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Attorneys for Plaintiffs and the Class

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

* * *

JULIAN SMOTHERS, an individual, ASA DHADDA, an individual;

Plaintiffs,

vs.

NORTHSTAR ALARM SERVICES, LLC, a Utah corporation; and Does 1–50, inclusive,

Defendants.

Case No. 2:17-CV-00548-KJM-KJN

CLASS ACTION

NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES, COSTS AND ENHANCEMENT AWARD

Date: December 6, 2019
Time: 10:00 a.m.
Courtroom: 3

Judge: Hon. Kimberly J. Mueller

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I. INTRODUCTION

On or about February 23, 2018, Plaintiffs Julian Smothers and Asa Dhadda (collectively "Plaintiffs"), filed a Motion for Preliminary Approval of Joint Stipulation of Class Settlement and Conditional Certification of FLSA Collective ("Motion"), seeking the Court's approval of a Joint Stipulation for Class Settlement ("the Settlement") between themselves and Defendant Northstar Alarm Services, LLC ("Defendant") (collectively "the Parties"). (ECF No. 39). The Settlement establishes a Gross Settlement Amount of $1.8 Million for a group of 94 putative class members in California (the "California Class") and 285 putative FLSA collective action members nationwide (the "FLSA Group"). On or about January 22, 2019, approximately 11 months later, the Court issued an order granting in part and denying in part Plaintiffs' Motion. (ECF No. 55). Plaintiffs thereafter filed a Renewed Motion for Preliminary Approval, which was granted by the Court on or about August 12, 2019. (ECF No. 70). The Court's preliminary approval order requires that Plaintiffs file their Motion for Attorneys' Fees, Costs and Enhancement Award not later than fourteen (14) days before the Settlement Class' deadline to opt-out, opt-in or object to the Settlement. (*Id.*). Plaintiffs file the instant Motion in compliance with the Court's Order.

The proposed Settlement is the result of nearly three years of litigation resulting in an extremely favorable result for the Settlement Class. The Class Members' reaction to the Settlement to date has been highly positive, evidenced by the fact that none of the Class Members have thus far opt-out of the Settlement or objected to the Settlement on any basis. The Settlement Class has thus far claimed 88.84% of the total available net settlements for the California Class and the FLSA Group, and there are still two weeks for submission of additional claims. Moreover, the average Class Member projects to receive a settlement payment of approximately $4,034.65, which is higher than the average recovery in cases of this type. This is a significant benefit to the Class Members, all of whom are hourly wage earners who would be unlikely to have the means to individually contract with an experienced attorney on an hourly basis.

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Further, as described *infra*, the Settlement also provides significant non-monetary value to current and future employees of Defendant because of the extensive changes Defendant made to its workplace policies, practices and procedures as a result of the settlement negotiations in this case. All of these benefits were obtained by Class Counsel without incurring additional years of litigation through trial and eventual appeals, and thus will bring immediate relief to the Class. The requested fees, costs and enhancement award should be approved.

II. SUMMARY OF THE SETTLEMENT

For ease of reference, Plaintiffs provide the following overview of the proposed Settlement Class and general details of the Settlement fund.

Gross Settlement and Net Settlement Amounts

Under the terms of the Settlement, the $1.8 Million Gross Settlement Amount ("GSA") is to be distributed as follows:

(1) Attorneys' fees of not more than $450,000 (25% of the GSA) to be paid to Class Counsel[1];

(2) Litigation costs of not more than $20,000 to be paid to Class Counsel;

(3) Settlement administration costs of up to $50,000 to be paid to Phoenix Settlement Administrators as the third-party settlement administrator or to other third-party service providers engaged to locate potential class members;

(4) Plaintiffs to receive incentive fees of not more than $20,000 ($10,000 each);

(5) PAGA penalty of $50,000, 75% of which ($37,500) will be paid to the California Labor and Workforce Development Agency and 25% of which ($12,500) will be paid to the Class Members; and

(6) Net Settlement Amount ("NSA"), estimated to be $1,222,500, available to the Settlement Class Members who participate in the Settlement.

[1] In response to the Court's January 22, 2019 Order, Class Counsel decreased their maximum attorneys' fee threshold under the Settlement from 33% ($600,000) to 25% ($450,000), which will correspondingly increase each participating Settlement Class Member's individual share of the Settlement.

