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Chief Executive Officer/Clerk

Superior Court of CA, County of Santa Clara

Case #1-12-CV-232227 Filing #G-81921

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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 COUNTY OF SANTA CLARA

9 BRENT T. ROBINSON, et al., Individually )  
10 and on Behalf of All Others Similarly Situated, )

11 Plaintiffs, )

12 vs. )

13 AUDIENCE, INC., et al., )

14 Defendants. )

Case No. 1:12-cv-232227

CLASS ACTION

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFFS' COUNSEL'S MOTION FOR  
AN AWARD OF ATTORNEYS' FEES AND  
EXPENSES

DATE: May 6, 2016

TIME: 9:00 a.m.

DEPT: 1

JUDGE: Hon. Peter H. Kirwan

DATE ACTION FILED: 09/13/12

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1 **I. INTRODUCTION**

2 Plaintiffs' Counsel have obtained an all-cash settlement of \$6,050,000 for the benefit of the  
3 Class in this Litigation.<sup>1</sup> This is a highly favorable recovery obtained in the face of substantial risk and  
4 is the result of Plaintiffs' Counsel's vigorous, persistent, and skilled efforts. Plaintiffs' Counsel now  
5 respectfully move this Court for an award of attorneys' fees in the amount of 30% of the Settlement  
6 Fund, as well as payment of \$96,181.79 in litigation expenses they incurred in prosecuting this  
7 Litigation and interest on both amounts. Furthermore, Class Representatives Brent T. Robinson and  
8 Dorothy Kasian respectfully request compensation for their time spent while prosecuting this Litigation  
9 on behalf of the Class.

10 As explained below, and in the Memorandum of Points and Authorities in Support of Class  
11 Representatives' Motion for Final Approval of Class Action Settlement and Plan of Allocation  
12 ("Settlement Memorandum"),<sup>2</sup> as well as in the previously filed Declaration of John K. Grant in  
13 Support of Motion for Preliminary Approval of Class Action Settlement ("Grant Decl."), this  
14 Settlement is an excellent result for the Class and constitutes a substantial and certain recovery when  
15 balanced against the risks, costs, and duration of continued litigation. Absent a settlement, this  
16 Litigation would likely have continued for many years, including through completion of trial and likely  
17 appeals. Class Representatives and their counsel faced substantial obstacles in proving liability and  
18 damages, yet nevertheless reached a timely and substantial resolution for the Class.

19 In addition to the significant risks in prosecuting this Litigation, the skill and effort required to  
20 achieve the Settlement was substantial. Plaintiffs' Counsel marshalled considerable resources and  
21 committed substantial amounts of time and expense to research, investigate, and prosecute this  
22 Litigation. The Settlement was not achieved until Plaintiffs' Counsel, *inter alia*: (1) conducted an  
23 extensive investigation of Defendants' actions in connection with Audience, Inc.'s ("Audience" or the  
24 "Company") May 9, 2012 IPO and Defendants' preparation and filing of the Registration Statement and

25 <sup>1</sup> Unless otherwise defined herein, all capitalized terms have the meanings ascribed to them in the  
26 Stipulation of Settlement dated October 19, 2015 ("Stipulation" or "Settlement").

27 <sup>2</sup> Because many of the factors supporting final approval of the Settlement also buttress the requested  
28 award of attorneys' fees and expenses, Plaintiffs' Counsel incorporate herein the concurrently filed  
Settlement Memorandum.



1 Prospectus (collectively, the “Registration Statement”), including a thorough review and analysis of all  
2 relevant U.S. Securities and Exchange Commission (“SEC”) filings, press releases and analyst reports;  
3 (2) obtained and reviewed witnesses’ accounts of Audience’s operations from former Audience  
4 employees and other witnesses developed through counsel’s investigation; (3) prepared two complaints;  
5 (4) successfully opposed two demurrers; (5) assisted Class Representatives in responding to  
6 Defendants’ class certification discovery requests; (6) successfully obtained class certification over  
7 Defendants’ opposition; (7) propounded document requests on Defendants and Apple Inc. (“Apple”);  
8 (8) reviewed more than 55,000 pages of documents produced by Audience and Apple; (9) fully  
9 evaluated the strengths and weaknesses of the case with the assistance of experts; (10) prepared two  
10 detailed mediation statements prior to participating in mediation sessions with Randall W. Wulff and  
11 Jed D. Melnick, both well-respected attorneys with extensive experience in the mediation of complex  
12 actions; and (11) participated in arm’s-length settlement negotiations, including two mediations. Grant  
13 Decl., ¶5. In total, Plaintiffs’ Counsel and their paraprofessionals spent over 3,800 hours in prosecuting  
14 this Litigation with a combined resulting lodestar of \$2,194,357.75. As a result, the requested fee of  
15 30% of the Settlement Fund, or \$1,815,000, represents an approximate 17% discount from counsel’s  
16 lodestar, resulting in a negative multiplier.

