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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GERARDO ORTEGA, AND MICHAEL D. PATTON, individually and on behalf of themselves, all others similarly situated, and the general public,

Plaintiffs,

v.

J. B. HUNT TRANSPORT, INC., an Arkansas corporation; and DOES 1 to 100, inclusive,

Defendants.

CASE NO. 07-CV-08336-RGK-AFM
(Hon. R. Gary Klausner)

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES, COSTS, AND INCENTIVE AWARDS; MEMORANDUM OF POINTS AND AUTHORITIES

[Proposed Order, and Declarations of Stanley D. Saltzman, Paul Cullen, Mark Bradley, Gerardo Ortega, and Michael Patton filed concurrently herewith]

Date: February 11, 2019
Time: 9:00 a.m.
Room: 850
Trial: February 19, 2019

TO: ALL PARTIES HEREIN AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on February 11, 2019, at 9:00 a.m. or as soon thereafter as the matter can be heard in Courtroom No. 850 in the above entitled courthouse located at 255 Temple Street, Los Angeles, California, Representative Plaintiffs Gerardo Ortega and Michael D. Patton ("Plaintiffs"), individually and on behalf of all others similarly situated, will and hereby do move, in conjunction with final approval of the settlement of this action, for (1) an award of attorneys' fees in the total amount of **$5,000,000** to Plaintiffs' counsel (equal to 1/3 of the non-reversionary common fund established by the settlement between the parties); (2) reimbursement of **$475,362.98** in expenses incurred by Plaintiffs' counsel; and (3) incentive awards of **$15,000** for each Plaintiff.

This Motion is based on this Notice of Motion, as well as the contemporaneously filed memorandum of points and authorities and exhibits in support of this Motion, the supporting declarations, the papers filed in support of Plaintiffs' motions for preliminary and final settlement approval, all pleadings and other papers on file in this action, any matters of which the Court may take judicial notice, and upon such further evidence, both documentary and oral, as may be presented at the hearing of said motion.

DATED: December 28, 2018

MARLIN & SALTZMAN, LLP
THE CULLEN LAW FIRM

By: s/ Adam M. Tamburelli
Stanley D. Saltzman, Esq.
Adam M. Tamburelli, Esq.

Attorneys for Plaintiffs and the Settlement Class

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I. STATEMENT OF RELIEF SOUGHT

After approximately eleven years of litigation, Class Counsel has secured a $15,000,000 **non-reversionary** settlement fund on behalf of the Settlement Class, consisting of slightly more than 12,000 drivers. This action arose from alleged wage and hour violations by Defendant J.B. Hunt Transport, Inc. ("Defendant") affecting the company's California-based Dedicated Contract Services and intermodal truck drivers. Plaintiffs now seek: (1) an award of attorneys' fees of $5,000,000 to Class Counsel, equal to 1/3 of the common fund established by the Settlement (representing a slightly negative multiplier, as discussed below); (2) reimbursement of $475,362.98 in costs incurred by Class Counsel; and (3) incentive awards of $15,000 for each Plaintiff. These requests were detailed in the Notice of Settlement provided to settlement class members, a copy of which is attached as Exhibit 1 to the concurrently filed Declaration of Stanley D. Saltzman ("Saltzman Decl."), Dkt. No. 356-1.

As this Court has already recognized, "[t]he settlement also appears reasonable with respect to the requested attorneys' fees and litigation expenses." Dkt. No. 352, p.5. As demonstrated below, the Court was correct in its statement that:

> While the agreed upon attorneys' fees are higher than the 25% 'benchmark' set by the Ninth Circuit, this case has continued for nearly eleven years, with multiple appeals, lengthy discovery, and numerous summary judgment motions on both sides. Thus, at this stage of settlement, the Court finds the agreed upon ceiling for attorneys' fees and costs are reasonable under the circumstances, subject to final approval.

Id. at pp.5-6

II. INTRODUCTION

Plaintiffs brought this risky and complex class action to secure important workplace protections for the putative class of Defendant's piece-rate truck drivers, and to obtain compensation owed for those workers. They achieved both of their goals. First, following over eleven years of litigation in which the case was at one time dismissed with judgment

entered for the Defendant based on federal preemption grounds, then re-instated by the Ninth Circuit, and finally decertified six weeks before the scheduled class trial, and after the pretrial conference while Plaintiffs' Fed. R. Civ. P. 23(f) Petition for Permission to Appeal was pending in the Ninth Circuit, Class Counsel secured a settlement that creates a $15,000,000 common fund for the settlement class. Second, as this Court recognized in granting preliminary approval, Plaintiffs secured a ruling that Defendant's piece-rate pay plan was illegal. Dkt. No. 352, p.5. Plaintiffs and their counsel obtained this exceptional monetary settlement—again, shortly after the class was decertified—despite facing vigorous opposition from well-respected attorneys at two elite national law firms.

