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CHRISTIANA BUSH

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CHRISTIANA BUSH, on behalf of herself, all others similarly situated, and the general public,

Plaintiff,

vs.

VACO LLC, a Tennessee limited liability company; GOOGLE LLC., a Delaware limited liability company; and DOES 1 to 50, inclusive,

Defendants.

Case No.: 5:17-cv-05605-BLF

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR AN AWARD OF (1) ATTORNEYS' FEES TO CLASS COUNSEL, AND (2) ENHANCEMENT TO PLAINTIFFS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Information

Date:	January 20, 2022
Time:	9:00 a.m.
Judge:	Hon. Beth Labson Freeman
Place:	Courtroom 3 280 South 1st St. San Jose, CA 95113

Complaint filed: August 24, 2017
Trial Date: None Set

Submitted Under Separate Cover

1. Declaration of Shaun Setareh
2. Declaration of Christiana Bush
3. Declaration of Taylor Mitzner

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TO THE COURT, TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE on January 20, 2022 at 9:00 a.m., in Courtroom 3 of the San Jose Courthouse of the U.S. District Court for the Northern District of California, located at 280 South 1st Street, in San Jose, California 95113, Plaintiff Christiana Bush ("Plaintiff") will and hereby does move this Court for an order: awarding fees to Class Counsel and an enhancement payment to Plaintiff.

Plaintiffs' motion is based on this Notice, the following Memorandum of Points and Authorities, the Declaration of Shaun Setareh, the Declaration of Christiana Bush, and the Declaration of Taylor Mitzner submitted herewith, all other pleadings and papers on file in this action, and any oral argument or other matter that may be considered by the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Settlement Fund here provides $1,500,000 for 201 class members. This excellent settlement result was achieved after years of hard-fought litigation. The case was extremely risky, considering Defendants' defenses.

Plaintiff requests that the Court award Plaintiff's counsel $500,000 in fees, which is one-third of the gross settlement and roughly 1.71 times the actual lodestar of Plaintiff's counsel and $15,941.94 in costs. Although the fee award requested here is above the Ninth Circuit's starting point of a 25 percent benchmark, the fee request is appropriate given the excellent result obtained, the experience of counsel and the hours of work performed.

This is a putative wage and hour class action on behalf of the California Class, or "all persons employed by Vaco in California who were assigned to work at Google in any of the roles of Order Audit Operation Specialist, Content Bug Technician, Expedition Associate, and/or Expedition Team Lead, at any time from August 12, 2013 through September 9, 2021," and an Expedition FLSA Class, or "all persons employed by Vaco in the United who were assigned to work at Google in the position of Expedition Associate and/or Expedition Team Lead at any time from August 12, 2014 through September 9, 2021." The Settlement (of which the Court granted preliminary approval on September 9, 2021) provides for a Total Settlement Amount ("TSA") of $1,500,000. California Class members will not have to make a claim but instead will be mailed checks directly, unless they timely and validly submit a

Request for Exclusion from the Settlement. However, due to the opt-in requirements of FLSA claims under 29 U.S.C. 216(b), claims by the Expedition FLSA Class will be subject to the Class Members timely and validly submitting the Consent to Join Settlement form sent with the Class Notices. To the extent that Expedition FLSA Class Members do not opt into the Settlement, only up to 10% of the TSA in funds attributable to such persons will revert to the Defendant. Any other amounts remaining from uncashed checks will be transmitted to the Law Foundation of Silicon Valley as a *cy pres* recipient. The highest Settlement Share to be paid is approximately $23,671.44 and the average Settlement Share to be paid is approximately $7,378.38. (Declaration of Taylor Mitzner "Mitzner Decl." ¶ 16.) (It should be noted that these amounts will decrease if more FLSA Class members opt in.)

Plaintiffs achieved an excellent result for the class given that the operative claims are narrowly defined, and this case was vigorously defended at the pleading stage by experienced and skilled defense counsel. In fact, over the past few years, the Parties have gone through five separate amendments to the Complaint, each aimed at making the class definition more accurate and precise, Defendants working continually to constrain the scope of the class claims, while Plaintiff fought to maintain it. The Settlement was unquestionably the result of thorough factual and legal analyses and arms-length negotiations. The Agreement represents a fair, adequate and reasonable compromise of disputed wage claims. Indeed, Plaintiff obtained an excellent result for class members in the face of formidable opposition. Likewise, the Agreement's attorneys' fees and costs provisions are reasonable and consistent with Ninth Circuit precedent

Through this Motion, Plaintiff requests an award of attorney's fees and costs to Class Counsel and an enhancement award to Plaintiffs. On a percentage or lodestar basis, the fee award sought by this Motion is within the range of reasonableness. The costs incurred were only those costs necessary to successfully resolve this matter.

II. BACKGROUND

Vaco LLC ("Vaco") provides staffing solutions to companies located in the Silicon Valley. (ECF 118, ¶ 5.) This includes the placement of temporary agents on contract projects for tech companies, which could result in short-term or long-term work depending on the project's duration. (*Id.*)

Vaco hired Plaintiff on May 12, 2014 and assigned her to work at Google as an Order Audit Operations Specialist ("OAOS"). (*Id.*, ¶ 6.) On May 18, 2015, Vaco assigned Plaintiff to work at Google as a Content Bug Technician ("CBT"). (*Id.*) On September 12, 2015, Vaco assigned Plaintiff to work as part of a project for Google Expedition. (*Id.*) Prior to September 2017, Vaco classified "Expedition Leads" who oversaw work on the team as exempt from overtime; however, following a claim filed by counsel for Plaintiff here, out of an abundance of caution Vaco converted those employees to non-exempt. (*Id.*)

On August 24, 2017, Plaintiff[1] filed suit in Santa Clara Superior Court, asserting 8 claims against Defendants.[2] (ECF 1-1, Ex. A.)