17 While Class Representatives successfully prevailed on two separate demurrers and certified the  
18 Class, continued litigation posed significant risks for the Class with ultimate success far from certain.  
19 Defendants, represented by highly experienced and skilled counsel, resisted Class Representatives at  
20 every turn, set forth several viable defenses, and would continue to adamantly deny any wrongdoing  
21 and offer testimony to support their contentions. Assuming Class Representatives survived Defendants’  
22 summary judgment motion(s) after completion of discovery, which was certainly not a given, at trial,  
23 Class Representatives would face the risk that a jury or trier-of-fact would react unfavorably to the  
24 evidence presented and instead believe the testimony and arguments of Defendants and find in their  
25 favor. Plaintiffs’ Counsel firmly believe that the Settlement obtained is an excellent result for the Class  
26 under the circumstances and is a result of their creative and diligent efforts as well as their reputations  
27 as attorneys who are unwavering in their dedication to the interest of the class and unafraid to zealously  
28 prosecute a case through trial and appeals.

1 For their diligence and efforts in obtaining this significant recovery on behalf of the Class,  
2 Plaintiffs' Counsel respectfully request an award of attorneys' fees of 30% of the Settlement Fund and  
3 payment of expenses incurred in the prosecution of the Litigation in the amount of \$96,181.79, plus  
4 interest on both amounts. The requested fee is fair and reasonable under the applicable standards and is  
5 well within the range of fees awarded by California Superior Courts and courts nationwide. Plaintiffs'  
6 Counsel's costs and expenses are likewise reasonable in amount, and were necessarily incurred in the  
7 successful prosecution of the Litigation. Finally, the service awards requested by Class Representatives  
8 are supported by declarations, reasonable in amount, and should be awarded.<sup>3</sup>

9 There is no indication that the Class disagrees. More than 9,900 copies of the Notice of  
10 Proposed Settlement of Class Action (the "Notice") were sent to potential Class Members and their  
11 nominees, and a Summary Notice was published once in *Investor's Business Daily* and transmitted over  
12 the *PR Newswire*.<sup>4</sup> The Notice informed the Class that Plaintiffs' Counsel would apply for 30% of the  
13 Settlement Fund plus expenses not to exceed \$140,000, and for service awards to Plaintiffs of up to  
14 \$2,500 each. While the deadline for filing written objections to the fee and expense request – March  
15 30, 2016 – has not yet expired, to the knowledge of Plaintiffs' Counsel, not a single Class Member has  
16 filed an objection to the fee and expense request or any other aspect of the Settlement. The fair  
17 conclusion from the lack of objection is that those most impacted by the requests of counsel do not  
18 dispute that the requests are fair and reasonable.<sup>5</sup>

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23 <sup>3</sup> Mr. Robinson's declaration is being filed concurrently. Ms. Kasian's declaration will be filed in the  
24 next few days.

25 <sup>4</sup> See ¶¶4-11, 14 to the Declaration of Carole K. Sylvester Regarding (A) Mailing of the Notice of  
26 Proposed Settlement of Class Action and the Proof of Claim and Release Form, (B) Publication of the  
27 Summary Notice, (C) Internet Posting, and (D) Requests for Exclusion Received to Date ("Sylvester  
28 Decl."), submitted herewith.

<sup>5</sup> Plaintiffs' Counsel will address any objections in their reply memorandum, which will be filed on or  
before April 22, 2016.

1 **II. THE COURT SHOULD AWARD ATTORNEYS' FEES USING THE**  
2 **PERCENTAGE METHOD**

3 **A. The Common Fund Doctrine Allows Courts to Assess the Beneficiaries of**  
4 **a Fund Created by Litigation with the Costs of Creating that Fund**

5 Where, as here, litigation has created a common fund for the benefit of the named plaintiffs as  
6 well as others, courts have the power to award plaintiffs' counsel their reasonable attorneys' fees and  
7 expenses out of the fund created. The California Supreme Court has expressly affirmed "the historic  
8 power of equity to permit . . . a party preserving or recovering a fund for the benefit of others in  
9 addition to himself, to recover his costs, including his attorneys' fees, from the fund of property itself or  
10 directly from the other parties enjoying the benefit." *Serrano v. Priest*, 20 Cal. 3d 25, 35 (1977);<sup>6</sup>  
11 *Glendale City Emps.' Ass'n, Inc. v. City of Glendale*, 15 Cal. 3d 328, 341 n.19 (1975).

12 The common fund doctrine rests on two premises. One is preventing unjust enrichment – "that  
13 all who will participate in the fund should pay the cost of its creation or protection and that this is best  
14 achieved by taxing the fund itself for attorney's fees." *Serrano*, 20 Cal. 3d at 35 n.5; *see also Lealao v.*  
15 *Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 27 (2000).

16 The second is a "salvage" rationale – "encouragement of the attorney for the successful litigant,  
17 who will be more willing to undertake and diligently prosecute proper litigation for the protection or  
18 recovery of the fund if he is assured that he will be promptly and directly compensated should his  
19 efforts be successful." *Estate of Stauffer v. Wollenberg*, 53 Cal. 2d 124, 132 (1959). The salvage  
20 purpose requires "a flavor of generosity . . . in order that an appetite for efforts may be stimulated."  
21 *Melendres v. City of Los Angeles*, 45 Cal. App. 3d 267, 273 (1975).

22 While "[c]ourts recognize two methods for calculating attorney fees in civil class actions: the  
23 lodestar/multiplier method and the percentage of recovery method," *Wershba v. Apple Computer, Inc.*,  
24 91 Cal. App. 4th 224, 254 (2001), the U.S. Supreme Court has consistently held that where a common  
25 fund has been created for the benefit of a class as a result of counsel's efforts, the award of counsel's  
26 fee should be determined on a percentage-of-the-fund basis. *See, e.g., Trustees v. Greenough*, 105 U.S.  
27 527, 532 (1882); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79 (1980). California courts have long

28 <sup>6</sup> Unless otherwise noted, citations are omitted throughout.

