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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SANDRO RODRIGUEZ

PLAINTIFF,

v.

MITSUBISHI CHEMICAL CARBON
FIBER AND COMPOSITES, INC., et
al.

DEFENDANT

CASE NO. 8:21-CV-01711-CJC (JDEx)

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR ATTORNEYS'
FEES AND COSTS; MEMORANDUM
OF POINTS AND AUTHORITIES**

Date: June 12, 2023

Time: 1:30 p.m.

Place: Courtroom 9B

NOTICE OF MOTION

**TO THE CLERK OF COURT, ALL PARTIES, AND THEIR COUNSEL
OF RECORD, PLEASE TAKE NOTICE THAT:**

On June 12, 2023, at 1:30 p.m. or as soon thereafter as can be heard in Courtroom 9B of the above-captioned Court, located at the Ronald Reagan Federal Building and United States Courthouse, 411 West Fourth Street, Santa Ana, CA 92701, plaintiff Sandro Rodriguez (“Plaintiff”) will and hereby does move the Court for an Order to award \$264,000 in attorneys' fees; \$24,892.46 in reasonable litigation costs and expenses; and a Class Representative Incentive Award of \$7,500, to Sandro Rodriguez for his services on behalf of the Settlement Class and for agreeing to broader releases than those required of other Class Members.

This Motion should be granted because: (1) under the California and Ninth Circuit common fund doctrines, the fee request is reasonable when measured against the benefits conferred by the Settlement and non-reversionary common fund; (2) public policy recognizes that attracting competent counsel to litigate wage and hour cases on behalf of clients unable to pay hourly fees requires attorney fee awards commensurate with such risks; (3) no action would likely have been taken by Class Members individually, and no compensation would have been recovered for them, but for Plaintiff’s services on their behalf; and (4) the absence of objection to the settlement to date confirms that the requested attorneys' fees, costs and expenses, and incentive awards should be approved.

This motion shall be based on the memorandum of points and authorities filed by Plaintiff, the Declarations of Plaintiff, Kiley Lynn Grombacher, and Raul Perez, and the exhibits thereto, and the Court’s own records, files, notes, and other documents on file in this matter, as well as upon all oral and/or documentary evidence as may be properly presented at the time of the hearing of this matter.

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II

1 DATED: April 13, 2023

BRADLEY/GROMBACHER, LLP
CAPSTONE LAW APC

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3
4 By: /s/ Kiley Grombacher

5 Marcus Bradley, Esq.
6 Kiley Grombacher, Esq.
7 Lirit King, Esq.
8 Orlando Villalba, Esq.

9 Attorneys for Plaintiff
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Sandro Rodriguez (“Plaintiff”) brought this class action to secure important workplace protections--payment of minimum and overtime wages, and relief to take meal and rest breaks--for current and former employees of defendants Mitsubishi Chemical Carbon Fiber and Composites, Inc., Mitsubishi Chemical Holdings America, Inc. and Mitsubishi Chemical America, Inc. (“Mitsubishi” or “Defendants”) (collectively with Plaintiffs, the “Parties”) through the imposition of Private Attorney General Act (“PAGA”) penalties. Despite the risk and uncertainty associated with litigating the claims, Plaintiffs secured an Eight Hundred Thousand Dollars and Zero Cents (\$800,000.00) non-reversionary settlement that will provide timely monetary relief to about 350 workers.

Having obtained valuable relief for the Settlement Class, Plaintiff seeks an award of attorneys' fees in the amount of \$264,000, or one-third of the total non-reversionary settlement fund for his counsel, Bradley/Grombacher LLP and Capstone Law APC (“Class Counsel” or “Plaintiff’s Counsel”). The percentage of the fund requested is entirely consistent with fee awards in similar cases, including decisions in comparable wage and hour class litigation that awarded fees ranging from 30 to 40 percent of the common fund. See, e.g., *Laffitte v. Robert Half Int'l Inc.*, 231 Cal. App. 4th 860 (2014), 871 (“Laffitte I”)² (“33 ⅓ percent of the common fund is consistent with, and in the range of, awards in other class action lawsuits”); *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43 (2008) 66 n.11 (“[e]mpirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery”); Conte & Newberg, *Newberg on Class Actions* (4th ed. 2002) (same). The attorneys' fees are also reasonable on a lodestar cross-check.