On September 27, 2017, the Vaco Defendants removed the Action to the U.S. District Court for the Northern District of California (the "Northern District"). (ECF 1.) On October 31, 2017, Plaintiff filed a First Amended Complaint ("FAC") alleging a ninth claim for civil penalties under the California Private Attorneys General Act of 2004 ("PAGA") and narrowing the class definition to just those employees who worked for the Vaco Defendants who were assigned to Google during the class period. (ECF 20.) After Google filed a Motion to Dismiss Plaintiff's FAC, the Court issued an order on May 2, 2018, granting Google's motion to dismiss the FAC, with leave to amend, except that Plaintiff's PAGA cause of action was dismissed without leave to amend. (ECF 44.)

On May 23, 2018, Plaintiff filed a Second Amended Complaint ("SAC") dropping her PAGA claim but keeping all other causes of action. (ECF 47.) After Defendants filed a Motion to Dismiss Plaintiff's SAC, the Court issued an order, on December 3, 2018, dismissing Plaintiff's SAC with leave to amend. (ECF 60.)

On January 23, 2019, Plaintiff filed a Third Amended Complaint ("TAC"). (ECF 65.) After

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[1] This action essentially continued from where *Trujillo v. Vaco Technology Services, Inc., et al.*, Santa Clara Superior Court Case No. 1-15-CV-280846, left off after the plaintiff there settled with Defendants on an individual basis; this action involves the same Defendants, the same counsel of record, but a new class representative in Plaintiff. (ECF 118, ¶ 4.)

[2] In the Complaint, VACO TECHNOLOGY SERVICES, LLC, VACO SAN FRANCISCO, LLC, VACO LA JOLLA, LLC, VACO ORANGE COUNTY, LLC, and VACO LOS ANGELES, LLC (the "Vaco Defendants") were named. (ECF 1-1, Ex. A.) In the 5AC and in the Settlement, Vaco LLC has replaced all the formerly named Vaco Defendants. (ECF 118, ¶ 9, Ex. 1.)

Defendants filed a Motion to Dismiss Plaintiff's TAC, the Court issued an order, on July 22, 2019, dismissing the TAC with leave to amend in part and without leave to amend in part. (ECF 85.)

On August 12, 2019, Plaintiff filed a Fourth Amended Complaint ("4AC"). (ECF 87.) After Defendants filed a Motion to Dismiss Plaintiff's 4AC, the Court issued an order, on February 12, 2020, denying Defendants' motion. (ECF 103.) On February 26, 2020, Google filed its Answer to the 4AC. (ECF 104.) On March 11, 2020, Vaco did likewise. (ECF 105.)

On August 31, 2020, the Parties participated in a full-day private, arm's-length mediation with Tripper Ortman, Esq., serving as neutral. (ECF 118, ¶ 7.) Through informal discovery in advance of mediation, Defendants provided Class Counsel with documents, including copies of all applicable versions of personnel and payroll policies, contact information for the putative class, and records reflecting Class Members' hours worked and wages paid, amongst numerous other documents, as well as payroll and time clock data for the putative class. (*Id.*)

At the mediation, the Parties debated their legal positions, the likelihood of certification of Plaintiffs' claims, and the legal bases for the claims and defenses. (*Id.*, ¶ 8.) Ultimately, the Parties agreed to resolve this matter on a class-wide basis and memorialized their agreement in a Memorandum of Agreement, which was signed by the parties on December 3, 2020. (*Id.*) Following further negotiations, the Parties finalized the long-form Agreement, which the Parties executed on February 1, 2021. (*Id.*)

On February 19, 2021, the Parties filed a stipulation, pursuant to the Agreement, to file a Fifth Amended Complaint ("5AC") to substitute Vaco LLC for the Vaco Defendants in the action. (ECF 116.) The 5AC also changes Google's name from "Google, Inc." to "Google LLC." (*Id.*) The Parties filed the Motion for Preliminary Approval on the same day. (ECF 117.) The Court granted the Stipulation on February 22, 2021. (ECF 120.) Plaintiff filed the 5AC separately, as requested by the Court, on August 18, 2021. (ECF 127.) The Parties modified the terms of the Settlement per the Court's request, and submitted a fully executed copy of the Amended Settlement Agreement to the Court on August 21, 2021. (ECF 129.) The Court granted preliminary approval on September 9, 2021. (ECF 133.)

III. SUMMARY OF SETTLEMENT TERMS

The following is a summary of the material elements of the Settlement.