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The GSA will be allocated between the FLSA Group and the California Class as follows: $1,000,000 to the FLSA Group and $800,000 to the California Class. The deductions from the GSA to reach the NSA will be deducted from the portion of the GSA allocated to the FLSA Group and to the California Class pro rata except that the PAGA penalty will be allocated solely to the California Class. With specific reference to the instant Motion, the Settlement provides that "[t]he 'California Class Counsel Fees' are Class Counsel's Court-approved fees for the California Class, which are not to exceed one-fourth (1/4) of the California Class Gross Settlement Amount," and that "[t]he 'FLSA Potential Class Counsel Fees" are Class Counsel's Court-approved fees or the FLSA Group, which are not to exceed one-fourth (1/4) of the FLSA Actual Gross Participation Amount." (ECF No. 60-1 at 11:10-12; 13:4-6).

Given that the deadline for Settlement Class Members to timely opt-out, submit a Claim Form or object to the Settlement has not yet accrued, and in view of the fact that a Settlement Class Member may evaluate the instant Motion as part of his or her decision to take a specific course of action with respect to the Settlement, Plaintiffs submit the instant Motion under the assumption that Class Counsel seek the maximum attorneys' fees and litigation costs that may be obtained under the Settlement, anticipating that Plaintiffs will submit a supplemental brief and corresponding declarations *after* the aforementioned deadlines have expired, providing updated calculations in attorneys' fees sought to reflect the actual participation of the FLSA Group. In other words, Class Counsel will not seek *more* in attorneys' fees than what the Settlement provides, but may ultimately request *less*.

Any difference between the attorneys' fees, litigation costs, administration costs, incentive fees, and PAGA penalty permitted under the settlement and actually awarded by the court following hearing on final approval will revert to the NSA and be allocated pro rata to the FLSA group and to the California Class. Additionally, Defendant's share of any applicable payroll taxes shall be paid by Defendant separately from the settlement, such that the Settlement Class will not have to bear those costs. Thus, as mentioned above, the NSA may increase after final approval, but it will not decrease.

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III. CLASS COUNSEL'S FEE AND COST REQUEST SHOULD BE GRANTED

Rule 23 permits a court to award "reasonable attorney's fees... that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). In the Ninth Circuit, the benchmark for percentage-of-recovery awards is 25 percent of the total settlement award, which may be adjusted up or down. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998); *Ross v. U.S. Nat'l Bank Ass'n*, No. C 07–02951, 2010 WL 3833922, at *2 (N.D. Cal. 2010). Factors that may justify departure from the benchmark include: (1) the result obtained; (2) the risk involved in the litigation; (3) the contingent nature of the fee; (4) counsel's efforts, experience, and skill; and (5) awards made in similar cases. *Vizcaino v. Microsoft Corp*. (*Vizcaino II*), 290 F.3d 1043, 1048–49 (9th Cir. 2002).

A. The Attorneys' Fees Request Is Reasonable

The "common fund doctrine" allows an award of "reasonable" attorneys fees from the fund recovered as a whole. *Boeing Co. v. Van Gemet*, 444 U.S. 472, 478-479 (1980). Under this doctrine, Courts recognize two methods for calculating "reasonable" attorney fees in civil class actions; the lodestar/multiplier method and the percentage of recovery method. *Fischel v. Equitable Life Assur. Soc. Of U.S.*, 307 F.3d 997, 1006-1010 (9th Cir. 2002). While either approach is permissible, in each case the Court must exercise discretion to produce a reasonable result. *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 942-944 (finding that a district court, "abuses that discretion when it uses a mechanical or formulaic approach that results in an unreasonable reward."). As described herein, Plaintiffs' Counsel's attorney fee request is reasonable under either the percentage of recovery method or the lodestar/multiplier method.

B. The Requested Attorneys' Fees Are Appropriate Under the Percentage of the Common Fund Doctrine

In complex litigation, Courts prefer the application of the percentage of recovery method. *Staton v. Boeing Co*., 327 F.3d 938, 968 (9th Cir. 2003). Under this method, the court awards a "reasonable" percentage of the fund sufficient to provide plaintiff's attorneys with a "reasonable" fee. To determine a "reasonable" percentage, the court considers the following: 1) awards in

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similar cases; 2) the experience and skill of class counsel; 3) the risk of non-payment; 4) the complexity of the issues involved; and 5) the amount of time and resources expended. *Gunter v. Ridgewood Energy Corp*. 223 F.3d 190, 194, fn. 1 (3rd Cir. 2000). Here, Class Counsel seeks an award of fees equivalent to 25 percent of the GSA, which is the benchmark in the Ninth Circuit. *Schiller v. David's Bridal, Inc.*, 2012 WL 2117001, at *17 (E.D. Cal. 2012).

