount of the settlement is fair and adequate. While it is unclear exactly how much of the fund will ultimately be distributed to eligible class members, as class counsel have not attempted to calculate this amount, it is possible to arrive at a reasonable estimate. Class counsel seek attorneys' fees of $1,200,000, expenses of $217,452.85, and an incentive award for Rendelman of $6,600. The court awards these amounts, *infra*, although it reduces class counsel's requested reimbursement for expenses to $211,305.91. This leaves $3,382,094.09 in the fund. Even assuming administration costs and taxes are as much as $500,000 – a generous estimate – the class would receive $2,882,094.09 in settlement, or 24% of their potential recovery at trial. The immediacy of the relief provided by the settlement eliminates the possibility that class members would have to wait years to receive compensation.

The claims process, moreover, is fairly straightforward. Class members need only complete a form that requests their name, contact information, and the last four digits of their social security number or taxpayer identification number, and the dates and amounts of stock they purchased and/or sold during the class period. If they have them available, class members are to provide copies of documents supporting the information they supply.[77] The claims procedure

[77]Settlement Agreement, Exh. A(2) (Claims Form).

eliminates the need for each class member to adduce evidence of actual damage following a finding of liability; this will result in a quicker and less costly manner of recovery.

The compensation contemplated by the settlement, whether viewed in toto or as the lower amount that will actually be distributed to eligible class members, represents a compromise reached following extensive arms-length negotiation. It takes into account the risks the class faced in seeking certification and at trial. For these reasons, the court concludes that the settlement amount is fair and adequate, and will provide more immediate monetary relief to the class than proceeding with the litigation. See *In re Mego Financial Corp.*, 213 F.3d at 459 (holding that, given the difficulties inherent in complex securities litigation, one-sixth of the potential recovery was fair and adequate); *Officers for Justice*, 688 F.2d at 628 ("It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair"); *Jaffe v. Morgan Stanley & Co.*, No. C 06-3903 THE, 2008 WL 346417, *9 (N.D. Cal. Feb. 7, 2008) ("The settlement amount could undoubtedly be greater, but it is not obviously deficient, and a sizeable discount is to be expected in exchange for avoiding the uncertainties, risks, and costs that come with litigating a case to trial"). This factor therefore weighs in favor of approving the settlement.

e. The Stage of the Proceedings and Extent of Discovery Completed

"'The extent of discovery may be relevant in determining the adequacy of the parties' knowledge of the case.'" *NRTC*, 221 F.R.D. at 527 (quoting MANUAL FOR COMPLEX LITIGATION, THIRD, § 30.42 (1995)). "'A court is more likely to approve a settlement if most of the discovery is completed because it suggests that the parties arrived at a compromise based on a full understanding of the legal and factual issues surrounding the case.'" *Id.* (quoting 5 W. Moore, MOORE'S FEDERAL PRACTICE, § 23.85[2][e] (Matthew Bender 3d ed.)). The more discovery that has been completed, the more likely it is that the parties have "'a clear view of the strengths and weaknesses of their cases.'" *Young*, 2007 WL 951821 at *4 (quoting *In re Warner Communications Securities Litigation*, 618 F.Supp. 735, 745 (S.D.N.Y. 1985)).

There has been extensive discovery and a fair amount of motion practice in this case. Rendelman and class member Robert England both filed motions for appointment as lead plaintiff

and consolidation. Following supplemental briefing and the court's appointment of Rendelman as lead plaintiff, the parties litigated a total of nine motions to dismiss each of the three complaints Rendelman filed.[78] Rendelman's opposition to the various motions total 179 pages in length.[79]

Kaplan's declaration reveals that class counsel spent a tremendous amount of time investigating the class claims and conducting discovery. Kaplan states that class counsel (1) reviewed and analyzed voluminous publicly available information regarding defendants, including American Apparel's SEC filings, financial statements, press releases, reports, news articles, analyses and reports by securities firms, and pleadings in other actions in which defendants were parties; (2) prepared, submitted to ICE, and litigated a Freedom of Information Act ("FOIA") request, which resulted in production of 499 pages of documents related to ICE's investigation of American Apparel; (3) conducted detailed investigative interviews of fourteen witnesses, including former employees of American Apparel;[80] (4) consulted with, and obtained

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[78]Lion Capital, American Apparel, and the individual defendants together filed a motion to dismiss each of Rendelman's complaints.

[79]Kaplan Decl., ¶ 4.

[80]These former employees provided useful information class counsel included in their amended pleadings. For example, one former customer service supervisor who worked at the company's downtown facility during the class period allegedly stated that the company routinely hired undocumented workers, and that he/she knew of at least three people in his/her department who lacked documentation. (SAC, ¶ 61.) Another former employee testified that "the majority of manufacturing personnel employed at American Apparel lacked the necessary papers to legally work at the [c]ompany." (*Id.*, ¶ 74.) Moreover, a former payroll administrator stated that he or she believed that "American Apparel had separate payroll systems because there were many manufacturing employees at the [c]ompany's Los Angeles factory who lacked proper documentation." (*Id.*, ¶ 75.) A former production scheduler at the Los Angeles facility allegedly testified that "many manufacturing employees who were dismissed after failing to produce ICE documentation were later rehired by American Apparel under different names." (*Id.*, ¶ 71). A former manufacturing division controller, who worked at American Apparel from 2008 to mid-June 2010, confirmed that the impact of terminations during the third quarter of 2009 was evident no later than the fourth quarter of that year, and that Charney was personally aware of the significant adverse impact that the workforce reduction had had. (*Id.*, ¶ 66.) He further stated that American Apparel had great difficulty replacing the workers it had lost. (*Id.*) A former distribution supervisor who worked at the company from August 2009 to early 2010 found it

reports and analysis from forensic accountants and other experts; and (5) obtained informal discovery from defendants following the settlement in principle, which resulted in a review of 1.5 million documents defendants produced.[81] Moreover, as part of the briefing of the motions for appointment as lead plaintiff, England asked to take Rendelman's deposition under 15 U.S.C. § 78u-4(a)(3)(B)(iv), a request the court granted.

In *Browning v. YahooA Inc.*, No. C04-01463 HRL, 2007 WL 4105971 (N.D. Cal. Nov. 16, 2007), the court found that a similar amount of discovery and the stage of the proceedings weighed in favor of approving the settlement proposed in that case. *Id.* at *12 (finding that the extent of discovery and stage of the proceedings weighed in favor of approving a settlement where the case had been pending three years, it "involved discovery and motion practice, including a motion to dismiss," "the parties [had] engaged in multiple rounds of mediation," and "[a]s a result [of these activities], the parties and this Court [were] well positioned to assess the strength of this case and the comparative benefits of the proposed settlement").

Here, too, the court concludes that the action is at a stage where the parties have a "clear view of the strengths and weaknesses of their cases." See *True v. American Honda Motor Co.*, 749 F.Supp.2d 1052, 1078 (C.D. Cal. 2010) (finding, in a case where "class counsel reviewed 'thousands of pages of relevant documents,'" that "discovery has been sufficient to permit the parties to enter into a well-informed settlement, and [that] this factor weighs in favor of approval"). This factor therefore weighs in favor of approving the settlement.

f. The Presence of a Governmental Participant

This factor does not apply because no government entity participated in the case.

"ridiculous" for Charney to suggest that he did not know the impact of the terminations, since they had immediate negative effects on the company's productivity. (*Id.*, ¶ 70.) A former resource assignor for American Apparel reported that the replacement workers the company had to hire after the ICE audit were producing only half as much product as the workers who were terminated. (*Id.*, ¶ 73.) Finally, several former employees stated that Charney knew in real time about the significant negative impact the termination of manufacturing workers had had because he was heavily involved in every aspect of American Apparel's operations. (*Id.*, ¶¶ 66, 78.)

[81] *Id.*, ¶¶ 4, 34, 63-68.

g. The Experience and Views of Counsel

"The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 622 (N.D. Cal. 1979) (citations omitted). "Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pacific Enterprises Securities Litigation*, 47 F.3d 373, 378 (9th Cir. 1995). Kaplan states that "the attorneys at Kessler Topaz are experienced and skilled securities class action litigators and have a successful track record in securities cases throughout the country – including within this Circuit."[82] The firm's profile states that it has specialized in securities class actions since 1987 and that its 94 attorneys "ha[ve] recovered billions of dollars in the course of representing defrauded shareholders from around the world."[83] The profile includes summaries of 23 securities fraud class action cases in which the firm served as class counsel, most of which settled for millions of dollars.[84] Kaplan states that class counsel, "[h]aving considered the [ ] risks [of not settling] and evaluated [d]efendants' defenses" believe the settlement "is fair, reasonable and adequate, and in the best interests of the [c]lass."[85] While the weight to be given to this factor is tempered somewhat by counsel's "obvious pecuniary interest in seeing the settlement approved," *Young*, 2007 WL 951821 at *5, the court nonetheless concludes that counsel's views weigh in favor of approving the settlement. See *Fernandez v. Victoria Secret Stories*, No. CV 06-04149 MMM (SHx), 2008 WL 8150856, *7 n. 32 (C.D. Cal. Jul. 21, 2008) ("While the court agrees that this factor must be discounted to some degree in recognition of the personal interest

[82] *Id.*, ¶ 119.

[83] *Id.*, Exh. C (Declaration of David Kessler in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Kessler Decl."), Docket No. 188-3 (June 23, 2014), Exh. 4 (Firm Profile at 1)).

[84] See *id.* at 2-8.

[85] Kaplan Decl., ¶ 106.

of class counsel in having the settlement approved, it declines to discount the well-considered views of counsel entirely").

h. Class Members' Reaction to the Proposed Settlement

Rendelman supports the settlement. He states that his "understanding of the facts and law as they pertain to this case enables [him] to support presentation of the Settlement to the [c]ourt for approval. Based on [his] involvement throughout the prosecution and resolution of the [c]lass's claims, [he] strongly endorse[s] the [s]ettlement and believe[s] it provides a substantial recovery for the [c]lass, particularly in light of the risks of continuing to prosecute the claims in the [a]ction."[86]

In order to gauge the reaction of the other class members, it is appropriate to evaluate the number of requests for exclusion, as well as the objections submitted. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 812 (3d Cir. 1995) ("In an effort to measure the class's own reaction to the settlement's terms directly, courts look to the number and vociferousness of the objectors," quoting *Pallas v. Pacific Bell*, No. C-89-2373 DLJ, 1999 WL 1209495, *6 (N.D. Cal. July 13, 1999) ("The greater the number of objectors, the heavier the burden on the proponents of settlement to prove fairness")).

