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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JOSHUA WRIGHT, LORETTA STANLEY, HALEY QUAM, and AIESHA LEWIS, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

FRONTIER MANAGEMENT LLC, FRONTIER SENIOR LIVING, LLC, and GH SENIOR LIVING, LLC dba GREENHAVEN ESTATES ASSISTED LIVING,

Defendants.

Case No.: 2:19-cv-01767-JAM-CKD

Hon. John A. Mendez

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES AND COSTS AND FOR SERVICE AWARDS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: March 1, 2023
Time: 1:30 p.m.
Ctrm.: 6, 14th Floor

Filed: September 6, 2019
Trial Date: None

TO THE HONORABLE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on March 1, 2023, at 1:30 p.m., before Judge John A. Mendez of the United States District Court, Eastern District of California, Plaintiffs Joshua Wright, Loretta Stanley, Haley Quam, and Aiesha Lewis ("Plaintiffs") move the Court for an Order awarding Class Counsel reasonable attorneys' fees and costs and awarding Plaintiffs service awards.

Specifically, Plaintiffs move this Court for an Order awarding Class Counsel reasonable attorneys' fees of $3,166,663.50 plus reimbursement of actual out-of-pocket costs of $94,296.46. Plaintiffs also move for an Order granting service awards in the amount of $10,000 for the Class Representative Plaintiff Joshua Wright, in the amount of $5,000 for each of the Class and Collective Representatives Plaintiffs Loretta Stanley, Haley Quam, and Aiesha Lewis, and $5,000 for Emily Gracey, to be paid out of the Gross Settlement Amount in recognition of their considerable service to the Classes and Collective.

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 H. Cottrell in Support of Motion for Final Approval of Class and Collective Action Settlement and Motion for Attorneys' Fees and Costs and For Service Awards ("Cottrell Decl."); and the exhibits attached thereto; the Declaration of Joshua Wright ("Wright Decl."), the Declaration of Loretta Stanley ("Stanley Decl."), the Declaration of Haley Quam ("Quam Decl."), the Declaration of Aiesha Lewis ("Lewis Decl."); such oral argument as may be heard by the Court; and all other papers on file in this action.

Date: January 24, 2023

Respectfully Submitted,

/s/ Carolyn H. Cottrell
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I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 23(h), Class Counsel for Plaintiffs Joshua Wright, Loretta Stanley, Haley Quam, and Aiesha Lewis ("Plaintiffs"), and Plaintiffs move the Court for recovery of attorneys' fees and costs, as well as approval of incentive awards to Plaintiffs for their hard-fought efforts and significant results obtained for the benefit of the Class and Collective.[1] Class Counsel worked with Plaintiffs to litigate this Action in order to achieve a complex and intricate Class and Collective Settlement,[2] which this Court has preliminarily approved.

Through over three years of intensive litigation, including extensive discovery and motion practice, amendments to the complaint, conditional certification, multiple mediations and exhaustive pre-mediation discovery and outreach, appellate filings, and extensive arm's-length negotiations between counsel, the Parties have reached a global settlement of the Action, memorialized in the proposed Settlement. The Parties have resolved the claims of approximately 20,374 Caregivers, for a total non-reversionary settlement amount of $9,500,000. With this proposed Settlement, the Parties are resolving claims unlikely to have been prosecuted as individual actions. The Settlement provides an excellent benefit to the Classes and an efficient outcome in the face of expanding and highly risky litigation. This Settlement will bring substantial relief to thousands of Caregivers, who would otherwise be unlikely to obtain relief.

Under well-established precedent, Class Counsel now seek as their reasonable attorneys' fees one-third (1/3) of the Gross Settlement Amount to compensate them for their extensive work in achieving this Settlement, plus the reimbursement of actual out-of-pocket costs incurred by Class Counsel in the amount of $94,296.46. These amounts will compensate Class Counsel Schneider Wallace Cottrell Konecky LLP ("SWCK") for all work already performed in this case, and for all of the work remaining to be performed in this case, including ensuring that the Settlement is fairly administered and implemented, and obtaining dismissal of the action.

Plaintiffs further seek the proposed Service Awards, which are well within the range of those

[1] For ease of reference, Class and Collective Members are referred to as "Caregivers."

[2] The "Settlement" or "Settlement Agreement" refers to the Class Action Settlement Agreement and Release attached as **Exhibit 1** to the Declaration of Carolyn Hunt Cottrell in Support of Plaintiff's Motion for Preliminary Approval of Class and Collective Action Settlement. ECF 85-1, at pp. 22-157.

granted by courts in similar settlements. The requested Service Awards are reasonable given each proposed recipient's agreement to general releases, and in light of their significant efforts in bringing and prosecuting this proceeding, and obtaining substantial monetary relief for thousands of Caregivers across the country despite all the attendant risks of this litigation.

These requests are appropriate given their efforts in successfully negotiating a class-wide settlement that greatly benefits the Settlement Class Members. Moreover, approval is strongly supported by the fact that the Settlement Class: (a) has received written notice of the Settlement; (b) has overwhelmingly supported the Settlement; and (c) has submitted ***zero objections*** to the Settlement or request for attorneys' fees and costs. Accordingly, Class Counsel respectfully requests this Court to enter an order: (1) awarding Class Counsel $3,166,663.50 in reasonable attorneys' fees; (2) awarding Class Counsel $94,296.46 in out-of-pocket costs; and (3) awarding named Plaintiffs in the amount of $10,000 to Plaintiff Joshua Wright, in the amount of $5,000 to each of the Plaintiffs Loretta Stanley, Haley Quam, and Aiesha Lewis, and $5,000 to Emily Gracey.

II. SUMMARY OF WORK PERFORMED

Since filing the Complaints, over three years ago, Class Counsel has vigorously litigated the Action, devoting over 3,351 hours to the prosecution of this Action, representing an estimated lodestar amount of $2,167,230. *See* Cottrell Decl., ¶¶ 94-96, Ex. A. The procedural history of this action has been well documented in prior briefs, including in Plaintiffs' Motion for Preliminary Approval of Settlement, ECF 85, and in the accompanying Motion for Final Approval of Settlement. For purposes of this Motion, Plaintiffs break down the case to focus on the stages of the case here.

A. Plaintiff's Complaint.

Through independent inquiry and research, Class Counsel thoroughly and diligently investigated and pursued the claims of the Class. Cottrell Decl., ¶ 9. On September 6, 2019, Plaintiff Wright filed a Class and Collective Action alleging violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201, *et seq*. and under California law on behalf of a putative California Class. ECF 1. Following further investigation, research, and informal discovery, Class Counsel and Plaintiffs pursued additional claims and classes. Cottrell Decl., ¶¶ 10-12.

On November 6, 2020, Plaintiffs filed a motion for leave to file a First Amended Complaint.

ECF 50, Amended Motion to Amend the Complaint; ECF 45 Motion to Amend the Complaint. The proposed amendments significantly expanded the action, by adding Loretta Stanley, Haley Quam, and Aiesha Lewis as named plaintiffs on behalf of three additional Rule 23 classes, including additional state law class claims against Frontier Management LLC and Frontier Senior Living, LLC, and clarifying preexisting allegations. On February 8, 2021, the Court granted in part Plaintiff leave to amend the complaint. *See* ECF 56. The FAC, filed February 9, 2021, alleges that Defendants violated the FLSA and California, Oregon, Washington, and Illinois wage and hour laws by failing to pay non-exempt employees their earned wages, failing to provide legally compliant meal and rest periods, and failing to reimburse for work-related expenditures. ECF 57; Cottrell Decl., ¶¶ 11-12.

