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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JANE ROES 1-2, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DÉJÀ VU SERVICES, INC. et al.

Defendants.

Case No: 14-cv-03616-LB

Related Case: 19-cv-03960-LB

CLASS COUNSELS' NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES AND COSTS AND ENHANCEMENT AWARDS; MEMORANDUM OF LAW IN SUPPORT OF MOTION

Judge: Hon. Laurel Beeler

Date: November 17, 2022
Time: 9:30 AM

NOTICE OF MOTION AND MOTION

TO ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on November 17, 2022, at 9:30 a.m., or as soon thereafter as the matter may be heard, in Courtroom C of the Northern District of California, San Francisco Division, located at 450 Golden Gate Avenue, San Francisco on the 15th Floor, Plaintiffs Jane Roe 1 and Jane Roe 3 ("Plaintiffs") will and hereby do move the Court, pursuant to Federal Rules of Civil Procedure 23(h), for an order awarding to Sommers Schwartz and Pitt, McGehee, Palmer, Bonanni & Rivers PC ("Pitt Firm") for $866,666.671.30 in attorneys' fees and $47,258.75 in incurred litigation costs, and enhancement payments to certain class members for their service and assistance to the Class: To Jane Roe 1 and Jane Roe 2 in the San Diego Action, in the amount of $3,500.00 each. The motion will be based on this Notice, the following Memorandum of Points and Authorities, the declarations of Jason J. Thompson, Esq., and Megan Bonanni, Esq., filed herewith, the other records, pleadings, and papers filed in this action, and any evidence or argument presented at the hearing on this motion.

Respectfully submitted,

SOMMERS SCHWARTZ, P.C.

Dated: October 13, 2022

By: *Jason J. Thompson*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

INTRODUCTION

Preliminary approval of the parties' $6.5 million class action settlement agreement ("Agreement") has been granted, the class representatives and class counsel have been appointed, class notice has been issued and the final fairness hearing is scheduled for November 17, 2022. *See* ECF No. 126 in Case No. 19-03960; ECF No. 268 in Case No. 14-03616. At the fairness hearing, the Court will decide the question of awarding class counsel fees and costs as contemplated by the Agreement and pursuant to the Courts Order. *Id.* In this motion, class counsel firms Sommers Schwartz and the Pitt Firm submit their fee and cost request.

Before proceeding further, a word on the filing of separate attorneys' fee motions by class counsel firms, and specifically the tardiness of the instant motion, is warranted. Due to confusion among the plaintiff counsel firms from the two cases included in the settlement – who collectively have been appointed as class counsel by this court – together with the fall-out effects of recent Hurricane Ian as to the undersigned attorneys[1], counsel for Jane Doe I-II are only now filing their motion for attorneys' fees. The confusion revolved around whether plaintiff counsel in each of the cases being settled would file one joint motion as class counsel since they were indeed both appointment as class counsel, or instead would file separate motions. A departing Sommers Schwartz partner who had day-to-day responsibilities for the case only added to the confusion.[2] Despite this Court consolidating the two cases in the Preliminary Approval Order, and ordering the lower case number file to be used going forward *See*, ECF No. 268. The two firms failed to adequately discuss the process, and as a result, the Court received a motion from the Tidrick Law Firm as to only their fees and costs in the San Francisco Action (ECF. No. 270) and not a request for fees and costs from lawyers in Jane Roe I-II in the San Diego Action.

[1] Jason Thompson lives in St. Petersburg. *See* **Exhibit A**, Declaration of Jason J. Thompson at ¶9.

[2] After the motion for preliminary approval was drafted, reviewed and approved for filing, and was filed in this case, *Roe v. SFBSC Management, LLC*, Case 3:14-cv-03616-LB (the "San Francisco Action") Sommers Schwartz attorney Trenton Kashima learned from defense counsel that a separate motion for preliminary approval of the same settlement was needed in the *Jane Roe I-IV* case (Case No. 19-cv-03960-LB)(San Diego Action) However, before the deadline to file a motion for fees and costs, Mr. Kashima left Sommers Schwartz without advising, or perhaps himself realizing, that a single motion for class counsel fees would not be filed covering all class counsel. The undersigned were not involved in the day-to-day activities of the case and were under the impression that the class settlement was being guided through motion practice jointly. (*See* for example brief on resolution of objections, San Francisco Action, Case No. 14-cv-03616, ECF No. No. 263).

Having discovered the problem, all parties have conferred and all confirm that they have no objection to the class counsel requests for fee and costs being separated and to the filing of two motions, or to the late filing of the instant motion by counsel in the San Diego Action. *See* **Exhibit A**, at ¶10 Furthermore, the final fairness hearing is not for one month, November 17, 2022. There should be enough time still for a full review of the motion, including any potential objectors, before the November 17th hearing.[3] Therefore, class counsel ask that the Court accept the fling of separate attorneys' fee and costs motions, and the filing of instant motion despite being filed after the deadline. Counsel apologizes to the Court for any confusion, and requests the Court accept the instant motion as filed, or a supplement to Co-class Counsels Fee Motion filed as ECF No. 270.

Returning to the instant motion, in light of class counsel filing separate motions for fees and costs, this motion will avoid repeating what has already been said in the motion already on file by co-class counsel. *See* ECF No. 270. Their motion, including the recitation of facts, the description of the settlement and citations to relevant case law are all accurate and robust. Very little supplementation is needed, and counsel for Jane Doe I-IV request that those sections be incorporated herein.

Class Counsel Sommers Schwartz and Pitt Firm request the court approve an attorneys' fee award of $866,666.67 and $47,258.75 in litigation expenses.

FACTS AND BACKGROUND

For purposes of this motion, some additional facts and background as to the history of litigation leading up to the instant Agreement, and specifically the benefit of Defendants (hereafter collectively referred to as "DJV") conversion of all class member dancers and other entertainers from independent contractors to employees, is essential for the court's consideration.[4]

Originally, DJV entered into two class action settlements that received preliminary approval by their respective District Courts and essentially provided DJV the proverbial global settlement.[5]

[3] Upon filing the instant motion, a copy was also provided to the settlement administrator Simpluris for posting on the settlement website, along with the Tidrick Law Firm's motion, to ensure anyone interested in the fee and cost issues could have as much time as possible to review and, if desired, lodge an objection before the November 17th hearing.

[4] The facts have previously been attested to in Thompson Declaration, ECF no. 239-1, and which is incorporated into the Thompson Declaration attached as **Exhibit A**. Citation to specific paragraphs from the earlier Thompson Declaration will reference "ECF No. 239-1", whereas citation to new statements made will be referenced as "Exhibit A".

[5] *See*, ECF No. 239-1, ¶¶12-22.

One was *Jane Doe I* vs. *Déjà vu Services, Inc.* Case No. 16-cv-10877 in the Eastern District of Michigan and the other being the San Francisco Action, of which this court is intimately familiar. Each case involved separate classes, which together would have provided DJV essentially a nationwide settlement. *Id.* Of note for the instant motion, both settlements left dancers without employment status, i.e. neither contained an unconditional clause obligating DJV to convert all class member dancers to employees.

Upon being approved by their respective District Courts, both settlements were appealed by clients represented by the Lichten & Liss-Riordan, P.C. (hereafter "Liss"). *Id.* at ¶18-22. The *Jane Doe* I case was ultimately affirmed by the Sixth Circuit Court of Appeals and the settlement was administered, while the San Francisco Action case was reversed by the Ninth Circuit and remanded to this Court for further proceedings. *Id.*

Around the time of the two appeals, Counsel for the San Diego Action filed a new lawsuit captioned *Jane Doe I-IV vs Déjà vu Services, Inc.* to cover dancers who worked in southern California DJV clubs.[6] Due to the split-decision by the Sixth Circuit and Ninth Circuit Courts of Appeals, claims for the DJV dancers in the San Francisco Action were still active and open in this Court. (*See* Case No. 14-03616) However, the dancers in Southern California were not included in the San Francisco Action class definition, and furthermore, the class period in the *Jane Doe I* case had ended, leaving the Southern California dancers still working at DJV under the independent contractor model thereafter. Thus, the San Diego Action was filed to pursue wage violations for all California dancers – including specifically for the dates uncovered by the class period of the two earlier settlements.[7]

Eventually, and before removal to this Court, DJV and Plaintiffs' in the San Diego Action were able to reach a settlement. *Id. at* ¶¶ 23-44. In that settlement, and for the *first time ever*, DJV relented on the question of employee status, and agreed to convert all California dancers to employee status.[8] *Id*. at ¶44. This was of course significant relief, and as all lawyers representing dancers in wage

[6] Case No: 37-2018-00028014-CU-OE-CTL in Superior Court, County Of San Diego.

[7] Counsel in the *Jane Doe I* EDMI case are the same counsel in the San Diego Action, and the undersigned to this motion.

[8] The *Jane Doe I-IV* case represented the third class action lawsuit the undersigned filed against DJV, and finally the goal of converting all dancers to employee status was achieved, at least as far as the Southern California DJV dancers.

litigation would agree, constitutes what can be described as the proverbial "full victory" for a dancer plaintiff. As employees, the dancers came out from the shadows and into the full light of employment laws, and received full coverage and protections of those laws and employment benefits. The values of that one settlement term includes, for example, accumulating a wage history for purposes of social security coverage, workers compensation coverage, employment discrimination protection, and of course overtime wages and other labor code benefits.[9] This had never before achieved in a DJV dancer case.

While not initially approved by the state court in San Diego (the court there wanting further information of the value of "conversion" before approving the same), after that case was removed to the federal court in San Diego and then to this Court, that conversion process was expanded -- as a result of multiple mediations and further negotiation efforts -- to include the San Francisco entertainers as well, which resulted, as discussed immediately below, in a comprehensive settlement that ended a decade of litigation in this Court. *Id.* at ¶¶45-46.

In any event, upon filing the motion for preliminary approval in the San Diego Action in San Diego Superior Court, dancers represented by Liss immediately moved to intervene and object to the proposed settlement as inadequate. *Id.* Extensive motion practice ensured – both in state court and then in the SDCA. *Id.* at ¶¶45-51. The settlement stalled from Liss class member objections, and the case, along with the still unsettled San Francisco Action, and other Liss individual dancer clients, all went to mediation with Tripper Ortman on March 11, 2020. *Id.* at ¶61. Without reciting any facts protected by the mediation privilege, the salient point for purposes of the instant motion is that a global settlement of all claims was not achieved, and DJV turned their attention to a settlement of just the San Diego Action and San Francisco Action. *Id.* at ¶65. The $6.5 million settlement now before the court was reached through those post-mediation efforts, and the extension of the enhanced employment; undersigned were successful in both increasing certain conversion terms (specifically the amount of "commission" payments to which dancers would be entitled) and expanding the

[9] In the San Francisco Action, DJV C.P.A. David Shindel outlined the full picture and costs (i.e. value) of the settlement term. (*See*, *See* Preliminary Approval Order (ECF No. 268 at 12-13) (citing Settlement Agreement, ECF No. 239-1 at 80 (¶ 5.2(c); Defts.' Reply, ECF No. 249 at 18-19; Shindel Mem., Ex. 4 to Shindel. Decl., ECF No. 243 at 135–38).

employee conversion term they negotiated in the San Diego Action settlement into the Agreement now before the Court for final approval. *Id.* at ¶¶66-88.

ARGUMENT

A. Standards for Awarding Class Counsel Fees and Costs

Without repeating the entirety of case law provided in the fee motion filed already in the San Francisco Action (*See*, Dckt. No. 270) including awarding fees from a common fund settlement[10] and acceptable ranges of fee awards[11], the undersigned join co-class counsel argument in support of a finding by this Court that the fee and cost award negotiated in the settlement is reasonable. *Id.* at p. 9.

The Settlement Agreement preliminarily approved by the Court states: "Class Counsel will apply to the Court for an award of: (1) attorneys' fees in an amount that does not exceed thirty-five percent (35%) of the Settlement Consideration; and (2) up to eighty thousand dollars ($80,000) in Litigation Expenses." *See* Settlement Agreement § 10.1.

B. Sommers Schwartz and Pitt Firm Request for Attorneys' Fees and Costs is Reasonable

As class counsel, the undersigned request the Court approve an award of attorneys' fees of $866,666.67, which together with the already filed request for $1.3 million in fees, totals $2,166,666.67 and amounts to 33 1/3% of the $6.5 million common benefit settlement fund amount.[12] Also, the undersigned request an award of actual costs advanced, totaling $47,258.75

The 331/3% fee request is reasonable under the percentage of the common fund method, as it is consistent with Ninth Circuit authority. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002) (affirming award of 28% of $96.885 million common fund, while recognizing that the percentage of an award generally increases as the common fund decreases); *In re Pacific Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming award of 33% of $12 million common fund); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 460 (9th Cir. 2000) (affirming award of 33.3% of $1.725 million fund); *Boyd v. Bank of Am. Corp.*, No. 13 Civ. 0561, 2014 WL 6473804, at *9 (C.D. Cal. Nov. 18, 2014) (approving fee award of 36% of common fund settlement); *In re Quantum Health*

[10] *Id.* at Section V(a), pp. 5-7.
[11] *Id.* at Section V(b), pp. 7-8.
[12] The total Settlement Consideration is at least $6.5 million (all non-reversionary), divided into a Cash Pool of $4 million, a Dance Fee Pool of $500,000, and changed business practices valued at a minimum of $2,000,000. *See* ECF No. 268 at Section 3.2.

Res., Inc., 962 F. Supp. 1254, 1258 (C.D. Cal. 1997) (attorneys representing a class "routinely recover attorneys' fees in the range of 20 to 40 percent of the common fund"); *see also Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 492 (E.D. Cal. 2010) (33.3% fee award; $300,000 common fund) (collecting cases). This is especially true in FLSA cases.[13] Likewise, common fund settlements of less than $50 million, such as this one, a higher percentage is often awarded by the district court and affirmed by the Ninth Circuit. *See, e.g., In re Pacific Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming award of 33% of $12 million common fund); *In re Activision Sec. Litig.*, 723 F. Supp. at 1375 (awarding 32.8% of $3.5 million common fund); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 460 (9th Cir. 2000) (affirming award of 33.3% of $1.725 million). Lastly, the *combined* total class counsel attorneys' fee request percentage of 331/3% is within, actually *slightly less than*, the 35% provided in the Agreement.[14]

The factors for testing reasonableness of a fee request include: (1) the results achieved; (2) the riskiness of prosecuting the litigation; (3) whether counsel obtained benefits for the Class beyond the cash settlement fund itself; and (4) the financial burden carried by Plaintiffs' counsel in prosecuting the case on a contingency basis. *Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1047 (9th Cir. 2002). See also In re Activision Sec. Litig., 723 F. Supp. 1373, 1377-78 (N.D. Cal. 1989)*, 290 F.3d 1043 at

[13] Many courts in this Circuit and across the country have awarded class counsel fees at or above 30% of the common benefit fund in other FLSA class action cases. *See, e.g., Boyd v. Bank of Am. Corp.*, No. 13 Civ. 0561, 2014 WL 6473804, at *9 (C.D. Cal. Nov. 18, 2014) (approving fee award of 36% of common fund settlement in wage and hour case); *Birch v. Office Depot, Inc.*, No. 06 Civ. 1690 (S.D. Cal. Sept. 28, 2007) (awarding a 40% fee on a $16 million settlement); *In re Heritage Bond Litig.*, No. 02 Civ. 1475, 2005 WL 1594403, at *18 (C.D. Cal. June 10, 2005) (approving fees of 33.33% of approximately $28 million common fund); *Clark v. Ecolab, Inc.*, 2010 WL 1948198 at *8 (S.D.N.Y. May 11, 2010) (approving attorneys' fees of $2 million from the $6 million common fund in a FLSA collective action and noting that attorneys' fee percentages of one-third are "reasonable and consistent with the norms of class litigation in [the Second] circuit."); *Wineland v. Casey's Gen. Stores, Inc.*, 267 F.R.D. 669, 677 (S.D. Iowa 2009) (approving attorneys' fees of 33 1/3% of total settlement fund of $6.7 million, plus $150,000 in costs, in FLSA collective action on behalf of class approximately 11,400 convenience store employees); *Smith v. Krispy Kreme Doughnut Corp.*, 2007 WL 119157 at * 2 (M.D.N.C. Jan. 10, 2007) (noting, "in this jurisdiction, contingent fees of one-third (33.3%) are common."); *Bredbenner v. Liberty Travel, Inc.*, 2011 WL 1344745 at *21 (D.N.J. Apr. 8, 2011) (analyzing cases from district courts throughout the country in common fund cases where attorneys' fee awards "generally range anywhere from nineteen percent (19%) to forty-five percent (45%) of the settlement fund," and noting that most of the cases awarded attorneys' fees at the level of 33.3% of the common fund.).