This theory also rests on the understanding that attorneys should normally be paid by their clients and that unless attorneys' fees are paid out of the common fund, those who benefited from the fund would be unjustly enriched. *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal. 3d 917, 943; *Save El Toro Ass'n v. Days* (1979) 98 Cal. App. 3d 544, 548–49. To prevent this unfair result, courts exercise their inherent equitable powers to assess attorneys' fees against the entire fund, thereby spreading the cost of those fees among all those who benefited. *Serrano III*, 20 Cal. 3d at 35. "A court, in the exercise of its equitable discretion, may decree that those receiving the benefit should contribute to the costs of its production." *Save El Toro Ass'n*, 98 Cal. App. 3d at 548. As this approach "better approximates the workings of the marketplace than the lodestar approach," there is "a greater judicial willingness to evaluate a fee award as a percentage of the recovery" in common fund cases. *Lealao*, 82 Cal. App. 4th at 31, 48.

In the immediate case, Class Counsel requests an attorney fee award of 25 percent of the California Class GSA of $800,000, and an attorney fee award of 25 percent of the FLSA Group Potential Gross Settlement Amount of $1,000,000, equaling a combined fee award of $450,000. As demonstrated below, all relevant factors support this fee as inherently reasonable in the context of this litigation.

1. Class Counsel Achieved an Outstanding Result for the Settlement Class

As described *supra*, the "common fund" doctrine rests in part on the proposition that an attorney has obtained something of *value* for persons other than himself or his client, therefore entitling the recovering party, under cooperating theories of equity and unjust enrichment, to seek a fee based on the *value* of what was obtained. *See, e.g., Serrano III*, *supra* at 34; *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Vincent Hughes Air West Inc.* (9th Cir. 1977) 557

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F.2d 759, 769. First, in addition to the monetary amount of the award, it is important to note that Class Counsel also obtained significant value for the Settlement Class in the form of changes to Defendant's workplace policies, practices and procedures. These changes are detailed in the Settlement and include, but are not limited to, Defendant's commitment to: (1) ensure that it will pay Alarm Installation Technicians and Lead Technicians performing work in California in accordance with California's minimum wage and overtime laws; (2) notify its California non-exempt employees that they are authorized to take a first and second meal period and rest periods in a manner that complies with California law; and (3) modify its on-call policies to state that employees are not to monitor their phones during off-duty hours or during meal and rest periods. (ECF No. 60-1 at 22:9 – 23:18). While these and other policy changes do not have specific monetary value, they are of unquestionable benefit to Settlement Class Members currently employed by Defendant, as well as to those future employees of Defendant who will benefit from a workplace that complies with California law. These changes should be taken into account in evaluating the value obtained by Class Counsel.

The monetary aspects of the Settlement also justify the requested award. The average Settlement Class Member recovery is approximately $4,034.65, a very favorable amount in comparison with other wage and hour class action cases. (Declaration of Jared Hague at ¶11). As previously detailed in Plaintiffs' Motion for Preliminary Approval, the Settlement represents a reasonable compromise of the maximum potential recovery of the California Class and FLSA Group Members' claims based on the arguments and counterarguments applicable to the respective groups. The FLSA Group stands to recover not less than $700,000 against an estimated $772,000, representing approximately 90% of the value of the FLSA Group's claims. (*See* ECF No. 39 at 10:27 – 11:1; ECF No. 60-1 at 5:17-21).

The California Class stands to recover not less than $522,500 against an estimated $1.9 million in maximum exposure, assuming certification of all of Plaintiffs' claims and a jury verdict for 100 percent of Plaintiff's estimated damages. However, the maximum estimated value of the California Class' claims as it was estimated in February 2018 would likely be lower as of the filing of this Motion following the California Second District Court of Appeals in *Naranjo, et*

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al. v. Spectrum Security Services, Inc., 2019 WL 5078721 (2nd Cal. App. Ct. October 10, 2019), as a portion of the statutory penalties contributing to Defendant's maximum potential liability were attributable to alleged missed meal and rest periods.