During the course of this lengthy action, Class Counsel collectively invested, on a wholly contingent basis, **8,178.65** hours of their time to the prosecution of this litigation. Some of the broad categories of litigation tasks include: (i) researching the complex issues involved in Plaintiffs' claims and then drafting several iterations of the complaint; (ii) exchanging, responding to, and often meeting and conferring over multiple sets of written discovery; (iii) reviewing and analyzing thousands of pages of relevant pay plans, policy manuals, training documents and personnel files; (iv) analyzing, with the assistance of highly respected (and costly) experts, millions of payroll records, trip sheets, and daily driver logs–both computer generated and manual versions; (v) preparing for and taking numerous depositions of Fed. R. Civ. P. 30(b)(6) and other corporate witnesses, third-party witnesses, and absent class members; (vi) meeting with and preparing the class representatives for their depositions and then defending those depositions; (vii) preparing for and taking and defending the depositions of several expert witnesses related to both the certification briefing and trial preparation process; (viii) interviewing dozens of class members throughout the case; (ix) continually researching applicable law on preemption and other emerging issues; (x) preparing and fully briefing a successful motion for class certification; (xi) responding to post-certification summary judgment and judgment on the pleadings motions on preemption grounds; (xii) successfully appealing in the Ninth Circuit the Court's grant of Defendant's summary judgment and judgment on the pleadings

motions on preemption grounds; (xiii) fully briefing two separate motions to decertify the class; (xiv) preparing and fully briefing Plaintiffs' motion for summary judgment, which resulted in a ruling that Defendant's pay plan was illegal; (xv) responding to Defendant's second motion for summary judgment; (xvi) preparing and filing a Petition for Permission to Appeal the Court's order decertifying the class in the Ninth Circuit, along with a separate motion to stay the trial; (xvii) preparing for and attending multiple mediations; and ultimately (xiii) preparing the preliminary approval motion and supporting papers. Further, Plaintiffs' counsel will be preparing the final approval motion and related documents, and following final approval, counsel anticipates spending additional time assisting class members with inquiries that always follow the distribution of settlement checks.

In addition to the substantial time invested, Class Counsel also took on the extreme contingent risk of advancing out of pocket expenses of **$475,362.98**, as detailed in the declarations of counsel and in the attached copies of expense records filed herewith. *See* Dkt Nos. 356-1, 356-6. Given the many defenses raised by the Defendant, the time and expenses risked could have easily gone unrewarded because, for example, (i) Plaintiffs could have lost at trial; (ii) this Court could have found Defendant's pay plans to be legal; (iii) the Ninth Circuit or the U.S. Supreme Court could have upheld the Court's ruling that federal law preempts California law; and/or (iv) during the case, there was the constant threat that long-pending proposed federal legislation intended by the proponents to effectively wipe out Plaintiffs' claims—actually passed by the House of Representatives—would be signed into law. Moreover, the risk of decertification and its resulting impact on the case effectively materialized approximately six weeks before the trial date, exemplifying the high level of risk always inherent in complex class actions.

Now, however, if finally approved, the Settlement will provide substantial cash payments to more than 12,000 settlement class members automatically, without requiring them to submit claim forms. All of the Settlement funds will be paid for the benefit of class members after deducting approved fees, costs, incentive awards, settlement administration costs, employer taxes and the PAGA payment. Each settlement class member should

receive his or her check soon after the effective date of the final approval, unless he or she elects to opt-out of the Settlement. Uncashed checks will be deposited by escheatment with the State of California.

In light of the above, Class Counsel's request for attorneys' fees is fair and reasonable. The requested percentage of the common fund is comparable to fee awards made in similar contexts, and the request is fully supported by the lodestar cross-check.

Plaintiffs also request reimbursement of $475,362.98 in out-of-pocket costs reasonably incurred by counsel on behalf of the settlement class.

Finally, Plaintiffs request incentive awards of $15,000 for each of the Class Representatives. These incentive awards sensibly compensate the Plaintiffs for prosecuting this action, undertaking the reputational risks associated with the action, and assisting with and staying involved in the litigation for eleven years up until the eve of trial, thereby helping to secure the benefits of the Settlement for the settlement class.

III. BACKGROUND

A. Procedural History

Plaintiffs filed this case on November 19, 2007. From its inception, the case was heavily litigated, including extensive pre-certification discovery covering both liability and damages, and production of extensive payroll and pay-related databases, payroll records, Department of Transportation logs, and other driver logs. Plaintiffs also obtained corporate policy documents relating to Defendant's pay plans and related documents, all geared towards possible certification of the case. Plaintiffs deposed multiple corporate witnesses, including Rule 30(b)(6) designees and Defendant's expert. Defendant also deposed both proposed class representatives. Plaintiffs moved for class certification on March 16, 2009. Dkt. 59. The Court granted the motion on May 18, 2009, but concurrently stayed the case pending the California Supreme Court's ruling in *Brinker Restaurant Corp. v. Hohnbaum*, 53 Cal.4th 1004 (2012), which clarified the law on meal and rest breaks. Dkt. No. 64.

Following certification and the lifting of the stay, Defendant filed its first motion for decertification on September 27, 2012. Dkt. No. 77. After full briefing, that motion was

denied on December 18, 2012. Dkt. No. 87. Plaintiffs then renewed their request for dissemination of class notice. In response, Defendant again moved for a complete stay of the case—this time pending the decision by the Ninth Circuit in the *Dilts* preemption case. Plaintiffs successfully opposed that stay, but the Court again deferred the class notice. Thereafter, Defendant moved for judgment on the pleadings as to the meal and rest break claims based on FAAAA preemption, which was granted on October 2, 2013. Dkt. No. 124. Class notice was again deferred by the Court. Defendant then followed with a preemption summary judgment motion directed at Plaintiffs' wage claims on October 18, 2013. Dkt. No. 125. That motion was also granted by the Court. Dkt. No. 168.

