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on behalf of himself and all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF PLACER

KEVIN HARRIS, individually and on behalf
of himself and all others similarly situated,

Plaintiff,

v.

MCKESSON MEDICAL-SURGICAL INC.,
a Delaware Corporation; and DOES 1-50,
inclusive,

Defendants.

Case No. S-CV-0044686

Assigned for All Purposes to:

Hon. Garen Horst

Dept.: 42

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR AWARD OF
ATTORNEYS' FEES, COSTS, AND
CLASS REPRESENTATIVE SERVICE
PAYMENT**

Date: June 27, 2024

Time: 8:30 a.m.

Complaint Filed: April 3, 2020

Trial Date: None Set

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1 **I. INTRODUCTION**

2 In connection with the \$925,000.00 Settlement secured by Plaintiff Kevin Harris
3 (“Plaintiff”) on behalf of the Class, Plaintiff respectfully requests the Court grant this Motion for
4 Award of Attorneys’ Fees and Costs and Class Representative Service Payment, granting an
5 award of one-third (approximately 33.33%) of the common fund totaling \$308,333.33 for
6 attorneys’ fees, and actual litigation costs in the amount of \$31,365.04. Further, Plaintiff requests
7 that this Court approve a Class Representative Service Payment in the amount of \$10,000.00 to
8 Plaintiff Kevin Harris for the time, effort, and risk he undertook in obtaining this settlement for
9 the Class and in consideration for the broad releases he is required to enter.

10 The requested fee falls well within the benchmark of 25% to 40% of a common fund and
11 is fair compensation for undertaking such complex, risky, and time-consuming litigation on a
12 contingent basis. In *Laffitte v. Robert Half International, Inc.*, 1 Cal. 5th 480 (August 11, 2016),
13 the California Supreme Court affirmed an award of attorneys’ fees equal to 1/3 of the common
14 fund, which correlated to the lodestar with a 2.13 multiplier. Here, Class Counsel’s lodestar is
15 currently \$326,135.00 and will only continue to increase. This amount is greater than the
16 requested fee award, and thus no lodestar multiplier is necessary, further supporting the
17 reasonableness of Class Counsel’s fee request. See e.g., *Wershba v. Apple Computer, Inc.*, 91 Cal.
18 App. 4th 224, 255 (2001) (“Multipliers can range from 2 to 4 or even higher.”)

19 This settlement was only achieved through the vigorous pursuit of Plaintiff’s claims by
20 Class Counsel. A detailed summary of the action is provided in paragraph five of the Declaration
21 of James Hawkins in Support of Preliminary Approval.

22 Since the attorneys’ fees requested are well within the range of reasonableness and the
23 results achieved for the Class Members are excellent, Plaintiff, by and through Class Counsel,
24 respectfully request that the Court award the requested fees of \$308,333.33 and approve payment
25 of Class Counsel’s actual litigation expenses in the amount of \$31,365.04 in accordance with the
26 preliminarily approved Settlement. In addition, Plaintiff respectfully requests the Court approve
27 the requested Class Representative Service Payment in the amount of \$10,000.00 to Plaintiff
28 Kevin Harris for his efforts in this case, and in exchange for a general release.

1 **II. THE ATTORNEYS' FEES REQUESTED ARE FAIR AND REASONABLE AND**
2 **SHOULD BE APPROVED**

3 In defining a reasonable fee, the Court should mimic the marketplace for cases involving a
4 significant contingent risk such as this one. Given the unique reliance of our legal system on
5 private litigants to enforce substantive provisions of law in class actions, attorneys providing
6 these substantial benefits should be paid an award equal to the amount negotiated in private
7 bargaining that takes place in the legal marketplace. *Deposit Guaranty Nat. Bank, Jackson, Miss.*
8 *v. Roper*, 445 U.S. 326, 338, reh'g. denied, 446 U.S. 947 (1980). “When a fee is set by a court
9 rather than by contract, the object is to set it at a level that will approximate what the market
10 would set. . . . The judge, in other words, is trying to mimic the market in legal services.” *Gaskill*
11 *v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998). The “percentage of the fund method more
12 accurately reflects the results achieved.” *Laffitte*, 1 Cal. 5th at 439; see also *Lealao v. Beneficial*
13 *California, Inc.*, 82 Cal.App.4th 19, 50 (2000) (“...in cases where the class recovery can be
14 monetized with a reasonable degree of certainty... a trial court should adjust the basic lodestar
15 through the application of a positive or negative multiplier where necessary to ensure that the fees
16 awarded is within the range of freely negotiated in the legal marketplace in comparable
17 litigation.”)