A. The Settlement Class.

The classes conditionally certified are defined as:

- **California Class**: All persons employed by Vaco in California, who were assigned to work at Google in any of the roles of Order Audit Operation Specialist, Content Bug Technician, Expedition Associate, and/or Expedition Team Lead, at any time from August 12, 2013 through September 9, 2021. (ECF 133, at 2.)
- **Expedition FLSA Class**: All persons employed by Vaco in the United States, who were assigned to work at Google in the position of Expedition Associate and/or Expedition Team Lead, at any time from August 12, 2014 through September 9, 2021. (*Id.*)

B. Total Settlement Amount and Distributions.

Defendants will pay a maximum aggregate TSA of **$1,500,000**. (Agreement, §§ I(EE), III(A).) The TSA covers: (1) the Class Representative payment of **$7,500** to Plaintiff in compensation for having prosecuted the action and undertaken the risk of payment of costs in the event this matter had not been successfully concluded (*Id*, § III(C)(1)); (2) Settlement Payment paid to Class Members for their class claims (*Id*, § III(B)(1)); (3) the Class Members' respective shares of any applicable payroll taxes (including but not limited to Class Members' FICA and FUTA contributions and any other taxes) attributable to any payments under the Settlement (*Id.*, § III(B)(4)); (4) the Class Counsel Award, consisting of attorneys' fees not to exceed **$500,000** (1/3 of the TSA), plus costs not to exceed **$40,000 (the actual costs incurred which Plaintiff is seeking are$15,941.94)** to compensate Class Counsel for all work performed thus far and all work remaining to be performed in connection with the Settlement, including without limitation documenting and administering the Settlement and securing Court approval (*Id*, §§ I(H) and III(C)(2)); and (5) the fees and expenses of the Settlement Administrator, expected not to exceed **$7,250** (*Id.*, §§ III(C)(3) and (D)).

After all Court-approved deductions from the TSA, it is estimated that the NSA payable to Class Members, including related tax payments but excluding Defendants' portion of tax payments,

will be **$969,308.06** out of the $1,500,000 TSA.[3] To fairly allocate settlement funds based on each Class Member's dates of employment as a Class Member, the distribution amount will be calculated as follows: each Participating Class Member (*i.e.*, California Class Members who do not opt out and those FLSA Class Members who opt in to the Agreement pursuant to its procedures (Agreement, § I(Z)) will receive a payment equal to the NSA times the ratio of (i) the number of Covered Workweeks that he or she worked to (ii) the total number of Covered Workweeks worked by all Class Members. (*Id.*, at § III(B)(1).) For the California Class, the number of Covered Workweeks will be measured from August 12, 2013 to September 9, 2021; for the FLSA Class, the number of Covered Workweeks will be measured from August 12, 2014 to September 9, 2021. (*Id.*) To calculate the estimated Settlement Share reported to Class Members in the Notice of Estimated Settlement Award, it will be assumed that no California Class Members opt out or request exclusion and that all FLSA Class Members opt into the Settlement. (*Id.*)

In the event that more than **$969,308.06** remains in the NSA after payment of the Class Counsel fees and costs, Class Representative Payment, and Settlement Administrator's fees and costs, then the class Settlement Shares allocated to Class Members, will be increased on a *pro rata* basis, in proportion to the amounts estimated above. (*Id.*, ¶ I(X).) Finally, if the actual number of Covered Workweeks is over 10% greater than the aggregate of 1,752 exempt employee workweeks and 8,309 non-exempt employee workweeks, the TSA will increase on a *pro rata* basis equal to the increase in class size. (*Id.*, ¶ III(I).)

C. Scope of the Class Member Releases

In consideration for their Settlement Shares, as of the date the Settlement becomes Final (as defined in Agreement section I(R)), each California Class Member who did not timely and properly opt out of the Agreement, shall release any and all known and unknown claims against Vaco LLC, Google LLC, and any of their present and former parents, subsidiaries and affiliated companies or entities, and their respective officers, directors, employees, partners, members, shareholders and agents, and any other successors, assigns and legal representatives and their related persons and entities (collectively, "Released

[3] The Mitzner Declaration provides a slightly lower number because it assumes the Court will award the maximum $40,000 in costs specified in the Settlement Agreement.

Parties"), based on the facts alleged in the operative complaint, including that from August 12, 2013 through the date on which the Court grants preliminary approval of the Settlement, Defendants failed to provide meal periods; provide rest periods; pay hourly wages; pay overtime compensation; indemnify employees for business expenses; provide accurate itemized wage statements; and pay all wages due to discharged and quitting employees. The released claims include but are not limited to claims brought under California Labor Code sections 201, 202, 203, 204, 223, 226, 226.7, 510, 512, 1194, 1194.2, 1197, 1197.1, 1198, 2802, California Business and Professions Code sections 17200-17208, and the Industrial Welfare Commission Wage Orders. (Agreement, § III(F)(2).)

In consideration for their Settlement Shares, as of the date the Settlement becomes Final (as defined in Agreement section I(R)), each FLSA Class Member who timely and properly opted into the Agreement, shall be deemed to have fully, finally, and forever released the Released Parties any and all known and unknown claims that arise out of the allegations that, from August 12, 2014 through September 9, 2021, Defendants failed to pay for all hours worked; failed to pay overtime wages; and failed to keep accurate records of all hours worked. The released claims include but are not limited to claims under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 et seq., and any similar federal, state, municipal or local laws. (Agreement, § III(F)(3).

IV. DISCUSSION

A. The Legal Standard for Attorneys' Fee Awards

California and the Ninth Circuit, and all federal courts, for that matter, use similar criteria to assess a fee request attendant to a motion for final approval, including: (i) the results achieved on behalf of the class; (ii) class counsel's experience, reputation and ability; (iii) the time and labor required by the litigation; (iv) whether class counsel was precluded from other work; (v) the complexity of the litigation; and (vii) the contingent nature of the litigation. *See Serrano v. Priest*, 20 Cal. 3d 25, 49 (1977); *accord Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002) (identifying similar criteria); *see also* Herr, MANUAL FOR COMPLEX LITIGATION, FOURTH, § 21.71 at 524-27 (2008) (survey of federal criteria similar to California criteria).

