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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES – SPRING STREET COURTHOUSE

CHARLES YNIGUEZ, individually and
on behalf of all others similarly situated,

Plaintiff,

vs.

AIRGAS USA, LLC, a Delaware limited
liability corporation; AIRGAS
CARBONIC, INC., a Delaware
corporation; and DOES 1 through 20,
inclusive

Defendants .

CASE NO. 20STCV18190

[Assigned to Judge Elihu M. Berle, Dept. 6]

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR
ATTORNEYS' FEES, COSTS, AND
INCENTIVE AWARD**

Date: January 23, 2023

Time: 9:00 a.m.

Dept.: 6

Complaint Filed: May 8, 2020

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1 **I. INTRODUCTION**

2 In connection with the Gross Settlement Amount (which after application of the escalator
3 provision) of approximately \$564,338.24 secured by Plaintiff Charles Yniguez (“Plaintiff”) and
4 Class Counsel, on behalf of the Class, Plaintiff respectfully requests the Court grant Plaintiff’s
5 Motion for Award of Attorneys’ Fees and Costs and Class Representative Incentive Award by
6 approving this application for an award of one-third of the common fund or \$188,112.75 (1/3 of
7 the Gross Settlement Amount) for attorneys’ fees and \$24,035.10 for reimbursement of costs
8 (preliminarily approved not to exceed \$27,000). Further, Plaintiff respectfully requests that this
9 Court award a \$7,500 incentive award to Plaintiff for his role in obtaining this Settlement for the
10 Class and in consideration for the general release he is required to enter.

11 The requested fee falls well within the benchmark of 25% to 40% of a common fund and is
12 fair compensation for undertaking such complex, risky, and time-consuming litigation on a
13 contingent basis. In a similar wage and hour class action, *Laffitte v. Robert Half International, Inc.*,
14 1 Cal. 5th 480 (2016), the California Supreme Court affirmed an award of attorneys’ fees equal to
15 1/3 of the common fund, which correlated to the lodestar with a 2 multiplier. Here, Class Counsel’s
16 lodestar is in excess of the requested fee award (approximately \$188,112.75) and little to no positive
17 multiplier will be required in connection with this Settlement to reach the requested award.
18 Plaintiffs’ counsel has expended significant resources, costs and time in litigating this action over
19 the last two and one-half years. Therefore, Plaintiff respectfully submits that the requested fee
20 award is well within the range approved in *Laffitte* and is therefore undoubtedly reasonable.

21 Since the attorneys’ fees requested are well within the range of reasonableness and Counsel
22 obtained significant positive results for the Class Members, Plaintiff, by and through Class Counsel,
23 respectfully requests that the Court award the requested fees equal to one-third (1/3) of the
24 \$564,338.24 common fund and approve payment of Class Counsel’s attorney fees in the amount of
25 \$188,112.75 and litigation costs in the amount of \$24,035.10 in accordance with the preliminarily
26 approved Settlement Agreement. In addition, Plaintiff respectfully requests the Court award the
27 requested \$7,500 incentive award to him as appointed Class Representative for his efforts and
28 service to the Class.

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

17 At the time this case was brought, the result was far from certain. Defendant asserted
18 numerous defenses to the case that created difficulties with proof and complex legal issues for Class
19 Counsel to overcome. For example, Defendant contended that they maintained compliant policies,
20 paid at least minimum wages for all hours worked, paid all overtime wages as legally required,
21 provided timely meal breaks and rest breaks, timely paid wages, and provided compliant wage
22 statements and maintained accurate records, or that any alleged violations, to the extent Plaintiff
23 could prove any, are due solely to individual preference. (See Ex. 3, Declaration of James R.
24 Hawkins in Support of Motion for Preliminary Approval (“Hawkins Prelim. Decl.”) ¶ 20, 27, 29-
25 38.)

26 There was also a significant risk that, if the litigation was not settled, Plaintiff would be
27 unable to certify the action as a class action and maintain class certification through trial and thereby
28 not recover on behalf of any employees other than themselves. Throughout the action, Defendant

1 challenged whether Plaintiff can prove commonality or whether a class action trial was manageable
2 under the standards set forth in *Duran v. U.S. Bank Nat'l Assn.* 59 Cal. 4th 1 (2014). With such
3 precedent in mind, Defendant alleged any claims involved highly individualized inquiries which
4 were not appropriate or ripe for class certification. As a result, there was considerable risk that
5 Plaintiff would not prevail on a motion for certification or that Defendant would prevail on its
6 defenses, thus, defeating any and all recovery to the Class. Even if Plaintiff were to obtain class
7 certification, liability was by no means a foregone conclusion. (Declaration of James R. Hawkins
8 In Support of Final Approval and Fees and Costs Motion ("Hawkins Final Approval Decl."), filed
9 concurrently herewith, ¶¶ 28-29.)