The requested award is also fair, reasonable, and appropriate in light of the favorable results obtained by Plaintiff’s Counsel, the complexities of the litigation,

1 and the contingent risk assumed by Plaintiff's Counsel. As discussed in more detail
2 in the Motion for Preliminary Approval of the Class Action Settlement (see Dkt. No.
3 23), Plaintiff's Counsel delivered significant benefits to the Class in the face of
4 adverse conditions and assumed substantial risk in litigating this action on a
5 contingency basis, having invested over 170 hours of their time toward the zealous
6 prosecution of the class's claims.

7 In addition to attorneys' fees, Plaintiff's Counsel also seek reimbursement for
8 their reasonable litigation costs and expenses. These costs and expenses were
9 incurred in connection with the prosecution and settlement of the action.

10 Lastly, Plaintiff moves for a Class Representative Service Payment of \$7,500,
11 for putting the interests of the Class ahead of his own, for investing considerable
12 time and effort in assisting in the prosecution of this action, for assuming the risk of
13 being branded "litigious" by future prospective employers, for being deposed, and
14 for providing Defendant with a general release that is much broader than the releases
15 required of Class Members.

16 For the reasons set forth in greater detail below, Plaintiff respectfully submits
17 that the requested attorneys' fees, costs and expenses, and service payments are fair
18 and reasonable, and should be approved.

19 **II. BACKGROUND**

20 **A. Procedural History**

21 Plaintiff filed a class action complaint on September 7, 2021, alleging multiple
22 wage and hour class action claims against Defendants, including claims for unpaid
23 wages due to alleged off-the-clock work, failure to provide meal and rest breaks,
24 unreimbursed business expenses, failure to pay vacation wages, failure to provide
25 safety devices, and the standard derivative wage and hour claims. On October 14,
26 2021, Defendants removed the class action to this Court.

27 On April 4, 2020, Plaintiff filed a separate lawsuit in the Orange County
28 Superior Court seeking civil penalties under the Private Attorneys General Act of

2004, California Labor Code sections 2698, et seq. (“PAGA”) premised on the same violations as those alleged in his class action complaint, entitled *Rodriguez v. Mitsubishi Chemical Carbon Fiber and Composites, Inc. et al.*, Case 30-2022-01253057-CU-OE-CXC (“PAGA Action”.) The PAGA Action was dismissed on September 30, 2022.

B. Mediation & Negotiation

For purposes of mediation, Mitsubishi shared time and payroll records for a randomly selected sample population of 20% of the putative class during the Class Period. Mitsubishi also provided policy documents and other information in the interest of resolving these matters, including excerpts from its handbooks. The parties agreed to stay formal discovery while the parties proceed with mediation.

Additionally, prior to mediation, Mitsubishi informed Plaintiff’s counsel of an earlier class action settlement in the *Henry Cress v. Mitsubishi Chemical Carbon* class action (Case No. 34-2017-00222101 Sacramento County Superior Court), which released similar claims to those alleged here through December 22, 2018. Plaintiff reviewed the relevant documents and the parties agreed to resolve all class and PAGA claims for the shorter time period not covered by the *Cress* lawsuit

Armed with this information, and through mediation conducted on May 26, 2022, with Judge Gandhi, Plaintiff was able to reach an agreement in principle on a settlement.

III. ANALYSIS

In class actions, statutory provisions and the common fund exception to the “American Rule” provide the authority for awarding attorneys’ fees. See Newberg on Class Actions § 14.1 (4th ed. 2005) (“Two significant exceptions [to the ‘American Rule’] are statutory fee-shifting provisions and the equitable common-fund doctrine”). Rule 23(h) authorizes a court to award “reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement.” Fed. R. Civ. Proc. 23(h). Under normal circumstances, once it is established that a party is

entitled to attorneys' fees, "[i]t remains for the district court to determine what fee is 'reasonable.' " *Hensley v. Eckerhart*, 461 U.S. 424 (1983) 433.