As noted, Gilardi mailed 35,767 notices and claim forms to potential class members and their nominees. This includes 2,853 persons and entities whose information Gilardi obtained from American Apparel as well as 24,144 additional potential class members whose information nominees provided to Gilardi after receiving the notice, and 2,430 claim packages requested by nine institutions for distribution by those institutions to clients. In return, Gilardi has received 2,942 proofs of claim; 582 were submitted by individuals and 2,360 were submitted by

[86] *Id.*, Exh. A (Declaration of Charles Rendelman in Support of Application for Reimbursement of Costs and Expenses in Connection with his Representation fo the Class and in Support of the Settlement ("Rendelman Decl."), Docket No. 188-1 (June 23, 2014), ¶ 9).

institutions.[87] As of July 11, 2014, no member of the class had objected to the settlement.[88] As of that date, moreover, there had only been one exclusion request.[89] Even assuming there are 29,427 class members – the sum of the 2,853 names Gilardi received from American Apparel, the 24,144 names it received from nominees, and the 2,430 clients for whom the nine institutions requested additional notice packets – rather than 35,767, this single exclusion request represents only .000034% of the class.

The fact that only one class member opted out of the settlement and none filed an objection indicates that the class overwhelmingly approves the settlement. See *Churchill Village, L.L.C.*, 361 F.3d at 577 (affirming the approval of a class action settlement where 90,000 members received notice and 45 objections were received); see also *Rodriguez*, 563 F.3d at 967 ("The court had discretion to find a favorable reaction to the settlement among class members given that, of 376,301 putative class members to whom notice of the settlement had been sent, 52,000 submitted claims forms and only fifty-four [.014 percent] submitted objections"); *Chun-Hoon v. McKee Foods Corp.*, 716 F.Supp.2d 848, 852 (N.D. Cal. 2010) (concluding, in a case where "[a] total of zero objections and sixteen opt-outs (comprising 4.86% of the class) were made from the class of roughly three hundred and twenty-nine (329) members," that the reaction of the class "strongly supports settlement"); *Garner v. State Farm Mut. Auto Ins.*, No. CV 08 1365 CW (EMC), 2010 WL 1687832, *15 (N.D. Cal. Apr. 22, 2010) (finding that an opt-out rate of 0.4 percent supported "the fairness of the Settlement"); *Glass*, 2007 WL 221862 at *5 (approving a settlement where the opt-out rate was 2%); *Mangone v. First USA Bank*, 206 F.R.D. 222, 227 (S.D. Ill. 2001) (finding that an opt-out rate of .10614 percent and an objection rate of .0052 percent represented "overwhelming support" for the settlement by class members and that it was "strong circumstantial evidence supporting the fairness of the Settlement"). For this reason, the class members' reaction weighs strongly in favor of approving the settlement.

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[87]Sylvester Decl., ¶ 8.

[88]*Id.*, ¶ 7.

[89]*Id.*, ¶ 6, Exh. A (June 15, 2014 Letter Requesting Exclusion by Stephen G. Fridl).

i. Other Factors

As noted, the *Young* court considered two additional factors: the process by which settlement was achieved and the involvement of the named plaintiffs in the process. The parties here reached agreement after arms-length negotiations facilitated by a neutral mediator. The court therefore finds that the process by which the settlement was achieved weighs in favor of approving the settlement.

As for the involvement of the named plaintiff in the settlement negotiations, Rendelman reports that although he did not attend the mediation in person, he

> "engaged in numerous lengthy discussions with Lead Counsel concerning the pros and cons of mediation and the strategies to be employed when negotiating, reviewed the mediation statement that Lead Counsel prepared, and made [himself] available for the October 11, 2013 mediation session by telephone. [He] also consulted at length with Lead Counsel following the mediation session as well as during the additional settlement negotiations which followed the session."[90]

Although it does not appear Rendelman was present during any of the parties' negotiations, the fact that he kept apprised of the settlement process and fully reviewed the settlement agreement as well as the fact that the settlement grants him an opportunity to meet with American Apparel's general counsel and CFO regarding his views of the company's retail operations indicates that he was somewhat involved in the negotiations. This factor, therefore weighs in favor of approval.

j. Signs of Collusion

The Ninth Circuit has explained that, in addition to evaluating the fairness of the settlement terms, the district court should be watchful for "subtle signs" that class counsel and the class representative permitted self-interest to trump their obligation to ensure a fair settlement for the class as a whole. *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 947 (9th Cir. 2011). In *Bluetooth*, the Ninth Circuit identified three possible signs of collusion:

[90]Rendelman Decl., ¶ 7.

> "(1) when the settlement terms result in class counsel receiving a disproportionate share of the settlement, or when the class receives no monetary compensation but counsel receive an ample award of attorneys' fees;
>
> (2) the presence of a clear sailing agreement that carries the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for . . . accepting an unfair settlement; and
>
> 3) when the parties arrange for fees not awarded to revert to defendants, rather than being paid into the class fund." *Id.* (citations and quotation marks omitted).

The Ninth Circuit noted that this list is not exclusive, but felt it offered some guidance to lower courts regarding the type of provisions that require "greater scrutiny than ordinarily demanded" in assessing the overall fairness of the settlement. *Id.* at 949.

None of the signs of collusion is present here. First, the attorneys' fees class counsel seek are not nearly as disproportionate as was the fee award at issue in *In re Bluetooth*. There, "the amount awarded was 83.2% of the total amount defendants were willing to spend to settle the case." *Id.* at 945. Here, class counsel seek 25% of the $4,800,000 settlement fund, or $1,200,000. Class counsel also seek $217,452.85 in expenses. Even when expenses are added to the fees requested, the combined amount of $1,417,452.85 is 29.53% of the total recovery, and is not disproportionate. While 29.53% is a significant percentage, it is much lower than the 83.2% at issue in *Bluetooth*, and is only slightly higher than the 25% benchmark courts typically use to calculate a reasonable fee award. See *id.* at 942. For that reason, the fee award to which the parties agreed is not so disproportionate to the class's recovery that it suggests collusion. Compare *Harris v. Vector Marketing Corp.*, No. C–08–5198 EMC, 2011 WL 4831157, *6 (N.D. Cal. Oct. 12, 2011) (rejecting a class settlement that permitted "class counsel [to] seek[ ] an unopposed award roughly four times greater than the actual and expected payout to the class (approximately $4 million compared to approximately $1 million").

Second, the settlement agreement does not contain a clear sailing agreement. "In general, a clear sailing agreement is one where the party paying the fee agrees not to contest the amount to be awarded by the fee-setting court so long as the award falls beneath a negotiated ceiling."

Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518, 520 n. 1 (1st Cir. 1991). Clear sailing provisions are troubling on several levels. "[T]he very existence of a clear sailing provision increases the likelihood that class counsel will have bargained away something of value to the class." *In re Bluetooth*, 654 F.3d at 948 (citation omitted); see also *Malchman v. Davis*, 761 F.2d 893, 908 (2d Cir. 1985) (Newman, J., concurring) ("It is unlikely that a defendant will gratuitously accede to the plaintiffs' request for a 'clear sailing' clause without obtaining something in return. That something will normally be at the expense of the plaintiff class"), abrogated on other grounds in *Amchem*, 521 U.S. at 619. "Such a clause deprives the court of the advantages of the adversary process. The source of the proposed payment renders it improbable that class members will come forward to challenge the reasonableness of the requested fee. Meanwhile, the payor is bound by contract not to contest the application." *Weinberger*, 925 F.2d at 525.

The settlement agreement provides:

> "Lead Counsel will apply to the Court for an award of attorneys' fees which, subject to Court approval, shall be paid from the Settlement Fund. . . . The procedure for and the allowance or disallowance of any application for attorneys' fees and Litigation Expenses are not part of the Settlement and are to be considered by the Court separately from the Court's consideration of the fairness, reasonableness and adequacy of the Settlement."[91]

This is not a clear sailing provision. The settlement agreement does not state how much class counsel will seek to recover, nor is there a provision in which defendants agree not to contest any such motion. Thus, although defendants did not oppose the motion for attorneys' fees, it does not appear that the settlement agreement was contingent on such non-opposition.

Finally, as noted, any undistributed amount will be paid to a court-approved non-profit organization; it will not revert to defendants. Because none of the signs of collusion identified by the *Bluetooth* is present, this factor weighs in favor of approving the settlement.

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[91]Settlement Agreement, ¶¶ 16, 18.

k. Relief Specific to Rendelman

In addition to providing monetary relief to all class members, including Rendelman, the settlement agreement provides relief specific to Rendelman, i.e., an opportunity to meet with American Apparel's general counsel and CFO to communicate his views regarding the company's retail operations. Courts express concern regarding the fairness of the settlement and the named plaintiff's adequacy as a class representative when a settlement agreement provides the plaintiff with relief not recoverable by the remainder of the class. See, e.g., *Staton v. Boeing Co.*, 327 F.3d 938, 976 (9th Cir. 2003) ("Generally, when a person 'join[s] in bringing [an] action as a class action . . . he has disclaimed any right to a preferred position in the settlement," citing *Officers for Justice*, 688 F.2d at 632 (internal alterations original)); *True*, 749 F.Supp.2d at 1065 ("The court [ ] has misgivings about [the named plaintiffs'] adequacy as representatives, due to their membership in the limited group of class members who are eligible to receive cash payments of $100 under Option C, and the potential conflict this creates").