10 The Settlement was possible only because Class Counsel was able to convince Defendant
11 that Class Counsel could potentially prevail on the difficult legal issues regarding liability and
12 obtain and maintain class certification for the Class through trial and overcome difficulties in proof
13 as to monetary relief. In successfully navigating these hurdles so as to convince Defendant to settle,
14 Class Counsel displayed significant skill. (Hawkins Final Approval Decl., ¶ 45.)

15 To represent the Class on a contingent fee basis, Class Counsel had to devote the necessary
16 time and resources to this contingent case. (Hawkins Final Approval Decl. ¶ 47.) In so doing, Class
17 Counsel gave up the hourly work that a firm can bank on for the risky contingent fee work in this
18 case which could have paid Class Counsel nothing. *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th
19 Cir. 2000).

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

22 The United States Supreme Court has ruled that the parties to a class action properly may
23 negotiate not only the settlement of the action itself, but also the payment of attorneys' fees. See
24 *Evans v. Jeff D.*, 475 U.S. 717, 734-35, 738, n.30 (1980). In *Hensley v. Eckerhart*, 461 U.S. 424,
25 437 (1983), the Supreme Court held that negotiated, agreed-upon attorneys' fee provisions are the
26 ideal towards which the parties should strive: "A request for attorney's fees should not result in a
27 second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Id.*
28

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

7
8 Given the unique reliance of our legal system on private litigants to enforce
9 substantive provisions of law through class and derivative actions, attorneys
10 providing the essential enforcement services must be provided incentives
11 roughly comparable to those negotiated in the private bargaining that takes
place in the legal marketplace, as it will otherwise be economic for
Defendants to increase injurious behavior.

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

13 Here, the Settlement is the result of months of continuing discussions after a full-day of
14 non-collusive, informed, and arm’s-length negotiations between experienced counsel for the Class
15 and Defendant with the assistance of Michael Dickstein, an experienced mediator who has
16 substantial experience mediating putative wage and hour class and PAGA actions. (Hawkins
17 Prelim. Approval Decl., ¶ 44.) The requested fee and cost award was negotiated during adversarial
18 bargaining by counsel for each of the parties, after the substantive terms of the Settlement had been
19 negotiated. Such arm’s length bargaining fairly reflects the marketplace value of the services
20 rendered by Class Counsel in this case. As a result, the fee agreed to by the parties should be
21 approved.

22 **IV. CLASS COUNSEL'S FEE AWARD IS PROPERLY CALCULATED AS A**
23 **PERCENTAGE OF THE TOTAL VALUE CREATED FOR THE BENEFIT**
24 **OF THE CLASS.**

25 Class Counsel seeks an attorney fee award for their successful prosecution and resolution
26 of this action, calculated as one-third (1/3) of the cash value of the common fund created by the
27 Settlement. In cases such as this one, the Courts have long recognized that an appropriate method
28 for determining the award of attorneys’ fees is based on a percentage of the total value of benefits
afforded to class members by the settlement. *Laffitte*, 1 Cal. 5th at 494 (“the percentage method has

1 been generally approved in common fund cases”); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478
2 (1980); *Paul, Johnson, Alston & Hunt v. Gaulty*, 886 F.2d 268, 272 (9th Cir. 1989); *Vincent v.*
3 *Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). The awarding of a fee based on a
4 percentage of the common fund recovered is to “spread litigation costs proportionately among all
5 the beneficiaries so that the active beneficiary does not bear the entire burden alone.” *Vincent*,
6 *supra*, 557 F.2d at 769. The Gross Settlement Amount is \$564,338.24. Accordingly, Class Counsel
7 requests \$188,112.75 in attorneys’ fees as it is properly calculated as a percentage (33-1/3%) of the
8 common fund created for the benefit of the Class.

