SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

IN RE RENREN, INC.	: Index No. 653594/2018
	: Hon. Andrew Borrok
DERIVATIVE LITIGATION	: Mot. Seq. No. 028

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF REVISED APPLICATION FOR AWARD OF COUNSEL FEES AND EXPENSES

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PRELIMINARY STATEMENT

The common fund doctrine, which provides for fee awards to counsel out of the common funds they create, strikes a balance between equally important equitable and public policy considerations. The possibility of unfair lawyer windfalls obtained at the expense of non-party victim beneficiaries and the risk of perversely incentivizing frivolous litigation weigh against excessive fee awards. But, on the other side of the scale, the restitution principle that underpins the common fund doctrine[1] and the need to optimally incentivize the creation of future common fund recoveries for would-be beneficiaries weigh in favor of sizable fee awards. Here, Plaintiffs' counsel requests a 22.5% fee[2] award, which strikes an appropriate balance, is supported by ample precedent in large common fund cases in federal courts and in fee awards in derivative actions in Delaware, and is warranted based on the exceptional result achieved.

Importantly, a court tasked with determining a fee award protects *both* the common-fund beneficiaries immediately before it *and* the interests of potential beneficiaries of future common fund cases. Giving present beneficiaries too big a percentage slice of the immediate pie creates the risk that similar future cases will be litigated poorly (*i.e.,* future pies will be too small) or not pursued at all (*i.e.,* too few future pies will be made). The public interest is best served when fees are awarded in a way that maximizes the total net recoveries available to present *and future* common fund beneficiaries (*i.e.,* to provide as much pie for all as possible).

For that reason and because courts are attuned to the ways that lawyer incentives drive total net recoveries, a "strong consensus" has emerged in New York and "across the country" to

[1] The common fund doctrine is premised on the equitable principle that those who benefit from a lawsuit should pay for the efforts of the attorneys who created the fund. *See, e.g.*, *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

[2] The settlement itself is not conditioned on the amount of the fee awarded, and the Court has discretion to award a reasonable fee in an amount higher, lower, or the same as that requested.

award fees based on the percentage method, which at its core is a market-based approach. *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002); *see Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003) ("[T]he percentage method is consistent with and, indeed, is intended to mirror, practice in the private marketplace."). A market-based approach to fee awards makes sense, as leading fee scholar Professor Brian Fitzpatrick has recently explained, because it is most likely to maximize expected net recoveries for the beneficiaries of common fund cases in the future. *See generally* Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions* (hereinafter, "*Fiduciary Judge's Guide*"), 89 FORDHAM L. REV. 1151 (2021).

Specifically, in negotiating fee agreements at the outset of the case, sophisticated commercial litigants seek to maximize their expected net recovery on their claims,[3] while wrestling with how best to compensate and incentivize counsel to make that happen. Accordingly, commercial litigation marketplace norms, set by sophisticated commercial litigants, can serve as an effective proxy for optimally setting fees in the way that maximizes expected recoveries of participants in common fund recoveries. In turn, a court in its quasi-fiduciary role as guardian of non-party beneficiaries—present *and future*—can best serve their interests by awarding fee percentages in the manner that beneficiaries themselves would have bargained for at the outset of the case (as informed by commercial litigation market norms).

[3] The net recovery is what matters. For instance, a client is better off paying a 40% contingency fee to a top-notch lawyer to obtain a 60% net share out of a $100 million recovery than the client would be paying a below-market 20% contingency fee to a mediocre lawyer to obtain an 80% net share of a $50 million recovery (or perhaps nothing at all if the case is dismissed). Sophisticated commercial consumers of legal services recognize that paying market rates to retain high quality lawyers is the best way of maximizing their expected recovery.

For those reasons, Professor Fitzpatrick suggests that "judges acting as good fiduciaries" should "follow" the market practice of "fixed one-third percentages or even higher escalating percentages based on litigation maturity…even in the most enormous cases." Fitzpatrick, *Fiduciary Judge's Guide*, 89 FORDHAM L. REV. at 1169-71. Many courts across the country routinely award market-based feed percentages of around one-third in common fund cases as large or larger than this one, based on similar reasoning, as discussed below. Federal and state courts in New York likewise award market-tracking one-third fee percentages, at least for common funds that are eight figures and lower.

Nevertheless, some federal courts[4] in the Second Circuit have applied a sliding scale approach that deviates from market norms, awarding lower fee percentages as the size of the recovery increases in very large cases. This sliding scale approach is an outgrowth of the frequent large securities class action cases brought in the Southern District of New York, where recovery percentages are typically 2-4% (for similarly sized settlements), where parallel governmental or regulatory actions often make liability a foregone conclusion, and where the legal path to recovery is well-tread, with many lawyers chomping at the bit to pursue such cases and many dozens of successful securities class action settlements each year.

Here, the Court need not wrestle with the question of whether the sliding scale approach (borne from dissimilar cases) or strict fidelity to the market is best, however, because counsel is no longer seeking a market-based 33.0% fee. Instead, counsel now seeks a below-market fee percentage of ***22.5%***. Even in jurisdictions applying a sliding scale, that reduced fee percentage falls well within the range for comparable recoveries. *See, e.g.*, *In re Signet Jewelers Ltd. Sec.*

[4] New York appellate courts have not addressed the propriety of applying a sliding scale approach to awarding fees in large common fund cases and in shareholder derivative suits, such as this one, that are dissimilar from most large federal securities class actions.