Defendants filed a motion to dismiss the Action pursuant to Fed. R. Civ. P. 12(b)(6) on March 15, 2021, arguing that the FAC (1) failed to plead sufficient facts to state plausible claims for meal and rest period violations; (2) failed to plead sufficient facts to support Plaintiffs' claims for unpaid wages; (3) fails to plead a claim for reimbursement of business expenses; and (4) fails to plead derivative claims because the primary claims fail. ECF 68.

The Court granted Defendants' motion with prejudice and without leave to amend. *See* ECF 72-73. Plaintiffs appealed the Court's order on June 17, 2021 (Case No. 21-16052). *See* ECF 74. Prior to reaching the instant Settlement, Plaintiffs researched and drafted their opening appellate brief, which was ultimately not filed prior to the dismissal of the appellate action.[3] Cottrell Decl., ¶¶ 14-16.

B. The Companion State Action Including Defendants' Motion to Strike and Motion for Summary Judgment or Adjudication, and Subsequent Appeal.

After providing the California Labor and Workforce Development Agency ("LWDA) with the requisite notice under the California Labor Code Private Attorneys General Act of 2004 ("PAGA"), Plaintiff Wright filed a separate complaint pursuant to the PAGA in the California Superior Court of Alameda County ("State Action") against Defendants (Case No. RG19035167), on September 16, 2019. *See* ECF 79; Cottrell Decl., ¶ 17.

On April 8, 2021, Defendants filed a motion for summary judgment or, in the alternative,

[3] The Ninth Circuit subsequently dismissed the appeal without prejudice for settlement purposes pursuant to the Parties' stipulation on June 22, 2022, following the execution of the Settlement. *See* ECF 78; *see also* Case No. 21-16052, Dkt. No. 22; Settlement., ¶ 17.

summary adjudication arguing, *inter alia*, that Plaintiff failed to exhaust his administrative remedies under the PAGA. *Id.,* ¶ 18. Following full briefing, the superior court denied Defendants' motion without prejudice, and ordered Plaintiff Wright to file a first amended complaint to more clearly plead separate causes of action against Defendants. *Id.* Plaintiff Wright filed the first amended complaint in the State Action on July 14, 2021. *Id.*

Defendants also filed a motion to strike Plaintiff's PAGA claims under the theory that Plaintiff's PAGA claims would be unmanageable at trial on April 8, 2021. *See Id.*, ¶ 19. On July 2, 2021, and following full briefing and oral argument, the superior court denied Defendants' motion to strike without prejudice. *Id.*

On September 10, 2021, Defendants filed a petition for writ of mandate for an order directing the superior court to vacate its July 2, 2021 order and to rule on Defendants' motion to strike on the merits. *Id.*, ¶ 20. On September 15, 2021, the California Court of Appeal notified the parties that it was considering issuing a peremptory writ in the first instance. *Id.* The petition for writ of mandate is currently pending before the Court of Appeal of the State of California, First Appellate District, Division One (Case No. A163424), and will be dismissed should the Settlement be finally approved pursuant to the Settlement. *Id.*, ¶ 21; Settlement, ¶ 16.

C. FLSA Conditional Certification.

On March 13, 2020, following significant meet and confer between the Parties, the Parties stipulated to conditional certification of the Collective and to facilitate nationwide notice pursuant to 29 U.S.C. 216(b), on behalf of a nationwide collective of non-exempt employees of Defendants, which was granted on March 17, 2020. ECF 13, 15; Cottrell Decl., ¶ 22. A total of 953 individuals filed FLSA opt-in consent forms. *See, e.g.,* ECF 67.

D. Formal and Informal Discovery.

On December 2, 2020, Plaintiffs propounded written discovery requests, including 72 requests for production of documents and 12 special interrogatories to each Defendant. Cottrell Decl., ¶ 23. Plaintiffs further served 23 subpoena duces tecum to various assisted senior living communities maintained by Defendants in December 2020 to February 2021. *Id.,* ¶ 24. Plaintiff Wright propounded an additional 69 requests for production of documents and 19 special interrogatories in the State Action

in December 2020, as well as 5 subpoena duces tecum to various assisted senior living communities maintained by Defendants in December 2020. *Id.*, ¶¶ 25. Plaintiff Wright filed 4 motions to compel further written discovery responses in the State Action. *Id.*, ¶ 27. Numerous and lengthy meet and confer efforts, including multiple meet and confer letters and meet and confer calls that took hours at a time, convened between the Parties, including, as ordered by the State Court, hours of transcribed meet and confer conferences. *Id.*, ¶ 26. Plaintiff Wright further additionally responded and objected to 88 requests for production of documents and 35 special interrogatories in the state action. *Id.*, ¶ 28.

Ultimately, through the formal and informal discovery process in advance of mediation, Defendants produced over 3,000 documents in this Action, including their general policies throughout each state, job descriptions, personnel records, written complaints, as well as tens of thousands of pages of Excel data sheets showing samplings of time and payroll records representing 25% of the Classes and the Collective. *See id.,* ¶¶ 29, 31. Defendants also provided class-wide figures, including the total number of Caregivers and associated workweeks and pay periods, hourly rates, and additional data points, ahead of each mediation, to enable Plaintiffs' counsel to evaluate damages on a Class and Collective basis. *Id*.

Plaintiffs additionally completed extensive outreach with Caregivers, including nearly 300 in-depth interviews, which covered topics including dates and locations of work, hours of work, pre-shift and post-shift off-the-clock work, meal and rest breaks, and reimbursement of work-related expenses. *Id.,* ¶ 30. Numerous Caregivers that completed interviews also provided additional documents to Plaintiff's counsel. *Id.* Through this process, Plaintiffs garnered substantial factual background regarding the alleged violations, which Plaintiffs' counsel utilized to build their case and to assess Defendants' potential exposure in this action. *Id*.

Plaintiffs' counsel completed an exhaustive review of the documents, and used the information and data from Defendants and from the Caregiver to prepare for mediation. *Id.*, ¶ 32.

E. Mediations, the Resulting Settlement, and Amendment of the Pleadings.

Throughout the mediation process, the Parties engaged in serious and arm's-length negotiations, culminating in a mediator's proposal after multiple mediation sessions. On July 29, 2020, the Parties participated in a full-day private mediation before respected wage and hour mediator, David Rotman.

Id., ¶ 33. The Parties were unable to reach an agreement and the cases did not settle that day. *Id.* On August 26, 2020, the Parties participated in a second, half-day mediation before Mr. Rotman, but again the cases did not settle. *Id.*, ¶ 34.

On October 5, 2021, the Parties further participated in a full-day mediation before respected wage and hour mediator Steven Serratore. *Id.* ¶¶ 35-36. The case did not settle that day; however, the Parties accepted a mediator's proposal to settle both this Action and the PAGA Action the next day on October 6, 2021. *Id.,* ¶ 36. The Parties then extensively met and conferred over the detailed terms of the settlement, which included approximately 18 different drafts, over the next couple of months of intensive, arm's-length negotiations, and eventually executed the finalized long-form settlement agreement on June 8, 2022. *Id.*, ¶ 37-39.

For purposes of the Settlement, the Parties agreed to stay the State Action pending approval of the Settlement, and to stipulate to amend the FAC in this Action to include the PAGA claims asserted in the State Action and to cite additional theories of liability under the PAGA.[4] Settlement*,* ¶¶ 16-19. On June 30, 2022, the Parties filed the stipulation to amend the FAC, which was subsequently granted, and the Second Amended Class and Collective Action Complaint ("Complaint") was deemed filed on July 5, 2022. ECF 79, 79-1, 82.