1 accepted the percentage approach for awarding fees in common fund cases as well. For instance, in  
2 1989, Judge Eli Chernow awarded a fee of 35% of the recovery in a class action related to securities  
3 fraud, stating “35 percent certainly is not high compared to the kinds of contingent fee arrangements  
4 that the courts see all the time for plaintiffs’ litigation.” *Steiner v. Whittaker Corp.*, No. 000817,  
5 Transcript, at 8:9-11 (Los Angeles Super. Ct. Mar. 23, 1989) (Appendix, Ex. 1).<sup>7</sup>

6 In both *Sanders v. City of Los Angeles*, 3 Cal. 3d 252 (1970) and *Glendale City Emps.’ Ass’n*, 15  
7 Cal. 3d 328, the California Supreme Court upheld fee awards to plaintiff’s counsel, set at a percentage  
8 of the common fund. Likewise, in *Parker v. City of Los Angeles*, 44 Cal. App. 3d 556, 567-68 (1974),  
9 the California Court of Appeal upheld a fee award equal to one-third of the damages to owners of  
10 residential property in an inverse condemnation action. *See also Melendres*, 45 Cal. App. 3d 267  
11 (percentage award upheld); *Knoff v. San Francisco*, 1 Cal. App. 3d 184, 203 (1969) (upholding  
12 percentage fee). In the federal courts, where common fund fee awards are addressed frequently, the  
13 Ninth Circuit and at least six other Circuits have endorsed, and in some cases mandated, use of the  
14 percentage-of-recovery method.<sup>8</sup>

15 The rationale for compensating counsel in common fund cases on a percentage basis is sound.  
16 First, it is consistent with the practice in the private marketplace, where contingent fee attorneys are  
17 customarily compensated by a percentage of the recovery. Second, it more closely aligns the lawyers’  
18 interest in being paid a fair fee with the interest of the class in achieving the maximum possible  
19 recovery in the shortest amount of time. Indeed, one of the nation’s leading scholars in the field of class  
20 actions and attorneys’ fees, Professor Charles Silver of the University of Texas School of Law, has  
21 concluded that the percentage method of awarding fees is the only method of fee awards that is  
22 consistent with class members’ due process rights. Professor Silver notes:

23 <sup>7</sup> All unreported authorities cited herein are attached to the accompanying Appendix of Unreported  
24 Authorities (“Appendix”).

25 <sup>8</sup> The Third, Eleventh, and District of Columbia Circuits require the percentage method in common  
26 fund cases. *See In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995);  
27 *Camden I Condo. Ass’n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991); *Swedish Hosp. Corp. v. Shalala*,  
28 1 F.3d 1261 (D.C. Cir. 1993). The Sixth, Seventh, Ninth and Tenth Circuits recommend or allow this  
method. *Rawlings v. Prudential-Bache Props.*, 9 F.3d 513 (6th Cir. 1993); *In re Cont’l Ill. Sec. Litig.*,  
962 F.2d 566 (7th Cir. 1992); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th  
Cir. 1994); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451 (10th Cir. 1988).

1 The consensus that the contingent percentage approach creates a closer harmony  
2 of interests between class counsel and absent plaintiffs than the lodestar method is  
3 strikingly broad. It includes leading academics, researchers at the RAND Institute for  
4 Civil Justice, and many judges, including those who contributed to the Manual for  
5 Complex Litigation, the Report of the Federal Courts Study Committee, and the report  
6 of the Third Circuit Task Force. Indeed, it is difficult to find anyone who contends  
7 otherwise. No one writing in the field today is defending the lodestar on the ground that  
8 it minimizes conflicts between class counsel and absent claimants.

9 In view of this, it is as clear as it possibly can be that judges should not apply the  
10 lodestar method in common fund class actions. The Due Process Clause requires them  
11 to minimize conflicts between absent claimants and their representatives. The  
12 contingent percentage approach accomplishes this.

13 Charles Silver, *Due Process and the Lodestar Method: You Can't Get There from Here*, 74 Tul. L. Rev.  
14 1809, 1819-20 (June 2000).

15 **B. An Award of 30% of the Settlement Fund Created Is Consistent with**  
16 **Awards in Other Class Action Cases in California**