9 **A. In a Common Fund Case, the Supreme Court Approves an Award Based Upon the**
10 **Percentage of the Fund**

11 California courts have been expressly authorized to award attorneys’ fees so as “to ensure
12 that the fee awarded is within the range of fees freely negotiated in the legal marketplace in
13 comparable litigation.” *Lealao v. Beneficial Cal., Inc.*, *supra*, 82 Cal.App.4th at 50. As *Lealao*
14 explained, in a representative action, courts must consider the amount of attorney fees typically
15 negotiated in comparable litigation:

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

24 *Id.* at 47.

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

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

3 We join the overwhelming majority of federal and state courts in holding that when
4 class action litigation establishes a monetary fund for the benefit of the class
5 members, and the trial court in its equitable powers awards class counsel a fee out
6 of that fund, the court may determine the amount of a reasonable fee by choosing an
7 appropriate percentage of the fund created.

8 *Laffitte*, 1 Cal. 5th at 503.

9 The recognized advantages of the percentage method – including relative ease of
10 calculation, alignment of incentives between counsel and the class, a better
11 approximation of market conditions in a contingency case, and the encouragement
12 it provides counsel to seek an early settlement and avoid unnecessarily prolonging
13 the litigation (*Lealao, supra*, 82 Cal.App.4th at pp. 48–49; *Rawlings v. Prudential-*
14 *Bache Properties, Inc., supra*, 9 F.3d at p. 516)—convince us the percentage method
15 is a valuable tool that should not be denied our trial courts.

16 *Id.* The Supreme Court in *Laffitte* went on to approve the trial court’s reliance on a percentage
17 method for the calculation of the fee award, and ultimately affirmed the fee award that was one-
18 third (1/3) of the common fund. *Id.*, at 504.

19 The Court in *Laffitte* indicated that the trial courts may utilize a “lodestar cross-check” to
20 double check the reasonableness of the percentage fee award. *Id.* In *Laffitte*, the Supreme Court
21 affirmed the propriety of a lodestar cross-check where the multiplier exceeded 2. Indeed, the Court
22 explicitly held that the lodestar is a cross check that should not override the primary use of the
23 percentage method:

24 [W]e emphasize the lodestar calculation, when used in this manner, does not
25 override the trial court's primary determination of the fee as a percentage of the
26 common fund and thus does not impose an absolute maximum or minimum on the
27 potential fee award.

28 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

1 is within the reasonable range of comparable awards for common fund cases, which establishes the
2 requested award as reasonable. Moreover, as discussed below, the use of the lodestar cross-check
3 in this case further supports the reasonableness of the percentage fee award as it falls squarely
4 within the range approved in *Laffitte*. See also *Taylor v. Fedex Freight, Inc.*, 2016 U.S. Dist. LEXIS
5 142202 (E.D. Cal. 2016) (following *Laffitte* to approve 30% fee award with cross-check lodestar
6 multiplier of 2.26).

7
8 **B. The Percentage Fee Award is Supported by a Lodestar Cross-Check**

9 The reasonableness of the requested attorneys' fee of \$188,112.75 is also established by
10 reference to Class Counsel's lodestar cross-check in this matter. Class Counsel's total lodestar is
11 approximately \$159,862.50.¹ (Hawkins Final Approval Decl. ¶ 49-54.) In this case and once the
12 engagement is completed little multiplier will be required to reach the requested attorneys' fees of
13 \$188,112.75. As it stands, Class Counsel currently seeks a multiple of 1.18 times. An award which
14 seeks a small multiplier—fall smaller than that approved in *Laffitte* is undoubtedly fair, reasonable
15 and justified under California law.²

16 In a common fund settlement "[t]he lodestar method is merely a cross-check on the
17 reasonableness of a percentage figure". *Vizcaino v. Microsoft Corp.*, *supra*, 290 F.3d 1043, 1050,
18 n.5. (9th Cir. 2002). In this case, consideration of Class Counsel's overall lodestar as a cross-check

19 ¹ Class Counsel's hourly rates used in the lodestar are also reasonable. Class Counsel's hourly rates
20 have been approved by Court's throughout California, including the Courts in the Superior Court
21 of California. The reasonableness of Class Counsel's hourly rates is further confirmed by
22 comparing such rates with the rates of comparable counsel practicing complex and class litigation
23 as detailed in the National Law Journal Billing Survey. See *Zest IP Holdings, LLC v. Implant*
24 *Direct MFG., LLC*, 2014 U.S. Dist. LEXIS 167563 (S.D. Cal. 2014) (finding that "Mayer Brown's
\$775 average billing rate for partners" and "Mayer Brown's \$543 average associate billing rate"
are reasonable rates when compared within 21 other firms practicing in the Southern District of
California.)

