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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF PLACER

DARWIN COLINAYO and EDELMIRA
MALDONADO, on behalf of themselves and
all others similarly situated,

Plaintiff,

v.

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

Defendants.

Case No. S-CV-0049039

Hon. Trisha Hirashima
Dept.: 42

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR AWARD OF
ATTORNEYS' FEES, COSTS, AND
CLASS REPRESENTATIVES' SERVICE
PAYMENTS**

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1 **I. INTRODUCTION**

2 In connection with the \$3,500,000 Settlement secured by Plaintiffs Darwin Colinayo and
3 Edelmira Maldonado (“Plaintiffs”) on behalf of the Class, Plaintiffs respectfully request that the
4 Court grant this Motion for Award of Attorneys’ Fees and Costs and Class Representatives’
5 Service Payments, granting an award of no more than 35% of the common fund totaling
6 \$1,225,000 for attorneys’ fees, and actual litigation costs in the amount of \$26,228.29. Further,
7 Plaintiffs request that this Court approve Class Representatives’ Service Payments in the amount
8 of \$10,000 to each Plaintiff for the time, effort, and risk they undertook in obtaining this
9 settlement for the Class and in consideration for the broad releases they are required to enter.

10 The requested fee falls well within the benchmark of 25% to 40% of a common fund and
11 is fair compensation for undertaking such complex, risky, and time-consuming litigation on a
12 contingent basis. Here, Class Counsel’s lodestar is currently \$494,316.80 and will only continue
13 to increase. Further, the requested fee award only requires a modest lodestar multiplier of 2.47,
14 which is within the range of multipliers approved by California courts. See e.g., *Wershba v. Apple*
15 *Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001) (“Multipliers can range from 2 to 4 or even
16 higher.”)

17 This settlement was only achieved through the vigorous pursuit of Plaintiffs’ claims by
18 Class Counsel. A detailed summary of the action is provided in paragraphs 17-19 of the
19 Declaration of James Hawkins in Support of Preliminary Approval (“Hawkins Preliminary
20 Decl.”), which is attached as Exhibit 2 to the Declaration of James Hawkins in Support of
21 Plaintiffs’ Motion for Final Approval (“Hawkins Final Decl.”), and Declarations of Zorik
22 Mooradian and Haik Hacopian in Support of Preliminary Approval, generally.

23 Since the attorneys’ fees requested are within the range of reasonableness and the results
24 achieved for the Class Members are excellent, Plaintiffs, by and through Class Counsel,
25 respectfully request that the Court award the requested fees of \$1,225,000 and approve payment
26 of Class Counsel’s actual litigation expenses in the amount of \$26,228.29 in accordance with the
27 preliminarily approved Settlement. In addition, Plaintiffs respectfully request the Court approve
28 the requested Class Representatives’ Service Payments in the amount of \$10,000 to Plaintiff

1 Darwin Colinayo and \$10,000 to Plaintiff Edelmira Maldonado for their efforts in this case, and
2 in exchange for a general release.

3 **II. THE ATTORNEYS' FEES REQUESTED ARE FAIR AND REASONABLE AND**
4 **SHOULD BE APPROVED**

5 In defining a reasonable fee, the Court should mimic the marketplace for cases involving a
6 significant contingent risk such as this one. Given the unique reliance of our legal system on
7 private litigants to enforce substantive provisions of law in class actions, attorneys providing
8 these substantial benefits should be paid an award equal to the amount negotiated in private
9 bargaining that takes place in the legal marketplace. *Deposit Guaranty Nat. Bank, Jackson, Miss.*
10 *v. Roper*, 445 U.S. 326, 338, reh'g. denied, 446 U.S. 947 (1980). "When a fee is set by a court
11 rather than by contract, the object is to set it at a level that will approximate what the market
12 would set. . . . The judge, in other words, is trying to mimic the market in legal services." *Gaskill*
13 *v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998). The "percentage of the fund method more
14 accurately reflects the results achieved." *Laffitte v. Robert Half International, Inc.*, 1 Cal. 5th 480,
15 439 (2016); see also *Lealao v. Beneficial California, Inc.*, 82 Cal.App.4th 19, 50 (2000) ("...in
16 cases where the class recovery can be monetized with a reasonable degree of certainty... a trial
17 court should adjust the basic lodestar through the application of a positive or negative multiplier
18 where necessary to ensure that the fees awarded is within the range of freely negotiated in the
19 legal marketplace in comparable litigation.")

