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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JENNIFER MODICA, individually and on behalf of other similarly situated current and former employees and as proxy for the LWDA,

Plaintiff,

v.

IRON MOUNTAIN INFORMATION MANAGEMENT SERVICES, INC., a Delaware corporation; and DOES 1-100, inclusive,

Defendants.

Case No. 2:19-cv-00370-TLN-JDP

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE PAYMENT

Date: **December 17, 2020**
Time: **2:00 p.m.**
Dept.: **Courtroom 6, 14th Floor**
Judge: **Hon. Troy L. Nunley**

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I. INTRODUCTION.

In conjunction with seeking final approval of the Joint Stipulation of Class and Representative Action Settlement ("Settlement")[1], preliminarily approved on August 19, 2020, Plaintiff Jennifer Modica ("Plaintiff") hereby moves the Court for an award of attorneys' fees in the amount of $500,000, one third of the Maximum Settlement Amount ("MSA") secured on behalf of the Class, $16,000.05 in actual litigation costs (substantially less than the $25,000 preliminarily approved by this Court [Doc. 21]), and a Service Payment of $15,000, one percent (1%) of the MSA. The fees, costs, and service award were provisionally deemed appropriate through this Court's August 19, 2020 Order ("Preliminary Approval Order"); the provisional determination should be reaffirmed as the amounts sought are consistent with both applicable precedent and recent awards in similar wage and hour class action settlements, and fall well within the range of reasonableness under the facts and circumstances of this case. Further, although the notice period does not conclude until October 30, 2020, ***not one of the 1,264 Class Members has objected to the requested award since receiving the court-approved Class Notice more than a month ago***.

The attorneys' fee award should be approved under the common fund methodology because it serves to spread the attorneys' fees equally among all the beneficiaries of the fund, mimics the legal market place had the Class Members each individually retained Class Counsel on a contingency basis, and encourages competent counsel to take on complex contingency cases such as this and to seek an early settlement and avoid unnecessarily prolonging litigation. Further, the sought fee is appropriate because Class Counsel have, through this litigation (1) obtained a significant monetary benefit for the Class (i.e., the $1,500,000 MSA, which is slated to provide an average payment of more than $800 to *each* member of *each* of the three Classes/Sub-Classes covered by the Settlement); (2) helped prompt Defendant to modify its overtime and wage statement policies; (3) worked diligently and efficiently despite considerable risks faced in prosecuting this litigation; and (4) carried the financial burden of representing Plaintiff and the Class on a contingency basis. The requested reimbursement of $16,000.05 in litigation costs is also reasonable and appropriate.

[1] All capitalized terms shall have the same meanings given those terms in the Parties' Joint Stipulation of Class and Representative Action Settlement Agreement and Release of Claims ("Settlement Agreement", "Settlement", or "SA"), a copy which is attached as **Exhibit A** to the Declaration of Jenny D. Baysinger ("JDB Dec.") filed herewith.

Finally, the $15,000 service payment is appropriate because Plaintiff helped procure substantial monetary and non-monetary relief for the Class, assumed the considerable financial and reputational risk attendant to serving as the class representative, spent significant time and had an impactful effect assisting with the prosecution of this case, and has provided Defendant with a much broader release of claims than other Class Members. Further, the requested Service Payment is only 1% of the MSA and is within the range is only of those granted by courts in similar settlements and, again, ***not a single Class Member has objected to it to date*.**

II. SUMMARY OF THE CASE.

A. Brief Overview of the Litigation

Modica initially filed this lawsuit in the Superior Court of the State of California, County of San Joaquin on January 25, 2019. Defendant Iron Mountain Information Management Services, Inc. ("Defendant" or "Iron Mountain") removed the action to this Court on March 1, 2019. Doc. 1. Pursuant to stipulation and leave of this Court, Plaintiff filed a First Amended Class Action and Individual Complaint for Damages (the "FAC") on January 15, 2020. Doc. 13. Through the pending action, Modica is pursuing five (5) causes of action on a class-wide basis (the "Class Claims"); 1) failure to furnish accurate wage statements, 2) failure to properly pay overtime wages, 3) failure to properly pay sick leave wages, 4) failure to timely pay wages on separation of employment, and 5) violation of California's unfair competition law. FAC, Doc. 13. In addition to the Class Claims, Modica also brings two individual causes of action for failure to timely provide payroll and personal records (the "Individual Claims"), and a representative action to assess and collect civil penalties pursuant to the PAGA (the "PAGA Claim"). *Ibid*.

The PAGA Claim seeks to assess and collect civil penalties arising out of the Class Claims *as well as* additional alleged Labor Code violations, including making alleged unlawful deductions of wages. FAC at ¶ 48 (Doc. 13). The Individual Claims arise out of circumstances that were unique to Modica alone because Defendant allegedly unreasonably failed to timely respond to her statutory request for copies of her employment records. Modica is not receiving any compensation for the Individual Claims through the Settlement (or at all), although she is providing a comprehensive

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release of claims, including a Civil Code § 1542 waiver to Defendant, in partial consideration for the $15,000 requested Service Payment. SA at ¶ 73.