25 ² Lodestar cross-checks with multipliers far in excess of 2 are commonly approved. See e.g.,
26 *Pellegrino*, 182 Cal.App.4th at 293; *Vizcaino*, *supra*, 290 F.3d at 1051 (3.65 multiplier approved
because of substantial risk); *Rievman v. Burlington Northern Railroad Co.*, 118 F.R.D. 29, 35
27 (S.D.N.Y. 1987) ("In recent years, multipliers between 3 and 4.5 have been common"); *Amaral v.*
28 *Cintas Corporation No. 2*, 163 Cal. App.4th 1157, 1174 (2008) (approving lodestar with a 1.65
multiplier in a fee-shifting case); *Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 549
(S.D.Fla. 1988) (court applied multiplier of 3, noting that this was "average" for a large complicated
class action where multipliers ranged from 2.26 to 4.5).

1 to the percentage figure strongly supports the reasonableness of the requested fee award. In
2 addition, Class Counsel anticipates performing additional work that is not included in this current
3 lodestar amount.

4 **C. The Percentage Award is Supported by The Relevant Factors.**

5 What has now emerged in most fee award decisions is a recognition that fee determinations
6 in both common fund and statutory fee situations are incapable of mathematical precision because
7 of the intangible factors that must be resolved in the court's discretion based on the circumstances
8 of each particular case. See, A. Conte, *Attorney Fee Awards*, 2nd Ed., 207, at 44. In determining
9 an appropriate fee in a common fund case, a court must decide, based on the unique posture of each
10 case, what percentage of the common fund would most reasonably compensate Class Counsel given
11 the nature of the litigation and the performance of counsel. *Paul, Johnson, Alston & Hunt, supra*,
12 886 F.2d at 272 (the benchmark percentage fee may be adjusted to account for the circumstances
13 involved in this case.) Courts apply a five-part test in reviewing a reasonable percentage fee in
14 common fund cases:

15 (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality
16 of work; (4) the contingent nature of the fee and the financial burden carried by the
17 Plaintiff; and (5) awards made in similar cases.

18 *In re Omnivision Technologies, Inc.*, 2007 WL 4293467 at *9 (N.D. Cal. 2007).

19 Here, each of these five factors strongly support an award of the percentage fee (33-1/3%)
20 requested in this case.

21 **1. The Results Achieved**

22 "The overall result and benefit to the class from the litigation is the most critical factor in
23 granting a fee award." *Omnivision*, 2007 WL 4293467 at *9; See also *In re Heritage Bond Litig.*,
24 2005 U.S. Dist. LEXIS 13627, at *27-28 (C.D. Cal. June 10, 2005). Class Counsel obtained a very
25 favorable result in this case for the Class Members. The Settlement provides meaningful monetary
26 benefits to the Class Members that are comparable to or even exceed those recovered in similar
27 wage and hour class actions. The Settlement is particularly advantageous to the Class Members
28

1 because the proceeds will be distributed in the near term without waiting additional years for a
2 similar, or possibly, less favorable result.

3 There is little question that the result achieved in this litigation is favorable. The average
4 estimated payment amongst the Class Members is estimated to be \$942.07 (inclusive of PAGA)
5 and the highest estimated payment is \$3,103.06. (Hawkins Final Approval Decl. ¶ 41.)

6 **2. The Risks of Litigation**

7 “The risk that further litigation might result in Plaintiffs not recovering at all, particularly a
8 case involving complicated legal issues, is a significant factor in the award of fees” *Omnivision*,
9 2007 WL 4293467 at *9.

10 As detailed above, at the time this case was brought, the result was far from certain.
11 Defendant’s numerous defenses to the case created difficulties with proof and complex legal issues
12 for Class Counsel to overcome. Here, a number of defenses asserted by Defendant presented
13 serious threats to the claims of Plaintiff and the other Class Members. (Hawkins Final Approval
14 Decl. ¶ 26-30; Ex. 3, Hawkins Prelim. Decl. ¶ 19-20, 26-27, 29-35.)