20 At the time this case was brought, the result was far from certain. Defendant's numerous
21 defenses to the case created difficulties with proof and complex legal issues for Class Counsel to
22 overcome. While Class Counsel believes Plaintiffs' claims are meritorious, Defendant has denied
23 liability, disputed damages, and raised factual and legal arguments which could render the Class
24 Members' claims worthless at either class certification or trial. Specifically, Defendant argued,
25 *inter alia*, that Court could significantly reduce the civil penalties specified under PAGA,
26 Plaintiffs' PAGA claim is unmanageable, a Court could rule that Plaintiffs' claims are not
27 certifiable or without merit in light of recent case law, Plaintiffs would have difficulty certifying
28 their claims, Plaintiffs' derivative claims are meritless and Plaintiffs would fail to meet the

1 requisite standards for such penalties, and Defendant complied with the law at all times and the
2 claims lacked factual basis. (Hawkins Preliminary Decl. at ¶¶ 6-11).

3 The Settlement was possible only because Class Counsel was able to convince Defendant
4 that Plaintiffs could prevail regarding liability, obtain and maintain class certification for the
5 Class through trial, and overcome difficulties in proof as to monetary relief. In successfully
6 navigating these hurdles so as to convince Defendant to settle, Class Counsel displayed skills
7 consistent with those that might be expected of attorneys of comparable experience. (Hawkins
8 Final Decl. ¶¶ 42-50).

9 To represent the Class on a contingent fee basis, Class Counsel had to devote the
10 necessary time and resources to this case. (Id. ¶¶ 52-54). In so doing, Class Counsel gave up the
11 hourly work that a firm can rely on for the risky contingent fee work in this case. *Powers v.*
12 *Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000).

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

15 The United States Supreme Court has ruled that the parties to a class action may properly
16 negotiate not only the settlement of the action itself, but also the payment of attorneys' fees. See
17 *Evans v. Jeff D.*, 475 U.S. 717, 734-35, 738, n.30 (1980); In *Hensley v. Eckerhart*, 461 U.S. 424,
18 437 (1983), the Supreme Court held that negotiated, agreed-upon attorneys' fee provisions are the
19 ideal towards which the parties should strive: "A request for attorney's fees should not result in a
20 second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Id.*

21 The United States Supreme Court has reemphasized this policy and further stressed that
22 the trial court "has a responsibility to encourage agreement" on fees. *Blum v. Stenson*, 465 U.S.
23 886, 902 n.19 (1984). Here, as part of the Settlement, Defendant agreed not to oppose an award of
24 thirty-five percent of the Gross Settlement Amount for attorneys' fees. Such a fee is
25 commensurate with what the market would provide for similar services and the Court therefore
26 can most certainly enforce the agreement. As the United States Supreme Court has instructed:

1 Given the unique reliance of our legal system on private litigants to enforce
2 substantive provisions of law through class and derivative actions, attorneys
3 providing the essential enforcement services must be provided incentives roughly
4 comparable to those negotiated in the private bargaining that takes place in the
5 legal marketplace, as it will otherwise be economic for Defendant to increase
6 injurious behavior.

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

8 Here, the Settlement is the result of non-collusive, informed, and arm's-length
9 negotiations between experienced counsel for the Class and Defendant with the assistance of
10 Steven Serratore, an experienced wage and hour mediator, over a full day mediation session on
11 February 7, 2024. Later, the case was settled upon a mediator's proposal. (Hawkins Final Decl. ¶
12 24). Such bargaining is the best measure of the market for fees. The requested fee and cost award
13 was negotiated during adversarial bargaining at arms' length by counsel for each of the parties,
14 after the substantive terms of the Settlement had been negotiated, and fairly reflects the
15 marketplace value of the services of Class Counsel. As a result, the fee agreed to by the parties
16 should be approved.