F. Preliminary Approval of the Settlement, Subsequent Notice, and Response of Class Members.

The Court granted preliminary approval of the Settlement on August 29, 2022. ECF 89. Pursuant to the Court's order, Settlement Services, Inc. ("SSI"), the settlement administrator, sent the Court-approved notices of settlement to all Class Members in accordance with the terms of the Settlement. *See* Lange Decl., ¶¶ 5-8. Only 439, or 2.15%, of the 20,381 notices of settlement were undeliverable. *See id.,* ¶ 9; Cottrell Decl., ¶ 50. Only 7 Class Members have opted-out of the Settlement and no

[4] Pursuant to the Settlement, the Parties agreed the Settlement is conditioned on the dismissal with prejudice of Defendants and the Releasees from the lawsuit entitled *Emily Gracey v. Frontier Management, LLC, et al*., Stanislaus Superior Court, Case No. CV-22-000990 (the "*Gracey* Action"). Settlement, ¶¶ 19, 25, 34.a. The Second Amended Class and Collective Action Complaint filed in this action incorporates the PAGA claims Gracey asserted in her complaint and pursuant to her December 29, 2021 letter to the LWDA. Following extensive meet and confer between Ms. Gracey's counsel, Defendants' counsel, and Plaintiffs, Ms. Gracey agreed to dismiss with prejudice Defendants and the Releasees from the *Gracey* Action and agreed to a general release of claims in exchange for her incorporation into the Settlement. Cottrell Decl., ¶ 43.

objections were filed. Lange Decl., ¶¶ 12-13; Cottrell Decl., ¶¶ 51-52. ***Not a single Class Member objected to the proposed attorneys' fees and costs, nor to the service awards, requested in this Motion***. The overwhelming positive reaction of the Class is a clear indication of its approval of the Settlement and the sought fees, costs, and Service Awards.

III. TERMS OF THE SETTLEMENT WITH RESPECT TO FEES, COSTS, AND SERVICE AWARDS

The Settlement provides that, subject to Court approval, Class Counsel is entitled to up to 35% of the Gross Settlement Amount of $9,500,000 (*i.e*., $3,325,000), plus costs not to exceed $110,000. *See* Settlement, ¶¶ 2.e, 2.m, 2.u, 34.b. However, Class Counsel only seeks one-third of the Gross Settlement Amount, or $3,166,663.50 in reasonable attorneys' fees. Cottrell Decl., ¶¶ 54, 121.

The Settlement Agreement provides that Class Counsel is to be reimbursed for their out-of-pocket costs in an amount not to exceed $110,000. Settlement, ¶ 2.e, 34.b. In this Motion, Class Counsel seeks $94,296.46 as reimbursement for their actual out-of-pocket expenses. Cottrell Decl., ¶ 124, Ex. B.

The Settlement also provides that Plaintiffs may seek service awards not to exceed $10,000 for Plaintiff Wright, $5,000 each for Plaintiffs Stanley, Quam, and Lewis, and $5,000 for Emily Gracey, for their work in prosecuting this action and in exchange for a general release. Settlement, ¶¶ 2.dd, 34.a. In this Motion, Plaintiffs seek service awards of $10,000 to Plaintiff Wright, $5,000 each to Plaintiffs Stanley, Quam, and Lewis, and $5,000 to Emily Gracey, for their work on behalf of the Classes and Collective.

Pursuant to the Settlement, Frontier does not object to Class Counsel's request for fees and costs, nor to Plaintiffs' request for service awards. Settlement, ¶¶ 2.e, 2.m, 2.u, 2.dd, 34.a, 34.b.

IV. ARGUMENT

A. The Court Should Apply the Percentage of Recovery Methodology to Award Class Counsel the Requested One-Third Fee Award, as is Customary 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., Staton v. Boeing Co.,* 327 F.3d 938, 967 (9th Cir. 2003); *Hendricks v. Starkist Co.*, No. 13-cv-00729-HSG, 2016 U.S. Dist. LEXIS 134872, at *34 (N.D. Cal. Sep. 29, 2016). The two methods for determining reasonable fees in the class action settlement context are the "percentage of recovery" method and the "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).

It is settled law in the Ninth Circuit that a district court may award attorney fees based on a percentage of the common fund when a settlement results in the creation of a fund that will inure to the benefit of class members. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Hanlon*, 150 F.3d at 1029.[5] Courts within the Ninth Circuit generally prefer the percentage approach to other methods for awarding attorney fees, such as a lodestar calculation. The Ninth Circuit routinely awards attorneys' fees pursuant to the common fund approach "[b]ecause the benefit to the class is easily quantified in common-fund settlements" and avoids the "often more time-consuming task of calculating the lodestar." *In re Bluetooth v. Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011).[6] The percentage-of-the-fund method is appropriate where – as it is here – the amount of the settlement is fixed without any reversionary payment to the defendant. *See Thieriot v. Celtic Ins. Co.,* No. C 10-04462 LB, 2011 U.S. Dist. LEXIS 44852, at *15 (N.D. Cal. Apr. 21, 2011) (citing *Chu v.*

[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.").

[6] *See also, e.g.*, *Vizcaino*, 290 F.3d at 1047 (approving the percentage method for determining fees in a common-fund case); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (same); *Vasquez v. Coast Valley Roofing,* 266 F.R.D. 482, 491 (E.D. Cal. 2010) (applying the percentage approach—even when the lodestar would have dictated a larger fee award—because "a percentage of the common fund [to assess fees] is particularly appropriate when each member of a certified class has an undisputed and mathematically ascertainable claim").

1 *Wells Fargo Invs., LLC*, Nos. C 05-4526 MHP, C 06-7924 MHP, 2011 U.S. Dist. LEXIS 15821, 2011
2 WL 672645, at *4 (N.D. Cal. Feb. 16, 2011)).

3 "The typical range of acceptable attorneys' fees in the Ninth Circuit is 20% to 33 1/3% of the
4 total settlement value, with 25% considered the benchmark." *Vasquez,* 266 F.R.D. at 491-492 (granting
5 33.3% fee award and collecting cases) (citing *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000));
6 *Hanlon*, 150 F.3d at 1029; *Staton*, 327 F.3d at 952. The Ninth Circuit instructs that "[t]he 25%
7 benchmark, though a starting point for analysis, may be inappropriate in some cases." *Vizcaino*, 290
8 F.3d at 1047. The choice of "the benchmark or any other rate must be supported by findings that take
9 into account all of the circumstances of the case." *Id.* at 1048.

10 As this District has observed, upward adjustments are common, as "courts usually award
11 attorneys' fees in the 30-40% range in wage and hour class actions that result in recovery of a common
12 fun[d] under $10 million." *Watson v. Tennant Co*., No. 2:18-cv-02462 WBS DB, 2020 U.S. Dist.
13 LEXIS 166823, at *17 (E.D. Cal. Sep. 10, 2020) (citations omitted). Indeed, courts customarily approve
14 payments of attorneys' fees amounting to one-third of the common fund, including in comparable wage
15 and hour class actions, and courts in this Circuit have described a one-third fee as "well within the range
16 of percentages which courts have upheld as reasonable in other class action lawsuits." *Stuart v.*
17 *RadioShack Corp*., No. C-07-4499 EMC, 2010 U.S. Dist. LEXIS 92067, at *18 (N.D. Cal. Aug. 9,
18 2010); *Zamora v. Lyft, Inc*., No. 3:16-cv-02558-VC, 2018 U.S. Dist. LEXIS 166618, at *10 (N.D. Cal.
19 Sep. 26, 2018) (one-third award is "consistent with the Ninth Circuit authority and the practice in this
20 District.").[7]

