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18 **UNITED STATES DISTRICT COURT**
19 **NORTHERN DISTRICT OF CALIFORNIA**
20 **SAN JOSE DIVISION**

21 MARTIN JOSEPH ABADILLA, et al.,

22 Plaintiff,

23 v.

24 PRECIGEN, INC., et al.,

25 Defendants.

Case No.: 5:20-cv-06936-BLF

Dept.: Courtroom 3, 5th Floor

Judge: Honorable Beth Labson Freeman

Date: October 19, 2023 at 9:00 AM

This Document Relates to:

ALL CONSOLIDATED ACTIONS

26 **PLAINTIFF’S AND PLAINTIFF’S COUNSEL’S COMBINED REPLY MEMORANDUM**
27 **OF LAW IN SUPPORT OF (A) MOTION FOR FINAL APPROVAL OF SETTLEMENT**
28 **PLAN OF ALLOCATION, AND (B) MOTION FOR AN AWARD OF ATTORNEYS’**
FEEES AND LITIGATION EXPENSES

1 face of above-average risk, and does not consider Ninth Circuit cases regarding fee awards in
2 comparably complex cases. Accordingly, that objection should also be rejected.

3 **ARGUMENT**

4 **I. THE REACTION OF THE CLASS FURTHER SUPPORTS APPROVING**
5 **THE SETTLEMENT AND THE FEE AND EXPENSE APPLICATION**

6 It is respectfully submitted that the opening papers in support of the Motions show why both
7 should be approved. That only two objections and two requests for exclusion have been submitted,
8 following a robust notice program that reached *over 70,000* potential Class members, strongly
9 confirms that the “reaction of the class” factor supports approval of both Motions.

10 **Reaction to the Settlement.** “[T]he favorable reaction of the overwhelming majority of
11 class members to the Settlement is perhaps the most significant factor” in determining the fairness
12 and adequacy of a settlement. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 119 (2d Cir.
13 2005) (citing 4 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS §13:58). Accordingly,
14 “the absence of a large number of objections to a proposed class action settlement raises a strong
15 presumption that the terms of a proposed class settlement action are favorable to the class
16 members.” *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008); *see also*,
17 *e.g., Destefano v. Zynga, Inc.*, No. 12-CV-04007-JSC, 2016 WL 537946, *13 (N.D. Cal. Feb. 11,
18 2016) (“a ‘court may appropriately infer that a class action settlement is fair, adequate, and
19 reasonable when few class members object to it”). Similarly, that only two requests for exclusion
20 were submitted in response to the mailing of over 70,000 Notice Packets also supports approving
21 the Settlement. *See, e.g., Zynga*, 2016 WL 537946, at *14 (“a low number of exclusions . . . also
22 supports the reasonableness of a securities class action settlement”); *In re Volkswagen “Clean*
23 *Diesel” Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 15-MD-02672-CRB, 2022 WL 17730381,
24 at *9, 11 (N.D. Cal. Nov. 9, 2022) (that only 27 class members opted-out and only three objected
25 supported approving settlement).

26 Moreover, it is significant that *no* institutional investors have objected to (let alone opted
27 out from) the Settlement. Institutional investors are typically the most sophisticated members of
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1 a securities class, and possess the incentive and ability to object if they believe a settlement lacks
 2 merit. Institutional investors here held in the range of 60%-70% of Precigen’s publicly traded
 3 common stock.² The absence of objections (and opt-out requests) by any institutional investors is
 4 thus particularly probative of the Settlement’s fairness and adequacy. *See, e.g., In re Wells Fargo*
 5 *& Co. S’holder Derivative Litig.*, 445 F. Supp. 3d 508, 518 (N.D. Cal. 2020) (class’s reaction
 6 supported settlement where “not one sophisticated institutional investor objected”); *Zynga, Inc.*,
 7 2016 WL 537946, at *14 (lack of exclusion requests from institutional investors also “strongly
 8 supports” final approval of settlement).³