17 Plaintiffs' Counsel are applying for a fee award of 30% of the Settlement Fund. This request  
18 falls squarely within the parameters of percentage fees awarded in other class action litigation in  
19 California. Indeed, this Court in *Paton v. Advanced Micro Devices, Inc.*, No. 1-07-CV-084838, slip op.  
20 (Santa Clara Super. Ct. Aug. 22, 2014), noted that a fee award of 33-1/3% "was not an uncommon  
21 contingency fee percentage." *Id.* at 5 (Appendix, Ex. 2). *See also In re CafePress Inc. S'holder Litig.*,  
22 No. CIV522744, slip op. (San Mateo Super. Ct. Aug. 11, 2015) (awarding 30% of settlement amount  
23 plus expenses) (Appendix, Ex. 3); *In re Epicor Software Corp. S'holder Litig.*, No.  
24 30-2011-00465495-CU-BT-CXC, slip op. (Orange Super. Ct. Oct. 24, 2014) (awarding 30% fee)  
25 (Appendix, Ex. 4); *In re eMachines, Inc. Merger Litig.*, No. 01-CC-00156, slip op. (Orange Super. Ct.  
26 July 25, 2007) (awarding 30% of settlement fund plus expenses) (Appendix, Ex. 5); *Pipefitters, Locals*  
27 *522 & 633 Pension Trust Fund v. Salem Commc'ns Corp.*, No. CIV232456, slip op. (Ventura Super. Ct.  
28 June 19, 2006) (awarding 30% of settlement fund plus expenses) (Appendix, Ex. 6); *Hattan v.*  
*Restoration Hardware*, No. CV 075563, slip op. (Marin Super. Ct. Sept. 24, 2008) (awarding 33% of  
settlement fund plus expenses) (Appendix, Ex. 7); *Hawaii Structural Ironworkers Pension Trust Fund*  
*v. Calpine Corp.*, No. 1-04-CV-021465, slip op. (Santa Clara Super. Ct. Feb. 3, 2010) (awarding 30%  
of settlement fund plus expenses) (Appendix, Ex. 8); *West Palm Beach Police Pension Fund v.*  
*CardioNet, Inc.*, No. 37-2010-00086836-CU-SL-CTL, slip op. (San Diego Super. Ct. June 28, 2012)

1 (approving 33-1/3% fee award) (Appendix, Ex. 9); *Bonilla v. Regis Corp.*, No. 30-2009-00329724,  
2 2010 WL 6509279, at \*1 (Orange Super. Ct. Nov. 23, 2010) (same). The requested fee was disclosed in  
3 the Notice and, to date, not a single Class Member has objected to the fee.

4 **C. The Requested Fee of 30% of the Settlement Fund Created Is**  
5 **Reasonable in This Case**

6 In determining the reasonableness of a fee request, California courts typically consider the  
7 following “basic factors”: (1) the result class counsel obtained; (2) the time and labor required of the  
8 attorneys; (3) the contingent nature of the case and the delay in payment to class counsel; (4) the extent  
9 to which the nature of the litigation precluded other employment by class counsel; (5) the experience,  
10 reputation, and ability of the attorneys who performed the services, the skill they displayed in the  
11 litigation, and the novelty, complexity and difficulty of the case; and (6) the informed consent of the  
12 clients to the fee agreement. *In re Cal. Indirect Purchaser*, No. 960886, 1998 WL 1031494, at \*3  
13 (Alameda Super. Ct. Oct. 22, 1998); *see also Serrano*, 20 Cal. 3d at 49; *Dunk v. Ford Motor Co.*, 48  
14 Cal. App. 4th 1794, 1810 n.21 (1996); *Glendora Cmty. Redevelopment Agency v. Demeter*, 155 Cal.  
15 App. 3d 465, 474 (1984). “However, no rigid formula applies and each factor should be considered  
16 only ‘where appropriate.’” *Natural Gas Anti-Trust Cases*, No. 4221, 2006 WL 5377849, at \*3 (San  
17 Diego Super. Ct. Dec. 11, 2006); *see also In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1046 (N.D.  
18 Cal. 2007) (“The Ninth Circuit has approved a number of factors which may be relevant to the district  
19 court’s determination: . . . (2) the risk of litigation; . . . and (5) awards made in similar cases.”); *In re*  
20 *Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 U.S. Dist. LEXIS 13555, at \*70-\*71 (C.D. Cal. June  
21 10, 2005) (reaction of the class is a factor to be considered). An analysis of the relevant factors  
22 supports the requested fee award.

23 **1. The Result Achieved**

24 Courts have consistently recognized that the result achieved is an important factor to be  
25 considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (“most critical  
26 factor is the degree of success obtained”); *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 630 (D.  
27 Colo. 1976) (“the amount of the recovery, and end result achieved are of primary importance, for these  
28 are the true benefit to the client”). In this case, a Settlement Fund of \$6,050,000 in cash has been



1 Decl., ¶5. As a result, Plaintiffs’ Counsel and their paraprofessionals spent over 3,800 hours  
2 prosecuting this Litigation with a resulting lodestar of \$2,194,357.75.<sup>9</sup>

3 An award of 30% of the Settlement Fund, or \$1,815,000, would yield a negative multiplier of  
4 approximately 0.82 to Plaintiffs’ Counsel’s lodestar, which puts the requested fee well below the range  
5 of lodestar multipliers awarded in other cases. Indeed, “[m]ultipliers can range from 2 to 4 or even  
6 higher.” *Wershba*, 91 Cal. App. 4th at 255; *see also Sternwest Corp. v. Ash*, 183 Cal. App. 3d 74, 76  
7 (1986) (remanding for a lodestar enhancement of “two, three, four or otherwise”).<sup>10</sup> Thus, a lodestar  
8 cross-check analysis of Plaintiffs’ Counsel’s requested fee confirms its reasonableness.