21 [7] *See also, Moreno v. Beacon Roofing Supply, Inc*., No. 3:19-cv-00185-GPC-LL, 2020 U.S. Dist.
22 LEXIS 122642, 2020 WL 3960481, at *8 (S.D. Cal. July 13, 2020) ("In cases where the common fund is under $10 million, fees are often above 25%."); *Shaw v. Amn Servs*., No. 3:16-cv-02816 JCS, 2019
23 U.S. Dist. LEXIS 239897, at *5 (N.D. Cal. May 31, 2019) (approving SWCK's requested one-third fee award); *Villalpando v. Exel Direct Inc*., No. 3:12-cv-04137-JCS, 2016 U.S. Dist. LEXIS 182521, at *4
24 (N.D. Cal. Dec. 9, 2016) (same); *Beaver v. Tarsadia Hotels*, No. 11-CV-01842-GPC-KSC, 2017 U.S. Dist. LEXIS 160214, 2017 WL 4310707, at *9 (S.D. Cal. Sept. 28, 2017) ("California courts routinely
25 award attorneys' fees of one-third of the common fund."); *Laffitte v. Robert Half Int'l,* 1 Cal.5th 480, 506 (2016) (affirming fee award representing one-third of the common fund); *Emmons v. Quest*
26 *Diagnostics Clinical Labs., Inc.,* No. 1-13-CV-00474-DAD-BAM, at *7 (E.D. Cal. Feb. 27, 2017) (following *Laffitte* and awarding one-third fee award of a common fund settlement). *C.f., Chavez v.*
27 *Netflix, Inc*., 162 Cal.App.4th 43, 66 n.11 (Ct. App. 2008) ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average
28 around one-third of the recovery."); *Smith v. CRST Van Expedited, Inc*., No. 10-CV-1116-IEG WMC,

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 Amount.

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

Application of the following *Vizcaino* factors support the requested fee award: (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"). Other courts have additionally considered (6) reactions from the class; and, in its discretion, (7) a lodestar cross-check. *See Barnes v. Equinox Grp., Inc.,* No. C 10-3586 LB, 2013 U.S. Dist. LEXIS 109088, at *13 (N.D. Cal. Aug. 1, 2013).

1. The Results Achieved by this Settlement Justify 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 Techs., Inc.*, 559 F.Supp.2d 1036, 1046 (N.D. Cal. 2008). Here, the Settlement preliminarily approved by the Court resolves the claims of the Class Members for a total non-reversionary settlement of $9,500,000. This represents over approximately 42% of the nonliquidated $23.3 million estimated total exposure for all claims at issue (i.e., excluding derivative and penalty claims), and approximately 14% of the estimated $69.4 million estimated total exposure that Plaintiffs calculated for all claims at issue. *See* Cottrell Decl., ¶¶ 65-72.

From the Gross Settlement Amount, Participating Individuals will receive a share of the Net Settlement Amount (estimated to be approximately $5,988,790.04). *Id.,* ¶ 54. The Settlement provides excellent recoveries, and the largest recovery a Class Member will receive is an impressive $5,199.76. Lange Decl., ¶ 16. Approximately 1,113 Class Members will receive an average recovery $1,000 or more, of which approximately 297 Class Members will receive an average recovery of $2,000 or more and 30 Class Members will receive an average recovery of $3,000 or more. *Id*. On average, Class Members will receive an average recovery of approximately $300 per Class Member and $105 per Collective Member. *See id.*; Cottrell Decl., ¶ 74. Moreover, these recoveries will increase given that

2013 U.S. Dist. LEXIS 6049, 2013 WL 163293, at *5 (S.D. Cal. Jan. 14, 2013) ("Under the percentage method, California has recognized that most fee awards based on either a lodestar or percentage calculation are 33 percent.").

they were calculated based on a smaller estimated Net Settlement Amount of $5,948,936.50 (which incorporated the maximum attorneys' costs of $110,000) and on the assumption that no Class Members would opt-out of the Settlement. *See* Lange Decl., ¶ 16.

These recoveries are particularly excellent in light of the Class Members' relatively short tenures, given that over 74% of the Class worked 1 year or less, which includes over 52% who worked 20 or fewer workweeks, and over 36% who worked a mere 10 or fewer workweeks. Cottrell Decl., ¶ 75; *see* Lange Decl., ¶ 16. Indeed, excluding Class Members who worked 10 weeks or fewer, the average recovery for Class Members is $409.23, and excluding Class Members who worked 52 weeks or fewer, the average recovery for Class Members is $714.83. Lange Decl., ¶ 16. And as the Class Members' Individual Settlement Shares are based on their number of Workweeks, which range from 1 to 458 workweeks, long-term Caregivers will receive larger recoveries under the Settlement. *Id.*; Settlement, ¶ 38.a. With the weighting factors provided in the Settlement, Class Members are paid five times more for each workweek they worked in California, three times more for each workweek worked in Oregon and Washington, and two times more for each workweek worked in Illinois, to recognize that the stronger wage and hour laws in these states that would result in enhanced recoveries compared to states with no wage and hour protections beyond the FLSA and are not alleged in this Action. *See* Settlement, ¶ 38.a; Cottrell Decl., ¶ 77.

The highly favorable terms achieved by Class Counsel's skill and perseverance, in light of the attendant risks presented by continued litigation with Defendants, favor upward departure from the benchmark and support Class Counsel's request for a one-third award. *See, e.g., In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig*., No. 4:14-md-2541-CW, 2017 U.S. Dist. LEXIS 201108, at *6 (N.D. Cal. Dec. 6, 2017) (noting "[f]ar lesser results (with 20% recovery of damages or less) have justified upward departures from the 25% benchmark" and collecting cases); *Barbosa v. Cargill Meat Sols. Corp*., 297 F.R.D. 431, 449 (E.D. Cal. 2013) (finding that a recovery of $1,290,000 for 1,837 meat-packing facility class members claiming off-the-clock and meal and rest break claims was a "favorable result").

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 U.S. Dist. LEXIS 118060,

at *12 (N.D. Cal. Sep. 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 requested one-third attorneys' fee award.

2. The Risks of Litigating this Case Were Substantial and Justify the Fee Request.

"Risk is a relevant circumstance." *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1020 (E.D. Cal. 2019) (citing *Vizcaino*, 290 F.3d at 1048 and awarding one-third 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] Here, Class Counsel has taken considerable risk in litigating this case, not just because it was done on a contingency basis, but because it involves complex, representative wage-and-hour litigation with unique appellate risks. Although these risks are summarized in Plaintiffs' motion for final approval, the substantially unique risks inherent in further litigation here bears repeating.

At the outset, Plaintiffs would have to win on appeal before the Ninth Circuit and the California Court of Appeal, which would stall any continued litigation in the underlying district and superior courts. Cottrell Decl., ¶ 81. For the federal action, this would require Plaintiffs to successfully argue that the Court's order dismissing the action was in error, and although Plaintiffs are confident in their arguments on appeal, any order short of reversal would imperil not only the FLSA claims at issue in this action, but all state class claims as well. *Id.* The situation in the state action would be equally risky, as the superior court may reverse its ruling and grant Defendants' motion to strike the PAGA claims for lack of manageability on the merits, which would in turn result in further appeals. *Id.* Such a scenario would likely further be delayed, as the Supreme Court has recently granted review of *Estrada v. Royalty Carpet Mills, Inc.*, 76 Cal.App.5th 685 (2022), to resolve the split of authority created by *Estrada* and *Wesson* regarding whether trial courts can strike or limit unmanageable PAGA actions. *See Wesson v.*

[8] *Hightower v. JPMorgan Chase Bank, N.A.,* No. CV 11-1802 PSG (PLAx), 2015 U.S. Dist. LEXIS 174314, at *32 (C.D. Cal. Aug. 4, 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").

