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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO

DESIDERO SOTO, STEVEN STRICKLEN, STEEVE FONDROSE, LORENZO ORTEGA, and JOSE ANTONIO FARIAS, JR., on behalf of themselves and all other similarly situated,

Plaintiffs,

vs.

O.C. COMMUNICATIONS, INC., COMCAST CORPORATION, and COMCAST CABLE COMMUNICATIONS MANAGEMENT, LLC,

Defendants

Case No.: 3:17-cv-00251-VC

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR APPROVAL OF ATTORNEYS' FEES AND COSTS AND OF SERVICE AWARDS TO CLASS REPRESENTATIVES; MEMORANDUM OF POINTS AND AUTHORITIES

Date: October 17, 2019
Time: 10:00 a.m.
Courtroom: 4 (17th Floor)
Judge: Honorable Vince Chhabria

Complaint Filed: January 18, 2017

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on October 17, 2019 at 10:00 a.m. or as soon thereafter as the Parties may be heard in Courtroom 4 before Hon. Vince Chhabria of the United States District Court, Northern District of California, Plaintiffs Desidero Soto, Steven Stricklen, Steeve Fondrose, Lorenzo Ortega, and Jose Antonio Farias, Jr. ("Plaintiffs") will move, and hereby do move, this Court for an Order awarding Class Counsel reasonable attorneys' fees of $2,500,000 plus reimbursement of actual out-of-pocket costs of $207,361.46.

Plaintiffs also move for an Order granting service awards in the aggregate amount of $55,000 for the five Class Representative – $15,000 to Class Representative Desidero Soto and $10,000 each to Class Representatives Steven Stricklen, Steeve Fondrose, Lorenzo Ortega, and Jose Antonio Farias, Jr. – to be paid out of the Gross Settlement Amount in recognition of their considerable service to the Class.

Plaintiffs bring this Motion pursuant to Federal Rule of Civil Procedure 23(h), and 29 U.S.C. § 216(b) of the Fair Labor Standards Act. This motion is based on the accompanying Memorandum of Points and Authorities; the Declaration of Carolyn Hunt Cottrell and the exhibits attached thereto; the Declaration of Sarah R. Schalman-Bergen and the exhibits attached thereto; the Declarations of Desidero Soto, Steven Stricklen, Steeve Fondrose, Lorenzo Ortega, and Jose Antonio Farias, Jr.; such oral argument as may be heard by the Court; and all other papers on file in this action.

Dated: September 9, 2019

Respectfully submitted,

/s/ *Carolyn Hunt Cottrell*
Carolyn Hunt Cottrell
David C. Leimbach
Scott L. Gordon
SCHNEIDER WALLACE
COTTRELL KONECKY WOTKYNS LLP

Shanon J. Carson (*pro hac vice*)
Sarah R. Schalman-Bergen (*pro hac vice*)
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Attorneys for Plaintiffs, the Collective, and the Settlement Classes

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Class Counsel respectfully submit this application for an award of attorneys' fees and costs to compensate them for their extensive work over the past two-and-a-half years in achieving a $7,510,555.21 non-reversionary, class and collective action settlement on behalf of current and former non-exempt Technicians who install cable television, phone, security, and internet services for Defendants O.C. Communications, Inc., Comcast Corporation, and Comcast Cable Communications Management, LLC (collectively, "Defendants"). The fee that Schneider Wallace Cottrell Konecky Wotkyns LLP ("SWCKW") and Berger Montague PC ("Berger Montague") (together referred to herein as "Class Counsel") seek here – one-third of the $7,500,000 Gross Settlement Amount set forth in the initial settlement Agreement, equivalent to $2,500,000 – represents *less* than Class Counsel's current lodestar, and does not include the additional work necessary to bring this case to a conclusion. Plaintiffs also seek reimbursement of $207,361.46 in costs, all of which were reasonable and necessary to reach this result for the Settlement Class. Class Counsel also seek approval of Service Awards for the Named Plaintiffs who represent the Settlement Class Members in this Action.

On June 17, 2019, the Court granted preliminary approval to the Amended Settlement[1] of this wage and hour, hybrid state law class and collective action under Rule 23 of the Federal Rules of Civil Procedure and the Fair Labor Standards Act ("FLSA"). *See* ECF 296. The Settlement provides Settlement Class Members with immediate and certain payment of meaningful amounts, reflecting approximately 86% of the calculated unpaid wages allegedly owed to Settlement Class Members if each had been able to prove that he or she worked 2.5 hours off the clock in every workweek during the relevant time period. ECF 284-3 at ¶ 29.

The excellent result did not come without extensive effort, skill and substantial risk,

[1] The term "Settlement," "Settlement Agreement," "Amended Settlement," or "Settlement as Amended" refer to the initial Settlement Agreement and the Addendum which modified the Settlement Agreement. The Parties submitted the Settlement Agreement and Addendum with a Renewed Motion for Preliminary Approval on May 10, 2019, which the Court preliminarily approved on June 17, 2019. ECF 289, 296, 296-1.

including risk of nonpayment, even if Plaintiffs were to prevail. From the start, Defendants put up a staunch defense. In addition, the risks were further exacerbated in this case by the tenuous financial position of Defendant OCC, and Comcast denied that it was a joint employer.