15 As discussed above, there was also a significant risk that, if the litigation was not settled,
16 Plaintiff would be unable to obtain and maintain class certification through trial and thereby not
17 recover on behalf of any employees other than himself. Defendant also steadfastly challenged
18 Plaintiff’s ability to obtain class certification and, if certified, to demonstrate a viable trial plan and
19 ability to manage the potential individual issues a trial under *Duran*, (2014) 59 Cal. 4th 1, arguing
20 that individual issues precluded class-wide recovery. With such precedent in mind, Defendant
21 contended that any claims involved highly individualized inquiries which were not appropriate or
22 ripe for class certification. As a result, there was considerable risk that Plaintiff would not prevail
23 on a motion for class certification and/or Defendant would prevail on their defenses, thus, defeating
24 any and all recovery to the class. Even if Plaintiff successfully obtained class certification of his
25 wage and hour claims, proving class-wide liability was by no means a foregone conclusion.
26 (Hawkins Final Approval Decl. ¶ 26-30.)

27 All of these were very substantial risks any of which could have resulted in the Class
28 receiving nothing if the claims were litigated.

3. The Skill Required and the Quality of Work

Practice in the narrow areas of wage and hour and class action litigation requires skill, knowledge, and experience in two distinct subsets of the law. Expertise in one does not necessarily translate into expertise in the other. Class Counsel must have expertise in both. The issues presented in this case required more than just a general appreciation of wage and hour law and class action procedure as this area of practice is still developing as evidenced by the California Supreme Court's ruling in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012).

The Settlement was possible only because Class Counsel was able to convincingly argue that Plaintiff could potentially prevail on the difficult legal issues regarding liability, maintain class certification, overcome difficulties in proof as to monetary relief and take the case to trial. (Hawkins Final Decl. ¶ 29, 45, 59.) In successfully navigating these hurdles Class Counsel displayed the necessary dual skill set. The high quality of the work in this case was mandated by the very vigorous and contentious defense presented by counsel for Defendant. Class Counsel was required to invest substantial time and resources in investigation, informal discovery, formal discovery, motion practice, and determination of potential damages, mediation, negotiations, and preliminary and final approval. (Hawkins Final Decl. ¶ 50-55.)

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

4. The Contingent Nature of the Fee and the Financial Burden

There is a substantial difference between the risk assumed by attorneys being paid by the hour and attorneys working on a contingent fee basis. The attorney being paid by the hour can go to the bank with his fee. *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000). The attorney working on a contingent basis can only log hours while working without pay towards a result that will hopefully entitle him to a market place contingent fee taking into account the risk and other factors of the undertaking. *Id.* at 1257. Otherwise, the contingent fee attorney receives nothing. *Id.*

1 In this case, Class Counsel subjected themselves to this contingent fee market risk in this
2 all or nothing contingent fee case wherein the necessity and financial burden of private enforcement
3 makes the requested award appropriate. Counsel retained on a contingency fee basis, whether in
4 private matters or in class action litigation, is entitled to a premium in order to compensate for both
5 the risks and the delay in payment. See e.g. *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734 (9th
6 Cir. 2016) (courts “must” apply a risk enhancement); *Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th
7 Cir. 2016) (abuse of discretion not to apply risk multiplier). The simple fact is that despite the most
8 vigorous and competent of efforts, success is never guaranteed. *McKittrick v. Gardner*, 378 F.2d
9 872, 875 (4th Cir. 1967). Indeed, if counsel is not adequately compensated for the risks inherent
10 in difficult class actions, competent attorneys will be discouraged from prosecuting similar cases.
11 *Steiner v. BOC Financial Corp.*, 1980 U.S. Dist. LEXIS 14561 at *6- *7 (S.D.N.Y. 1980). Class
12 Counsel has invested time and money into contingency cases which ultimately generated no fee,
13 which further emphasizes the need for contingent cases to provide premium compensation when
14 successful.

15 Here, the contingent nature of the fee award, both from the point of view of eventual
16 settlement and the point of view of establishing eligibility for an award, also warrant the requested
17 fee award. Many difficult issues, the adverse resolution of any one of which could have doomed
18 the successful prosecution of the action, were present here. As discussed above, attorneys’ fees in
19 this case were not only contingent but extremely risky, with a very real chance that Class Counsel
20 would receive nothing at all for their efforts, having devoted time and advanced costs.

21 Class Counsel were required to advance all costs in this litigation. Accordingly, because
22 the risk of advancing costs in this type of litigation can be significant, it is therefore cost prohibitive
23 to many attorneys. The financial burdens undertaken by Plaintiff and Class Counsel in prosecuting
24 this action on behalf of the Class were substantial. To date, Class Counsel advanced \$24,035.20, in
25 costs which could not have been recovered if this case had been lost. (Hawkins Final Decl. ¶ 55;
26 Exhibit 6, Cost Detail Report.)