The value of the Settlement is also evidenced by the fact that none of the California Class Settlement Members have opted out of the Settlement, approximately 40% of the FLSA Group has opted into the Settlement thus far, and none of the Class Members have objected to the Settlement. The Settlement Class' favorable response to the Settlement weighs strongly in support of the reasonableness.

2. Class Counsel Undertook Significant Risk In Representing the Class

Virtually all wage and hour class action litigation entails a high degree of risk in California due to the contingent nature of the litigation, described *infra*, and the ever-changing landscape of California law. For example, during the pendency of this case, the Ninth Circuit adopted the position of the Department of Labor to confirm that employers may permissibly average the total weekly earnings of employees to determine whether the employer has satisfied its minimum wage and overtime obligations. *Douglas v. Xerox Business Services, LLC*, 875 F.2d 884 (9th Cir. 2017). As mentioned above, a California appellate court recently held that a defendant's failure to pay meal and rest period premiums does not necessarily trigger a corresponding violation of California Labor Code sections 226 or 204, which potentially eliminates a significant source of statutory penalties under each of those respective statutes. *Naranjo, et al., supra* at 2019 WL 5078721.

These changes in the law present difficulty and risk both in terms of certification and a defendant's ultimate exposure even if class certification may be maintained throughout the life of a case. Also, these frequent changes in the law are in contrast to other more settled areas of the California law. Statutory changes during the course of litigation also present risk. For example, AB 1513 significantly altered the value of a number of class action litigation cases following its passage, and the risk of such legislation increases correspondingly with the duration of a case. Therefore, this case did, in fact, entail a degree of risk to the Plaintiffs, underscoring the

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reasonableness of the Settlement as a whole and the amount of attorneys' fees sought by Class Counsel.

3. The Contingent Nature of the Case Presented Additional Risk

As a contingency fee case, the immediate action posed significant financial risk of non-payment when Class Counsel chose to accept the representation. Courts uniformly recognize that this risk plays a significant factor when determining whether an attorneys requested award is "reasonable." *See, e.g., People v. Yuki* (1995) 31 Cal. App. 4th 1754, 1771; *In re Medical X-Ray Anti-Trust Litigation* (1998) 1998 WL 661515 at *7. Indeed, as a contingent fee, "involves a gamble on the result, [the court] may properly provide for a larger compensation than would otherwise be reasonable." *Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1133. This notion conforms to basic public policy which seeks to incentivize attorneys to take contingency fee cases—cases which tend to act as the exclusive means of legal remedy for lower income communities. *Id.*

Class Counsel's representation of the interest of the Class Members—on a contingency basis alone—has extended for over nearly three years now, since February 2017, and has required counsel to forego significant other work and required the advancement of costs at a time when routine business expenses still had to be met. (Declaration of Brett Sutton at ¶¶22-24). Through the investment of substantial effort and resources, including the filing of a Motion for Class Certification, Class Counsel has secured an outstanding settlement on behalf of the Class Members. An attorneys' fee award that represents 25% of the settlement fund reflects the real economics that have been passed on to the members of the Settlement Class and the true risks of the case, and is therefore consistent with the market value for work fully performed. In fact, courts have exceeded the 25% benchmark for attorney fee awards in cases where counsel took the case on a contingency basis and the case lasted for only two years. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1377 (9th Cir. 1993). Therefore this factor strongly supports the reasonableness of the requested fee award.

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4. Class Counsel Provided Valuable Class Action Experience to the Class

Class Counsel's request is further bolstered by the significant experience and skill Class Counsel provided to the immediate litigation. Among the numerous accomplishments expounded on in detail in the accompanying declaration, lead counsel S. Brett Sutton was elected by the Governors of the College of Labor and Employment Lawyers as a Fellow in 2016; he has been listed as a Northern California Super Lawyer for the past six years; has been appointed as class counsel in numerous wage and hour class actions and has recovered millions of dollars for Plaintiffs in such cases throughout the years and has also appeared as counsel for defendants in several wage and hour class action lawsuits. (Sutton Decl. at ¶¶ 3-14). Attorney Jared Hague is also highly experienced in cases of these types and has practiced exclusively in the area of employment law during his career. (Hague Decl. at ¶¶3-5.)