Class Counsel's request for a one-third fee award is within the typical range of attorneys' fees awarded in this Circuit, and merits an upward adjustment from the 25% "benchmark" under the factors established for determining fee awards. In addition to representing a *negative* multiplier of Class Counsel's aggregate lodestar, the requested fee is reasonable compensation for the excellent result Class Counsel achieved as a result of its work during more than two years of intensive litigation, which included: three amended complaints, extensive and voluminous written discovery and depositions; litigation of discovery disputes; Defendants' service of multiple motions to compel arbitration; Plaintiffs' service of hundreds of individual demands for arbitration; two separate mediations and arms'-length negotiations that resulted in an initial settlement reached in March 2019; and an Addendum which modified the initial agreement to address the Court's concerns as articulated, which the Court preliminarily approved.

Finally, Class Counsel seek the Court's approval of a service award of a total of $55,000 to the five Class Representatives[2] – $15,000 to Named Plaintiff Soto and $10,000 each to Named Plaintiffs Stricklen, Fondrose, Ortega, and Farias, Jr., as contemplated by the Settlement Agreement. For the reasons set forth below, the Court should award the proposed Service Award to each of these individuals as fair and reasonable compensation for their effort in bringing and prosecuting this matter for the benefit of the Settlement Classes.

II. OVERVIEW OF CLASS COUNSEL'S WORK ON THE CASE

In over two-and-half years since the first Complaint was filed in this Action, Class Counsel has devoted 6,752 hours to the prosecution of this action, with a combined lodestar amount of $3,783,103. *See* Cottrell Decl. ¶ 8; Schalman-Bergen Decl. ¶ 24. Class Counsel vigorously litigated this case, engaging in intensive discovery and motion practice to effectively prosecute

[2] The "Named Plaintiffs" are Desidero Soto, Steven Stricklen, Steeve Fondrose, Lorenzo Ortega, and Jose Antonio Farias, Jr. They are sometimes referred to herein as "Class Representatives." *See* Settlement Agreement ¶29(a). "Named Plaintiffs" and "Class Representatives" are used interchangeably herein.

the Class and Collective claims, while also demonstrating willingness to participate in good-faith attempts to settle the Action. Class Counsel's efforts culminated in the Settlement, which provides significant monetary benefits for Settlement Class Members.[3]

The extensive procedural history of this action has been well documented in Plaintiffs' March 1, 2019 Motion for Preliminary Approval of Class and Collective Action Settlement ("Preliminary Approval Motion"). *See* ECF 284. The Preliminary Approval Motion and attached Declarations by Class Counsel detail the events that transpired in this Action from the time Plaintiffs Desidero Soto and Steven Stricklen filed their initial Collective and Class Action Complaint in this action on January 18, 2017 through March 1, 2019. Since that time, Class Counsel expended further efforts to reach an Amended Settlement to address issues identified by the Court, which the Court preliminarily approved on June 17, 2019. ECF 296. Pursuant to the U.S. District Court for the Northern District of California Procedural Guidance for Class Action Settlements, the full procedural history and background facts are set forth in Plaintiffs' forthcoming Motion for Final Approval of the Settlement.[4]

III. ARGUMENT

A. Legal Standard for Fee Awards in Common Fund Cases in the Ninth Circuit

In a class action settlement, the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement. Fed. R. Civ. P. 23(h). Courts have the power to award reasonable attorneys' fees and costs where, as here, a litigant proceeding in a representative capacity secures a "substantial benefit" for a class of persons. *See e.g., Hendricks v. Starkist Co*, No. 13-cv-00729-HSG, 2016 WL 5462423, *10 (N.D. Cal. Sept. 29, 2016). *Staton v. Boeing Co.*, 327 F. 3d 938, 967 (9th Cir. 2003). The two methods for determining reasonable fees in the class action settlement context are the "percentage of recovery" method and the

[3] Under the Settlement Agreement's "holdback" provision, prior to any payment of the Fee Award, the Settlement Administrator will deposit a 10% holdback of the Fee Award into a separate interest-bearing account. The Settlement Administrator will release this holdback to Class Counsel as soon as practicable following completion of the distribution process and filing of the Post-Distribution Accounting with the Court. *See* Settlement Agreement ¶ 29((b)(iv).

[4] A brief summary of Class Counsel's work to date is provided in the accompanying Cottrell Decl. at ¶¶ 10-19.

"lodestar method." *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1170 (C.D. Cal. 2010); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998).

