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on behalf of himself and all others similarly situated

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

JOE VIGIL, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

HYATT CORPORATION, a
Delaware corporation, GRAND
HYATT S.F., LLC, a Delaware
limited liability company, doing
business as GRAND HYATT SAN
FRANCISCO, and DOES 1-50,
inclusive,

Defendants.

Case No. 4:22-cv-00693-HSG
Judge: Haywood S. Gilliam, Jr.

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

Date: February 2, 2024
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Courtroom: 2, 4th Floor

Action Filed: November 2, 2021

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ARGUMENT	2
A.	Class Counsel Has Extensive Experience Acting As Class Counsel.....	2
B.	Attorneys’ Fees Should be Awarded Based on a Percentage of the Settlement Fund.	3
C.	A Fee of One-Third of the Gross Settlement Amount is Reasonable.	4
1.	The Results Achieved Were Substantial.	6
2.	The Risk of Litigation Was Significant.....	7
3.	The Skill Required and Quality of Work Justifies the Request.	8
4.	The Contingent Nature of the Fee and the Financial Burden Carried by the Plaintiff Justifies the Request.	9
5.	Awards Made in Similar Cases.	10
D.	Although Not Required, Class Counsel’s Fee Request is Reasonable if Cross-Checked With the Lodestar	12
E.	Plaintiff’s Counsel’s Expenses Should be Approved.	16
F.	The Incentive Payment to the Named Plaintiff Should be Approved.....	17
III.	CONCLUSION	19

TABLE OF AUTHORITIES

Cases

<i>Aichele v. City of Los Angeles</i>	
2015 WL 5286028, at *5 (C.D. Cal. 2015).....	4, 10, 11
<i>Barbosa v. Cargill Meat Sols. Corp.</i>	
297 F.R.D. 431, 450 (E.D. Cal. 2013).....	11, 12
<i>Beaver v. Tarsadia Hotels</i>	
2017 WL 4310707, at *9 (S.D. Cal. 2017).....	11
<i>Bebchick v. Wash. Metro. Area Transit Comm'n</i>	
805 F.2d 396, 408 (D.C. Cir. 1986).....	10
<i>Betancourt v. Advantage Human Resourcing, Inc.</i>	
2016 WL 344532 at * 9 (N.D. Cal. 2016).....	5
<i>Birch v. Office Depot, Inc.</i>	
No. 06cv1690 DMS (WMC), Doc. No. 48, ¶13 (S.D. Cal. 2007).....	12
<i>Boeing Co. v. Van Gemert</i>	
444 U.S. 472, 478 (1980).....	3
<i>Brotherton v. Cleveland</i>	
141 F.Supp. 2d 907, 913-14 (S.D. Ohio 2001).....	19
<i>Camacho v. Bridgeport Fin., Inc.</i>	
523 F.3d 973, 979 (9th Cir. 2008).....	14
<i>Chavez v. Netflix, Inc.</i>	
162 Cal. App. 4th 43, 66 n.11 (2008).....	5
<i>Cicero v. DirecTV, Inc.</i>	
No. EDCV 07-1182, 2010 WL 2991486 (C.D. Cal. 2010).....	11
<i>Craft v. Cty. of San Bernardino</i>	
624 F. Supp. 2d 1113, 1116 (C.D. Cal. 2008).....	4
<i>Espinosa v. California Coll. of San Diego, Inc.</i>	
No. 17CV744-MMA (BLM), 2018 WL 1705955, at *8 (S.D. Cal. 2018).....	3, 11

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Fischel v. Equitable Life Assur. Soc.
307 F. 3d 997 (9th Cir. 2002).....16

Gaskill v. Gordon
160 F.3d 361, 363 (7th Cir. 1998).....4

Glass v. UBS Fin. Services, Inc.
C-06-4068 MMC, 2007 WL 221862 at *16 (N.D. Cal. 2007)
aff'd, 331 F. App'x 452 (9th Cir. 2009).....6, 8, 19

Hefler v. Wells Fargo & Co.
2018 WL 6619983, at *14 (N.D. Cal. 2018).....15

Hensley v. Eckerhart
461 U.S. 424, 436 (1983).....6, 15

Hoffman v. Constr. Protective Services, Inc.
EDCV03-01006VAPSGLX, 2006 WL 6105638 at *8 (C.D. Cal. 2006).....17

In re Activision Sec. Litig.
723 F. Supp. 1373 (N.D. Cal. 1989).....12

In re Bluetooth Headset Prods. Liab. Lit.
654 F.3d 935, 942 (9th Cir. 2011).....5, 6, 15

In re Heritage Bond Litig.
2005 WL 1594403, at *20 (C.D. Cal. June 10, 2005).....8, 9, 17

In re MacBook Keyboard Litig.
2023 WL 3688452, at *15 (N.D. Cal. 2023).....14

In Re NCAA Grant-in-Aid Cap Antitrust Litigation
2017 WL 6040065, *2 (N.D. Cal. 2017).....5

In re Omnivision Techs., Inc.
559 F. Supp. 2d 1036, 1047-48 (N.D. Cal. 2008).....12

In re Pac. Enterprises Sec. Litig.
47 F.3d 373, 379 (9th Cir. 1995).....8

1	<i>In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions</i>	
2	148 F.3d 283, 333 (3d Cir. 1998).....	4
3	<i>In re Pub. Serv. Co. of New Mexico</i>	
4	No. 91-0536M, 1992 WL 278452, at *8 (S.D. Cal. 1992).....	9
5	<i>In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.,</i>	
6	2017 WL 1047834, at *5 (N.D. Cal. 2017).....	15
7	<i>In re Washington Pub. Power Supply Sys. Sec. Litig.</i>	
8	19 F.3d 1291, 1299, 1300-01 (9th Cir. 1994).....	10
9	<i>Ingalls v. Hallmark Mktg. Corp.</i>	
10	08cv4342 VBF (Ex), Doc. No. 77, ¶ 6 (C.D. Cal. Oct. 16, 2009).....	12
11	<i>Jenson v. First Tr. Corp.</i>	
12	No. CV 05-3124 ABC (CTX), 2008 WL 11338161, at *16 (C.D. Cal. 2008).....	18
13	<i>Jordan v. Mutnomah County</i>	
14	815 F.2d 1258, 1263 at fn. 8 (9th Cir. 1987).....	15
15	<i>Wershba v. Apple Computer, Inc.</i>	
16	91 Cal. App. 4th 224, 255 (2001).....	15
17	<i>Knight v. Red Door Salons, Inc.</i>	
18	2009 WL 248367 at *5–6 (N.D. Cal. 2009).....	5, 12
19	<i>Laffitte v. Robert Half Internat., Inc.</i>	
20	1 Cal. 5th 480, 503 (2016).....	3, 5, 6
21	<i>Linney v. Cellular Alaska Partnership</i>	
22	1997 WL 450064, at *7 (N.D. Cal. 1997).....	18
23	<i>Low v. Trump Univ., LLC</i>	
24	246 F. Supp. 3d 1295, 1316 (S.D. Cal. 2017)	
25	<i>aff’d</i> , 881 F.3d 1111 (9th Cir. 2018).....	19
26	<i>Mangold v. Cal. Pub. Utils, Comm’n</i>	
27	67 F.3d 1470, 1478 (9th Cir. 1995).....	3
28		