B. The Fee Award Is Reasonable and Should Receive Final Approval

1. An Excellent Result Was Achieved on Behalf of the Class

The benefit achieved on behalf of class members defines a primary yardstick against which any fee motion is measured. *See Serrano*, 20 Cal. 3d at 49; *accord Vizcaino*, 290 F.3d at 1048.

The Parties reached a Settlement in good faith after negotiating at arm's length with a professional mediator and receiving a mediator's proposal. (ECF 118, ¶ 7.) Settlement occurred only after extensive informal discovery commenced. Through informal discovery in advance of mediation, Defendants provided Class Counsel with documents, including copies of all applicable versions of personnel and payroll policies, contact information for the putative class, and records reflecting Class Members' hours worked and wages paid, amongst numerous other documents, as well as payroll and time clock data for the putative class. (*Id.*)

The information obtained through Plaintiff's informal discovery in advance of mediation including Defendants' employee records and the additional, detailed data about class composition produced for mediation, were sufficient to permit Plaintiff's counsel to adequately evaluate the settlement. (Setareh Decl., ¶ 31.) And, notably, approval of a class action settlement does not require that discovery be exhaustive. *See, e.g., In re Immune Response Securities Litigation*, 497 F. Supp. 2d 1166, 1174 (S.D. Cal. 2007) (settlement approved where informal discovery gave the parties a clear view of the strength and weaknesses of their cases). The fact that settlement results from arm's length negotiations following "relevant discovery" creates "a presumption that the agreement is fair." *Linney v. Cellular Alaska Partnership*, 1997 WL 450064, at *5 (N.D. Cal. 1997).

With respect to the claims asserted on behalf of the settlement Class in this case, there are significant risks that support the reduced compromise amount. First, there is risk that class certification could have been denied by way of contested motion. Indeed, while some courts have certified cases of this nature by way of contested motion, including cases brought by Plaintiffs' counsel, there are also numerous decisions where courts have declined to certify such claims. As such, while Plaintiff believes that her claims are amenable to class treatment for purposes other than settlement, Defendants fully intended to contest any motion for class certification and the possibility that class certification might be denied factored into Plaintiff's evaluation of the inherent risks of further litigation. This risk is heightened

by the fact that both parties would have been forced to engage in additional and protracted written discovery, would need to take further depositions, and would have needed to conduct additional factual investigations in order to gather further evidence in support of their positions.

Second, there is a risk that Defendant could have obtained summary judgment as to Plaintiff's claims. For example, Defendants contend that their timekeeping, meal and rest break, and expense reimbursement policies are legally compliant and that they are, in any event, not subject to common proof. (ECF 118, ¶ 12-15.)

Even if the Court granted class certification, prevailing at trial would require further risky litigation and likely involve an expensive battle of the experts. Defendant would certainly appeal any verdict favorable to the class, resulting in further delay and the risk that a favorable verdict would be overturned on appeal.

When facing an uncertain resolution of the claims in this Action, settlement is all the more reasonable. Indeed, the Total Settlement Amount will provide Settlement Class members with real and timely payments as opposed to the largely speculative awards that may or may not otherwise be obtained based on the various litigation risks going forward should the proposed Settlement not be approved. (Setareh Decl., ¶¶ 33-38.) Continued litigation of this lawsuit presented Plaintiffs and Defendant with substantial legal risks that were (and continue to be) very difficult to assess.

In light of the uncertainties of protracted litigation, the settlement amount reflects a fair and reasonable recovery for the settlement Class Members. (Setareh Decl., ¶ 37.) The settlement amount is, of course, a compromise figure. (*Id*., ¶ 37) By necessity it took into account risks related to liability, damages, and all the defenses asserted by the Defendant. (*Id*.) Moreover, each settlement Class Member will be given the opportunity to opt out of the Settlement, allowing those who feel they have claims that are greater than the benefits they can receive under this Settlement, to pursue their own claims. (*Id*.) With 201 class members in the class, the gross recovery for each class member is projected to exceed $7,462 per employee ($1,500,000/201 = $7,462.69). The value of this amount reflects a fair compromise well within the range of reasonableness. Given the strong case that Defendant could bring to bear to challenge liability, this is not an inconsequential sum in these challenging economic times. And, confirming the fundamental fairness of the settlement, Class Members who worked for Defendant longer will receive

more of the net settlement share. After analyzing the claims in this matter, Plaintiffs have concluded that the value of this Settlement is fair, adequate and reasonable. Based on information provided by Defendant during the litigation, as well as other investigation, Plaintiffs' counsel estimates that the liability exposure is $3,121,348.92 without considering statutory and civil penalties. (Setareh Decl. ¶ 38.) Thus, the Total Settlement Amount of $1,500,000 represents 48% of the damages the class could reasonably have expected to recover at trial. (*Id*.) While Plaintiff would certainly have preferred to recover more (and Defendants would have preferred to pay less), this outcome is favorable considering the risks of further litigation. (*Id*.) On that basis, it would be unwise to pass up this settlement opportunity.