Plaintiffs then appealed both of the above preemption rulings. After full briefing and a three-year delay, Plaintiffs fully prevailed on the appeal, and the two orders were vacated. *See Ortega v. J.B. Hunt*, 694 Fed.Appx. 589 (9th Cir. 2017). Defendant sought *en banc* review by the Ninth Circuit, which was denied, and then petitioned for a writ of certiorari to the U.S. Supreme Court, which was also denied after full briefing.

This Court then set a very prompt trial date, after which the Parties engaged in frenetic, final pre-trial discovery proceedings involving at times as many as twenty lawyers combined on the two sides. This Court eventually issued its two partial summary judgment rulings in July and August, which were strongly favorable to the Plaintiffs. Unfortunately for the Plaintiffs, however, the Court then also decertified the class, which had been certified almost nine years earlier.

The Order decertifying the class triggered yet another course of furious briefing involving Plaintiffs' Rule 23(f) petition and their concurrent motion to stay the trial of the individual claims, while the Parties also engaged in massive efforts to comply with the many pre-trial filing requirements. This included almost twenty motions *in limine* filed and opposed, trial briefs, memoranda of contentions of fact and law, stipulations as to facts, proposed jury instructions, a final proposed pre-trial order, and much more.

Concurrently, the Parties prepared the joint exhibit and witness lists, met with and interviewed potential trial witnesses, and worked with their respective experts to finalize

their reports and arrange their depositions. While the decertification order served to limit the trial to the two representative Plaintiffs, both sides recognized the critical importance of the trial to the still sought-after class action, as eventual post-trial appeals of both certification and all legal and factual issues would undoubtedly relate to and impact the proposed settlement class as a whole, if certification was re-instated by the Ninth Circuit.

While all of the foregoing matters progressed at break-neck speed, the Parties maintained an open settlement dialogue. Plaintiffs insisted that those negotiations be on a class-wide basis, as they recognized their fiduciary obligations to the class, which they were actively pursuing via their Rule 23(f) Petition and, in the alternative, intended to pursue via post-trial appellate review of this Court's decertification order. Thus, at all times, Plaintiffs would only engage in class-wide negotiations, never entertaining the idea of obtaining any undue benefit to themselves by way of a "golden parachute" type settlement wherein they might obtain an outsized payment to themselves in exchange for giving up the claims of the class members for whom they had been standing up for the entire eleven years of litigation. Thus, Plaintiffs never considered individual settlements.

To avoid unnecessary duplication, Plaintiffs respectfully refer the Court to their motion for preliminary approval, the declarations of Stanley D. Saltzman and the Paul D. Cullen filed in support thereof, Dkt. Nos. 347-1 and 347-6, respectively, for further details on the litigation history.

B. Class Counsel's Lodestar

Class Counsel's combined lodestar figure, as of the filing of this motion, is **$5,498,318**, reflecting **8,178.65** hours of attorney and paralegal time devoted to this action over the past eleven years of extensive litigation. This figure is supported by the Saltzman, Cullen, and Bradly Declarations submitted concurrently herewith and the billing records attached thereto. *See* Saltzman Decl., Dkt. No. 356-1, ¶¶24-31; Cullen Decl., Dkt. No. 356-6, ¶¶23-25; Bradley Decl., Dkt. No. 356-9, ¶¶9-10.

C. Litigation and Settlement Administration Costs

Class Counsel have incurred **$475,362.98** in litigation costs to date, as discussed more

fully in the declarations submitted by Class Counsel and set forth in the expense records listings attached to thereto. *See* Saltzman Decl., Dkt. No. 356-1, ¶¶36-39; Cullen Decl., Dkt. No. 356-6, ¶¶26-28. Also, the Parties have agreed to allocate $83,000 of the Settlement to cover the Administrator's costs (i.e. settlement notice, class member contacts, check calculations and distribution, tax reporting, etc.).

IV. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE

The fees sought by Class Counsel relate to all efforts expended by Class Counsel for the complete handling of this case, including any additional work remaining in the Settlement process. Class Counsel submits that the effort and result more than justify the fee request.

Fed. R. Civ. P. 23(h) provides that "[i]n a certified class action, the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement." Moreover, the U.S. Supreme Court has consistently recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Company v. Van Gemert*, 444 U.S. 472, 478 (1980); *Mills v. Auto-Lite Co.*, 396 U.S. 375, 392-93 (1970). In determining the amount of fees that are reasonable, the Court may award attorneys' fees, in its discretion, based on a percentage of the common fund or based on the lodestar method. *See In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296 (9th Cir. 1994); *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002).

Class Counsel seeks an award of $5 million for attorneys' fees from the $15 million gross settlement fund, or one-third of the fund. The total hours of **8,178.65** results in a combined lodestar of **$5,498,318**, so the requested fee award is actually slightly less than the lodestar, resulting in a *negative* multiplier of approximately 1.1.

In short, this award is justified because Class Counsel obtained an exemplary recovery against a very strong opponent, well represented throughout this case by two excellent, top-tier litigation firms. Most noteworthy is the fact that Class Counsel secured this class settlement despite the fact that ***the Court had recently decertified the class***.