18 At the time this case was brought, the result was far from certain. Defendant’s numerous
19 defenses to the case created difficulties with proof and complex legal issues for Class Counsel to
20 overcome. While Class Counsel believes Plaintiff’s claims are meritorious, Defendant has denied
21 liability, disputed damages, and raised factual and legal arguments which could render the Class
22 Members’ claims worthless at either class certification or trial. Specifically, Defendant argued,
23 *inter alia*, that Court could significantly reduce the civil penalties specified under PAGA,
24 Plaintiff’s PAGA claim is unmanageable, a Court could rule that Plaintiff’s claims are not
25 certifiable or without merit in light of recent case law, Plaintiff would have difficulty certifying
26 his claims, Plaintiff’s derivative claims are meritless and Plaintiff would fail to meet the requisite
27 standards for such penalties, and Defendants complied with the law at all times and the claims
28 lacked factual basis. (Declaration of James R. Hawkins In Support of Final Approval (“Hawkins

Final Decl.”) ¶¶ 26-30).

The Settlement was possible only because Class Counsel was able to convince Defendant that Plaintiff could prevail regarding liability, overcome the arbitration agreements, obtain and maintain class certification for the Class through trial, and overcome difficulties in proof as to monetary relief. In successfully navigating these hurdles so as to convince Defendant to settle, Class Counsel displayed skills consistent with those that might be expected of attorneys of comparable experience. (Id. ¶ 43).

To represent the Class on a contingent fee basis, Class Counsel had to devote the necessary time and resources to this case. (Id. ¶¶ 45-52). In so doing, Class Counsel gave up the hourly work that a firm can rely on for the risky contingent fee work in this case. *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000).

III. THE AGREEMENT FOR THE PAYMENT OF FEES AND EXPENSES IS APPROPRIATE AND SHOULD BE ENFORCED

The United States Supreme Court has ruled that the parties to a class action may properly negotiate not only the settlement of the action itself, but also the payment of attorneys' fees. See *Evans v. Jeff D.*, 475 U.S. 717, 734-35, 738, n.30 (1980); In *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), the Supreme Court held that negotiated, agreed-upon attorneys' fee provisions are the ideal towards which the parties should strive: “A request for attorney’s fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee.” *Id.*

The United States Supreme Court has reemphasized this policy and further stressed that the trial court “has a responsibility to encourage agreement” on fees. *Blum v. Stenson*, 465 U.S. 886, 902 n.19 (1984). Here, as part of the Settlement, Defendant agreed not to oppose an award of one-third (1/3) of the Gross Settlement Amount for attorneys' fees. Such a fee is commensurate with what the market would provide for similar services and the Court therefore can most certainly enforce the agreement. As the United States Supreme Court has instructed:

Given the unique reliance of our legal system on private litigants to enforce substantive provisions of law through class and derivative actions, attorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the

1 legal marketplace, as it will otherwise be economic for Defendant to increase
2 injurious behavior.

3 *Deposit Guaranty Nat. Bank, supra*, 445 U.S. at 338.

4 Here, the Settlement is the result of non-collusive, informed, and arm's-length
5 negotiations between experienced counsel for the Class and Defendant with the assistance of
6 Steven Serratore, an experienced wage and hour mediator, over two full day mediation sessions.
7 The case was settled at the second mediation on March 23, 2021. (Hawkins final Decl. ¶ 23).
8 Such bargaining is the best measure of the market for fees. The requested fee and cost award was
9 negotiated during adversarial bargaining at arms' length by counsel for each of the parties, after
10 the substantive terms of the Settlement had been negotiated, and fairly reflects the marketplace
11 value of the services of Class Counsel. As a result, the fee agreed to by the parties should be
12 approved.