Class Counsel's skill and experience was a significant contributing factor in their ability to provide the Settlement Class with real and immediate monetary relief given the complexity and potential duration of the case and supports the reasonableness of the requested award.

5. Awards In Similar Cases

The requested percentage is in line with the Ninth Circuit's benchmark for percentage of fund cases, and is less than the awards approved and obtained through settlement in other wage-and-hour class actions in this district:

(1) *Bond v. Ferguson Enterprises, Inc.*, No. 1:09–cv–01662– OWW–MJS, Docket No. 59 (E.D. Cal. June 30, 2011) (court approved attorney's fees in the amount of 30% of the common fund);

(2) *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482 (E.D. Cal. 2010) (wage-and-hour action putative class-action settlement where court approved award of attorney's fees in the amount of 33.3% of the common fund);

(3) *Benitez v. Wilbur*, No. 1:08–cv–01122 LJO GSA, Doc. No. 52 (E.D. Cal., Dec. 15, 2009) (awarding 33.3% of the benefit to the class in attorney's fees); (4) Chavez v. Petrissans, (Case No. 1:08–cv–00122 LJO GSA, Doc. No. 89 (E.D. Cal. Dec. 15, 2009) (court approved awards of attorney's fees of 33.3% of the common fund);

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(5) *Romero v. Producers Dairy Foods, Inc.*, No. 1:05–cv–0484– DLB, 2007 WL 3492841, at * 4 (E.D. Cal. Nov.14, 2007) (class action settlement where court approved attorney's fees in the amount of 33% of common fund); and

(6) *Vasquez v. Jim Aartman, Inc.*, No. 1:02–cv–05624–AWI– LJO, Doc. No. 130 (E.D. Cal. Sept. 16, 2005 (class action settlement where court approved attorney's fees in the amount of 30% of the settlement amount).

Based on the foregoing, the fact that Class Counsel seeks an award that is in line with the Ninth Circuit's benchmark of 25%, and because Class Counsel seek an award of a lower percentage than the amount awarded in cases involving similar issues and of a similar duration, Class Counsel's request should be approved as reasonable.

C. CLASS COUNSEL'S FEE REQUEST IS REASONABLE UNDER THE LODESTAR METHOD

Courts may "cross-check" the results of the common fund method against the lodestar method. *See, e.g., Bluetooth,* 654 F.3d at 944-945. In calculating an attorney's fees award under this method, a court must start by determining how many hours were reasonably expended on the litigation, and then multiply those hours by the prevailing local rate for an attorney of the skill required to perform the litigation. *Moreno v. City of Sacramento,* 534 F.3d 1106, 1111 (9th Cir. 2008). This amount may be increased or decreased by a multiplier that reflects any factors not subsumed within the calculation, such as "the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment." *Bluetooth,* 654 F.3d at 942 (quoting *Hanlon*, 150 F.3d at 1029). "Foremost among these considerations, however, is the benefit obtained for the class." Id. at 942 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434–36 (1983); *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009)). When a court uses the lodestar as a cross-check to a percentage award, it need only make a "rough calculation." *Schiller*, 2012 WL 2117001, at *22.

In determining the attorney fee award that would have been reached using the lodestar method, California courts uniformly acknowledge that lodestar figures, "may . . . be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market

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value for the legal services provided." *PLCM Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084, 1095. Specifically, "it has long been recognized . . . that the contingent and deferred nature of the fee award in a civil rights or other case with statutory attorney fees requires that the fee be adjusted in some manner to reflect the fact that the fair market value of legal services provided on that basis is *greater than the equivalent noncontingent hourly rate*." *Horsford v. Board of Trustees of California State University* (2005) 132 Cal. App. 4th 359, 394 (citing *Ketchum*, 24 Cal. 4th at 1132) (emphasis added).

Applied to the instant case, a lodestar cross-check confirms that the percentage requested is reasonable. The aggregate lodestar of attorneys for Plaintiffs amounts to $305,010, which represents 627.5 hours of attorney work on this litigation, incurred from its inception, including substantial pre-litigation investigation, exchange of information and settlement discussions, and the full briefing of the class certification motion through the filing of this Motion. (Sutton Decl. at ¶16-17).