Litig., No. 1:16-CV-06728-CM-SDA, 2020 WL 4196468, at *15-17 (S.D.N.Y. July 21, 2020) (then-Chief Judge McMahon awarding 25% on $240 million recovery and gathering Second Circuit cases with fee awards from 25% to 28.8% on recoveries from $225 million to $486 million). And it is likewise within the range awarded in other very large derivative settlements in other jurisdictions (including Delaware) that do not strictly follow commercial litigation market norms. *See, e.g.*, *In re Wells Fargo & Co. S'holder Derivative Litig.*, 445 F. Supp. 3d 508, 526 (N.D. Cal. 2020) (awarding 22% fee in $240 million derivative settlement); *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1064, 1075 (Del. Ch. 2015) (awarding requested $72.5 million fee in derivative settlement involving $275 million common fund).

Counsel's substantially lowered request for a 22.5% fee also finds significant support from other considerations shaping fee awards. Indeed, all the holistic factors that courts consider in awarding fees—such as risk, complexity, counsel's performance, and the benefit achieved—weigh in favor of an award at the top of the relevant range of comparison.

And critically, this case does not involve a situation—unlike some large class action settlements with pennies-on-the-dollar recoveries for investors who suffered cognizable legal injuries—where some fairness notion of shared sacrifice could conceivably weigh in favor of a steep discount to a market-based fee percentage. Net of a 22.5% fee award, the distribution to participating Renren current investors will approach an amount over ***five times*** the average Renren ADS trading price during this litigation, and about ***$25 per ADS above*** the average market value of ADSs during the relevant period, before and after the Transaction (when accounting for the dividend paid in 2018).

Moreover, the substantial distribution itself is the result of the Settlement's specific structure rather than a company-level recovery flowing to Renren's corporate treasury, as is often the case in derivative actions. Had counsel pursued a company-level recovery, the amount on which the fee award is based would have been much higher. But counsel instead negotiated a settlement structure that would keep funds away from Defendants' control, thereby providing funds for Renren's minority shareholders rather than indirectly benefitting them via a more typical company-level recovery. Counsel spent a significant chunk of last year pursuing that structure and have been fighting since December 2021 to defend it.

Accordingly, if the Court grants the reduced 22.5% fee request, Renren's minority investors will receive a better outcome than they reasonably could have expected at the outset of the case, while counsel will receive a significantly lower fee than commercial litigation market norms would have provided (on a percentage basis) or had a company-level recovery been obtained through a different settlement structure or following trial (on a dollar basis). And the investor-friendly nature of the split if a 22.5% fee is awarded is further evident given that sophisticated investors holding a substantial portion of the minority interest affirmatively supported the significantly higher 33.0% request before, while only three opportunistic and coordinated objectors holding a tiny fraction of the minority interest challenged it.

For these and the other reasons discussed below, the Court should award the requested 22.5% fee (or some other reasonable percentage in the Court's discretion).

BACKGROUND

A. COUNSEL DEFTLY PROCURED AN OUTSTANDING RESULT IN THIS COMPLEX AND HIGH-RISK CASE.

This case was filed nearly four years ago and has required extensive litigation efforts involving over 1,021 docket entries, twenty-eight motion sequences, nine motions to dismiss,

and six appeals (and possibly more). Reid Aff. ¶41. The underlying facts and the claims asserted, as set forth in Plaintiffs' original pleadings, 147-page operative pleading (NYSCEF 405), and 188-page proposed second amended pleading (NYSCEF 741) are highly complex and were developed by counsel through hard work and review of over 792,000 pages of documents, many requiring foreign language translation. Reid Aff. ¶42. Counsel developed the facts and legal theories under foreign law on their own and built the case from the ground up, without the benefit of any parallel governmental or regulatory proceedings. *Id.* ¶43. And counsel faced significant risks at the outset in needing to obtain personal jurisdiction over foreign defendants (typically not an issue in derivative cases) and in establishing derivative standing under Cayman Island law, something never previously achieved in New York and incredibly rare nation-wide (having been achieved only once before in any American court). *Id.* ¶47.

Yet through their skill, effort, and creativity, over 20,000 hours worked, marshalling of significant evidence, procuring a pre-suit attachment order, and many months of grueling mediation and settlement negotiations, counsel secured a settlement of at least $300 million (the "Settlement"). *Id.* ¶45. It is one of the largest settlements of any derivative action in history, and the largest ever transitive property settlement (structured to transform the indirect benefit that minority shareholders would receive from a company recovery into a direct benefit of cash distributions to minority shareholders). *Id.* ¶18. The settlement amount under this structure implies at least an 87% recovery on the company-level damages model. *Id.* ¶21.

B. THE RESULT IS IN A LEAGUE OF ITS OWN IN TERMS OF THE DISTRIBUTIONS TO RENREN SHAREHOLDERS.

While the 87% implied recovery on the most aggressive company-level damages model is an exceptional result, the size of the settlement distributions to Renren Shareholders is without peer.