B. The Settlement Is The Product Of A Full Day Mediation and Protracted Negotiations

Negotiating the terms of the Settlement and finalizing details necessitated the parties participating in a full-day mediation with experienced class action mediator David Rotman, Esq. and engaging in nearly two (2) months of additional negotiations to reach agreement on the nuances of an appropriate resolution and long-form Settlement Agreement. JDB Dec. ¶¶ 13-17. The Settlement was finally executed January 22, 2020. JDB Dec. ¶ 16, Exh. A; RJW Dec. ¶¶ 3-9.

Pursuant to the Settlement, Defendant will pay $1,500,000 ("MSA") to resolve the claims of Participating Class Members. The MSA will be deposited into a Qualified Settlement Fund within 7 calendar days of the Effective Date and does not include Employer-side Taxes, which will be separately paid by Defendant. After deducting the costs of administering the Settlement, the payment to the LWDA, Service Payment to Plaintiff, and fees and revised costs sought by Class Counsel, $947,499.95 (the "NSA"), will be distributed to Participating Class Members. SA ¶¶ 49-50; JDB Dec. ¶ 26.

Additionally, as a result of the Class Action and efforts of Plaintiff and Class Counsel, Defendant (a) revised it wage statements on November 29, 2019, and (b) revised its policies, practices, and procedures associated with the calculation and payment of doubletime and sick pay. SA ¶ 10. Accordingly, and regardless of any individual Class Member's decision to participate in or exclude themselves from the Settlement, Defendant's employees will receive tens of thousands of dollars in additional compensation over the next few years as a result of the Class Action and the efforts of Plaintiff and Class Counsel. This amounted to more than $20,000 since October 1, 2017. JDB Dec. ¶19; RJW Dec. ¶ 11.

C. The Court Granted Preliminary Approval of the Settlement.

On August 19, 2020 this Court granted preliminary approval of the Settlement. Order (Doc. 21). Having reviewed Plaintiffs' Motion for Preliminary Approval and the substantive terms of the Settlement, the Court (1) found the proposed settlement classes appropriate for preliminary and conditional approval and certification as meeting the requirements of Federal Rules of Civil Procedure

23(a) and 23(b)(3) (Order at § 1); (2) found that there is no evidence of collusion between the parties and that the Settlement appears to have been entered into only after substantial investigation enabling the parties to make a reasoned and informed decision regarding settlement (Order at p. 7); (3) found the monetary relief in the Settlement to be "adequate and valuable consideration in support of the release" (Order at p. 7); (4) preliminarily approved the PAGA penalties in the Settlement as fair, reasonable, and adequate (Order at p. 8); (5) preliminarily approved Plaintiff's attorneys' fee request of $500,000 and cost request of $25,000 (subject to further consideration) (Order at p. 8); (6) preliminary approved Plaintiff's proposed incentive award of $15,000 (subject to further briefing) (Order at p. 8); (7) found that the notice and manner of notice proposed by Plaintiff meets the requirements of FRCP 23(c)(2)(B) (Order at § 3); and (8) set a final approval hearing for December 17, 2020.

D. Distribution of the Notice.

On September 15, 2020, the Court-approved Class Notice was mailed to each Class Member via First Class mail. Only seven (7) Notice Packets, a mere 0.55%, were returned as undeliverable. All of those have now been re-mailed and none has been returned a second time to date. In accordance with the Court's instructions, the Class Notice informs Class Members about the terms of the Settlement, including the fact that Plaintiff would request: (1) an award of attorney's fees of $500,000 to be paid from the MSA, (2) reimbursement of up to $25,000 in litigation costs, and (3) a Service Payment of $15,000 to Plaintiff. See Class Notice. To date, although the Notice Period does not expire until October 30, 2020, not a single Class Member has expressed any concerns regarding the requested fees, costs or Service Payment. ***In fact, to date, not one of the 1,264 Class Members to whom Notice was sent has objected in any way, to any degree, to the terms of the Settlement including Class Counsel's requested award of fees and costs or Plaintiff's requested Service Payment***. The overwhelmingly positive reaction of the Class is a clear indication of its approval of the Settlement and sought fees, costs and Service Payments.

III. LAW AND ARGUMENT

In diversity actions, such as the instant case, federal courts are bound to apply state law in evaluating the right to attorneys' fees and the appropriate method of calculating them. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). Under California law, Plaintiff Modica is

entitled to payment of reasonable attorneys' fees and costs in connection with the settlement of this wage and hour class action. Cal. Lab. Code §§ 218.5, 226(e)(1), 1194, and 2699(g); Fed. R. Civ. P. 23(h); *Early v. Superior Court*, 79 Cal.App.4th 1420, 1427 (2000). The percentage-of-fund method of calculation is appropriate when in the context of a class action settlement, such as this, that results in an established in a monetary fund for the benefit of all class members. *Laffitte v. Robert Half Int'l., Inc.*, 1 Cal.5th 480, 503-506 (2016). While California law governs the analysis, this Court has an independent obligation to review requested fees and costs to be deducted from a common fund and to evaluate them for objective fairness and reasonableness. *In re Wash. Pub. Power Supply Sys. Secs. Litig.*, 19 F.3d 1291, 1302 (9th Cir. 1994). Here, Plaintiff seeks an award of $500,000, which is equal to one-third of the "common fund" created by the MSA; this is in line with the "30-50% commonly being awarded in cases in which the common fund is relatively small." *Miller v. CEVA Logistics USA, Inc.*, 2015 WL 4730176 *8 (E.D. Cal. 2015), citing NEWBERG ON CLASS ACTIONS (4th Ed. 2002) § 14.6.