The amount of fees awarded rests in the court's sound discretion. *Evans v. Jeff D.*, 475 U.S. 717 (1986) 736 n.26. Under California law, which applies here, See *Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470 (9th Cir. 1995) 1478, attorneys' fees in class action cases may be calculated in one of two ways: the percentage method (a percentage of the common fund or settlement value) or the lodestar-multiplier method (reasonable hours spent multiplied by reasonable hourly rate adjusted to account for factors such as the risks taken and results achieved). See *Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5th 480 (2016) 489. "[T]rial courts have discretion to conduct a lodestar cross-check on a percentage fee" or they may "use other means to evaluate the reasonableness of a requested percentage fee." *Id.* at 506. Class Counsel has provided the Court with the information necessary to employ both methods.

A. The Attorneys Fees Sought Are Reasonable

1. The Fees Are Reasonable Under the Percentage of the Fund Method

California courts routinely award attorneys' fees of one-third of the common fund." *Beaver v. Tarsadia Hotels*, 2017 WL 4310707 (S.D. Cal. 2017) No. 11-CV-01842GPC-KSC, at *9 (approving a fee award of one-third of the \$15,150,000 settlement fund in a class action settlement); see *Laffitte*, 1Cal. 5th at 506 (approving a fee award of one-third of the gross settlement amount in a wage and hour class action settlement); *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43 (2008) 66 n.11 ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery."). "Under the percentage method, California has recognized that most fee awards based on either a lodestar or percentage calculation are 33 percent." *Smith v. CRSTVan Expedited, Inc.* 2013 WL 163293 (S.D. Cal. 2013) No. 10-CV-1116-IEG

1 WMC, at *5.

2 Under the percentage-of-recovery method, the Ninth Circuit has held that 25%
3 of a common fund is the “benchmark” for a reasonable fee award. *In re Bluetooth*,
4 654 F.3d 935 (9th Cir. 2011) at 942–43 (citing *Six (6) Mexican Workers v. Arizona*
5 *Citrus Growers*, 904 F.2d 1301(9th Cir.1990) 1311; *Paul, Johnson, Alston & Hunt v.*
6 *Grauly*, 886 F.2d 268 (9th Cir. 1989) 272 (“We note with approval that one court
7 has concluded that the ‘bench mark’ percentage for the fee award should be 25
8 percent. That percentage amount can then be adjusted upward or downward to
9 account for any unusual circumstances involved in this case.” (internal citation
10 omitted)).

11 Notwithstanding, the Ninth Circuit has also held that the benchmark is the
12 “starting point for analysis” and notes that “it may be inappropriate in some
13 cases.” *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002) 1048. The
14 “[s]election of the benchmark or any other rate must be supported by findings
15 that take into account all of the circumstances of the case.” *Id.* The district
16 court’s duty is to not presume benchmark percentage applies, but simply
17 “whether in arriving at its percentage it considered all the circumstances of the
18 case and reached a reasonable percentage.” *Id.*

19 Thus, the “exact percentage [awarded] varies depending on the facts of the
20 case, and **in most common fund cases, the award exceeds that benchmark.**”
21 *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482 (E.D. Cal. 2010) 491
22 (emphasis added); *In re Activision Sec. Litig.*, 723 F. Supp. 1373 (N.D. Cal.
23 1989) 1377 (“[a] review of recent reported cases discloses that nearly all
24 common fund awards range around 30%”); *In re Omnivision Techs., Inc.*, 559 F.
25 Supp. 2d 1036 (N.D. Cal. 2008) 1047 (in “most common fund cases, the award
26 exceeds that benchmark”).