Staples, LLC, 68 Cal.App.5th 746, 766-67 (2021). Should however, Defendants ultimately be successful in its attempt to strike Plaintiff Wright's PAGA actions, no further representative PAGA claims would remain viable in the state action. Cottrell Decl., ¶ 81.

Following potentially months or even years of further appeals, Plaintiffs would subsequently need to certify all claims and withstand any decertification motions, and prevail on the merits on all claims. *Id.*, ¶ 82. This would require substantial additional preparation and discovery, including (1) propounding additional written discovery and responding to likely numerous sets of written discovery to Caregivers; (2) depositions of the Caregivers and Defendants' 30(b)(6) witnesses, managers, and executives; (3) third party discovery to the various facilities where Caregivers worked, and (4) expert discovery. *Id.* Likely before all this necessary discovery is even completed, Plaintiffs also would inevitably need to obtain a ruling that Frontier Management LLC and Frontier Senior Living, LLC are indeed, employers of Caregivers at assisted senior living communities, an issue that Defendants have and would continue to vigorously contest, given that a large number of such locations are owned or jointly operated by other entities. *Id.,* ¶ 83. If Frontier Management LLC and Frontier Senior Living, LLC are found not to be employers at such locations, the value of the case would likely plummet. *Id.*

If Plaintiffs successfully overcame these obstacles, Plaintiffs would still face the risks associated with certification and proving liability as to all of Plaintiffs' claims, a questionable feat in light of developments in wage and hour and class and collective action law as well as the legal and factual grounds that Defendants have asserted to defend this action. *Id., ¶* 84. Off-the-clock claims are difficult to certify for class treatment, given that the nature, cause, and amount of the off-the-clock work may vary based on the individualized circumstances of the worker.[9] While Plaintiffs are confident that they would establish that common policies and practices give rise to the off-the-clock work for Caregivers,

[9] *See, e.g., In re AutoZone, Inc., Wage & Hour Emp't Practices Litig*., 289 F.R.D. 526, 539 (N.D. Cal. 2012), aff'd, No. 17-17533, 2019 WL 4898684 (9th Cir. Oct. 4, 2019); *Kilbourne v. Coca-Cola Co.*, No. 14CV984-MMA BGS, 2015 WL 5117080, at *14 (S.D. Cal. July 29, 2015); *York v. Starbucks Corp*., No. CV 08-07919 GAF PJWX, 2011 WL 8199987, at *30 (C.D. Cal. Nov. 23, 2011); *Forrester v. Roth's I. G. A. Foodliner, Inc.,* 475 F.Supp. 630, 634 (D. Or. 1979) (employees maybe estopped from "off-the-clock" claims when they have deliberately underreported their hours and/or routinely signed payroll records, certifying them to be true and accurate); *Hawkins v. Securitas Sec. Servs. USA, Inc*., 280 F.R.D. 388, 392 (N.D. Ill. 2011) (certifying Illinois Rule 23 subclass asserting off-the-clock work performed during training and orientation but denying certification of subclass asserting off-the-clock work performed pre- and post- shift).

Class Counsel acknowledged that the work was performed by Caregivers holding various job titles at many different locations around the country, which were often owned and/or operated by numerous different companies, and varied in policies and practices, physical layouts, and the nature of the work varying by location. *Id.*, ¶ 84. Certification of off-the-clock work claims would further be complicated by the lack of documentary evidence and reliance on employee testimony, and Plaintiffs would likely face motions for decertification as the case progressed. *Id.*

Similar obstacles may also hinder class certification and proving their claims on the merits of Plaintiffs' class claims regarding Caregivers' meal and rest breaks, given that, the core factual allegations of Plaintiffs' claims are Defendants' alleged common policy and practice of requiring Caregivers to carry communication devices and respond to work related calls during their breaks, rendering such breaks on-duty. *Id.*, ¶ 85. Although California, Oregon, and Washington, share similar meal and rest break policies against "on-duty" breaks, courts in Oregon and Washington lack the abundance of case law existing in California regarding whether being required to carry and respond to communication devices would suffice to show breaks were on-duty and thus non-compliant. *Id*. Defendants were also poised to submit evidence and deposition testimony as to their defense, that communication devices were only provided to certain Caregivers, and among such Caregivers, only to Caregivers who were assigned to be on-call. *Id*. Had Defendants' evidence proved to be true, Plaintiffs' meal and rest break claims could have potentially failed at the class certification stage. Further, given that the substantive damages are largely driven by the alleged off-the-clock work and meal and rest breaks, and that the derivative and penalty claims are tethered to off-the-clock claims, Plaintiffs recognized that their potential failure to obtain class certification on the off-the-clock work and meal rest breaks could potentially result in the death knell of their derivative claims. *Id.*[10]

[10] Plaintiffs would encounter difficulties in proving Defendants' liability on the merits for various other reasons as well. Cottrell Decl., ¶¶ 86-89. For example, Section 260 of the FLSA indicates that at the court's discretion, liquidated damages may be denied if an employer shows that it had reasonable reason to believe its actions or omissions causing a violation of the FLSA was not unlawful and was made in good faith. 29 U.S.C. 260. On the California derivative claims, no penalties for waiting-time violations can be awarded unless the failure to pay wages is "willful," an element that Plaintiffs acknowledge given Defendants' policies and enforcement would have been difficult to prove. *See Smith v. Rae Venter Law Group*, 29 Cal.4th 345, 354 n.2 (2002) (holding that a good faith dispute that any wages are due will preclude an award of waiting time penalties). Defendants would no doubt be poised to submit evidence showing these additional penalties and damages would not be applicable here, and whether the Court agrees would be yet another risk Plaintiffs would need to undertake. Cottrell Decl., ¶ 87.

1 As to Plaintiff Wright's PAGA claims, Plaintiff Wright would first need to overcome similar
2 hurdles, including completing substantial amounts of written discovery and depositions. *See id.*, ¶¶ 81-
3 82. Even after successfully overcoming all hurdles and proving the merits of his claims, Plaintiff Wright
4 would further need to persuade the superior court to "stack" penalties under the PAGA. *Id.* The PAGA
5 allows an employee to present multiple PAGA violations (*e.g.*, for meal and rest violations, off-the-
6 clock work, and failure to reimburse) for a particular pay period. This, however, would be an uphill
7 battle, given that there is a significant chance that the Court would decline to stack on derivative
8 violations per employee per pay period where an employer shows that it maintains comprehensive,
9 facially compliant policies and training. *Id.*, ¶ 89.[11]

10 Plaintiffs would further likely need to move for and defend against motions for summary
11 judgment or adjudication, and would have been further required to take their claims to trial. Cottrell
12 Decl., ¶ 90. Even in the state action, where Plaintiff has already successfully fended off Defendants'
13 motion for summary judgment, the superior court had rejected Defendants' motion without prejudice,
14 giving Defendants the opportunity to file another motion, which it would undoubtedly do. *Id.* Finally,
15 Plaintiff would need to prepare for trial, which would require the presentation of percipient and expert
16 witnesses, as well as the consideration, preparation, and presentation of voluminous documentary
17 evidence and the preparation and analysis of expert reports. *Id.* Trials are inherently risky for all parties.
18 Although Plaintiffs believes that they could have been successful in proving these claims, and that
19 Defendants' evidence would not have been as persuasive, a trial on the off-the-clock claims and meal
20 and rest periods would have carried a high degree of risk.

21 These risks could have resulted in no recovery to the Class and Collective. Class Counsel's
22 perseverance in pursing the litigation for over three years, and their commitment to developing the
23 employees' claims and maximizing the Class and Collective recovery in the face of these risks warrant
24 an increase in the benchmark to one-third of the total recovery.