A. The Common Fund Methodology In Class Action Settlements.

"[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to reasonable attorneys' fees from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The California Supreme Court clarified its stance on common fund cases, ruling –

> "We join the overwhelming majority of federal and state courts in holding that when class action litigation established a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created."

Laffitte, 1 Cal.5th at 503. Explaining its ruling, the Court further held that "[t]he recognized advantages of the percentage method – including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging litigation – convince us the percentage method is a valuable tool that should not be denied by our trial courts." *Id.* (internal citations omitted); see also *Vizcaino*, 290 F.3d at 1047. Based on this rationale,

the California Supreme Court in *Laffite* affirmed a fee award representing one-third of a $19,000,000 fund and rejected the objections of putative class members to such despite a multiplier above 2.0 being applied to the lodestar to reach the requested fee award. *Laffitte*, 1 Cal.5th at 487, 506.

In general, common fund fee awards between 30 and 50 percent of the total fund are routinely afforded. See Rubenstein, Conte and Newberg, *Newberg on Class Actions* at § 14:6; see *Miller*, 2015 WL 4730176 at *8 (surveying cases and attendant percentage fee awards). Review of California cases "reveals that courts usually award attorneys' fees in the 30-40% range in wage and hour class actions that result in recovery of a common fund under $10 million." *Cicero v. DirecTV, Inc.*, 2010 WL 2991486 *6 (C.D. Cal. 2010). As reiterated by the Ninth Circuit, district courts are obligated to apply California law in awarding attorneys' fees in diversity jurisdiction cases such as this one. *Farmers Ins. Exch. v. Law Offices of Conrado Joe Sayas, Jr.*, 250 F.3d 1234, 1236 (9th Cir. 2001) ("Because this case is based on diversity jurisdiction, we are obligated to apply California state law regarding attorneys' fees."); *Chambers v. Whirlpool Corp.*, 2016 WL 5922456 *10 (C.D. Cal. 2016) ("[i]n diversity actions, the Ninth Circuit applies state law to determine the right to fees and the method for calculating fees").

Here, Class Counsel has created an ascertainable fund, the MSA of $1,500,000, which will substantially benefit the Class and from which reasonable attorneys' fees can (and should) be easily calculated and awarded. As such, and pursuant to entrenched precedent, Plaintiff respectfully requests the Court apply *Laffitte* and award 1/3 of the MSA. As discussed below, Plaintiff and her counsel assumed all of the risks in working on this case on a contingency basis. Moreover, in prosecuting this action diligently and efficiently, Class Counsel has *both* created an ascertainable fund from which reasonable attorneys' fees can be easily calculated and awarded and prompted Defendant to modify its policies and practices thereby ensuring Doubletime Subclass Members and Sick Pay Subclass Members are being paid properly and that wage statements clearly provide California employees all of the information required by Labor Code section 226(a). JDB Dec. ¶ 19. The Settlement creates an MSA of $1,500,000 that will substantially benefit the 1,264 Class Members; each participating member of *each* Class is expected to receive in excess of $800, with many individuals collecting substantially more because of participation in multiple classes. JDB Dec. ¶ 28.

B. An Award of Attorneys' Fees to Class Counsel of one-third of the MSA is Reasonable and Should Be Approved.

The requested one-third fee award, or $500,000, should be approved because: (1) it is consistent with recent Federal and California court awards in similar wage and hour class settlements; (2) the Class has responded positively to the requested award to date; (3) it is reasonable in light of the substantial monetary and non-monetary benefits conferred on the Class; (4) it achieves the dual purposes of a common fund award by spreading the litigation costs among those who benefited from the settlement while rewarding and encouraging competent counsel to handle complex, contingency, class action cases like this; and (5) the lodestar cross-check, while not required, nevertheless confirms reasonableness of the requested fees as the multiplier is well within the "normal range" of 3-4 in lengthy and complex class action litigation. *Miller*, 2015 WL 4730176 at * 9 (recognizing the normal range and approving a multiplier of 1.56); *Laffitte*, 1 Cal.5th at 504 (unless the imputed multiplier is "far outside the normal range" there is no reason to reexamine the choice of a percentage).

The Ninth Circuit recognizes that 25% of the gross settlement amount is the benchmark for attorneys' fees awarded under the percentage method, with 20-30% as the usual range in common fund cases where recovery is between $50 and $200 million. *Vizcaino*, 290 F.3d at 1047. Cases with relatively small common funds (i.e. less than $10 million) tend to have fees above the 25% benmark in California, with 30-50% commonly awarded in cases under such circumstances. See Rubenstein, Conte and Newberg, *Newberg on Class Actions* at § 14:6; *Miller*, 2015 WL 4730176 at * 9, citing *Craft v. County of San Bernardino*, 624 F.Supp.2d 1113, 1127 (C.D. Cal. 2008). Review of relevant California cases "reveals that courts usually award attorneys' fees in the 30-40% range in wage and hour class actions that result in recovery of a common fund under $10 million." *Cicero*, 2010 WL 2991486 *6. These smaller class actions frequently involve fee awards in the range of one-third because they do not implicate megafunds where a smaller percentage recovery is more appropriate. See *Vandervort v. Balboa Capital Corp*. 8 F.Supp.3d 1200, 1209-10 (C.D. Cal. 2014).[2]

[2] "Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." *Chavez v. Netflix, Inc*., 162 Cal. App. 4th 43, 66 n.11 (2008) (quoting *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 972 (E.D. Tex. 2000); see also *Knight v. Red Door Salons, Inc.*,

In smaller wage-hour class actions like this one, California Federal courts routinely award attorneys' fees of percentages equal to or greater than that sought by Plaintiff in this action.[3] When viewed in the light of the foregoing authorities, the reasonableness of Plaintiff's requested fee award of one-third is clear.