The California Supreme Court has endorsed the use of the percentage method of awarding attorneys' fee where a class action suit results in a common fund for the class, citing the method's relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation. *Laffitte v. Robert Half Intern. Inc.*, 1 Cal. 5th 480, 503 (Cal. 2016) (approving attorneys' fee award in wage and hour case in the amount of one-third of gross settlement). Similarly, "[u]nder Washington law, the percentage of-recovery approach is used in calculating fees in common fund cases." *Vizcaino v. Microsoft Corp.*, 290 F. 3d 1043, 1047 (9th Cir. 2002) (citation omitted). The majority of Ninth Circuit and other federal courts are in accord. *See Six Mexican Workers v. Arizona Citrus Growers*, 904 F. 2d 1301, 1311 (9th Cir. 1990) (common fund fee is generally "calculated as a percentage of the recovery").[5] Accordingly, the Court should employ the percentage of recovery method in this case and award Class Counsel their requested fee of one-third of the Gross Settlement Fund.

B. Class Counsel's Fee Request is Fair and Reasonable and Merits Upward Adjustment from the 25% Benchmark Under the *Vizcaino* Factors

"The typical range of acceptable attorneys' fees in the Ninth Circuit is 20% to 33 1/3% of the total settlement value, with 25% considered the benchmark." *Vasquez v. Coast Valley Roofing*, 266 F.R.D. 482, 491-492 (E.D. Cal. 2010) (granting 33.3% fee award and collecting cases) (citing

[5] *See also In re Capacitors Antitrust Litig.*, No. 3:17-md-02801-JD, 2018 WL 4790575, at *2 (N.D. Cal. Sept. 21, 2018) ("Indeed, the percentage of the fund method is *preferred* when counsel's efforts have created a common fund for the benefit of the class.") (collecting cases); *Fleury v. Richemont N. Am., Inc.*, No. C-05-4525 EMC, 2009 WL 1010514, *3 (N.D. Cal. Apr. 14, 2009) ("Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for Plaintiff who could not afford to pay on an hourly basis regardless whether they win or lose… [i]f this 'bonus' methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing") (internal citation omitted); *Swedish Hosp. Corp. v. Shalala*, 1 F. 3d 1261, 1271 (D.C. Cir. 1993) ("a percentage of the fund method is the appropriate mechanism for determining the attorney fees award in common fund cases.").

Powers v. Eichen, 229 F.3d 1249, 1256 (9th Cir. 2000)); *Hanlon v. Chrysler Corp.*, 150 F. 3d 1011, 1029 (9th Cir. 1998); *Staton*, 327 at 952. However, the exact percentage varies depending on the facts of the case, and in "most common fund cases, the award exceeds that benchmark." *Vasquez*, 266 F.R.D. at 491-492 (citations omitted); *In re Pacific Enterprises Sec. Litig.*, 47 F. 3d 373, 379 (9th Cir. 1995) (affirming award of 33% of $12 million common fund).

This Court and other courts have customarily approved payments of attorneys' fees amounting to one-third of the common fund, including in comparable wage and hour class actions, and this Court has awarded a fee of 33 1/3% of the total fund as "consistent with the Ninth Circuit authority and the practice in this District." *Zamora v. Lyft, Inc.*, No. 3:16-cv-02558-VC, 2018 WL 4657308, at * 3 (N.D. Cal. Sept. 26, 2018) (Chhabria, J.). In awarding that fee, this Court noted that that "[t]he Ninth Circuit benchmark for megafund class action settlements of $50-200 million of 25% is to be adjusted upward or downward based on the size of the fund made available and in light of the lodestar cross-check." *Id.* The Court further noted that the settlement fund of $1.95 million was "well below the megafund range" and that "[i]n this District, fee awards of approximately 33 1/3% are typical for settlements up to $10 million." *Id*. at *3 (citing *Galeener v. Source Refrigeration & HVAC, Inc.*, No. 3:13-cv-04960-VC, 2015 WL 12977077, at *4 (N.D. Cal. Aug. 21, 2015) (Chhabria, J.) (33 1/3% fee of $10 million fund) and *Bennett v. SimplexGrinnell LP*, No. 11 Civ. 01854, 2015 WL 12932332, at *6 (N.D. Cal. Sept. 3, 2015) (38.8% of $4.9 million fund)).[6]

The Ninth Circuit instructs that "[t]he 25% benchmark, though a starting point for analysis, may be inappropriate in some cases." *Vizcaino*, 290 F. 3d at 1047; *Six Mexican Workers*, 904 F. 2d at 1311 (the "benchmark percentage should be adjusted, or replaced by a lodestar calculation,