25

26 [11] *See Smith v. Lux Retail N. Am., Inc.*, No. C 13-01579 WHA, 2013 U.S. Dist. LEXIS 83562, at *9 (N.D. Cal. June 13, 2013) ("For the single mistake of failing to include commissions in the overtime
27 base, plaintiff has asserted five (count them, five) separate labor code violations that could lead to statutory penalties. One is a penalty for failure to pay overtime at the appropriate rate []. Another is for
28 denying employees minimum wage and overtime []. But is it plausible that we would really pile one penalty on another for a single substantive wrong?").

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3. Class Counsel's Skill Throughout the Litigation of this Matter and Extensive Background in this Field of Law Justifies the Fee Request.

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 U.S. Dist. LEXIS 49482, at *4 (N.D. Cal. Apr. 22, 2010). As described above, Class Counsel took on this case despite its complexity and risks, diligently prosecuted the case, and negotiated a substantial recovery. This factor also supports Class Counsel's fee request.

Class Members have been represented by highly experienced and skilled counsel who focus almost exclusively on wage and hour class actions. Cottrell Decl., ¶¶ 93. Class Counsel has been recognized as a leading plaintiffs' firm nationally for their work on behalf of employees in wage and hour litigation. *Id.*, ¶¶ 4-7. Class Counsel used its skill and experience to navigate the complex provisions of the FLSA and the wage and hour laws of the states where Caregivers worked, despite the vigorous and robust defense by Defendants' Counsel.[12] Accordingly, Class Counsel's expertise and skill in this area of law, coupled with their willingness to take on risky cases, justify the fee request.

4. Class Counsel Incurred a Financial Burden in Litigating this Case on a Contingency Fee Basis, Justifying the Fee Request.

"It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases." *Fischel v. Equitable Life Assurance Soc'y of U.S.*, 307 F.3d 997, 1008 (9th Cir. 2002). 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*, 380 F. Supp. 3d at 1021. Here, Class Counsel undertook all the risk of this litigation on a completely contingency fee basis, expending time and incurring expenses with the understanding that there was no guarantee of compensation or reimbursement. Class Counsel continued to expend time and incur

[12] *See Schroeder v. Envoy Air, Inc.*, No. CV 16-4911-MWF (KSx), 2019 U.S. Dist. LEXIS 76344, at *21 (C.D. Cal. May 6, 2019) (awarding 33% fee, finding that counsel "exercised considerable skill" in litigation, and "did so against experienced, highly skilled opposing counsel and on an entirely contingent basis.").

expenses even after the Court granted Defendants' Motion to Dismiss, which if upheld on appeal, would have guaranteed that Class Counsel would receive no compensation for their work on this case. 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.[13]

Substantial fee awards encourage attorneys to incur the risks of litigating 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.").[14] 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, Class Counsel committed themselves to developing and pressing Plaintiffs' legal claims to enforce the employees' rights and maximize the class and collective recovery despite Defendants' robust defense. Class Counsel have prosecuted this

[13] *See, e.g., Hightower,* 2015 U.S. Dist. LEXIS 174314, at *31 ("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); *In re Nuvelo, Inc. Sec. Litig.*, No. C 07-04056 CRB, 2011 WL 2650592, *2 (N.D. Cal. July 6, 2011) ("It 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 they might be paid nothing at all"); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.,* No. 2672 CRB (JSC), 2017 U.S. Dist. LEXIS 39115, at *727 (N.D. Cal. Mar. 17, 2017) (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").

[14] California courts further recognize "the amount of attorney fees typically negotiated in comparable litigation should be considered in the assessment of a reasonable fee in representative actions in which a fee agreement is impossible." *Lealao v. Beneficial Calif., Inc.*, 82 Cal.App.4th 19, 47 (2000). By doing so, courts can ensure that the awarded fee approximates the legal marketplace by being comparable to what clients and counsel would have likely negotiated at the outset of the matter. Notably, the typical contingency fee contract ranges from 20 to 40 percent of the total recovery—leaving Plaintiffs' requested attorneys' fee in the middle of the spectrum. *Chavez*, 162 Cal.App.4th at 64-65.

case wholly on a contingency basis, and have done so at great risk of never receiving any compensation due to the risky nature of class action litigation in general, and also due to the numerous factual and legal defenses presented by Defendants. *See* Cottrell Decl., ¶¶ 94-96, 104-110, 123-124. Class Counsel has spent $94,296.46 and has expended over 3,351 hours of time, with significant additional work remaining to be done, without receiving any compensation, all while passing on other potentially lucrative cases. *Id.* Accordingly, a one-third recovery for fees is appropriate.

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

As already discussed above, many, if not most, fee awards in class settlements of common fund cases in this Circuit *exceed* the 25% benchmark. *See, supra,* Section II.A. The same holds true for fee awards in common fund settlements of wage and hour class and collective actions. *See, e.g., Andrews v. Prestige Care, Inc.,* Case No. 2:18-cv-00378-JAM-KJN, ECF 34 (E.D. Cal. July 13, 2020) (Mendez, J.) (awarding one-third fee award in wage and hour class action settlement); *Watson,* 2020 U.S. Dist. LEXIS 166823, at *17 (observing courts generally award attorneys' fees in the 30-40% range in wage and hour class actions in settlements under $10 million); *Gonzalez v. CoreCivic of Tenn., LLC,* No. 1:16-cv-01891-DAD-JLT, 2020 U.S. Dist. LEXIS 184510, at *25-26 (E.D. Cal. Oct. 2, 2020) (approving one-third fee award in wage and hour class action settlement); *Romero v. Producers Dairy Foods, Inc.*, No. 1:05cv0484 DLB, 2007 U.S. Dist. LEXIS 86270, at *10 (E.D. Cal. Nov. 13, 2007) (in wage and hour action, observing "fee awards in class actions average around one-third of the recovery" and awarding fees in that amount) (citation omitted)).[15]

[15] *See also, Galeener v. Source Refrigeration & Hvac, Inc.*, No. 3:13-cv-04960-VC, 2015 U.S. Dist. LEXIS 193092, at *13 (N.D. Cal. Aug. 20, 2015) (approving one-third fee award of $10 million settlement); *Bennett v. SimplexGrinnell LP*, No. 11-cv-01854-JST, 2015 U.S. Dist. LEXIS 192870, at *21 (N.D. Cal. Sep. 3, 2015) (awarding 38.8% fee award of $4.9 million settlement fund). Numerous courts have granted fees based on the percentage that Plaintiff requests here. *See, e.g.*, *Soto, et al. v. O.C. Commc'ns, Inc., et al.*, Case No. 3:17-cv-00251-VC, ECF 304, 305 (N.D. Cal. Oct. 23, 2019) (finding SWCK fees based on one-third of the common fund in $7.5 million hybrid FLSA/Rule 23 wage and hour class and collective action settlement justified); *Shaw*, 2019 U.S. Dist. LEXIS 239897, at *5 (approving one-third fee award); *Villalpando*, 2016 U.S. Dist. LEXIS 182521, at *4 (same); *Jones, et al. v. CertifiedSafety, et al*., 3:2017-cv-02229, ECF 232 (N.D. Cal. June 1, 2020) (awarding SWCK fees based on one-third of the common fund); *Williams v. Costco Wholesale Corp.*, Case No. 02-CV-2003-IEG (AJB), 2010 U.S. Dist. LEXIS 67731, at *3, 17-18 (S.D. Cal. July 7, 2010) (awarding fees based on 40% of the common fund); *Singer v. Becton Dickinson & Co.*, No. 08-CV-821-IEG (BLM), 2010 U.S. Dist. LEXIS 53416, at *23 (S.D. Cal. June 1, 2010) (awarding fees based on one-third of the common fund) (citations omitted)); *Wren v. RGIS Inventory Specialists*, No. C-06-05778 JCS, 2011 U.S. Dist. LEXIS 38667, at *79, 84 (N.D. Cal. Apr. 1, 2011) (approving attorneys' fee award of just under 42% of common fund).