17 **IV. CLASS COUNSEL'S FEE AWARD IS PROPERLY CALCULATED AS A**
18 **PERCENTAGE OF THE TOTAL VALUE CREATED FOR THE BENEFIT OF**
19 **THE CLASS**

20 Class Counsel seeks an attorney fee award for their successful prosecution and resolution
21 of this common fund contingent action. In cases such as this one, the Courts have long recognized
22 that an appropriate method for determining the award of attorneys' fees is based on a percentage
23 of the total value of benefits afforded to class members by the settlement. *Laffitte*, 1 Cal. 5th at
24 494 ("the percentage method has been generally approved in common fund cases"); *Boeing Co. v.*
25 *Van Gemert*, 444 U.S. 472, 478 (1980); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268,
26 272 (9th Cir. 1989); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). The
27 awarding of a fee based on a percentage of the common fund recovered is to "spread litigation
28 costs proportionately among all the beneficiaries so that the active beneficiary does not bear the
entire burden alone." *Vincent, supra*, 557 F.2d at 769. The Gross Settlement Amount is
\$3,500,000. Accordingly, Class Counsel requests \$1,225,000 in attorneys' fees as it is properly

1 calculated as a percentage (35%) of the common fund created for the benefit of the Class.

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

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

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

14 *Id.* at 47.

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

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

24 We join the overwhelming majority of federal and state courts in holding that when
25 class action litigation establishes a monetary fund for the benefit of the class
26 members, and the trial court in its equitable powers awards class counsel a fee out
27 of that fund, the court may determine the amount of a reasonable fee by choosing
28 an appropriate percentage of the fund created. The recognized advantages of the
percentage method – including relative ease of calculation, alignment of incentives
between counsel and the class, a better approximation of market conditions in a

contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation convince us the percentage method is a valuable tool that should not be denied our trial courts.

Laffitte, 1 Cal. 5th at 503 (citations omitted). The Supreme Court in *Laffitte* went on to approve the percentage method for the calculation of the fee award, and affirmed a fee award of one-third (1/3) of the common fund. *Id.*, at 504. The Court in *Laffitte* indicated that the trial courts may utilize a “lodestar cross-check” to double check the reasonableness of the percentage fee award. *Id.* In *Laffitte*, the Supreme Court affirmed the propriety of a lodestar cross-check where the multiplier exceeded 2. Indeed, the Court explicitly held that the lodestar is a cross check that should not override the primary use of the percentage method:

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

Id. at 505.

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

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

A summary of the rates and hours of Plaintiffs’ counsel are provided in the Declarations of Class Counsel (Hawkins Final Decl., ¶ 52); (Declaration of Zorik Mooradian (“Mooradian Decl.”) ¶ 9). The reasonableness of the requested attorneys’ fee of \$1,225,000 is established by reference to Class Counsel’s lodestar cross-check in this matter. The lodestar is \$494,316.80, and therefore the requested fee would represent a multiplier of approximately 2.47 on that billed time. Fee awards are typically approved even when lodestar multipliers are required. See e.g., *Wershba v.*

1 *Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001) ("Multipliers can range from 2 to 4 or
2 even higher."); *Pellegrino v. Robert Half Internat., Inc.* (2010) 182 Cal.App.4th 278, at 293;
3 *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051 and fn. 6 (approving 3.65
4 multiplier and collecting cases "finding a range of 0.6-19.6, with most (20 of 24, or 83%) from
5 1.0-4.0 and a bare majority (13 of 24, or 54%) in the 1.5-3.0 range"); *see also* 4 Newberg on
6 Class Actions § 14.7 (stating that courts typically approve 25% to 33.34% percentage awards with
7 lodestar cross-checks of 1.9 to 5.1).