As discussed more fully below, the requested fee award is justified under both the percentage-of-fund approach and the lodestar cross-check. The Class Notice advised settlement class members of the exact amount of fees Class Counsel is requesting at the Final Approval hearing, and that they would have the opportunity to object. As of the date of this filing, no settlement class member has objected. If they receive an objection, Class Counsel will respond thereto in a timely fashion. However, given the exemplary settlement achieved after such extensive litigation and the favorable automatic payment process, the settlement does not appear to be vulnerable to good-faith objection.

The results that Class Counsel achieved in this case are indeed commendable. The gross recovery per settlement class member is dependent on the length of time they were employed by Defendant, with some expected to receive over $7,000 (subject to Court approval). This class litigation was complex and risky, requiring a high degree of skill and experience from Class Counsel. To be sure, the attorneys at Marlin & Saltzman and The Cullen Law Firm have significant skill and experience not only in class actions generally, but in wage and hour class actions. *See* Saltzman Decl., Dkt. No. 356-1, ¶¶2-7; Cullen Decl., Dkt. No. 356-6, ¶¶3-7, 13. In this case, they demonstrated that skill and experience by successfully navigating this longstanding consolidated litigation through protracted discovery, class certification and dispositive motions, culminating in the $15 million settlement now before the Court.

A. The Requested Fee Award is Reasonable Under the Percentage-of-the-Fund Approach

Under the percentage-of-fund approach for determining fees in common fund cases, the Ninth Circuit applying federal law would begin with a 25% "benchmark" for attorneys' fees. *See Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). However, this "benchmark" is simply a starting point. *See Vizcaino*, 290 F.3d at 1048. "[I]n most common fund cases, the award exceeds that benchmark." *In re Omnivision Technologies, Inc.*, 559 F.Supp.2d 1036, 1047 (N.D. Cal., 2008); *Knight v. Red Door Salons, Inc.*, 2009 WL 248367, at *6 (N.D. Cal. 2009) (same). Indeed, "[e]mpirical studies

show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." *Romero v. Producers Dairy Foods, Inc.*, 2007 WL 3492841, at *4 (E.D. Cal. 2007) (citing 4 Newberg and Conte, *Newberg on Class Actions* § 14.6 (4th ed.2007)).

When evaluating whether the percentage sought by counsel is reasonable, the Court may consider the following factors: (1) the results achieved; (2) the risk involved with the litigation; (3) the skill required and quality of work by counsel; (4) the contingent nature of the fee; and (5) awards made in similar cases. *Vizcaino*, 290 F.3d at 1048-1050. Each of these factors support the award sought by counsel herein.

1. The Results Obtained for the Settlement Class Support the Request

The results achieved here were very favorable, especially in light of the fact that the class was decertified. Had the Ninth Circuit denied Plaintiffs' Rule 23(f) Petition, as it commonly does, Plaintiffs and Class Counsel would have to litigate the case through trial on the individual Plaintiffs' claims, and then appeal the decertification order. Even if Plaintiffs were successful on their appeal, which would take at least two more years, they would then have had to prepare for and litigate a class-wide trial and almost certainly another appeal. Thus, the case would proceed for at least six more years.

Class Counsel negotiated the instant settlement despite the possibility that the class might receive nothing, and the settlement provides real and substantial cash benefits to the settlement class in the form of a $15 million gross settlement fund. This common fund will be distributed to all settlement class members unless they affirmatively elect to opt out of the Class. As set out in detail in the preliminary approval motion, settlement class members will receive significant cash awards that increase with the number of weeks worked. The parties estimate that for each year of employment, they will be entitled to receive a gross amount of approximately $800. Therefore, for example, two years would yield around $1,600, five years around $4,000, and ten years would be around $8,000 (before the deductions for attorneys' fees, costs, and notice and administration costs described herein). Finally, there is **no reversion possible to Defendant** under this Settlement.

Additionally, Class Counsel conferred a non-monetary benefit to those drivers who are still employed with Defendant, as well as Defendant's future employees and the public at large, as they obtained a ruling that Defendant's pay plan was illegal. Therefore, Defendant will have to change its plan to comport with California law going forward.

Accordingly, this factor warrants an upward departure from the 25% benchmark.

2. The Risks of Litigation Support the Request

As discussed above, this case presented considerable litigation risks. During the eleven years that this case has been pending, California law has been in a near-constant state of flux regarding numerous critical legal issues involved, including the federal preemption issue under which the Court initially granted judgment in favor of Defendant, the unsettled nature of California law regarding averaging wages in piece-rate payment plans, and the effect and retroactivity of Labor Code § 226.2, which was enacted on January 1, 2016. Additionally, during the life of the case, the California Supreme Court also accepted review on and eventually decided the critical *Brinker* case, relating to an employer's obligations over meal and rest breaks—in fact, this Court actually stayed this case pending the decision in *Brinker*.

Plaintiffs had to navigate these and other legal and factual disputes over the eleven years. During that time, Defendant aggressively litigated every defense, including opposing class certification, filing two motions to decertify, two motions for summary judgment, and a motion for judgment on the pleadings. Class Counsel never wavered in their commitment, advancing $475,363 in costs that they were far from certain to recoup.

This factor also warrants an upward departure from the 25% benchmark.