9 **3. The Contingent Nature of the Case, Risk of Loss, and the Delay in**  
10 **Payment to Plaintiffs’ Counsel**

11 Plaintiffs’ Counsel undertook this Litigation on a contingent-fee basis, assuming a significant  
12 risk that the Litigation would yield no recovery and leave them uncompensated. Unlike counsel for  
13 Defendants, who are paid an hourly rate and paid for their expenses on a regular basis, Plaintiffs’  
14 Counsel have not been compensated for any time or expense since this case began in September 2012.  
15 Courts have consistently recognized that the risk of receiving little or no recovery is a major factor in  
16 considering an award of attorneys’ fees. *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 54 (2d  
17 Cir. 2000) (the level of risk taken by plaintiff’s counsel is “perhaps the foremost’ factor” in considering

18 <sup>9</sup> *See* Declaration of John K. Grant Filed on Behalf of Robbins Geller Rudman & Dowd LLP in  
19 Support of Application for Award of Attorneys’ Fees and Expenses, Declaration of Francis A. Bottini,  
20 Jr. Filed on Behalf of Bottini & Bottini, Inc. in Support of Application for Award of Attorneys’ Fees  
21 and Expenses, Declaration of Ex Kano S. Sams II Filed on Behalf of Glancy Prongay & Murray LLP in  
22 Support of Application for Award of Attorneys’ Fees and Expenses, Declaration of Stephen J. Oddo  
23 Filed on Behalf of Robbins Arroyo LLP in Support of Application for Award of Attorneys’ Fees and  
24 Expenses, and Declaration of Corey D. Holzer Filed on Behalf of Holzer & Holzer, LLC in Support of  
Application for Award of Attorneys’ Fees and Expenses (“Plaintiffs’ Counsel’s Declarations”), filed  
herewith. The hourly rates of Plaintiffs’ Counsel are consistent with or lower than the rates of lawyers  
at Cooley LLP who represent Defendants in this Litigation. According to a National Law Journal study  
dated January 13, 2014, Cooley’s rates for partners ranged from \$660 per hour to \$990 per hour with an  
average rate of \$820 per hour. Hourly rates for associates ranged from \$160 per hour to \$630 per hour  
with an average rate of \$525 per hour. *See* Exhibit 1 attached hereto.

25 <sup>10</sup> *See also* Logan, Moshman & Moore, *Attorney Fee Awards in Common Fund Class Actions*, 24  
26 *Class Action Reports* 169 (2003) (average multiplier of the 64 cases sampled was 4.5); *Vizcaino v.*  
27 *Microsoft Corp.*, 290 F.3d 1043, 1052-54 (9th Cir. 2002) (The Ninth Circuit listed 34 common-fund  
28 cases that were decided between 1996 and 2001 in which the fees were awarded as a percentage of the  
common fund. In 24 of these cases, a lodestar-times-multiplier analysis was also used. The multipliers  
in these 24 cases were as high as 19.6, and the average multiplier was 3.32.).



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

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

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

16 *Id.* at 288.

17           Class Representatives faced significant risk concerning their ability to establish both liability  
18 and damages. While Class Representatives believe they could have proven their claims brought pursuant  
19 to §§11, 12(a)(2) and 15 of the Securities Act, success at trial was far from certain. Defendants have  
20 vigorously argued that Class Representatives cannot demonstrate the falsity of the challenged statements  
21 made in connection with the Company’s IPO in the Registration Statement. Defendants also argued that  
22 purchasers of Audience stock knew the information that Class Representatives alleged was omitted from  
23 the Registration Statement.

24           Moreover, even assuming that Class Representatives were able to demonstrate liability, there  
25 was no guarantee they would prevail on the issues of loss causation and damages. Under §11(e) of the  
26 Securities Act, a defendant can reduce or eliminate damage through a showing that the false or  
27 misleading statement or omission alleged was not the cause of class representatives’ loss. In this  
28 Litigation, Defendants would likely argue that Class Representatives’ loss was attributable not to any  
misrepresentation, but to the announcement of reduced revenue going forward. At summary judgment  
and trial, Defendants’ expert(s) would present testimony to support Defendants’ contention that all or

1 most of the losses sustained by the Class were due to factors completely unrelated to Defendants'  
2 conduct, thereby eliminating any potential recovery. There was, therefore, a substantial risk that the  
3 finder of fact could agree with Defendants' contention that no damages could be linked to the  
4 Defendants' conduct, or that damages were substantially less than the amount Class Representatives  
5 have asserted. *See In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985) ("it  
6 is virtually impossible to predict with any certainty which testimony would be credited, and ultimately,  
7 which damages would be found to have been caused by actionable, rather than the myriad  
8 nonactionable factors such as general market conditions"), *aff'd*, 798 F.2d 35 (2d Cir. 1986). In short,  
9 success was far from certain.

10 In light of these risks, a quick settlement was not likely. Indeed, from the beginning of the case,  
11 it was clear that Defendants were prepared to litigate to judgment and through trial and appeals. Thus,  
12 from day one, Plaintiffs' Counsel needed to commit the time and resources necessary to successfully  
13 take the case to trial. Thousands of hours of attorney and paraprofessional time and over \$96,000 in  
14 expenses have been incurred. The risk of non-payment was substantial. While Class Representatives  
15 and their counsel believe that the Class would prevail at trial, the complexity of this case made the  
16 outcome at trial extremely uncertain. The contingent nature of counsel's representation and the sizable  
17 financial risks borne by Plaintiffs' Counsel support the percentage fee requested. The risk of no  
18 recovery in complex cases of this type is very real. As the court in *Xcel Energy* recognized,  
19 "[p]recedent is replete with situations in which attorneys representing a class have devoted substantial  
20 resources in terms of time and advanced costs yet have lost the case despite their advocacy." *In re Xcel*  
21 *Energy, Inc.*, 364 F. Supp. 2d 980, 994 (D. Minn. 2005). Indeed, the Eleventh Circuit recently upheld a  
22 lower court's decision overturning a jury verdict because plaintiff did not present sufficient evidence to  
23 prove loss causation. *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012).<sup>11</sup>