1. The Overwhelmingly Positive Reaction of the Class Supports Approval.

It is well settled that positive reactions by class members underscore the propriety of settlement terms. *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal.App.4th 1135, 1152-53 (2000). Thus, the absence of disapproval constitutes strong evidence in support of the reasonableness of the requested fee and cost award. See *In re Heritage Bond Litig.*, 2005 WL 1594403 * 21 (C.D. Cal. 2005). Here, after having received notice of the same, ***not one of the 1,264 Class Members has objected to the requested attorneys' fees award*** to date. JDB Dec. ¶ 42; Exh. B. This further reflects the reasonableness of the fee request here.

2. An Award of one-third of the MSA Is Reasonable in Light of the Substantial Benefits Obtained for the Class and the Risks Faced by Class Counsel.

In addition to equity and market considerations, courts also look to the following to assess the reasonableness of a common fund award: (1) the results achieved; (2) the riskiness of prosecuting the litigation; (3) the skill and high quality of work by counsel; and (4) the financial burden carried by Class Counsel in prosecuting the case on a contingency basis. *Serrano v. Priest*, 20 Cal.3d 25, 49 (1977); *Lealao v. Beneficial Cal., Inc.*, 82 Cal.App.4th 19, 26 (2000); see also *Vizcaino*, 290 F.3d at

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2009 WL 248367, at *6 (N.D. Cal. 2009) ("fee awards in class actions average around one-third of the recovery") (quoting Newberg on Class Actions § 14.6 (4th ed. 2007)).

[3] See, e.g., *Wren v. RGIS Inventory Specialists* 2011 WL 1230826 *29 (N.D. Cal. 2011) (approving fee award that constituted 42% of the common fund in wage and hour class and collective action); *Boyd v. Bank of Am. Corp.*, 2014 WL 6473804 *8-*12 (C.D. Cal. 2014) (awarding one-third of settlement in wage and hour case on behalf of real estate review appraisers); *Birch v. Office Depot, Inc*., 2007 WL 9776717 *13 (S.D. Cal. 2007) (awarding a 40% fee on a $16,000,000 wage and hour class action settlement); *Stuart v. Radioshack Corp*., 2010 WL 3155645 at *5-*7 (N.D. Cal. 2010) (awarding one-third of $4.5 million settlement fund as fees in class case alleging failure to reimburse employees for expenses); *Quezada v. Con-Way Freight, Inc.*, 2017 WL 6949286 *1 (N.D. Cal. 2017) (awarding one-third of $2 million settlement fund as fees in class case alleging failure to pay wages for all hours worked); *Singer v. Becton Dickinson and Co.*, 2010 WL 2196104 *8 (S.D. 2010) (approving fee award of 1/3 of the common fund; award was similar to awards in three other cited wage and hour class action cases where fees ranged from 30% to 40%); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491-92 (E.D. Cal. 2012) (citing five recent wage and hour class actions where federal district courts approved attorney fee awards ranging from 30% to 33%); *Cicero*, 2010 WL 2991486, at *6 (noting that fees of one-third are common in wage and hour settlements below $10 million, citing cases).

1048-50 (internal quotation and citation omitted). As discussed below, all of these factors justify Plaintiff's fee request.

a. The fee request is justified by the positive results achieved.

The ultimate reasonableness of the fee "is determined primarily by reference to the level of success achieved by the plaintiff." *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009). Here, Class Counsel achieved an excellent result and obtained significant monetary relief for the Class, justifying the requested fee award. Participating Class Members (i.e., Class Members who do not exclude themselves) will receive a share of the Net Settlement Amount ($117,000 after subtracting the fees and costs of class counsel, payment to the LWDA, Service Payment, and administrative costs). SA ¶ 48. The estimated *average* payment will be more than $800 to each Participating Doubletime Subclass Member, Sick Pay Subclass Member, and Wage Statement Subclass Member, with many individuals being in multiple classes *and* Former Employee Subclass Members receiving an additional $500. JDB Dec. ¶ 28; RJW Dec. ¶ 17. This recovery represents substantial monetary relief for the Class given the complexity of the issues, the risk and uncertainty inherent in class action litigation, and the myriad factual and legal defenses advanced by Defendants. In addition to this monetary relief, Class Counsel also motivated Defendant to modify its pay practices with respect to doubletime and sick pay, resulting in more than $20,000 in additional wages paid, and to change the format of its wage statements. SA at ¶ 10.a-c; JDB Dec. ¶ 19; RJW Dec. ¶ 11. Under the circumstances a fee award of one-third of the MSA is reasonable and appropriate.

b. The risks associated with this litigation justify the fee request.