3. The Skill Required and Quality of Work Supports the Request

The evolving nature of California wage and hour laws and Defendant's changing business practices since 2003 called for skillful prosecution of this case. Fortunately, Class Counsel have significant skill and experience litigating wage and hour claims and complex class actions, which they put to use here. Over eleven years, Class Counsel prevailed on their motion for class certification and Defendant's first motion to decertify; their appeal

of the summary judgment entered against them; their motion for summary judgment in significant part; Defendant's second motion for summary judgment in almost all respects; and they achieved this $15 million settlement despite the decertification of the class.

Class Counsel also analyzed the voluminous and varied databases and hard copy documents produced by the Defendant that continued up until the settlement. It was a nearly continuous effort throughout much of the litigation, which required the engagement of experts who, due to the massive volume of data produced, were required to spend a substantial amount of time simply processing the data. Class Counsel's tenacious time commitment to the case, and constant willingness to advance all costs and expenses necessary as the case proceeded forward, further supports the requested fee award.

This factor also warrants an upward departure from the 25% benchmark.

4. The Contingent Nature of the Fee Supports the Request

The attorneys' fee award should also take into account the heightened risks of representing the Class on a purely contingent basis over so many years. The contingent nature of the work was even riskier in this case because Class Counsel needed to advance substantial costs that would not have been recouped if the litigation had been unsuccessful.

Given the extreme time commitment required both to develop and pursue Plaintiffs' theories, and to defend and respond to the Defendant's vigorous defense, Class Counsel necessarily had to martial its resources in a manner that caused it to pass on other case opportunities in favor of this case. Simply stated, even in this 24/7 "always on" litigation environment, there are only so many cases firms can handle at any one time, and difficult choices need to be made at every step during complex and difficult matters in terms of how many additional matters can be taken on during that litigation. Indeed, the Ninth Circuit recognized that an upward departure from the benchmark is warranted when "counsel's representation of the class—on a contingency basis—extended over eleven years, entailed hundreds of thousands of dollars of expense, and required counsel to forgo significant other work, resulting in a decline in the firm's annual income." *Vizcaino*, 290 F.3d at 1050.

This factor also warrants an upward departure from the 25% benchmark.

5. Awards Made in Similar Cases Support the Request

As set forth above, California courts and Ninth Circuit district courts alike have observed that under the percentage method, "[e]mpirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." *In re Consumer Privacy Cases*, 175 Cal.App.4th 545, 558, n.13 (Cal. Ct. App. 2009); *Romero*, 2007 WL 3492841, at *4 (same); *see also In re Heritage Bond Litig.*, 2005 WL 1594403, at *18, n.12 (C.D. Cal. 2005) (noting more than 200 federal cases have awarded fees higher than 30%).

Here, the request for attorneys' fees in the amount of one-third of the common fund falls within the range of acceptable attorneys' fees in this District and other courts within the Ninth Circuit. *See*, *e.g.*, *Multi–Ethnic Immigrant Workers Organizing Network v. City of Los Angeles*, 2009 WL 9100391, *5 (C.D. Cal. 2009) (one-third award of the common fund based on empirical studies, an exceptional result, litigation risk, benefits to the class, and the lengthy time the litigation had been pending, which led counsel to forego other work); *Garcia v. Gordon Trucking, Inc.*, 2012 WL 5364575, *8-10 (E.D. Cal. 2012) (awarding attorneys' fees equal to 33% of the common fund based on the "overall success, the skill with which the case was prosecuted, the substantial legal risks associated with Plaintiffs' claims, and the financial risks borne by Class Counsel"); *Singer v. Becton Dickinson and Co.*, 2010 WL 2196104, *8-9 (S.D. Cal. 2010) (awarding fees equal to one-third of the common fund); *Morris v. Lifescan, Inc.*, 54 F.App'x 663, 664 (9th Cir. 2003) (affirming 33% fee award where district court noted that class counsel achieved excellent results in a risky and complicated class action despite vigorous opposition throughout the litigation); *Waldbuesser v. Northrop Grumman Corp.*, 2017 WL 9614818, at *3 (C.D. Cal. 2017) ("exceptional result achieved in this action justifies an attorney fee award of one-third of the settlement fund."); *Lee v. JPMorgan Chase & Co.*, 2015 WL 12711659, at *8-9 (C.D. Cal. 2015) (awarding 33% of $2.4 million common fund); *In re Activision Sec. Litig.*, 723 F.Supp. 1373, 1375 (N.D. Cal. 1989) (awarding 32.8% fee); *Linney v. Cellular Alaska P'ship*, 1997 WL 450064, at *7 (N.D. Cal. 1997) (awarding 33.3% fee); *In re Pac.*

Enterprises Sec. Litig., 47 F.3d 373, 379 (9th Cir. 1995) (affirming 33% fee award); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 460 (9th Cir. 2000) (affirming 1/3 fee).

Notably, courts have found such fee awards are appropriate in wage and hour class actions. *See*, *e.g.*, *Bickley v. Schneider Nat'l Carriers, Inc.*, 2016 WL 6910261, at *3 (N.D. Cal. 2016) (awarding 1/3 fee); *Lusby v. GameStop Inc.*, 2015 WL 1501095, at *4 (N.D. Cal. 2015) (granting 33% fee award and collecting cases regarding the same); *Burden v. SelectQuote Ins. Servs.*, 2013 WL 3988771, at *5 (N.D. Cal. 2013) (awarding 33% of fund); *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 450 (E.D. Cal. 2013) (granting 33% fee award and collecting cases regarding the same).