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

12 **B. Class Counsel's Hourly Rates Are Reasonable**

13 Reasonable hourly rates are determined by "prevailing market rates in the relevant
14 community." *Blum*, 465 U.S. at 895. Typically, the forum where the district court sits is
15 recognized as the "relevant community." *Shirrod v. Dir., OWCP*, 809 F.3d 1082, 1087 (9th Cir.
16 2015) (citing *Christensen v. Stevedoring Servs. of Am.*, 557 F.3d 1049, 1053 (9th Cir. 2009)).
17 Thus, Plaintiffs' Counsel is entitled to the hourly rates charged by attorneys of comparable
18 experience, reputation, and ability for similar litigation. *Blum v. Stenson*, 465 U.S. 886, 895 n.11
19 (1984); *Ketchum v. Moses*, 24 Cal. 4th 1122, 1133 (2001). *See also Serrano v. Unruh*, 32 Cal. 3d
20 621, 640 n.31 (1982) ("The formula by which 'reasonable market value' is reached is variously
21 phrased" as "comparable salaries earned by private attorneys with similar experience and
22 expertise in equivalent litigation," and the "hourly amount to which attorneys of like skill in the
23 area would typically be entitled.") (citations omitted). The reasonableness of Class Counsel's
24 rates is confirmed by comparing such rates with the rates of comparable counsel practicing
25 complex and class litigation. *See LG Corp. v. Huang Xiaowen*, 2017 U.S. Dist. LEXIS 143409
26 (S.D. Cal. 2017) (finding a rate of \$850 to \$890 an hour for lead counsel reasonable); *see also*
27 *San Diego Comic Convention v. Dan Farr Prods.*, 2018 U.S. Dist. LEXIS 110391 (S.D. Cal.
28 2018) (finding rates of \$795 and \$785 an hour reasonable).

1 Class Counsel’s 2024-2025 rates are reasonable and consistent with attorneys of
2 comparable experience and qualifications in their areas of practice. As demonstrated by their
3 hundreds of successful wage and hour employment law actions, including in this particular area
4 of law, James Hawkins, APLC and Mooradian Law, APC are experienced and highly-skilled law
5 firms with expertise in representing employees in California wage and hour class actions.
6 (Hawkins Final Decl., ¶¶ 46-50); (Mooradian Decl, ¶¶ 3-4). Their ability to secure a favorable
7 Settlement for the class in this case despite the many challenges Plaintiffs faced is a further
8 testament to their expertise.

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

12 What has now emerged in most fee award decisions is a recognition that fee
13 determinations in both common fund and statutory fee situations are incapable of mathematical
14 precision because of the intangible factors that must be resolved in the court’s discretion based on
15 the circumstances of each particular case. See, A. Conte, Attorney Fee Awards, 2nd Ed., 207, at
16 44. In determining an appropriate fee in a common fund case, a court must decide, based on the
17 unique posture of each case, what percentage of the common fund would most reasonably
18 compensate Class Counsel given the nature of the litigation and the performance of counsel. *Paul,*
19 *Johnson, Alston & Hunt, supra*, 886 F.2d at 272 (the benchmark percentage fee may be adjusted
20 to account for the circumstances involved in this case.) Courts apply a five-part test in reviewing
21 a reasonable percentage fee in common fund cases: (1) the results achieved; (2) the risk of
22 litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and
23 the financial burden carried by the Plaintiff; and (5) awards made in similar cases.
24 *In re Omnivision Technologies, Inc.*, 2007 WL 4293467 at *9 (N.D. Cal. 2007). Here, each of
25 these five factors strongly support an award of the percentage fee (1/3) requested in this case.