13 **IV. CLASS COUNSEL'S FEE AWARD IS PROPERLY CALCULATED AS A
14 PERCENTAGE OF THE TOTAL VALUE CREATED FOR THE BENEFIT OF
15 THE CLASS**

16 Class Counsel seeks an attorney fee award for their successful prosecution and resolution
17 of this action, calculated as one-third (1/3) of the cash value of the common fund created by the
18 Settlement. In cases such as this one, the Courts have long recognized that an appropriate method
19 for determining the award of attorneys' fees is based on a percentage of the total value of benefits
20 afforded to class members by the settlement. *Laffitte*, 1 Cal. 5th at 494 ("the percentage method
21 has been generally approved in common fund cases"); *Boeing Co. v. Van Gemert*, 444 U.S. 472,
22 478 (1980); *Paul, Johnson, Alston & Hunt v. Gaulty*, 886 F.2d 268, 272 (9th Cir. 1989); *Vincent*
23 *v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). The awarding of a fee based on a
24 percentage of the common fund recovered is to "spread litigation costs proportionately among all
25 the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent*,
26 *supra*, 557 F.2d at 769. The Gross Settlement Amount is \$925,000.00. Accordingly, Class
Counsel requests \$308,333.33 in attorneys' fees as it is properly calculated as a percentage (33-
1/3%) of the common fund created for the benefit of the Class.

27 **V. In a Common Fund Case, the Supreme Court Approves an Award Based Upon the
28 Percentage of the Fund**

1 California courts have been expressly authorized to award attorneys' fees so as "to ensure
2 that the fee awarded is within the range of fees freely negotiated in the legal marketplace in
3 comparable litigation." *Lealao v. Beneficial Cal., Inc.*, *supra*, 82 Cal.App.4th at 50. As *Lealao*
4 explained, in a representative action, courts must consider the amount of attorney fees typically
5 negotiated in comparable litigation:

6 Given the unique reliance of our legal system on private litigants to enforce
7 substantive provisions of law through class and derivative actions, attorneys
8 providing the essential enforcement services must be provided incentives roughly
9 comparable to those negotiated in the private bargaining that takes place in the legal
10 marketplace, as it will otherwise be economic for Defendant to increase injurious
behavior. It has therefore been urged (most persistently by Judge Richard Posner)
that in defining a "reasonable fee" in such representative actions the law should
"mimic the market."

11 *Id.* at 47.

12 In this case, the fees are being paid from the common fund. Accordingly, the fee should be
13 awarded to mimic fees freely negotiated in the legal marketplace for comparable common fund
14 cases under *Lealao*. As *Lealao* acknowledged, in cases like this one, the percentage-of-the-benefit
15 approach should be considered because "it better approximates the workings of the marketplace
16 than the lodestar approach." *Id.*, 82 Cal.App.4th at 49; see also *Apple Computer, Inc. v. Superior*
17 *Court*, 126 Cal.App.4th 1253, 1270 (2005) (observing that "attorney fees awarded under the
18 common fund doctrine are based on a 'percentage-of-the-benefit' analysis").

19 In *Laffitte*, the California Supreme Court confirmed that the percentage of the fund
20 method is properly used in a common fund case:

21 We join the overwhelming majority of federal and state courts in holding that when
22 class action litigation establishes a monetary fund for the benefit of the class
23 members, and the trial court in its equitable powers awards class counsel a fee out
24 of that fund, the court may determine the amount of a reasonable fee by choosing
25 an appropriate percentage of the fund created. The recognized advantages of the
26 percentage method – including relative ease of calculation, alignment of incentives
between counsel and the class, a better approximation of market conditions in a
contingency case, and the encouragement it provides counsel to seek an early
settlement and avoid unnecessarily prolonging the litigation convince us the
percentage method is a valuable tool that should not be denied our trial courts.