Nonetheless, the court does not believe this aspect of the settlement renders it unfair or gives rise to concern that Rendelman has not been an adequate class representative. First, the agreement does not provide that Rendelman will receive more than his pro rata share of the settlement fund.[92] Although the settlement gives Rendelman an opportunity not provided to other class members, it is an opportunity that will inure to the benefit of the class. Rendelman will be able to express his views concerning American Apparel's retail operations from the standpoint of a shareholder. He, like all shareholders, earns money when American Apparel is profitable. Thus, any advice or concerns he expresses during the meeting on which American Apparel acts should inure to the benefit of the class.

Next, although the meeting is a unique opportunity that Rendelman most likely would not have had absent this litigation, the court does not believe that it is of such significance that it caused Rendelman to agree to a settlement he did not believe provided class members adequate

[92]Rendelman has applied for a small incentive award, but, as the court discusses *infra*, that award is intended to compensate him for his efforts as class representative. It is not intended as an additional recovery against defendants.

financial compensation for their losses. First, American Apparel is under no obligation to accept any of Rendelman's suggestions. Second, even if there are changes to American Apparel's operations following the meeting, this will not compensate Rendelman or the class for losses that occurred in the past. Recovering those losses was the primary relief sought by Rendelman in the complaint.

Finally, this provision of the settlement agreement was included in the notices Gilardi mailed to class members and their nominees; as the court has noted, no one objected to the fairness of this provision or the settlement as a whole. Accordingly, although Rendelman is being afforded a type of relief not offered to other members of the class – and not sought in the complaint – the court cannot conclude that it renders the agreement unfair or makes Rendelman an inadequate representative of the settlement class.

l. Balancing the Factors

"Ultimately, the district court's determination [concerning the fairness and adequacy of a proposed settlement] is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." *Officers for Justice*, 688 F.2d at 625 (citation omitted). "[I]t must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation." *Id.* Having considered the relevant factors, the court concludes that the terms of the settlement and the circumstances surrounding the parties' agreement to it weigh in favor of a finding that it is fair and adequate. Additionally, all requirements for class certification continue to be satisfied since

the court provisionally certified the settlement class on April 16, 2014.[93] Thus, the court certifies the settlement class and approves the settlement.

B. Plan of Allocation

"Approval of a plan of allocation of settlement proceeds in a class action under FRCP 23 is governed by the same standards of review applicable to approval of the settlement as a whole: the plan must be fair, reasonable and adequate." *In re Oracle Securities Litigation*, No. C-90-0931-VRW, 1994 WL 502054, *1 (N.D. Cal. June 18, 1994) (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1285 (9th Cir. 1992)). "A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable." *Id.*

Under the proposed allocation plan, a settlement class member's claim will be computed based on his or her estimated losses. As noted, no class member is eligible to receive a distribution if his or her pro rata share under the plan of allocation would be less than $10.00.[94] The class member's pro rata share depends on his or her "Recognized Loss Amount,"[95] which is to be calculated by determining when a class member purchased, acquired, and/or sold his or her shares in relation to American Apparel's allegedly misleading disclosures on June 30, 2009, March 25, May 19, July 28, and August 16, 2010. This amount is then compared with the value

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[93]Specifically, the court found, and continues to find, "that the prerequisites for a class action under Rules 23(a)(and (b)(3) have been satisfied as: the members of the Class are so numerous that joinder of all Class Members in the class action is impracticable; there are questions of law and fact common to the Class which predominate over any individual questions; the claims of Lead Plaintiff are typical of the claims of the Class; Lead Plaintiff and his counsel have fairly and adequately represented and protected the interests of all of the Class Members; and a class action is superior to other available methods for the fair and efficient adjudication of the controversy, considering: the interests of the members of the Class in individually controlling the prosecution of the separate actions, the extent and nature of any litigation concerning the controversy already commenced by members of the Class, the desirability or undesirability of continuing the litigation of these claims in this particular forum, and the difficulties likely to be encountered in the management of the class action." (Prelim. Approval Order, ¶ 5.)

[94]Settlement Agreement, Exh. A(1) (Allocation Plan").

[95]*Id.*, ¶¶ 2-3.

of the shares 90 days following the end of the class period.[96] A settlement class member will be eligible to receive a distribution from the settlement fund only if he or she suffered a net loss, after all profits from transactions in American Apparel common stock during the settlement class are subtracted from all losses: thus, only class members who suffered an overall net loss 90 days after the class period will be entitled to receive a portion of the settlement fund. Finally, loss amounts on claims based on stock ownership during the period between June 30, 2009 and March 30, 2010 are to be reduced by 10% to reflect the fact that it is unlikely Rendelman and the class would have prevailed on claims alleging misrepresentations between these dates following the court's dismissal of those claims in its order granting in part and denying in part defendants' motions to dismiss the second amended complaint.[97] Any funds remaining after subsequent redistributions have become economically infeasible will be donated to a non-profit charitable organization selected by class counsel and approved by the court.[98]

The court finds the plan of allocation fair and reasonable. It is based on the damages theory that class counsel developed in consultation with their damages expert. Awards will reflect the extent of a class member's damage, and all who suffered a loss entitling them to at least $10 under the plan will be compensated. Accordingly, the court approves the allocation plan. **C .**

Motion for Attorneys' Fees, Expenses, and an Incentive Award

Having approved the settlement, the court turns to class counsel's motion for fees, expenses, and an incentive payment for Rendelman. The procedure for requesting attorneys' fees is set forth in Rule 54(d)(2) of the Federal Rules of Civil Procedure. While the rule specifies that requests shall be made by motion "unless the substantive law governing the action provides for the recovery of . . . fees as an element of damages to be proved at trial," the rule does not itself authorize the awarding of fees. "Rather, [Rule 54(d)(2)] and the accompanying advisory committee comment recognize that there must be another source of authority for such an award

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[96]Kaplan Decl., ¶¶ 21-23, 101.

[97]*Id.*, ¶ 100 n. 7.

[98]*Id.*, ¶ 103.

. . . [in order to] give[ ] effect to the 'American Rule' that each party must bear its own attorneys' fees in the absence of a rule, statute or contract authorizing such an award." *MRO Communications, Inc. v. AT&T*, 197 F.3d 1276, 1281 (9th Cir. 1999).

In class actions, statutory provisions and the common fund exception to the "American Rule" provide the authority for awarding attorneys' fees.[99] See Alba Conte and Herbert B. Newberg, NEWBERG ON CLASS ACTIONS, § 14.1 (4th ed. 2005) ("Two significant exceptions [to the "American Rule"] are statutory fee-shifting provisions and the equitable common-fund doctrine"). Rule 23(h) authorizes a court to award "reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." FED.R.CIV.PROC. 23(h). Under normal circumstances, once it is established that a party is entitled to attorneys' fees, "[i]t remains for the district court to determine what fee is 'reasonable.'" *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

Here, class counsel seek to recover fees under the common fund doctrine. As noted, they request an award of 25% of the settlement fund – or $1,200,000. They also seek to recover expenses of $217,452.85, plus interest, and an incentive award for Rendelman of $6,600.

1. Attorneys' Fees

Courts calculate attorneys' fees using either the lodestar or percentage-of-the-fund method. In a lodestar analysis, the court multiplies the number of hours reasonably expended by counsel on the matter by a reasonable hourly rate and adjusts the result upward or downward depending on a variety of factors. In a percentage-of-the-fund analysis, the court awards a percentage of the class recovery as fees. See *State of Florida v. Dunne*, 915 F.2d 542, 545 n. 3 (9th Cir. 1990). "Though courts have discretion to choose which calculation method they use, their discretion must be exercised so as to achieve a reasonable result." *In re Bluetooth*, 654 F.3d at 942 (citing *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997). As respects selection of the lodestar or percentage-of-the-fund method, the Ninth

[99]The common fund doctrine recognizes that attorneys' fees can be collected from a fund preserved, protected, collected or realized by attorneys' efforts on behalf of the class of persons benefitted by or entitled to the fund. See 38 A.L.R.3d 1384, § 4(a) & (b).

Circuit has observed:

> "Despite the recent ground swell of support for mandating a percentage-of-the-fund approach in common fund cases, . . . we require only that fee awards in common fund cases be reasonable under the circumstances. Accordingly, either the lodestar or the percentage-of-the-fund approach 'may, depending upon the circumstances, have its place in determining what would be reasonable compensation for creating a common fund.'" *Dunne*, 915 F.2d at545 (quoting *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989)).

In cases where courts apply the percentage-of-the-fund method to calculate fees, they should use a rough calculation of the lodestar as a cross-check to assess the reasonableness of the percentage award. See *In re Bluetooth*, 654 F.3d at 943 (encouraging "comparison between the lodestar amount and a reasonable percentage award"); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002) ("Calculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award"). By the same token, "a court applying the lodestar method to determine attorney's fees may use the percentage-of-the-fund analysis as a cross-check." *Grays Harbor Adventist Christian School v. Carrier Corp.*, No. 05-05437 RBL, 2008 WL 1901988, *5 (W.D. Wash. Apr. 24, 2008) (citing *Wing v. Asarco Inc.*, 114 F.3d 986, 988-90 (9th Cir. 1994)). "The object in awarding a reasonable attorney's fee . . . is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation, had one been feasible." *In re Continental Illinois Securities Litigation*, 962 F.2d 566, 572 (7th Cir. 1992).

Class counsel request that the court use the percentage-of-the-fund method to calculate fees.[100] Because the monetary value of the settlement is determinable, the percentage method is properly used in awarding fees. See *In re Oracle Securities Litigation*, 852 F.Supp. 1437, 1449, n. 5 (N.D. Cal. 1994) ("Because there were no nonmonetary benefits conferred on upon Oracle by this derivative suit, common fund principles are particularly pertinent"). Moreover, using the

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[100]Fees Motion at 5-8.

percentage method is proper in a securities fraud case. The PSLRA states that "[t]otal attorneys' fees and expenses awarded by the court to counsel for plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." See 15 U.S.C. § 78u-4(a)(6); 15 U.S.C. § 77z-1(a)(6). By using this language, "Congress plainly contemplated that percentage-of-recovery would be the primary measure of attorneys' fees awards in federal securities class actions." *In re Telik, Inc. Securities Litigation*, 576 F.Supp.2d 570, 586 (S.D.N.Y. 2008); see also *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 300 (3d Cir. 2005) ("[T]he percentage-of-recovery method was incorporated in the [PSLRA]").