1	<i>McCown v. City of Fontana</i>	
2	565 F.3d 1097, 1102 (9th Cir. 2009).....	6
3	<i>McIntosh v. McAfee, Inc.</i>	
4	No. C06-07694, 2009 WL 673976, *2 (N.D. Cal. 2009).....	14
5	<i>Missouri v. Jenkins</i>	
6	491 U.S. 274, 284 (1989).....	16
7	<i>Parkinson v. Hyundai Motor Am.</i>	
8	796 F. Supp. 2d 1160, 1170 (C.D. Cal. 2010).....	14
9	<i>Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware</i>	
10	<i>Valley II)</i>	
11	483 U.S. 711 (1987).....	16
12	<i>Rippee v. Boston Mkt. Corp.</i>	
13	No. 05cv1359 BTM (JMA), Doc. No. 70, at 7-8 (S.D. Cal. 2006).....	12
14	<i>Romero v. Producers Dairy Foods, Inc.</i>	
15	2007 WL 3492841 at *4 (E.D. Cal. 2007).....	5
16	<i>Singer v. Becton Dickinson & Co.</i>	
17	08-CV-821-IEG (BLM), 2010 WL 2196104 at *8 (S.D. Cal. 2010).....	5, 11, 19
18	<i>Smith v. CRST Van Expedited, Inc.</i>	
19	No. 10-CV-1116- IEG WMC, 2013 WL 163293, at *5 (S.D. Cal. 2013).....	11
20	<i>Staton v. Boeing Co.</i>	
21	327 F.3d 938, 977 (9th Cir. 2003).....	18
22	<i>Torrissi v. Tucson Elec. Power Co.</i>	
23	8 F.3d 1370, 1377 (9th Cir.1993).....	10
24	<i>Van Vranken v. Atlantic Richfield Co.</i>	
25	901 F. Supp. 294, 299 (N.D. Cal. 1995).....	14, 19
26	<i>Vizcaino v. Microsoft Corp.</i>	
27	290 F.3d 1043, 1050 and fn.5 (9th Cir. 2002).....	<i>passim</i>
28		

1	<i>Wert v. U.S. Bancorp</i>	
2	No. 13-CV-3130-BAS-AGS, 2017 WL 5167397, at *7 (S.D. Cal. 2017).....	11

3	<i>Wren v. RGIS Inventory Specialists</i>	
4	2011 WL 1230826 at *29 (N.D. Cal. 2011).....	5

5 **Rules**

6	Fed. R. Civ. P. 23.....	1, 3
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8 **Treatises**

9	4 Newberg on Class Actions.....	14
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10	<i>Common Funds and Common Problems: Fee Objections and Class Counsel's</i>	
11	<i>Response</i> , 17 Rev. Litig. 525, 534 (1998).....	4

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As previously set forth in detail in Plaintiff's Motion for Preliminary Approval and related filings (Dkt. 44), the \$725,000.00 non-reversionary settlement now before this Court is the culmination of significant investigation, research, information exchange, mediation, and negotiation which has resulted in a settlement that provides meaningful monetary compensation to the Class. Plaintiff's counsel now seeks, consistent with the Notice to the Class, an award of attorneys' fees of 1/3 of the Gross Settlement Amount or \$241,666.67¹, an award of actual litigation expenses in the amount of \$24,253.43, and a Class Representative Incentive Payment of \$10,000 to Plaintiff Joe Vigil for pursuing this case and representing the interests of the Class. Each of these allocations is provided for in the Settlement. (See, Ex. 1, Joint Stipulation of Class Action Settlement and Release ("Settlement Agreement").)²

Fed. R. Civ. P. 23(h) provides that, as part of a class action settlement, "the court may award reasonable attorney's fees and nontaxable costs that are authorized . . . by the parties' agreement." The Settlement Agreement provides that Class Counsel will file a motion for Fees and Costs of up to 35% of the Gross Settlement Amount (or \$253,750). See Ex. 1, Settlement, at § 5.3. The Notice to the Class clearly informed Class Members that payment would be made from the Gross Settlement Amount for attorneys' fees up to 35% the Gross Settlement Amount or \$253,750 as compensation for work Class Counsel performed and will continue to perform through finalization of the Settlement. (See, Declaration of James R. Hawkins in Support of Preliminary Approval, Dkt. 44-2, Exhibit A.) Therefore, in

¹ Notably, the settlement agreement permits Class Counsel to seek up to 35% of the common fund as reasonable attorneys' fees, however Class Counsel only seeks 1/3 of the common fund in this matter.

² All Exhibits are attached to the Declaration of James R. Hawkins In Support of Motion for Attorneys' Fees and Expenses, and Class Representative Incentive Payment ("Hawkins Decl."), concurrently filed herewith, unless otherwise indicated.

1 accordance with the Settlement Agreement and the Class Notice, Class Counsel
2 respectfully requests 1/3 of the Gross Settlement Amount. The substantial relief
3 secured by Class Counsel supports the requested fee. Class Counsel's willingness
4 to accept this representation on a contingency basis despite real and significant risks
5 further confirms the reasonableness of this application. The fees requested, as a
6 percentage of the common fund, fall within the range of fees approved by courts in
7 the Ninth Circuit, including this Court.

8 The costs and expenses requested are reasonable out-of-pocket expenses of
9 the kind that would normally be charged to a fee paying client. As such, the request
10 for costs should be approved.