In large securities class action settlements of comparable size, recovery percentages are typically just 2-4%. Reid Aff. ¶36 (median settlement recoveries of 2.2% to 4.2% in cases $250 million and larger) (citing NYSCEF 815). In such cases, where investors suffered the relevant legal injury that formed the basis for direct claims brought on their behalf (unlike this derivative case, where the company suffered the relevant legal injury), the investors are forced to eat massive losses on their investments.

Here, by contrast, distributions to Renren Shareholders, net of a 22.5% fee, will far exceed the value of their investments in Renren during the relevant period. Given the minimum per ADS distribution under the defined "Settlement Amount," the distribution net of fees and expenses will exceed $29 per ADS (and will be $29.98 per ADS, before expenses). Reid Aff. ¶30. That distribution is over five times the average ADS closing price from when this suit was filed on July 19, 2018, to when the Settlement was first announced on October 7, 2021, and over $24 per ADS higher than that average. *Id.*

Moreover, the highest Renren ADS closing price at any point from the beginning of Q2 2018[5] onward was $31.14, on April 13, 2018. Reid Aff. ¶31 & Ex. A. Current Renren Shareholders who held as of that time previously received the $27.56 Cash Dividend in June 2018 when the Transaction occurred, meaning that they previously recouped all but $3.58 of the value of their investment as of the Q2 2018 peak. Reid Aff. ¶31. The Settlement distribution they will receive following final Settlement approval is about $26 per ADS higher than that amount. *Id.* ¶32.

No other prior common fund case comes remotely close to achieving anything like this for investors. And for that reason, Renren's current minority shareholders are appreciative of the

[5] The Transaction occurred near the end of that quarter on June 21, 2018.

extraordinary results that counsel achieved. Plaintiffs and other sophisticated institutional investors representing a substantial portion of the minority interest previously supported the initial 33.0% request. NYSCEF 762, 763, 771, 772, 773, 774. And many other sophisticated investors had no objection to the 33.0% request. Indeed, the only objections previously raised to the initial 33.0% request were by three opportunistic—and coordinated—objectors hoping to increase trading profits at counsel's expense due to the zero-sum nature of the fee request (and that Renren's ADS were then trading at a price that baked in a 33.0% award).[6] Reid Aff., Ex. A.

ARGUMENT

I. ALL PERTINENT FACTORS WARRANT A FEE AT THE UPPER END OF THE RELEVANT RANGE FOR COMPARISON.

"[T]he common fund doctrine allows for an award of counsel fees out of a common fund actually created by a successful shareholder litigation." *Seinfeld v. Robinson*, 246 A.D.2d 291, 294 (1st Dep't 1998). The Court should apply the percentage of fund method to determine a reasonable fee award. "Where a settlement establishes a common fund, the percentage method is often preferable." *Fernandez v. Legends Hospitality, LLC*, No. 152208/2014, 2015 WL 3932897, at *5 (Sup. Ct. N.Y. Cty. June 22, 2015). Indeed, "there is a strong consensus…across the country…in favor of awarding attorneys' fees in common fund cases as a percentage of the recovery."[7] *Maley*, 186 F. Supp. 2d at 370; *see also* Theodore Eisenberg *et. al.*, *Attorneys' Fees*

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[6] The ADS closing price on December 8, 2021 was $26.05, and a 33% award would have led to a gross distribution of $25.92 per ADS (before expenses and True Up). In November 2021, posters on a merger arbitrage-focused online message board discussed the opportunity to obtain a "free option" by purchasing ADSs and then objecting to the fee request, with opportunists pursuing this strategy standing to gain through an increased distribution if the fee award were reduced while facing minimal downside if not.

[7] The shift to the percentage method was motivated by many well-known problems with the lodestar approach. *See Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1268-70 (D.C. Cir. 1993) (describing problems with lodestar approach).

in Class Actions: 2009-2013 (hereinafter, "*Fees in Class Actions*"), 92 N.Y.U. L. REV. 937, 945 (2017) (percentage method used in over 91.8% of cases, with or without cross-check); *Lea v. Tal Educ. Grp.*, No. 18-CV-5480-KHP, 2021 WL 5578665, at *11 (S.D.N.Y. Nov. 30, 2021) ("The trend…is toward the percentage method, which directly aligns the interests of the class and its counsel....").

A variety of factors, along with the stage of litigation, guide a court's determination of a reasonable fee as a percentage of the settlement amount:

> the time and labor required; the difficulty of the questions involved; the skill required to handle the issues presented; the experience, ability and reputation of counsel; the proposed amount of fees; the benefit resulting to the putative class from the services; the customary fee charged for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved.

Gordon v. Verizon Comms., Inc., 148 A.D.3d 146, 165 (1st Dep't 2017).

There are relatively few decisions applying the *Gordon* factors and, thus, federal decisions and Delaware decisions that apply the same, or very similar, considerations are informative. *See, e.g.*, *In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d 114, 126 (2d Cir. 2014) (listing factors and noting that "New York state courts have adopted a similar set of factors"); *In re Checking Acct. Overdraft Litig.*, 830 F. Supp. 2d 1330, 1359 (S.D. Fla. 2011) (twelve factors similar to *Gordon* factors); *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1254 (Del. 2012) (listing factors).