27 *Laffitte*, 1 Cal. 5th at 503 (citations omitted). The Supreme Court in *Laffitte* went on to approve the
28 percentage method for the calculation of the fee award, and affirmed a fee award of one-third

(1/3) of the common fund. *Id.*, at 504. The Court in *Laffitte* indicated that the trial courts may utilize a “lodestar cross-check” to double check the reasonableness of the percentage fee award. *Id.* In *Laffitte*, the Supreme Court affirmed the propriety of a lodestar cross-check where the multiplier exceeded 2. Indeed, the Court explicitly held that the lodestar is a cross check that should not override the primary use of the percentage method:

[W]e emphasize the lodestar calculation, when used in this manner, does not override the trial court's primary determination of the fee as a percentage of the common fund and thus does not impose an absolute maximum or minimum on the potential fee award. A lodestar cross-check is simply a quantitative method for bringing a measure of the time spent by counsel into the trial court's reasonableness determination; as such, it is not likely to radically alter the incentives created by a court's use of the percentage method.

Id. at 505.

Because the Gross Settlement Amount is a pure common fund, and the percentage of the fund is the comparable marketplace for fee awards in common fund cases, *Laffitte* and *Lealao* support an award based upon the percentage of the common fund. Here, as noted above, one-third is within the reasonable range of comparable awards for common fund cases, which establishes the requested award as reasonable. Moreover, as discussed below, the use of the lodestar cross-check in this case further supports the reasonableness of the percentage fee award.

A. The Percentage Fee Award is Supported by a Lodestar Cross-Check

A summary of the rates and hours of Plaintiff’s counsel are provided in the Declarations of Class Counsel (Hawkins Final Decl., ¶¶ 45-50) The reasonableness of the requested attorneys’ fee of \$308,333.33 is established by reference to Class Counsel’s lodestar of \$326,125.00, which is greater than the requested fee award, and therefore no lodestar multiplier is necessary to justify this fee request. (Hawkins Final Decl. ¶ 52.) Fee awards are typically approved even when lodestar multipliers are required. See e.g., *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001) (“Multipliers can range from 2 to 4 or even higher.”); *Pellegrino v. Robert Half Internat., Inc.* (2010) 182 Cal.App.4th 278, at 293; *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051 and fn. 6 (approving 3.65 multiplier and collecting cases “finding a range of 0.6-19.6, with most (20 of 24, or 83%) from 1.0-4.0 and a bare majority (13 of 24, or 54%) in the 1.5-3.0 range”); *Amaral v. Cintas Corporation No. 2*, 163 Cal. App.4th 1157, 1174 (2008)

(approving lodestar with a 1.65 multiplier in a fee-shifting case); *see also* 4 Newberg on Class Actions § 14.7 (stating that courts typically approve 25% to 33.34% percentage awards with lodestar cross-checks of 1.9 to 5.1).

In a common fund settlement “[t]he lodestar method is merely a cross-check on the reasonableness of a percentage figure”. *Vizcaino, supra*, 290 F.3d at 1050, n.5. The lodestar cross-check in the present case strongly supports the reasonableness of the requested fee award as the lodestar is greater than the requested fee award.

B. Class Counsel’s Hourly Rates Are Reasonable

Reasonable hourly rates are determined by “prevailing market rates in the relevant community.” *Blum*, 465 U.S. at 895. Typically, the forum where the district court sits is recognized as the “relevant community.” *Shirrod v. Dir., OWCP*, 809 F.3d 1082, 1087 (9th Cir. 2015) (citing *Christensen v. Stevedoring Servs. of Am.*, 557 F.3d 1049, 1053 (9th Cir. 2009)). Thus, Plaintiff’s Counsel are entitled to the hourly rates charged by attorneys of comparable experience, reputation, and ability for similar litigation. *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984); *Ketchum v. Moses*, 24 Cal. 4th 1122, 1133 (2001). *See also Serrano v. Unruh*, 32 Cal. 3d 621, 640 n.31 (1982) (“The formula by which ‘reasonable market value’ is reached is variously phrased” as “comparable salaries earned by private attorneys with similar experience and expertise in equivalent litigation,” and the “hourly amount to which attorneys of like skill in the area would typically be entitled.”) (citations omitted). The reasonableness of Class Counsel’s rates is confirmed by comparing such rates with the rates of comparable counsel practicing complex and class litigation. *See LG Corp. v. Huang Xiaowen*, 2017 U.S. Dist. LEXIS 143409 (S.D. Cal. 2017) (finding a rate of \$850 to \$890 an hour for lead counsel reasonable); *see also San Diego Comic Convention v. Dan Farr Prods.*, 2018 U.S. Dist. LEXIS 110391 (S.D. Cal. 2018) (finding rates of \$795 and \$785 an hour reasonable).