[6] In *Galeener*, this Court cited the observation of Chief Judge Wilken that a fee award of 30% "is only modestly more than the Ninth Circuit's 25% 'benchmark' percentage" and "[i]n light of the many cases in this circuit that have granted fee awards of 30% or more" it is "well within the usual range of percentages awarded." *Galeener*, 2015 WL 12977077, at *1 (citing *Vedachalam v. Tata Consultancy Servs. Ltd.*, No. 06 Civ. 963, 2013 WL 3941319, at *2 (N.D. Cal. July 18, 2013) (collecting cases)); *see also Wren v. RGIS Inventory Specialists*, No. C-06-05778 JCS, 2011 WL 1230826, at *29 (N.D. Cal. Apr. 1, 2011) (approving attorneys' fee award of just under 42% of common fund); *see also Big Lots Overtime Cases*, JCC Proceeding No. 4283 (San Bernardino Super. Ct. Feb. 4, 2004) (approving 33% fee award).

when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors."). The choice of "the benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case." *Vizcaino*, 290 F. 3d at 1048. The Ninth Circuit has identified a number of factors that may be relevant in determining whether the requested fee is "reasonable" under the "circumstances of the case:" (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the Plaintiff; and (5) awards made in similar cases. *Vizcaino*, 290 F. 3d at 1048-1050 (the "*Vizcaino* factors"). *See Hightower v. JPMorgan Chase Bank, N.A.*, No. CV 11-1802 PSG (PLAx), 2015 WL 9664959, *11 (C.D. Cal. 2015) (citing *Vizcaino*, 290 F.3d at 1048-50). Other courts have additionally considered (6) reactions from the class; and, in its discretion, (7) a lodestar cross-check. *See Barnes v. The Equinox Group, Inc.*, No. C 10-3586 LB, 2013 WL 3988804, *4 (N.D. Cal. 2013).

Here, application of the *Vizcaino* factors supports the requested fee award.

1. The Results Achieved by this Settlement Support the Request

"The overall result and benefit to the class from the litigation is the most crucial factor in granting a fee award." *In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008). Here, the Amended Settlement Agreement preliminarily approved by the Court resolves the claims of the Settlement Class Members for a total non-reversionary settlement of $7,510,555.21. Cottrell Decl. ¶ 17. The Settlement provides Class Members with immediate and certain payment of meaningful amounts, reflecting approximately 86% of the calculated unpaid wages allegedly owed to Settlement Class Members if each class member had been able to prove that he or she worked 2.5 hours off the clock in every workweek during the relevant time period. ECF 284-3 at ¶ 29; Cottrell Decl. ¶ 26. Settlement Class Members will receive their awards without the need to file claims forms. Cottrell Decl. ¶ 26. In addition, the Addendum provides an accompanying increase of $10,555.21 to the Gross Settlement Amount to account for the increased shares for approximately 18 Collective Members who performed work in Oregon, Utah

and Arizona, without diluting the settlement awards to any other Class Members.[7] Cottrell Decl. ¶ 17. Class Counsel does not seek additional fees on this amount. *Id.* The highly favorable terms achieved by Class Counsel's skill and perseverance favor upward departure from the benchmark and support Class Counsel's request for a 33.33% award. *See Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1022 (E.D. Cal. 2019) (settlement which recovered approximately 48% of estimated damages and provided that all funds would go to claimants with no reversion was "exceptional result" weighing in favor of higher-than-benchmark award of 33.3%, or $13.3 million, especially since award was less than lodestar).

Courts have also recognized the benefits to class members of receiving payments sooner rather than later, where litigation could extend for years on end, thus significantly delaying any payments to class members. *See California v. eBay, Inc.*, No. 5:12-cv-05874-EJD, 2015 WL 5168666, *4 (N.D. Cal. Sept. 3, 2015) ("Since a negotiated resolution provides for a certain recovery in the face of uncertainty in litigation, this factor weighs in favor of settlement"); *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D. Colo. 1974) ("It has been held proper to take the bird in hand instead of a prospective flock in the bush."). Thus, this *Vizcaino* factor supports the reasonableness of the 33.33% attorneys' fee award.

2. The Risks of Litigating this Case Were Substantial

"Risk is a relevant circumstance." *Carlin* 380 F. Supp. 3d at , 1020 (citing *Vizcaino*, 290 F. 3d at 1048 and awarding 33 1/3% fee). There are many risks inherent in litigating a class action: class certification, decertification, a decision on the merits, potential appeals, and inability to collect a judgment are all issues that can result in no recovery whatsoever to class members or class counsel. Courts routinely find that this factor supports a fee request above the benchmark.[8]

[7] The Addendum modified the allocation formula such that the allocation of settlement shares would more closely reflect the wage laws and remedies released in the various states where collective members worked, based on the wage laws and remedies within each applicable state. Addendum, ¶ E. 33(a)(i). Cottrell Decl. ¶ 17.