26 **i. The Favorable Result Support Approval.**

27 “The overall result and benefit to the class from the litigation is the most critical factor in
28 granting a fee award.” *Omnivision*, 2007 WL 4293467 at *9; See also *In re Heritage Bond Litig.*,

1 2005 U.S. Dist. LEXIS 13627, at *27-28 (C.D. Cal. June 10, 2005). Class Counsel obtained a
2 very favorable result in this case for the Class Members despite facing numerous challenges that
3 threatened all recovery. The Settlement provides monetary benefits to the Class Members that are
4 comparable to or even exceed those recovered in similar wage and hour class actions. The
5 Settlement is particularly advantageous to the Class because the proceeds will be distributed
6 shortly as opposed to waiting additional years for a similar, or possibly, less favorable result.

7 There is little question that the result achieved in this litigation is favorable. After all Court-
8 approved deductions from the GSA, the Net Settlement Amount (“NSA”) of approximately
9 \$2,038,393.71 will be distributed on a pro rata basis to the Class Members based on the number of
10 workweeks each Participating Class Member worked during the Class Period. In addition, each
11 Aggrieved Employee’s share of the remaining PAGA Fund (25% or \$43,750.00) will be distributed
12 based on the number of individual Aggrieved Employee’s PAGA Pay Periods worked during the
13 PAGA Period. (Hawkins Final Decl., Ex. 1, Settlement, Section 3.2.) If the settlement is finally
14 approved with the requested allocations, the average individual class settlement payment per Class
15 Member will be \$1,433.47¹ on a net basis and \$2,461.32² per Class Member on a gross basis. This
16 amount compares very favorably to other class action settlements.³

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

18 “The risk that further litigation might result in Plaintiff not recovering at all, particularly a
19 case involving complicated legal issues, is a significant factor in the award of fees” *Omnivision*,
20 2007 WL 4293467 at *9. Defendant’s numerous defenses to the case created difficulties with
21 proof and complex legal issues for Class Counsel to overcome. Broadly, Defendant’s defenses
22 included, *inter alia*, that some Class Members signed individual arbitration agreements with
23 enforceable class action waivers, that this could Court significantly reduce the civil penalties

24 ¹ \$2,038,393.71 Net Settlement Amount / 1422 Participating Class Members = \$1,433.47.

25 ² \$3,500,000.00 Gross Settlement Amount / 1422 Participating Class Members = \$2,461.32.

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

1 specified under PAGA, that Plaintiffs' PAGA claims are unmanageable, that Plaintiffs would
2 have difficulty certifying their meal period, minimum wage, overtime, and reimbursement claims,
3 and that Plaintiffs' derivative wage statement claims are meritless and Plaintiffs would fail to
4 meet the requisite standards for such penalties. (Hawkins Prelim. Decl. ¶¶ 6-11). Many of the
5 defenses asserted by Defendant present serious threats to the claims of Plaintiffs and the other
6 Class Members. (Hawkins Final Decl. ¶¶ 24-30).

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

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

17 The Settlement was possible only because Class Counsel was able to convince Defendant
18 that Plaintiffs could potentially prevail on the difficult legal issues regarding liability, maintain
19 class certification, overcome difficulties in proof as to monetary relief and take the case to trial.
20 (Hawkins Final Decl. ¶¶ 26, 54); (Mooradian Decl, ¶ 7). In successfully navigating these hurdles
21 Class Counsel displayed the necessary dual skill set. The high quality of the work in this case
22 was mandated by the very vigorous and contentious defense presented by counsel for Defendant.
23 Class Counsel was required to invest substantial time and resources in investigation, mediation
24 and settlement, and preliminary and final approval. (Hawkins Final Decl.¶¶ 52-54); (Mooradian
25 Decl, ¶ 9).

26 The contingent fee practice of Class Counsel does not accommodate the investment of
27 unnecessary time in a case. This case was litigated on a contingent basis with all of the
28

1 concomitant risk factors inherent in such an uncertain undertaking. Moreover, the favorable result
2 obtained by the settlement further supports the skill and quality of work.