27 Accordingly, the contingent nature of the fee and the financial burdens on Class Counsel
28 also support the fee requested.

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5. Awards in Similar Cases

The attorneys' fees requested by Class Counsel are within the range of fees awarded in comparable cases. A review of class action settlements over the past 10 years shows that the courts have historically awarded fees in the range of 20% to 50%, depending upon the circumstances of the case. *In re Warner Communications Sec. Lit.*, 618 F.Supp. 735, 749-50 (S.D. N.Y. 1985). Class Counsels' requested fees are one-third (1/3) of the total value of the case, a percentage well within the range of reasonableness given the significant results obtained for the Class, the risks undertaken, and the skill of the prosecution. See *Laffitte*, 1 Cal. 5th at 486, 506 (approving one-third (1/3) attorneys fee award).

In *In re Warner Communications Sec. Lit.*, Judge Keenan concluded that percentage fees in common fund cases range from 20% to 50%. *Id.*, 618 F. Supp. at 749-50. Professor Newberg is in accord:

No general rule can be articulated on what is a reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented.

Newberg, *Newberg on Class Actions*, 3rd Ed., 14.03, at 14-13.

A fee award of one-third (1/3) of the common fund in this case is therefore reasonable in light of the prevailing fees that have been awarded in other cases.

D. Class Counsel's Costs Were Reasonably Incurred

Class Counsel requests reimbursement for expenses and costs in the amount of \$24,035.20, which is below the amount preliminary approved by the Court. These litigation expenses are detailed in Exhibit 6 to the Hawkins Declaration. (Hawkins Final Decl. ¶ 55; Ex. 6.) These expenses primarily involve the costs incurred for initial filing fees, mediation fees, court filing fees and service charges, court appearance fees, CaseAnywhere fees, and expert fees, all of which are costs normally billed to and paid by the client. These costs were reasonably incurred in the prosecution of this matter. (*Id.*). Class Counsel only requests \$24,035.10 as that is below the amount that was preliminarily approved.

1 **V. THE CLASS REPRESENTATIVE SHOULD RECEIVE THE REQUESTED**
2 **INCENTIVE PAYMENT.**

3 Plaintiff respectfully submits that for his service as the Class Representative, Plaintiff
4 should be awarded \$7,500.00 as the agreed Class Representative Incentive Award. Defendant has
5 agreed not to oppose the payment of this amount to Plaintiff.

6 As the Class Representative, Plaintiff has selflessly performed his duties to the Class
7 admirably and without exception. Plaintiff provided valuable information and documents from his
8 employment which were instrumental in Class Counsel's understanding of the case. Plaintiff also
9 provided Class Counsel with evidence for use at mediation and in litigation. He was also involved
10 in the settlement negotiations and provided invaluable assistance and information which ultimately
11 resulted in the settlement benefitting the Class. (See generally Declaration of Plaintiff Charles
12 Yniguez.)

13 Plaintiff also assumed the risk, among other things, that they might possibly be liable for
14 costs incurred in connection with this case and risked being "blacklisted" by other future employers
15 for having sued Defendant in a class action. See *Guippone v. BH S&B Holdings LLC*, 2011 U.S.
16 Dist. LEXIS 126026, at **4, 20 (S.D.N.Y. Oct. 28, 2011) ("[T]he fact that a Plaintiffs has filed a
17 federal lawsuit is searchable on the internet and may become known to prospective employers when
18 evaluating the person . . . Even where there is not a record of actual retaliation, notoriety, or personal
19 difficulties, class representatives merit recognition for assuming the risk of such for the sake of
20 absent class members.").

21 Without Plaintiff's support, cooperation and information, none of the other employees
22 would have received any benefit. The payment of the incentive award to a successful class
23 representative is appropriate and the amount of \$7,500 is a small portion of the total Settlement
24 secured on behalf of the Class.

25 This payment to compensate Plaintiff for his effort and risk in bringing this case to benefit
26 the other members of the Class and securing a total settlement of \$564,338.24. Plaintiff's effort in
27 the lawsuit have conferred a substantial benefit on the Class Members. Accordingly, Class Counsel
28 respectfully requests that the Court approve the requested Class Representative Incentive Award.

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