1. The Number of Hours Claimed Is Reasonable

Plaintiffs' counsel are entitled to be compensated "for all time reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter." *Hensley v. Eckerhart* (1983) 461 U.S. 424, 431 [internal quotations omitted]; *accord Serrano v. Unruh* (1982) 32 Cal. 3d 621, 633 ["*Serrano IV*"] [parties should recover for all hours reasonably spent]; *Meister v. Regents of Univ. of Cal.* (1998) 67 Cal. App. 4th 437, 447–48 [same].

The Declarations of Class Counsel offered in support of this Motion confirm that counsel spent 627.5 hours through the filing of this Motion on this case. (Sutton Decl. at ¶17). All of these hours were necessary to achieve the highly favorable result attained for the Class Members. (*Id.*) This figure is also reasonable given the complexity and novelty of the issues involved, the vigorous defense, the length of the case, including substantial pre-litigation efforts, and the intensive documentary review and analysis that supported Plaintiffs' settlement position. Accordingly, Plaintiffs are entitled to full compensation for the hours claimed by Class Counsel.

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2. The Hourly Rates Requested Are Reasonable

Class Counsel is entitled to be compensated at hourly rates that reflect the reasonable market value of their legal services, based on their experience and expertise. *See Serrano IV*, *supra*, 32 Cal. 3d at 640–43, n.31. "The reasonable hourly rate is that prevailing in the community for similar work." *PLCM Group*, 22 Cal. 4th at 1095. Payment at full market rates is essential to entice well-qualified counsel to undertake difficult cases, such as this one. *San Bernardino Valley Audubon Society v. County of San Bernardino* (1984) 155 Cal. App. 3d 738, 755. Additionally, calculation of a lodestar based on current hourly rates is appropriate as a means of compensating for delay in payment. *Missouri v. Jenkins by Agyei* (1989) 491 U.S. 274, 283-84.

Here, the requested hourly rates in this case range from $300 per hour to $800 per hour. (Sutton Decl. at ¶17-21). Counsel's hourly rates are fully supported by their experience and reputation in handling complex employment litigation, including wage and hour class actions, and actual trial experience. As detailed in the declarations submitted by Class Counsel, the reasonableness of Class Counsel's hourly rates has been cited and approved by other judges in recent actions. Class Counsel has made all reasonable attempts to avoid duplication of assignments and to assign tasks to timekeepers at the appropriate billing rates.

One difficulty in determining the hourly rate of attorneys of similar skill and experience in the relevant community is the scarcity of hourly fee paying clients in class action litigation. As a practical matter, few if any consumers pay attorneys' fees on an hourly basis for such extensive litigation, and thus retainer agreements in such cases are based on a contingency fee relationship. Although there is no customary billing rate, the nature of class action work should be strongly considered by the Court.

Counsel's rates are also in line with the rates set forth in the Laffey Matrix, a "widely recognized compilation of attorney and paralegal rates used in the District of Columbia, and frequently used in determining fee awards." *Schiller v. David's Bridal, Inc.* (E.D. Cal. 2012) 2012 WL 2117001 at *21. (Sutton Decl. at ¶15).

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In cross-checking the current $305,010 lodestar against the $450,000 in attorneys' fees to which the Defendant agreed under the terms of the Settlement, the award would provide Class Counsel with a multiplier of approximately 1.47. This figure is well within the range of multipliers applied by California courts. *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051 n.6 ("[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.") In fact, "[m]ultipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation." (*Van Vraken v. Atlantic Richfield Co.* (N.D.Cal.1995) 901 F.Supp. 294, 298; *see also, Wershba, supra,* 91 Cal.App.4th at p. 255 ["Multipliers can range from 2 to 4 or even higher."].)

There are also two important issues that bear on this figure. First, this again assumes that all FLSA Group Members will participate in the Settlement. First, while the FLSA Group Members have claimed a majority of the available workweeks under the Settlement and there is still approximately two weeks for additional claims to be submitted, it is not likely that 100% of the FLSA Group Members will submit claims. Second, Class Counsel anticipates accruing another 20 to 40 hours in billable time in the finalizing of the Motion for Final Approval and appearance at hearing for that Motion and the instant Motion on December 6, 2019. Therefore, while Class Counsel's requested multiplier will in no circumstance be higher than 1.47, it will almost certainly be lower. Again, Class Counsel will submit supplemental declarations reflecting the final attorneys' fee request once the deadline for Settlement Class Members to opt-out, object or submit claim forms has accrued.