24  
25 <sup>11</sup> *See, e.g., In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486 CW(EDL), 2007 WL 4788556 (N.D.  
26 Cal. Nov. 27, 2007) (defense verdict by jury); *Robbins v. Koger Props.*, 116 F.3d 1441, 1448-49 (11th  
27 Cir. 1997) (jury verdict of \$81 million for plaintiffs against an accounting firm reversed on appeal on  
28 loss causation grounds and judgment entered for defendant); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d  
1215, 1233 (10th Cir. 1996) (Tenth Circuit overturned securities fraud class action jury verdict for  
plaintiffs in case filed in 1973 and tried in 1988 on the basis of 1994 Supreme Court opinion); *In re*  
*Apple Computer Sec. Litig.*, No. C-84-20148(A)-JW, 1991 U.S. Dist. LEXIS 15608, at \*1-\*2 (N.D. Cal.

1                                   **4.       Awards Made in Similar Cases**

2           As set forth above, Plaintiffs' Counsel's fee request of 30% of the Settlement Fund falls within  
3 the range of reasonable attorneys' fee awards by California courts. *See* §II.B., *supra*. Indeed,  
4 “[e]mpirical studies show that, regardless whether the percentage method or the lodestar method is  
5 used, fee awards in class actions average around one-third of the recovery.” *Chavez v. Netflix, Inc.*,  
6 162 Cal. App. 4th 43, 66 n.11 (2008); *see also Lealao*, 82 Cal. App. 4th at 31 n.5 (“whatever method is  
7 used and no matter what billing records are submitted . . . , the result is an award that almost always  
8 hovers around 30[%] of the fund created by the settlement”).

9           The findings of the *Lealao* and *Chavez* courts also hold true for securities class actions. For  
10 example, a 1996 study conducted by the economic consulting firm National Economic Research  
11 Associates, Inc. (“NERA”), using data from 433 shareholder class actions, found that: “[r]egardless of  
12 case size, fees average approximately 32 percent of the settlement.” Denise N. Martin, Vinita M.  
13 Juneja, Todd S. Foster & Frederick C. Dunbar, *Recent Trends IV: What Explains Filings and*  
14 *Settlements in Shareholder Class Actions?* at 12-13 (NERA Nov. 1996). Likewise, a more recent study  
15 by NERA found that the median award of attorneys' fees as a percentage of the settlement amount for  
16 shareholder class actions that settled between \$5 million and \$10 million from 2011-2015 was 30%.  
17 Svetlana Starykh & Stefen Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-*  
18 *Year Review*, at 36 (NERA Jan. 25, 2016). The fee requested is, therefore, consistent with the fees  
19 awarded in other shareholder class actions.

20           The fee requested is also consistent with the practice in the private marketplace where  
21 contingent fee agreements typically range between 30% and 40%. *See Kirchoff v. Flynn*, 786 F.2d 320,  
22 323 (7th Cir. 1986) (observing that “40% is the customary fee in tort litigation”). In their concurring  
23 opinion in *Blum v. Stenson*, 465 U.S. 886 (1984), Justices Brennan and Marshall observed favorably  
24 that: “In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In  
25 those cases, therefore, the fee is directly proportional to the recovery.” 465 U.S. at 903\*.

26  
27 Sept. 6, 1991) (verdict against two individual defendants, but court vacated judgment on motion for  
28 judgment notwithstanding the verdict).

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

The skill, experience, reputation, quality, and ability of the attorneys who prosecuted this case also support the requested fee award. Robbins Geller Rudman & Dowd LLP, Holzer & Holzer, LLC, Glancy Prongay & Murray LLP, Bottini & Bottini, Inc. and Robbins Arroyo LLP have each earned a national reputation for excellence through many years of litigating complex civil actions. As set forth in the firm résumés filed concurrently herewith, Plaintiffs’ Counsel’s experience, resources, and high-quality attorneys have allowed them to obtain significant recoveries throughout the country on behalf of their clients.<sup>12</sup>

Here, Plaintiffs’ Counsel’s experience and resources allowed them to properly and efficiently investigate this Litigation, identify the complex issues involved, and to formulate strategies to prosecute it effectively. Plaintiffs’ Counsel’s experience also enabled them to assess whether a larger settlement could be recovered, and to see that, in light of the circumstances of the case, the Settlement represents an excellent recovery for the Class. In short, the successful prosecution of this Litigation required the participation of highly skilled and specialized attorneys. *See, e.g., J. N. Futia Co. v. Phelps Dodge Indus.*, No. 78 Civ. 4547, 1982 U.S. Dist. LEXIS 15261 (S.D.N.Y. Sept. 17, 1982).

The quality of opposing counsel is also important in evaluating the quality of the work done by Plaintiffs’ Counsel. *See, e.g., In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977). Plaintiffs’ Counsel were opposed in this Litigation by highly experienced and skilled counsel from Cooley LLP, a large law firm with a well-deserved reputation for vigorous advocacy on behalf of its clients. Cooley challenged virtually every aspect of the case. As a result, this factor weighs in favor of the requested fee.