[14] To be clear, $50,000 the class counsel fee award to class counsel is being paid to Objector counsel Liss.

1048-50. Based on the work performed, risk and delay and the strong results achieved, the undersigned's request for $866,666.67 and the total class counsel fee request of $2,166,666.67, meets the test for reasonableness under *Vizcaino*, and including this District Court in similar FLSA cases and in which Sommers Schwartz served as class counsel. *Brown v. The Permanente Medical Group, Inc.*, No. 16-cv-05272-VC (N.D. Cal.); *Wolf v. The Permanente Medical Group, Inc.*, Case No. 17-cv-05345-DMR (N.D. Cal.); *Flores v TFI International, Inc.* Case No. 12-cv-05790 (N.D. Cal.)[15]

1. <u>The Results Achieved</u>:

The benefit obtained for the class is the single most important factor. *In re Bluetooth*, 654 F.3d at 942; *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008). It weighs heavily in favor of approving Class Counsel's fees. Again, without repeating co-class counsels' first fee brief, but only to supplement, the results obtained in the instant settlement, included a never-before benefit of converting DJV dancers from various non-employee forms of employment to employees. In the nearly ten years the undersigned has litigated dancer class action cases, including those against DJV, there have bene numerous employment models used to avoid classifying the dancers as employees, including independent contractors, tenants renting space, and even charging the dancers themselves to work. *See*, **Exhibit A**, at ¶15. The other models are used, in large part, because the burdens of classifying dancers as employees – some of which are listed above – are tremendous. Furthermore, dance clubs like Spearmint Rhino tried it and lost significant number of dancers. *Id*. at ¶17. Although the dollar value of the conversion of the DJV dancers to employees is incapable of a precise monetary calculation, one approach is to examine the cost to the employer. DJV C.P.A. David Shindel explains the various factors in his declaration, which certainly stands as a credible and reasonable answer to the valuation question. *See* Preliminary Approval Order (ECF No. 268 at 12-13).

In any context, the conversion of DJV dancers to employees under the Agreement constitutes a tremendous result, and the Court should consider that benefit when assessing the award of attorneys' fees. That would include when considering an adjustment up from the 25% benchmark. Also, the overwhelmingly positive response from Class Members further validates the Settlement's merit.

[15] Attached as **Exhibits C, D and E**.

Lastly, the changes to the Agreement effectuated by Liss can be considered in weighing the results achieved against the fee request. The benefits include: (1) extending the provision of the Enhanced Terms of Employment from one year to two years after the Final Approval Date (*see*, 9.1 of the Agreement); and (2) the Settlement Administrator shall mail a reminder notice to Settlement Class Members no later than 90 days after the third installment payment, or Third Case Payment (as outlined in Paragraphs 5.5 through 5.5.5 of the Agreement). A more complete explanation of benefits added by Liss were provided in the San Francisco Action on the subject. *See* San Francisco Action ECF No. 263; Dckt No. 239 at pp. 23, 30 (As detailed in Plaintiffs' motion and in the declaration of C.P.A David Shindel, the Enhanced Employment Benefits have been valued at a well over $1,000,000 per year.); *see also,* San Francisco Action Dckt. No. 243 [Shindel Declaration] at pp. 30-31, ¶¶34, 36; *see also,* San Francisco Action Dckt. No. 247 at pp. 4-5 and ECF No. 249 at pp. 16-19.

2. <u>The Riskiness of Prosecuting the Litigation:</u>

Al contingent fee class action litigation is very risky, and dancer cases are no exception. Here, class counsel faced all the normal risks, plus strong objections from objector counsel who has been entrenched in prosecuting her clients' objections. And on top of all that, class counsel watched the defendant clubs face bankruptcy as they were shuttered during the Covid-19 pandemic. *See* ECF No. 239-1 at ¶111; **Exhibit A** at ¶16. Nonetheless, they never wavered, never quit, and never backed down from the challenges associated with bringing the Agreement to completion. Furthermore, they will not receive full amount of fees at the conclusion of the fairness hearing, but to assist the class members and clubs, the awarded fees are being paid over time in 50%, 25% and 25% increments. *See* ECF No. 239-1, the Agreement, at Section 5.5. This of course only adds to the risk class counsel have taken on in prosecuting the case. Therefore, this factor strongly supports the fee request, and in particular, an increase from the benchmark of 25% to 35%. *See Vizcaino,* at p. 1048.

3. <u>Whether Counsel Obtained Benefits for the Class Above and Beyond the Cash Settlement Fund Itself:</u>

For the same reasons outlined above for factor No. 1, the conversion of DJV dancers to employees directly relates to this factor, and it this factor strongly supports the fee requests before the court.

4. The Financial Burden Carried by Plaintiffs' Counsel in Prosecuting the Case on a Contingency Basis:

Class counsel have undoubtedly demonstrated their commitment to the class members and this case. The court is all too familiar with the obstacles they faced, and eventually overcame, to be at a final fairness hearing on a $6.5 million settlement, with objections and interventions, appeals, Covid-19 and years of carrying costs all while not being paid for their time. And, again, the fact that class counsel have subordinated their fee to class member benefits and will be paid over instalments of 50%, 25% and 25% is also relevant. *See,* Agreement at Section 5.5. Together, these factor strongly supports the combined class counsel $2,166,666.67 fee request, and in particular, an increase from the benchmark of 25% to 331/3%. *See Vizcaino,* at p. 1048. In conclusion, for all the reasons provided in the two fee motions, the four-part test for reasonableness supports class counsels' combined request for fees as reasonable and warranted.

C. The Lodestar "Cross-check" Confirms that the Requested Attorneys' Fees Are Reasonable

While a pure lodestar method of evaluating attorneys' fees is not favored, Courts that do employ the lodestar analysis as a "cross-check employ a "streamlined" analysis to "cross-check" the reasonableness of a requested award. Class Counsels' combined 331/3% of the common fund fee request is reasonable under the lodestar method and is consistent with other similar cases.

The Court can perform a "cross-check" of class counsels' 331/3% fee request using the billing and time records. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002) ("[W]hile the primary basis of the fee award remains the percentage method, the lodestar may provide a useful perspective on the reasonableness of a given percentage award."). Co-class Counsel from the San Francisco Action have provided the Court with a detailed submission of their time and billing rates. (Dckt. No. 270) The undersigned have here done the same, and their lodestar was calculated using contemporaneous time records and based on counsels' standard class action hourly billing rates. *See* **Exhibit A** and **Exhibit B**. Naturally, since the Court is deciding the attorneys fee requests of all class counsel, the Court should consider all time from both the San Francisco and San Diego Actions when deciding the total class counsel award. *Flores, supra* at p. 16.

Both the hourly rates and the associated hours are reasonable. First, the hourly rates being requested by the undersigned have been approved in many other FLSA class cases, including several in this district. See *Brown, supra* (**Exhibit C**)(*see* Dckt. No's. 101-1-5; 105)(approving $775/hour for Outten Golden partner and $685 for Sommers Schwartz partner in 2017 settlement); *Wolf, supra* (**Exhibit D**); *Flores, supra* (**Exhibit E**); *Jane Doe I, supra* (*see*, Dckt No. 327-8)*;* and *Ealy-Simon v Change Healthcare*, Case No. 20-cv-00521 (M.D. Tenn)(*see* Dckt No. 58-2)(approving $725/hour for Sommers Schwartz partner). Upon information and belief, the rates used to calculate counsels' lodestar here are conservative in that they are actually below the rates used in this District Court for lawyers of similar professional and practice experience[16], including co-class counsels' rates. *See* Dckt. No. 270, at Section C, pp 13-18. Second, the work performed by the undersigned was necessary and reasonable, and it was assigned to lawyers and staff of an appropriate experience level. The result was varied, and thus efficient, billing rates. *See* **Exhibit A** and **Exhibit B**. Lastly, there is no indication that this is one of those cases where "the lodestar method create[d] incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee." *Vizcaino*, 290 F.3d at 1050 n.5.

Class counsels' fee request amounts to a small upward multiplier adjustment of just under 1.3 (1.286)[17]. Courts recognize the fairness of awarding reasonable multipliers in common fund cases because of the equitable notion that those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it. *Chem. Bank v. City of Seattle (In re Wash. Pub. Power Supply Sys. Sec. Litig.),* 19 F.3d 1291, 1300 (9th Cir. 1994) (citing *Boeing*, 444 U.S. at 478). "[I]n the common fund context, attorneys whose compensation depends on their winning the case, must make up in compensation in the cases they win for the lack of compensation in the cases they lose." *Id.* (quoting *Skelton v. General Motors Corp.*, 860 F.2d 250, 254 (7th Cir. 1988)). As the California Court of Appeals recognized, a common fund fee springs from the theory "that those who benefit from the creation of the fund must share the wealth with the lawyers whose skills created it."

[16] In *Flores*, Judge Tiger referenced a custom of using NDCA rates for out of state lawyers in fee awards. Using the NDCA rates for Sommers Schwartz and Pitt Firm would have the effect of ***reducing*** the requested multiplier, and thus increasing the reasonableness of the request.

[17] *See Exhibit A* at ¶24.

Ramos v. Countrywide Home Loans, Inc., 82 Cal. App. 4th 615, 628 n.3, 98 Cal. Rptr. 2d 388, 396 (2000). Furthermore, "[t]he purpose of the FLSA attorney fees provision is to insure effective access to the judicial process by providing attorney fees for prevailing plaintiffs with wage and hour grievances." *Fegley v. Higgins*, 19 F.3d 1126, 1134 (6th Cir. 1994) (internal quotation marks and citation omitted). Thus, "[g]iven the nature of claims under the FLSA, it is not uncommon that attorneys' fee requests will exceed the amount of the judgment in the case." *Holyfield v. F.P. Quinn & Co.*, No. 90 C 507, 1991 WL 65928, at *1 (N.D. Ill. Apr. 22, 1991); *see also Flores v. City of San Gabriel*, No. CV1204884JGBJCGX, 2014 WL 12700907, at *3 (C.D. Cal. Sept. 26, 2014) ("[G]iven the importance of assuring worker's rights under the FLSA, even a limited damages award can justify a substantial fee." (alteration in original) (quoting *Dajbabic v. Rick's Cafe*, 995 F. Supp. 2d 210, 212 (E.D.N.Y. 2014)); *Wales v. Jack M. Berry, Inc.*, 192 F. Supp. 2d 1313, 1328-29 (M.D. Fla. 2001) (awarding $352,225.40 in fees for an FLSA recovery of less than $21,000); *cf. Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1033 (9th Cir. 2012).

Taking class counsels' total lodestar and comparing it to the combined $2,166,666.67 total class counsel fee request produces a very modest 1.3 multiplier.[18] The small multiplier is warranted in this case based on the eleven factors set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (a lodestar figure "may be adjusted upward or downward to account for several factors including the quality of the representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment") (citing *Kerr*). The eleven factors in *Kerr* include:

> (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the requisite legal skill necessary; (4) the preclusion of other employment due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount at controversy and the results obtained; (9) the experience, reputation, and ability of the

[18] If the court is interested in examining just the undersigned's lodestar for cross-check purposes, as opposed to the full class counsel fee award, the same is true; a 1.98 multiplier results. As the undersigned counsel have stated above, and in supplement to the fee motion already on file (ECF No. 270) their work in successfully negotiating the conversion of dancers to employees in the San Diego Action, and then in the San Francisco Action case, was significant, dramatically improved the San Francisco Action settlement, previously rejected by the Ninth Circuit, and resolved one of the primary objections of class members. Thus the undersigned ask the Court to consider their role in this respect when deciding whether a multiplier is reasonable in this case if the court finds a separate analysis between co-class counsels' fee requests is appropriate.

> attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and awards in similar cases.

Id. This Court is all too familiar with the life of the cases as they progressed through the courts, including appeal and objections and mediations. On top of all that, and also familiar to the Court, was the Covid-19 pandemic and shuttering of businesses during the prosecution of these cases. DJV clubs were particularly hard hit over a prolonged time period, and faced widespread bankruptcy. It is fair to say that through it all, class counsels' commitment to this case was clearly demonstrable, valuable, and noteworthy. Together, with the results achieved, their commitment triggers each of the above eleven factors in favor of awarding a 1.3 multiplier. *See Vizcaino* at 1051 (approving 3.65 multiplier and citing recent cases approving multipliers as high as 19.6); *Steiner v. Am. Broad. Co.,* 248 Fed. App'x 780, 783 (9th Cir. 2007) (approving 6.85 multiplier). *see also* Newberg, *Attorney Fee Awards,* § 14.03 at 14-5 (1987) ("[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied."); *Rabin v. Concord Assets Group, Inc.,* No. 89 Civ. 6130, 1991 WL 275757 (S.D.N.Y. 1991) (4.4 multiplier) ("In recent years multipliers of between 3 and 4.5 have become common.") (internal quotations and citations omitted); *In re the PMI Group, Inc. Securities Litig.,* No. 08 Civ. 1405 (N.D. Cal. Dec. 16, 2010) (4.76 multiplier); *Teeter v. NCR Corp.,* No. 08-297 (C.D. Cal. Aug. 6, 2009) (4.61 multiplier); *Doty v. Costco Wholesale Corp.,* No. 05-3241 (C.D. Cal. May 14, 2007) (9.07 multiplier); *The Music Force, LLC v. Viacom, Inc.,* No. 04-8239 (C.D. Cal. Aug. 8, 2007) (6.43 multiplier); *In re IDB Communications Group, Inc. Sec. Litig.,* No. 94 Civ. 3618-RG (C.D. Cal. Jan. 17, 1997) (6.2 multiplier).[19]

D. Class Counsel's Requested Expense Reimbursement is Proper

An attorney is entitled to "recover as part of the award of attorney's fees those out-of-pocket expenses that would normally be charged to a fee paying client." *Harris v. Marhoefer,* 24 F.3d 16, 19 (9th Cir. 1994) (citation omitted). The litigation expenses incurred by the undersigned have been

[19] In fact, a summary of common multipliers in class actions was recently filed in the Volkswagen MDL 2672 pending in this Court. That summary reveals the mean (3.36) and median (2.7) multipliers in super-mega-fund settlements, which of course are far larger than this case. (*In Re: Volkswagen, supra,* ECF No 3396, Exhibit B, Professor William Rubenstein Declaration at ¶ 36).

adequately documented and were reasonably incurred for the benefit of the Class. *See* **Exhibit A** and **Exhibit B**.