"Th[e] [percentage method] provision [in the PSLRA] is intended to prevent the payment of attorney's fees based on an inflated settlement figure, where a large part of the settlement is later returned to the coffers of the settling defendant because of a low number of claims. Before awarding fees, therefore, the Court must determine what portion of the settlement fund will actually be paid to plaintiffs." *Lyons v. Scitex Corp.*, 987 F.Supp. 271, 279 (S.D.N.Y. 1997). In this case, the entire fund will be distributed to members of the plaintiff class, except for any funds remaining after subsequent redistributions have become economically infeasible. Those funds, if there are any, will be donated to a non-profit organization chosen by class counsel and approved by the court. Thus, the size of the attorneys' fee award should be measured against the full $4.8 million settlement amount.

a. Whether the Percentage of the Fund Sought by Class Counsel Is Reasonable

Class counsel's request for $1,200,000 equals 25% of the settlement amount. As the court has noted, the Ninth Circuit has established 25% of the common fund as a benchmark for an award of attorneys' fees. See *Fischel v. Equitable Life Assurance Society of U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). The 25% benchmark "can be 'adjusted upward or downward to account for any unusual circumstances involved in [the] case.'" *Fischel*, 307 F.3d at 1006 (quoting *Paul, Johnson, Alston & Hunt*, 886 F.2d at 272). In determining the reasonableness of the percentage requested in any given case, the court must consider "(1) the results achieved; (2) the risk of

litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases." *In re Omnivision Technologies, Inc.*, 559 F.Supp.2d 1036, 1046 (N.D. Cal. 2008) (citing *Vizciano*, 290 F.3d at 1048-50); see also *Vasquez*, 266 F.R.D. at 492.

i. The Results Achieved

"The overall result and benefit to the class from the litigation is the most critical factor in granting a fee award." *In re Omnivision Technologies, Inc.*, 559 F.Supp.2d at 1046. Class counsel argue that the settlement "confers a substantial and immediate benefit on the Class[.]"[101] As noted, the $4.8 million recovery represents 40% of the potential recovery Rendelman's damage expert predicted the class could have won if completely successful. This is a sizeable recovery compared to the amount the class stood to recover at trial and the court agrees with counsel that it confers a substantial benefit on the class. See *In re Omnivision Technologies*, 559 F.Supp.2d at 1046 (concluding that a total award of 9% of the possible damages weighed in favor of granting a requested 28% fee); *In re Immune Response Securities Litigation*, 497 F.Supp.2d 1166, 1175 (S.D. Cal. 2007) (awarding attorneys' fees of 25% of the settlement fund, despite the fact that the "$10 million award *only represents approximately 12%* of the maximum provable damages assuming complete success" (emphasis added)).

Moreover, as noted, the class overwhelmingly favors the settlement and class counsel's request for fees, the amount of which was included in the notice Gilardi mailed to class members. See *Knight v. Red Door Salons, Inc.*, No. 08–01520 SC, 2009 WL 248367, *7 (N.D. Cal. Feb. 2, 2009) ("The reaction of the class may also be a factor in determining the fee award") No member of the class has filed an objection to the fee request and only one class member has requested exclusion from the class. The exclusion request does not indicate why the class members wishes to opt out. See *id.* ("After reasonable efforts were made to notify all potential Class Members, [no one] requested to be excluded or objected. The Notice explicitly stated that Plaintiffs' Counsel would ask the Court for up to $150,000 to be paid from the settlement fund,

[101] *Id.* at 9.

plus actual, reasonable expenses. This factor, like those above, supports the requested award of 30% of the Settlement Fund"); *In re Immune Response*, 497 F.Supp.2d at 1177 ("[T]he lack of objection from any Class Member supports the attorneys' fees award. As indicated above, counsel provided notice and instructions on how to object to all potential Class Members. To date, counsel indicates that they are unaware of any objections"). For these reasons, this factor favors a finding that a 25% fee is reasonable.

ii. The Risk of the Litigation

"The risks assumed by Class Counsel, particularly the risk of non-payment or reimbursement of expenses, is a factor in determining counsel's proper fee award." *In re Heritage Bond Litigation*, Nos. 02-ML-1475-DT (RCx), *et seq.*, 2005 WL 1594389, *14 (C.D. Cal. June 10, 2005). Class counsel argue that they faced considerable risk litigating the case further for the reasons the court has already discussed *supra* involving proving scienter and loss causation. As the court has noted, it agrees that proving these elements of the claims could have been difficult. Litigating these claims further therefore posed a serious risk to class counsel that it would not have its expenses reimbursed.

The court has also noted that at the time the parties reached the settlement in this case, the Supreme Court was deciding whether to grant *certiorari* in *Halliburton* to decide whether the fraud-on-the-market presumption was valid in the class action context. Although the Supreme Court ultimately granted the petition and held that the presumption was valid, this outcome was uncertain at the time the parties decided to settle and therefore Rendelman did face a risk that he would be unable to prove that common questions of law or fact predominated over individual issues such as whether each class member relied on defendants' alleged misrepresentations and that the court would therefore find that the class was not appropriate for certification. This uncertainty also posed a serious risk to class counsel: if the court refused to certify the class and proceeded only with Rendelman's claims, any potential recovery from which class counsel could be reimbursed for its expenses would have been drastically reduced.

These considerations therefore also weigh in favor of approving a 25% fee award. See *In re Omnivision Technologies*, 559 F.Supp.2d at 1046-47 ("The risk that further litigation might

result in Plaintiffs not recovering at all . . . is a significant factor in the award of fees"); *In re Pacific Enterprises Sec. Litig.*, 47 F.3d at 379 (holding that fees were justified "because of the complexity of the issues and the risks").

iii. The Skill Required and the Quality of Work

The difficulty of securities litigation generally – particularly the challenges presented by the PSLRA's pleading requirements – requires skilled counsel familiar with the relevant statutes and case law. The court found nothing deficient about the work performed by class counsel. Although the court eventually dismissed portions of Rendelman's claims with prejudice, class counsel made efforts to address aspects of the claims the court found deficient in its orders on defendants' motions to dismiss and clearly engaged in an extensive amount of factual investigation and legal research. Ultimately, these efforts contributed to the court's decision to find that several aspects of Rendelman's claims should be permitted to go forward. See *In re Omnivision Tech.*, 559 F.Supp.2d at 1047 ("That Plaintiffs' case withstood two [motions to dismiss], despite other weaknesses, is some testament to Lead Counsel's skill"). Moreover, had the case not settled, class counsel faced complex legal and factual issues that would have been the subject of lengthy and technically complex dispositive and evidentiary motions and trial presentation.

In addition to the difficulty of the legal and factual issues raised, the court should also consider the quality of opposing counsel as a measure of the skill required to litigate the case successfully. See *In re Equity Funding Corp. Securities Litigation*, 438 F.Supp. 1303, 1337 (C.D. Cal. 1977). See also *Wing v. Asarco*, 114 F.3d 986, 989 (9th Cir. 1997) (noting the district court's evaluation of the job done by class counsel "in light of the quality of opposition counsel and [defendant's] record of success in such litigation"). Opposing counsel here were Skadden Arps Slate Meagher and Flom LLP, O'Melveny and Myers LLP, and Simpson Thacher and Bartlett LLP, all well-respected firms with a significant practice defending securities class actions. For all of these reasons, the court concludes that this factor also weighs in favor of granting counsel's request for 25% of the settlement fund.

iv. The Contingent Nature of the Fee and the Financial Burden Carried by the Plaintiff

"The importance of assuring adequate representation for plaintiffs who could not otherwise afford competent attorneys justifies providing those attorneys who do accept matters on a contingent-fee basis a larger fee than if they were billing by the hour or on a flat fee." *In re Omnivision Tech.*, 559 F.Supp.2d at 1047. Class counsel litigated this case on a contingency fee basis, incurring hundreds of thousands of dollars in out-of-pocket expenses as well as more than 5,321 hours in as-yet uncompensated time over the past three-plus years.[102] This type of "substantial outlay, when there is a risk that [no money] will be recovered, further supports the award of the requested fees." *Id.*; see also *id.* at 1046-47 (finding that the fees requested were reasonable where the "suit began over three years ago. During that time, the various attorneys representing Plaintiffs have spent over 7500 hours litigating this case, without receiving any compensation. Counsel also advanced over $560,000 in expenses related to prosecuting this action"); *In re Immune Response*, 497 F.Supp.2d at 1176 ("[T]he Court notes that counsels' representation of the Class on a contingency fee basis over approximately six years places a heavy burden on counsel and involves significant risk. Counsel has incurred thousands of hours of attorney time and put forth hundreds of thousands of dollars in expenses on an 'at-risk' basis"). Accordingly, this factor also weighs in favor of approval of class counsel's requested 25% fee.

v. Awards Made in Similar Cases

"[I]n most common fund cases, the award exceeds th[e] benchmark." *In re Omnivision Tech.*, 559 F.Supp.2d at 1047; see also *Vasquez*, 266 F.R.D. at 491 (awarding 33 1/3% of the common fund as fees, and stating that "the exact percentage varies depending on the facts of the case and in 'most common fund cases, the award exceeds that [25%] benchmark,'" citing *Knight*, 2009 WL 248367 at *6); *Singer v. Becton Dickinson and Co.*, No. 08-CV-821-IEG (BLM), 2010 WL 2196104, *8 (S.D. Cal. June 1, 2010) (approving an attorneys' fees award of 33.33% of a common fund, and noting that "the request for attorneys' fees in the amount of 33.33% of the

[102]Rendelman Decl., ¶ 3; Kaplan Decl., ¶¶ 108-110.

common fund falls within the typical range of 20% to 50% awarded in similar cases"); *Knight*, 2009 WL 248367 at *6 ("[I]n most common fund cases, the award exceeds that benchmark"); *Romero v. Producers Dairy Foods, Inc.*, No. 1:05cv0484 DLB, 2007 WL 3492841, *4 (E.D. Cal. Nov. 14, 2007) (approving a fee award of 33% of the common fund, and stating "'[e]mpirical 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,'" citing 4 Newberg and Conte, NEWBERG ON CLASS ACTIONS § 14.6 (4th ed. 2007)); *In re M.D.C. Holdings Securities Litigation*, No. CV89–0090 E (M), 1990 WL 454747, *7-10 (S.D. Cal. Aug. 30, 1990) (collecting cases and awarding 30%); *In re Activision Securities Litigation*, 723 F.Supp. 1373, 1377 (N.D. Cal. 1989) (collecting cases and noting that "in most recent cases the benchmark is closer to 30%").