These similar cases further support the requested fee award.

6. The Overwhelmingly Positive Reaction of the Class Justifies 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). Thus, where no members of the class object to a proposed fee award that is communicated in the notice, such absence of objections support an increase in the benchmark rate. *See Thieriot,* 2011 U.S. Dist. LEXIS 44852, at *17 (citing *In re Omnivision Techs., Inc*., 559 F.Supp.2d at 1048)); *see also, 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."); *In re Heritage Bond Litig*., 2005 WL 1594403 at * 21 (C.D. Cal. 2005) ("The absence of objections or disapproval by class members to Class Counsel's fee request further support finding the fee request reasonable.").

Here, Notices of Settlement, which included disclosure of the potential fee award of $3,166,663.50, were sent via regular mail and electronic mail to 20,381 Class Members, and to date, ***not a single Class Member has objected to the requested attorneys' fees award***. *See* Lange Decl., ¶¶ 13; Cottrell Decl., ¶¶ 51-52, 122. The lack of objections by Class Members to the Settlement or the disclosed fee provision demonstrates the Class's approval of the result in this case and further bolsters counsel's reasonable request for fees.

7. A Lodestar Cross-Check, if Applied, Supports the Reasonableness of the Requested Fee Award.

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, this cross-check is not required.[16] While Plaintiffs submit that a cross-check is not necessary in this case, even if the Court

[16] *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

were to employ one, the cross-check supports increasing the benchmark rate here.

Class Counsel's accompanying declaration provide a summary of the lodestar, time, and hourly rates, as well as descriptions of the nature of work performed. *See* Cottrell Decl., ¶¶ 94-119, Ex. A. Class Counsel's rates have been found reasonable and consistent with the market by California district courts. *Id.*, ¶¶ 102-103; *see, e.g., Amaraut v. Sprint/United Mgmt. Co.,* No. 19-cv-411-WQH-AHG, 2021 U.S. Dist. LEXIS 147176, at *28-29 (S.D. Cal. Aug. 5, 2021) ("The Court finds the fee award is further supported by a lodestar crosscheck, whereby it finds that the hourly rates of [SWCK] are reasonable, and that the estimated hours expended are reasonable."); *Villafan v. Broadspectrum Downstream Servs., Inc., et al.*, Case No. 3:18-cv-06741-LB, ECF 150 (N.D. Cal. April 9, 2021) (finding SWCK's 2021 rates "[a]s to the lodestar cross-check, the billing rates are normal and customary (and thus reasonable) for lawyers of comparable experience doing similar work."); *Shaw*, 2019 U.S. Dist. LEXIS 239897, at *3 (finding the 2018 "hourly rates charged by [SWCK] are within the prevailing range of hourly rates charged by attorneys providing similar services in class action, wage-and-hour cases in California" and "[t]he hourly rates of [SWCK] also have consistently and recently been approved as reasonable by the courts.") (collecting cases).

To-date, Class Counsel has spent over 3,351 hours litigating this case, for a lodestar of $2,167,230, not including all the work remaining to bring the Settlement to a close, which will require additional time responding to Class Member inquiries, attending the Final Approval Hearing, overseeing the administration of the Settlement, and reporting to the Court. Cottrell Decl., ¶¶ 94-96, Ex. A. The requested fee award represents a modest 1.46 multiplier of the estimated lodestar. *Id.*, ¶ 98.

This multiplier falls well within the customary range for common fund cases like this one where class counsel has taken the case on a contingency fee arrangement. *See Laffitte,* 1 Cal.5th at 506 (approving one-third fee award with multiplier between 2.03 and 2.13); *see also Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224 at 255 (2001) (noting that multipliers can range from 2 to 4 or higher); *Van Vranken v. Atlantic Richfield Co.,* 901 F.Supp.294, 298 (N.D. Cal. 1995) ("Multipliers in

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 also Lopez v. Youngblood,* No. cv-F-07-0474 DLB, 2011 U.S. Dist. LEXIS 99289, at *39 (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").

the 3-4 range are common in lodestar awards for lengthy and complex class action litigation"); *Vizcaino*, 290 F.3d at 1051 & n.6 (affirming multiplier of 3.65 in a common fund case, and noting that vast majority of common fund cases result in a multiplier of between one and four).[17]

Moreover, a district court "*must* apply a risk multiplier to the lodestar 'when (1) attorneys take a case with the expectation they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence that the case was risky. Failure to apply a risk multiplier in cases that meet these criteria is an abuse of discretion." *Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th Cir. 2016) (quoting *Stanger v. China Elec. Motor, Inc*., 812 F.3d 734, 741 (9th Cir. 2016) (emphasis in original, internal quotation marks omitted)). In this matter, Class Counsel took on this class action with an expectation that at least a modest risk enhancement would be applied to any fee request, the hourly rates cited are not adjusted for risk and, as set forth above, this case involved substantial risk. Accordingly, a modest multiplier would be appropriate.

C. Class Counsel's Costs Are Reasonable and Compensable and Should Be Approved.

In addition to being providing for awards of reasonable attorneys' fees, the FLSA and state wage and hour laws provide for the reimbursement of costs. *See, e.g.,* 29 U.S.C. 216(b); Fed. R. Civ. P. 23(h); Cal. Lab. Code § 1194; 820 ILCS §§ 105/12, 115/14; 815 ILCS §§ 205/2, 505/10a; ORS §§ 652.200, 652.615, 653.055; RCW §§ 49.12.150, 49.46.090, 49.48.030, 49.52.070; *see also Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (holding that attorneys may recover reasonable expenses that would typically be billed to paying clients in non-contingency matters.). 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,at *5.

Here, Class Counsel's current costs total $94,296.46. Cottrell Decl., ¶ 124, Ex. B. The expenses

[17] *See also*, *e.g., Shaw*, 2019 U.S. Dist. LEXIS 239897, at *2 (approving fee award representing 2.4 multiplier or less); *Abante Rooter & Plumbing v. Pivotal Payments*, No. 3:16-cv-05486-JCS, 2018 U.S. Dist. LEXIS 232054, at *26 (N.D. Cal. Oct. 15, 2018) (approving fee award representing a 2.7 multiplier and citing *Vizcaino*); *Cifuentes v. Ceva Logistics U.S., Inc*., No. 3:16-cv-01957-H-DHB, 2017 U.S. Dist. LEXIS 176279, at *23 (S.D. Cal. Oct. 23, 2017) (approving one third fee award to SWCK representing a multiplier of 3); *Vandervort v. Balboa Capital Corp.,* 8 F.Supp.3d 1200, 1210 (C.D. Cal. 2014) (awarding one-third of fund, which was 2.52 multiplier of lodestar); *Hopkins v. Stryker Sales Corp*., No. 11-CV-02786-LHK, 2013 WL 496358, at *6 (N.D. Cal. Feb. 6, 2013) (approving fee award that represented a multiplier of 2.76 as falling within the "majority" range for risk multipliers); *Spann v. J.C. Penney Corp.,* 211 F.Supp.3d 1244, 1265 (C.D. Cal. 2016) (applying a 3.07 multiplier to award $13,500,000.00 in attorneys' fees).

incurred in this litigation to date are described in the accompanying declaration of Carolyn H. Cottrell. *See* Cottrell Decl., ¶¶ 123-125, Ex. B. 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, FLSA notice costs, copying and printing costs, 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 the Actions, and pursuant to the terms of the Settlement, Defendants do not object to the request for costs. Cottrell Decl., ¶ 126. Further, no Class Member has objected to the request for costs. *See Id.*, ¶¶ 51-52, 127; Lange Decl., ¶ 13. Class Counsel therefore requests reimbursement of costs in the amount of $94,296.46.