E. The Requested Enhancement Payments are Reasonable

The undersigned concur on the enhancement payment request as already briefed by co-class counsel and request the enhancements be awarded pursuant to the Agreement. Jane Doe I-II were very helpful in the litigation and deserving of an enhancement award. *See* Exhibit B; ECF No. 239-1 at ¶¶102-105. Therefore, counsel request the court award $3,500 each to Jane Doe I and II.[20]

CONCLUSION

In conclusion, the undersigned, along with their co-counsel, request the Court approve their motions for fees and award them a combined $2,166,666.67 class counsel fee, to be paid as they have requested – including specifically $866,666,67 to Sommers Schwartz and the Pitt Firm. Furthermore, the undersigned request the Court grant the firms' request for reimbursement of costs advanced in the litigation – including specifically $47,258.75 to Sommers Schwartz and Pitt Firm. Lastly, the undersigned request the Court approve payment of the enhancement awards as provided in the Agreement, including specifically $3,500 each to Jane Doe I-II.

Respectfully submitted,

SOMMERS SCHWARTZ, P.C.

Dated: October 13, 2022

By: *Jason J. Thompson*

Jason J. Thompson (*Admitted Pro Hac Vice*)
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Attorneys for the Plaintiffs and the Putative Class

[20] Or an equal share of the balance left after the Court awards enhancement payments to the other dancers in the San Francisco Action as requested by Co-class counsel (ECF No. 270).

Exhibit A

SOMMERS SCHWARTZ, PC
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Attorneys for Plaintiffs
and the Putative Classes

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JANE ROES 1-2, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DÉJÀ VU SERVICES, INC. et al.

Defendants.

Case No: 14-cv-03616-LB

Related Case: 19-cv-03960-LB

DECLARATION OF JASON J. THOMPSON IN SUPPORT OF MOTION FOR ATTORNEYS FEES AND COSTS

Judge: Hon. Laurel Beeler

Date: November 17, 2022
Time: 9:30 AM

DECLARATION OF JASON J. THOMPSON

After being duly sworn, I, Jason J. Thompson, hereby state:

1. I filed a declaration with the Motion for Preliminary Approval, and incorporate the statements made there in this declaration to save space. Thompson Decl. – ECF No. 239-1; Sommers Schwartz Firm Resume, Ex. A to Id.

2. I make this declaration in support of Plaintiffs' Motion for Attorneys' Fees, Litigation/Settlement Administration Expenses, and Class Representative Service Awards and final approval of the class settlement.

A. Late Filing of Motion for Fees and Costs

3. As represented in the Motion for Fees and Costs, there has been a longstanding level of confusion as to filing in the two related actions, the San Francisco Action and the San Diego Action. Attorney Trenton Kashima was working on the settlement when the motion for preliminary approval was filed, and there was a discussion on filing separate motions. Mr. Kashima has since left Sommers Schwartz.

4. I spoke with Mr. Kashima about why the instant motion was not filed, and he was unaware that appointed class counsel would file separate class counsel fee motions. Neither he nor I have ever done that.

5. The Court did not expressly require separate fee motions, and in fact consolidated the San Francisco Action and San Diego Action into one case in the order of preliminary approval. (See, ECF No. 268).

6. I first learned that the filed motion for fees was not a combined motion when co-class counsel Joel Young called me on Wednesday October 5, 2022. He advised me that I had failed to file our fee and cost motion by the deadline established in the Preliminary Approval Order. *Id.*

7. When discussing the matter with Mr. Young, it became apparent that we each had a different impression on what was being filed as far as class counsels fee and cost motion, and thus he did not file a combined motion, when I believed he would. Mr. Kashima's departure only added to the lack of attention to detail on this matter.

8. In the weeks after the Tidrick Law Firm filed there motion, I did not receive any indication form anyone else that separate class counsel fee and cost motions were being filed. Furthermore, during the past several weeks, as a resident of St. Petersburg Florida, many day-to-day activities and observations fell by the wayside as hurricane Ian grew and moved towards, and eventually made landfall, in the Tampa area.

9. For all the above reasons, the fee motion for Sommers Schwartz and Pitt Firm was not filed timely.

10. Having discovered the problem, all parties have conferred and all confirm that they have no objection to the class counsel requests for fee and costs being separated and to the filing of two motions, or to the late filing of the instant motion by counsel in the San Diego Action.

B. Work and Experience with Dancer Litigation

11. I have been involved in this litigation from the outset and have been responsible for coordinating and directing the efforts of all attorneys who performed services on behalf of the Named Plaintiffs and the putative class since this case was commenced.

12. I have represented dancers in wage and hour litigation in various cases over the past ten years and have seen several employment models designed by dance clubs, all of which fail to employ the dancers as employees. Some charge dancers to work, and leave them to earn tips. Some use an independent contractor model, and others have used tenant model and lease agreements.

13. I have three cases in California that have canceled settlements due to Covid-19 and the economic fall-out therefrom.

14. In discussions with defense attorneys representing clubs, I have learned that some who have tried to operate under a traditional employer-employee model have lost dancers and been unable to maintain the employee term, including Spearmint Rhino, for example.

C. Reasonableness of Requested Attorneys' Fees

15. In preparing this declaration, I reviewed the contemporaneously maintained time records of all participating attorneys/paralegals from the Sommers Schwartz, confirming that the accuracy, utility, efficiencies and reasonableness of the amount of time spent by Class Counsel

working on this litigation, and expenses incurred by those law firms. A copy of our time records is available for the Court, if requested, at the final fairness hearing.

16. I typically charge $685 per hour for my legal services in FLSA and state wage law class action cases. I am familiar with rates customarily charged in the legal market for FLSA and state wage law class action litigation. The rates charged by my firm for my services and those of Senior Shareholders, Shareholders, Associates and Paralegals are, on the whole, lower than prevailing rates charged for equivalent services by attorneys of similar skill, experience, and reputation. Therefore, I believe that we are reasonable in seeking lodestar rates of $685 per hour for myself, $615 per hour for Kevin Stoops, $315 per hour for Rod Johnston and $150 per hour for Debbie Nichols and $125 for Wendy Vaughn as Paralegals.

17. I have reviewed all of the time and expenses and can attest that they are reasonable as to both the hourly rate, time spent, work allocation and totals, as well as being absolutely necessary to reach the settlement in this case. Class Counsel diligently worked to avoid duplication of efforts and expenses, while at the same time not sacrificing work quality on behalf of the class. The settlement obtained in this litigation were directly affected by the efforts and expenses advanced by Class Counsel in this lawsuit.

18. A summary of the Sommers Schwartz, P.C.'s hours by working attorney and paralegal are identified as follows:

Name	**Position**	**Hourly Rate**	**Total Time**	**Total Bill**
Jason Thompson	Sr. Ptr.	$686.31	371.90 hrs	$255,011.50
Rod Johnston	Sr. Assc.	$315	48 hrs	$15,120.00
Rob Ash	Sr. Assc	$243.75	1.4 hrs	$315.00
Trent Kashima	Jr. Prtr.	$474.88	130.20 hrs	$61,842.50
Debbie Nichols	Para	$150	25.8 hrs	$3,870.00
Veronica Stewart	Para	$175	18.4 hrs	$3,220.00
Wendy Vaughn	Para	$126.39	11.1 hrs	$1,432.50

Jiaye Zhou	Para	$150	3.32 hrs	$498.00
Total			**610.12**	**$341,309.50**

19. The work was initiated in May of 2018 and continues through the present. However, the time submitted and listed above only went through September 20, 2022.

20. Class Counsel has provided the above chart assist the Court in its effort to perform a loadstar cross check, determine whether the time records and billing entries are reasonable, and decide if the requested combined class counsel 1.3 multiplier is warranted.

21. The average hourly billable rate was $559.41

22. The Pitt Firm has incurred **$95,900.00 in billable time** per my discussions with my co-counsel Megan Bonnani on October 12, 2022. They also have incurred $**17,701.87 in costs**.

23. Totaling the two firm's lodestar and cost produces **$437,209.50 in lodestar** and **$47,258.75 in costs**.

24. The math underlying the 1.3 multiplier is calculated by first (a) the San Francisco Action lodestar of $1,791,852.70, minus the $106,513.40 of Public Justice lodestar, plus (b) the combined San Diego Action lodestar (the two firms) of $437,209.50 for (c) a class counsel total lodestar of $1,685,339.30. Dividing the requested $2,166.666.67 by the total class lodestar of $1,685,339.30 equals 1.286.

25. By combining the total lodestar in the San Diego Action with the $1,685,339.30 in lodestar from the San Francisco Action, the combined multiplier requested is 1.3 (1.285)

26. Based on my personal experience, the requested 33 1/3% attorneys' fee (equal to $2,166,666.67 of the $6.5 million settlement value preliminarily approved by the Court) and combined fee multiplier of 1.3 reflects the reasonable value of those services in light of the nature of the case, the result obtained, the quality of representation, the risks of the litigation, the customary fee, and other applicable considerations as set forth by the law.

27. In fact, my Firm has received similar fee awards in numerous wage and hour cases. A few examples include the following: *Matthews v. Convergys*, W.D. N.C., Case No. 1:14-cv-00125 (33 1/3% attorneys' fee award of $1,500,000 in connection with $4,500,000 FLSA and state law wage and

hour collective/class action. Attorneys' fee award represented a multiplier of approximately 2.7); *Tarrant v. Sutherland*, W.D. N.Y., Case No. 6:15-cv-00320 (31.3% attorneys' fee award of $336,666.67 in connection with $1,075,000 FLSA and state law wage and hour collective/class action. Attorneys' fee award represented a multiplier of approximately 2.2).

28. Further, Sommers Schwartz, P.C., typically enters into 40% contingent fee retainer agreements with clients in connection with employment litigation matters including wage and hour actions.

29. Class Counsel undertook to prosecute this action without any assurance of payment for their services, litigating the case on a wholly contingent basis in the face of significant risk. Class and collective wage and hour cases of this type are, by their very nature, complicated and time-consuming. Any lawyer undertaking representation of large numbers of affected employees in wage and hour actions inevitably must be prepared to make a tremendous investment of time, energy and resources. Due also to the contingent nature of the customary fee arrangement, lawyers are asked to be prepared to make this investment with the very real possibility of an unsuccessful outcome and no fee of any kind. Class Counsel stood to gain nothing in the event the case was unsuccessful.

30. Class Counsel takes on difficult cases like this one because we believe that they are important. We take seriously our responsibility to push the law in a direction favorable for employees. We continue to do so despite, unfortunately, having suffered several major (and very expensive) losses in wage and hour cases over the years. Like this case, we believed that each of these cases was meritorious and socially useful but understood the risks. For example, for the past 4 years Sommers Schwartz, P.C., has litigated the companionship exemption issue in several home healthcare aid cases, and lost approximately $1,000,000 in lodestar.

31. To date, Class has worked without compensation of any kind, and the fee has been wholly contingent upon the result achieved.

32. In my experience, administering class settlements of this nature and size requires a substantial and ongoing commitment. Class Counsel will continue to invest time and incur litigation expenses for the next several months as Class Counsel communicates with Class Members and the

settlement administrator concerning the settlement, prepares for an attends the Final Approval hearing, and monitors the implementation of the settlement.

33. In my opinion, and based on my experience in, and research of, other FLSA and state wage law class action settlements in this District and nationwide, the requested fee will be reasonable and appropriate, especially in light of the amount of work performed by Class Counsel in this case and the substantial recovery obtained on behalf of the Class.

D. Reasonableness of Requested Named Plaintiff Class Representative Service Awards

34. The Named Plaintiffs worked diligently to assist Class Counsel in their activities during the pendency of this litigation. In particular, the Named Plaintiffs each took part in multiple interviews and meetings, and prepared and attended extensive mediation sessions, and follow up discussions on settlement values and terms.

35. The requested amount of $3,500 each for the three Named Plaintiffs is commensurate with other service awards I have been involved in nationally and, as documented by research of other similar awards, is reasonable under the circumstances.

E. Reasonableness of Requested Litigation Expenses

36. Pursuant to the Parties' Settlement Agreement Class Counsel may seek reimbursement of reasonable and necessary litigation costs not to exceed $80,000.

37. I have personally reviewed the records of litigation expenses incurred in this matter by Sommers Schwartz, P.C. According to those records, to date, Sommers Schwartz, P.C., has incurred litigation expenses in the amount of $47,258.75. The litigation expenses has been itemized and broken down in **Tabs A** to this declaration**.**

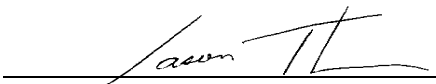
38. Sommers Schwartz, P.C., has not yet received any reimbursement for any of the monies expended to cover the litigation expenses listed above.

39. The records identifying the litigation expenses are available for submission to the Court upon request, and a final amount will be submitted to the Court in connection with Class Counsel's Final Approval briefing. All the expenses were reviewed by me and are reasonable, necessary, and customary for FLSA and California wage statute cases. They were all incurred in the normal course of litigation, directly benefited the Class Members, and added to the overall success of this case.

F. Final Approval and Fairness and Fee and Costs

40. Finally, I have reviewed the declaration of co-class counsel and can affirm that the representations made therein are accurate full and fairly describe the events that occurred during the litigation, reasons for reaching the settlement currently before the court for final approval and value of services performed on behalf of the class. I concur in the recommendation to grant final approval and the fee and cost motions and affirm that in my opinion the settlement represents an acceptable class settlement that is fair and reasonable and represents a reasonable resolution of a bona fides FSLA dispute, including the fee and cost motion.

I declare, under penalty of perjury, under the laws of the State of Florida that the foregoing is true and correct. Executed this 13th day of October, 2022 at St. Petersburg, Florida.