11 Finally, the amount requested as the Class Representative Incentive Payment
12 to Plaintiff Vigil is within the range of awards in that have been approved in similar
13 cases and is reasonable given the Plaintiff's actions, time, and effort expended in
14 this litigation and the related litigation. For these reasons, Plaintiff respectfully
15 submits that the instant motion should be granted.

16 II. ARGUMENT

17 A. Class Counsel Has Extensive Experience Acting As Class 18 Counsel.

19 Class Counsel's experience in prosecuting complex class action matters is
20 extensive. (See, generally, Declaration of James R. Hawkins in Support of
21 Attorneys' Fees and Costs, and Class Representative Incentive Payment
22 ("Hawkins Decl."); see also, Declaration of James R. Hawkins In Support of
23 Preliminary Approval (Dkt. No. 44-2) Class Counsel has prosecuted hundreds of
24 cases on behalf of employees for California Labor Code violations and are
25 experienced and qualified to evaluate the class and representative claims present
26 in this case and the defenses thereto, and to weigh the risks and benefits of
27 proceeding with a settlement (as opposed to proceeding with certification and
28 trial) on a fully informed basis. (Hawkins Decl. ¶¶ 33, 49-54.) This experience

1 instructed Class Counsel on the risks and uncertainties of further litigation. As
2 detailed in the supporting declarations on preliminary approval, Class Counsel
3 supports the Settlement and believes that it is fair, reasonable and adequate.

4 **B. Attorneys' Fees Should be Awarded Based on a Percentage**
5 **of the Settlement Fund.**

6 Rule 23(h) of the Federal Rules of Civil Procedure provides that, “[i]n a
7 certified class action, the court may award reasonable attorney’s fees and non-
8 taxable costs that are authorized by law or by the parties' agreement.” Fed. R. Civ.
9 P. 23(h). The United States Supreme Court has stated that “a litigant or a lawyer
10 who recovers a common fund for the benefit of persons other than himself or his
11 client is entitled to a reasonable attorney's fee from the fund as a whole.” *Boeing*
12 *Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). “The doctrine rests on the perception
13 that persons who obtain the benefit of a lawsuit without contributing to its cost are
14 unjustly enriched at the successful litigant's expense.” *Id.* Under the common fund
15 doctrine, the Court may assess “attorney's fees against the entire fund, thus
16 spreading fees proportionately among those benefited by the suit.” *Id.*

17 The Ninth Circuit has held that in cases where state law claims predominate,
18 state law governs the method of calculating fee awards. *See Mangold v. Cal. Pub.*
19 *Utils, Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995) (stating that the Ninth Circuit
20 has “applied state law in determining not only the right to fees, but also in the
21 method of calculating the fees”); *Espinosa v. California Coll. of San Diego, Inc.*,
22 No. 17CV744-MMA (BLM), 2018 WL 1705955, at *8 (S.D. Cal. Apr. 9, 2018)
23 (citing same). The California Supreme Court has held that in common fund cases
24 (like this case), a trial court may award class counsel a fee out of that fund by
25 “choosing an appropriate percentage of the fund.” *Espinosa*, 2018 WL 1705955 at
26 *8, citing *Laffitte v. Robert Half Int’l Inc.*, 1 Cal. 5th 480, 503-06 (2016).

27 The percentage-of-the-fund method is generally recognized as the superior
28 method of calculating attorneys’ fees in common fund class action settlements, such

1 as this one. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 and fn.5
2 (9th Cir. 2002) (stating that the “primary basis of the fee award remains the
3 percentage method” and noting that the lodestar method “creates incentives for
4 counsel to expend more hours than may be necessary on litigating a case so as to
5 recover a reasonable fee,” and therefore “is merely a cross-check on the
6 reasonableness of a percentage figure”); *see also Aichele v. City of Los Angeles*, No.
7 CV1210863DMGFFMX, 2015 WL 5286028, at *5 (C.D. Cal. Sept. 9, 2015)
8 (“Many courts and commentators have recognized that the percentage of the
9 available fund analysis is the preferred approach in class action fee requests because
10 it more closely aligns the interests of the counsel and the class...”); *Craft v. Cty. of*
11 *San Bernardino*, 624 F. Supp. 2d 1113, 1116 (C.D. Cal. 2008) (*quoting Vizcaino*);
12 *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 333
13 (3d Cir. 1998) (the percentage-of-the-fund approach “rewards counsel for success
14 and penalizes it for failure”); *Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998)
15 (percentage of the fund “more closely align[s] the lawyer’s interests with those of
16 his client by giving him a stake in a successful outcome.”) Commentators have
17 similarly noted that the percentage-of-the-fund method is a means of “maximizing
18 the recovery of the class.” Reagan W. Silber and Frank E. Goodrich, *Common*
19 *Funds and Common Problems: Fee Objections and Class Counsel’s Response*, 17
20 *Rev. Litig.* 525, 534 (1998). Accordingly, Plaintiff respectfully submits that the
21 attorneys’ fees in this case should be awarded as a percentage of the common fund
22 secured, as contemplated by the Settlement Agreement and consistent with the
23 above-cited authority.

24 **C. A Fee of One-Third of the Gross Settlement Amount is**
25 **Reasonable.**

26 The Ninth Circuit has identified a number of factors the Court may consider
27 in assessing whether an award is reasonable and whether an upward departure from
28 the standard benchmark is warranted, including: (1) the results achieved; (2) the

1 risk of litigation; (3) the skill required and quality of work; (4) the contingent nature
2 of the fee; (5) the financial burden carried by the plaintiffs; and (6) awards made in
3 similar cases. *Singer v. Becton Dickinson & Co.*, 08-CV-821-IEG (BLM), 2010 WL
4 2196104 at *8 (S.D. Cal. June 1, 2010) (citing *Vizcaino v. Microsoft Corp.*, 290
5 F.3d 1043, 1048-50 (9th Cir. 2002)).