27 Awards of one-third are likewise routinely upheld by the Ninth Circuit.
28 *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454 (9th Cir. 2000) 463

(affirming one-third of the common fund); *In re Pac. Enterprises Sec. Litig.*, 47 F.3d 373 (9th Cir. 1995) 378-79 (affirming one-third of a \$12 million common fund). A fee award representing one-third of the fund falls within the range of other comprehensive surveys of class action settlements and fee awards. See *Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Award* (2010) 7 J. Empirical Leg. Stud. 811, 833 (analyzing 444 cases between 2006-2007 and concluding that “[m]ost fee awards were between 25 percent and 35 percent, with almost no awards more than 35 percent.”); Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical Study: 1993-2008* (2010) 7 J. of Empirical Leg. Stud. 248, 262, fn.16 (finding a similar range of fee awards).

Plaintiff submits that all relevant factors militate in favor of granting one-third of the gross amount including: (1) the results achieved; (2) the risk of litigation; (3) the benefits generated beyond the cash settlement fund; (4) the contingent nature of the fee and the financial burden carried; and (5) awards in similar cases. *Id.* at 1048–50. Indeed, in similar cases, “district courts in this circuit have routinely awarded fees of one-third of the common fund or higher after considering the particular facts and circumstances of each case.” *Beaver*, 2017 WL 4310707, at *10 (listing cases within the Ninth Circuit that approved a fee award of one-third the common fund); *Taylor v. Shippers Transp. Express, Inc.*, 2015 WL 12658458 (C.D. Cal. 2015) No. CV1302092BROPLAX, at *17 (awarding one-third of the \$11,040,000 gross settlement amount in a wage and hour class action); *Smith v. CRST Van Expedited, Inc.*, 2013 WL 163293, at *5 (awarding one-third of the \$2,625,000 total settlement fund in a wage and hour class action).¹

¹ See also *Singer v. Becton Dickinson & Co.*, 2010 WL 2196104 (S.D. Cal. 2010) No. 08-CV-821-IEG (BLM) at *9 (33 and 1/3% fee award in wage and hour class action); *Karapetyan v. ABM Indus.*, No. 2:15-cv-08313-GW-E, 2015 U.S. Dist. LEXIS 24210 (C.D. Cal. Sept. 7, 2017) (awarding 33-1/3% in \$5,000,000 wage and hour class action); *Aguirre v. Genesis Logistics, Inc.*, No. 8:12-cv-00687-JVS-KES,

Here, Class Counsel request \$264,000.00 in fees, which represents 33.33% of the common fund. While Plaintiff is cognizant that this Court is reluctant to depart from the benchmark,² it has noted in prior orders that district courts approve attorneys' fees in excess of the benchmark in wage and hour cases, in cases with high individual payouts. See, e.g., *Moore v. PetSmart, Inc.*, 2015 WL 5439000 (N.D. Cal. 2015) No. 5:12-cv-03577, at *11 (awarding 27% where mean individual payout was \$645.02 and settlement included injunctive relief); see also *Holly Attia, et. al. v. The Neiman Marcus Group, LLC*, 2019 WL 13089601 (C.D. Cal. 2019) No. 816CV00504DOCFM, at *7 (adjusting upward where average estimated payout was \$964.22 and settlement was non-reversionary); Here the estimated payout is

2014 U.S. Dist. LEXIS 184617 (C.D. Cal. Nov. 29, 2017) (awarding 33-1/3% in \$7,000,000 wage and hour class action); *Grillo v. Key Energy Services, LLC*, No. 2:14-cv-000881-AB-AGR, 2017 U.S. Dist. LEXIS 42682 (C.D. Cal. Oct. 13, 2017) (awarding 33-1/3% in \$3,000,000 wage and hour class action); and *Shiferaw v. Sunrise Senior Living Management, Inc.*, No. 2:13-cv-02171-JAK-PLA, 2016 U.S. Dist. LEXIS 187548 (C.D. Cal. Jul. 17, 2017) (awarding 33-1/3% in \$2,180,000 wage and hour class action)