[8] *Hightower v. JPMorgan Chase Bank, N.A.*, No. CV 11-1802 PSG (PLAx), 2015 WL 9664959, *11 (C.D. Cal. 2015) (approving 30% fee request in part because "the risk of no recovery for Plaintiff, as well as for Class Counsel, if they continued to litigate, were very real"); *In re Nuvelo, Inc. Sec. Litig.*, No. C 07-04056 CRB, 2011 WL 2650592, *2 (N.D. Cal. July 6, 2011) (approving 30% fee request and noting that "[i]t is an established practice to reward attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that

In this litigation, the Parties engaged in voluminous and costly extensive formal and informal discovery, motion practice, and two separate negotiations and mediations facilitated by experienced mediators, which enabled Class Counsel (as well as Defendants) to accurately assess the legal and factual issues – and related risks – that would arise if the case proceeded to trial. In addition to the risks inherent in obtaining class certification for two Rule 23 classes, contesting FLSA decertification motions, and proving liability and damages at trial, Plaintiffs and Class Counsel faced defenses and risks unique to this case. Cottrell Decl. ¶¶ 22-24; Schalman-Bergen Decl. ¶¶ 13, 16-17, 19-21. For example, Plaintiffs would encounter difficulties in moving for certification and proving their claims on the merits in part due to the fact that key Class Member compensation documents were kept in paper format, and Class Member timecards and the work orders that controlled the services performed were largely hand-written and heavily edited. Thus, Plaintiffs would face fundamental logistical difficulties in reviewing and analyzing the massive amount of hard copy records. *Id.* In addition, the Court's order granting Defendants' motion compelling individual arbitration for the underlying FLSA and state law claims for thousands of Class Members impacts the prospects for recovery for the Classes and the Collective. Although Plaintiffs' counsel were prepared to litigate hundreds of individual arbitrations, and the PAGA claims continue on a representative basis, the arbitration order undeniably affects the prospects for recovery for the Classes and Collective. *Id.*

Finally, Plaintiffs and Class Counsel faced the possibility that the Court could rule against Plaintiffs, on summary judgment or at trial, and decline to find Comcast liable as a joint employer. Although OCC would still be liable in the event of a favorable outcome for Plaintiffs, a finding that Comcast was not a joint employer would greatly lessen the value of the case, and could even make any recovery impossible. OCC produced confidential financial information to Plaintiffs to support its contention that it is financially unable to pay a significant portion of

they might be paid nothing at all"); *Kanawi v. Bechtel Corp.*, No. C 06-05566 CRB, 2011 WL 782244, *2 (N.D. Cal. Mar. 1, 2011) (approving 30% fee request and reasoning "[s]uch a practice encourages the legal profession to assume such a risk and promotes competent representation for Plaintiffs who could not otherwise hire an attorney").

damages, or *any* damages, even if found liable. The risk of Comcast avoiding joint employer liability – and Plaintiff's receiving *no* recovery - was substantial. Schalman-Bergen Decl. ¶17.

Plaintiffs, Settlement Class Members, and their counsel faced all of these risks, and others, any one of which could have resulted in no recovery. Class Counsel's perseverance in pursing the litigation for two-and-a-half years, their commitment to developing the employees' claims and maximizing the Class and Collective recovery in the face of risks, and occasional setbacks, and awareness that one of the Defendants has claimed poor financial heath that could impede or reduce recovery for the Class, warrant an increase in the benchmark to 33 1/3%.

3. Counsel Have Demonstrated Significant Skill Throughout the Litigation of this Matter and Have Extensive Background in this Field of Law

Prosecuting class actions requires an "extraordinary commitment of time, resources, and energy from Class Counsel," and, many times, settlements "simply [are not] possible but for the commitment and skill of Class Counsel." *Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV 08 1365 CW, 2010 WL 1687829, at *2 (N.D. Cal. 2010). As described above, Class Counsel took on this case despite its complexity and risks, diligently prosecuted the case, and negotiated a meaningful and substantial recovery. This factor also supports Class Counsel's fee request.

Class Members have been represented by highly experienced counsel who focus on wage and hour class actions. Cottrell Decl. ¶¶ 5-7; Schalman-Bergen Decl. ¶¶ 1-7, Ex. 1. Both SWCKW and Berger Montague have been recognized as leading Plaintiffs' firms nationally for their work on behalf of employees in wage and hour litigation. Cottrell Decl. ¶ 5; Schalman-Bergen Decl. ¶¶ 1-7, Ex. 1. The Settlement involves complex provisions of the FLSA, the California Labor Code, Washington wage and consumer protection law, as well as the wage and hour laws of numerous other states where Technicians worked, and is a reflection of Class Counsel's experience and skill.[9] Accordingly, Counsel's expertise and skill in this area of law, coupled with their willingness to take on risky cases, justify the fee request.

[9] *See Schroeder v. Envoy Air, Inc.*, No. CV 16-4911-MWF (KSx), 2019 WL 2000578, at *7 (C.D. Cal. May 6, 2019) (awarding 33% fee, finding that counsel "exercised considerable skill" in litigating various motions, and engaging in substantial discovery, and "did so against experienced, highly skilled opposing counsel and on an entirely contingent basis.").