6 The Ninth Circuit has established “25 percent of the fund as the benchmark
7 for a reasonable fee award” in common fund cases.” *In re Bluetooth Headset Prods.*
8 *Liab. Lit.*, 654 F.3d 935, 942 (9th Cir. 2011); *In Re National Collegiate Athletic*
9 *Association Grant-in-Aid Cap Antitrust Litigation*, 2017 WL 6040065, *2 (N.D.
10 Cal. 2017) (the 25% benchmark is “presumptively reasonable.”). However, despite
11 the fact that the Ninth Circuit has generally established 25% of a common fund as
12 the “benchmark” award for attorney fees, *Vizcaino*, 290 F.3d at 1043, it has also
13 held that benchmark is only the starting point for the analysis and that the exact
14 percentage to be awarded varies based on the facts of the case but that “in most
15 common fund cases, the award exceeds that benchmark.” *In Re NCAA*, 2017 WL
16 6040065 at *2. Finally, 33.33% percent fee is within the range typically awarded
17 by California state courts. *See Laffitte v. Robert Half Internat., Inc.*, 1 Cal. 5th 480,
18 503 (2016) (the California Supreme Court affirmed percentage awards for attorney
19 fees from common funds, and then upheld a 33.33% attorney fee award from the
20 common fund in a wage and hour class action); *see also Chavez v. Netflix, Inc.* 162
21 Cal. App. 4th 43, 66 n.11 (2008) (“fee awards in class actions average around one-
22 third of the recovery”); *see also, e.g., Betancourt v. Advantage Human Resourcing,*
23 *Inc.*, 2016 WL 344532 at * 9 (N.D. Cal. 2016) (awarding 34.3% of settlement fund
24 in wage and hour class action); *Wren v. RGIS Inventory Specialists*, 2011 WL
25 1230826 at *29 (N.D. Cal. 2011) (awarding fees that “amount to just under 42% of
26 the settlement amount” in a wage and hour class action); *Knight v. Red Door Salons,*
27 *Inc.*, 2009 WL 248367 at *5–6 (N.D. Cal. 2009) (approving of a 30% fee award in
28 a wage and hour class action settlement); *Romero v. Producers Dairy Foods, Inc.*,

1 2007 WL 3492841 at *4 (E.D. Cal. 2007) (approving a 33% fee award in a wage
2 and hour class action settlement).

3 Plaintiff respectfully submits that given that the California Supreme Court
4 declined to adopt a 25% benchmark in *Laffite*, 1 Cal. 5th at 503-06, the 25%
5 benchmark should no longer apply in cases in which California law governs the fee
6 motion. In *Vizcaino*, the lead Ninth Circuit decision adopting the 25% benchmark,
7 both the claims and the fee motion were governed by Washington law, and the Ninth
8 Circuit relied on a Washington Supreme Court decision in which a 25% benchmark
9 was adopted. *Vizcaino*, 290 F.3d at 1047 (citing *Bowles v. Dep't of Ret. Sys.*, 847
10 P.2d 440, 451 (Wash. 1993)). Thus, after *Laffitte*, there is no reason for the Ninth
11 Circuit to continue to apply this benchmark in cases governed by California law.

12 In any event, the upward departure from the 25% benchmark is justified here
13 given the skill displayed by counsel in securing an excellent \$725,000.00 settlement
14 for thousands of employees involving complex issues on a purely contingent basis.

15 **1. The Results Achieved Were Substantial.**

16 The Supreme Court has said that in an award of attorney's fees the "most
17 critical factor is the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S.
18 424, 436 (1983). The "benefit obtained for the class" is considered the "foremost"
19 consideration in determining the appropriate fee in a common fund case. *In Re*
20 *Bluetooth*, 654 F.3d at 942. Thus, ultimately the reasonableness of the fee "is
21 determined primarily by reference to the *level of success* achieved by the plaintiff."
22 *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009) (emphasis added).
23 Indeed, the Ninth Circuit has held that the relevant circumstances that could justify
24 an *upward* departure from the 25 percent benchmark include the achievement of
25 "exceptional results" for the class. *Glass v. UBS Financial Services, Inc.*, 2007 WL
26 221862, *16 (N.D. Cal. 2007) (italics in original). Here, the results achieved fully
27 warrant the fee request.
28

1 First, Class Counsel recovered a significant aggregate sum on behalf of the
2 Settlement Class Members and through these efforts approximately 527 Class
3 Members will receive payment. (Hawkins Decl., ¶ 17.) The Net Settlement Amount
4 remaining for the Individual Settlement Payments is estimated to be \$429,329.90.
5 (Hawkins Decl., ¶ 5.) The average award is estimated to be \$814.67³.

6 Class Counsel respectfully submits that this excellent result was only
7 achieved because Class Counsel tenaciously litigated this matter in state and federal
8 court in this dynamic area of wage and hour law. (Hawkins Decl. ¶¶ 31-42.) All of
9 these efforts ultimately culminated in the instant settlement. Without this dogged
10 pursuit by Class Counsel and Plaintiff, and the investment of substantial resources
11 and time, the Settlement Class may have received nothing. At all times, Defendant
12 mounted factual and legal challenges, and asserted numerous defenses which
13 threatened all recovery, as it argued that it complied with all applicable laws at all
14 times. (Id.)

15 In sum, the substantial results achieved in this matter and the superior work
16 to achieve these results supports a 33.33% percent fee. Accordingly, this factor
17 supports approval of counsel's fees.

18 **2. The Risk of Litigation Was Significant.**

19 The risk factor also supports the requested fee percentage. In accepting this
20 case, Class Counsel committed to a long and arduous fight against a sophisticated
21 Defendant with experienced counsel, Seyfarth Shaw, LLP. Plaintiff's claims
22 involved complex and disputed legal issues and fact-specific arguments which the
23 Parties litigated heavily since inception of the actions.

24 Defendant vigorously challenged all aspects of the Action from the inception.
25 Defendant asserted numerous defenses which threatened all recovery, and argued
26 that it complied with all applicable laws at all times. Nevertheless, Class Counsel
27

28 ³ \$429,329.90 / 527 Class Members = \$814.67

1 negotiated this substantial settlement for the Class. (Hawkins Decl., ¶¶ 10-14, Dkt.
2 44-2, ¶¶ 54-88.)

3 In short, Plaintiff's counsel proceeded with this litigation under a significant
4 risk of no recovery and with some aspects of their case uncertain. Negotiating a
5 settlement "while the state of the law remain[s] uncertain" is the kind of difficult
6 litigation and assumption of risk that "should be fully rewarded." *Glass v. UBS Fin.*
7 *Services, Inc.*, C-06-4068 MMC, 2007 WL 221862 at *16 (N.D. Cal. Jan. 26, 2007)
8 *aff'd*, 331 F. App'x 452 (9th Cir. 2009), *cert. denied* *D'Aria v. Glass*, 130 S. Ct. 797
9 (2009) and *Evans v. Glass*, 130 S. Ct. 801 (2009).