³ Indeed, the recovery is far higher than other recent analogous wage and hour settlements. See, e.g., *Aqui v. Sutton Foundation, Inc.*, Case No. 30-2008-00180062 (Orange County Super. Ct.) (average net recovery of approximately \$445); *Badami v. Grassroots Campaigns, Inc.*, Case No. C 07-03465 JSW (N.D. Cal. Sept. 15, 2008) (average net recovery of approximately \$195); *Sandoval v. Nissho of Cal., Inc.*, Case No. 37-2009-00091861 (San Diego County Super. Ct.) (average net recovery of approximately \$145); *Fukuchi v. Pizza Hut*, Case No. BC302589 (L.A. County Super. Ct.) (average net recovery of approximately \$120); *Contreras v. United Food Group, LLC*, Case No. BC389253 (L.A. County Super. Ct.) (average net recovery of approximately \$120); *Ressler v. Federated Department Stores, Inc.*, Case No. BC335018 (L.A. County Super. Ct.) (average net recovery of approximately \$90); *Doty v. Costco Wholesale Corp.*, Case No. CV05-3241 FMC-JWJx (C.D. Cal. May 14, 2007) (average net recovery of approximately \$65); *Sorenson v. PetSmart, Inc.*, Case No. 2:06-CV-02674-JAM-DAD (E.D. Cal.) (average net recovery of approximately \$60); *Lim v. Victoria's Secret Stores, Inc.*, Case No. 04CC00213 (Orange County Super. Ct.) (average net recovery of approximately \$35); and *Gomez v. Amadeus Salon, Inc.*, Case No. BC392297 (L.A. Super. Ct.) (average net recovery of approximately \$20).

1 estimated to be about \$1,300—an average exponentially higher than many wage and
 2 hour settlements, including those cited above³.

3 2. **The Fee Is Reasonable Under a Lodestar Cross Check**

4 The trial court may use an abbreviated lodestar “cross-check” for common
 5 fund awards if the court considers it useful. *Laffitte v. Robert Half Int’l Inc.*, 1
 6 Cal. 5th 480, 504-05 (2016). However, under *Laffitte*, this is not meant to
 7 displace the percentage analysis, but rather to act as a backstop. Indeed, the
 8 Supreme Court expressly instructed that “the lodestar calculation, when used in
 9 this manner, does not override the trial court’s primary determination of the fee
 10 as a percentage of the common fund and thus does not impose an absolute
 11 maximum or minimum on the fee award.” *Id.* at 505. Critically, the Court in
 12 *Laffitte* emphasized that only where the “multiplier calculated by means of a
 13 lodestar cross-check is **extraordinarily high or low**” should the court “consider
 14 whether the percentage should be adjusted so as to bring the imputed multiplier

15
 16 ³ Indeed, the recovery is far higher than other recent analogous wage and hour
 17 settlements. See, e.g., *Aqui v. Sutton Foundation, Inc.*, Case No. 30-2008-00180062
 18 (Orange County Super. Ct.) (average net recovery of approximately \$445); *Badami*
 19 *v. Grassroots Campaigns, Inc.*, Case No. C 07-03465 JSW (N.D. Cal. Sept. 15,
 20 2008) (average net recovery of approximately \$195); *Sandoval v. Nissho of Cal.,*
 21 *Inc.*, Case No. 37-2009-00091861 (San Diego County Super. Ct.) (average net
 22 recovery of approximately \$145); *Fukuchi v. Pizza Hut*, Case No. BC302589 (L.A.
 23 County Super. Ct.) (average net recovery of approximately \$120); *Contreras v.*
 24 *United Food Group, LLC*, Case No. BC389253 (L.A. County Super. Ct.) (average
 25 net recovery of approximately \$120); *Ressler v. Federated Department Stores, Inc.*,
 26 Case No. BC335018 (L.A. County Super. Ct.) (average net recovery of
 27 approximately \$90); *Doty v. Costco Wholesale Corp.*, Case No. CV05-3241 FMC-
 28 JWJx (C.D. Cal. May 14, 2007) (average net recovery of approximately \$65);
Sorenson v. PetSmart, Inc., Case No. 2:06-CV-02674-JAM-DAD (E.D. Cal.)
 (average net recovery of approximately \$60); *Lim v. Victoria's Secret Stores, Inc.*,
 Case No. 04CC00213 (Orange County Super. Ct.) (average net recovery of
 approximately \$35); and *Gomez v. Amadeus Salon, Inc.*, Case No. BC392297 (L.A.
 Super. Ct.) (average net recovery of approximately \$20).