Jason J. Thompson

TAB A

Litigation Cost Report for:
JANE ROES, et al v. DÉJÀ VU SERVICES, INC. et al

Sommers Schwartz, P.C. Cost Reimbursement

Date	ExpCode	Amount	Narrative
5/31/2018	30	$4.52	Postage
6/5/2018	210	$75.00	Filing fee re PAGA Department of Industrial RelationsAccounting Unit 455 Golden Gate Avenue, 10th FloorSan Francisco, CA 94102
6/6/2018	30	$1.89	Postage
6/6/2018	30	$0.47	Postage
6/6/2018	130	$13.71	Cab [5/31/2018] Jason J. Thompson
6/8/2018	495	$7.98	Publications & on line media
6/13/2018	30	$6.88	Postage
6/14/2018	130	$23.66	Cab [San Diego, CA 6.13.18] Jason J. Thompson
6/14/2018	130	$25.47	Cab [San Diego, CA 6.13.18] Jason J. Thompson
6/18/2018	130	$36.48	Car rental [6/16-17/2018] Jason J. Thompson
6/20/2018	110	$699.00	Flight to San Diego, CA June 12, 2018 Jason J. Thompson
6/22/2018	30	$137.60	Postage
7/9/2018	125	$1,237.93	Lodging [June 12-15, 2018] Jason J. Thompson Lodging
7/10/2018	210	$1,435.00	Filing fee re Complaint - Finkelstein & Krinsk
7/18/2018	250	$2,700.00	Mediation Fee Judicate West
7/19/2018	495	$20.40	Publications & on line media
7/19/2018	30	$0.47	Postage
7/24/2018	120	$85.89	JJT Mileage & Parking Romulus 06-17-18
7/24/2018	130	$35.30	Cab [LaJolla, Ca re Mediation 7.23.18] Jason J. Thompson
7/24/2018	130	$33.28	Cab [LaJolla, Ca re Mediation 7.23.18] Jason J. Thompson
7/25/2018	135	$74.21	Meal - Meeting w/T. Kashima to discuss case Jason J. Thompson
7/26/2018	130	$18.74	Cab [July 26, 2018, CA] Jason J. Thompson

7/30/2018	110	$511.75	Air fare [California for Mediation 7/19-26/2018] Jason J. Thompson
8/1/2018	125	$745.00	Lodging [Mediation in California 7.23.18] Jason J. Thompson
8/2/2018	130	$20.32	Cab [Boston, MA meeting w/Harold Lichten 8.2.2018] Jason J. Thompson
8/2/2018	110	$853.40	Air fare [DTW to Boston, meeting w/Lichten and his client] Jason J. Thompson
8/3/2018	130	$21.68	Cab [Boston, MA meeting w/Harold Lichten 8.2.2018] Jason J. Thompson
8/3/2018	130	$13.40	Cab [Boston, MA meeting w/Harold Lichten 8.2.2018] Jason J. Thompson
8/9/2018	495	$28.00	Publications & on line media
8/10/2018	135	$175.63	Meals [San Diego, CA for Mediation 7.23-25.2018] Jason J. Thompson
8/20/2018	135	$4.99	Meals [San Diego, CA re Mediation 7.25.2018] Jason J. Thompson
8/20/2018	130	$61.80	Cab [8.15.18] Jason J. Thompson
8/20/2018	130	$16.01	Cab [8.16.18] Jason J. Thompson
8/22/2018	120	$110.27	JJT Mileage & Parking Romulus 07-26-18
9/10/2018	135	$392.06	Meals [San Francisco, CA for Mediation 8.15-18.2018] Jason J. Thompson
9/11/2018	135	$167.20	Meals [Meeting w/Atty. Harold Lichten 8.2.2018 in Boston, MA] Jason J. Thompson
9/11/2018	135	$212.66	Meals [San Francisco, CA re Mediation 8.17.18] Jason J. Thompson
9/12/2018	120	$56.79	JJT Mileage & Parking Romulus 08-03-18
9/12/2018	120	$129.79	JJT Mileage & Parking Romulus 08-18-18
9/17/2018	490	$634.96	Reimbursement to Local Counsel Trent Kashima's Travel for mediation 8.17-18.2018 Finkelstein & Krinsk, 550 West C Street, Suite 1760, San Diego, CA 92101 Service fee
10/24/2018	265	$245.00	Mediation 7/24/18 balance dueJudicate West1851 East First Street, Suite 1600Santa Ana, CA 92705 Facilitation
10/24/2018	120	$39.79	JJT Mileage & Parking Romulus 07-26-18
10/26/2018	135	$95.44	Meals [10.16.18 Court Hearing] Jason J. Thompson
10/26/2018	130	$44.85	Cab [10.16.18] Jason J. Thompson
10/31/2018	120	$64.90	Local travel
10/31/2018	30	$0.47	Postage
11/5/2018	110	$872.19	Air fare [Court hearing 11.2.18]Jason J. Thompson
11/5/2018	125	$1,127.10	Lodging [Court Hearing 11.2.18]Jason J. Thompson
11/7/2018	210	$51.13	Filing fee

11/12/2018	210	$665.97	Filing fees Reimbursements Finkelstein & Krinsk550 West C Street, Suite 1760, San Diego, CA 92101
11/19/2018	110	$246.45	Air fare [11.17.2018] Jason J. Thompson
12/4/2018	130	$50.22	Cab 11.29.2018 Jason J. Thompson
12/4/2018	130	$73.08	Cab 11.29.2018 Jason J. Thompson
12/4/2018	130	$46.54	Cab [11.30.18]Jason J. Thompson
12/4/2018	130	$47.99	Cab [11.30.18] Jason J. Thompson
12/7/2018	125	$872.62	Lodging [Court Hearing 11.29-12.1.18] Jason J. Thompson
12/7/2018	110	$1,480.40	Air fare [11.29-12.1-2018] Jason J. Thompson
12/10/2018	490	$24.98	Internet fee usage with Gogo Air [June 2018] Jason J. Thompson
12/10/2018	490	$12.48	Internet fee usage with Gogo Air [July 2018] Jason J. Thompson
12/10/2018	490	$24.98	Internet fee usage with Gogo Air [August 2018] Jason J. Thompson
12/10/2018	490	$16.65	Internet fee usage with Gogo Air [October 2018] Jason J. Thompson
12/10/2018	490	$12.49	Internet fee usage with Gogo Air [November 2018] Jason J. Thompson
12/12/2018	120	$105.79	JJT Mileage & Parking Romulus 12-01-18
12/12/2018	130	$24.70	Cab [11/16 and 29/2018] Jason J. Thompson
12/12/2018	135	$497.64	Meals [11.2, 3, 16, 30.2018] Jason J. Thompson
2/11/2019	495	$6.40	Publications & on line media
2/11/2019	495	$2.10	Publications & on line media
4/29/2019	495	$17.80	Publications & on line media
8/27/2019	135	$40.18	Meals [CA Mediation 8/12-14/2019] Jason J. Thompson
8/27/2019	125	$850.02	Lodging [CA Mediation 8/12-14/2019] Jason J. Thompson
8/27/2019	110	$801.00	Air fare [CA Mediation 8/12-14/2019] Jason J. Thompson
9/3/2019	110	$262.98	Air fare [Mediation 8/12-14/2019] Jason J. Thompson
9/3/2019	120	$10.00	Local travel [August 14, 2019, Oakland, CA re mediation] Jason J. Thompson
10/22/2019	495	$0.30	Publications & on line media
11/19/2019	120	$92.37	Cab Fares [San Francisco Court hearing 11.13-14.2019] Trenton R. Kashima
11/25/2019	210	$310.00	Filing fee
12/3/2019	135	$115.60	Meals - Attendees Megan Bonanni and Jason Thompson for meeting re case status and Mediation Jason J. Thompson

1/22/2020	120	$109.30	Local travel by Train to Los Angeles Court Hearing 1.16.2020 Trenton R. Kashima
1/28/2020	110	$214.97	Air fare for November, 2019 court hearing Trenton R. Kashima
1/28/2020	125	$143.03	Lodging [Court hearing] Trenton R. Kashima
2/3/2020	265	$3,600.00	Mediation 3/11/2020Ortman Mediation, Inc.1440 Broadway, Suite 700, Oakland, CA 94612
2/4/2020	495	$3.20	Publications & on line media
2/5/2020	125	$950.46	Lodging [1/16-17/2020 court hearing] Jason Thompson
2/5/2020	135	$71.87	Meals [1/16/2020 court hearing] Jason J. Thompson
2/5/2020	120	$83.23	Cab Fares 1.16-17.2020 re Court Hearing Jason Thompson
3/12/2020	120	$65.97	Local travel [Mediation 3.11-12.2020] Jason Thompson
3/13/2020	120	$30.00	Local travel 3.10-12.2020 Jason J. Thompson
3/13/2020	120	$104.00	Local travel 3.10-12.2020 re mediation Jason Thompson
3/13/2020	125	$622.71	Lodging re Mediation 3.10-12.2020 Jason Thompson
3/13/2020	110	$1,747.70	Air fare re 3.10-12.2020 Mediation Jason J. Thompson
3/13/2020	110	$678.50	Air fare for 1.15-16.2020 Hearing Jason Thompson
7/28/2020	495	$1.40	Publications & on line media
8/3/2020	125	$686.26	Trent KashimaLodging-Mary Hopkins San Francisco. InterContinental Hotel from 3/10/20-3/12/20
8/3/2020	120	$185.91	Trent KashimaLocal travel-Lyft rides/taxi
8/3/2020	135	$37.38	Trent KashiimaMeals-Dated 3/10/20 at Nob Hill and Top of the Mark on 3/11/20
3/2/2022	40	$73.75	Outside courier--Please make payable to Knox Attorney Service, Inc. and mail to 1550 Hotel Circle North, Ste. 440, Attn: Accounts Receivable, San Diego, CA 92108 for Invoice 4362430
3/2/2022	490	$65.05	Service fee--Please make payable to Knox Attorney Services, Inc - CopyCenters for Invoice 9315208, and mail to Attn: Accounts Receivable, 1550 Hotel Circle North, Ste. 440, San Diego, CA 92108

TOTAL COSTS BY ACCOUNT

Cost	Code	Amount
Postage	30	$152.30

Outside courier	40	$73.75
Air fare	110	$8,368.34
Local travel	120	$1,274.00
Lodging	125	$7,235.13
Car rental	130	$607.23
Meals	135	$1,884.86
Filing fee	210	$2,537.10
Case evaluation fee	250	$2,700.00
Facilitation	265	$3,845.00
Service fee	490	$791.59
Publications & on line	495	$87.58
EXPENSE TOTALS		**$29,556.88**

Exhibit B

Jason J. Thompson, Esq. (*Pro Hac Vice*)
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Facsimile: 248-746-4001

Attorneys for Plaintiffs Roes 1-2, et al.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JANE ROES 1-2, et al., Plaintiffs, **v.** **DÉJÀ VU SERVICES, INC., et al.,** jointly and severally, Defendants.	Case No: 14-cv-03616-LB Related Case: 19-cv-03960-LB The Honorable Laurel Beeler Date: November 17, 2022 Time: 9:30 a.m.

DECLARATION OF MEGAN BONANNI IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEY FEES

I, Megan Bonanni, declare as follows:

1. I am an equity partner of the law firm of Pitt McGehee Palmer Bonanni & Rivers, P.C. ("Pitt McGehee"), Plaintiffs' counsel herein. Pitt McGehee is an 9-attorney firm based in Royal Oak, Michigan, the largest firm in Michigan exclusively representing workers as plaintiffs in employment-related matters, including claims based upon individual and class-wide violations of state and federal wage and hour laws.

2. Along with lawyers from Sommers Schwartz, P.C., I am one of the lawyers responsible for prosecuting Plaintiffs' claims and negotiating this settlement.

3. I make these statements based on personal knowledge and would so testify if called as a witness.

Firm Background

4. Pitt McGehee has tremendous experience prosecuting class actions, including wage and hour class and collective actions such as this one.

5. Since its inception in 1992, the firm has represented employees in class actions, including claims of unpaid overtime and minimum wage claims in both individual cases and collective & class actions in Michigan and across the United States. The firm is highly experienced in class action litigation.

6. I am licensed to practice in Michigan and have been so since 1994. I have served as lead class counsel and various leadership co-counsel roles in numerous matters involving federal litigation. Approximately 75% of my practice consists of civil rights class actions, including FLSA collective actions. The remaining 25% of my practice centers on individual civil rights cases.

7. Courts have repeatedly found me and other members of my firm Pitt McGehee to be adequate class counsel in class actions and wage and hour class actions. I continue to be appointed as class counsel or co-class counsel in class and collective actions on the basis of my experience as an employment lawyer:

In Re: USA Gymnastics, U.S. Bankruptcy Court for Southern Division of Indiana, Case No. 18-9108 (Counsel for Survivor's Committee)

John Does et al v. University of Michigan et al, U.S. District Court for the Eastern District of Michigan, Case 2:20-cv-11170 (Steering Committee)

Jane Doe et al v. Déjà vu et al, U.S. District Court for the Eastern District of Michigan, Case No. 1:l6-cv-10877

Krieger et al v. USA, U.S. District Court for the Eastern District of Michigan, Case No. 22-10647 (Steering Committee)

Flanagan et al v. Sundance, U.S. District Court for the Eastern District of Michigan, Case No. 2:16-cv-13598

Turner et al v. United Towing, U.S. District Court for the Eastern District of Michigan Case No. 2:14-cv-14801

Copher et al v. Motor City Auto Transport, Inc. et al, Macomb County Circuit Court, Case No. 15-2500-CK

Joyella vs. Angel Healthcare Private Duty Nursing, U.S. District Court for the Eastern District of Michigan, No. 10 Civ. 13362 (Class Counsel)

Chris Wright vs. Flagstar Bank FSB, U.S. District Court for the Eastern District of Michigan, No. 13 Civ. 15069 (Class Counsel)

Neal vs. Michigan Department of Corrections, Washtenaw County Circuit Court, Case No. 96-6986-CZ

Cunningham vs. Electronic Data Systems Corp., S.D.N.Y, Case No. 06 Civ. 3530

Steavens vs. Electronic Data System Corp., S.D.N.Y., Case No. 08 Civ. 10409

Gilford vs. Detroit Edison, Wayne County Circuit Court, Case Nos. 93-333296-NO, 97-706639-NO

Jane Does 1-3 vs. The Coliseum, U.S. District Court for the Eastern District of Michigan, No. 13 Civ. 14492

Applebaum vs. MGM Grand Detroit, LLC, U.S. District Court for the Eastern District of Michigan, No. 14 Civ. 13005

Dallas vs. Alcatel-Lucent, U.S. District Court for the Eastern District of Michigan, No. 09-14596

Jones et al. vs. The Goodyear Tire & Rubber Co., Court of Common Pleas Ohio, Case No. CV-2002-09-5090

Halabicky, et al vs. University of Michigan, U.S. District Court for the Eastern District of Michigan, No. 08 Civ. 10065

Thompson vs. City of Flint, U.S. District Court for the Eastern District of Michigan, No. 07 Civ. 11107

Aleobua v. Micholding, Inc., U.S. District Court for the Eastern District of Michigan, No. 14 Civ. 12932

Sisman v. Dearborn Avenue Bistro, Inc. et al, U.S. District Court for the Eastern District of Michigan, No. 15 Civ. 10772

Hoffman et al v Dearborn Avenue Bistro, Inc. et al, U.S. District Court for the Eastern District of Michigan, No. 15 Civ. 10771

Stacy Allen et al v. Talmer Bancorp, Inc. and Talmer Bank & Trust, Oakland County Circuit Court, Case No. 16-154136 CZ

Reasonableness of Fee Request, Cost Reimbursement and Incentive Award

8. I have reviewed time and expense records in this case, and I am fully aware of the hours worked on this litigation and money spent on costs and expenses in this litigation.

9. Pitt McGehee has been involved in this litigation from the outset and I have been responsible for both performing and coordinating the legal work conducted by Pitt McGehee in connection with this lawsuit.

10. All of Plaintiffs' Counsel's hourly rates are well within the range, or substantially less, than the ordinary fees awarded to attorneys in their respective geographic areas with similar skill, experience, and reputation as that of Plaintiffs' counsel.

11. In submitting the requests for fees I have reviewed the applicable factors and tests and believe that all of the factors support Plaintiffs' application for the requested attorneys' fees and costs.

12. As class counsel, I have reviewed all of the Pitt McGehee time and expenses and can attest that they are reasonable as to both the hourly rate, time spent, work allocation and totals, as well as being absolutely necessary to reach the settlement in this case.

13. All Plaintiff's counsel diligently worked to avoid duplication of efforts and expenses, while at the same time not sacrificing work quality on behalf of the class. The settlement obtained in this litigation were directly affected by the efforts and expenses advanced by Plaintiff's counsel, and only those counsel, in this lawsuit.