10 Class Counsel assumed the risk that they would not be paid and that they
11 would lose all costs and time invested if this case failed. Despite these real and
12 substantial risks, significant monetary relief was secured for the class. This
13 significant risk supports the requested fee award. *See In re Pac. Enterprises Sec.*
14 *Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (approving 33 1/3% fee award "because of
15 the complexity of the issues and the risks" involved); *Vizcaino*, 290 F.3d at 1048
16 (citing *In re Pac. Enterprises* and noting that "Risk is a relevant circumstance.")

17 **3. The Skill Required and Quality of Work Justifies the**
18 **Request.**

19 Class Counsel is experienced and skilled in complex class actions and
20 employed those necessary skills in pursuing these claims against a well-funded
21 Defendant with formidable defense counsel. The skill and quality of Class
22 Counsel's work is best illustrated by the results achieved. This case involved
23 complex analysis and investigation of Defendant's policies and practices, as well as
24 difficult legal and factual issues. (Hawkins Decl. ¶¶ 49-53.) Nevertheless, Class
25 Counsel negotiated a substantial sum for the Settlement Class.

26 The experience of Class Counsel also justifies the fee award requested. *See*
27 *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *20 (C.D.
28 Cal. June 10, 2005), *citing In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423,

1 432 (E.D. Pa. 2001) (awarding a fee award of one-third of a common fund based in
2 part on the experience of counsel in litigating similar class actions); *see also In re*
3 *Pub. Serv. Co. of New Mexico*, No. 91-0536M, 1992 WL 278452, at *8 (S.D. Cal.
4 July 28, 1992) (finding that “extensive experience and skill in these types of actions,
5 as well as experience in other complex litigation actions” cut in favor of a one-third
6 fee award of the common fund).

7 “[T]he quality of opposing counsel is important in evaluating the quality of
8 Plaintiff’s counsel’s work.” *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005
9 WL 1594403, at *20 (C.D. Cal. June 10, 2005). There is no dispute that the Plaintiff
10 in this litigation was opposed by highly skilled and respected counsel with well-
11 deserved reputations for vigorous advocacy in the defense of their clients. The
12 difficulty of achieving such a settlement against experienced and motivated
13 opposing counsel is substantial, and also stands in favor of approval of Plaintiff’s
14 request.

15 **4. The Contingent Nature of the Fee and the Financial**
16 **Burden Carried by the Plaintiff Justifies the Request.**

17 The contingent nature of this representation also supports the requested fee.
18 Plaintiff’s counsel took on this case, and the out-of-pocket costs prosecuting it, with
19 no remuneration and with the understanding that they would be compensated only
20 if they succeeded. Specifically, Plaintiff’s Counsel dedicated 319.2 hours and
21 incurred \$24,253.43 in costs in bringing this action on behalf of Plaintiff. (Hawkins
22 Decl., ¶¶ 31-42, 48.) Courts have recognized the need to reward counsel who accept
23 a case on a contingent fee basis because of the risk of non-payment that they face:

24 It is an established practice in the private legal market to reward
25 attorneys for taking the risk of non-payment by paying them a
26 premium over their normal hourly rates for winning contingency cases.
27 *See Richard Posner, Economic Analysis of Law* §21.9, at 534-35 (3d
28 ed. 1986). Contingent fees that may far exceed the market value of the
services if rendered on a non-contingent basis are accepted in the legal
profession as a legitimate way of assuring competent representation

1 for plaintiffs who could not afford to pay on an hourly basis regardless
2 of whether they win or lose.

3 *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299, 1300-
4 01 (9th Cir. 1994). The Court should not overlook the real risks that counsel incur
5 by accepting contingent fee cases, such as this one. *See, e.g., Aichele*, 2015 WL
6 5286028 at *5 (describing Federal Judicial Center report which found that 31.7%
7 or less of the filed class cases in four districts resulted in successful class outcomes
8 for plaintiffs). Large-scale wage and hour actions of this type are, by their very
9 nature, complicated and time-consuming. Any law firm undertaking
10 representation of a large number of class members inevitably must be prepared to
11 make a tremendous investment of time, energy, and resources. Due also to the
12 contingent nature of the customary fee arrangement, lawyers must be prepared to
13 make this investment with the very real possibility of an unsuccessful outcome
14 and no fee of any kind. The demands and risks of this type of litigation overwhelm
15 the resources – and deter participation – of many traditional claimants’ firms. The
16 fact that Plaintiff’s counsel accepted this financial burden supports the
17 reasonableness of the requested fee percentage. *See Vizcaino*, 290 F.3d at 1050
18 (“These burdens are relevant circumstances”) (citing *Six (6) Mexican Workers*,
19 904 F.2d at 1311; *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1377 (9th
20 Cir.1993), *Bebchick v. Wash. Metro. Area Transit Comm’n*, 805 F.2d 396, 408
21 (D.C.Cir.1986)).

22 **5. Awards Made in Similar Cases.**

23 The Ninth Circuit has also found it appropriate to “to examine lawyers’
24 reasonable expectations, which are based on the circumstances of the case and the
25 range of fee awards out of common funds of comparable size” in assessing a fee
26 request. *Vizcaino*, 290 F.3d at 1050. Thirty-three percent of a common fund is an
27 award well within the range of awards made in similar cases:
28

1 The Ninth Circuit has held that 25% of the gross settlement
2 amount is the benchmark for attorneys' fees awarded under the
3 percentage method, with 20 to 30% as the usual range in common
4 fund cases where the recovery is between \$50 and \$200 million.
5 Other case law surveys suggest that 50% is the upper limit, with
6 30-50% commonly being awarded in cases in which the common
7 fund is relatively small. Indeed, California cases in which the
8 common fund is small, tend to award attorneys' fees above the
9 25% benchmark. More particularly, a review of California cases
10 in other districts reveals that courts usually award attorneys' fees
11 in the 30-40% range in wage and hour class actions that result in
12 recovery of a common fund under \$10 million. Overall, although
13 this [30%] percentage is slightly higher than the 25% benchmark
14 for fees in class action cases, it is consistent with other wage and
15 hour class actions where the recovery is less than \$10 million.