In short, Plaintiffs' request for attorneys' fees fall in line with awards in other wage and hour cases in this District and elsewhere. Again, this is especially so where, as here, a true common fund will be fully paid out and no claim forms are required. Checks will be mailed to settlement class members unless they affirmatively elect not to receive a check. The settlement simply could not be easier from a settlement class member's standpoint.

In sum, all the factors support the requested upward departure from the benchmark.

B. The Requested Fee Award is Reasonable Using the Lodestar Cross-Check, as Class Counsel's Lodestar Reflects a Negative Multiplier

In common fund cases, the lodestar method may be used as a cross-check for the purpose of validating the percentage-of-the-fund method. The Court determines the lodestar by multiplying the number of hours reasonably spent litigating the case by a reasonable hourly rate. *See Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 622 (9th Cir. 1993). The district court may adjust the lodestar figure by then applying a "multiplier" thereto, based upon various factors that have not been subsumed in the lodestar calculation. *Id*. Essentially, in considering whether or how much of a multiplier to apply, the district court may consider (without limitation) the same factors addressed under the percentage-of-fund approach in relation to adjusting the benchmark. *See id*.

Where the lodestar method is employed solely as a cross-check, as is true in common fund cases, it can be performed with a less exhaustive cataloguing and review of counsel's

hours. *See In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 306 (3d Cir. 2005) ("The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting."); *In re Immune Response Sec. Litig.*, 497 F.Supp.2d 1166 (S.D. Cal. 2007) ("Although counsel have not provided a detailed cataloging of hours spent, the Court finds the information provided to be sufficient for purposes of lodestar cross-check."). Nonetheless, despite this clearly more relaxed standard for the lodestar cross-check analysis, Class Counsel herein have elected to submit their extensive hourly records so that the Court can have full comfort that it has been provided with ample facts to conduct its review.

1. The Hours Incurred by Plaintiffs' Counsel Are Reasonable

In support of the lodestar determination, Plaintiffs have submitted the declarations of Class Counsel attesting to their total hours, hourly rates, experience, and efforts to prosecute this action, and have lodged their billing records, including extensive and detailed time entries. *See* Saltzman Decl., Ex. 2, Dkt. No. 356-3; Cullen Decl., Ex. B, Dkt. No. 356-8; Bradley Decl., Ex. A, Dkt. No. 356-9. Plaintiffs' counsel has collectively spent **8,178.65** hours of attorney and paralegal time on this action. *See* Saltzman Decl., Dkt. No. 356-1, ¶31.[1] The total hours are reasonable, given: (1) the extensive written discovery engaged in by both sides, as well as the numerous depositions taken and defended across the country; (2) the extensive briefing on motions for class certification and decertification, three motions for summary judgment, and judgment on the pleadings (among other motions); (3) the developing legal landscape over the past eleven years; (4) the breadth of data analyzed by Plaintiffs' counsel and their experts; (5) extensive trial preparation; and (6) the in-depth settlement efforts. All of this occurred over the eleven years the case has been pending, and the parties were deep into final trial preparation when the settlement was reached *after* the pretrial conference.

[1] Marcus J. Bradley, who was employed with Marlin & Saltzman until 2016 but continued to work on the case after leaving, has attached a declaration supporting his lodestar since he left Marlin & Saltzman. Any time he incurred on this matter prior to leaving is captured in the time records submitted by Marlin & Saltzman. Bradley Decl., Dkt. No. 356-9, ¶9.

Moreover, Class Counsel's work will not end after the settlement is finally approved. Even then, as in every class action they have handled, Class Counsel understand and accept that they will be called upon to assist settlement class members with inquiries as to settlement issues, and they will need to work with the settlement administrator and the Defendant on any issues that may arise with respect to the settlement and distribution of checks. Class Counsel also may be required to spend additional time and effort addressing any objections or litigating any appeals. Again, past experience shows that this ongoing work will add significant time to the work already undertaken in this case.

In sum, given the contentious, complex, and protracted nature of this litigation, the hours that Plaintiffs' counsel devoted were reasonably incurred in litigating this action.

2. Plaintiffs' Counsel's Hourly Rates Are Reasonable

The Court also considers whether counsel's hourly rates are reasonable within the relevant community, in this case, the Central District of California. Here, counsel's hourly rates in this action range from $450 to $825, with the upper-end reserved for the most experienced partner with just shy of forty years of practice. The hourly rate for the very senior paralegal assigned to the case is now at $225. Class Counsel are highly-respected members of the bar with substantial experience in complex litigation, including complex wage and hour actions. The billing rates for Settlement Class Counsel are well within normal and customary ranges for timekeepers with similar qualifications and experience in this and similar Districts. *See* Saltzman Decl., Dkt. No. 356-1, ¶¶29-30; Cullen Decl., Dkt. No. 356-6, ¶¶19-22, 24; Bradley Decl., Dkt. No. 356-9, ¶¶5-6, 10; *see also In re Walgreens Co Wage & Hour Litigation*, Case No. 2:11-cv-07664 (E.D. Cal. 2014) (noting that "billing rates that span from approximately $200 to $820 are reasonable because they prevail in both the Central District of California, and California at large, for the type of work involved in a class action."); *Lynne Wang v. Chinese Daily News, Inc*., 2008 WL 11342908, at *2 (C.D. Cal. 2008) (in a wage-and-hour action, approving 2008 rates of up to $800 per hour); *Rutti v. Lojack Corp.*, 2012 WL 3151077, at *11 (C.D. Cal. 2012) (in a wage-and-hour action, approving 2012 rates of up to $750 per hour); *Aarons v. BMW of N. Am., LLC*, 2014