This is particularly true in securities class actions such as this. See *In re Pacific Enterprises*, 47 F.3d at 379 (affirming a 33% attorneys' fees award in a case where the settlement fund was $12 million); *In re Mego Financial Corp.*, 213 F.3d at 463 (affirming award of one-third of the total recovery); *In re Activision*, 723 F.Supp. at 1377–78 (surveying securities cases nationwide and noting that "[t]his court's review of recent reported cases discloses that nearly all common fund awards range around 30%. . ."); *In re Ikon Office Solutions, Inc., Securities Litigation*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("The median in class actions is approximately twenty-five percent, but awards of thirty percent are not uncommon in securities class actions"). Accordingly, this factor also weighs in favor of granting class counsel's requested 25% fee.

b. The Lodestar Cross-Check

As noted, when a court uses the percentage-of-the-fund method to determine the reasonableness of attorneys' fees, checking that figure against the lodestar is appropriate. See *Vizcaino*, 290 F.3d at 1050; *Young II*, 2007 WL 951821 at *5 ("[T]he best practice is to assess a percentage fee award not only by using the usual litany of factors bearing on the reasonableness of a fee, but also by cross-checking the percentage fee award against a rough fee computation under the lodestar method" (internal citations omitted)). "In contrast to the use of the lodestar method as a primary tool for setting a fee award, the lodestar cross-check can be performed with a less exhaustive cataloging and review of counsel's hours." *Young II*, 2007 WL 951821 at *6;

see also *In re Immune Response*, 497 F.Supp.2d at 1176 ("Although counsel have not provided a detailed cataloging of hours spent, the Court finds the information provided to be sufficient for purposes of lodestar cross-check"); see also *In re Rite Aid Corp.*, 396 F.3d at 306 ("The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting"); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) ("Of course, where [the lodestar method is] used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized").

Class counsel contend that the lodestar cross-check reveals that their 25% fee request is reasonable because they billed more than 5,321 hours, and generated fees of $2,461,266.[103] This is $1,261,266 more than class counsel request. Twelve attorneys worked on the case as well as five paralegals and one member of class counsel's "professional support staff."[104] The court has reproduced counsel's lodestar chart below, along with – where available from the Firm's Profile – the year of graduation, law school attended, and any distinctions earned by the attorneys:

NAME (YEAR OF GRADUATION/LAW SCHOOL/DISTINCTIONS)	**HOURLY RATE**	**HOURS**	**AMOUNT**
Partners	--	--	--
Abadou, Ramzi (2002, Boston College)	$675	966.0	$652,050.00
Amjed, Naumon A. (Villanova, *cum laude*)	$600	28.90	$17,340.00
Greenstein, Eli (2001, Santa Clara)	$650	62.5	$40,625.00
Handler, Sean (Temple University, *cum laude*)	$650	38.0	$24,700.00
Topaz, Marc A. (J.D., Temple University; L.L.M. from New York University)	$735	29.0	$21,315 .00
Associates	--	--	--

[103]Fees Motion at 18.

[104]Although class counsel do not elaborate, it is apparent from the work this individual performed that he is an accountant or financial analyst employed by Kessler Topaz. He analyzed Bloomberg data, Rendelman's stock transactional data, daily and historical stock price charts, related preferred and debt securities, and he summarized and formatted the reviewed data for class counsel. (See Kessler Decl., Exh. 2 at 5 (Summary of Work by Category).

Breucop, Paul (Hastings)	$395	222.5	$87,887.50
Enck, Jennifer (2003, Syracuse, *cum laude*)	$475	89.5	$42,512.50
Kaplan, Stacey (2005, UCLA)	$475	1,643.46	$780,643.50
Peterson, Erik D.	$475	507.0	$240,825.00
Staff Attorneys	--	--	--
Gaskill, Warren D.	$395	84.0	$33,180.00
Calhoun, Elizabeth W. (Georgetown, *cum laude*)	$395	140.0	$55,300.00
Of Counsel	--	--	--
Brooks, Ioana (Univ. of San Francisco)	$425	544.4	$231,370.00
Paralegals	--	--	--
Chuba, Jean	$200	28.25	$5,650.00
Hebard, Sarah	$250	256.72	$64,187.50
Jayasuriya, Yasmin	$225	109.8	$24,705.00
Weiland, Kristen	$250	36.0	$9,000.00
Nguyen, Katherine	$250	496.5	$124,125.00
Professional Support Staff	--	--	--
Eng, Benjamin	$150	39.0	$5,850.00
TOTALS:		**5,321.56**	**$2,461,266.00**

i. Whether Counsel's Hourly Rate Is Reasonable

In support of the contention that the hourly rates charged for these attorneys, paralegals, and professional support staff are reasonable, partner David Kessler states in his declaration that the rates are the same or similar to rates that the firm has charged as class counsel in contingent matters and that have been accepted by federal courts handling securities litigation cases in the Central District of California as well as across the country.[105] While class counsel do not provide citations to cases in which courts have found the rates reasonable, they have submitted a January 13, 2014 survey by ALM Legal Intelligence, the rates charged by opposing counsel, and citations to cases in this district in which class counsel in complex cases were awarded comparable fees.

[105]Kessler Decl., ¶ 4.

Courts can use survey data to evaluate the reasonableness of attorneys' rates. See *Fish v. St. Cloud State Univ.*, 295 F.3d 849, 852 (8th Cir. 2002) ("The parties presented two surveys of hourly rates, one reporting fees received by seven Twin Cities class action firms and the other reporting fees received by sixty-two firms doing a variety of work around the state. The court set individual hourly rates at the median of the class action survey and near the upper limit of the statewide survey, also taking into account the number of years an attorney had been admitted to practice"); *American Petroleum Inst. v. United States EPA*, 72 F.3d 907, 912 (D.C. Cir. 1996) ("Petitioners have provided support for the reasonableness of their rates through affidavits and a survey of rates and we hold that these rates are reasonable"); *Martin v. University of South Alabama*, 911 F.2d 604, 607 (11th Cir. 1990) ("Based on the testimony and survey produced by plaintiffs the reasonable non-contingent hourly rate for civil rights lawyers in the relevant market (Alabama) was found to be $135 to $150 per hour for senior counsel and $105 to $115 per hour for junior counsel").

The ALM survey concludes that the average partner billing rate at the country's 350 largest law firms is $604 per hour while the average associate billing rate is $370.[106] Among firms with their largest office in Los Angeles, the average partner billing rate is $665 per hour while the average associate rate is $401 per hour.[107] Class counsel's billing rates are, for the most part, slightly higher than these averages. Thus, although the survey assists class counsel in showing that their rates are reasonable, it may indicate that a slight reduction in the rates is appropriate.

Counsel also cite the fact that the average partner billing rate at Skadden – American Apparel's counsel – is $1,035, and that the average associate billing rate there is $620 per hour.[108] The average partner billing rate at O'Melveny – counsel for Charney and Kowalewski – is $715

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[106]Fees Motion, Exh. G (ALM: The National Law Journal Reports that 1 in 5 of the Largest U.S. Law Firms Employ Partners who Charge More than $1,000 per Hour ("ALM Survey")).

[107]*Id.*

[108]Fees Motion at 18-19 (citing ALM Survey).

per hour.[109] Comparing class counsel's hourly rates to the hourly rates charged by partners at Skadden and O'Melveny is not wholly persuasive, as these are two of the largest and most well-known national firms in the country. Nonetheless, the fact that class counsel seek rates equal to or lower than those charged by their opposing counsel provides some support for their contention that the hourly rates they request are reasonable.

Finally, counsel cite other cases in which courts in this district have approved similar rates in complex class action litigation.[110] See *In re Toys R Us-Delaware, Inc. – Fair and Accurate Credit Transactions Act (FACTA) Litigation*, 295 F.R.D. 438, 462 (C.D. Cal. 2014) (approving rates of between $595 and $600 for partners, $220 to $595 for other attorneys and associates, and $95 to $195 for paralegals); *Kearney v. Hyundai Motor America*, No. SACV 09–1298–JST (MLGx), 2013 WL 3287996, *8 (C.D. Cal. June 28, 2013) (approving hourly rates between $650 and $800 for class counsel in a consumer class action); *Parkinson v. Hyundai Motor America*, 796 F.Supp.2d 1160, 1172 (C.D. Cal. 2010) (approving hourly rates between $445 and $675 for class counsel in a consumer class action); see also *POM Wonderful, LLC v. Purely Juice, Inc.,* No. CV 07-2633, 2008 WL 4351842, *4 (C.D. Cal. Sept. 22, 2008) (finding rates of $475 to $750 for partners and $275 to $425 for associates reasonable in a consumer class action); see also *Craft v. County of San Bernardino*, 624 F.Supp.2d 1113, 1122 (C.D. Cal. 2008) (finding a $225 rate reasonable for paralegals); *Vasquez*, 2011 WL 3320482 at *2 (finding $210 and $200 rates reasonable for paralegals); *Bernal v. Paradigm Talent & Literary Agency*, No. CV 07–06445 SVW (PLAx), 2010 WL 6397561, *5, 7 (C.D. Cal. June 1, 2010) (finding a paralegal rate of $225 reasonable); *L.A. Printex Indus., Inc. v. William Carter Co.*, No. CV 09–2449–JFW (FMOx), 2010 WL 4916634 *2-3 (C.D. Cal. Dec. 1, 2010) (using paralegal rates of $229.50 and $202.50 to calculate fees).