12 *Cicero v. DirecTV, Inc.*, EDCV 07-1182, 2010 WL 2991486 (C.D. Cal. July 27,
13 2010) (citations omitted); *see also Espinosa*, 2018 WL 1705955 at *8 (approving
14 30% fee); *Beaver v. Tarsadia Hotels*, No. 11-CV-01842-GPC-KSC, 2017 WL
15 4310707, at *9 (S.D. Cal. Sept. 28, 2017) (“California courts routinely award
16 attorneys' fees of 33.33% of the common fund.”); *Wert v. U.S. Bancorp*, No. 13-
17 CV-3130-BAS-AGS, 2017 WL 5167397, at *7 (S.D. Cal. Nov. 7, 2017)
18 (“Awarding 30% of the common fund for attorneys' fees is typical in wage and
19 hour cases.”); *Aichele*, 2015 WL 5286028, at *5 (“...[I]n cases under \$10 million,
20 the awards more frequently will exceed the 25% benchmark, and indeed go above
21 30%.”); *Smith v. CRST Van Expedited, Inc.*, No. 10-CV-1116- IEG WMC, 2013
22 WL 163293, at *5 (S.D. Cal. Jan. 14, 2013) (“Under the percentage method,
23 California has recognized that most fee awards based on either a lodestar or
24 percentage calculation are 33 percent and has endorsed the federal benchmark of
25 25 percent.”); *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 450 (E.D.
26 Cal. 2013) (collecting cases approving 30% or 33% of common fund); *Singer*,
27 2010 WL 2196104 at *8 (stating that “the request for attorneys' fees in the amount
28 of 33.33% of the common fund falls within the typical range of 20% to 50%

1 awarded in similar cases” and citing *Ingalls v. Hallmark Mktg. Corp.*, 08cv4342
2 VBF (Ex), Doc. No. 77, ¶ 6 (C.D. Cal. Oct. 16, 2009) (awarding 33.33% fee on a
3 \$5.6 million wage and hour class action); *Knight v. Red Door Salons, Inc.*, 08-
4 01520 SC, 2009 WL 248367 (N.D. Cal. Feb. 2, 2009) (finding award of 30%
5 reasonable in wage and hour case); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d
6 1036, 1047-48 (N.D. Cal. 2008) (stating that “in most common fund cases” the
7 award is more than 25% and citing cases approving 30%); *Birch v. Office Depot,*
8 *Inc.*, No. 06cv1690 DMS (WMC), Doc. No. 48, ¶13 (S.D. Cal. Sept. 28, 2007)
9 (awarding 40% fee on a \$16 million wage and hour class action); *Rippee v. Boston*
10 *Mkt. Corp.*, No. 05cv1359 BTM (JMA), Doc. No. 70, at 7-8 (S.D. Cal. Oct. 10,
11 2006) (awarding 40% fee on a \$3.75 million wage and hour class action)); and *In*
12 *re Activision Sec. Litig.*, 723 F. Supp. 1373 (N.D. Cal. 1989) (collecting cases and
13 stating “as documented by the lengthy list of cases below, this court finds that in
14 most recent cases the benchmark is closer to 30%”). Accordingly, the requested
15 fee percentage is well within that approved in similar cases.

16 **D. Although Not Required, Class Counsel’s Fee Request is**
17 **Reasonable if Cross-Checked With the Lodestar**

18 The Ninth Circuit has recognized that “while the primary basis of the fee
19 award remains the percentage method,” a lodestar cross-check “may provide a
20 useful perspective on the reasonableness of a given percentage award.” *Vizcaino*,
21 290 F.3d at 1050. In so doing, the Ninth Circuit cautioned that “the lodestar
22 method is merely a cross-check on the reasonableness of a percentage figure....”
23 *Id.* at fn. 5. The Ninth Circuit also cautioned against relying upon the lodestar
24 method in this context, stating that “it is widely recognized that the lodestar
25 method creates incentives for counsel to expend more hours than may be
26 necessary on litigating a case so as to recover a reasonable fee, since the lodestar
27 method does not reward early settlement.” *Id.* at fn. 5.

1 Plaintiff's Counsel has expended a significant amount of time litigating this
2 case and the related cases to secure this excellent result on behalf of the Class
3 Members. These hours were spent on, among others, the following tasks:
4 investigating the claims and Plaintiff; interviewing Plaintiff and reviewing
5 documents provided by him; drafting the complaints in each of the actions, the
6 First Amended Complaint and the Second Amended Complaint;; drafting notice
7 documents to the LWDA; reviewing notices of removal; preparing for and
8 attending court hearings; conducting Rule 26(f) conference; interviewing
9 witnesses; reviewing publicly available information; reviewing information
10 regarding prior settlements and actions; meeting and conferring with Defendant's
11 counsel to obtain relevant documents and information; reviewing time and payroll
12 records and other employment records produced by Defendant; retaining
13 consultants to analyze time and payroll data; working with the experts/consultants
14 to analyze the data provided; performing legal research regarding Plaintiff's
15 claims and Defendant's defenses thereto; drafting various stipulations; preparing
16 several Rule 26 reports; drafting a mediation brief and preparing a damages
17 analysis prior to mediation; attending a private mediation session; negotiating,
18 drafting, and revising the Settlement Agreement and Release of Class and PAGA
19 Claims; drafting and revising the Motion for Preliminary Approval of the Class
20 Action Settlement and accompanying documents; drafting multiple supplemental
21 declarations and related filings in support of the approval motion; traveling and
22 attending court hearings; conferences with clients and members of the Class to
23 provide updates; overseeing the administration process; working the administrator
24 to ensure that the notice process was carried out properly; and drafting the final
25 approval documentation.