WL 4090564, at *16 (C.D. Cal. 2014) (based on "the Court's own experience with hourly rates in the Los Angeles area" awarding 2014 rates ranging from $775 for the requested partner to $390-$630 for non-partners); *Kearney v. Hyundai Motor Am.*, 2013 WL 3287996, at *8 (C.D. Cal. 2013) (approving 2013 hourly rates of $650-$800 for senior attorneys in a class action); *Richard v. Ameri-Force Mgmt. Servs., Inc.*, No. 37-2008-00096019 (San Diego Sup. Ct. 2010) (approving 2010 hourly rates of $695 to $750 an hour for partners; $495 an hour for associates).

The current hourly rates of co-lead counsel at Marlin & Saltzman, which are the relevant rates for long-standing contingent fee cases, ranging from $450-$825, and the paralegal rate of $225, have never been questioned in any of the dozens of final approval hearings at which these rates been presented for cross-check purposes. *See* Saltzman Decl., Dkt. No. 356-1, ¶29.

In addition to the cases cited above, the Laffey Matrix—which courts have recognized as a valid, inflation-adjusted measure of prevailing hourly rates for lawyers, *see Trujillo v. Singh*, 2017 WL 1831941, at *2 (E.D. Cal. 2017)[2]—demonstrates that these hourly rates are reasonable. The Laffey Matrix shows the prevailing rate for lawyers with 20+ years of experience as $894 per hour, and for lawyers with 11-19 years of experience as $742 per hour. *See* Saltzman Decl., Dkt. No. 356-1, ¶30 and Ex. 3; *see also*

[2] Although the Laffey Matrix is indexed for civil attorneys in the Baltimore/Washington D.C. area, the U.S. Bureau of Labor Statistics publishes wage estimates for private lawyers and paralegals in many major metropolitan areas, allowing for a comparison of those in the Baltimore/Washington, D.C. area to those in the Los Angeles area. The mean wage for lawyers in the Baltimore/Washington D.C. area is $176,170, https://www.bls.gov/oes/current/oes_47900.htm, and the mean wage for lawyers in Los Angeles is $174,390. https://www.bls.gov/oes/current/oes_31080.htm. Because of the marginal difference in mean wages, the hourly rates in the Laffey Matrix do not need to be adjusted for the location difference. *Cf. Trujillo*, 2017 WL 1831941, at *2 (discussing adjustments using BLS data); *Fernandez v. Victoria Secret Stores, LLC*, 2008 WL 8150856, at *15 (C.D. Cal. 2008) (finding that the Laffey Matrix rates should be adjusted upward due to the higher cost of living in Los Angeles).

http://www.laffeymatrix.com/see.html. Those rates are much higher than the rates that the attorneys at Marlin & Saltzman and The Cullen Law Firm are seeking here.

3. Class Counsel Does Not Seek a Risk Multiplier

In conducting a lodestar cross-check of a common fund award, courts frequently apply a multiplier to the base lodestar to reflect the risks involved, the complexity of the litigation, the length of the case, and other relevant factors. *See Vizcaino*, 290 F.3d at 1051 (courts "routinely enhance[] the lodestar to reflect the risk of non-payment in common fund cases"). Such an enhancement "mirrors the established practice in the private legal market of rewarding attorneys for taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning contingency cases." *Id.* Indeed, if a contingent-fee lawyer was awarded fees at the same level as an hourly-fee lawyer, it would be economically irrational for any lawyer to accept a contingent-fee case because there would be absolutely no incentive to accept the risks inherent in such representation. *See Posner*, *Economic Analysis of Law* (4th ed. 1992) pp. 534, 567 ("A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services.")

In this case, however, the requested $5,000,000 attorneys' fee award is actually lower than the lodestar cross check amount. Thus, while the normal range of multipliers awarded in similar cases is between 1 and 4, it is not applicable here. *See Vizcaino*, 290 F.3d at 1051, n.6 (surveying class actions settlements nationwide, and noting that 83 percent of multipliers fell within the 1.0 to 4.0 range); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 264 (N.D. Cal. 2014) (54 percent of lodestar multipliers fall within 1.5 to 3.0 range, and 83 percent of multipliers fell within the 1.0 to 4.0 range).

Notably, Class Counsel reviewed the billing records at issue and made a good faith effort to exclude hours that appeared either excessive or potentially seemed unnecessary. Co-Class Counsel coordinated with each other and other attorneys involved in the case effectively and efficiently, regularly consulting throughout the duration of the case to

coordinate efforts in a manner that would avoid duplication of efforts and would streamline the process at all times. Despite all these efforts, the sheer length and complexity of the case triggered the necessary expenditure of the hours documented, and the resulting lodestar has exceeded the fee requested. Saltzman Decl., Dkt. No. 356-1, ¶¶25, 34.