How class members respond to a class action settlement is typically addressed in concert with courts' assessments of a settlement's overall benefit to class members. *See generally, Vizcaino, supra*. State and federal courts alike take the measure of a settlement's "fairness" with reference to the class members' reaction, and specifically the extent to which class members object, and through their objections imply a settlement's unfairness. *See, e.g., 7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1152-53 (2000) (only nine objectors from a class of 5454 was an "overwhelmingly positive" fact that supported approval of the settlement); *Reynolds v. National Football League*, 584 F.2d 280 (8th Cir. 1978) (16 objectors out of 5400 strongest evidence of no dissatisfaction with settlement among class members); *American Eagle Ins. Co. v. King Resources Co.*, 556 F.2d 471, 478 (10th Cir. 1977) (only one objector "of striking significance and import"). The deadline to object has not yet passed. When the final approval motion is field Plaintiffs will provide updated information on the number of objections.

2. The Experience, Reputation, and Ability of Class Counsel

California law also recognizes the "skill and experience of attorneys" as appropriate criteria for evaluating a fee motion. *Flannery v. California Highway Patrol*, 61 Cal. App. 4th 629, 647 (1995); *accord In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491 (W.D. Pa. 2003) ("skill and efficiency of counsel" among fee motion criteria); *In re Heritage Bond Litig*., 2005 U.S Dist. LEXIS 13555 at *64 (C.D. Cal. June 10, 2005) (Considering "the quality of Class Counsel's effort, experience and skill"). Class Counsel has had substantial experience with the causes of action here and have regularly litigated employment law class actions. (Setareh Decl., ¶¶ 6-15.)

3. The Effort Required by the Litigation Justifies the Fee

California and federal law also look to the time and labor required in connection with the litigation and settlement of a class action for which final approval is sought. *See Serrano,* 20 Cal.3d at 49, *accord Vizcaino,* 290 F.3d at 1048-50. Compared to the reasonable value of the claims, Class Counsel expended substantial effort to achieve the settlement result. (Setareh Decl. ¶¶ 8-12.)

Class counsel expended considerable time and resources in litigating this matter. The work done by the attorneys working on this case includes communicating with Plaintiff, interviewing Plaintiff in order to determine the claims in the case, drafting pleadings, propounding written discovery, reviewing documents produced by Defendants, filing an oppositions to Defendants' several motions to dismiss, or in the alternative to strike class and representative allegations, working up and drafting a mediation brief, working with an expert to analyze the data produced by Defendants, preparing for mediation and preparing and reviewing documents for settlement, drafting the motion for preliminary approval and drafting the motion for attorney fees. (Setareh Decl. ¶¶ 8-12.) The "time and labor" criterion weighs in favor of an award of the requested fees.

4. The Complexity of the Legal and Factual Issues

California law recognizes that the litigation's general complexity and "difficulty of the questions involved, and the skill in presenting them" are properly considered. *Serrano,* 30 Cal. 3d at 49, *accord Wershba v. Apple Computer,* 91 Cal. App. 4th 224, 245 (2001). Here, Complexity of legal issues was a significant factor as evidenced by the extensive history of motion practice just at the pleading stage.

On September 27, 2017, the Vaco Defendants removed the Action to the U.S. District Court for the Northern District of California (the "Northern District"). (ECF 1.) On October 6, 2017, they further filed a Motion to Stay the Action Pending Adjudication of the *Trujillo* Action. (ECF 14.) On October 10, 2017, Google filed a Motion to Dismiss Plaintiff's Complaint or, in the Alternative, to Strike Class Allegations, alleging the class definitions to be vague and overbroad. (ECF 16.)

On October 31, 2017, Plaintiff filed a First Amended Complaint ("FAC") alleging a ninth claim for civil penalties under the California Private Attorneys General Act of 2004 ("PAGA") (Labor Code § 2698, *et seq.*) and narrowing the class definition to just those employees who worked for the

Vaco Subsidiaries who were assigned to Google during the class period. (ECF 20.) On November 14, 2017, Google filed a Motion to Dismiss Plaintiff's FAC, or in the Alternative to Strike Class and Representative Allegations, and the Vaco Subsidiaries filed another Motion to Stay pending the *Trujillo* Action in response to the FAC. (ECF 21, 23.) November 15, 2017, the Court terminated the previously filed motions by the Defendants as moot due to the filing of the second round of motions with respect to the FAC. (ECF 24.) On November 28, 2017, Plaintiff filed her Oppositions to these two pending motions. (ECF 25, 26.) On December 5, 2017, Google and the Vaco Defendants filed their respective replies in support of their motions. (ECF 29, 30.) On February 26, 2018, the Court issued an Order Staying Discovery pending resolution of the pleading issues. (ECF 38.) On May 2, 2018, the Court issued its Order (1) Granting with Leave to Amend in Part Google's Motion to Dismiss the FAC; (2) Denying Without Prejudice Vaco Defendants' Motion to Stay (the "FAC Order") that granted Google's motion to dismiss with leave to amend as to all causes of action except for PAGA, which was dismissed without leave to amend. (ECF 44.)

On May 23, 2018, Plaintiff filed a Second Amended Complaint ("SAC") to address the issues raised by the Court in its FAC Order. (ECF 47.) On June 27, 2018, Google filed a Motion to Dismiss/Strike Class Claims from the SAC, and the Vaco Defendants also filed a separate motion to dismiss/strike class allegations from the SAC. (ECF 50, 51.) On July 11, 2018, Plaintiff filed her Oppositions to the two motions. (ECF 52, 53.) On August 8, 2018, Google and the Vaco Defendants filed their respective replies. (ECF 56, 57.) On December 3, 2018, the Court issued its Order Granting Defendants' Motions to Dismiss With Leave to Amend (the "SAC Order") that, in particular, instructed Plaintiff to narrow the class allegations and sufficiently allege that the Vaco Defendants other than Vaco Technology Services, LLC ("VTS") are proper defendants in the Action. (ECF 60.)