1 within a justifiable range.” *Id.* (emphasis added). Accordingly, when the cross-
2 check multiplier is within a normal range, the lodestar-cross check does not
3 provide a basis for a court to reduce the fee award. Furthermore, in conducting a
4 lodestar cross-check, the court is not “required to closely scrutinize each claimed
5 attorney-hour.” *Id.* at 505. An evaluation may be done by reviewing “counsel
6 declarations summarizing overall time spent.” *Id.*

7 In conducting a lodestar cross-check, the Court first determines a lodestar
8 value for the fees by multiplying the time reasonably spent by plaintiffs’ counsel
9 on the case by a reasonable hourly rate. *In re Consumer Privacy Cases*, 175 Cal.
10 App. 4th 545 (2009) 556-57. To determine whether the requested rate is
11 reasonable, courts look to the prevailing rate for similar work in the pertinent
12 geographic region. *PLCM Group v. Drexler*, 22 Cal. 4th 1084 (2000) 1096-97
13 (using prevailing hourly rate in community for comparable legal services even
14 though party used in-house counsel). “Affidavits of the plaintiff[’s] attorney and
15 other attorneys regarding prevailing fees in the community, and rate
16 determinations in other cases, particularly those setting a rate for the plaintiff[’s]
17 attorney, are satisfactory evidence of the prevailing market rate.” *United*
18 *Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403 (9th Cir. 1990) 407.

19 Here, Class Counsel’s lodestar is \$120,180, thus the multiplier to reach the
20 requested \$264,000 in fees is now about 2.19. This is within the range courts have
21 found to be reasonable. “Multipliers can range from 2 to 4 or even higher.” *Wershba*
22 *v. Apple Computer, Inc.*, 91 Cal. App. 4th 224 (2001) 255 overruled on other
23 grounds in *Hernandez v. Restoration Hardware, Inc.*, 4 Cal. 5th 260 (2018) 269;
24 *Vizcaino, supra*, 290 F.3d 1043, 1051-52, (the Ninth Circuit held that a lodestar
25 multiplier of 3.65 was appropriate after surveying 34 other cases and finding the
26 average lodestar multiplier in those cases was 3.32); see also 4 Newberg of Class
27 Actions § 14.7 (courts typically approve percentage awards based on lodestar cross-
28 checks of 1.9 to 5.1 or even higher, and “multiplier of 1.9 is comparable to

multipliers used by the courts”). Thus, consideration of Class Counsel's overall lodestar as a cross-check to the percentage figure strongly supports the reasonableness of the requested fee award.

3. The Clear Sailing Provision is Not a Death Knell and, Taken as A Whole, The Settlement is Fair, Reasonable and Adequate and the Attorneys Fees are

In its prior Order granting in substantial part, the Motion for Preliminary Approval, the Court noted that the Settlement Agreement contained a “clear sailing provision”. As this Court has noted, “[t]his is not a “death knell” for approval, but rather means that the Court must scrutinize the Settlement Agreement for signs that the fees counsel requests are unreasonably high. *Brightk Consulting Inc. v. BMW of N. Am., LLC*, 2023 WL 2347446 (C.D. Cal. 2023) No. SACV2102063CJCJDEX, at *7 citing *McKinney-Drobnis v. Oreshack*, 16 F.4th 594 (9th Cir. 2021) 610.