**6. The Reaction of the Class**

While the date for objecting to counsel’s fee and expenses has not passed, to date, Plaintiffs’ Counsel are not aware of a single Class Member who has objected to the fee and expense request or any other aspect of the Settlement or Plan of Allocation. “The absence of objections or disapproval by class

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<sup>12</sup> See résumés attached to the Plaintiffs’ Counsel’s Declarations.

1 members to Class Counsel's fee request further supports finding the fee request reasonable." *Heritage*  
2 *Bond*, 2005 U.S. Dist. LEXIS 13555, at \*71.

3 **III. PLAINTIFFS' COUNSEL'S LITIGATION EXPENSES ARE REASONABLE**  
4 **AND SHOULD BE APPROVED**

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

12 Here, Plaintiffs' Counsel are seeking payment of costs and expenses in an aggregate amount of  
13 \$96,181.79. As itemized in Plaintiffs' Counsel's Declarations, counsel's expenses include:  
14 (1) telephone, photocopying, and facsimile charges; (2) overnight delivery and messenger services;  
15 (3) legal filing, process server, and court reporter fees; (4) on-line legal, financial, and factual research;  
16 (5) transportation, meals, and hotels; (6) consultant, investigator, and expert fees; and (7) mediation  
17 fees.

18 In *Brown v. Pro Football*, 839 F. Supp. 905 (D.D.C. 1993), the court addressed whether  
19 plaintiffs who create a common fund are entitled to reimbursement of expenses. Relying on *Missouri v.*  
20 *Jenkins*, 491 U.S. 274, 285 (1989), the court held that counsel's expenses are appropriately  
21 compensable:

22 Plaintiffs' out-of-pocket costs for telephone, telecopier, air and local couriers,  
23 postage, photocopying, Westlaw research, secretarial overtime, and counsels' travel  
expenses are routinely billed to fee-paying clients, and thus are all compensable as part  
of a reasonable attorney's fee.

24 *Brown*, 839 F. Supp. at 916.<sup>13</sup>

25 \_\_\_\_\_  
26 <sup>13</sup> *See also In re Am. Bus. Fin. Servs. Noteholders Litig.*, No. 05-232, 2008 U.S. Dist. LEXIS 95437, at  
27 \*53-\*54 (E.D. Pa. Nov. 21, 2008) (approving expenses for "delivery and freight, class notice costs,  
28 duplication costs, online legal research, travel, meals, experts, telephone, fax services, transcripts,  
postage, messenger, mediator, filing and court fees, service fees, transportation and press releases"  
based on declarations of counsel).

1 The expenses for which Plaintiffs' Counsel seek payment are those which are normally charged  
2 to paying clients, over and above hourly fees. Further, the expenses which have been incurred and for  
3 which payment is sought were necessary for the successful prosecution of the Litigation, are reasonable  
4 in amount, and thus should be paid to the extent requested.

5 **IV. AN AWARD OF \$2,500 TO EACH CLASS REPRESENTATIVE IS**  
6 **REASONABLE**

7 Plaintiffs' Counsel seek service awards for Class Representatives, Brent T. Robinson and  
8 Dorothy Kasian, in the amount of \$2,500 each for their time and service in representing the Class. Such  
9 awards are reasonable and merited in this case. The service and time devoted to the Litigation by each  
10 Class Representative are set forth in their respective declarations. Class Representatives performed a  
11 public service through their willingness to step forward and represent the Class. Courts routinely grant  
12 awards to plaintiffs who, through their efforts, brought a case and pursued it to a successful conclusion  
13 for the benefit of a class of people. Approval of these awards is warranted as a matter of public policy  
14 and appropriate under applicable precedents. *Advanced Micro Devices*, slip op. at 5 (court awarded  
15 service award of \$10,000 to plaintiff) (Appendix, Ex. 2); *Williams, Inc. v. Kaiser Sand & Gravel Co.*,  
16 No. C91 4028 MHP, 1995 U.S. Dist. LEXIS 14262, at \*6-\*7 (N.D. Cal. Sept. 19, 1995) (granting  
17 \$10,000 incentive award to single plaintiff).

18 **V. CONCLUSION**

19 For the reasons set forth herein, Plaintiffs' Counsel respectfully submit that the request for an  
20 award of attorneys' fees and expenses as well as the payment of service awards to Class Representatives  
21 are fair, reasonable, and appropriate under all the circumstances of this case and therefore should be  
22 granted.

23 DATED: March 16, 2016

Respectfully submitted,

24 ROBBINS GELLER RUDMAN  
25 & DOWD LLP  
26 JOHN K. GRANT

27 s/ John K. Grant  
JOHN K. GRANT

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Additional Counsel for Plaintiffs



# **EXHIBIT 1**

# Billing Rates Across the Country

The National Law Journal's annual survey of law firm billing rates for partners and associates.