Class counsel has taken considerable risk in litigating this case—not just because it was done on a wholly contingency basis, but also because complex, representative wage-and-hour litigation is an ever-emerging area under the law. Tellingly, judicial decisions in the wake of the Settlement potentially detrimentally impact some claims asserted on behalf of the Class. See *Flores v. Dart Container Corp.*, 2020 WL 2770073 (E.D. Cal. 2020). This is a common occurrence in the ever-changing landscape of California wage and hour litigation and compounds the risks inherent in representation on a contingency basis.

Despite the numerous transgressions of the California Labor Code allegedly committed by Defendant, recovery is far from guaranteed and could only occur after years of costly litigation that is rife with risk. Defendant asserted numerous defenses and planned to employ a multipronged attack aimed at circumscribing both the scope of the Class and the available damages. Primarily, Defendants intended to argue 1) that it properly calculated and paid doubletime and sick pay wages to its employees, 2) that any underpayments were inadvertent and thus insufficient to justify imposition of waiting time penalties and/or that the waiting time penalty was so disproportionate to the actual unpaid/underpaid wages as to offend the Constitution, 3) that it acted in good faith and thus waiting time penalties are not authorized, and 4) that its wage statements did not result in actual injury and/or that they are distinguishable from the wage statements found violative in *McKenzie v. Fed. Express Corp.*, 765 F.Supp.2d 1222 (C.D. Cal. 2011) and thus do not engender any liability for statutory penalties under 226(e) or civil penalties pursuant to the PAGA. JDB Dec. at ¶¶ 29-33.

Success on any one of these challenges would, in a best case scenario for Class Members, substantially limit Defendant's exposure. It is possible class-wide relief might be precluded entirely. Success by Plaintiff on any of these issues was not a foregone conclusion at any time. Nevertheless, Class Counsel persevered at great risk (while foregoing other profitable work) on a contingency basis, and brought this case to beneficial resolution for the Class, recovering more than 33% of the maximum potential recovery and 46% of the realistic recovery. JDB Dec. ¶ 26. Class Counsel undertaking these numerous litigation risks, particularly in light of the success attained, further justifies the sought fees award.

c. The skill of class counsel and the quality of their work justifies the fee request.

Class counsel has demonstrated substantial skill, diligence, and high quality of work in achieving the proposed Settlement, creating an MSA of $1,500,000; 1,490,000 solely for alleged damages resulting from failures to properly calculate and pay doubletime/sick pay and statutory penalties for inaccurate wage statements and failing to pay all wages at separation. Through these efforts, Class Counsel was able to expand the litigation from the simple wage statement claim originally asserted to incorporate and redress claims for unpaid/underpaid doubletime and sick pay

wages. The Settlement, and the substantial monetary benefits it conveyed upon the Class, was obtained efficiently and effectively without wasted effort or years of needless, costly litigation. As a result of the skill and tremendous effort of Class Counsel, who have significant experience representing Plaintiffs in class, collective, and representative actions, Plaintiff was well-positioned to reach a favorable settlement for the Class, which itself required significant expertise, engaging in written discovery, employment of a damages expert, a full-day mediation and protracted, at times contentious, negotiations to achieve. In addition to the MSA, Class Counsel also conferred non-monetary benefits on Class Members (and all of Defendant's California employees) by motivating Defendant to change its doubletime and sick pay practices, resulting in more than $20,000 in additional wages being paid, and modify the format of its wage statements. JDB Dec. ¶¶ 6-16, 19 and 64-69; RJW Dec. ¶¶ 11 and 21-28.

d. The contingent nature of the fee and financial burden carried by class counsel justifies the fee request.

A law firm that prosecutes class action cases does not get paid in every case. Sometimes, it gets nothing or is awarded fees equal to only a small percentage of the amount actually incurred. Where plaintiffs' counsel does succeed, therefore, it is appropriate to compensate the firm for the risks the firm regularly undertakes. As the California Supreme Court explains:

> "[A] contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans. A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases."

Ketchum v. Moses, 24 Cal.4th 1122, 1132-33 (2001) (internal citation and quotation omitted). Accordingly, courts recognize that "[i]t 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).

In this case, Class Counsel worked diligently on this case since October, 2018, and in effect have loaned their legal services to the entire Class since that time. Class Counsel prosecuted this case wholly on a contingency basis, at cognizable risk of never receiving any compensation due to the inherently uncertain nature of class action litigation in general, the ever-changing environment of California wage and hour law, and also due to the numerous factual and legal defenses of Defendant. Class Counsel took a tremendous risk by taking on this case, and persevered to attain the Settlement on behalf of the Class. To date Class Counsel has spent $16,000.05 and expended 311.80 hours of time, with significant additional work remaining to be done, without receiving any compensation at all. JDB Dec. ¶¶ 53-61; Exh. D. Meanwhile, all of this entailed passing on other lucrative cases. JDB Dec. ¶ 55.

3. The Requested Fee Award Fairly Spreads the Litigation Costs Among the Class Members Who Will Benefit From It.

The percentage-of-the-fund approach is an appropriate method for reviewing attorneys' fees here because it allows Plaintiff and Class Counsel to create "a fund from which others will benefit [and] to require those other beneficiaries to bear their fair share of the litigation costs." *Nw. Energetic Servs., LLC v. Cal. Franchise Tax Bd.*, 159 Cal.App.4th 841, 878 (2008) (citing *Serrano*, 20 Cal. 3d at 35). This approach ensures that the class members, who have accepted the benefits from a common fund recovery, also accept their fair *pro rata* responsibility to contribute towards the attorneys' fees and costs that created the fund in the first place. *Early*, 79 Cal.App.4th at 1436. In other words, "[t]hose who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d at 1300. Accordingly, the percentage-of-the-fund approach is appropriate here and supports Class Counsel's request for an award of a percentage of the common fund (i.e., 1/3 of the $1,500,000 MSA).