9 **Reaction to the Fee Request.** The Class’s reaction should also be considered with respect
 10 to the Fee and Expense Application. The Notice disclosed that Plaintiff’s Counsel would be
 11 seeking a fee equal to 25% of the Settlement Fund. ECF Nos. 138, 138-3. In addition, counsel’s
 12 Fee and Expense Application (“Fee Brief”) (which was publicly posted on the Settlement
 13 Website), included both the briefs and supporting declarations that provided detailed information
 14 concerning Plaintiff’s Counsel’s lodestar and expenses, and the tasks performed by the various
 15 lawyers who worked on the case. *See* ECF Nos. 137-141. The Notice also stated that Plaintiff’s
 16 Counsel would seek litigation expenses of up to \$111,000 (although counsel are actually seeking
 17 reimbursement of only \$88,688.02 in expenses). *See* Fee Brief at *3. Finally, the Notice also
 18 advised the Class that Plaintiff would seek a relatively modest award of \$3,000 under 15 U.S.C.
 19 §78u-4(a)(4), for his time spent representing the Class.

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 21
 22 ² Publicly available data shows that over 200 institutional investors currently own roughly
 23 62% of PGEN shares, with roughly 10% held by insiders, and roughly 28% held by smaller
 24 investors. *See* PGEN Major Holders, available at [https://finance.yahoo.com/quote/PGEN/](https://finance.yahoo.com/quote/PGEN/holders/)
 25 holders/. Bloomberg data available by subscription indicates that institutional holdings of PGEN
 shares were generally even greater during the Class Period, before Precigen’s most recent post-
 2021 share price collapse.

26 ³ Similarly, that there was also only one objection from an individual investor to the Plan of
 27 Allocation supports approval of that Plan. *In re Payment Card Interchange Fee & Merch. Disc.*
 28 *Antitrust Litig.*, 986 F. Supp. 2d 207, 240 (E.D.N.Y. 2013) (conclusion that proposed allocation
 plan was fair and reasonable was “buttressed” by absence of objections from class members).

1 That only one objection was made to Plaintiff’s Counsel’s 25% fee request – and none
 2 were submitted as to the requested expenses or §78u-4(a)(4) award – also supports a finding that
 3 these requests are fair, reasonable and should be approved. *See, e.g., In re Volkswagen*, 2022 WL
 4 17730381, at *9, 11 (existence of only three objections supported approval of requested fees); *see*
 5 also, *e.g., In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) (absence of any
 6 objections by institutional investors, who had greatest incentive to object if they believe requested
 7 fees are excessive, further supported approval of requested fees).

8 In sum, the “reaction of the Class” factor – like the other relevant factors previously
 9 discussed in Plaintiff’s Counsel’s opening papers – strongly supports approval of the requested
 10 25% fee, the requested award of \$88,688.02 in litigation expenses, and Plaintiff’s request for a
 11 relatively modest PSLRA award of \$3,000.

12 **II. THE OBJECTIONS TO THE SETTLEMENT SHOULD BE OVERRULED**

13 There were only two objections to the Settlement. *See* Objection of Ronald Dean, ECF
 14 No. 142 (“Dean Objection”), and Objection of Lawrence B. Dvores, ECF No. 143 (“Dvores
 15 Objection”). Both of these objections should be overruled.

16 **A. Mr. Dean’s Objections to the Settlement Should Be Overruled⁴**

17 Mr. Dean writes, “This settlement is not being made for the little guy, or even the medium
 18 guy. All the money will go to the major players . . . the ones who should have already known
 19 better. . . . It is just not fair. It has all of the appearances of a set-up.” ECF No. 142 at 1.