Although the rates billed by counsel are slightly higher than those in the ALM survey, they are within the range of rates this and other courts in the Central District of California have

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[109] *Id.*

[110] *Id.* at 19.

approved for attorneys with the experience and skill of class counsel. Accordingly, the court believes that for purposes of the lodestar cross-check, the hourly rates requested by class counsel are reasonable.

ii. Whether the Hours Billed Are Reasonable

"[T]he fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of th[e] hours worked. . . .'" *Gates v. Rowland*, 39 F.3d 1439, 1449 (9th Cir. 1994) (quoting *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th Cir. 1992)); *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986) ("[C]ounsel bears the burden of submitting detailed time records justifying the hours claimed to have been expended"); *Pac. W. Cable Co. v. City of Sacramento*, 693 F.Supp. 865, 870 (E.D. Cal. 1988) ("The cases do not indicate that every minute of an attorney's time must be documented; they do, however, require that there be adequate description of how the time was spent, whether it be on research or some other aspect of the litigation. . ."). Although a fee applicant "is not required to record in great detail how each minute of [his] time was expended . . . [he must] list[ ] [the] hours and identify[ ] the general subject matter of [the] time expenditures." *Gucci Am., Inc. v. Pieta*, No. CV 04-9626 ABC (Mcx), 2006 WL 4725707, *2 (C.D. Cal. July 17, 2006) (quotation omitted).

Kessler has segregated the number of hours billed by each attorney, paralegal, and professional support staff member in categories of work, and provided a detailed description of the tasks performed in each category. He has also offered an explanation as to which attorney or staff member handled which portion of the work. The attorneys and paralegals billed a combined 686.65 hours, or $229,915, conducting preliminary investigation, drafting the initial complaint, and litigating the lead plaintiff motions.[111] Class counsel billed 1,932 hours, or $940,091.25, conducting further investigation of Rendelman's claims – which included litigating the FOIA request directed to ICE – and preparing the consolidated and two amended complaints.[112] Counsel

[111]Kessler Decl., Exh. 2 at 5-6 (Summary of Work by Category).

[112]*Id.* at 7-8.

billed 1,839.86 hours, or $852,786, opposing defendants' nine motions to dismiss and attending hearings on those motions.[113] Counsel billed 90.8 hours, or $26,925, on "discovery-related work," which Kessler reports involved compiling a list of third parties who might have had potentially relevant information, drafting discovery requests, making initial disclosures, and drafting the Rule 26(f) report.[114] Counsel billed 103.05 hours, or $56,573.75, on mediation-related efforts.[115] Finally, counsel billed 669.20, or $274,975.00, conducting settlement negotiations, preparing settlement approval documents, and reviewing the informal discovery received from defendants to ensure the reasonableness of the settlement.[116]

The court has reviewed these hours and the categories of work they cover and finds them generally reasonable. Although a large number of attorneys worked on this case, the action was pending for almost four years and involved fairly complex issues of fact and law. It was reasonable, therefore, to staff the case with several attorneys. See *Schiller v. David's Bridal, Inc.*, No. 1:10–cv–00616–AWI–SKO, 2012 WL 2117001, *21 (E.D. Cal. June 11, 2012) ("The Court finds the 596.2 hours expended on the litigation to be reasonable in light of law and motion practice with respect to subject matter jurisdiction, the amount of discovery conducted, the number of Defendant's employees included in the Settlement Classes, and the mediation preparation required").

Second, it appears counsel reasonably distributed the work, assigning lower-billing associates, staff attorneys, and of counsel to perform the majority of the work. The lodestar chart reflects that these individuals performed 66% of the attorney work on the case. Nonetheless, 966 hours, or 85.9% of the time billed by partners, were recorded by Abadou, the second-highest-billing partner. It appears Abadou performed a significant amount of work that could have been

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[113] *Id.* at 9-10.

[114] *Id.* at 11.

[115] *Id.* at 12.

[116] *Id.* at 13-14.

delegated to lower-billing attorneys. For example, he billed more than half the total hours he spent on the case – 543 of 966 – investigating the claims and preparing the consolidated and amended complaints. While the court appreciates the importance of these activities to counsel's ultimate success, it is likely that some portion of that time could have been expended by Kaplan or another lower-billing attorney under Abadou's supervision. Even were the court to reduce the $366,525 in fees Abadou generated in connection with these activities by half, to $183,262.50, to compensate for his higher fee, see *In re HPL Technologies, Inc. Securities Litigation*, 366 F.Supp.2d 912, 920-21 (N.D. Cal. 2005) (noting the "unusually large fraction of senior attorney time devoted to settlement" in calculating reasonable attorneys' fees); *Sines v. Service Corp. Intern.*, No. 03 Civ. 5465(PKC), 2006 WL 1148725, *2 (S.D.N.Y. May 1, 2006) ("A senior lawyer for plaintiffs, who billed over 1,400 hours on the matter, elected to use no other lawyers at lower billing rates to perform service. . . . [M]uch of the work could have been done by lawyers, paralegals, technology experts or secretaries billing at much lower rates with a net efficiency. . . . I conclude that, of the 636.4 hours of the senior lawyer's time billed at $485 and 576.7 hours at $550 per hour, 20% could have been performed by persons billing at $275 per hour or less"), this would reduce the overall lodestar to $2,278,003.5, a number that greatly exceeds the $1,200,000 class counsel seek.

Counsel also engaged in some work that may have been duplicative. See *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) ("The court may reduce the number of hours awarded because the lawyer performed unnecessarily duplicative work"). For example, three attorneys – Abadou, Kaplan, and Peterson – participated in briefing Rendelman's opposition to the motions to dismiss the consolidated and first amended complaint. Kaplan and Breucop briefed defendants' motions to dismiss the second amended complaint, overseen by Abadour and Greenstein. Having so many attorneys participating in drafting the briefs likely resulted in duplication of effort, as each attorney had to familiarize himself or herself with the motions and defense arguments, discuss and review each other's work, and conduct research. See *Campon v. City of Blue Springs, Missouri*, 289 F.3d 546, 553 (8th Cir. 2002) ("In our view, it should not take four experienced, highly paid attorneys 480 hours to prepare one summary judgment motion

and to prepare for and conduct a four-day trial when all pretrial discovery had been completed"). This case, however, is different than *Campon*, where four, high-billing attorneys spent almost 500 hours preparing a single summary judgment motion and conducting a four-day trial. Here, counsel's opposition briefs totaled 179 pages and addressed complicated issues, given the quantity of factual allegations involved, the heightened pleading standard that applies under the PSLRA, and the complexity of the legal issues (e.g., loss causation). Even if the court reduces the number of hours billed on the opposition briefs by 30% to account for duplication, and subtracts this amount from the reduced lodestar, the lodestar would still be $2,022,167.70. Again, this number is significantly higher than the $1,200,000 counsel request.

Thus, keeping in mind that the lodestar calculation need not be precise when it is being used as a cross-check on a percentage-of-the-fund award, the court finds that a reasonable lodestar would be $2,022,167.70. Because this number is higher than the 25% fee counsel request, the lodestar crosscheck reveals that the fee award counsel seek is reasonable.

c. Conclusion Regarding Attorneys' Fees

For the reasons stated, the court awards class counsel attorneys' fees of $1,200,000.

2. Whether Counsel's Request for Litigation Expenses is Reasonable

The district court also has discretion to determine an appropriate award of costs and expenses. See FED.R.CIV.PROC. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement"); *Trans Container Services v. Security Forwarders, Inc.*, 752 F.2d 483, 488 (9th Cir. 1985). Costs are recoverable where a settlement results in a common fund. See *In re Omnivision Tech.*, 559 F.Supp.2d at 1048 ("Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters"); *In re Media Vision Technology Securities Litigation*, 913 F.Supp. 1362, 1366 (N.D. Cal. 1996) ("Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit by the settlement").

One court has noted that, in evaluating the reasonableness of costs, "the judge has to step in and play surrogate client." See *In re Continental Illinois*, 962 F.2d at 572. In keeping with

this role, the court must examine prevailing rates and practices in the legal marketplace to assess the reasonableness of the costs sought. *Missouri v. Jenkins*, 491 U.S. 274, 286-87 (1989). "Expenses such as reimbursement for travel, meals, lodging, photocopying, long-distance telephone calls, computer legal research, postage, courier service, mediation, exhibits, documents scanning, and visual equipment are typically recoverable." *Rutti v. Lojack Corp., Inc.*, No. SACV 06–350 DOC (JCx), 2012 WL 3151077, *12 (C.D. Cal. July 31, 2012). See also *In re Media Vision Technology*, 913 F.Supp. at 1367-68 *(*"Requests for reimbursement for photocopying charges are regularly reimbursed, although courts are careful not to award [costs] for excessive copies, excessive costs per page, or copying of documents not reasonably related to the litigation." Courts have discretion to reimburse consulting and expert witness fees. *In re Media Vision Technology*, 913 F.Supp. at 1366-67.

Class counsel seek $217,452.85 in out-of-pocket expenses.[117] The expenses fall into the following categories[118]:

CATEGORY	**EXPENSE**
Experts and Consultants	$80,780.37
Investigative Services	$50,314.54
Online Legal and Factual Research	$35,963.52
Travel Expenses	$14,839.05
Mediation Fees	$9,335.50
Internal Reproduction Costs	$9,099.90
Web Hosting for Document Review	$5,197.15
Court Reporting and Transcripts	$3,025.42
Messenger, Courier, and Overnight Mail	$2,883.08
External Reproduction Costs	$2,793.97

[117]Fees Motion at 22.

[118]Kessler Decl., ¶ 8, Exh. 3 (Expense Report).