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

4 The attorney being paid by the hour can go to the bank with his fee, whereas the attorney
5 working on a contingent basis can only log hours while working without pay towards a result that
6 will hopefully entitle him to a marketplace contingent fee. *Powers v. Eichen*, 229 F.3d 1249,
7 1256-1257 (9th Cir. 2000). In this case, Class Counsel subjected themselves to this contingent fee
8 market risk in this all or nothing contingent fee case. The necessity and financial burden of private
9 enforcement makes the requested award appropriate. Counsel working on contingency, whether in
10 private matters or in class action litigation, are entitled to a premium in order to compensate for
11 both the risks and the delay in payment. See e.g., *Stanger v. China Elec. Motor, Inc.*, 812 F.3d
12 734 (9th Cir. 2016) (courts “must” apply a risk service); *Stetson v. Grissom*, 821 F.3d 1157, 1166
13 (9th Cir. 2016) (abuse of discretion not to apply risk multiplier). The simple fact is that despite the
14 most vigorous and competent of efforts, success is never guaranteed. *McKittrick v. Gardner*, 378
15 F.2d 872, 875 (4th Cir. 1967). Class Counsel has invested time and money into contingency cases
16 which ultimately generated no fee, which further emphasizes the need for contingent cases to
17 provide premium compensation when successful.

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

22 Class Counsel were required to advance all costs in this litigation. In litigation such as this
23 where a corporate Defendant and their attorneys are well funded, this can prove to be very
24 expensive and risky. The risk of advancing costs in this type of litigation can be significant, and is
25 cost prohibitive to many attorneys. The financial burdens undertaken by Class Counsel in
26 prosecuting this action on behalf of the Class were substantial. Class Counsel has advanced
27 approximately \$26,228.29 in costs which could not have been recovered if this case had been lost.

(Hawkins Final Decl. ¶ 32); (Mooradian Decl, ¶ 10). Accordingly, the contingent nature of the fee and the financial burdens on Class Counsel also support the fee requested.

v. Awards in Similar Cases

The attorneys' fees requested by Class Counsel are within the range of fees awarded in comparable cases. In similar class action cases, Courts have awarded fee requests in the range from of as much as one-third of the amount obtained. See, *Ortegon-Ramirez v. Cedar Fair, L.P.*, Case No. 1-13-CV-254098 (Santa Clara County Superior Court, 2015) (awarding attorneys' fees equal to one-third of \$4,750,000.00 class action and PAGA settlement. 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 thirty-five percent of the total value of the case, a percentage well within the range of reasonableness given the excellent results obtained for the Class, the risks undertaken, and the skill of the prosecution.

In *In re Warner Communications Sec. Lit.*, the Court concluded that percentage fees in common fund cases range from 20% to 50%. *Id.*, 618 F.Supp. at 749-50. "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 on Class Actions, 3rd Ed., 14.03. A fee award of thirty-five percent (35%) of the common fund is therefore reasonable in light of the prevailing fees that have been awarded in other cases.

D. Class Counsel's Costs Were Reasonably Incurred

Under the common fund doctrine, the attorneys whose efforts helped to create the fund are entitled to recover "the costs of . . . [the] litigation" from the fund, in addition to attorneys' fees. *Vincent v. Hughes Air W., Inc.*, 557 F.2d at 769 (9th Cir. 1977). "In common fund cases, counsel is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case." *Chemi v. Champion Mortg.* No. 05-1238, 2009 WL 1470429 (D.N.J. May 26, 2009); see *In re Omnivision*, 559 F.Supp.2d at 1048-49

1 (awarding payment for reimbursement of expenses, plus interest from settlement fund; discussing
2 that attorneys may recover reasonable expenses that would typically be billed to paying clients in
3 non-contingency matters, including expenses for photocopying, printing, postage, messenger
4 services, legal research in electronic databases, experts and consultants, and travel costs).

5 Class Counsel requests reimbursement for actual expenses and costs in the amount of
6 \$26,228.29, which are detailed in the Declarations of Class Counsel in Support of Final Approval.
7 (Hawkins Final Decl. ¶ 55); (Mooradian Decl, ¶ 10).⁴ These expenses primarily consist of fees for
8 filing, mediation, and court call, and were reasonably incurred in the prosecution of this matter.
9 (Id.).