In addition to spreading the litigation costs among all the beneficiaries, awards of common fund fees are essential to furthering the important societal goal of attracting competent counsel to handle these often-complex contingency cases, "who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if [attorneys are] assured that [they] will be promptly and directly compensated should [their] efforts be successful." *Melendres v.*

City of L.A., 45 Cal.App.3d 267, 273 (1975). "Given the unique reliance of our legal system on private litigants to enforce substantive provisions of law through class and derivative actions, attorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace, as it will otherwise be economic for defendants to increase injurious behavior." *Lealao*, 82 Cal.App.4th at 47. Without such incentives, meritorious class actions such as this would not be brought and thus the private enforcement of important statutory rights would be undermined.

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*, 82 Cal.App.4th at 47. 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 Class Counsel's requested attorneys' fee here in the middle of the spectrum. *Chavez*, 162 Cal.App.4th at 64-65.

Here, the requested fee award constitutes a fair charge in light of the substantial monetary and non-monetary relief obtained for the Class. Because each Class Member will receive a share of the MSA, equity requires that each also contribute a *pro rata* share to the attorneys' fees that netted them this positive result. Moreover, the requested fee, i.e., one-third of the common fund, is equal to or less than 1) typical fees awarded in small wage and hour class actions like this one, 2) most contingency fee retainer agreements, and 3) the fee that Class Counsel would have expected if they had negotiated individual retainer agreements with each Class Member. *Chavez*, 162 Cal.App.4th at 64-65; see also JDB Dec. ¶ 55. Thus, the requested award ensures that Class Counsel receives appropriate compensation for the actual benefit conferred to the Class, particularly where it would impossible *ex ante* to enter a fair fee arrangement with all individual members.

4. The Lodestar Cross-Check Further Confirms the Reasonableness of the Requested Fee Award.

California law affords trial courts discretion to award fees as a percentage of the common fund, with or without conducting a lodestar cross-check. *Laffitte*, 1 Cal.5th at 506 ("We further hold that trial

courts have discretion to forgo a lodestar cross-check and use other means to evaluate the reasonableness of a requested percentage fee."). Although not required, courts asked to approve fee awards on a common fund percentage basis may perform a "lodestar cross-check" as a means of determining whether the requested percentage is reasonable in relation to the amount and value of the time expended by counsel. See *Lealao*, 82 Cal.App.4th at 47-50. The goal under either the percentage or lodestar approach being the award of a reasonable fee to compensate counsel for their efforts. *Laffitte*, 1 Cal.5th at 504. It is only where the lodestar cross-check imputes a multiplier that is "far outside the normal range" that a trial court has any reason to reexamine its percentage choice. *Ibid.* Such is not the case here as the imputed multiplier of 2.17 is within the normal range.

This cross-check starts with the basic lodestar calculation but may then "evaluate the lodestar as a percentage of the recovery and adjust it accordingly if it can be determined that the lodestar is significantly different from the range of percentage fees freely negotiated in comparable litigation." *Lealao*, 82 Cal.App.4th at 50. Under the first step of the cross-check, the "lodestar" figure is calculated by multiplying "the number of hours [the prevailing party] reasonably expended on the litigation [ ] by a reasonable hourly rate." See *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Press v. Lucky Stores, Inc.*, 34 Cal.3d 311, 322 (1983).

Class Counsel, to date, have expended over 311 hours to bring this settlement to the brink of finalization. These hours reflect time reasonably spent litigating this case, which Class Counsel sought to efficiently manage, staff, assign, and divide the work between their respective offices and to avoid duplication of effort. JDB Dec. ¶ 57, Exh. D. Class Counsel will also spend significant additional time responding to Class Member inquiries, finalizing the Motion for Final Approval, attending the Final Approval Hearing, overseeing the administration of the Settlement, and reporting to the Court. JDB Dec. ¶ 61.[4] Class Counsel's customary hourly rate in plaintiff's employment class action cases ranges from $455/hr (for an associate with 7 years' experience litigating plaintiffs' employment cases) to $894/hr (for a senior partner with nearly 30 years of experience), are commensurate with the rates of practitioners with similar experience in plaintiffs' wage-and-hour class actions within the California

[4] Class Counsel will apprise this Court of our final hours/lodestar total when we file the Motion for Final Approval.

legal market, and have also been approved by numerous federal and state courts across the state. JDB Dec. ¶ 58.[5],[6] Applying the appropriate hourly rates to the number of hours worked yields a lodestar of $231,212.10 and is supported by detailed and contemporaneous billing records maintained by Class Counsel. JDB Dec. ¶ 57, Exh. D. Summaries of these billing records are attached to and described in Class Counsel's declaration for the Court's review. JDB Dec. ¶¶ 55-61, Exh. D.