Class Counsel’s 2024 rates are reasonable and consistent with attorneys of comparable experience and qualifications in their areas of practice. As demonstrated by their hundreds of successful wage and hour employment law actions, including in this particular area of law, James Hawkins, APLC is an experienced and highly-skilled law firm with expertise in representing

employees in California wage and hour class actions. (Hawkins Final Decl., ¶¶ 45-51). Their ability to secure a favorable Settlement for the class in this case despite the many challenges Plaintiff faced is a further testament to their expertise.

C. The Percentage Award is Supported by the Results Achieved, the Risks of Litigation, the Skill Required and the Quality of Work, The Contingent Nature of the Fee and the Financial Burden, and Awards in Similar Cases

What has now emerged in most fee award decisions is a recognition that fee determinations in both common fund and statutory fee situations are incapable of mathematical precision because of the intangible factors that must be resolved in the court's discretion based on the circumstances of each particular case. See, A. Conte, *Attorney Fee Awards*, 2nd Ed., 207, at 44. In determining an appropriate fee in a common fund case, a court must decide, based on the unique posture of each case, what percentage of the common fund would most reasonably compensate Class Counsel given the nature of the litigation and the performance of counsel. *Paul, Johnson, Alston & Hunt, supra*, 886 F.2d at 272 (the benchmark percentage fee may be adjusted to account for the circumstances involved in this case.) Courts apply a five-part test in reviewing a reasonable percentage fee in common fund cases: (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 Plaintiff; and (5) awards made in similar cases. *In re Omnivision Technologies, Inc.*, 2007 WL 4293467 at *9 (N.D. Cal. 2007). Here, each of these five factors strongly support an award of the percentage fee (1/3) requested in this case.

i. The Favorable Result Support Approval.

"The overall result and benefit to the class from the litigation is the most critical factor in granting a fee award." *Omnivision*, 2007 WL 4293467 at *9; See also *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13627, at *27-28 (C.D. Cal. June 10, 2005). Class Counsel obtained a very favorable result in this case for the Class Members despite facing numerous challenges that threatened all recovery. The Settlement provides monetary benefits to the Class Members that are comparable to or even exceed those recovered in similar wage and hour class actions. The Settlement is particularly advantageous to the Class because the proceeds will be distributed

1 shortly as opposed to waiting additional years for a similar, or possibly, less favorable result.

2 There is little question that the result achieved in this litigation is favorable. Plaintiff and
3 Class Counsel secured a common fund of \$925,000.000 on behalf of the Class. As a result, 258
4 Participating Class Members will receive a pro-rata share of the Net Settlement Fund (Hernandez
5 Decl. ¶ 14). The average estimated payment amongst all Class Members is \$1,976.42 and the
6 highest is \$3,585.27. (Id. ¶ 15). The amount obtained per participating Class Member on a gross
7 basis, \$3,585.27 per participating Class Members (\$925,000 / 258 participating Class Members)
8 compares very favorably to other class action settlements.¹

9 **ii. The Risks of Litigation and of Losing Were Significant**

10 “The risk that further litigation might result in Plaintiff not recovering at all, particularly a
11 case involving complicated legal issues, is a significant factor in the award of fees” *Omnivision*,
12 2007 WL 4293467 at *9. Defendant’s numerous defenses to the case created difficulties with
13 proof and complex legal issues for Class Counsel to overcome. Broadly, Defendant’s defenses
14 included, *inter alia*, that many Class Members signed individual arbitration agreements with
15 enforceable class action waivers, that this could Court significantly reduce the civil penalties
16 specified under PAGA, that Plaintiff’s PAGA claim is unmanageable, that Plaintiff would have
17 difficult certifying their meal period, minimum wage, overtime, and reimbursement claims, and
18 that Plaintiff’s derivative wage statement claims are meritless and Plaintiff would fail to meet the
19 requisite standards for such penalties. (Declaration of James R. Hawkins in Support of
20 Preliminary Approval (“Hawkins Prelim. Decl.”) ¶¶ 46-60). Many of the defenses asserted by
21 Defendant present serious threats to the claims of Plaintiff and the other Class Members.
22 (Hawkins Final Decl. ¶¶ 26-29, 43, 54).