20 First, to the extent this objection can be read as contending that the Settlement is collusive,
 21 such a charge is utterly without foundation. For example, as discussed in Plaintiff’s Approval
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23 ⁴ As a threshold matter, Mr. Dean, a practicing California lawyer, failed to establish his
 24 standing to object because his objection (ECF No. 142) did not comply with the Preliminary
 25 Approval Order’s requirements, also set forth in the Notice, that objectors state the date(s),
 26 price(s), and number of Precigen shares they purchased and sold during the Class Period;
 27 Preliminary Approval Order, ECF No. 135, ¶26; Notice at Item 17 at 9. Although, the Court should
 28 arguably simply strike his objection (*see Miller v. Ghirardelli Choc. Co.*, No. 12-CV-04936-LB,
 2015 WL 758094, at *10 (N.D. Cal. Feb. 20, 2015) (striking objections because objectors did not
 prove standing as class members); *Feder v. Elec. Data Sys. Corp.*, 248 Fed. Appx. 579, 581 (5th
 Cir. 2007) (same)), Plaintiff’s response will focus on the merits of the objections.

1 Memo, the Settlement is based on the parties' acceptance of a Mediator's Proposal made by a
2 highly experienced mediator (and retired federal judge), the Hon. Layn Phillips. Second, to the
3 extent Mr. Dean is alleging that the amount of the Settlement is inadequate, the objection should
4 be overruled because it is conclusory, lacks specificity, and otherwise failed to address any of the
5 specific factors relevant to assessing the adequacy of a settlement under well established Ninth
6 Circuit law. Indeed, as this Court has noted in another case, "[objector's] assertion that the
7 settlement should be ten times greater is devoid of supporting facts or legal citations. Accordingly,
8 it does not provide a basis for denying the motion for final approval." *Quiruz v. Specialty*
9 *Commodities, Inc.*, No. 17-cv-03300-BLF, 2020 WL 6562334, (N.D. Cal. Nov. 9, 2020) citing
10 *Young v. LG Chem Ltd.*, 783 F. App'x 727, 737 (9th Cir. 2019) (objection to class action settlement
11 unpersuasive where "devoid of analysis and legal citations"). *See also* §C below.

12 To the extent that Mr. Dean's assertion that "all the money will go to the major players" is
13 intended as an objection to the Plan of Allocation, it must also be overruled. As discussed in
14 Plaintiff's opening brief, the Plan of Allocation provides that each eligible claimant will receive
15 their *pro rata* share of the recovery based on damages that they suffered attributable to the alleged
16 fraud. ECF No. 136 at 18. In other words, no member or subset of the Class will receive any
17 special treatment. That larger investors with larger "Recognized Losses" will receive more is not
18 "unfair," but simply reflects the equitable principle that class members, as is customary in such
19 cases, should be paid on a *pro rata* basis. Mr. Dean's objection to the Plan should also be
20 overruled.

21 Mr. Dean's "procedural" objections should also be rejected. First, he complains that he
22 did not receive the Notice until September 16, 2023. However, consistent with the Court's
23 Preliminary Approval Order (ECF No. 135, ¶15), A.B. Data mailed the Notices to (*inter alia*)
24 "Nominee" holders (such as brokers) within 21 days, *i.e.*, on July 28, 2023. Walter Decl., ¶3. A.B.
25 Data's mailings to such "Nominees" included a cover letter that advised them that, within seven
26 (7) days of receipt, the Nominee was required to either (a) forward copies of the Notice Packet to
27 beneficial owners, or (b) provide A.B. Data with beneficial owners' contact details so that A.B.

1 Data could accomplish such mailings. *Id.*, ¶6. Because A.B. Data did not receive Mr. Dean’s
2 name and address from a broker, it is virtually certain that Mr. Dean’s broker assumed
3 responsibility for mailing his Notice (Supp. Walter Decl., ¶10) – and that Mr. Dean’s complaint
4 about not receiving his Notice until September 16 lies with his broker (and not with A.B. Data or
5 Plaintiff’s Counsel). In any event, the Court-approved Notice Plan built in time for such delays,
6 such that Mr. Dean was not prejudiced by his broker’s delay, as Mr. Dean still received the Notice
7 by September 16, and was able to timely submit his objection prior to the September 26, 2023
8 deadline.