Here, the relevant factors weigh heavily in favor of a substantial fee award, at the top of the relevant comparative range.

Counsel bore significant risk in bringing a highly complex case with difficult legal and factual questions on a contingent basis, which supports a substantial reward. *See Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079, at *8 (S.D. Ill. Dec. 16, 2018) ("The greater the risk of walking away empty-handed, the higher the award must be to attract

competent and energetic counsel."). The risk borne by counsel is a particularly weighty consideration when setting a fee. *See, e.g.*, *Lea*, 2021 WL 5578665, at *12 ("[R]isk of the litigation is often cited as the first, and most important…factor.").

At the outset of the case, Plaintiffs' counsel faced long odds. *See Checking Acct. Overdraft*, 830 F. Supp. 2d at 1364 ("Risks must be evaluated from the standpoint of plaintiffs' counsel as of the time they commenced the suit, not retroactively, with the benefit of hindsight."). Obtaining personal jurisdiction over foreign defendants and establishing derivative standing under Cayman law was a daunting prospect. Every prior attempt to obtain derivative standing under Cayman law in New York courts failed. *See, e.g.*, *Davis v. Scottish Re Grp. Ltd*, 160 A.D.3d 114, 118 (1st Dep't 2018); *Varga v. McGraw Hill Fin., Inc.*, 147 A.D.3d 480, 481 (1st Dep't 2017); *Shenwick v. HM Ruby Fund, L.P.*, 106 A.D.3d 638, 639 (1st Dep't 2013). And counsel is aware of only one other successful effort nationwide, compared to many failures.

In addition, counsel developed this complex case from the ground up, without the benefit of any parallel governmental or regulatory action. *See In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-CIV-8557-CM, 2014 WL 7323417, at *15 (S.D.N.Y. Dec. 19, 2014) (complexity supported fee request where counsel lacked "the benefit of a 'road map' established by a government investigation off which they could 'piggy back'"). The absence of parallel investigations is particularly noteworthy for a recovery of this size. *See Hale*, 2018 WL 6606079, at *9 (awarding one-third fee on $250 million recovery and noting "that unlike many [large] cases where attorneys seek a substantial fee, [counsel] here were not assisted by any governmental investigations or prosecution"). Moreover, this was not a simple case to prosecute. The case involved complex fact patterns and legal issues given the foreign law involved, the highly unusual Transaction, and complex valuation issues involving 44 start-up technology

companies. *See Americas Mining*, 51 A.3d at 1256 (complex valuation issues manifested difficulty and warranted substantial fee award).

Given those many difficulties, other firms refused the case. NYSCEF 771 ¶4. That "no other lawyers were interested in taking this case when it was filed" itself evidences the substantial risk involved. *Hale*, 2018 WL 6606079, at *9; *Checking Acct. Overdraft*, 830 F. Supp. 2d at 1364 (fee request supported where other firms refused). But counsel overcame those long odds to obtain a $300+ million common fund.

Such extraordinary success, a primary driver in fee determinations, warrants a substantial award. *See Americas Mining*, 51 A.3d at 1255 (result is most important factor in determining fee awards); *Bekker v. Neuberger Berman Grp. 401(k) Plan Inv. Comm.*, 504 F. Supp. 3d 265, 270 (S.D.N.Y. 2020) ("[T]he factor given the greatest emphasis is the size of the fund created….") (internal quotation and citation omitted). Indeed, a striking difference between this case and many so-called "mega-fund" settlements, especially large securities class action settlements, is that both the implied 87% recovery obtained and the sizable distribution to investors far exceed the low single-digit recovery percentages and small distributions typical in many such cases. Reid Aff. ¶36 (median settlement recoveries of 2.2% to 4.2% in cases $250 million and larger) (citing Cornerstone Research study, NYSCEF 815); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) (settlement for "9% of the possible damages" was "more than triple the average recovery in securities class action settlements").

Obtaining that result took significant skill to navigate a minefield of complex legal and factual issues, especially given the numerous blue-chip firms representing Defendants. *See Signet*, 2020 WL 4196468, at *20 ("Courts have recognized that the quality of the opposition should also be taken into consideration in assessing the quality of the counsel's performance.");

Checking Acct. Overdraft, 830 F. Supp. 2d at 1363 (similar). Counsel here displayed such skill, and is highly qualified, with significant experience and national reputations in complex commercial matters, including derivative claims both nationwide and in New York courts, as summarized in affirmations and firm biographies filed in support of this fee request. Reid Aff. ¶¶45-46; Mackintosh Aff. ¶8 & Ex. 1; Notis Aff. ¶11 & Ex. A; Zauderer Aff. ¶¶5, 8; Gross Aff. ¶11 & Ex. A.

Lastly, achieving settlement was not quick or easy. Counsel has been litigating this case since July 2018 and has spent 20,324.5 hours. Reid Aff. ¶45. *See Perez v. Rash Curtis & Assocs.*, No. 4:16-CV-03396-YGR, 2020 WL 1904533, at *1, 18, 21 (N.D. Cal. Apr. 17, 2020) (awarding 33.33% fee on $267 million recovery for 5,014.8 hours worked with 5,450 additional hours anticipated); *Americas Mining*, 51 A.3d at 1257, 1262-63 ($304.7 million fee awarded, 8,597 hours worked). Counsel has faced nine motions to dismiss, defeated four appeals and briefed others, engaged in extensive discovery, reviewed over 792,000 pages of documents (many requiring translation), obtained a pre-judgment attachment, pieced together a complex factual puzzle culminating in a 188-page proposed second amended pleading, and drove months of grueling mediation and settlement negotiations. In short, counsel has expended substantial time and effort. And counsel will spend more time and effort defending the Settlement on any appeal.