23 **iii. The Skill Required and the Quality of Work**

24 Practice in the narrow areas of wage and hour and class action litigation requires skill,
25

26 ¹ See, *Salguero v. Deliv, Inc.*, Case No. 19STCV32534 (Los Angeles County Superior Court, 2021) (\$635,000.00
27 settlement for 3,021 class members with an average payment on a gross basis of \$210.20); *Sanderson v. A Bright*
28 *Future*, Case No. 34-2019-00252816-CU-OE-GDS (Sacramento County Superior Court, 2020) (\$105,000.00
settlement for 471 class members with an average payment on a gross basis of \$222.93); *Ortegon-Ramirez v. Cedar*
Fair, L.P., Case No. 1-13-CV-254098 (Santa Clara County Superior Court, 2015) (\$4,750,000.00 settlement for
31,425 class members with an average payment on a gross basis of \$151.15).

1 knowledge, and experience in two distinct subsets of the law. Expertise in one does not
2 necessarily translate into expertise in the other. Class Counsel must have expertise in both. The
3 issues presented in this case required more than just a general appreciation of wage and hour law
4 and class action procedure as this area of practice is still developing. This area of law is
5 potentially worsening for Plaintiff as evidenced by the dicta in *Estrada v. Royalty Carpet Mills,*
6 *Inc.*, 76, Cal.App.5th 685, 706 (2022), which suggests that on-premises rest periods are legal, an
7 argument that would kill one of Plaintiff's primary claims, in this case, for on-premises rest
8 periods alleged to be non-compliant.

9 The Settlement was possible only because Class Counsel was able to convince Defendant
10 that Plaintiff could potentially prevail on the difficult legal issues regarding liability, maintain
11 class certification, overcome difficulties in proof as to monetary relief and take the case to trial.
12 (Hawkins Final Decl. ¶¶ 26-29, 43, 54). In successfully navigating these hurdles Class Counsel
13 displayed the necessary dual skill set. The high quality of the work in this case was mandated by
14 the very vigorous and contentious defense presented by counsel for Defendant. Class Counsel was
15 required to invest substantial time and resources in investigation, mediation and settlement, and
16 preliminary and final approval. (Id. ¶¶ 41-54; Ex. 2, Ex. 7).

17 The contingent fee practice of Class Counsel does not accommodate the investment of
18 unnecessary time in a case. This case was litigated on a contingent basis with all of the
19 concomitant risk factors inherent in such an uncertain undertaking. Moreover, the favorable result
20 obtained by the settlement further supports the skill and quality of work.

21 **iv. The Contingent Nature of the Fee and the Financial Burden**

22 The attorney being paid by the hour can go to the bank with his fee, whereas the attorney
23 working on a contingent basis can only log hours while working without pay towards a result that
24 will hopefully entitle him to a marketplace contingent fee. *Powers v. Eichen*, 229 F.3d 1249,
25 1256-1257 (9th Cir. 2000). In this case, Class Counsel subjected themselves to this contingent fee
26 market risk in this all or nothing contingent fee case. The necessity and financial burden of private
27 enforcement makes the requested award appropriate. Counsel working on contingency, whether in
28 private matters or in class action litigation, are entitled to a premium in order to compensate for

1 both the risks and the delay in payment. See e.g., *Stanger v. China Elec. Motor, Inc.*, 812 F.3d
2 734 (9th Cir. 2016) (courts “must” apply a risk service); *Stetson v. Grissom*, 821 F.3d 1157, 1166
3 (9th Cir. 2016) (abuse of discretion not to apply risk multiplier). The simple fact is that despite the
4 most vigorous and competent of efforts, success is never guaranteed. *McKittrick v. Gardner*, 378
5 F.2d 872, 875 (4th Cir. 1967). Class Counsel has invested time and money into contingency cases
6 which ultimately generated no fee, which further emphasizes the need for contingent cases to
7 provide premium compensation when successful.

8 Here, the contingent nature of the fee award, both from the point of view of eventual
9 settlement and the point of view of establishing eligibility for an award, also warrant the
10 requested fee award. A number of difficult issues, the adverse resolution of any one of which
11 could have doomed the successful prosecution of the action, were present here.