V. PLAINTIFFS' COUNSEL ARE ENTITLED TO REIMBURSEMENT OF THEIR LITIGATION EXPENSES

Settlement class counsel also seek reimbursement of reasonable out-of-pocket expenses. *See* Fed. R. Civ. P. 23(h). In this case, Class Counsel jointly request **$475,362.98** to reimburse them for the reasonably incurred litigation costs.

Ninety-one percent (91%) of the cost reimbursement requested flows from five major categories, as follows:

- $290,565 paid to the retained data and damage experts, Global Economics Group;
- $50,000 paid to retained appellate counsel at the Washington, D.C. appellate firm of Gupta Wessler PLLC for their work on Plaintiffs' opposition to the Supreme Court certiorari petition and Plaintiffs' Rule 23(f) petition (Class Counsel handled the successful Ninth Circuit preemption appeal directly);
- $35,664.58 paid to the Class Administrators for the mailing of the pre-certification notice and the original class notice;
- $42,356.23 paid to court reporting services for deposition transcripts; and
- $13,750.00 paid to the mediator, Mark Rudy, Esq.

See Saltzman Decl., Dkt. No. 356-1, ¶37.

The remaining balance was paid for standard litigation expenses such as filing fees, attorney services and messengers, out of town travel for depositions and mediations, investigators, photocopies and postage charges. The declarations of class counsel attest to these costs and contain as exhibits the full listing of all the costs paid for the Court's review

VI. THE INCENTIVE AWARDS REQUESTED ON BEHALF OF THE CLASS REPRESENTATIVES ARE REASONABLE

"[N]amed plaintiffs… are eligible for reasonable incentive payments." *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003). The district court must evaluate individual

awards 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 benefitted from those actions, … the amount of time and effort the plaintiff expended in pursuing the litigation…and reasonabl[e] fear[s of] workplace retaliation." *Id.* (citations omitted). In wage and hour cases, incentive awards are especially important, as suing an employer can have drastically deleterious effects on an individual's employment and career prospects. *See Rodriguez v. West Publ. Corp.*, 563 F.3d 948 (9th Cir. 2009) (incentive awards should compensate for risks taken, such as "retaliation . . . , discrimination, trouble finding employment, and significant financial risk.").

In this case, the Class Representatives—***who stayed involved with this case for eleven years***—each assisted in the prosecution and settlement of the Class' claims by: (1) assisting Class Counsel in gathering evidence to initially file the actions, and then to investigate additional facts as needed for the subsequent pleadings; (2) spending substantial time assisting Class Counsel in seeking and responding to discovery, and preparing for and participating in depositions; (3) providing key insights into Defendant's policies and practices, and assisting counsel in understanding the day to day activities undertaken as employee drivers, the time spent on such activities, and the paperwork provided to them as well as that which they in turn had to submit each day to Defendant; (4) assisting with obtaining class certification and summary judgment (submitting declarations in the process) and ultimately reaching a resolution of this longstanding dispute; and (5) assisting with trial preparation and making themselves available and ready to prosecute the trial.

In connection with all of these activities, each of the class representatives spent at least 80 hours involved in the action. *See* Declarations of Gerardo Ortega and Michael Patton, filed herewith, Dkt. Nos. 356-12, 356-13; *see also* Saltzman Decl., Dkt. No. 356-1, at ¶¶40-43.

Furthermore, given the technology-driven world in which we all live and work and the power of the internet, Plaintiffs have undeniably placed their future employment prospects at risk by affixing their names onto a complaint against one of the largest

transportation companies in the U.S. Further still, each Plaintiff has executed a general release of claims, which is broader than the release for unnamed class members. Without people such as these representatives who take the brave steps discussed throughout his motion, there is no chance that wrongful employment practices can ever be challenged.

Finally, a $15,000 incentive award is in line with other awards in similar cases. *See*, *e.g.*, *Ross v. U.S. Bank Nat. Ass'n*, 2010 WL 3833922, at *2 (N.D. Cal. 2010) (awards of $20,000 each to four class representatives in a $3.5 million wage and hour class action settlement); *Stevens v. Safeway, Inc*., 2008 U.S. Dist. LEXIS 17119, at **34-37 (C.D. Cal. 2008) ($20,000 and $10,000 award); *Amochaev v. Citigroup Global Markets, Inc*., Case No. C-05-1298 (N.D. Cal. 2008) (awards of $50,000 and $35,000 to employees in light of factors that included fear of workplace retaliation); *Glass v. UBS Fin. Servs., Inc*., 2007 WL 221862, at *16 (N.D. Cal. 2007), aff'd, 331 F.App'x 452 (9th Cir. 2009) ($25,000 incentive award in FLSA overtime wages class action); *Bickley*, 2016 WL 6910261, at *3 (N.D. Cal. 2016) ($15,000 award each to five plaintiffs in a trucking wage and hour case).

The aggregate incentives ($30,000) equal only 0.2% of the Settlement. The Class Notice set forth the requested awards, and explained that settlement class members could object. To date, no settlement class members have objected. Accordingly, the requested incentive awards are reasonable and justified under the circumstances.

VII. CONCLUSION

Plaintiffs respectfully request that the Court enter the proposed Order granting the requested award of attorneys' fees, reimbursement of litigation costs, and incentive awards.

DATED: December 28, 2018

MARLIN & SALTZMAN, LLP
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