FOIA Request Fees	$2,507.00
Court Fees	$350.00
Press Releases and Notices	$200.00
Service of Process Fees	$163.35
TOTAL:	**$217,452.85**

Kessler states that all of these expenses are reflected on the books and records of his firm.[119]

Class counsel retained four experts during the course of the litigation: John C. Hammerslough, who served as a damages expert and performed an initial damage study at the outset of the litigation; FAILSAFE CPA, which provided forensic accounting services that assisted counsel in developing and refining the allegations in the amended complaints and arguments at the motion-to-dismiss stage regarding defendants' purported withholding of material information from Deloitte, and American Apparel's compliance with debt covenant and generally accepted accounting principles; Strategic Claims Services, which served as a loss causation and damages expert, preparing "more detailed loss causation and damages analyses"; and Stanford Consulting, which also served as a loss causation and damages expert, assisting counsel during mediation and developing the plan of allocation.[120] Kaplan states that class counsel paid Hammerslough $675.00, FAILSAFE CPA $34,460.00, Strategic Claims Services $11,109.37, and Stanford Consulting $34,536.00.[121] She asserts these experts were essential to prosecution and settlement of this action.[122]

Kaplan also reports that class counsel paid L.R. Hodges & Associates ("Hodges") $50,314.54 for investigative services.[123] Hodges compiled a list of hundreds of potential witnesses who may have knowledge about the underlying claims, located their contact information and spoke

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[119] *Id.*, ¶ 9.

[120] Kaplan Decl., ¶ 134.

[121] *Id.*

[122] *Id.*, ¶ 135.

[123] *Id.*

with approximately 73 of them.[124] Hodges interviewed former American Apparel employees and wrote memoranda detailing his investigation.[125] As noted earlier, class counsel incorporated information obtained from these interviews in their complaints. The court, moreover, relied on allegations concerning the witnesses' testimony in deciding defendants' motions to dismiss. See, e.g., *In re: American Apparel II*, 2013 WL 174119 at *21 ("The testimony of assorted confidential witnesses, moreover, indicates that American Apparel's compliance problems and shoddy screening practices were endemic even prior to commencement of the ICE audit. While the complaint does not include a 'smoking gun' allegation that Charney and/or Kowalewski were informed of the problems at an early date, several of the confidential witnesses who had access to information concerning these problems worked only one or two levels below Charney and Kowalewski, supporting an inference that the information was communicated to them at some point in time. CW 1, for example, reported to an individual immediately below Charney in the chain of command").

Kaplan explains that the $35,963.52 expended for online legal and factual research includes not only fees paid to online legal research companies such as LexisNexis, but also fees charged by online databases and services providers that Hodges used to identify and locate witnesses and former American Apparel employees.[126] She states that the $14,839.05 incurred for travel includes: (1) Abadou's travel to Washington, D.C. for Rendelman's February 11, 2011 deposition; (2) Abadou's, Kaplan's, and Peterson's travel to Los Angeles, California for the March 7, 2011 and September 12, 2011 hearings on motions for appointment of lead plaintiff and motions to dismiss the consolidated complaint; (3) Abadou's and Kaplan's travel to Los Angeles for the May 21, 2012 and June 5, 2013 hearings on defendants' motions to dismiss the first and second amended complaints; (4) Abadou's and Greenstein's travel to the October 11, 2013 mediation in Los Angeles, California; and (5) Greenstein's and Kaplan's upcoming trip to attend

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[124] *Id.*

[125] *Id.*

[126] *Id.*, ¶ 136.

the hearing on the final approval and fees motions in Los Angeles, California.[127] For each trip, counsel incurred expenses for airfare, lodging, and ground transportation. For some of the trips, counsel also incurred expenses for meals and wireless internet access.

Kaplan explains that the $9,335.50 expense represents half of the cost of mediation, which was split by the parties.[128] She states that this expense was crucial to successful resolution of the case.[129] The $5,197.15 for web hosting document review was charged by Precision Discovery, a third-party discovery vendor retained to host the 1.5 million pages of informal discovery defendants produced as part of the parties' agreement in principle to settle the matter.[130] Kaplan states that class counsel used the platform to organize and search the documents; this allowed them to perform targeted searches, categorize documents by issue and level of relevance, and synthesize the large amount of information produced efficiently and effectively.[131]

The court has reviewed the information provided by counsel and is satisfied that these costs were reasonable. The expert, investigation, mediation, and travel costs were necessary to prosecute and settle the litigation. To plead causation and damages adequately, and to arrive at an informed assessment concerning the reasonableness of the settlement and create a plan of allocation, class counsel needed to retain damages and loss causation experts. Class counsel's investigation and interviews with former American Apparel employees were, as noted, reasonable because they assisted in alleging facts that plausibly showed defendants acted with the requisite scienter. The costs charged for travel include reasonable amounts expended for airfare, hotels, what appears to be rental cars, and per diem food expenses. This is not a case in which class counsel seek reimbursement for "first class airplane tickets, luxury hotel accommodations, and

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[127] *Id.*, ¶ 137.

[128] *Id.*, ¶ 138 & n. 10.

[129] *Id.*, ¶ 138.

[130] *Id.*, ¶ 139.

[131] *Id.*

gourmet dinner meetings" at the expense of a common fund recovery. *In re Media Vision Technology*, 913 F.Supp. at 1372. Accordingly, the court is satisfied that these expenses were reasonable.

Class counsel have not, however, explained the $9,099.90 charge for internal reproduction or the $2,793.97 charge for external reproduction. Nor have they submitted receipts from which the court could determine whether the amounts are reasonable. Dividing these amounts by the almost four years this case has been pending, counsel are requesting compensation for copying charges of $8.15 per day of litigation. If copies cost $0.20 per page, see *Fresenius Medical Care Holdings, Inc. v. Baxter International, Inc.*, No. C 03-1431 SBA, 2008 WL 2020533, *6 (N.D. Cal. May 8, 2008) (approving rate of $0.12 per page and noting that courts have approved up to $0.20 as a reasonable charge for photocopies), this would mean that counsel copied 40.75 pages of documents each day, including weekends, for the entirety of the litigation. The charges appear high. Although there was substantial briefing, and class counsel engaged in extensive investigation and informal discovery, it does not appear they propounded significant formal discovery, and the court cannot discern why so many copies were required.[132] Consequently, the court finds it appropriate to reduce counsel's reproduction expenses by 50%, to $5,946.94.

Class counsel also have not explained to the $200 charge for "press releases and notices." The PSLRA requires that the plaintiff in the first-filed action against a company publish

> "in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class – (I) of the pendency of the action, the claims asserted therein, and the purported class period; and (II) that, not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class." 15 U.S.C. § 78u-4(a)(3)(A).

[132]This is particularly true since the documents produced by defendants were put into an online database.

Rendelman's was not the first-filed action, however, and Anthony Andrade, who filed the first action, was not represented by Kessler Topaz.[133] Absent an explanation of the purpose of the press releases and notices, and why the expenses were necessarily and reasonably incurred, the court declines to compensate class counsel for them. Accordingly, the court finds that class counsel reasonably incurred $211,305.91 in expenses prosecuting this action and awards that amount to reimburse them for out-of-pocket expenses.

3. Incentive Award

An individual who joins his claims with those of a class "disclaim[s] any right to a preferred position in the settlement [of those claims]." *In re Oracle Securities Litigation*, No. C-90-0931-VRW, 1994 WL 502054, *1 (N.D. Cal. June 18, 1994) (quoting *Officers for Justice*, 688 F.2d at 632). Nonetheless, it is well-established that the court may grant a modest incentive award to a class representative, both as an inducement to participate in the suit and as compensation for time spent in litigation activities, including depositions. See *In re Mego Financial Corp.*, 213 F.3d at 463 (holding that the district court did not abuse its discretion in approving incentive awards to the class representatives); *In re Continental Illinois*, 962 F.2d at 571 (stating that an incentive award in such amount "as may be necessary to induce [the class representative] to participate in the suit" is appropriate). The PSLRA, moreover, provides that although "[t]he share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class," the statute does not "limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class." 15 U.S.C. § 78u-4(a)(4).

Class counsel request that the court approve a $6,600 incentive award to Rendelman.[134] This is consistent with amounts courts typically award as incentive payments. See, e.g., *In re*

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[133]See Complaint.

[134]Fees Motion at 23.

Mego Financial Corp., 213 F.3d at 463 (approving a $5,000 incentive award for each class representative); *Faigman v. AT & T Mobility LLC*, No. C06-04622 MHP, 2011 WL 672648, *5 (N.D. Cal. Feb. 16, 2011) (approving an incentive payment of $3,333.33 for each of three class representatives, and noting that "[i]n [the Northern] [D]istrict, incentive payments of $5,000 are presumptively reasonable"); *Clesceri v. Beach City Investigations & Protective Services, Inc.*, No. CV-10-3873-JST (RZx), 2011 WL 320998, *2 (C.D. Cal. Jan. 27, 2011) (preliminarily approving an award of $3,000 to two named plaintiffs); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 646-47 (S.D. Cal. 2011) (approving an award of $4,000 for one named plaintiff and $2,000 for another); *Dennis v. Kellogg Co.*, No. 09-CV-1786-IEG (WMc), 2010 WL 4285011, *3 (S.D. Cal. Oct. 14, 2010) (preliminarily approving an incentive award of $5,000); *Aguayo v. Oldenkamp Trucking*, No. F04-6279 AWI LJO, 2006 WL 3020943, *10 (E.D. Cal. Oct. 17, 2006) (preliminarily approving a settlement agreement, which provided that class counsel would apply for an incentive award of no more than $5,000 for the named plaintiff).

Whether to authorize an incentive payment to a class representative is a matter within the court's discretion. The criteria courts consider in determining whether to approve an incentive award include:

> "1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation[;] and[ ] 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation." *Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 299 (N.D. Cal. 1995).

a. The Risk to the Class Representative in Commencing Suit

When a class representative shoulders some degree of personal risk in joining the litigation, such as workplace retaliation or financial liability, an incentive award is especially important. See *Staton*, 327 F.3d at 977 (noting that fear of workplace retaliation is a relevant factor in evaluating the propriety of an incentive award). Rendelman states that he is "a highly experienced retail business owner" who has worked in the retail industry for nearly forty years and owns a chain of

frozen yogurt stores in the District of Columbia.[135] His business, he states, requires his "constant presence and attention."[136] Rendelman reports that he earns approximately $249,600 per year, and that dividing this number by 2,080, which is the annual number of working hours assuming one works 40 hours per week, results in a salary of $120 per hour.[137] Rendelman estimates that he has spent approximately 55 hours on this litigation since 2010, and states that this is time he would have spent working on matters related to his business.[138] He therefore seeks an incentive award of $6,600 to compensate him for the time he spent prosecuting this action.[139] As Rendelman is self-employed and his income is derived from the profit he realizes on his yogurt stores, it is not clear that he actually lost $6,600 as a result of his involvement in this case. He states, however, that he would have spent the time he expended prosecuting this action on his business had he not been lead plaintiff; time spent on his business likely results in additional profits. Accordingly, the court concludes that this factor favors granting requested amount.