Accordingly, all risk, result, and performance-related *Gordon* factors—difficulty involved, skill required, experience and ability of counsel, result obtained and benefit, the contingency of compensation, responsibility involved, and time and effort—strongly favor a substantial fee award at the top of the relevant comparative range.

II. THE REQUESTED 22.5% FEE COMPARES FAVORABLY TO "THE CUSTOMARY FEE CHARGED FOR SIMILAR SERVICES."

In this case, determination of an appropriate fee award largely hinges on the reference point for comparison under the final *Gordon* factor, "the customary fee charged for similar services." *Gordon*, 148 A.D.3d at 165. There is no New York appellate guidance on how the "customary fee" is determined. Other jurisdictions diverge, but the requested 22.5% fee finds ample support under all approaches.

A. Many Federal Courts Across the Country Award Fees Tracking Commercial Litigation Market Norms, Even in Large Megafund Cases, and 22.5% is Significantly Below Market.

To be clear, counsel is now abandoning its prior 33.0% request and requesting a much lower 22.5% fee. Nevertheless, the authorities supporting a 33.0% award are still informative, as those authorities: (a) necessarily support the reasonableness of a much lower 22.5% fee; and (b) explain the downsides of awarding percentage fees that diverge too much from commercial litigation market norms.

A 33.0% (or one-third) fee is a customary contingency fee percentage in commercial litigation, and "the percentage method is consistent with and, indeed, is intended to mirror, practice in the private marketplace where contingent fee attorneys typically negotiate percentage fee arrangements with their clients." *Strougo*, 258 F. Supp. 2d at 262. Indeed, contingency fees in the 33% range are ubiquitous in complex commercial litigation matters. *See, e.g.*, *Hale*, 2018 WL 6606079, at *11 (observing that "sophisticated parties…agree to flat percentages at or above 33.33% in cases that yield significant recoveries"); *Cabot E. Broward 2 LLC v. Cabot*, No. 16-61218-CIV, 2018 WL 5905415, at *4 (S.D. Fla. Nov. 9, 2018) ("The percentage method of awarding fees…is intended to mirror[] practice in the private marketplace where attorneys….regularly contract for contingent fees between 30% and 40%.") (internal quotations

and citations omitted); Fitzpatrick, *Fiduciary Judge's Guide*, 89 FORDHAM L. REV. at 1170 (sophisticated clients "pay fixed one-third percentages or even higher escalating percentages based on litigation maturity").

Likewise, "courts nationwide have repeatedly awarded fees of 30 percent or higher even in so-called 'megafund' settlements" of $100 million or more. *Cabot*, 2018 WL 5905415, at *8 (cleaned up). Contingency fees in this range are commonplace in very large cases in several federal circuits, particularly the Seventh, Tenth, and Eleventh Circuits. *See, e.g.*, *In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1113 (D. Kan. 2018) (awarding one-third fee on $1.51 billion recovery and observing "a one-third fee is customary in contingent-fee cases"); *Hale*, 2018 WL 6606079, at *10 (awarding one-third fee on $250 million recovery and observing "Courts within the Seventh Circuit, and elsewhere, regularly award percentages of 33.33% or higher"); *Checking Acct. Overdraft*, 830 F. Supp. 2d at 1366 (finding 30% fee on $410 million recovery "comports with customary fee awards in similar cases"); *see also, e.g.*, *Standard Iron Works v. ArcelorMittal*, No. 08-C-5214, 2014 WL 7781572, at *1 (N.D. Ill. Oct. 22, 2014) (awarding 33% fee on $163.9 million and stating "33% fee comports with the prevailing market rate for legal services of similar quality in similar cases"); *In re Vitamins Antitrust Litig.*, No. MDL-1285, 2001 WL34312839, at *10 (D.D.C. July 16, 2001) (34.06% fee on $359.4 million).

Awarding percentages that track market norms makes good sense from a policy perspective. Professor Fitzpatrick suggests that "judges acting as good fiduciaries" should "follow" the market practice of "fixed one-third percentages or even higher escalating percentages based on litigation maturity…even in the most enormous cases." Fitzpatrick, *Fiduciary Judge's Guide*, 89 FORDHAM L. REV. at 1169–71. Courts applying 30-35% fee awards even in very large cases seek to mimic the market for many of the same reasons that Professor

Fitzpatrick has suggested courts should. *See, e.g.*, *Syngenta*, 357 F. Supp. 3d at 1114-15 (criticizing approaches that depart from market norms because of misalignment of incentives); *Checking Acct. Overdraft*, 830 F. Supp. 2d at 1367 (same).

Notably, courts awarding market-based fees in large common fund have observed the positive impact such fees have in creating incentives for lawyers to undertake high-risk common fund cases that are societally beneficial and to litigate those cases in the optimal manner. *See Syngenta*, 357 F. Supp. 3d at 1114-15 (emphasizing incentives); *Checking Acct. Overdraft*, 830 F. Supp. 2d at 1367 (same). Awarding market-based fees in common fund cases helps ensure that lawyers will take on those cases rather than foregoing them due to disparities ***relative***[8] to contingency percentages that lawyers can typically command in other large complex commercial litigation where fee percentages are fixed by agreement with clients.[9]

Given the foregoing authority and strong policy rationale for a substantially higher award, the requested 22.5% fee is reasonable.

B. The 22.5% Requested Fee Falls Within the Range in Lines of Authority that Do Not Directly Attempt to Mimic the Market.

Courts in this State and federal courts in the Second Circuit likewise routinely award market-based fee percentages of around one-third in common fund cases, at least for recoveries

[8] Optimally incentivizing quality counsel to pursue societally beneficial common fund cases in the future requires consideration of other opportunities available to counsel, just as a Major League Baseball team hoping to sign a free agent must ascertain the other opportunities available in the marketplace for professional ballplayers. It is not a metaphysical question of what one should make in the abstract, ignoring the real-world and other available opportunities.

[9] The relevant incentives and other opportunities are not assessed in hindsight or on an absolute dollar basis after the result has been achieved, but prospectively; lawyers do not know how a case will pan out in deciding whether to take it. *See In re Lawrence*, 24 N.Y.3d 320, 339 (2014) ("[T]he contingency system cannot work if lawyers do not sometimes get very lucrative fees, for that is what makes them willing to take the risk—a risk that often becomes reality—that they will do much work and earn nothing."); Simon's NY Rules of Prof. Conduct §1.5:9 (2021) ("The absolute dollar amount of a fee is not the correct measure in contingent fee cases.").

in the eight figures or less.[10] For larger recoveries, federal courts in New York generally deviate from market norms and use a sliding scale[11] to gradually reduce fees as recovery size increases. Even then, however, 22.5% falls within the range awarded for common funds similar in size. Courts have frequently awarded fees of 25% or higher for similar recoveries. *See, e.g.*, *Signet*, 2020 WL 4196468, at *15 (awarding 25% on $240 million recovery and gathering cases with fee awards from 25% to 28.8% on recoveries from $225 million to $486 million); *see also World Trade Ctr.*, 754 F.3d at 127 (25% or $187 million fee on $725 million recovery). And applying the graduated fee scale, akin to a marginal tax bracket, adopted by Judge Gleeson in *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, would support a $67.8 million fee on $300 million (or 22.6%) here. 991 F. Supp. 2d 437, 445 (E.D.N.Y. 2014) (awarding $544.8 million fee); *see also* Eisenberg, *Fees in Class Actions*, 92 N.Y.U. L. REV. at 948 (reporting average fee of 22.3% in top decile of cases).

The 22.5% requested fee also falls well within the range of fees awarded in jurisdictions, such as Delaware and the Ninth Circuit, that use benchmarks as the starting point.[12] *See*

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[10] *See, e.g.*, *Fernandez*, 2015 WL 3932897, at *5 (awarding one-third fee); *Charles v. Avis Budget Car Rental, LLC*, No. 152627/2016, 2017 WL 6539280, at *4 (Sup. Ct. N.Y. Cty. Dec. 21, 2017) (awarding 33% fee); NYSCEF 909 (*Kahn v. Buttner*, Index No. 650320/2008 (Sup. Ct. N.Y. Cty. Dec. 16, 2011) (awarding 33 1/3% fee in direct benefit derivative settlement); *Hi-Crush Partners*, 2014 WL 7323417, at *17 ("[T]he 33 1/3% fee requested…is consistent with percentage fees awarded in this Circuit and nationwide."); *In re Lloyd's Am. Tr. Fund Litig.*, No. 96-cv-1262-RWS, 2002 WL 31663577, at *26 (S.D.N.Y. Nov. 26, 2002) ("[T]here are scores of common fund cases where fees…were awarded in the range of 33-1/3% of the settlement fund.").

[11] Any sliding scale should consider comparably sized cases, not much larger multi-billion cases where fee percentages are typically lower. *See, e.g.*, *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 13-cv-7789-LGS, 2018 WL 5839691, at *2 (S.D.N.Y. Nov. 8, 2018) (applying sliding scale approach to award 13% fee for $2.3 billion common fund).

[12] In the Ninth Circuit, the 25% "benchmark" is merely a starting point, and courts sometimes award higher fee percentages (including 33.33%) even in large cases. *See, e.g.*, *Perez*, 2020 WL 1904533, at *16 (awarding 33.33% fee on $267 million and observing that "in most common

Americas Mining,[13] 51 A.3d at 1259-60 (describing 15% to 25% range for settlements after "meaningful litigation efforts" and noting empirical observation of 23% average and 25% median fee awards). And the 22.5% request is directly in line with fee awards in large derivative settlements in those jurisdictions. *See In re Wells Fargo & Co. S'holder Derivative Litig.*, 445 F. Supp. 3d 508, 526 (N.D. Cal. 2020) (awarding 22% fee on $240 million derivative settlement); *Activision*, 124 A.3d at 1064, 1075 (awarding requested $72.5 million fee in derivative case involving $275 million fund); *see also* Reid Aff., Ex. B (*In re McKesson Corporation Derivative Litig.*, No. 4:17-cv-01850-CW (N.D. Cal. April 22, 2020) (25% fee on $175 million derivative settlement)); *In re Jefferies Grp., Inc. Shareholders Litig.*, No. CV-8059-CB, 2015 WL 3540662, at *4 (Del. Ch. June 5, 2015) (awarding 23.5% of gross $91.5 million of settlement value); *Teachers' Retirement System of Louisiana v. Greenberg*, No. 20106-VCS, 2008 WL 5260548, at *1 (Del. Ch. Dec. 17, 2008) (awarding 22.5% fee on $115 million settlement fund).