14. The time and billing records are attached hereto as Tab 1, and in table format, Pitt McGehee time summary is as follows:

Name	Position	Hourly Rate	Total Time	Total Bill
Megan A. Bonanni	Partner	$685.00	140 hours	$95,900.00

15. The costs incurred by the Sommers Schwartz and Pitt McGehee are all reasonable, accurate and were necessary to prosecute the action. They are documented by the attached sheet (Exhibit 1).

Reasonableness of Requested Named Plaintiff Class Representative Service Awards

16. The Parties' Settlement Agreement identifies Class Representative service awards in the amount of $3,500, to Jane Doe 1 and 2.

17. The Named Plaintiffs worked diligently to assist Class Counsel in their activities during the pendency of this litigation. In particular, the Named Plaintiffs each took part in multiple interviews and meetings, and prepared with counsel for mediation sessions, and follow up discussions on settlement values and terms.

18. The Named Plaintiffs were counseled on the rights and responsibilities of serving as Rule 23 class representatives and agreed to serve in that capacity in the filing of Plaintiffs' Complaint.

19. The requested amount of $3,500 for Jane Doe 1 and 2 is commensurate with other service awards I have been involved in nationally and as documented by research of other similar awards, is reasonable under the circumstances.

20. I have read the foregoing Motion for an Award of Attorneys' Fees and Costs. I state that the contents thereof are true to the best of my knowledge, information and belief.

I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Respectfully submitted,

PITT McGEHEE PALMER BONANNI & RIVERS

By:_____
Megan A. Bonanni (P52079)
Attorney for Plaintiffs

Dated: October 13, 2022

Exhibit 1

Pitt McGehee's Litigation Cost Report

Date	Description	Code	Cost	
7/6/2018	Meghan Navoy		$54.00	Client Outreach
7/11/2018	Jonathan Lord		$120.00	Client Outreach
7/25/2018	Morgan Zalewski		$726.00	Client Outreach
8/8/2018	Robert Cleary		$135.00	Client Outreach
8/8/2018	Jessica Miyamoto		$495.00	Client Outreach
8/18/2018	Cab	100	$174.18	
8/18/2018	Air Fare	110	$1,436.40	
8/18/2018	Lodging	125	$2,015.48	
9/24/2018	Mileage	120	$16.00	
10/24/2018	Lodging	125	$674.87	
10/24/2018	Air Fare	110	$1,050.40	
10/24/2018	Records Pacer	65	$69.55	
11/4/2018	Air Fare	110	$448.87	
11/13/2018	Filing Pro Hac Vice	210	$500.00	
11/19/2018	DocuSign		$480.00	
12/19/2018	Filing Authorization California Bar	210	$71.13	
2/1/2019	Meals	135	$33.91	
5/13/2019	Legal Research		$492.03	
7/12/2019	Ortman Mediation		$5,000.00	
8/14/2019	Air Fare/Lodging	110/125	$1,147.88	
1/7/2020	Postage	30	$1.80	
1/20/2020	Copy Charges	60	$300.90	
2/21/2020	Deposition Transcript Discover Entertainment		$764.26	
2/21/2020	Certificate Good Standing Bonanni	210	$25.00	
3/10/2020	Mileage/Parking	120	$61.14	
3/12/2020	Air Fare/Lodging	110/125	$1,408.07	
			$17,701.87	Total

Exhibit C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEBRA BROWN, SANDRA MORTON, and BARBARA LABUSZEWSKI, individually and on behalf of all other similarly situated individuals,

Plaintiffs,

v.

THE PERMANENTE MEDICAL GROUP, INC., a California corporation,

Defendant.

No. 3:16-CV-05272-VC

CLASS ACTION

~~[PROPOSED]~~ ORDER GRANTING MOTION FOR ATTORNEYS' FEES, LITIGATION/SETTLEMENT ADMINISTRATION EXPENSES, AND CLASS REPRESENTATIVE SERVICE AWARDS AS MODIFIED

Date: October 5, 2017
Time: 10:00 a.m.
Courtroom: 4
450 Golden Gate Avenue, 17th Floor
San Francisco, California 94102
Judge: Hon. Vince Chhabria

On October 5, 2017, a hearing was held on the joint motion of plaintiffs Debra Brown, Sandra Morton and Barbara Labuszewski and defendant The Permanente Medical Group, Inc. ("TPMG"), and on the separate motion of Plaintiffs' and Class Counsel for Attorneys' Fees, Litigation Expenses, Settlement Administration Expenses, and Class Representative Service Awards. Kevin J. Stoops and Jason L. Thompson of Sommers Schwartz, P.C., and Jahan C. Sagafi of Outten & Golden LLP appeared for plaintiffs; and Jeffrey D. Wohl and Caitlin M. Wang of Paul Hastings LLP appeared for TPMG.

The parties have submitted their Settlement, which this Court preliminarily approved by its order entered on June 9, 2017. In accordance with the Preliminary Approval Order, Class Members have been given notice of the terms of the Settlement and the opportunity to object to it or to exclude themselves from its provisions.

Having received and considered the motion of Plaintiffs' and Class Counsel for Attorneys' Fees, Litigation Expenses, Settlement Administration Expenses, and Class Representative Service Awards; the Memorandum and corresponding declarations and documents filed in support of that motion; Plaintiffs' and Class Counsel's Reply Brief in support of their motion for Attorneys' Fees, Litigation Expenses, Settlement Administration Expenses, and Class Representative Service Awards; the Memorandum and corresponding declarations and documents filed in support of that reply; and based on the entire record of this action; the Court HEREBY ORDERS and MAKES DETERMINATIONS as follows:

1. The Court has jurisdiction over the subject matter of this action, the Defendant, and the Class.

2. Notice of the requested award of attorneys' fees, reimbursement of litigation expenses, reimbursement of settlement administration expenses, and awards of class representative service payments was directed to Class Members in an reasonable manner, and complies with Rule 23(h)(1) of the Federal Rules of Civil Procedure.

3. Class Members and any party from whom payment is sought have been given the opportunity to object in compliance with Fed. R. Civ. P. 23(h)(2).

Appointment of Class Representatives and Approval of Class Representative Awards

4. The Court confirms as final the appointment of Debra Brown, Sandra Morton and Barbara Labuszewski as Class Representatives of the FLSA Collective and the California Rule 23 Class.

5. The requested Class Representative service awards of $10,000 each for Class Representatives Brown, Morton and Labuszewski, are fair and reasonable in light of the time and effort the Class Representatives expended for the benefit of the Class Members, as well as the risk accepted by initiating the litigation and publicly representing the Class. *See, e.g., Stevens v. Safeway, Inc.*, No. 05 Civ. 01988, 2008 U.S. Dist. LEXIS 17119, at *34-37 (C.D. Cal. Feb. 25, 2008) ($20,000 and $10,000 to two class representatives); *Glass v. UBS Financial Services, Inc.*, 7 Case No. 06 Civ. 4068, 2007 WL 221862, at *16-17 (N.D. Cal. Jan. 26, 2007) ($25,000 each to four class representatives); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 300 (N.D. Cal. 1995) ($50,000 to one class representative); *In Re Janney Montgomery Scott LLC Financial Consultant Litig.*, No. 06 Civ. 3202, 2009 U.S. Dist. LEXIS 60790, at *35-37 (E.D. Pa. July 16, 2009) ($20,000 each to three class representatives); *Wade v. Kroger Co.*, No. 01 Civ. 699, 2008 WL 4999171, at *13 (W.D. Ky. Nov. 20, 2008) ($30,000 each to multiple class representatives); *Wright v. Stern*, 553 F. Supp. 2d 337, 342 (S.D.N.Y. 2008) ($50,000 each to eleven class representatives); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) ($35,000-55,000 each to five class representatives). The Class Representatives have satisfied the criteria as set forth in *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003). Under *Staton*, a service award request should be evaluated using "'relevant factors, includ[ing] the actions the Plaintiff has taken to protect the interests of the class, the degree to which the class has benefited from those actions, … the amount of time and effort the Plaintiff expended in pursuing the litigation … and reasonabl[e] fear[s] of workplace retaliation.'" *Staton*, 327 F.3d at 977 (citing *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)) (ellipses in original). Here, the Class Representatives' leadership of this action caused them personal exposure and potential adverse consequences with future employers, and their representation of the FLSA and state law Classes enhanced the case's value overall by increasing TPMG's potential exposure, tolling the statutes of limitations for those claims. Furthermore, Class Counsel attests that the Class Representatives were substantially involved throughout the litigation, educating Class Counsel regarding Class Members' job experiences and TPMG's policies and

procedures. Accordingly, the Court approves payment of Class Representative service awards in the amount of $10,000 each to Debra Brown, Sandra Morton and Barbara Labuszewski.

Appointment of Class Counsel; Approval of Class Counsel's Attorneys' Fees and Litigation Expenses

6. The Court confirms as final the appointment of the following law firms and attorneys as class counsel ("Class Counsel") for the Rule 23 and FLSA Classes: Kevin Stoops and Jason Thompson of Sommers Schwartz, P.C., Jahan C. Sagafi of Outten & Golden LLP.

7. The Court finds and determines that Class Counsel's requested award of $1,876,500 in attorneys' fees, or 30% of the common funds, is reasonable under the percentage of the common fund method, as it is consistent with Ninth Circuit authority. *See, e.g.*, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002) (affirming award of 28% of $96.885 million common fund, while recognizing that the percentage of an award generally increases as the common fund decreases); *In re Pacific Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming award of 33% of $12 million common fund); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 460 (9th Cir. 2000) (affirming award of 33.3% of $1.725 million fund); *see also In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1989) (surveying cases and stating, "in class action common fund cases the better practice is to set a percentage fee and that, absent extraordinary circumstances that suggest reasons to lower or increase the percentage, the rate should be set at 30%."). The Court reaches this conclusion based on attorneys' fees awards issued in similar wage and hour cases in this District, and the fact that the common fund of $6,255,000 was created for Class Members through the efforts of Class Counsel. *See Boyd v. Bank of Am. Corp.*, No. 13 Civ. 0561, 2014 WL 6473804, at *9 (C.D. Cal. Nov. 18, 2014) (approving fee award of 36% of common fund settlement); *In re Quantum Health Res., Inc.*, 962 F. Supp. 1254, 1258 (C.D. Cal. 1997) (attorneys representing a class "routinely recover attorneys' fees in the range of 20 to 40 percent of the common fund"); *see also Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 492 (E.D. Cal. 2010) (33.3% fee award; $300,000 common fund) (collecting cases).

8. The requested fee award is also reasonable under the lodestar method. The hours devoted to this case by Class Counsel and their rates are reasonable. The award results in a multiplier of approximately 3.0, which falls within the range of fee multipliers courts routinely approve, and is

reasonable in light of the time and labor required, the difficulty of the issues involved, the requisite legal skill and experience necessary, the results obtained for the Class, the contingent nature of the fee and risk of no payment, and the range of fees that are customary. Courts routinely approve similar or higher lodestar multipliers in comparable common fund cases. *See Vizcaino*, 290 F.3d at 1052-54; *Steiner v. Am. Broad. Co.*, 248 Fed. Appx. 780, 783 (9th Cir. 2007) (affirming award with multiplier of 6.85); *see also* Newberg, *Attorney Fee Awards*, § 14.03 at 14-5 (1987) ("multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied."); *Rabin v. Concord Assets Group, Inc.*, No. No. 89 Civ. 6130 (LBS), 1991 WL 275757 (S.D.N.Y. 1991) (4.4 multiplier) ("In recent years multipliers of between 3 and 4.5 have become common.") (internal quotations and citations omitted); *In re Xcel Energy, Inc., Securities, Derivative & "'ERISA" Litig.*, 364 F. Supp. 2d 980, 998-99 (D. Minn. 2005) (approving 25% fee, resulting in 4.7 multiplier); *In re Aremissoft Corp. Sec. Litig.*, 210 F.R.D. 109, 134-35 (D.N.J. 2002) (approving 28% fee, resulting in 4.3 multiplier); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 371 (S.D.N.Y. 2002) (approving 33.3% fee, resulting in "modest multiplier of 4.65"); *Di Giacomo v. Plains All Am. Pipeline*, Nos. 99-4137 & 99-4212, 2001 WL 34633373, at *10-11 (S.D. Fla. Dec. 19, 2001) (approving 30% fee, resulting in 5.3 multiplier); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 198 (S.D.N.Y. 1997) (5.5 multiplier); *Roberts v. Texaco*, 979 F. Supp. 185 (S.D.N.Y. 1997) (5.5 multiplier); *Weiss v. Mercedes-Benz of N. Am., Inc.*, 899 F. Supp. 1297, 1304 (D.N.J. 1995) (9.3 multiplier), *aff'd*, 66 F.3d 314 (3d Cir. 1995).

9. For these reasons, the Court awards Class Counsel attorneys' fees in the amount of $1,876,500.

10. The Court finds and determines, pursuant to the terms of the Settlement, that within 7 days of receipt of the Total Settlement Amount from TPMG (which must be paid within 14 days of the Settlement becoming Final) the Settlement Administrator will wire transfer the attorneys' fee award of $1,876,500 to Sommers Schwartz, P.C., and Sommers Schwartz, P.C., will be responsible for distribution of fees to Class Counsel including Outten & Golden LLP.

11. The Court finds and determines that Class Counsel's request for reimbursement of litigation expenses in the amount of $52,715.52 is reasonable and is consistent with Ninth Circuit

authority. The litigation expenses incurred by Class Counsel have been adequately documented and were reasonably incurred for the benefit of the Class. The Court finds that these litigation expenses are justified.

12. The Court finds and determines, pursuant to the terms of the Settlement, that within 7 days of receipt of the Total Settlement Amount from TPMG (which must be paid within 14 days of the Settlement becoming Final) the Settlement Administrator will wire transfer the fees expenses to Sommers Schwartz, P.C., and Sommers Schwartz, P.C., will be responsible for distribution of litigation expenses to Class Counsel including Outten & Golden LLP.

Settlement Administration Expenses

13. Settlement Administrator, Simpluris, Inc., has filed a declaration identifying the work it has performed and will perform in this matter and identifying its total invoice amount of $26,600.

14. The Court finds that these settlement administration expenses are fair and reasonable and appropriate in this case and awards reimbursement of that amount to Simpluris, Inc., from the Total Settlement Amount.

IT IS SO ORDERED.

Dated: October 11, 2017.

Vince Chhabria
United States District Judge

Exhibit D

(*Counsel of record on next page*)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEBRA WOLF, individually and on behalf of all other similarly situated individuals,

Plaintiffs,

v.

THE PERMANENTE MEDICAL GROUP, INC., a California corporation,

Defendant.

No. 3:17-cv-05345-VC

~~[PROPOSED]~~ ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND ENTERING FINAL JUDGMENT

Time: 10:00 a.m.
Courtroom: 4, 17th Floor
Judge: Hon. Vince Chhabria

Complaint filed: September 14, 2016
Trial date: Not yet set

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Attorneys for Defendant
The Permanente Medical Group, Inc.

On September 6, 2018, a hearing was held on the joint motion of plaintiff Debra Wolf and defendant The Permanente Medical Group, Inc. ("TPMG"), for final approval of their class settlement (the "Settlement") and payment to the Settlement Administrator. Kevin J. Stoops and Jason L. Thompson of Sommers Schwartz, P.C., and Jahan C. Sagafi of Outten & Golden LLP appeared for plaintiffs; and Jeffrey D. Wohl and Caitlin M. Wang of Paul Hastings LLP appeared for TPMG.