On January 23, 2019, Plaintiff filed a Third Amended Complaint ("TAC") to address the issues raised by the Court in its SAC Order. (ECF 65.) On February 19, 2019, Google filed a Motion to Dismiss/Strike Class Claims from the TAC, and VTS also filed a separate motion to dismiss/strike class allegations from the TAC. (ECF 70, 71.) On March 19, 2019, Plaintiff filed her Oppositions to the two motions. (ECF 73, 74.) On April 12, 2019, Google and VTS filed their respective replies. (ECF 77, 78.) On July 22, 2019, the Court issued its Order Granting With Leave to Amend In Part and

Without Leave to Amend in Part Google's and VTS's Motions to Dismiss or Strike (the "TAC Order") that, in particular, instructed Plaintiff to narrow her class allegations from a Vaco Class to classes based on her previous jobs at Google, to narrow her class allegations to the appropriate relevant time period, and to strike references to equitable tolling. (ECF 85.)

On August 12, 2019, Plaintiff filed a Fourth Amended Complaint ("4AC") to address the issues addressed by the Court in its TAC Order. (ECF 87.) On October 1, 2019, Google and VTS filed a Joint Motion to Dismiss/Strike Class Claims from the 4AC. (ECF 97.) On October 15, 2019, Plaintiff filed her Opposition. (ECF 98.) On October 22, 2019, Google and VTS filed their reply. (ECF 100.) On February 12, 2020, the Court issued its Order Denying Defendants' Motion to Dismiss/Strike Class Claims from the 4AC (the "4AC Order"). (ECF 103.) On February 26, 2020, Google filed its Answer to the 4AC. (ECF 104.) On March 11, 2020, VTS did likewise. (ECF 105.)

Accordingly, the complexity of the legal issues weighs in favor of the fees, sought though the fee is reasonable.

5. Class Counsel Assumed Substantial Risk

The novelty and challenges presented by a class action, as well as the corresponding risk that the class members and class counsel will be paid no recovery or fee, is properly evaluated in connection with a fee motion. *See Serrano*, 20 Cal. 3d at 49; *accord Vizcaino*, 290 F.3d at 1050-51 (multiplier applied to lodestar cross-check reflects risk of non-recovery). Ninth Circuit and California state courts regard circumstances in which class counsel's work is wholly contingent as a factor weighing in favor of approving a negotiated fee award that approximates market rates. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132-33 (2001).

Courts have found that similar classes do not satisfy predominance for class certification purposes. Class Counsel nevertheless faced that risk, and an excellent result was obtained.

6. The Fee is Reasonable Under the Common Fund Doctrine

Courts in the Ninth Circuit and California generally use the "percentage method" rather than the lodestar approach when awarding attorneys' fees in a common fund settlement. *See* 7 Witkin, B.E., CALIFORNIA PROCEDURE (2007 Supp.) §§ 255-261 at 236-241 (describing prevalence of percentage method under California law); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[A] litigant or a

lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole"); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377-78 (N.D. Cal. 1989) (Patel, J.) (endorsing percentage method). *See generally, Serrano,* 20 Cal. 3d at 25; *accord Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998).

a) The standard fee award in class actions has, over time, resolved itself as one-third of the recovery in common fund cases.

According to a leading treatise on class actions, "No general rule can be articulated on what is a reasonable percentage of a common fund. Usually, 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented." *See* Conte & Newberg, Newberg on Class Actions (3rd Ed.) § 14.03. Attorneys' fees that are fifty percent of the fund are typically considered the upper limit, with ***thirty to forty percent commonly awarded in cases where the settlement is relatively small***. *See id*; *see also, Van Vranken v. Atlantic Richfield Company*, 901 F. Supp. 294 (N.D. Cal. 1995) (stating that most cases where 30-50 percent was awarded involved "smaller" settlement funds of under $10 million).

The proposed one-third fee award is consistent with the average fee award in class actions. Awards of 33 percent or more are common in court-approved class actions litigated and settled by Class Counsel and other firms across the state. (Setareh Decl., ¶¶ 24-25.) Class counsel has been issued one-third of the settlement amount in fees in a number of cases in the Northern District, including recently in *Burnthorne-Martinez v. Sephora USA, Inc*., 2018 WL 5310833, at *3 (N.D.Cal., 2018), *Garza v. Brinderson Constructors L.P.,* Northern District of California Case No. 5:15-cv-05742-EJD ECF No. 80, and *Fronda v. Staffmark Holdings, Inc.*, 2018 WL 2463101, at *13 (N.D.Cal., 2018). (*Id*.)