January 13, 2014 | 0 Comments

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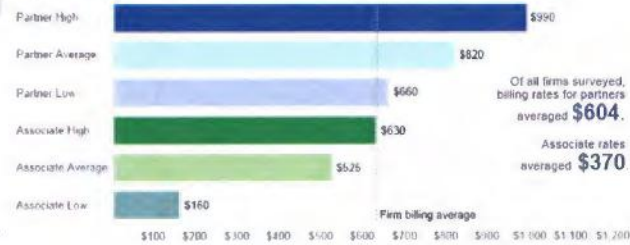
REPRINTS

## NLJ'S BILLING SURVEY

- Select a Firm
- Adams and Reese
  - Akerman Senterfit
  - Akin Gump
  - Allen Matkins
  - Alston & Bird
  - Andrews Kurth
  - Archer & Greiner
  - Arent Fox
  - Arnall Golden
  - Arnold & Porter
  - Arnstein & Lehr
  - Baker & Hostetler
  - Baker McKenzie
  - Baker Donelson
  - Ballard Spahr
  - Barnes & Thornburg

### Cooley

Largest U.S. Office: Palo Alto, Calif., 632 total full-time equivalent attorneys



### By the Numbers: The Firms Report Their Billing Rates

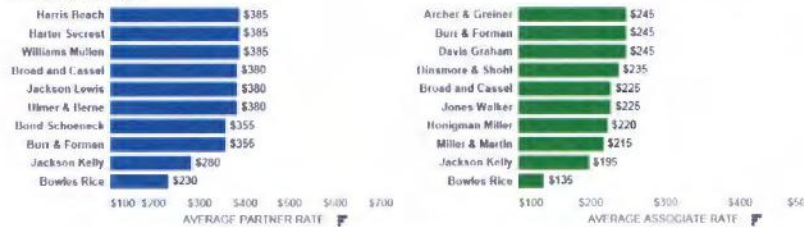
Firm	Largest U.S. Office	Total FTE Attorneys	Partner High	Partner Average	Partner Low	Associate High	Associate Average	Associate Low
Hogan Lovell	Washington							
Kasowitz Benson	New York							
Kirkland & Ellis	Chicago							
<b>Cooley</b>	<b>Palo Alto, Calif.</b>	<b>632</b>	<b>\$990</b>	<b>\$820</b>	<b>\$660</b>	<b>\$630</b>	<b>\$525</b>	<b>\$160</b>
Arnold & Porter	Washington							
Paul Hastings	New York							
Curtis, Mallet Prevost	New York							
Winston & Strawn	Chicago							
Bingham McCutchen	Boston							
Akin Gump	Washington							
Covington & Burling	Washington							
King & Spalding	Atlanta							
Norton Rose	N/A**							
DLA Piper	New York							

Full-time equivalent attorney numbers and the largest U.S. office are from the NLJ 350 published in April 2013. N/A\*\* Data not available due to merger in 2013.

### Billing at the Top of the Market ...



### ... And the Bottom



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Methodology/Sources: These data were compiled by ALM Legal Intelligence, the research arm of the NLJ's parent, ALM Media LLC. We asked respondents to the NLJ's annual survey of the nation's largest law firms (the "NLJ 350") to provide a range of hourly billing rates for partners and associates. For firms that did not supply data to us, in many cases we were able to supplement billing rate data derived from public records. In total, we have rates for 159 of the nation's 350 largest firms. Rates data include averages, highs and low rates for partners and associates. Information also includes the average full-time equivalent (FTE) attorneys at the firm and the city of the firm's principal or largest office.

Mar 16, 2016 5:00 PM

David H. Yamasaki

Chief Executive Officer/Clerk

Superior Court of CA, County of Santa Clara

Case #1-12-CV-232227 Filing #G-81921

By J. Cao-Nguyen, Deputy

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**THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA CLARA**

BRENT T. ROBINSON, BOYD DEEL, DOROTHY KASIAN, DAREN NOWAK, individually and on behalf of all others similarly situated,  
Plaintiff,

Plaintiff,

vs.

AUDIENCE, INC., PETER B. SANTOS, MOHAN S. GYANI, KEVIN S. PALATNIK, FOREST BASKETT, MARVIN D. BURKETT, BARRY L. COX, RICH GERUSON, GEORGE A. PAVLOV, J.P. MORGAN SECURITIES LLC, CREDIT SUISSE SECURITIES (USA) LLC, DEUTSCHE BANK SECURITIES INC., PACIFIC CREST SECURITIES LLC, and DOES 1 through 25, inclusive, Defendants.

Defendant.

AND RELATED ACTIONS

Robinson, et al. v. Audience, Inc., et al.

Lead Case No.1-12-CV-232227

Hon. Peter Kirwan

**PROOF OF SERVICE  
Electronic Proof of Service**

I am employed in the County of Alameda, State of California.

I am over the age of 18 and not a party to the within action; my business address is 2915 McClure Street, Oakland, CA 94609.

The documents described on page 2 of this Electronic Proof of Service were submitted via the worldwide web on Wed. March 16, 2016 at 4:46 PM PDT and served by electronic mail notification.

I have reviewed the Court's Order Concerning Electronic Filing and Service of Pleading Documents and am readily familiar with the contents of said Order. Under the terms of said Order, I certify the above-described document's electronic service in the following manner:

The document was electronically filed on the Court's website, <http://www.scefiling.org>, on Wed. March 16, 2016 at 4:46 PM PDT

Upon approval of the document by the Court, an electronic mail message was transmitted to all parties on the electronic service list maintained for this case. The message identified the document and provided instructions for accessing the document on the worldwide web.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 16, 2016 at Oakland, California.

Dated: March 16, 2016

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Andy Jamieson

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**THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA  
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**Electronic Proof of Service  
Page 2**

**Document(s) submitted by John K. Grant of Robbins Geller Rudman & Dowd LLP on Wed. March 16, 2016 at 4:46 PM  
PDT**

1. Memo:Ps & As/Suppt of Mtn: Fee Memorandum