The parties have submitted their Settlement, which this Court preliminarily approved by its order entered on May 9, 2018. In accordance with the Preliminary Approval Order, Class Members have been given notice of the terms of the Settlement and the opportunity to object to it or to exclude themselves from its provisions.

Having received and considered the Settlement, the supporting papers filed by the parties, and the evidence and argument received by the Court at the hearing before it entered the Preliminary Approval Order and at the final approval hearing on September 6, 2018, the Court grants final approval of the Settlement, and HEREBY ORDERS and MAKES DETERMINATIONS as follows:

1. Pursuant to the Preliminary Approval Order, a Notice of Proposed Settlement, Conditional Certification of Settlement Class, Preliminary Approval of Settlement, and Hearing Date for Final Court Approval; a Class Member Settlement Information Sheet; and an Election Not to Participate in Settlement were sent to each Class Member by first-class mail. These papers informed Class Members of the terms of the Settlement, their right to receive a Settlement Share, their right to object to the Settlement or to elect not to participate in the Settlement and pursue their own remedies, and their right to appear in person or by counsel at the final approval hearing and be heard regarding approval of the Settlement. Adequate periods of time were provided by each of these procedures. No Class Members filed written objections to the proposed Settlement as part of this notice period or stated an intention to appear at the final approval hearing. The Court finds and determines that this notice procedure afforded adequate protections to Class Members and provides the basis for the Court to make an informed decision regarding approval of the Settlement based on the responses of Class Members. The Court finds and determines that the notice provided in this case was the best notice practicable, which satisfied the requirements of law and due process.

///

2. In addition to the notice to the Class, pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1715 ("CAFA"), the Attorney General of the United States and the appropriate state official in each state in which a Class Member resides have been given notice of the Settlement. Pursuant to CAFA, not later than 10 days after the motion seeking preliminary approval of the Settlement was filed with the Court, TPMG served upon the appropriate state official of each state in which a Class Member resides and the appropriate federal official a notice of the Settlement consisting of: copies of the complaint in this action; a notice of the scheduled judicial hearings in this class action; copies of the Settlement Agreement, proposed notices of class action settlement and Class Members' right to request exclusion from the class; and the names of Class Members who reside in each state and the estimated proportionate share of the claims of Class Members in each state to the entire Settlement. The notice of Settlement also invited comment on the Settlement. The Court finds and determines that TPMG's notice of the Settlement was timely, adequate, and compliant with the statutory requirements of CAFA. Accordingly, 28 U.S.C. section 1715(e) has no application to the Settlement.

3. In addition to the notice to the Class and notice provided under CAFA, pursuant to the Labor Code Private Attorneys General Act ("PAGA"), Cal. Lab. Code §§ 2699(l)(2), (l)(4), the Labor Workforce and Development Agency ("LWDA") has been given notice of the Settlement. Pursuant to PAGA, on the date the parties filed the motion seeking preliminary approval of the Settlement with the Court, TPMG submitted to the LWDA a notice of the Settlement enclosing a copy of the parties' Settlement Agreement. The Court finds and determines that TPMG's notice of the Settlement complied with the statutory requirements of PAGA.

4. For the reasons stated in the Preliminary Approval Order, the Court finds and determines that the proposed Class, as defined in the definitions section of the Settlement and conditionally certified by the Preliminary Approval Order, meets all of the legal requirements for class certification, and it is hereby ordered that the Class is finally approved and certified as a class for purposes of the Settlement.

5. The Court further finds and determines that the terms of the Settlement are fair, reasonable and adequate to the Class and to each Class Member and that the Class Members who did not timely submit valid elections not to participate in the Settlement in accordance with the Settlement Agreement and the Preliminary Approval Order will be bound by the Settlement, that the Settlement is

ordered finally approved, and that all terms and provisions of the Settlement should be and hereby are ordered to be consummated.

6. The Court finds and determines that the Settlement Shares to be paid to the Class Members who did not timely submit valid elections not to participate, as provided for by the Settlement, are fair and reasonable. The Court hereby gives final approval to and orders the payment of those amounts be made to the Class Members who did not timely submit valid elections not to participate out of the Net Settlement Amount in accordance with the Settlement.

7. The Court finds and determines that the payment to the California Labor and Workforce Development Agency under the Settlement, in the amount of $37,500, is fair and reasonable. The Court hereby gives final approval to and orders that amount be paid out of the Total Settlement Amount in accordance with the Settlement.

8. The Court finds and determines that the fees and expenses in administrating the Settlement, in the amount of $35,000 are fair and reasonable. The Court hereby gives final approval to and orders that amount be paid out of the Total Settlement Amount in accordance with the Settlement.

9. The Court determines by separate order the request by plaintiffs and Class Counsel to the Class Representative Payments and the Class Counsel Fees and Expenses Payment.

10. Without affecting the finality of this order in any way, the Court retains jurisdiction of all matters relating to the interpretation, administration, implementation, effectuation and enforcement of this order and the Settlement.

11. Nothing in this order will preclude any action to enforce the parties' obligations under the Settlement or under this order, including the requirement that TPMG make payments to the Class Members in accordance with the Settlement.

12. Upon completion of administration of the Settlement, the Settlement Administrator will provide written certification of such completion to the Court and counsel for the parties.

13. Pursuant to the Settlement, plaintiffs and all Class Members who did not timely submit valid elections not to participate are permanently barred from prosecuting against TPMG, and its parents, predecessors, successors, subsidiaries, affiliates, joint ventures, and trusts, and all of its

Case 3:17-cv-05345-VC Document 274 Filed 10/13/22 Page 7 of 7

employees, officers, agents, attorneys, stockholders, fiduciaries, other service providers, and related persons and entities, and assigns, any of the claims released by them under the Settlement.

14. The parties are hereby ordered to comply with the terms of the Settlement.

15. The Court hereby enters final judgment in accordance with the terms of the Settlement Agreement, the Order Granting Preliminary Approval of Class Action Settlement filed on May 9, 2018, and this order.

16. This document will constitute a final judgment (and a separate document constituting the judgment) for purposes of Rule 58, Federal Rules of Civil Procedure.

The Parties will bear their own costs and attorneys' fees except as otherwise provided by the Court's order granting the Class Counsel Fees and Expenses Payment.

IT IS SO ORDERED.

Dated: September 14, 2018.

Hon. Vince Chhabria
United States District Judge

Exhibit E

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PHILLIP FLORES, et al.,

Plaintiffs,

v.

TFI INTERNATIONAL INC., et al.,

Defendants.

Case No. 12-cv-05790-JST

ORDER GRANTING MOTION FOR COLLECTIVE ACTION SETTLEMENT AND ATTORNEYS' FEES AND COSTS

Re: ECF Nos. 326, 329, 341

Before the Court is Plaintiffs Philip Flores and Darah Duong's "Unopposed Motion for Approval of Joint Stipulation of Settlement, and Attorneys' Fees and Costs" in this Fair Labor Standards Act ("FLSA") collective action. ECF No. 326. Plaintiffs have also filed an unopposed administrative motion to file a document under seal. ECF No. 329. The Court will deny the motion to seal and grant the motion for settlement approval and fees and costs.[1]

I. BACKGROUND

A. The Parties and Claims

The factual background of this litigation is set forth in greater detail in the Court's prior order granting partial summary judgment. *See* ECF No. 260. In brief, Plaintiffs claim that Defendants TFI International Inc., TForce Final Mile, LLC, and Velocity Express, LLC,[2] misclassified Velocity Express delivery drivers – including Plaintiffs – as independent contractors, thereby depriving them of minimum wages and overtime. *See* ECF No. 140 (Fourth Amended

[1] The Court also denies as moot the parties' joint administrative motion to set a case management conference. ECF No. 341.

[2] In 2012, Velocity Express was purchased by TFI International and TForce Final Mile, then operating as Transforce, Inc. and Dynamex Operations East, Inc., respectively. ECF No. 260 at 1-2.

Complaint, or "FAC") ¶¶ 85, 93. Though Velocity Express required its drivers to sign an Independent Contractor Agreement," it nonetheless exerted substantial control over the drivers' work. ECF No. 260 at 2-4.

B. Procedural History

On November 9, 2012, Plaintiffs filed this lawsuit as a putative collective action under the FLSA and putative class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, alleging violations of the FLSA, the California Labor Code, and California's Unfair Competition Law. *See* ECF No. 1.

On June 3rd, 2013, the Court granted Plaintiffs' motion to conditionally certify a FLSA collective action for the following class[3]:

> All current and former delivery drivers of Velocity Express, LLC who signed the 2009 "Independent Contractor Master Agreement," and who are or were employed to deliver goods to its clients at any time in the last three years, who worked over eight hours per workday or 40 hours per workweek, and were not paid a minimum wage or overtime for hours worked over 40 in a workweek or hours worked over 8 in a workday.

ECF No. 58 at 15. The Court approved a modified version of the proposed notice and consent form for additional class members to opt in to the litigation. *Id*. at 16.[4]

Velocity Express went defunct in December 2013, effectively ceasing operations. ECF No. 150-1 ¶ 10. The Court subsequently granted partial summary judgment in favor of Plaintiffs, holding that Dynamex Operations East (now TForce Final Mile) was a successor to Velocity Express's potential FLSA liability. ECF No. 176 at 12.

In September 2015, the Court approved a bellwether trial process to resolve whether Velocity had misclassified its drivers. ECF No. 188. The parties selected two individual Plaintiffs, James Mack and Claude Boconvi, as the bellwether plaintiffs for these trials. ECF Nos.

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[3] The Ninth Circuit recently addressed in some detail the reasons why terms borrowed from Rule 23 class action practice create confusion when applied to collective actions, due to functional differences between the two mechanisms. *See Campbell v. City of Los Angeles*, 903 F.3d 1090, 1099-1102 (9th Cir. 2018). The Court will follow the Ninth Circuit's lead, and "[d]espite the imprecision, . . . will adhere to the terms commonly used in collective action practice, as the terms are now widespread." *Id.* at 1102.

[4] Plaintiffs never sought to certify a Rule 23 class action for their state-law claims.

224, 226. The Court selected a third bellwether plaintiff, Charles Chambers. ECF No. 237.

On April 24, 2017, the Court granted Plaintiffs' motion for partial summary judgment, finding that Mack, Boconvi, and Chambers were Velocity Express employees as a matter of law, rendering Defendants liable under the FLSA. ECF No. 260 at 34. The Court also found that Mack was an employee under California law. *Id.*

On June 6, 2017, rather than go to trial on damages, the parties stipulated to $2,500 in damages for Boconvi and $60,000 for Mack. *See Boconvi v. Velocity Express*, 17-cv-2623-JST, ECF No. 35.[5] The Court awarded Plaintiffs' counsel $2,124,031.14 in attorneys' fees and $136,575.60 in costs for work related to Boconvi's and Mack's cases. *See Boconvi*, 17-cv-2623-JST, ECF No. 82. Defendants appealed the *Boconvi* judgment to the Ninth Circuit, where it is currently pending. *Boconvi*, 17-cv-2623-JST, ECF No. 87.

Having resolved the questions of liability, the parties jointly proposed to resolve the remaining Plaintiffs' claims through a series of six trial tranches; the Court approved the proposal in January 2018. *See* ECF Nos. 297, 300, 303.

The parties represent that they had previously twice attempted to mediate their claims with the assistance of Mark Rudy, but those attempts were unsuccessful due to outstanding issues regarding liability. ECF No. 326 at 11. The parties engaged in a third round of mediation during discovery for the Tranche 1 Plaintiffs, including an all-day mediation session and multiple follow-up conferences, resulting in the Settlement before the Court. *Id.*

On October 26, 2018, Plaintiffs filed this unopposed motion for settlement approval. *See* ECF No. 326. The Court heard argument on the motion on November 15, 2018. ECF No. 334. At the hearing, the Court expressed the concerns about the proposed settlement identified later in this order. To respond to these concerns, the parties filed a supplemental joint statement on November 28, 2018, ECF No. 336, supported by a further declaration from Plaintiff's counsel, ECF No. 337. Plaintiffs' counsel then filed a further supplemental declaration in support on December 17, 2018. ECF No. 338. On January 25, 2019, Plaintiffs' counsel filed yet a further

[5] The Court granted Defendants' motion to dismiss Chambers from the litigation for failure to prosecute when he did not respond to requests to appear for trial. ECF No. 291.

declaration, detailing counsel's efforts at notice to members of the collective action and the response by participating drivers. ECF No. 340.

C. Overview of the Settlement Agreement

Under the terms of the Settlement, Defendants agree to pay a maximum amount of $4,750,000. ECF No. 327-1 at 14. The Settlement allocates that amount as follows: (1) $1,850,000 for participating Plaintiffs (the "Claims Amount"), *id.* at 5-6; and (2) $2,900,000 for Plaintiffs' counsel's attorneys' fees and costs, including the costs of administering the Settlement, *id.* at 14, 18. The Claims Amount will first be used to satisfy the $62,500 judgment the Court awarded to Boconvi and Mack. *Id.* at 9. In addition, 13 percent of the Claims Amount, or $240,500, will be allocated to the subset of participating Plaintiffs who provided services in California, in exchange for the release of their California law claims. *Id.* at 6. The remaining $1,547,000 will be allocated to all participating Plaintiffs. *Id.* The Claim Share of each participating Plaintiff (both as to the California-specific and general amounts) will be determined in proportion to the number of weeks worked by that Plaintiff during the qualifying period. *Id.*[6] Plaintiffs' counsel have calculated the number of qualifying weeks for each Plaintiff using data provided by Defendants. ECF No. 327 ¶ 6; *see also* ECF No. 327-2.

Defendants also agree to dismiss the pending appeal of the *Boconvi* action. *Id.* at 19.

In exchange, Plaintiffs agree to release the following claims:

> [F]or the duration of the Settlement Period, all claims that were pled in the *Flores* Action, including claims for failure to pay all minimum wages (as pled under Fair Labor Standards Act, 29 U.S.C. § 201 *et. seq.*); failure to pay all overtime wages (as pled under Fair Labor Standards Act, 29 U.S.C. § 201 *et. seq.*); failure to compensate for all hours worked (as pled under Fair Labor Standards Act, 29 U.S.C. § 201 *et. seq.*), liquidated damages under 29 U.S.C. § 216(b), failure to pay minimum wages and overtime under California Labor Code Sections 510, 1194, and Industrial Welfare Commission (IWC) Order No. 9, willful misclassification of individuals as independent contractors in violation of California Labor Code § 226.8, failure to provide meal periods in violation of California Labor Code §§ 226.7, 512, and IWC Wage Order No. 9, failure to reimburse business

[6] The Settlement defines this period as the date each Plaintiff opted into the litigation, "going back a period of three years plus an additional eleven weeks consistent with the Court's Minute Order [tolling the statute of limitations, ECF No. 67,] dated August 19, 2013 plus any additional weeks of service the [Plaintiff] engaged in after" opting in. ECF No. 327-1 at 6.

> expenses in violation of California Labor Code § 2802, failure to furnish accurate wage statements in violation of California Labor Code §§ 226, 226.3, and IWC Wage Order No. 9, failure to keep accurate payroll records in violation of California Labor Code §§ 1174, 1174.5, and IWC wage order No. 9, failure to pay wages upon termination in violation of California Labor Code §§ 201-203 (i.e., waiting time penalties), allegedly unlawful, unfair, unconscionable, and/or fraudulent business acts or practices in violation of § 17200 et seq. of California's Business and Professions Code, and any claims under state or federal law seeking substantially the same recovery (e.g., lost wages, unreimbursed expenses, or penalties) as secured by the above-referenced statutory claims. The . . . Released Claims further encompass all damages or recovery that might be sought under these claims including but not limited to requests for injunctive relief, actual or statutory damages, attorneys' fees and costs, or pre- or post-judgment interest.