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[135] Rendelman Decl., ¶¶ 6, 8.

[136] *Id.*, ¶ 6.

[137] *Id.*, ¶ 8.

[138] *Id.*

[139] *Id.* 55 hours x $120/hour = $6,600.

b. The Notoriety and Personal Difficulties Encountered by the Class Representative

This case has garnered some media attention over the years.[140] There is no indication, however, that Rendelman himself has been subjected media attention as a result of his involvement in the case. See, e.g., *Wilson v. Airborne, Inc.*, No. EDCV 07-770-VAP (OPx), 2008 WL 3854963, *13 (C.D. Cal. Aug. 13, 2008) (finding that the media attention class representatives attracted supported incentive awards). The fact that media attention does not seem to have focused on Rendelman, however, does not preclude approval of an incentive payment. See *Razilov v. Nationwide Mut. Ins. Co.*, No. 01-CV-1466-BR, 2006 WL 3312024, *4 (D. Or. Nov. 13, 2006) (approving an incentive award of $10,000 despite a lack of notoriety or demonstration of personal difficulties). Rendelman has not identified any personal difficulties he has encounter as a result of his involvement in this action. Nonetheless, because the case attracted some media attention, the court concludes that this factor weighs in favor of authorizing Rendelman's requested incentive award.

c. The Amount of Time and Effort Expended by the Class Representative

An incentive award is appropriate where, as here, the "class representative[ ] remained fully involved and expended considerable time and energy during the course of the litigation." *Razilov*, 2006 WL 331204 at *4. As noted, Rendelman estimates that he devoted approximately 55 hours to the litigation. He asserts he

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[140]See e.g., American Apparel to Pay $4.8M to Exit Investor Suit, http://www.law360.com/articles/502493/american-apparel-to-pay-4-8m-to-exit-investor-suit (accessed July 20, 2014); American Apparel: From Sex Slaves, to Slump, to Sales Success, http://www.businessinsider.com/the-american-apparel-turnaround-from-sex-slaves-to-slump-to-sales-success-2012-6?op=1 (accessed July 20, 2014); 10 Scandals that Totally Rocked American Apparel, http://www.huffingtonpost.com/2013/06/05/ 10-things-american-apparel-learned-from_n_3248529.html (accessed July 20, 2014); American Apparel Pays $4.8m to Investors Misled over Immigrant Workers, http://www.workpermit.com/news/2014-02-10/ american-apparel-pays-48m-to--investors-misled-over-immigrant-workers (accessed July 20, 2014).

> "dedicated a substantial amount of time monitoring the progress of the litigation and the efforts of Lead Counsel on behalf of the Class and performing my duties as representative for the class. Specifically, I reviewed the significant pleadings in this Action and provided feedback to my attorneys at Kessler Topaz. Throughout the course of this Action, attorneys at Kessler Topaz also kept me apprised of the status of the litigation through myriad communications and conversations. I also reviewed correspondence, memoranda, and filings with the Court. In addition, I prepared for and sat for a deposition on February 11, 2011, which lasted approximately five-and-a-half hours (not including preparatory time, travel time and debriefing)."[141]

Rendelman's deposition focused on his fitness to serve as class representative given that Robert England – the other class member who sought appointment as lead plaintiff – had raised concerns about Rendelman's background as president of a clothing company called Long Ramp.[142] England alleged that Rendelman had been sued by a Long Ramp employee for accounting manipulations "similar to the conduct defendants are accused of here," that Long Ramp had sought bankruptcy protection, that the company identified American Apparel on its creditor matrix, and that the company had been audited in connection with the bankruptcy proceedings, with the result that the District of Columbia Office of Tax and Revenue had determined that it underreported corporate franchise taxes by more than $150,000 during the class period.[143]

Rendelman was also involved in the settlement process. He states that he "engaged in numerous lengthy discussions with Lead Counsel concerning the pros and cons of mediation and the strategies to be employed when negotiating, [and] reviewed the mediation statement that Lead

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[141]Rendelman Decl., ¶ 5.

[142]See Order Granting Proposed Lead Plaintiff Robert England's Request for Discovery, Docket No. 36 (Jan. 21, 2011).

[143]See Opposition to Motion for Appointment of Counsel and for Appointment of Lead Plaintiff, Docket No. 26 (Jan. 10, 2011), at 1-2, 6-8.

Counsel employed."[144] He reports he "consulted at length with Lead Counsel following the mediation session as well as during the additional settlement negotiations which followed the session."[145]

Because Rendelman has remained involved in the litigation during the years it has been pending, and because his deposition concerned accusations leveled at him and the company of which he had been President, the court concludes that this factor weighs in favor of granting Rendelman the requested incentive award. See *Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV 08 1365 CW (EMC), 2010 WL 1687832, *17 (N.D. Cal. Apr. 22, 2010) (approving a $20,000 award where plaintiff "made herself available for deposition on two separate occasions, wherein she was subjected to questioning regarding her personal financial affairs and other sensitive subjects; met with Class Counsel on six separate occasions; attended the full-day Court-ordered appraisal hearing; spoke with Class Counsel and their staff on many occasions; reviewed all major pleadings; and repeatedly responded to interrogatories and document requests); *In re Heritage Bond*, 2005 WL 1594403 at *14 (activities such as "responding to discovery, preparing for, traveling to and attending their depositions and maintaining contact with Plaintiffs' counsel to monitor the litigation" gave rise to an inference that class representatives were "actively involved in every aspect of . . . litigation").

d. The Duration of the Litigation

When litigation has been protracted, an incentive award is especially appropriate. See *Van Vranken*, 901 F.Supp. at 299 (finding that a class representative's participation through "years of litigation" supported an incentive award). This case was filed on August 25, 2010, and has been litigated for almost four years. Given the length of the litigation and Rendelman's involvement in it, the court concludes that this factor also favors an incentive award.

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[144]Rendelman Decl., ¶ 7.

[145]*Id.*

e. The Personal Benefit Enjoyed by the Class Representative as a Result of the Litigation

An incentive award may be appropriate when a class representative will not gain any benefit beyond that she would receive as an ordinary class member. See *Razilov*, 2006 WL 331204 at *4 (approving the payment of an incentive award where the only benefit a class representative was going to receive from a settlement was the same statutory damages other class members would receive); *Van Vranken*, 901 F.Supp at 299 (where a class representative's claim made up "only a tiny fraction of the common fund," a substantial incentive award was appropriate). As noted, Rendelman's recovery under the plan of allocation will be determined on the same basis as the other class members'. He will, however, also have the opportunity to meet with American Apparel's general counsel and CFO to discuss his views of the company's retail operations. Given that this additional relief will not result in an additional financial recovery for Rendelman and will inure to the class's benefit, however, the court determines that this factor does not weigh against granting his request for incentive award.

f. Weighing the Factors

Considering the relevant factors, and despite the fact that Rendelman will have the opportunity to speak with American Apparel's general counsel and CFO, the court concludes that an incentive award of $6,600 to Rendelman is "just and reasonable under the circumstances." *Van Vranken*, 901 F.Supp at 299.

4. Conclusion Regarding Class Counsel's Motion for Attorneys Fees and Expenses

For the reasons stated, the court grants class counsel's motion for attorneys' fees and expenses. It awards counsel $1,200,000 in attorneys' fees and $211,305.91 in out-of-pocket expenses. It awards Rendelman $6,600 as an incentive award.

D. Findings Regarding the Parties' Compliance with Rule 11(b)

The final issue the court must consider is the parties' and counsel's compliance with Rule 11. The PSLRA requires that the district court make specific findings upon termination of a private securities fraud action "regarding compliance by each party and each attorney representing

any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion." 15 U.S.C. § 78u–4(c)(1).

> Under Rule 11(b), by presenting pleadings, written motions or other papers to the court, ". . . an attorney . . . certif[ies] that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances . . . (1) [the paper] is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; [and] (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity to further investigation or discovery[.]" FED.R.CIV.PROC. 11(b).

Rule 11(b) thus "imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well grounded in fact, legally tenable, and 'not interposed for any improper purpose.'" *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990); see also *Primus Automotive Financial Services, Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997) ("Rule 11 imposes a duty on attorneys to certify that all pleadings are legally tenable and well-grounded in fact; it governs only papers filed with the court").

The PSLRA directs that, "[i]f the court makes a finding . . . that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion, the court shall impose sanctions on such party or attorney in accordance with Rule 11." 15 U.S.C. § 78u–4(c)(2). The presumptive sanction for the "substantial failure of any complaint to comply with any requirement of Rule 11(b) . . . is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred in the action." In the case of a responsive pleading or dispositive motion, it is an award of reasonable attorneys' fees "as a direct result of the violation." 15 U.S.C. § 78u–4(c)(3)(A)(I) and (ii). The presumptive sanction can be rebutted only by proof either that "the award of

attorneys' fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are imposed," or that "the violation of Rule 11(b) . . . was *de minimis*." 15 U.S.C. § 78u–4(c)(3)(B)(I) and (ii).

No party has proffered any evidence, and the court discerns none independently, that any party or lawyer has violated Rule 11(b) during the course of these proceedings. Accordingly, and absent proof to the contrary, the court concludes that Rendelman, American Apparel, Charney, Kowalewski, and Lion Capital, as well as their lawyers, have complied with Rule 11(b) and are not subject to sanctions for having filed any pleading for an improper purpose or with knowledge that it lacked factual or legal support.

III. CONCLUSION

For the reasons stated, the court grants the motion for final approval of the parties' settlement and plan of allocation, and class counsel's request for attorneys' fees, expenses, and an incentive award. It awards attorneys' fees of $1,200,000, expenses of $211,305.91, and a $6,600 incentive award to Rendelman. The court also concludes that no party has engaged in sanctionable conduct under Rule 11(b) and § 78u–4(c).

DATED: July 28, 2014

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE