

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIAIn re OMNIVISION TECHNOLOGIES, INC.
SECURITIES LITIGATION

Case No. 5:11-cv-05235-RMW

This document Relates to:

ALL ACTIONS.

**ORDER GRANTING PLAINTIFFS'
MOTION FOR AWARD OF
ATTORNEYS' FEES AND COSTS**

Re: Dkt. No. 179

Before the court is plaintiffs' motion for approval of attorneys' fees and costs. Plaintiffs' counsel requests \$2,675,179.16 in attorneys' fees and \$340,094.74 in costs,¹ plus accrued interest. For the reasons explained below, the court awards plaintiffs' counsel \$2,675,179.16 in attorneys' fees and \$340,094.74 in costs, plus accrued interest.

It is well established that "a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorney's fees." *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). This rule, known as the "common fund doctrine," is designed to prevent

¹ Plaintiffs' motion for attorneys' fees lists plaintiffs' costs at \$340,511.54, and calculates requested attorneys' fees based on this amount. At the hearing on this motion, plaintiffs' counsel alerted the court to an error in the calculation of plaintiffs' requested costs and provided the court the correct number, \$340,094.74. The court's award of fees and costs is based on this corrected amount.

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unjust enrichment by distributing the costs of litigation among those who benefit from the efforts of the litigants and their counsel. *See Paul, Johnson, Alston, & Hunt v. Graulity*, 886 F.2d 268, 271 (9th Cir. 1989) (“Paul, Johnson”). The ultimate goal is to reasonably compensate counsel for their efforts in creating the common fund. *Id.* at 271–72. It is not sufficient to arbitrarily apply a percentage; rather the district court must show why that percentage and the ultimate award are appropriate based on the facts of the case. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002).

The Ninth Circuit has approved a number of factors which may be relevant to the district court’s determination: (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’ counsel; and (5) awards made in similar cases. *See id.* at 1048–50.

Here, the court finds that the *Vizcaino* factors favor awarding the requested 22% fee, a lower percentage of the common fund than what has been referred to as the 25% benchmark. *See, e.g., Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000). First, the overall result and benefit to the class from the litigation will be an estimated per share recovery of \$0.20, amounting to a recovery of between 4.7% and 31.7% of the possible relief. Counsel’s requested attorneys’ fees of 22% is significantly less than their lodestar² total.

Second, the risk that further litigation might result in plaintiffs not recovering at all, particularly in a case involving complicated legal issues, is a significant factor in the award of fees. *See Vizcaino*, 290 F.3d at 1048. Although the court had not yet certified the class, plaintiffs still faced substantial challenges regarding: (1) the actionability of statements; (2) their falsity; (3) *scienter*; (4) loss causation; and (5) damages. Furthermore, plaintiffs would have had to proceed through summary judgment, a likely opposition to class certification, and a complex trial involving loss causation and damages before class members would have recovered. The risk that plaintiffs would have recovered less than the settlement amount, or recovered nothing, also

² Counsel estimate their lodestar at \$4,619,340.79. Dkt. No. 179 at 21.

supports granting the requested fee.

Third, the “prosecution and management of a complex national class action requires unique legal skills and abilities.” *Edmonds v. United States*, 658 F. Supp. 1126, 1137 (D.S.C. 1987). This case was litigated through a motion to dismiss and significant discovery took place. Plaintiffs reviewed securities analysts’ reports, reviewed over 400,000 documents from Omnivision and third parties, interviewed Apple representatives, and consulted with experts. In addition, plaintiffs completed two depositions and prepared for four more.

Fourth, the importance of assuring adequate representation for individuals who could not otherwise afford competent attorneys justifies providing 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. *Vizcaino*, 290 F.3d at 1050. This suit began over three years ago. During that time, the various attorneys representing the class have spent over 8,800 hours litigating this case. *See* Dkt. No.179 at 7. Counsel also advanced significant costs related to prosecuting this action. *Id.* This substantial outlay, when there is a risk that none of it will be recovered, further supports an award of substantial fees.

Finally, the percentage of the Settlement Fund that Lead Counsel seeks is slightly less than the benchmark of 25% established by the Ninth Circuit. *See, e.g., Powers*, 229 F.3d at 1256. In addition, the requested 22% fee is less than fees that have been awarded in similar complex class actions. *See, e.g., In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1049 (N.D. Cal. 2007) (awarding 28% of \$13.75 million settled during discovery phase with class certification motion pending); *see also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 457-58, 463 (9th Cir. 2000) (upholding fee award of 33.3% of \$1.725 million settlement). The court therefore finds the requested fee reasonable.

For the reasons explained above, the court awards plaintiffs 22% of the net recovery to the class, calculated as follows:

$$(\$12,500,000 - \$340,511.54) * 22\% = \$2,675,179.16$$

1 Accordingly, plaintiffs' counsel are awarded attorneys' fees in the amount of
2 \$2,675,179.16 and \$340,094.74 in expenses, plus interest, to be paid out of the Settlement Fund to
3 BARRACK, RODOS & BACINE, 600 West Broadway, Suite 900, San Diego, California 92101,
4 who then will be responsible for allocating the award of attorneys' fees and expenses between
5 Settlement Class Counsel.

6 **IT IS SO ORDERED.**

7 Dated: June 5, 2015

8 

9 Ronald M. Whyte
United States District Judge