9 Finally, Mr. Dean objects to the Court-approved requirements that require him and other
10 class members to “dig up” the records of his Precigen transactions in order to submit them as part
11 of a valid proof of claim. However, submitting adequate transaction documentation to the Claims
12 Administrator is obviously necessary to ensure that settlement proceeds go only to eligible Class
13 Members and to enable the Claims Administrator to weed out inaccurate – or fraudulent – claims.
14 Nor does Mr. Dean identify any aspect of the settlement’s documentation requirements that are
15 not entirely customary and standard in securities class actions.

16 **B. Mr. Dvores’ Procedural Objections Should Be Overruled**

17 Mr. Dvores, a retired New Jersey lawyer, raises a different procedural objection, namely
18 that the Notice was “defective” since it did not give Class members “important information” about
19 an SEC proceeding that resulted in a consent decree issued against Precigen under which Precigen
20 agreed to pay a \$2.5 million fine. ECF No. 143, at 3-4. Mr. Dvores further argues, without
21 authority, that the notice was defective for failing to “summarize all material factors which
22 shareholders should consider in deciding whether to approve or reject the settlement.” *Id.* at 4.

23 However, “summarizing all material factors” is *not* the standard for evaluating the
24 adequacy of a notice in 23(b)(3) classes. Instead, the Ninth Circuit has made clear that Rule 23
25 simply requires that the notice contain “sufficient detail simply ‘to alert those with adverse
26 viewpoints to investigate and to come forward and be heard.’” *In re Online DVD-Rental Antitrust*
27 *Litig.*, 779 F.3d 934, 946 (9th Cir. 2015) (quoting *Lane v. Facebook, Inc.*, 696 F.3d 811, 826 (9th

1 Cir. 2012)); *see also Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 962 (9th Cir. 2009) (notice
2 contained “adequate information” when it did not exaggerate class representative support for the
3 settlement and described “the aggregate amount of the settlement fund and the plan for
4 allocation”). Here, the Notice easily meets the standards articulated in *Online DVD-Rental, Lane*,
5 and *Rodriguez* because it adequately describes the nature of the case and *summarizes* the main
6 claims and defenses at issue. *See* ECF No. 136, §IV. But no Notice could ever purport to
7 summarize *all* facts potentially relevant to a settlement (and still be concise enough to mail) –
8 which is precisely why the Notice here advised Class Members that if they wanted more detailed
9 information they could go to the Settlement Website. *See* Notice, Item 23 at 14, and “More
10 Information” at 2. On the Settlement Website, Dr. Dvoves (and every other Class Member) has
11 ready access to, *inter alia*, copies of Second Amended Complaint, all parties’ respective briefs on
12 Defendants’ Motion to Dismiss that complaint, the Court’s MTD Order, and Plaintiff’s
13 subsequently filed Third Amended Complaint – *all* of which discuss the SEC proceedings at
14 length. Moreover, the SEC proceedings (and the extent to which they did – and did not – support
15 Plaintiff’s claims is also expressly discussed in Plaintiff’s opening Final Approval Brief (*see* ECF
16 No. 136, §II.C.7), which was also posted to the Settlement Website promptly after it was filed on
17 September 18, 2023. *See* Supp. Walter Decl., ¶7). In sum, Mr. Dvoves provides no authority for
18 his view that the SEC action must be disclosed in the text of the Court-approved Notice itself, and
19 ignores the fact that all Class Members who were interested have had ready access, through the
20 Settlement Website, to ample information about the SEC proceedings.