The Ninth Circuit has directed that, to determine what constitutes a fair and reasonable percentage of the settlement for purposes of calculating common fund attorneys' fees, the courts should use a "benchmark" percentage of 25% of the total fund. *Paul, Johnson, Alston & Hunt v. Graulty,* 886 F.2d 268, 272 (9th Cir. 1989); *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1047 (9th Cir. 2002); *Six Mexican Workers v. Arizona Citrus Growers,* 904 F.2d 1301, 1311 (9th Cir. 1990). The percentage can be adjusted upwards where the risks overcome, the benefits obtained and the work necessary to achieve those results

supports such an adjustment of the benchmark. In fact, while the Ninth Circuit identified 25% as a fee percentage that is presumptively reasonable, the custom and practice in class actions is to award approximately one-third of a fund as a fee award. *See Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 66, n.11 (2008) ("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.") (emphasis added). Class Members will have the opportunity to object to the proposed award of fees and costs (or any other aspect of the settlement, if they so choose).

b) Plaintiffs seek one-third of the Settlement Fund in fees and costs less than $40,000.

The compensation sought for Class Counsel is also fair and reasonable. Here, the gross settlement fund obtained through the efforts of Class Counsel is $1,500,000. Class Counsel has agreed to request no more than $500,000 in fees from the gross settlement amount, or one-third of the gross settlement amount. Class Counsel has agreed to request no more than $40,000 in costs. Compared to a lodestar of approximately $292,221.25 based on contemporaneously recorded and reasonably projected hours, the total compensation to Class Counsel is consistent with their lodestar. The multiplier necessary to reach the total requested compensation is approximately 1.71, a multiplier less than the multipliers of 3 or more that are routinely approved in class settlements.

The fee award requested here is slightly above the Ninth Circuit's starting point of a 25% "benchmark." The Settlement amount available through the efforts of Plaintiff's counsel is $1,500,000, and they have agreed to request no more than $500,000 in fees and $40,000 in costs. (Agreement, § III.C.2.) Plaintiffs have actually incurred costs of $15,941.94 in this matter, including filing fees, mediation fees, expert costs, Westlaw charges, PACER charges, travel expenses, and postage charges. (Setareh Decl., ¶ 20.) But perhaps most importantly, the proposed attorneys' fees were disclosed to the Class Members in the Notice issued to Class Members.

7. A Lodestar Analysis Supports the Requested Fee

Despite the widely recognized limitations of the so-called "lodestar" method, California and federal courts recognize the utility of a lodestar "cross-check." *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 46 (2000). A lodestar "cross-check" analysis typically happens in three steps. *Cundiff*

v. Verizon California, 167 Cal. App. 4th 718 (2008), *accord Vizcaino*, 290 F.3d at 1047. First, a trial court must determine a baseline guide or "lodestar" figure based on the time spent and reasonable hourly compensation for each attorney involved in the case. *Serrano*, at 48. Second, the court sets a reasonable hourly fee to apply to the time expended, with reference to the prevailing rates in the geographical area in which the action is pending. *Bihun v. AT&T Information System*, 13 Cal. App. 4th 976, 997 (1993) (16 years ago, affirming a $450 per hour rate for a Southern California litigation attorney). Finally, a "multiplier" of the base lodestar is set with reference to the factors described in detail in this brief. Courts often apply a positive multiplier to the lodestar to determine a reasonable fee. *E.g. Vizcaino supra* at 1051 (positive multiplier of 3.65.) Across all jurisdictions, multipliers of up to four are frequently awarded. NEWBERG, §14.03 at 14. Often, multipliers of greater than four are warranted.

Looking at the work of attorneys for Plaintiffs in this matter (***and excluding paralegals***), the lodestar calculation for Setareh Law Group is $292,221.25, calculated as follows:

Attorney	Bar Year	Rate	Hours	Total
Shaun Setareh	1999	$900.00	80	$72,000.00
Thomas Segal	2002	$750.00	132.5	$99,375.00
William M Pao	2002	$750.00	37.8	$28,350.00
Jose Patino	2010	$625.00	73.65	$46,031.25
Candice Pillion	2011	$600.00	0.8	$480.00
Farrah Grant	2013	$500.00	87.65	$43,825.00
Lilit Ter-Astvatsatryan	2018	$375.00	2.7	$1,012.50
Ashley Batiste	2018	$375.00	1.8	$675.00
Nolan Dilts	2019	$350.00	1.35	$472.50
Total			**418.25**	**$292,221.25**
Total Fees Sought			(1/3 TSA)	$500,000.00
Multiplier				**1.71**

(Setareh Decl., ¶ 16.)

This lodestar figure is in line with the requested fee, requiring a multiplier of 1.71. (Setareh Decl., ¶ 17.) This is in the typical multiplier range typically applied by district courts. *See, e.g., Bellinghausen v. Tractor Supply Co.* 306 F.R.D. 245, 264 (N.D. Cal. 2014) (54 percent of lodestar multipliers fall within the 1.5 to 3.0 range, and 83 percent of multipliers fell within the 1.0 to 4.0 range); *Hopkins v. Stryker Sales Corp*., No. 11-CV-02786- LHK, 2013 WL 496358, at *5 (N.D. Cal. Feb. 6, 2013) (multiplier of 2.86); *Di Giacomo v. Plains All Am. Pipeline, Nos*. 99–4137 & 99–4212, 2001 WL 34633373, at *10–11

(S.D. Fla. Dec. 19, 2001) (5.3 multiplier); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (4.65 multiplier); *In re Aremissoft Corp. Sec. Litig*., 210 F.R.D. 109, 134–35 (D.N.J. 2002) (4.3 multiplier).

The multiplier needed to align the negotiated fee award with the attorney hours expended here is below the multipliers of three or more routinely approved in class actions. (Setareh Decl., ¶ 17.) Accordingly, the lodestar cross-check affirms that the fee award that has been preliminarily approved does in fact fall easily within the range of reasonableness. (*Id*.)