Under the second step of the analysis, the reasonableness of the requested fee award is confirmed by the application of a multiplier. In wage and hour actions, California and Ninth Circuit courts both approve reasonable multipliers on the class counsel's lodestar, which range from 2 to 4 times, to reward counsel for accepting the contingent risk of the litigation or obtaining excellent results. See, e.g. *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, 255 (2001) (noting that multipliers can range from 2 to 4 or higher); *Contreras v. Bank of Am., N.A.* (S.F. Cnty. Super. Ct. Sept. 3, 2010) No. CGC-07-467749 (approving one-third of common fund fee award, which was 2.73 multiplier of lodestar); *Van Vranken v. Atlantic Richfield Co.*, 901 F.Sup. 294, 298 (N.D. Cal. 1995) ("Multipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation").[7]

Courts also recognize that, where Class Counsel are able to obtain a settlement prior to overcoming certain hurdles, such as class and collective certification motions in Court, plaintiffs should

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[5]These rates are based upon (and actually slightly lower than) the 2019-2020 Adjusted Laffey Matrix for the District of Colombia, a matrix that has been used by California district courts in determining reasonable hourly rates. *Chanel, Inc. v. Doan*, 2007 WL 781976 *6-7 (N.D. Cal. 2007); *Garnes v. Barnhardt*, 2006 WL 249522 *7 (N.D. Cal. 2006); *Viveros v. Donahoe*, 2013 WL 1224848, *5-6 (C.D. Cal. 2013). Moreover, the prevailing rate is to be determined with respect to the forum in which the court sits, which in this case is the Northern California/Sacramento area. *Sirrod v. Dir., OWCP*, 809 F.3d 1082, 1086 (9th Cir. 2015). Similar and higher rates are commonly approved in the Northern California/Sacramento region. See e.g., *In re Magsafe Apple Power Adapter Litig*., 2015 WL 428105 * 12 (N.D. Cal. 2015).

[6] Calculating the lodestar using Class's Counsel's current rates is appropriate given the deferred nature of counsel's compensation. See *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2nd Cir. 1998) ("[C]urrent rates, rather than historical rates, should be applied in order to compensate for the delay in payment . . . . ") (citing *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989)); *In re Washington Pub. Power Supply Sys. Sec. Litig*., 19 F.3d at 1305.

[7] See also, *Vizcaino*, 290 F.3d at 1051 & n.6 (affirming lodestar multiplier of 3.65 in light of complexity and risk of case and surveying 34 class common fund settlements to find that 83% of multipliers were in the 1 to 4 range); *Vandervort*, 8 F.Supp.3d at 1210 (awarding one-third of fund, which was 2.52 multiplier of lodestar); *Boyd*, 2014 WL 6473804, at *11 (awarding one-third of fund, which was 2.58 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); *Buckingham, et. al. v. Bank of America*, United States District Court, Northern District, Case No. 3:15-cv-06344-RS, Docket No. 103 (approving lodestar multiplier of 5.31).

not be penalized by use of a straight lodestar in determining the reasonableness of their fee request. See *Vizcaino*, 290 F.3d at 1050 n. 5 ("We do not mean to imply that class counsel should necessarily receive a lesser fee for settling a case quickly; in many instances, it may be a relevant circumstance that counsel achieved a timely result for class members in need of immediate relief."); *In Re Activision Secs. Litig.*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1989) (noting, "Where attorneys must depend on a lodestar approach there is little incentive to arrive at an early settlement."). Here, a multiplier to Class Counsels' lodestar is justified based on the substantial monetary and non-monetary results obtained through a timely Settlement – prior to a ruling on Plaintiff's Motions for Class Certification, or a trial – and the contingent risk assumed by Class Counsel who agreed to represent Plaintiff and the Class with no guarantee of payment. Indeed, 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 based on the Adjusted Laffey Matrix without any adjustment for risk and, as set forth above, this case involved substantial risk. Accordingly, a risk multiplier would be appropriate.

If a well-deserved multiplier of even 2.17 is applied to Class Counsel's current lodestar, the total would exceed the $500,000 fee requested. JDB Dec. ¶ 60. As this Court has itself recognized, "[m]ultipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation." *Miller*, 2015 WL 4730176 * 9. Class Counsel's fee request does not impute such a high multiplier and, considering the risks and the objectively positive results (both monetary and non-monetary) secured by the Settlement, is wholly appropriate under the circumstances. Because the lodestar cross-check confirms that the common fund fee request of one-third of the MSA is reasonable and appropriate—it imputes a multiplier that is well within the "normal range"—it should be approved.

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C. Class Counsel's Out-of-Pocket Expenses Are Reasonable and Compensable From the Common Fund.

The Settlement allows Class Counsel to request reimbursement for the out-of-pocket expenses they incurred during this litigation in the reasonable amount of no more than $25,000. Reimbursement of incurred expenses is appropriate for the same reason attorneys' fees should be paid out of the fund: all beneficiaries should bear their fair share of the costs of the litigation, and these are the normal costs of litigation that counsel traditionally bill their paying clients. See *Serrano*, 20 Cal. 3d at 35 (common fund doctrine permits class counsel to recover attorneys' fees and costs from the fund as a whole); *Rider v. County of San Diego*, 11 Cal.App.4th 1410, 1423 n.6 (1992) (costs are recoverable from the common fund "[o]f necessity, and for precisely the same reasons discussed above with respect to the recovery of attorney fees"); *Early*, 79 Cal.App.4th at 1436; see also *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994).