21 **C. Dvoves’ Substantive Objections to the Settlement Should Be Overruled**

22 Like Mr. Dean, Mr. Dvoves also objects to the \$13 million Settlement as inadequate. ECF
23 No. 143, at 3. “Of course, every litigant hopes to recover the full amount of his losses, but the
24 very nature of a settlement is that the parties must compromise and accept less than a full recovery,
25 in exchange for no longer facing the risk of losing on the merits and losing any chance of
26 recovery.” *Free Range Content, Inc. v. Google, LLC*, No. 14-CV-02329-BLF, 2019 WL 1299504,
27 at *8 (N.D. Cal. Mar. 21, 2019). And here, like Mr. Dean, Mr. Dvoves simply ignores (a) the
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1 serious risks that Plaintiff would have obtained significantly less (or nothing) for the Class had he
2 risked a further motion to dismiss, completed formal discovery, and taken the case through trial,
3 and (b) all of the other multiple *Churchill* factors that weigh in favor of (if not heavily in favor of)
4 approval here. *See* Plaintiff’s Final Approval Brief (ECF No. 136, §I.C.2).

5 Mr. Dvoves’ objection does address “risk factors” in one specific, but narrow, context:
6 namely, he apparently believes that Plaintiff should have achieved a better result in light of the
7 SEC’s prior §16(b) enforcement action against Precigen. But Mr. Dvoves (a lawyer) fails to note
8 that the SEC’s §16(b) claims did not even allege fraud, nor does he explain why the SEC’s
9 willingness to settle its claims for \$2.5 million does anything other than reflect *highly favorably*
10 on the fairness, adequacy, and reasonableness of the *more than five times larger* settlement (\$13
11 million) that Plaintiff and his counsel obtained to settle vastly more difficult §10(b) claims.

12 Mr. Dvoves (like Mr. Dean) also ignores the objective data showing that the \$13 million
13 Settlement is also double the size of the median securities class action settlement (\$6.9 million) in
14 the Ninth Circuit between 2012 and 2021, and reflects a higher percentage of recovery than other
15 similarly sized securities class action settlements over the same period. And both objectors also
16 ignore that the Settlement is based on a “mediator’s proposal” by an experienced retired federal
17 judge. *See, e.g., In re Purdue Pharma, L.P.*, 635 B.R. 26, 62 (S.D.N.Y.) (referring to Judge Phillips
18 as “among the most experienced and respected mediators in the country”). In sum, Plaintiff and
19 his counsel respectfully submit that the \$13 million “bird in the hand” settlement is fair, reasonable,
20 and adequate, and Mr. Dvoves’ contrary objections should be rejected.

21 Finally, Mr. Dvoves objects to the Class Period set forth in the Settlement because it starts
22 too late to capture other allegedly misleading statements that pre-date May 10, 2017 – with the
23 result that the Settlement provides no recovery for Precigen shares purchased prior to the start of
24 Class Period. ECF No. 143, at 2-3. Mr. Dvoves, however, provides no legal authority for such an
25 objection, nor are Plaintiff’s Counsel aware of any. To the contrary – and leaving aside the
26 objector’s failure to specify any of the “other statements” that he believes were actionable – any
27 such objection must be overruled for the simple reason that the proposed Settlement does not
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1 release or otherwise impair any claims arising from any transactions that occurred prior to the start
2 of the Class Period. *See* Stipulation, ¶1.40. Indeed, since the commencement of this action, at no
3 point has Plaintiff – nor *any* other plaintiff or putative Class member (including those who filed
4 any of the other related actions against Precigen before the Court consolidated all such cases into
5 this consolidated action) – sought to represent a class that included those who purchased Precigen
6 shares before May 10, 2017. *See* the original, Amended, Second Amended, and Third Amended
7 Complaints filed in *Abadilla* case, 5:20-cv-06936-BLF, ECF No. 1, ¶1; ECF No. 71, ¶1; ECF No.
8 88, ¶1; and ECF No. 116, ¶1, respectively; *Seppen* Complaint, Case No. 5:20-cv-07422, ECF No.
9 1, ¶1; *Chen* Complaint, Case No. 5:20-cv-0758g, ECF No. 1, ¶1. *See also Critical Path, Inc. Secs.*
10 *Litig. v. Critical Path, Inc.*, C 1-00551, No. C 01-00551 WHA, 2002 WL 32627559, at *5 (N.D.
11 Cal. June 18, 2002) (options purchasers not unfairly excluded from the settlement class because
12 “[t]he consolidated complaint did not mention options [and] [t]here is no evidence that [objector]
13 or anyone else urged the inclusion of such claims in the complaint.”). Had Mr. Dvores wished to,
14 he was free to pursue his purported claims against Defendants for damages stemming from his pre-
15 Class Period purchases of Precigen shares. But his belated efforts to raise the issue now provides
16 no basis for rejecting the Settlement, or for preventing other Class Members from being able to
17 participate in its benefits.