Id. at 7.

The Settlement requires each Plaintiff to affirmatively opt to participate and establishes a process for securing their participation. By October 25, 2018 – one day prior to filing this motion with the Court – Plaintiffs' counsel mailed each Plaintiff notice of the Settlement. *Id.* at 15; ECF No. 327 ¶ 7. The Settlement provides that each Plaintiff must respond in writing by November 14, 2018 – twenty-one days later – expressing the intent to (1) participate in the Settlement ("Participating Drivers"); (2) opt out of the Settlement ("Non-Participating Drivers"); or (3) "challenge the number of weeks allocated" to that Plaintiff ("Challenging Drivers"). ECF No. 327-1 at 15. There is no mechanism for Plaintiffs to object to any other terms of the Settlement.

If a Challenging Driver's dispute is not resolved by November 15, 2018, the Settlement provides that the Court will adjudicate each challenge. *Id.* at 15-16. Any Plaintiff whose challenge is not resolved in their favor will be "deemed a Non-Participating Driver" and excluded from the Settlement. *Id.* at 16.

Finally, the Settlement contemplates a fourth class of Plaintiffs: those who fail to timely respond to the mailed notice by November 14, 2018 ("Absentee Participating Drivers"). *Id.* at 7. Those Plaintiffs shall have an additional thirty days, until December 14, 2018, to respond. *Id.* at 16. The Settlement does not allow these Plaintiffs to challenge their individual share. *Cf. id.* For those Plaintiffs who fail to respond within this fifty-one-day period, "the Court shall, on December 17, 2018, enter an order administratively dismissing the claim of that Absentee Participating Driver." *Id.* at 16.

Any Non-Participating Driver's share of the Claims Amount will be "ratcheted back" by Defendants and subtracted from the Settlement fund. *Id.* at 17. However, any dismissed Absentee Participating Driver's share will be reallocated among the participating Plaintiffs. *Id.* If 5 or more of the 367 Plaintiffs become Absentee Participating Drivers, Challenging Drivers, or Non-Participating Drivers, then Defendants may withdraw from the Settlement by December 17, 2018. *Id.* at 17.

In the event that the Settlement is funded, checks will be sent to participating Plaintiffs. *Id.* Those checks must be cashed within ninety days; the funds of any uncashed checks will be reallocated to a *cy pres* recipient designated by the Court. *Id.*

As events unfolded, many of these provisions became superfluous. By November 13, 2018, 357 of 367 of the opt-in plaintiff drivers had consented to participate in the Settlement (and two additional drivers had already had their claims adjudicated by the Court). ECF No. 333 at 5. Of the remaining eight drivers, two agreed to dismiss their claims with prejudice and not participate, *id.*; one driver died with no identifiable heirs, *id.*; and one driver was in bankruptcy proceedings, and the trustee verbally consented to the Settlement and stated an intention to seek approval from the bankruptcy court, *id.* The remaining four drivers had not responded by November 13, 2018. *Id.* Between November 13, 2018 and December 17, 2018, three of the remaining drivers contacted Plaintiffs' counsel to consent to the settlement. ECF No. 338. As for the one remaining driver, Plaintiffs' counsel made at least 20 attempts to contact him using priority mail and telephone, including leaving messages on a verified telephone number in both English and Spanish. That driver did not respond in any way to these efforts. Plaintiffs' counsel has stated an intention to move to withdraw as counsel for that driver.

No driver has challenged the terms of the Settlement.

II. MOTION TO SEAL

In connection with the motion for settlement approval, Plaintiffs have filed an administrative motion to file under seal the notice that Plaintiffs' counsel sent to each Plaintiff to alert them to the Settlement and their window to participate. *See* ECF No. 329. Plaintiffs contend that the notices are attorney-client privileged communications. *Id.* at 2. Plaintiffs have filed a

declaration in support of sealing. ECF No. 329-1.

A party seeking to seal a document filed with the court must (1) comply with Civil Local Rule 79–5; and (2) rebut a "strong presumption in favor of access" that applies to all documents other than grand jury transcripts or pre-indictment warrant materials. *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (citation omitted).

With respect to the first prong, Local Rule 79-5 requires, as a threshold, a request that (1) "establishes that the document, or portions thereof, are privileged, protectable as a trade secret or otherwise entitled to protection under the law"; and (2) is "narrowly tailored to seek sealing only of sealable material." Civil L.R. 79-5(b). An administrative motion to seal must also fulfill the requirements of Local Rule 79-5(d). "Reference to a stipulation or protective order that allows a party to designate certain documents as confidential is not sufficient to establish that a document, or portions thereof, are sealable." Civil L.R. 79-5(d)(1)(A).

With respect to the second prong, the showing required for overcoming the strong presumption of access depends on the type of motion to which the document is attached. "[A] 'compelling reasons' standard applies to most judicial records. This standard derives from the common law right 'to inspect and copy public records and documents, including judicial records and documents.'" *Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665, 678 (9th Cir. 2010) (citation omitted) (quoting *Kamakana*, 447 F.3d at 1178). To overcome this strong presumption, the party seeking to seal a judicial record must "articulate compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure." *Kamakana*, 447 F.3d at 1178-79 (internal quotation marks and citations omitted).

On the other hand, records attached to motions that are only "tangentially related to the merits of a case" are not subject to the strong presumption of access. *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1101 (9th Cir. 2016). Instead, a party need only make a showing under the good cause standard of Rule 26(c) to justify the sealing of the materials. *Id.* at 1097. A court may, for good cause, keep documents confidential "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c).

Because the parties' motion is more than tangentially related to the merits of the case, the

compelling reasons standard applies. "'[C]ompelling reasons' sufficient to outweigh the public's interest in disclosure and justify sealing court records exist when such 'court files might have become a vehicle for improper purposes,' such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets." *Kamakana*, 447 F.3d at 1179 (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978)).

Plaintiffs' counsel asserts as the basis of confidentiality that the notice communications are protected by the attorney-client privilege. "Issues concerning application of the attorney-client privilege in the adjudication of federal law are governed by federal common law." *United States v. Ruehle*, 583 F.3d 600, 608 (9th Cir. 2009) (quoting *United States v. Bauer*, 132 F.3d 504, 510 n.4 (9th Cir.1997)). The Ninth Circuit has adopted Professor Wigmore's eight-part test to determine whether a communication is privileged:

> (1) When legal advice of any kind is sought (2) from a professional legal adviser in his or her capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are, at the client's instance, permanently protected (7) from disclosure by the client or by the legal adviser (8) unless the protection be waived.

United States v. Martin, 278 F.3d 988, 999 (9th Cir. 2002) (citing 8 Wigmore, Evidence § 2292, at 554 (McNaughton rev. 1961). "The burden is on the party asserting the privilege to establish all the elements of the privilege." *Id.* at 999-1000.

Here, the Court cannot conclude that the notice documents to individual drivers are privileged because Plaintiffs' counsel shared them with Defendants when they filed their motion to seal. ECF No. 329-3. "Under the attorney-client privilege, it is a general rule that attorney-client communications made 'in the presence of, or shared with, third-parties destroys the confidentiality of the communications and the privilege protection that is dependent upon that confidentiality.'" *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (quoting 1 Paul R. Rice, Attorney-Client Privilege in the United States § 4:35, at 195 (1999 ed.)).

Accordingly, the motion to seal is denied. The Clerk is ordered to file the documents on the public docket.

III. LEGAL STANDARD

A. Authority to Review

The FLSA was enacted for the purpose of protecting workers from substandard wages and oppressive working hours. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981). The statute provides that collective actions against employers may be brought "in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). These collective actions allow aggrieved employees "the advantage of lower individual costs to vindicate rights by the pooling of resources." *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989).

"Rule 23 actions are fundamentally different from collective actions under the FLSA." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 74 (2013) (citing *Sperling*, 493 U.S. at 177-78). While class members in a Rule 23 class action may be bound by a judgment without their consent, members in a collective action must expressly opt in to the collective action by written consent. 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."); *see* Fed. R. Civ. P. 23. Further, while Rule 23 expressly requires that courts review settlement agreements that bind class members for fairness, reasonableness, and adequacy, there is no such statutory requirement in the FLSA. *See* Fed. R. Civ. P. 23(e)(2).

But under the FLSA, an employee's right to fair payment "cannot be abridged by contract or otherwise waived because this would nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate." *Barrentine*, 450 U.S. at 740 (internal quotation marks omitted); *see also Genesis Healthcare Corp.*, 569 U.S. at 69 ("The FLSA establishes federal minimum-wage, maximum-hour, and overtime guarantees that cannot be modified by contract."). Accordingly, courts in this district and this circuit have followed the Eleventh Circuit's holding that FLSA collective action settlements require the supervision of either the Secretary of Labor or the district court. *See Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352-53 (11th Cir. 1982); *see also Seminiano v. Xyris Enter., Inc.*, 602 F. App'x 682, 683

(9th Cir. 2015)[7]; *Slezak v. City of Palo Alto*, No. 16-CV-03224-LHK, 2017 WL 2688224, at *1 (N.D. Cal. June 22, 2017); *Otey v. CrowdFlower, Inc.*, No. 12-CV-05524-JST, 2014 WL 12643008, at *3 (N.D. Cal. Dec. 26, 2014).

B. Standard of Review

The Ninth Circuit has not established the criteria that a district court must consider in determining whether a collective action settlement agreement under 29 U.S.C. § 216(b) warrants approval. Most courts evaluate the settlement under the standard established by the Eleventh Circuit, which requires the settlement to constitute "a fair and reasonable resolution of a bona fide dispute over FLSA provisions."[8] *See Lynn's Food Stores*, 679 F.2d at 1355. "If a settlement in an employee FLSA suit does reflect a reasonable compromise over issues . . . that are actually in dispute," the district court may "approve the settlement in order to promote the policy of encouraging settlement of litigation." *Id.* at 1354.

IV. DISCUSSION

A. Bona Fide Dispute

"If a settlement in an employee FLSA suit does reflect a reasonable compromise over issues, such as FLSA coverage or computation of back wages, that are actually in dispute, the district court may approve the settlement in order to promote the policy of encouraging settlement of litigation." *Nen Thio* v. *Genji, LLC,* 14 F. Supp. 3d 1324, 1333 (N.D. Cal. 2014). "The purpose of this analysis is to ensure that an employee does not waive claims for wages, overtime compensation, or liquidated damages when no actual dispute exists between the parties." *Slezak,* 2017 WL 2688224, at *2.

Here, there are "legitimate questions about the existence and extent of [Defendants'] FLSA liability." *Gonzalez v. Fallanghina, LLC*, No. 16-CV-01832-MEJ, 2017 WL 1374582, at *2 (N.D. Cal. Apr. 17, 2017). The Court has ruled in favor of Plaintiffs on the question of successor

[7] Pursuant to Ninth Circuit Rule 36-3, *Seminiano* is not precedential. Nevertheless, the Court uses it as persuasive authority.

[8] *See, e.g.*, *Slezak*, 2017 WL 2688224, at *2; *Dunn v. Teachers Ins. & Annuity Ass'n of Am.*, No. 13-CV-05456-HSG, 2016 WL 153266, at *3 (N.D. Cal. Jan. 13, 2016); *Otey*, 2014 WL 12643008, at *3; *Nen Thio v. Genji, LLC*, 14 F. Supp. 3d 1324, 1333 (N.D. Cal. 2014).

liability, ECF No. 176, and on the questions whether Defendants misclassified their employees as independent contractors, and did so willfully, ECF No. 260. Those questions are currently on appeal to the Ninth Circuit. If the Ninth Circuit reverses the Court's holding on successor liability, Plaintiffs will not be able to recover damages. If the Ninth Circuit reverses the Court's holdings on misclassification, Plaintiffs will need to attempt to establish those points through full trials on the merits. Accordingly, there remains a bona fide dispute as to Plaintiffs' right to damages. *See Slezak*, 2017 WL 2688224, at *2 (finding a bona fide dispute over liability where "at the time of settlement it was unclear whether certioriari would be granted in [the controlling Ninth Circuit precedent] and whether [the case] would eventually be overturned").

The parties also dispute the extent of Defendants' liability, i.e., the amount of overtime damages compensable for each Plaintiff. Defendants estimate that, assuming liability, they owe $363,029 total in overtime wages to all Plaintiffs. ECF No. 327-4 at 1. Plaintiffs calculate more than four times more in liability, with a total of $1,476,910.45. ECF No. 327-5 at 1. The parties attribute this gulf to the ongoing dispute as to the amount of unpaid work Plaintiffs performed, which they agreed to compromise as part of the Settlement. ECF No. 326 at 20.

The Court therefore concludes that the Settlement resolves a bona fide dispute under the FLSA.

B. Fair and Reasonable Settlement Agreement

To evaluate the adequacy of the settlement amount, "courts primarily consider plaintiffs' expected recovery balanced against the value of the settlement offer." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007). But "[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." *Officers for Justice v. Civil Serv. Comm'n of City & County of S.F.*, 688 F.2d 615, 628 (9th Cir. 1982).

Even assuming the larger potential recovery estimated by Plaintiffs, the proposed settlement provides to each driver approximately one-third the amount he or she would have recovered at trial for the combination of overtime, liquidated damages, and interest – which is also an amount equivalent to 100 percent of the amount of unpaid overtime. California drivers will

also receive an equivalent percentage of their reimbursable expenses.

The parties contend that the settlement is fair and reasonable because Plaintiffs have a strong case but face the risk that they would recover nothing if the Ninth Circuit reverses the Court's rulings on successor liability or misclassification. ECF No. 326 at 21-22. Moreover, any recovery would be delayed by the lengthy six-Tranche process for determining individual damages through staged trials. *Id.* The parties also cite the extensive litigation and discovery completed during more than six years of proceedings to date, *id.* at 21, and that the Settlement was reached through multiple rounds of arm's-length negotiations supervised by a third-party mediator, *id.* at 23. Added to these factors are the fact that, because of difficulty in evaluating the Defendants' records, both sides necessarily engaged in a large degree of estimation.[9] Together, these factors support a finding that the Settlement is fair and reasonable.

As initially presented, however, the Settlement suffered from five potential deficiencies, each of which the parties have now cured either by amending their settlement agreement or by providing further information. Based on the additional information provided by the parties, the Court now concludes that this represents a fair and reasonable settlement amount in light of Plaintiffs' range of possible recovery.

First, the Settlement originally contemplated the administrative dismissal without prejudice of any plaintiff who did not respond to the settlement notice within fifty-one days. This procedure raised many problems. Among them was that in an FLSA collective action, once a plaintiff has opted in, no further action by him or her is required to receive the benefit of any settlement. "The

[9] The Court relies predominantly on Plaintiffs' estimates. Federal law is clear that "when employers violate their statutory duty to keep proper records, and employees thereby have no way to establish the time spent doing uncompensated work, the 'remedial nature of [the FLSA] and the great public policy which it embodies . . . militate against making' the burden of proving uncompensated work 'an impossible hurdle for the employee.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047 (2016) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)). When an employee proves that he has performed work for which he was improperly compensated "and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference," "[t]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." Thus, the fact that Defendants' records were incomplete or unclear cannot be used significantly to depress an appropriate settlement value.