D. The Court Should Approve the Service Awards to Plaintiffs Wright, Stanley, Quam, and Lewis, and to Gracey.

Courts have broad discretion to approve service awards for class representatives, *see In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000), which "are fairly typical in class action cases," *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). 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…" *Id.* at 958-59. Such awards provide "inducement [for class members] to lend their names and services to the class." *In re Oracle Sec. Litig.*, No. C-90-0931-VRW, 1994 U.S. Dist. LEXIS 21593, at *2 (N.D. Cal. June 16, 1994). In evaluating the appropriateness of service awards, courts may consider "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." *Staton*, 327 F. 3d at 977.

Here, Plaintiff Wright respectfully requests a service award of $10,000 and Plaintiffs Stanley,

Quam, and Lewis respectfully request a service award of $5,000 each, which are reasonable service awards that would compensate them for the critical role they played in this litigation as Class Representatives, and the time, effort, and risks they undertook in helping secure the result obtained on behalf of the Class Members.[18] *See* Cottrell Decl., ¶ 128. Plaintiffs further request a service award of $5,000 for Emily Gracey, who agreed to dismiss her related PAGA-only action in furtherance of the Settlement. *Id.*, ¶ 131. Such service awards are fair when compared to the payments approved in similar cases by courts in this District.[19] Such service awards are specifically warranted in this case, where, despite risks to themselves, Plaintiffs took great effort to litigate this action, culminating in significant relief for thousands of their fellow class members.

First, Plaintiffs expended substantial time – hundreds of hours total – assisting in the prosecution of the claims, including providing information and documents to counsel, assisting in the drafting of pleadings and other documents, and regularly discussing the facts and proceedings, as well as the settlement negotiations and ultimately, the settlement – with Class Counsel. *See* Cottrell Decl., ¶¶ 128, 130-132; Wright Decl., ¶¶ 7-25 (estimating total of 46 hours expended); Stanley Decl., ¶¶ 6-22 (estimating total of 13-17 hours expended); Lewis Decl., ¶¶ 6-22 (estimating total of 31-54 hours expended); Quam Decl., ¶¶ 6-22 (estimating total of 28-29 hours expended).

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[18] Defendants do not oppose the requested payments to the Plaintiff as a reasonable service award. *See* Settlement, ECF 134-2, ¶¶ 2.ff, 21.a, 26.

[19] *See, e.g., Bond v. Ferguson Enterprises, Inc.*, No. 1:09–cv–1662 OWW MJS, 2011 WL 2648879 (E.D. Cal. June 30, 2011) (approving $11,250 service award each to two class representatives in a meal break class action); *Vasquez*, 266 F.R.D. at 493 (approving service awards of $10,000 each from a $300,000 settlement in a wage and hour class action); *West v. Circle K Stores, Inc.*, No. CIV. S-04-0438 WBS GGH, 2006 U.S. Dist. LEXIS 76558, at *28 (E.D. Cal. Oct. 19, 2006) ("the court finds plaintiffs' enhancement payments of $15,000 each to be reasonable."). Numerous other courts in this Circuit have approved similar service awards. *See, e.g., Amaraut,* 2021 U.S. Dist. LEXIS 147176, at *29 (approving $15,000 and $10,000 service awards); *Villalpando*, 2016 U.S. Dist. LEXIS 182521, at *4 (granting service awards of $15,000 to three named plaintiffs in their contribution to a $13.5 million dollar settlement); *Guilbaud v Sprint/United Mgmt. Co., Inc.*, No. 3:13-cv-04357-VC, ECF No. 181 (N.D. Cal. Apr. 15, 2016) (approving $10,000 service payments for each class representative in FLSA and California state law representative wage and hour action); *Garner v. State Farm Mut. Auto. Ins. Co.*, *supra*, at *17 n.8 (N.D. Cal. Apr. 22, 2010) ("Numerous courts in the Ninth Circuit and elsewhere have approved incentive awards of $20,000 or more where, as here, the class representative has demonstrated a strong commitment to the class"); *Louie v. Kaiser Found. Health Plan, Inc.*, No. 08cv0795 IEG RBB, 2008 U.S. Dist. LEXIS 78314, at *18 (S.D. Cal. Oct. 6, 2008) (approving "$25,000 incentive award for each Class Representative" in wage an hour settlement); *Glass v. UBS Fin. Servs., Inc.*, No. C-06-4068, 2007 WL 221862, at * 17 (N.D. Cal. Jan. 26, 2007) (approving $25,000 service award to each of four class representatives because of risk incurred by putting their names on complaint and providing substantial information in informal discovery).

Second, each Plaintiff took significant reputational risk by publicly affiliating themselves with litigation against their employer. *See* Cottrell Decl., ¶ 128; Wright Decl., ¶¶ 8, 26-29; Stanley Decl., ¶¶ 9-10, 23-25; Lewis Decl., ¶¶ 9-10, 23-25; Quam Decl., ¶¶ 9-10, 23-25; *Millan v. Cascade Water Servs.,* No. 1:12-cv-01821-AWI-EPG, 2016 U.S. Dist. LEXIS 72198, at *37 (E.D. Cal. May 31, 2016) (reasoning that service 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.").

Third, Plaintiffs agreed to a general release of all claims, as did Ms. Gracey. *See* Cottrell Decl., ¶ 132; Wright Decl., ¶ 29; Stanley Decl., ¶ 26; Lewis Decl., ¶ 26; Quam Decl., ¶ 26. This substantial sacrifice supports the service awards sought here. *See Schaffer v. Litton Loan Servicing, LP,* No. CV 05-07673 MMM (JCx), 2012 U.S. Dist. LEXIS 189830, at *64 (C.D. Cal. Nov. 13, 2012).

Fourth, Plaintiffs persevered in pursuing litigation on behalf of their respective Classes over the course of a multiple years. *In re Toys "R" Us-Del., Inc. Fair & Accurate Credit Transactions Act (FACTA) Litig.,* 295 F.R.D. 438, 471 (C.D. Cal. 2014) ("When litigation has been protracted, an incentive award is especially appropriate."). Despite the protracted litigation in this Action, Plaintiffs were prepared to persevere through further litigation and trial if the Settlement had not been reached.

Fifth, the proposed service awards total $30,000, representing a modest comparison to the overall benefits of the settlement and recovery to the class, and representing less than 0.32% of the total funds that the Defendants will expend to settle this lawsuit.[20] Cottrell Decl., ¶ 129. The modest amount of the requested service awards in relation to the excellent settlement amount weighs in favor of their appropriateness.

Finally, no Class Members objected to the proposed service awards, which were contained in the Notice. *See Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528-29. Ultimately, Plaintiffs invested significant time and effort in litigating this case on behalf of the Class Members through its successful resolution, while also incurring the reputational risk of doing so. The proposed service awards should be finally approved.

[20] *See, e.g., Hightower*, 2015 U.S. Dist. LEXIS 174314, at *37 (approving service awards of up to $10,000 with a total value of 1.5% of the maximum settlement amount); *Staton*, 327 F.3d at 976-77; *Alberto v. GMRI, Inc*., 252 F.R.D. 652, 669 (E.D. Cal. 2008).

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V. CONCLUSION

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

Date: January 24, 2023

Respectfully Submitted,

/s/ Carolyn H. Cottrell

Carolyn H. Cottrell
Ori Edelstein
Michelle S. Lim
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Attorneys for Plaintiffs, and the Classes and Collective

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, Eastern District of California, by using the Court's CM/ECF system on January 23, 2023.

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 H. Cottrell*
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