4. Counsel Incurred a Financial Burden in Litigating this Case on a Contingency Fee Basis

The contingent nature of the fee considers "the burdens class counsel experienced while litigating the case (*e.g.*, cost, duration, foregoing other work)" and weigh in favor of granting the requested fee award. *Carlin v. DairyAmerica*, 380 F. Supp. 3d at 1021. Here, Class Counsel undertook all the risk of this litigation on a completely contingent fee basis, expending time and incurring expenses with the understanding that there was no guarantee of compensation or reimbursement. The contingent nature of litigating a class action and the financial burden assumed typically justifies an increase from the 25% benchmark, as counsel litigates with no payment and no guarantee that the time or money expended will result in any recovery.[10]

Substantial fee awards encourage attorneys to take on risky cases on behalf of clients who cannot pay hourly rates and would therefore not otherwise have realistic access to courts. That access is particularly important for the effective enforcement of public protection statutes, such as the wage laws at issue here. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) ("private suits provide a significant supplement to the limited resources available to [government enforcement agencies] for enforcing [public protection] laws and deterring violations."). By incentivizing plaintiff's attorneys to take on risky, high-stakes, and important litigation, and devote themselves to it aggressively and fully, fee awards serve an important purpose and extend the access of top legal talent to constituencies such as low-wage workers who would otherwise never be able to confront employers, who are themselves represented by top-rated attorneys.

In this case, although the risks were front and center, Plaintiffs and Class Counsel committed themselves to developing and pressing Plaintiffs' legal claims to enforce the employees' rights and maximize the class and collective recovery. During the litigation, Class Counsel had to turn away other less risky cases to remain sufficiently resourced for this one. *See*

[10] *See Hightower v. JPMorgan Chase Bank, N.A.*, No. CV 11-1802 PSG (PLAx), 2015 WL 9664959, at *10 (C.D. Cal. 2015) ("any law firm undertaking representation of a large number of affected employees in wage and hour actions inevitably must be prepared to make a tremendous investment of time, energy, and resources with the very real possibility of an unsuccessful outcome and no fee recovery of any kind.") (internal quotations omitted) (*citing Vizcaino*, 290 F.3d at 1051).

Cottrell Decl. ¶ 27; Schalman-Bergen Decl. ¶ 21. Accordingly, a one-third recovery for fees is appropriate.

5. The Requested Fee Award is Equivalent to Awards in Similar Cases

As discussed above, many, if not most, fee awards in class settlements of common fund cases in this Circuit *exceed* the 25% benchmark. The same holds true for fee awards in common fund settlements of wage and hour class and collective actions. *See, e.g., Romero v. Producers Dairy Foods, Inc.*, No. 1:05cv0484 DLB, 2007 WL 3492841, *4 (E.D. Cal. 2007) (in wage and hour action, stating "fee awards in class actions average around one-third of the recovery" and awarding fees in that amount) (citing 4 Newberg and Conte, Newberg on Class Actions § 14.6 (4th ed. 2007)).[11] These similar cases further support Plaintiffs' request.

6. The Reaction of the Class (or Lack Thereof) Supports the Fee Request

"It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528-29 (C.D. Cal. 2004). Here, notice of the settlement was sent via regular mail and electronic mail to 4,502 Settlement Class Members on July 25, 2019. Cottrell Decl. ¶ 19. As of this date, September 9, 2019, roughly three quarters of the way into the notice period, *not one* Class Member has objected to the settlement, and *not one* Class Member has requested exclusion. *Id.* The lack of objections by Class Members to the Settlement or the fee provision demonstrates the Class's approval of the result in this case and further bolsters counsel's reasonable request for fees.[12]

[11] *See also Zamora v. Lyft, Inc.*, No. 3:16-cv-02558-VC, 2018 WL 4657308, at * 3 (N.D. Cal. Sept 26, 2018) (Chhabria, J.) (noting that the settlement fund of $1.95 million was "well below the megafund range" and that "[i]n this District, fee awards of approximately 33 1/3% are typical for settlements up to $10 million.") (citing *Galeener v. Source Refrigeration & HVAC, Inc.*, No. 3:13-cv-04960-VC, 2015 WL 12977077, at *4 (N.D. Cal. Aug. 21, 2015) (Chhabria, J.) (33 1/3% fee; $10 million fund) and *Bennett v. SimplexGrinnell LP*, No. 11 Civ. 01854, 2015 WL 12932332, at *6 (N.D. Cal. Sept. 3, 2015) (38.8%; $4.9 million fund.)).

[12] *See Cunha v. Hansen Nat. Corp.*, No. 08-1249-GW(JCx), 2015 WL 12697627, at *7 (C.D. Cal. Jan. 29, 2015) ("[N]ot a single class member has objected to the settlement and/or fee/expense application. This dearth of opposition perhaps speaks most loudly in favor of approving the fee and expense requests.").