In sum, the requested 22.5% fee falls well within the range awarded by federal courts employing a sliding scale approach in similarly sized cases, the applicable range for derivative settlements in Delaware, and the range of fees awarded in other very large derivative settlements. Thus, the final *Gordon* factor, "the customary fee charged for similar services," supports the fee request. *Gordon*, 148 A.D.3d at 165.

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fund cases, the award exceeds the benchmark"); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M-07-1827-SI, 2013 WL 1365900, at *7 (N.D. Cal. Apr. 3, 2013) (28.5% fee on $1.08 billion).

[13] *Americas Mining* involved a 15% award of $304.7 million on a $2.031 billion judgment, but the percentage was reduced because the total judgment included $700 million in interest accrued due to counsel's delays in prosecuting the case. 51 A.3d at 1252, 1255-56. The fee as a percentage of the recovery, excluding interest, equates to 22.9%.

C. Fairness and Public Policy Interests Support a 22.5% Fee Award, and Most Renren Shareholders Supported or Had No Objection to the Substantially Higher Prior Request.

No fairness concerns warrant a downward departure from a 22.5% fee award under the circumstances of this case.[14] A company-level recovery would have been much larger and justified a larger fee in dollar terms, but counsel instead negotiated a transitive property structure to provide direct benefits to Renren Shareholders and keep funds away from Defendants. *See Americas Mining*, 51 A.3d at 1252, 1265 (rejecting argument that $304.7 million fee awarded on $2.031 billion company-level recovery should be reduced and based only on the 19% minority's proportionate indirect share rather than entire amount). And in doing so, counsel secured massive per ADS payouts for minority shareholders that, ***net of a 22.5% fee***, will be over ***$24 per ADS higher*** than the average price during the litigation, and about ***$26 per ADS higher*** than the difference between the highest Q2 2018 closing price and the Cash Dividend previously paid to holders in the Transaction. Reid Aff. ¶32. Where the settlement distribution—net of a 22.5% fee—puts Renren Shareholders about $25 per ADS into the black, where counsel successfully negotiated for the structure that led to that result, and where the fee is already a significant discount to standard contingency fees in the private marketplace, there are no fairness concerns that warrant any further discount to market contingency fee percentages.

Moreover, Renren Shareholders recognize that this is a fantastic split for them. A substantial portion of the minority interest affirmatively supported or had no objection to the significantly higher prior 33.0% fee request (which drew objections from only three coordinated objectors representing a tiny percentage of the minority interest). *See In re Bisys Sec. Litig.*, No.

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[14] The $31.5 million reduction in the fee request exceeds the amount of most derivative settlements, and it equates to over 9% of the minority's proportionate share of the company-level damages (more than double the typical large securities class action recovery percentage).

04-cv-3840-JSR, 2007 WL 2049726, at *1 (S.D.N.Y. July 16, 2007) (noting lack of objections from "numerous institutional investors who presumably had the means, the motive, and the sophistication to raise objections if they thought the one-third maximum fee was excessive"). And those who did not object to the 33.0% request before have no principled basis to object to the substantially reduced 22.5% request now. *See* NYSCEF 755 ¶12.

Finally, the implications here extend beyond the zero-sum game in how to split up the pie between counsel and Renren Shareholders, as the fee percentage awarded will have incentivizing effects by encouraging future high risk, but societally beneficial derivative cases that are a primary means of regulating corporate misconduct. *See Bansbach v. Zinn*, 1 N.Y.3d 1, 8 (2003) ("[D]erivative actions serve the important purpose of protecting corporations and minority shareholders."). The award of "fees should reflect the important public policy goal of providing lawyers with sufficient incentive to bring common fund cases… that serve the public interest." *Bekker*, 504 F. Supp. 3d at 270.

Awarding a fee significantly below 22.5% here, in the absence of any compelling fairness reason to do so, runs the risk of creating sub-optimal incentives and thereby tilting the scales to the detriment of would-be beneficiaries of future common fund cases. The requested 22.5% is already below the market-based solution to how best to set incentives, as adopted by many courts and advocated by Prof. Fitzpatrick (Section II.A, *supra*). And it is likewise below the 25-30% fee range that the Legislature fixed in incentivizing other types of litigation that serve the public interest. *See* N.Y. State Fin. Law §190(6)(b) (providing that qui tam plaintiffs receive 25-30% of settlements they obtain).