Here, the clear sailing agreement does not signal collusion nor does it indicate that the attorney’s fees sought are excessive. First, as noted above and in the motion for preliminary approval, the individual payments to the class are significant and are exponentially larger than those typically seen in similar litigations. Second, the fees sought by Class Counsel will be a percentage of the common fund, which mitigates the concern regarding collusion. *Acosta v. Evergreen Moneysource Mortg. Co.*, 2019 WL 6051117 (E.D. Cal. Nov. 15, 2019) No. 2:17-CV-00466-KJM-DB, at *13 (“Although defendant agreed not to oppose class counsel's request for attorneys' fees, those fees will come from the settlement fund, mitigating the concern regarding defendant's agreement.”); cf. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948 (9th Cir. 2009) 961 n.5 (collusion generally inferred from a “clear-sailing” provision where attorneys' fees are paid on top of the settlement fund); see also *Smith v. Am. Greetings Corp.*, 2016 WL 362395 (N.D. Cal. 2016), at *7 (“[C]lear sailing provision does not signal the possibility of collusion where, as here, Class Counsel's fee will be awarded by the Court from the same common fund as the recovery to the

class.”). Third, and importantly, no money from the settlement will revert to the defendant and the award of fees is ultimately left to the discretion of the Court. This means that if the Court awards Plaintiffs’ counsel less than has been allocated in the settlement agreement, the difference between what was awarded and what is sought will be paid *pro rata* to the members of the class. For these reasons, the Settlement’s proposed award of fees survives the rigorous scrutiny required by the Ninth Circuit.

B. The Costs Sought Are Less than Those Incurred

“There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of reasonable litigation expenses from that fund.” *Ontiveros v. Zamora*, 303 F.R.D. 356 (E.D. Cal. 2014) 375. The Settlement Agreement provides for the reimbursement of reasonable costs not to exceed \$15,000. Here, the costs incurred far exceed the amount sought. Indeed, amount sought barely covers the costs of the mediation alone. The requested costs are reasonable. See, e.g., *Greer v. Dick's Sporting Goods, Inc.*, 2020 U.S. Dist. LEXIS 168923 (E.D. Cal. Sept. 15, 2020) at *35.

C. Incentive Award Is Reasonable

Plaintiff seeks a \$7,500 incentive award to compensate the class representative for his time and efforts on behalf of the class. Incentive awards are payments to class representatives for their service to the class in bringing the lawsuit. *Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157 (9th Cir. 2013) 1163. Such awards “are fairly typical in class action cases” and are discretionary. *Rodriguez v. W. Pub. Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (emphasis removed).

In determining whether an incentive award is reasonable, courts generally consider:

(1) the risk to the class representative in commencing a suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; and (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

1 *Covillo v. Specialtys Café*, 2014 WL 954516 (N.D. Cal. 2014) No. C-11-
2 00594-DMR, at *8 (quoting *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294
3 (N.D. Cal. 1995) 299). A class representative must justify an incentive award
4 through “evidence demonstrating the quality of plaintiff’s representative service,”
5 such as “substantial efforts taken as class representative to justify the discrepancy
6 between [his] award and those of the unnamed plaintiffs.” *Alberto v. GMRI, Inc.*, 252
7 F.R.D. 652 (E.D. Cal. 2008) 669. Further, district courts must evaluate each
8 incentive award individually. See *Staton v. Boeing* 327 F.3d 938 (2003) at 977.

9 With respect to the first factor, Plaintiff, by initiating this case, assumed the
10 risk of a judgment against him and personal liability for an award of costs to
11 defendant in the event of an adverse outcome. Rodriguez Decl. at ¶¶ 9. He also
12 assumed reputational risk. Id at ¶ 8. “Incentive awards are particularly appropriate in
13 wage-and-hour actions where plaintiffs undertake a significant ‘reputational risk’ by
14 bringing suit against their former employers. *Bellinghausen v. Tractor Supply*
15 *Company*, 306 F.R.D. 245 (2015) at 267. Due to the risks undertaken by Plaintiff, the
16 first factor weighs in favor of granting an incentive award to Plaintiff.