7. A Lodestar Cross-Check, if Applied, Supports Plaintiffs' Fee Request

Both federal and California courts have the discretion to employ (or decline to employ) a "lodestar cross-check" on a request for a percentage of the fund fee award. However, as both the Ninth Circuit in *Vizcaino*, and the California Supreme Court in *Laffitte*, have made clear that this cross-check is not required.[13] While Plaintiffs submit that a cross-check is not necessary in this case, even if the Court were to employ one, the cross-check more than supports the requested fees here. Class Counsel's accompanying declarations provide a summary of the lodestar, time and hourly rates, as well as descriptions of the nature of work performed. *See* Cottrell Decl. ¶¶ 31-44; Schalman-Bergen Decl. ¶¶ 23-41. Class Counsel has spent a collective 6,752 hours litigating this case, for a current lodestar of $3,783,103, not including all the work remaining to bring the Settlement to a close. *See* Cottrell Decl. ¶ 8; Schalman-Bergen Decl. ¶ 22. This amount *exceeds* the requested fee, further supporting this Motion. *See Zamora*, 2018 WL 4657308, at *3 (finding that "lodestar multiplier of 0.86x strongly supports the 33 1/3% fee award").

C. Class Counsel's Costs Should be Approved

In addition to being entitled to reasonable attorneys' fees, the FLSA and California Labor Code both provide for the reimbursement of costs. *See* 29 U.S.C. § 216(b); Cal. Lab. Code § 1194; *see also Cunha*, 2015 WL 12697627, *5 ("[A] private plaintiff, or [its] attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of [its] litigation . . . .").

Here, Class Counsel's current costs total $207,361.46. Cottrell Decl. ¶ 50. Class Counsel's costs include reasonable out-of-pocket expenditures. Under the "common fund doctrine," "attorneys may recover their reasonable expenses that would typically be billed to paying clients in non contingency matters." *Cunha*, 2015 WL 12697627, *5.

The expenses incurred in this litigation to date are described in the accompanying declarations of the law firms involved in this litigation. *See* Cottrell Decl. ¶¶ 47-50; Schalman-

[13] *Vizcaino*, 290 F. 3d at 1050 & n. 5 (noting that while "primary basis of the fee award remains the percentage method," lodestar "may" be useful, but that it is "merely a cross check" and "it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case"); *Laffitte*, 1 Cal. 5th at 505. *See Lopez v. Youngblood*, No. cv-F-07-0474 DLB, 2011 WL 10483569, at *14 (E.D. Cal. Sept. 2, 2011) ("A lodestar cross check is not required in this circuit , and in a case such as this, is not a useful reference point").

Bergen Decl. ¶¶ 42-45. These expenses are of the type typically billed by attorneys to paying clients in the marketplace and include such costs as mediation fees, court costs, notice costs, copying and printing costs, travel expenses, and computerized research. *See id*. These costs are routinely found to be reasonable and awarded reimbursement by courts in the Ninth Circuit. *See, e.g., In re Immune Response Securities Litig.*, 497 F. Supp. 2d 1166, 1177 (S.D. Cal. 2007) (awarding reimbursement for expenses for meals, hotels, and transportation; photocopies; telephone; filing fees; messenger and overnight delivery; online legal research; and mediation fees, which it found to be "reasonable and necessary").

All of these expenses were reasonable and necessary for the successful prosecution of this case, and pursuant to the terms of the Settlement Agreement, Defendants do not object to the request for costs. Further, no Settlement Class Member has objected to the request for costs. Schalman-Bergen Decl. ¶ 44. Class Counsel therefore requests reimbursement of costs in the amount of $207,361.46.

D. The Court Should Approve Service Awards to Named Plaintiffs

"[N]amed Plaintiffs ….are eligible for reasonable incentive payments." *See Staton v. Boeing Co.*, 327 F. 3d 938, 977 (9th Cir. 2003). The purpose of such awards is "to compensate class representatives for work done on behalf of the class [and] make up for financial or reputational risk undertaken in bringing the action…" *Rodriguez v. West Pul'g Corp*., 563 F. 3d 948, 958-59 (9th Cir. 2009). Here, subject to the Court's approval, the enhancement payments of up to $15,000 for Plaintiff Soto and up to $10,000 for Plaintiffs Stricklen, Fondrose, Ortega, and Farias are intended to compensate these Plaintiffs for the critical roles they played in this case, and the time, effort, and risks undertaken in helping secure the result obtained on behalf of the Class Members.[14] Cottrell Decl. ¶ 30. In agreeing to serve as Class and Collective Representatives, Plaintiffs formally agreed to accept the responsibilities of representing the interests of all Class Members. *Id.* Defendants do not oppose the requested payments to the Plaintiffs as reasonable service awards. *See* Settlement Agreement ¶ 29(a).

[14] Moreover, Plaintiffs have agreed to a general release, unlike other Class Members. *See* Settlement Agreement ¶ 20.

The amounts of these service awards are fair when compared to the payments approved in similar cases by this Court and others in this District.[15] In evaluating the appropriateness of service awards, courts may consider "relevant factors include[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." *Staton*, 327 F. 3d at 977 (citation omitted).