III. LODESTAR CROSS-CHECKS AND IMPLIED HOURLY METRICS ARE UNNECESSARY, BUT DO NOT WARRANT A REDUCTION TO THE REQUESTED FEE IN ANY EVENT.

Because of the sheer size of the common fund that counsel created here, any reasonable fee award here will be large in terms of absolute dollar amount. But "[t]he absolute dollar amount of a fee is not the correct measure in contingent fee cases." Simon's NY Rules of Prof. Conduct §1.5:9. And the Court of Appeals has admonished courts from "becom[ing] too preoccupied with the ratio of fees to hours" because "the contingency system cannot work if lawyers do not sometimes get very lucrative fees, for that is what makes them willing to take the risk—a risk that often becomes reality—that they will do much work and earn nothing." *See In re Lawrence*, 24 N.Y.3d 320, 339 (2014) (citations omitted).

New York appellate courts have not required trial courts to conduct a lodestar or other hourly-metric cross-check in awarding fees under the percentage method, which is consistent with most jurisdictions, even in large cases. *See Americas Mining*, 51 A.3d at 1257-58 (noting that "time and effort" factor already guards against windfalls in cases requiring little effort, emphasizing the preeminence of the benefit achieved, and rejecting argument that implied hourly rate should serve as "backstop check," even where $304.7 million award implied $35,000 per hour); Eisenberg, *Fees in Class Actions*, 92 N.Y.U. L. REV. at 945 (percentage method with no crosscheck used in 53.61% of all federal class actions; percentage method with crosscheck used in 38.23% of cases); *see also World Trade Ctr.*, 754 F.3d at 126-27 ($187 million fee awarded on $725 million recovery with no documentation of hours); *Checking Acct. Overdraft*, 830 F. Supp. 2d at 1362 (awarding 30% fee on $410 million fund and concluding that the "lodestar approach should not be imposed through the back door via a 'cross-check'"). Moreover, Professor Fitzpatrick criticizes lodestar cross-checks for many of the same reasons that courts

have now largely rejected using the lodestar method. *See* Fitzpatrick, *Fiduciary Judge's Guide*, 89 FORDHAM L. REV. at 1167.

Even if the Court were to consider some cross-check,[15] however, it provides further confirmation that a 22.5% award is reasonable. A 22.5% award would yield a lodestar multiplier of 3.88, and that number will go down if counsel is forced to expend more time defending the Settlement on appeal. Reid Aff. ¶52. "Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers." *Yuzary v. HSBC Bank USA, N.A.*, No. 12-cv-3693, 2013 WL 5492998, at *10 (S.D.N.Y. Oct. 2, 2013) (gathering cases and approving 7.6 multiplier); *see also, e.g.*, *Bekker*, 504 F. Supp. 3d at 271 (finding 5.85 multiplier "within the range of acceptable multipliers"); *Maley*, 186 F. Supp. 2d at 369 (finding "multiplier of 4.65" to be "well within the range awarded by courts in this Circuit and courts throughout the country").

Indeed, courts have awarded fee percentages resulting in far higher implied hourly rates and lodestar multipliers than here, including in derivative cases. *See, e.g.*, *Americas Mining*, 51 A.3d at 1252, 1257 ($304.7 million fee equal to over $35,000 per hour for the 8,597 hours worked and 66x multiple); *Perez*, 2020 WL 1904533, at *20 (awarding 33.33% fee on $267 million recovery with 5,014.8 hours worked and anticipated additional 5,450 hours, resulting in lodestar multiplier of 13.4x); *Activision*, 124 A.3d at 1075 (awarding $72.5 million fee in

[15] Because of the wastefulness of detailed time audits, when courts have applied lodestar crosschecks, they do so loosely; "it is well established that courts may rely on summaries…and need not review actual billing records." *Hale*, 2018 WL 6606079, at *13 (internal citations and quotation marks omitted); *see In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005) (A "lodestar cross-check calculation need entail neither mathematical precision nor bean-counting," and courts may "rely on summaries submitted by the attorneys and need not review actual billing records.").

derivative settlement) & 2015 WL 751783 (7,363 attorney hours and implied hourly rate of $9,685 per hour).

IV. THE COURT SHOULD ALSO AWARD EXPENSES.

Counsel incurred $1,135,995.49 in expenses litigating this case, primarily for valuation experts, foreign law experts, mediation, electronic discovery services for the voluminous documents, and translations. Gross Aff. ¶9; Zauderer Aff. ¶6; Notis Aff. ¶9; Mackintosh Aff. ¶6. Those expenses were reasonable and incurred in procuring the common fund and should be reimbursed out of it. *See, e.g.*, *Signet*, 2020 WL 4196468, at *22.

CONCLUSION

For the foregoing reasons, Plaintiffs' counsel respectfully request that the Court, in exercising its discretion to determine a reasonable fee, award a fee of 22.5% to be paid out of the common fund that counsel created.

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PRINTING SPECIFICATIONS STATEMENT

1. Under N.Y. Comp. Codes R. & Regs. tit. 22, §202.70(g), Rule 17, Plaintiffs specify that the foregoing brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used as follows:

Name of Typeface: Times New Roman
Point Size: 12
Line Spacing: Double

2. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of the caption, prefatory tables, the signature block and the certificate of compliance is 6,983 words.

Dated: May 13, 2022

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