The Ninth Circuit has similarly recognized that the lodestar method "creates incentives for counsel to spend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement." *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1050, n.5 (9th Cir. 2002). As a corollary, a defendant willing to recognize a potential error and settle at an early stage would face the increased risk that an early settlement overture would be rejected. That did not happen here, in part because a percentage of the fund award encourages efficient litigation. The Ninth Circuit has thus cautioned that, while a lodestar method can be used as a cross check on the reasonableness of fees based on a percentage of recovery method if a district court in its discretion chooses to do so, a lodestar calculation is not required and it did "not mean to imply that class counsel should necessarily receive a lesser fee for settling a case quickly." *Id.*

The percentage of recovery method "rests on the presumption that persons who obtain benefits of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Staton*, 327 F.3d 938, 967 (9th Cir. 2003). This rule, known as the "common fund doctrine," is designed to prevent unjust enrichment by distributing the costs of litigation among those who benefit from the efforts of others. *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989).

It is only fair that every class member who benefits from the opportunity to claim a share of the settlement pay his or her pro rata share of attorney's fees, and Plaintiffs' request for fees here means that Class Counsel seek an amount of fees less than the amount Class Counsel would likely receive if they represented each class member individually. Typical contingent fee contracts of plaintiffs' counsel provide for attorney's fees of about 40% of any recovery obtained for a client. (Setareh Decl., ¶ 26.) It would be unfair to compensate Class Counsel here at a substantially lesser rate because they obtained

relief for hundreds of class members. To the contrary, equitable considerations dictate that Class Counsel be rewarded for achieving a settlement that confers benefits among so many people, especially without protracted litigation. The result achieved by Class Counsel merits an award of attorney's fees equal to 33.3% of the total recovered value in this case.

8. Important Public Policies Are Advanced by Awarding Reasonable Fees to Skilled Class Counsel

Wage and hours laws "concern not only the health and welfare of the workers themselves, but also the public health and general welfare." *California Grape Etc. League v. Industrial Welfare Com.*, 268 Cal. App. 2d 692, 703 (1969). California's overtime laws "are to be construed so as to promote employee protection." *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 340 (2004) (*citing Ramirez v. Yosemite Water, Inc.*, 20 Cal. 4th 785, 794 (1999)). Courts have also long acknowledged the importance of class actions as a means to prevent a failure of justice in our judicial system. *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 434-435 (2000) (citing *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 703-704 (1967)). As a practical matter, therefore, privately initiated class actions are the primary mechanism for enforcement of California's labor code protections.

C. <u>The Enhancement Awards Are Reasonable</u>

Enhancement awards serve to reward the named plaintiffs for the time and effort expended on behalf of the class, and for exposing herself to the significant risks of litigation. "Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001); *In re Southern Ohio Correctional Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997). In *Coca-Cola*, for example, the court approved enhancement awards of $300,000 to each named plaintiff in recognition of the services they provided to the class by responding to discovery, participating in the mediation process and taking the risk of stepping forward on behalf of the class. *Coca-Cola*, 200 F.R.D. at 694; *see also Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 300 (N.D. Cal. 1995) (approving $50,000 participation award).

Here, Plaintiff's counsel requests that the Court grant an enhancement award of $7,500 to Plaintiff. The amount of the enhancement award requested for Plaintiff is reasonable given the risks

undertaken by her. Taking the risk of filing a lawsuit against an employer deserves reward, especially in light of the settlement achieved by Plaintiff. Additionally, Plaintiff was actively involved in the litigation and settlement negotiations of this Action. Declaration of Christiana Bush, ¶ 9.) Plaintiff worked diligently with counsel to prepare the action, traveled to and attended the mediation and conferred with counsel regarding settlement negotiations. (Declaration of Christiana Bush, ¶ 9.) Plaintiff undertook to prosecute the cases despite the risk of a cost judgment against them, and despite the potential risk that prospective employers would hold it against them. (Declaration of Christiana Bush, ¶¶ 10-11.) The requested enhancement awards are reasonable and should be approved.

D. The Settlement Administrator's Expenses Should Be Approved

The charges for the Settlement Administrator Simpluris Inc. are estimated to be $7,250. (Mitzner Decl., ¶ 17.) PSA's costs to administer this settlement are in line with the "reasonable" amount allocated in the Settlement Agreement. (Settlement § III(C)(3).) These costs are reasonable and should be approved. (Setareh Decl. ¶ 40.)

V. CONCLUSION

This settlement is fair and reasonable, especially given the claims and the potential defenses to them and to class certification. Thus, the $1,500,000 settlement is worthy of final approval. And because Plaintiffs' counsel were required to expend resources and take risks to obtain that result, fair compensation is also reasonable. For the reasons set forth herein, Plaintiffs request that the Court award Plaintiffs' counsel $500,000 in fees, which is one-third of the gross settlement and roughly 1.71 times the actual lodestar of Plaintiffs' counsel and $15,941.94 in costs.[4]

Respectfully submitted,

Dated: November 22, 2021 **SETAREH LAW GROUP**

By: */S/ Shaun Setareh*
Shaun Setareh

[4] This motion for attorneys' fees, costs and class representative enhancement award is being filed 14 days prior to the deadline for class members to object or opt out of the settlement, and by the deadline set by the court in ECF 133. Plaintiffs will submit a proposed order regarding this motion and the motion for final approval when the motion for final approval is filed.

Thomas Segal
Attorneys for Plaintiffs