12 Class Counsel were required to advance all costs in this litigation. In litigation such as this
13 where a corporate Defendant and their attorneys are well funded, this can prove to be very
14 expensive and risky. The risk of advancing costs in this type of litigation can be significant, and is
15 cost prohibitive to many attorneys. The financial burdens undertaken by Class Counsel in
16 prosecuting this action on behalf of the Class were substantial. Class Counsel has advanced
17 approximately \$31,365.04 in costs which could not have been recovered if this case had been
18 lost. (Hawkins Final Decl. ¶ 54, Ex. 7). Accordingly, the contingent nature of the fee and the
19 financial burdens on Class Counsel also support the fee requested.

20 **v. Awards in Similar Cases**

21 The attorneys’ fees requested by Class Counsel are within the range of fees awarded in
22 comparable cases. In similar class action cases, Courts have awarded fee requests in the range
23 from of as much as one-third of the amount obtained. See, *Ortegon-Ramirez v. Cedar Fair, L.P.*,
24 Case No. 1-13-CV-254098 (Santa Clara County Superior Court, 2015) (awarding attorneys’ fees
25 equal to one-third of \$4,750,000.00 class action and PAGA settlement. A review of class action
26 settlements over the past 10 years shows that the courts have historically awarded fees in the
27 range of 20% to 50%, depending upon the circumstances of the case. *In re Warner*
28 *Communications Sec. Lit*, 618 F.Supp. 735, 749-50 (S.D. N.Y. 1985). Class Counsels’ requested

1 fees are one-third (1/3) of the total value of the case, a percentage well within the range of
2 reasonableness given the excellent results obtained for the Class, the risks undertaken, and the
3 skill of the prosecution. See *Laffitte*, 1 Cal. 5th at 486, 506 (approving one-third (1/3) attorneys
4 fee award).

5 In *In re Warner Communications Sec. Lit.*, the Court concluded that percentage fees in
6 common fund cases range from 20% to 50%. *Id.*, 618 F.Supp. at 749-50. “Usually 50% of the
7 fund is the upper limit on a reasonable fee award from a common fund in order to assure that the
8 fees do not consume a disproportionate part of the recovery obtained for the class, although
9 somewhat larger percentages are not unprecedented.” Newberg on Class Actions, 3rd Ed., 14.03.
10 A fee award of one-third (1/3) of the common fund is therefore reasonable in light of the
11 prevailing fees that have been awarded in other cases.

12 **D. Class Counsel’s Costs Were Reasonably Incurred**

13 Under the common fund doctrine, the attorneys whose efforts helped to create the fund are
14 entitled to recover “the costs of . . . [the] litigation” from the fund, in addition to attorneys’ fees.
15 *Vincent v. Hughes Air W., Inc.*, 557 F.2d at 769 (9th Cir. 1977). “In common fund cases, counsel
16 is entitled to reimbursement of expenses that were adequately documented and reasonably and
17 appropriately incurred in the prosecution of the case.” *Chemi v. Champion Mortg.* No. 05-1238,
18 2009 WL 1470429 (D.N.J. May 26, 2009); see *In re Omnivision*, 559 F.Supp.2d at 1048-49
19 (awarding payment for reimbursement of expenses, plus interest from settlement fund; discussing
20 that attorneys may recover reasonable expenses that would typically be billed to paying clients in
21 non-contingency matters, including expenses for photocopying, printing, postage, messenger
22 services, legal research in electronic databases, experts and consultants, and travel costs).

23 Class Counsel requests reimbursement for actual expenses and costs in the amount of
24 \$31,365.04, which are detailed in the Declarations of Class Counsel in Support of Final Approval.
25 (Hawkins Final Decl. ¶ 54, Ex. 7).² These expenses primarily consist of fees for filing, mediation,
26 and court call, and were reasonably incurred in the prosecution of this matter. (*Id.*).

27 _____
28 ² Though this Court preliminarily approved costs up to \$20,000 in its January 2, 2024 order, Class Counsel respectfully requests an award of actual costs incurred in this litigation of \$31,365.04.

1 **E. The Class Representative Should Receive the Requested Service Payment**

2 Plaintiff Kevin Harris respectfully submits that for his service as the Class Representative,
3 he should be awarded a Class Representative Service Payment in the amount of \$10,000.00.