D. THE REQUEST FOR LITIGATIONS COSTS FROM THE COMMON FUND IS FAIR AND REASONABLE

All costs set forth in Class Counsel's declaration are litigation-related costs. (Sutton Decl. ¶¶22-23). The authority for the Court to award costs from the common fund is derived from the Settlement. In the course of this litigation, Class Counsel incurred costs including, but not limited to, filing fees, court reporter and transcript fees, expert fees, travel costs to hearings and mediation, mediation fees, copy charges and postage charges. (*Id.*) This request should be approved. As of November 4, 2019, Class Counsel has incurred $13,822.30 in litigation costs,

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which is less than the maximum costs Class Counsel is entitled to request under the terms of the Settlement. Therefore, Class Counsel respectfully request that the Court approve payment of $13,822.30 in litigation costs from the common fund. To the extent that Class Counsel incurs additional costs between the filing of this Motion and the filing of their Motion for Final Approval of Settlement, Class Counsel will submit additional declarations in support of such request.

IV. PLAINTIFFS' ENHANCEMENT AWARD REQUEST SHOULD BE GRANTED

In addition to the sums paid to the Class, the Parties have agreed that Plaintiffs may request an enhancement awards totaling $20,000, with Plaintiffs Smothers and Dhadda each receiving Ten Thousand Dollars ($10,000).

Class action settlements typically provide for an incentive or enhancement payment to the named plaintiff for bringing and helping to prosecute an action that yields a benefit to other absent class members, and courts routinely approve these supplemental payments. *See, e.g., Van Vranken v. Atlantic Richfield Co*. (N.D. Cal. 1995) 901 F. Supp. 294; *Bogosian v. Gulf Oil Corp*. (E.D. Pa. 1985) 621 F. Supp. 27 (award of $20,000 each to two class representatives in antitrust case). Further, enhancement awards may recognize a plaintiff's "willingness to act as a private attorney general." *Rodriguez v. West Publ'g Corp*. (9th Cir. 2009) 563 F.3d 948, 958–59. As the court noted in *Staton v. Boeing* (9th Cir. 2003) 327 F.3d 938, 997:

> [N]amed plaintiffs…are eligible for reasonable incentive payments. The district court must evaluate their awards individually, using relevant factors include[ing] the actions the plaintiff has taken to protect the interests of the class, the degree which the class has benefited from those actions,…the amount of time and effort the plaintiff expended in pursuing the litigation…and reasonabl[e] fear[s] of work retaliation.

The retaliation issue identified in *Staton* extends outside the immediate workplace. It is common knowledge that the modern-day workforce is mobile, with employees holding several jobs in a career during their lifetime. It is also true that prospective employers in the digital age frequently conduct extensive background checks to see whether applicants have filed lawsuits against their employers or been sued.

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This enhancement award takes into consideration the risk, time, effort and expense incurred by Plaintiffs in coming forward to litigate this matter on behalf of the Class. Here, Plaintiffs were instrumental in the preparation, prosecution, and settlement of the immediate litigation. (Hague Decl. at ¶¶6-9).

Plaintiffs have been actively involved in the litigation of this Action from the outset. Each of these the Plaintiffs initially informed Class Counsel about the various workplace policies, procedures and payroll practices of the Defendant, and provided Class Counsel with the initial documentation that allowed Class Counsel to evaluate this case. (*Id.*). The Plaintiffs assisted with preparing and responding to formal written discovery requests, and reviewed numerous other documents obtained during the course of discovery to prepare for mediation. (*Id.*). Plaintiffs were responsible for securing the benefits that the Class Members are poised to receive. In doing so however, Plaintiffs undertook a serious burden.

By suing their employer, Plaintiffs increased the risk of retaliation by prospective employers to which they may apply in the future. Google searches for their names and basic key words related to civil suits quickly identify them as being associated with this Action. (Hague Decl. at ¶7). These search results are readily and easily available to any current or future employer.

Based thereon, the requested enhancement of $10,000 to Plaintiffs Smothers and Dhadda is in line with the prevailing views of burdens undertaken by class representatives and with awards in other cases. *Smith v. Cardinal Logistics Management Corp*. (N.D. Cal. 2011) 2011 WL 3667462 at *5 (approving $15,000 incentive award).

V. CONCLUSION

Based on all of the foregoing, Plaintiffs respectfully request that the Court issue an Order granting Plaintiffs' request for attorneys' fees, costs and enhancement awards.

Dated: November 4, 2019

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