17 As for the second factor, Plaintiff indeed encountered personal difficulties as a
18 result of his participation in this case. Plaintiff is afraid of disclosing the existence of
19 this case to future employers, and feels that his prospects for advancement in his
20 career have been impacted by filing this action. Decl. at ¶ 8; see *Pena v. Taylor*
21 *Farms Pacific Inc.* 2021 WL 916257 (E.D. Cal. 2021) at *6 (“[B]y attaching their
22 names to this litigation, the named plaintiffs took on the risk that future employers
23 would learn of their participation in this case and would unfairly associate them with
24 costly litigation.”).

25 As for the third factor, Plaintiff estimates he spent upwards of 45.5 hours
26 actively participating in this action. Decl. at ¶ 19. Plaintiff spent time conversing
27 with Class Counsel and other class members and helping direct the discovery and
28 litigation that were conducted in this case. He reviewed the pleadings and documents

1 in this action as well as the final settlement agreement. Decl. at ¶¶ 12-13. Because
2 plaintiff expended significant efforts and was personally involved in the litigation,
3 this factor weighs in favor of granting each an incentive award.

4 With respect to the fourth factor, see also *Ogbuehi v. Comcast of California*
5 2015 WL 3622999 (E.D. Cal. 2015) at* 14 (finding fourth factor neutral where
6 litigation settled after only roughly one year). Finally, with respect to the fifth factor,
7 the personal benefit enjoyed by a plaintiff, Plaintiff does not gain any other benefit
8 beyond what he will gain as a class member. See Settlement Agreement, exhibit 1 to
9 Grombacher Decl., Settlement Agreement at § 3.06(d); see also *In re Toys R Us-*
10 *Del., Inc.-Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438
11 (C.D. Cal. 2014) 472 (“An incentive award may be appropriate when a class
12 representative will not gain any benefit beyond that he would receive as an ordinary
13 class member.”). On the contrary, unlike normal Class members, Plaintiffs is also
14 entering into a general release with a Civil Code section 1542 waiver of unknown
15 claims, which shows that Plaintiff is giving up rights that other Class members are
16 retaining. This factor weighs in favor of granting an incentive award.

17 On balance, the relevant factors favor granting an incentive award. The
18 requested incentive awards of \$7,500 is reasonable and comparable to awards in
19 other cases.

20 The service award sought is within the range of awards approved by other
21 federal judges in class actions. See, e.g., *Wellens v. Sankyo*, 2016 WL 8115715 (N.D.
22 Cal. 2016) No. C 13-00581 WHO, at *3 (awarding \$25,000 for named plaintiffs);
23 *Garner v. State Farm Mut. Auto. Ins.*, 2010 WL 1687832 (N.D. Cal. Apr. 22, 2010)
24 No. CV 08 1365 CW, at *17 n.8 (“Numerous courts in the Ninth Circuit and
25 elsewhere have approved incentive awards of \$20,000 or more”); *Van Vranken v.*
26 *Atlantic Richfield Co.* 901 F.Supp.294 (N.D. Cal 1995) at 299-300 (approving
27 \$50,000 to one named plaintiff); *Alvarez v. Farmers Ins. Exchange*, 2017 WL
28 2214585 (N.D. Cal. 2017) No. 3:14-cv-00574-WHO, at *1 (service award of

1 \$10,000 each was “fair and reasonable” where the aggregate amount of the service
2 awards constituted 1.8% of the total settlement and the average payout to class
3 members was \$956.18); *Wannemacher v. Carrington Mortg. Servs., LLC*, 2014 WL
4 12586117 (C.D. Cal. 2014) No. SACV 122016 FMO, (granting final approval and
5 awarding enhancement 7.7 times greater than average class member recovery of
6 \$259); *In re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act*
7 *(FACTA) Litig.*, 295 F.R.D. 438, 472 (C.D. Cal. 2014) (final approval granted and
8 awarding enhancements 166 to 1,000 times greater than value of \$5, \$15, and \$30
9 vouchers.)

10 **IV. CONCLUSION**

11 The parties have negotiated a fair and reasonable settlement. Accordingly,
12 Plaintiff respectfully requests that the Court grant his motion for final approval of
13 attorneys’ fees, costs and service awards.

14
15 DATED: April 13, 2023

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