18 **D. Mr. Dvores’ Objection to Plaintiff’s Counsel Request for a 25% Award**
19 **of Attorneys’ Fees Should Be Overruled**

20 The sole objection to Plaintiff’s Counsel’s request for a “benchmark” attorneys’ fee award
21 of 25% of the Settlement Fund is Mr. Dvores’ objection that the “overall results in this case, and
22 its potential if taken to a jury trial” do not warrant a 25% fee. ECF No. 143, at 4-5. In short, the
23 basis of Mr. Dvores’ objection to the requested attorneys’ fees is that the \$13 million settlement
24 amount is inadequate. As discussed above, however, the \$13 million recovery represents a
25 decidedly superior result in the face of significant litigation risk. Mr. Dvores also cites no case
26 law that suggests that a downward departure from the presumptively reasonable 25% “benchmark”
27 fee requested here would be warranted – especially given that *all* of the relevant fee award factors
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1 under Ninth Circuit law (as shown in Plaintiff’s Counsel’s opening Fee Memo) weigh in favor of
 2 – if not strongly in favor of – the requested 25% fee. Accordingly, the objection should be
 3 overruled.

4 **III. THE COURT HAS THE POWER TO REJECT THE REQUESTS FOR**
 5 **EXCLUSION AS INVALID**

6 As noted above, the requests for exclusion from two individuals out of 72,571 potential
 7 Settlement Class Members who received notice constitute a miniscule portion of the Settlement
 8 Class. Plaintiffs note that even these two requests for exclusion are invalid on their face, as they
 9 fail to comply with the requirements for validly “opting out” as set forth in the Preliminary
 10 Approval Order and the Notice. Specifically, neither request provided the required information
 11 regarding the dates of the investor’s Class Period transactions in Precigen common stock during
 12 the Class Period – nor any other documentation that would even establish that they are members
 13 of Class in the first place. Supp. Walter Decl., ¶8, Exs. A & B (attaching copies of the exclusion
 14 requests); *see also* Notice at Item 12 at (iii) and (iv) at 8; Preliminary Approval Order, ¶23
 15 (providing that “[t]he request for exclusion shall not be effective unless it provides the required
 16 information . . . or is otherwise accepted by the Court.”). Accordingly, the Court has full authority
 17 to reject the requests for exclusion as invalid. However, *provided* that no Defendant seeks to
 18 terminate the Settlement under the Parties Supplemental Agreement on grounds relating to these
 19 opt-out requests, Plaintiff has no objection to granting these opt-out requests.

20 **CONCLUSION**

21 For the foregoing reasons, and those set forth in their opening papers, Lead Plaintiff and
 22 his Counsel respectfully request that the Court (a) approve the proposed Settlement and Plan of
 23 Allocation and enter the Parties’ previously agreed form of [proposed] Order and Final Judgment;
 24 and (b) approve Plaintiff’s Counsel’s Fee and Expense Application in full.

25 DATED: October 5, 2023

Respectfully submitted

26 **SCOTT+SCOTT ATTORNEYS AT LAW LLP**

27 *s/ William C. Fredericks*
 28 William C. Fredericks (*pro hac vice*)

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2023, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

s/ William C. Fredericks

William C. Fredericks