Although this Court preliminarily approved fees of up to $25,000, and no Class Member has objected to that amount, Class Counsel has only incurred $16,000.05 in actual out-of-pocket expenses. JDB Dec. at ¶ 63. Class Counsel made a concerted effort to limit the costs incurred, which will result in nearly $9,000 of additional funds being available to distribute to Class Members. The costs to be reimbursed are routinely reimbursed litigation costs typically charged to fee-paying clients, including filing fees, process server fees, court reporter fees, postage, computerized legal research charges, travel expenses, expert fees, mediation expenses, etc. See also *Harris*, 24 F.3d at 19 (attorneys may recover reasonable expenses typically billed to paying clients in non-contingency cases). These costs were necessarily incurred and are reasonable in relation to the size and scope of the case. JDB Dec. ¶ 63.

D. The Service Payment for the Class Representative Is Reasonable.

The Court should also approve the $15,000 Service Payment for Plaintiff because such is just, fair, and reasonable. Courts regularly approve incentive awards for class representatives to "be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class." *In re Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380, 1394 (2010) (quoting *Clark v. Am. Residential Servs. LLC*, 175 Cal.App.4th 785, 806 (2009)); see also *Bell v. Farmers Ins. Exch.*, 115

Cal.App.4th 715, 725-26 (2004) (upholding service payments to class representatives); *Munoz v. BCI Coca-Cola Bottling Co. of L.A.*, 186 Cal.App.4th 399, 412 (2010).

In deciding whether to approve an incentive award, a court should consider: "(1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulty encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation and; (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation." *In re Cellphone Fee Termination Cases*, 186 Cal.App.4th at 1394-95 (internal quotation marks omitted); see also *Van Vranken*, 901 F.Supp. at 299 (applying similar factors to evaluate service payments).

All of the factors support the $15,000 service payment requested here. The sought service payment is (a) in line with amounts this Court has itself awarded[8] and consistent with those commonly awarded by other courts in similar wage and hour class actions;[9] (b) 1% of the $1,500,000 MSA, and (c) fair, reasonable and appropriate under the circumstances of this case, including Plaintiff's provision of a general release and Civil Code section 1542 waiver.

Here, Plaintiff took on substantial risk in bringing this class action and exposed himself to negative notoriety and personal difficulties associated with serving as the named Plaintiff in this lawsuit. First, Plaintiff bore the significant financial risk of Defendants' costs in the event he lost at trial. This financial risk, in a complex employment class action involving more than 1,250 current and former employees, could easily total tens of thousands of dollars. The risks also included, but were not limited to, damage to her professional reputation in what is a relatively small employment market in the San Joaquin Valley. It is well established that plaintiffs in the employment context "face[] the risk that new employers would learn that they were class representatives in a lawsuit against their former

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[8] *Miller*, 2015 WL 4730176 at *9 (awarding $15,000 to each of 3 class representatives in connection with $2,600,000 Maximum Settlement Amount).

[9] See e.g. *Bond v. Ferguson Enterprises, Inc.*, 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); *Castellanos v. Pepsi Bottling Group, Inc.*, No. RG07332684 (Alameda Cnty. Super. Ct., March 11, 2010 (approving incentive award of $12,500 in a wage and how-class action); *Louie v. Kaiser Found. Health Plan, Inc.*, 2008 WL 4473183 *2 (S.D. Cal. 2008) (approving "$25,000 incentive award for each Class Representative" in wage an hour settlement); *Garner v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 1687832, at *17 n.8 (N.D. Cal. 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").

employer and take adverse action against them. Moreover, each time they change jobs, they will risk retaliation in the hiring process." *Asare v. Change Grp. of N.Y., Inc*., 2013 WL 6144764 *15 (S.D.N.Y. 2013). Such is undoubtedly the case here where a Google search of Plaintiff's name and "Iron Mountain" reveals—on the ***first page of results***—that she has been engaged in employment-related litigation against her former employer, information readily available to any prospective employer. JDB Dec. ¶ 45. Plaintiff, who worked diligently with Class Counsel throughout this entire litigation, including taking numerous calls with Class Counsel, participating in formal discovery and the Parties' informal information exchange, including preparing to submit to deposition (that was ultimately not taken), personally attending the mediation in San Francisco sessions and actively participating in the mediation and the protracted settlement negotiations, should be rewarded for taking the initiative to pursue these claims on behalf of her coworkers, and for her role in reaching a substantial settlement providing for valuable monetary relief to the Class. Plaintiff's commitment is further underscored by the fact that, had the Settlement not been reached, her participation may well have been required for several more years. Moreover, by actively pursuing this action, Plaintiff has furthered the twin California public policy goals of enforcing the Labor Code and making appropriate use of the class action device. See *Sav-on Drug Stores, Inc. v. Super. Ct*., 34 Cal.4th 319, 340 (2004).

The reasonableness of the requested Service Payment is further confirmed by the fact that ***not a single Class Member has objected to the requested Service Payment to date***. All of the aforementioned factors support the approval of the $15,000 Service Payment.

IV. CONCLUSION

For the foregoing reasons, the Court should grant the instant motion and award Class Counsel attorneys' fees in the amount of $500,000, costs of $16,000.05, and award $15,000 to Plaintiff for her service as Class Representative.

DATED: October 20, 2020 **MAYALL HURLEY P.C.**

By */s/ Jenny D. Baysinger*
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