FLSA leaves no doubt that 'every plaintiff who opts in to a collective action has party status.'" *Campbell*, 903 F.3d at 1104 (quoting *Halle v. W. Penn Allegheny Health Sys. Inc.*, 842 F.3d 215, 225 (3d Cir. 2016)). Once a plaintiff has opted in, "there is no statutory distinction between the roles or nomenclature assigned to the original and opt-in plaintiffs." *Id.* As the facts have developed, however, the Court need not be concerned about this provision. Because Plaintiffs' counsel have made contact with every plaintiff save one, and that plaintiff no longer communicates with counsel, the dismissal without prejudice provision of the Settlement will not be triggered.

Second, even if the Court were somehow to find a second opt-in procedure to be appropriate, the proposed opt-in period was too brief. For initial opt-in periods for FLSA collective actions, "[t]imeframes of sixty to ninety days appear to have become the presumptive standard in this district." *Ramirez v. Ghilotti Bros. Inc.*, 941 F. Supp. 2d 1197 (N.D. Cal. 2013) (quoting *Sanchez v. Sephora USA, Inc.*, No. 11-03396-SBA, 2012 WL 2945753, at * 6 (N.D. Cal. July 18, 2012). Given that virtually all Plaintiffs responded within the proposed time frame, the Court can also dispense with this concern.

Third, the release originally proposed by the parties was too broad. Courts in this district have held that "[an] FLSA release should not go beyond the specific FLSA claims at issue in the lawsuit itself." *Slezak*, 2017 WL 2688224 at *4. Courts, therefore, "routinely reject FLSA settlements when the scope of the release goes beyond the claims asserted in the complaint." *Dunn*, 2016 WL 153266, at *5. As detailed above, the Settlement's release provision formerly covered "all claims that were pled in the *Flores* action," ECF No. 327-1 at 7, tracking the claims raised in the operative Fourth Amended Complaint, *see* FAC. However, the complaint and the release include numerous state-law claims brought on behalf of a putative class, *see, e.g.*, FAC ¶¶ 58, 102, for which Plaintiffs never sought certification. The parties have now amended the Release so that these claims are not released but are instead dismissed without prejudice.

Fourth, the Settlement originally provided that the Court, not the parties, would choose the *cy pres* recipient. ECF No. 327-1 at 17. It is not the Court's role to select a *cy pres*. As a panel of the First Circuit has stated, "having judges decide how to distribute cy pres awards both taxes

judicial resources and risks creating the appearance of judicial impropriety." *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 38 (1st Cir. 2012). Moreover, the parties, and not the Court, bear the burden to show "a driving nexus between the plaintiff class and the *cy pres* beneficiaries." *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012) (citation omitted). A court cannot approve a settlement that "fail[s] to identify the *cy pres* recipients." *Dennis*, 697 F.3d at 867; *cf. id.* ("The difficulty here is that, by failing to identify the *cy pres* recipients, the parties have restricted our ability to undertake the searching inquiry that our precedent requires. The *cy pres* problem presented in this case is of the parties' own making, and encouraging multiple costly appeals by punting down the line our review of the settlement agreement is no solution.").

The parties have now cured this deficiency by selecting the Employee Rights Advocacy Institute for Law & Policy ("The Institute") in Oakland, California as the *cy pres* recipient in their settlement. ECF No. 337-1 at 17. As stated on that organization's website, its mission "is to advocate for employee rights by advancing equality and justice in the American workplace. . . . The Institute is the related charitable public interest organization of the National Employment Lawyers Association (NELA)." http://employeerightsadvocacy.org/about/ (last visited March 25, 2019). The Court is satisfied that an award to this *cy pres* recipient, if one results from the Settlement, would be "guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members," and would not benefit a group "too remote from the plaintiff class." *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1308, 1309 (9th Cir. 1990).

Finally, the Court was concerned that it could not measure the adequacy of the Settlement against the potential recovery in the case. Plaintiffs' counsel subsequently provided further information about the value of the claims, and also removed the state law claims from the release such that no compensation will be paid for those claims. As set forth above, these additional steps allowed the Court to determine that the class will receive from the Settlement approximately one-third of the amount it might have received had it prevailed at trial. On the facts of this case, the Court concludes this recovery is reasonable.

"[A] cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." *Cordy v. USS-Posco Indus.*, No. 12-CV-00553-JST,

2013 WL 4028627, at *4 (N.D. Cal. Aug. 1, 2013) (quoting *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000)). While this Court has approved FLSA settlements in which the settlement distribution was a larger percentage of the potential recovery, the amount paid here is in line with that approved in other cases. *See, e.g.*, *Monterrubio v. Best Buy Stores, L.P.*, 291 F.R.D. 443, 454 (E.D. Cal. 2013) (approving settlement representing "57% of Defendant's maximum exposure analysis and 30% of Plaintiff's maximum damages analysis"); *Glass v. UBS Fin. Servs., Inc.*, No. C-06-4068 MMC, 2007 WL 221862, at *4 (N.D. Cal. Jan. 26, 2007) (approving settlement constituting approximately "25 to 35% of the amount of damages plaintiffs could have hoped to prove at trial"), *aff'd*, 331 F. App'x 452 (9th Cir. 2009). The Court likewise concludes here that given the risks to both sides, the Settlement is a fair and reasonable compromise.

V. ATTORNEYS' FEES AND COSTS

1. Fees

The FLSA mandates an award of attorneys' fees when settling a collective action. 29 U.S.C. § 216(b) ("The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant."). "The case law construing what is a reasonable fee applies uniformly to all federal fee-shifting statutes." *Haworth v. Nevada*, 56 F.3d 1048, 1051 (9th Cir. 1995).

The district court has discretion to choose either the percentage-of-the-fund or the lodestar method to determine what constitutes a reasonable fee. *Vizcaino v. Microsoft Corp.*, 290 F. 3d 1043, 1047 (9th Cir. 2002). "The 'lodestar method' is appropriate in class actions brought under fee-shifting statutes . . . where the relief sought – and obtained – is often primarily injunctive in nature and thus not easily monetized." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). "The lodestar figure is calculated by multiplying the number of hours the prevailing party reasonably expended . . . by a reasonable hourly rate for the region and for the experience of the lawyer. Though the lodestar figure is presumptively reasonable, the court may adjust it upward or downward." *Id.* (internal citations and quotation marks omitted). On the other hand, "[w]here a settlement produces a common fund for the benefit of the entire class," courts may employ either the lodestar or the percentage-of-recovery method. *Id.* at 942. Twenty-

five percent of the fund is the benchmark for a reasonable fee award, although this may be adjusted to account for special circumstances. *Id.* Ultimately, the district court must exercise its discretion to reach a reasonable result. *Id.*

The Court first addresses counsel's claimed lodestar. After the parties stipulated to damages in the *Boconvi* action, Plaintiffs' counsel moved for an award of $2,289,085.50 in fees and $148,277.45 in costs. *Boconvi*, 17-cv-2623-JST, ECF No. 82 at 3. The Court reduced the fees by $36,398 to account for work unrelated to the *Boconvi* action, reduced fees for work in connection with the misclassification motion by $16,865.25, and then further reduced the remaining fees by 5 percent, resulting in a $2,124,031.14 award. *Id.* at 9. The Court awarded $136,575.60 in costs. *Id.*

Now, the parties have negotiated for a fee award to cover the entire litigation, including the Court's (presumably unpaid) prior award. Plaintiffs' counsel request $2,900,000 in attorneys' fees and costs, ECF No. 326 at 29, which includes an additional $639,393.26 above the Court's prior award to account for other fees and costs that were not subject to that motion, *id.* at 31.

According to counsel, their lodestar for fees for this entire action is $3,653,326.50, which they assert does not "ask for fees or costs the Court previously declined to award." ECF No. 327 ¶ 11. This is technically true, as their requested fee award is less than this total lodestar. Still, the Court observes that (1) the previously awarded fees of $2,124,031.14, when added to (2) the $615,625 in fees incurred but not requested in the prior motion and (3) the $739,253.35 in fees incurred since the Court's prior award, results in a total of $3,478,909.54. *See id.* This $165,054.36 difference corresponds precisely to the reductions the Court imposed on counsel's prior fee request. In other words, counsel's claimed lodestar, i.e., "the number of hours the prevailing party reasonably expended [multiplied] by a reasonable hourly rate," *In re Bluetooth*, 654 F.3d at 941 (citation omitted), includes hours and rates that the Court previously concluded were unreasonable, *see Boconvi*, 17-cv-2623-JST, ECF No. 82. Besides these prior reductions, the Court finds counsel's additional hours and rates claimed reasonable. Accordingly, the Court treats

counsel's lodestar as $3,512,970.04.[10]

The Court next considers whether $2,900,000 is a reasonable amount of fees. This represents 61 percent of the total amount paid by Defendants, far in excess of the 25 percent benchmark for common fund cases.[11] Nonetheless, the Court concludes that the award is reasonable under the facts of this case. First, the award is roughly 83 percent of counsel's lodestar. This contrasts with the majority of common fund settlements, in which the fees awarded are typically greater than, or a multiple of, counsel's lodestar. *See Vizcaino*, 290 F.3d at 1051 n.6 ("[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." (citation omitted)). Thus, this award would not "yield windfall profits for class counsel in light of the hours spent on the case." *In re Bluetooth*, 654 F.3d at 942.

Second, there is no indication that this is one of those cases where "the lodestar method create[d] incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee." *Vizcaino*, 290 F.3d at 1050 n.5. As the Court has previously remarked, "Defendants litigated this case in a way that was likely to produce high attorney fees." 17-cv-2623-JST, ECF No. 82 at 8. The Court concludes, as above, that Plaintiffs' counsel devoted a reasonable amount of compensable resources to the case.

Third, the Court is mindful that "[t]he purpose of the FLSA attorney fees provision is to insure effective access to the judicial process by providing attorney fees for prevailing plaintiffs with wage and hour grievances." *Fegley v. Higgins*, 19 F.3d 1126, 1134 (6th Cir. 1994) (internal quotation marks and citation omitted). Thus, "[g]iven the nature of claims under the FLSA, it is

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[10] The Court reduced the prior fee award by $36,398 for work unrelated to the *Boconvi* action. *See* 17-cv-2623-JST, ECF No. 82 at 4. However, this work is properly part of counsel's lodestar for the whole litigation.

[11] The Court acknowledges that the Settlement is not structured as a prototypical common fund, because changes to counsel's fees do not directly reduce Plaintiffs' recovery. *Cf. Staton v. Boeing Co.*, 327 F.3d 938, 970 (9th Cir. 2003) ("[I]n a common fund case, 'the defendant typically pays a specific sum into the court, in exchange for a release of its liability. The court then determines the amount of attorney's fees that plaintiffs' counsel may recover from this fund, thereby diminishing the amount of money that ultimately will be distributed to the plaintiff class.'" (quoting *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 563 (7th Cir. 1994)). But the Court finds it appropriate to "consider[] all payments that Defendants will make [pursuant to the Settlement] as coming out of one constructive common fund." *Otey*, 2014 WL 1477630, at *9.

not uncommon that attorneys' fee requests will exceed the amount of the judgment in the case." *Holyfield v. F.P. Quinn & Co.*, No. 90 C 507, 1991 WL 65928, at *1 (N.D. Ill. Apr. 22, 1991); *see also Flores v. City of San Gabriel*, No. CV1204884JGBJCGX, 2014 WL 12700907, at *3 (C.D. Cal. Sept. 26, 2014) ("[G]iven the importance of assuring worker's rights under the FLSA, even a limited damages award can justify a substantial fee." (alteration in original) (quoting *Dajbabic v. Rick's Cafe*, 995 F. Supp. 2d 210, 212 (E.D.N.Y. 2014)); *Wales v. Jack M. Berry, Inc.*, 192 F. Supp. 2d 1313, 1328-29 (M.D. Fla. 2001) (awarding $352,225.40 in fees for an FLSA recovery of less than $21,000); *cf. Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1033 (9th Cir. 2012) ("The same is true in consumer protection cases: where the monetary recovery is generally small, requiring direct proportionality for attorney's fees would discourage vigorous enforcement of the consumer protection statutes.").

Finally, as discussed below, the costs incurred by counsel further support the $2,900,000 award.

2. Costs

An attorney is entitled to "recover as part of the award of attorney's fees those out-of-pocket expenses that would normally be charged to a fee paying client." *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (citation omitted). To support an expense award, Plaintiffs should file an itemized list of expenses by category and the total amount advanced for each category, allowing the Court to assess whether the expenses are reasonable. *Wren v. RGIS Inventory Specialists*, No. C-06-05778 JCS, 2011 WL 1230826, at *30 (N.D. Cal. Apr. 1, 2011), *supplemented*, 2011 WL 1838562 (N.D. Cal. May 13, 2011). Counsel must also provide receipts to support their claimed expenses. *MacDonald v. Ford Motor Co.*, No. 13-CV-02988-JST, 2016 WL 3055643, at *10 (N.D. Cal. May 31, 2016), *appeal dismissed*, No. 16-16252, 2017 WL 4011879 (9th Cir. Feb. 22, 2017).

Here, Plaintiffs' counsel do not seek direct reimbursement of their costs, but they initially justified their $2,900,000 request in part on the ground that they have incurred $320,030.05[12] in

[12] As with their fees, counsel included $11,702.06 in costs that the Court previously found were unsubstantiated or duplicative. 17-cv-2623-JST, ECF No. 82 at 8-9. The Court therefore

litigation expenses. Because counsel failed to submit itemized expenses for the vast majority of those costs, and no supporting receipts for the remaining $36,879.53 incurred by Sommers Schwartz, P.C., the Court ordered counsel to provide additional supporting documentation. ECF No. 342.

In supplemental briefing, Sommers Schwartz provided receipts supporting $20,303.14 in expenses. ECF No. 343 ¶ 4. Johnson Becker, PLLC provided receipts for $89,309.23 in expenses, for a total of $109,612.37. ECF No. 344 ¶ 9. When added to the $136,575.60 that the Court previously awarded, counsel claim that they have incurred a total of $246,187.97 in compensable costs in this litigation. Having reviewed counsel's submissions, the Court concludes that these costs are reasonable. Accordingly, the Court considers them as further support for the request.[13]

In light of the $3,759,158.01 in fees and costs reasonably incurred, and for the reasons discussed above, the Court finds that a $2,900,000 award to Plaintiffs' counsel is reasonable.

CONCLUSION

For the foregoing reasons, the Court grants the parties' motion for approval of their collective action settlement agreement.

IT IS SO ORDERED.

Dated: April 17, 2019

JON S. TIGAR
United States District Judge

deducted that amount from the claimed total of $331,732.11 in determining the reasonableness of Plaintiffs' costs.

[13] The Court therefore need not consider why counsel's original motion repeatedly emphasized their entitlement to fees *and costs* if, as they now contend, their original "intent was to justify the additional $639,393.26 [above the Court's initial award] from Plaintiffs' submitted attorneys' fees only (not inclusive of costs)." ECF No. 344 ¶ 3-4; *compare, e.g.*, ECF No. 326 at 29 ("[T]he FLSA states that '[t]he court in such action *shall*, in addition to any judgment awarded to the plaintiff or plaintiffs, allow *a reasonable attorney's fee* to be paid by the defendant, *and costs* of the action." (emphasis in original) (quoting 29 U.S.C. § 216(b)); ECF No. 327 ¶ 11 ("Through the Joint Settlement, Plaintiffs will receive $2,900,000 in fees [and] costs, an almost 30% discount of their total fees and costs [of $3,985,058.61] incurred to litigate this case.").