26 The lodestar for all Plaintiff's counsel related to the efforts undertaken in
27 this action the related action is approximately \$236,042.50 and therefore the
28 requested fee would represent a multiplier of approximately 1.02 on that billed

1 time. (Hawkins Decl., ¶ 56.)⁴ This is on the low end of the standard of
2 reasonableness within the Ninth Circuit. *See, e.g., Vizcaino*, 290 F.3d at 1051 and
3 fn. 6 (approving 3.65 multiplier and collecting cases “finding a range of 0.6-19.6,
4 with most (20 of 24, or 83%) from 1.0-4.0 and a bare majority (13 of 24, or 54%)
5 in the 1.5-3.0 range”); *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160,
6 1170 (C.D. Cal. 2010) (“Where appropriate, multipliers may range from 1.2 to 4
7 or even higher”); *McIntosh v. McAfee, Inc.*, No. C06-07694, 2009 WL 673976,
8 *2 (N.D. Cal. March 13, 2009) (recognizing a range from “2 to 4 or even higher”);
9 *Van Vranken v. Atl. Richfield Co.*, 901 F.Supp. 294, 298-99 (N.D. Cal. 1995)
10 (holding that a 3.6 multiplier is “well within the acceptable range for fee awards
11 in complicated class action litigation”); *see also* 4 Newberg on Class Actions §
12 14.7 (stating that courts typically approve 25% to 33.34% percentage awards with
13 lodestar cross-checks of 1.9 to 5.1).

14 The lodestar itself is reasonable and well-supported. In determining the
15 reasonableness of the hourly rates which make up counsels’ lodestar, a court must
16 set rates according to what the market commands for analogous litigation. *Blum*
17 *v. Stenson*, 465 U.S. 886, 895 (1984). The relevant community for the purposes
18 of determining the prevailing market rate is generally the “forum in which the
19 district court sits.” *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir.
20 2008). The reasonableness of Class Counsel’s rates is confirmed by comparing
21 such rates with the rates of comparable counsel practicing complex and class
22 litigation. (See Hawkins Decl. ¶¶ 57-58, Ex. 1-2); *see also, e.g., In re MacBook*
23 *Keyboard Litig.*, 2023 WL 3688452, at *15 (N.D. Cal. May 25, 2023)(approving
24 partner rates up to \$1,195, associate rates up to \$850, \$425 for contract attorneys,
25

26 ⁴ In light of the strong judicial preference for the percentage-of-the-fee method
27 and the use of a lodestar comparison only as a cross-check, Plaintiff’s counsel
28 have not included their voluminous detailed time entries with this submission, but
have instead provided summaries of their time via declarations. However, if this
Court decides analysis of those entries is required, Plaintiff’s counsel can provide
those records for *in-camera* review upon request.

1 and \$325 for paralegals); *Hefler v. Wells Fargo & Co.*, 2018 WL 6619983, at *14
2 (approving partner rates up to \$1,250, \$650 for associates, and \$350 for
3 paralegals); *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods.*
4 *Liab. Litig.*, 2017 WL 1047834, at *5 (N.D. Cal. Mar. 17, 2017) (approving rates
5 of \$275 to \$1600 for partners, \$150 to \$790 for associates, and \$80 to \$490 for
6 paralegals).

7 The hours expended were also reasonable. In determining whether the
8 number of hours expended on the litigation was reasonable, the district court
9 examines whether “the time spent was reasonably necessary and that its counsel
10 made ‘a good faith effort to exclude from the fee request hours that are excessive,
11 redundant, or otherwise unnecessary.’” *Jordan v. Mutnomah County*, 815 F.2d
12 1258, 1263 at fn. 8 (9th Cir. 1987) (quoting *Hensley v. Eckerhart*, 461 U.S. 424,
13 434 (1983)). Plaintiff’s counsel staffed and managed this case as efficiently as
14 possible. All of the time submitted to the Court for compensation is (i) of the kind
15 and character that Plaintiff’s counsel would normally bill to fee-paying clients, (ii)
16 time that counsel normally track and seek to be paid for at the conclusion of
17 successful contingency litigation, and (iii) added value to the case and was
18 reasonably necessary to give the Plaintiff and the Class the best possible chance for
19 a favorable outcome.

20 Where a fee must be based on lodestar, a court may adjust it upward by using
21 a positive multiplier to reflect “reasonableness” factors, including, (1) quality of
22 representation, (2) class benefits, (3) complexity and novelty of issues presented,
23 and (4) risk of nonpayment. *In re Bluetooth, supra*, 654 F.3d at 941-42. “Multipliers
24 can range from 2 to 4 or even higher.” *Wershba v. Apple Computer, Inc.*, 91 Cal.
25 App. 4th 224, 255 (2001).

26 As detailed throughout this Motion, the quality of representation was
27 excellent, resulting in significant benefits to the Class. This result was achieved by
28 analyzing complex and novel legal issues. The result was achieved despite complex

1 and disputed factual and class certification issues, and a vigorous defense to all
2 claims. The case was undertaken on a completely contingent basis and presented a
3 high risk Class Counsel may not have been paid or reimbursed for the \$24,253.43
4 in costs advanced.

5 A lodestar should also be adjusted for delay in payment. *Missouri v. Jenkins*,
6 491 U.S. 274, 284 (1989) (“an appropriate adjustment for delay in payment” should
7 be factored into the calculation of a fee award); see also *Fischel v. Equitable Life*
8 *Assur. Soc.* 307 F. 3d 997 (9th Cir. 2002) (in common fund cases, delay in obtaining
9 payment must be compensated.) Under federal case law, delay must be considered
10 separately from any enhancement for contingency. See, *Pennsylvania v. Delaware*
11 *Valley Citizens’ Council for Clean Air (Delaware Valley II)*, 483 U.S. 711 (1987).

12 Based on all relevant factors, particularly benefits provided to the Class and
13 risk assumed by Class Counsel, a 1.02 multiplier is reasonable if a cross-check is
14 undertaken.