4 Defendant does not oppose this award and no Class Member has objected to this award.

5 The service award is intended to recognize the time, effort, and risk that Plaintiff
6 undertook in bringing this case and helping to secure the relief obtained for the members of the
7 Class. *See Bell v. Farmers Ins. Exchange*, 115 Cal.App.4th 715, 726 (2004) (upholding “service
8 payment” to named Plaintiff for their efforts in bringing the class case); *Rodriguez v. West*
9 *Publishing*, 563 F.3d 948, 959 (9th Cir. 2009) (stating that incentive awards are “intended to
10 compensate class representatives for work done on behalf of the class, to make up for financial or
11 reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness
12 to act as a private attorney general.”).

13 In addition, public policy considerations require the award of adequate service payments
14 reflective of the risks and efforts undertaken by class representatives. “Many courts have noted a
15 fourth rationale for incentive payments: that such payments do precisely what their name hopes
16 they will—incentivize class members to step forward on behalf of the class.” Newberg on Class
17 Actions § 17:3 (5th ed.) § 17:3.

18 Plaintiff has performed admirably as the Class Representative. Plaintiff provided valuable
19 information and documents from his employment which was instrumental in Class Counsel’s
20 understanding of the case and our ability to successfully litigate and mediate. Plaintiff was
21 involved in the settlement negotiations and provided invaluable assistance and information which
22 ultimately resulted in this Settlement. (Hawkins Final Decl. ¶ 32-40; Declarations of Kevin Harris
23 in Support of Preliminary Approval and in Support of Final Approval, generally). Plaintiff also
24 assumed the risks that they may be liable for costs incurred in this case, and that they may be
25 “blacklisted” by future employers for having brought this action.

26 A service payment made to a successful class representative is appropriate and the amount
27 of \$10,000.00 as service payment to Plaintiff is only approximately 1.1% of the Gross Settlement
28 Amount secured on behalf of the Class. Further, the service award is comparable to those awarded

1 in other class actions. *See e.g. Cellphone Termination Fee Cases*, 186 Cal.App.4th at 1381
2 (Cal.App. June 28, 2010) (affirming \$10,000 incentive awards to Plaintiffs in class action where
3 average recovery per class member was only \$81); *Nakagaki v. Proven Staffing Consultants LLC*,
4 San Diego County Superior Court, Case No. 37-2022-00026848-CU-OE-CTL (April 21, 2023)
5 (approving \$6,500 service award on \$81,000 settlement); *Carrillo v. SGS North America, Inc.*
6 LASC No. BC560240, Order Granting Final Approval, Dec. 20, 2016 (\$15,000 service payment
7 in a \$400,000 claims-made settlement for 52 employees); *Valladares v. The Sygma Network, Inc.*,
8 LASC No. BC406053, Order Granting Final Approval, Apr 6, 2010 (\$10,000 service payment in a
9 maximum \$1,195,000 claims-made settlement for 326 employees).

10 By bringing this case Plaintiff secured a total settlement of \$925,000.00 for 258 Class
11 Members. Plaintiff spent considerable time and effort, and undertook significant risks in bringing
12 this action. Accordingly, Class Counsel respectfully requests that the Court approve the requested
13 Class Representative Service Payment.

14 **VI. CONCLUSION**

15 The services provided by Class Counsel have been wholly contingent, and the requested
16 fee is reasonableness compared to fee requests approved by courts given the efforts expended in
17 this case and the stage of proceedings at the time of settlement. Class Counsel undertook great
18 risk on and achieved a favorable result for the benefit of Class Members. Based on the foregoing,
19 Class Counsel respectfully requests approval of the application for award of attorneys' fees of
20 \$308,333.33, reimbursement of actual litigations costs of \$31,365.04, totaling \$339,698.37, and
21 Class Representative Service Payment of \$10,000.00 to Plaintiff Kevin Harris.

22 Dated: June 3rd 2024

Respectfully Submitted

23 **JAMES HAWKINS, APLC**

24
25 By: 

26 James R. Hawkins
Christina M. Lucio
27 Mitchell J. Murray

28 Attorneys for Plaintiff