Here, each Class Representative has expended substantial time assisting in the prosecution of the case, including putting their names on the caption of complaints as named plaintiffs.[16] Each spent considerable time providing valuable information to counsel, assisting in the drafting of declarations and other pleadings, and regularly discussing the facts of the case with Class Counsel. The Class Representatives produced documents and Mr. Soto and Mr. Stricklen were deposed by Defendants.[17]

The requested Service Awards to each of these Class Representatives are also reasonable in light of the significant reputational risk each took by publicly affiliating themselves with the lawsuit against their former or current employer.[18] Notwithstanding these risks, each Class Representative has remained in the case and seen it through to its excellent outcome, while agreeing to a general release of all claims.[19] This substantial sacrifice supports the service awards sought here. *See Schaffer v. Litton Loan Servicing, LP*, No. CV 05-07673 MMM (JCx), 2012 WL 10274679, at *18 (C.D. Cal. Nov. 13, 2012); *Millan v. Cascade Water Services, Inc*., No. 1:12-cv-01821-AWI-EPG, 2016 WL 3077710, at *12 (E.D. Cal. June 2, 2016) (reasoning that service

[15] *See, e.g., Guidlbaud v Sprint/United Management Co., Inc*., No. 3:13-cv-04357-VC-, ECF No. 181 (N.D. Cal. Apr. 15, 2016) (Chhabria, J.) (approving $10,000 service payments for each class representative in FLSA and California state law representative wage and hour action); *Villalpando v. Exel Direct, Inc.*, No. 3:12-cv-04137-JCS, 2016 WL 7785852, at *2 (N.D. Cal. Dec. 9, 2016) (approving $15,000 service awards to each of three class representatives in light of important assistance, time and effort, and risks taken to represent the class).

[16] Soto Decl. ¶ 15; Stricklen Decl. ¶ 15; Fondrose Decl. ¶ 14; Ortega Decl. ¶ 13; Farias Decl. ¶ 13.

[17] Soto Decl. ¶¶ 8-10; Stricklen Decl. ¶¶ 8-10; Fondrose Decl. ¶¶ 8-9; Ortega Decl. ¶¶ 8-9; Farias Decl. ¶¶ 8-9.

[18] Soto Decl. ¶ 15; Stricklen Decl. ¶ 15; Fondrose Decl. ¶ 14; Ortega Decl. ¶ 13; Farias Decl. ¶ 13.

[19] Soto Decl. ¶¶ 17-18; Stricklen Decl. ¶¶ 17-18; Fondrose Decl. ¶¶ 16-17; Ortega Decl. ¶¶ 15-16; Farias Decl. ¶¶ 15-16.

awards "are particularly appropriate in wage-and-hour actions where plaintiffs undertake a significant 'reputational risk' by bringing suit against their present or former employers.").

Further, perseverance in pursuing litigation on behalf of a class over the course of a lengthy period of time supports the approval of reasonable service awards. "When litigation has been protracted, an incentive award is especially appropriate." *In re Toys R Us*, 295 F.R.D. at 471; *Trujillo v. City of Ontario*, No. EDCV 04-1015-VAP (SGLx), 2009 WL 2632723, at *1, *5 (C.D. Cal. Aug. 24, 2009). Here, the litigation has been protracted. Class Representatives Soto and Stricklen have each diligently represented the interests of the class since the outset of this case in 2017, Class Representative Fondrose joined shortly thereafter, followed by Class Representatives Ortega and Farias.[20] Each of these Class Representatives was prepared to persevere through further litigation and trial if the Settlement had not been reached. The "duration" factor weighs in favor of the requested service awards.

In addition, in evaluating proposed service awards, courts compare the overall settlement benefits and the range of recovery available to the class members to the representative plaintiffs' proposed service awards.[21] Here, the $55,000 aggregate amount of the proposed service awards is quite modest in comparison to the overall benefits of the settlement and recovery to the class, representing less than 1% (0.7%) of the total funds that the Defendants will expend to settle this lawsuit. The modest amount of these requested service awards in relation to the total settlement amount weighs in favor of their appropriateness. Finally, the Notice advised of the service awards, and no Settlement Class Members objected. Therefore, the proposed service awards should be finally approved.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant this Motion.

[20] Soto Decl. ¶ 7; Stricklen Decl. ¶¶ 7-9; *see also* ECF 1, 117, 232, 253.

[21] *See, e.g., Staton*, 327 F.3d at 976-77; *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 669 (E.D. Cal. 2008). The purpose of the inquiry is to ensure that the service awards have not compromised the ability of the representative plaintiffs to act in the best interest of the class. *Radcliffe v. Experian Info. Solutions, Inc.*, 715 F.3d 1157, 1163 (9th Cir. 2013).

Dated: September 9, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document(s) with the Clerk of the Court for the United States District Court, Northern District of California, by using the Court's CM/ECF system on September 9, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

/s/ *Carolyn Hunt Cottrell*
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