10 **E. The Class Representatives Should Receive the Requested Service Payments**

11 Plaintiffs Darwin Colinayo and Edelmira Maldonado respectfully submit that for their
12 service as the Class Representatives, they should be awarded Class Representative Service
13 Payments in the amount of \$10,000.00. Defendant does not oppose this award and no Class
14 Member has objected to this award.

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

23 In addition, public policy considerations require the award of adequate service payments
24 reflective of the risks and efforts undertaken by class representatives. “Many courts have noted a
25 fourth rationale for incentive payments: that such payments do precisely what their name hopes
26

27 _____
28 ⁴ Though this Court preliminarily approved costs up to \$50,000 in its October 29, 2024 order, Class Counsel respectfully requests an award of actual costs incurred in this litigation of \$26,228.29.

1 they will—incentivize class members to step forward on behalf of the class.” Newberg on Class
2 Actions § 17:3 (5th ed.) § 17:3.

3 Plaintiffs have performed admirably as the Class Representatives. Plaintiffs provided
4 valuable information and documents from their employment which was instrumental in Class
5 Counsel’s understanding of the case and our ability to successfully litigate and mediate. Both
6 Plaintiffs prepared for and had their depositions taken. Plaintiffs were involved in the settlement
7 negotiations and provided invaluable assistance and information which ultimately resulted in this
8 Settlement. (Hawkins Final Decl. ¶ 36; Declarations of Darwin Colinayo and Edelmira
9 Maldonado in Support of Preliminary Approval and in Support of Final Approval, generally).
10 Plaintiffs also assumed the risks that they may be liable for costs incurred in this case, and that
11 they may be “blacklisted” by future employers for having brought this action.

12 A service payment made to a successful class representative is appropriate and the amount
13 of \$10,000.00 as service payment to Plaintiffs is less than 1% of the Gross Settlement Amount
14 secured on behalf of the Class. Further, the service award is comparable to those awarded in other
15 class actions. *See e.g. Cellphone Termination Fee Cases*, 186 Cal.App.4th at 1381 (Cal.App. June
16 28, 2010) (affirming \$10,000 incentive awards to Plaintiffs in class action where average recovery
17 per class member was only \$81); *Nakagaki v. Proven Staffing Consultants LLC*, San Diego
18 County Superior Court, Case No. 37-2022-00026848-CU-OE-CTL (April 21, 2023) (approving
19 \$6,500 service award on \$81,000 settlement); *Carrillo v. SGS North America, Inc.* LASC No.
20 BC560240, Order Granting Final Approval, Dec. 20, 2016 (\$15,000 service payment in a
21 \$400,000 claims-made settlement for 52 employees); *Valladares v. The Sygma Network, Inc.*,
22 LASC No. BC406053, Order Granting Final Approval, Apr 6, 2010 (\$10,000 service payment in a
23 maximum \$1,195,000 claims-made settlement for 326 employees).

24 By bringing this case Plaintiffs secured a total settlement of \$3,500,000.00 for 1,422 Class
25 Members. Plaintiffs spent considerable time and effort, and undertook significant risks in bringing
26 this action. Accordingly, Class Counsel respectfully requests that the Court approve the requested
27 Class Representative Service Payments.

The services provided by Class Counsel have been wholly contingent, and the requested fee is reasonable compared to fee requests approved by courts given the efforts expended in this case and the stage of proceedings at the time of settlement. Class Counsel undertook great risk on and achieved a favorable result for the benefit of Class Members. Based on the foregoing, Class Counsel respectfully requests approval of the application for award of attorneys' fees of \$1,225,000, reimbursement of actual litigation costs of \$26,228.29, totaling \$1,251,228.29, and Class Representative Service Payments of \$10,000.00 to Plaintiff Darwin Colinayo and Plaintiff Edelmira Maldonado.

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