15 In short, Plaintiff’s counsel’s request for one-third of the Gross Settlement
16 Amount is justified by the fact that it is consistent with results in similar cases and
17 fully supported by each of the relevant factors. Moreover, it was clearly
18 communicated to Class Members in the Class Notice that Plaintiff’s counsel
19 would request an award of up to 35% of the Gross Settlement Amount or
20 \$253,750. Here, Plaintiff’s Counsel is only seeking \$241,666.67 in fees for their
21 efforts and therefore, if approved, \$12,084 would remain in the Net Settlement
22 Amount to be distributed to Participating Class Members resulting in slightly
23 greater individual settlement payments than were provided in the Notice. The
24 Court should, therefore, approve the requested fee award

25 **E. Plaintiff’s Counsel’s Expenses Should be Approved.**

26 Plaintiff’s counsel also requests \$24,253.43 from the Gross Settlement
27 Amount as reimbursement for their costs and expenses as provided for under the
28 terms of the Settlement Agreement. (Hawkins Decl., ¶ 24, Ex. 3). This request is

1 less than the \$25,000.00 of costs and expenses preliminarily approved by this
2 Court. The difference will remain part of the Net Settlement Amount to be
3 distributed to Participating Class Members. “There is no doubt that an attorney
4 who has created a common fund for the benefit of the class is entitled to
5 reimbursement of reasonable litigation expenses from that fund.” *In re Heritage*
6 *Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *23 (C.D. Cal. June 10,
7 2005) (quoting *In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 434 (E.D.
8 Pa. 2001)). Courts have found that expenses are routinely reimbursed in
9 contingency cases in addition to the fee award. *See, e.g., In re Businessland Sec.*
10 *Litig.*, 1991 WL 427887 at *2 (collecting cases where expenses were awarded in
11 addition to 30-33% of a common fund). The Ninth Circuit and other California
12 courts have explained that plaintiffs’ counsel in contingency cases may recover
13 reasonable out-of-pocket expenses “that would normally be charged to a fee
14 paying client.” *Hoffman v. Constr. Protective Services, Inc.*, EDCV03-
15 01006VAPSG LX, 2006 WL 6105638 at *8 (C.D. Cal. Aug. 31, 2006) (citing
16 *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir.1994)). The expenses that Plaintiff’s
17 counsel seeks here are of that nature. Plaintiff’s counsel have incurred their
18 expenses without remuneration and accepted the risk that they would never be
19 repaid if the case was not successfully resolved. Moreover, it was clearly
20 communicated to Class Members in the Class Notice that Plaintiff’s counsel
21 would request “costs not to exceed \$25,000” to reimburse costs actually incurred.
22 Accordingly, Plaintiff’s request for costs in the amount of \$24,253.43 should be
23 granted.

24 **F. The Incentive Payment to the Named Plaintiff Should be**
25 **Approved.**

26 “Courts across the country embrace incentive awards in light of the
27 enormous benefits created by the class representatives. Indeed, named plaintiffs
28 have little to gain by agreeing to represent a class: their individual recoveries are

1 small compared to the benefits bestowed upon the entire class, yet by acting as
2 class representatives they bear added risks and burdens not faced by the unnamed
3 class members who simply file claims after a case is settled.” *Jenson v. First Tr.*
4 *Corp.*, No. CV 05-3124 ABC (CTX), 2008 WL 11338161, at *16 (C.D. Cal. June
5 9, 2008). Accordingly, “[i]ncentive fees for class representatives serve much the
6 same function as attorneys' fees do in the class action context: they provide the
7 economic incentive necessary to ensure that meritorious actions are prosecuted.”
8 *Linney v. Cellular Alaska Partnership*, Nos. C-96-3008, C-97-0203, C-97-
9 0425, C970457, 1997 WL 450064, at *7 (N.D. Cal. July 18, 1997).

10 The Ninth Circuit has identified three factors that a Court should consider
11 in approving an incentive payment: “[1] the actions the plaintiff has taken to
12 protect the interests of the class, [2] the degree to which the class has benefitted
13 from those actions, and [3] the amount of time and effort the plaintiff expended in
14 pursuing the litigation.” *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003)
15 (citing and quoting factors from *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir.
16 1998)).

17 Under this formulation, Plaintiff should be granted an incentive payment.
18 Plaintiff is directly responsible for the benefits of this settlement made available
19 to the Class Members. He has protected the interests of the class, undergone
20 personal risk and difficulty, and exerted considerable time and effort in
21 maintaining this action. (See generally, Declaration of Joe Vigil filed herewith.)
22 Mr. Vigil stepped forward to be the named representative in the case, cognizant
23 of the inherent risks entailed in prosecuting a class and representation action
24 against his former employer. (Vigil Decl., ¶¶ 11-13.) Mr. Vigil spent hours
25 meeting with Plaintiff’s counsel, gathering documents, reviewing complaints,
26 communicating with other class members, monitoring the case, assisting with the
27 settlement negotiations and approval process, reviewing the Settlement
28 Agreement, reviewing his declarations in support of approval. (Vigil Decl., ¶¶ 16-

17.) He has received no benefit to date from this action. In addition, he is executing a general release as part of this settlement which is broader than that of other Class Members. (Vigil Decl., ¶¶ 21, 23.) The general release has independent value. (Id.) Although he stands to recover a share of the settlement fund, that share would be no more reward than that obtained for unnamed class members who have not put forth corresponding levels of time or effort into this litigation, and who are not executing a broader release.

Courts have often approved awards similar to, or greater than, the award requested here. See, e.g., *Low v. Trump Univ., LLC*, 246 F. Supp. 3d 1295, 1316 (S.D. Cal. 2017), *aff'd*, 881 F.3d 1111 (9th Cir. 2018) (approving \$15,000 service awards); *Singer*, 2010 WL 2196104 at *9 (“The \$25,000 incentive award is ... well within the acceptable range awarded in similar cases.”); *discussing*, *Brotherton v. Cleveland*, 141 F.Supp. 2d 907, 913-14 (S.D. Ohio 2001) [approving \$50,000 class representative payment to named plaintiff]; and *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995) (same); *Glass v. UBS Fin. Servs., Inc.*, No. C-06-4068 MMC, 2007 WL 221862, at *1 (N.D. Cal. Jan. 26, 2007), *aff'd*, 331 F. App'x 452 (9th Cir. 2009) (“the Court finds the requested payment of \$25,000 to each of the [four] named plaintiffs is appropriate”). Moreover, as with the other allocations requested within this Motion, the request for the incentive payment was communicated to Class Members in the Class Notice, and Class Members were given the opportunity to object to the Settlement including the requested incentive payment. Accordingly, the requested Class Member incentive payment should be granted.

III. CONCLUSION

For the above reasons, Plaintiff’s Counsel respectfully request that the Court award attorneys’ fees, litigation expenses, and an incentive payment to the named Plaintiff..

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Dated: November 3, 2023

JAMES HAWKINS APLC

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Settlement Class

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Plaintiff, certifies that this brief contains 6,381 words, which complies with the 7,000 word limit of Local Rule 11-6.1.

JAMES HAWKINS, APLC

Dated: November 3, 2023

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