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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DAVID CHAVEZ and VINCENT SLAUGHTER, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

STELLAR MANAGEMENT GROUP VII, LLC; STELLAR MANAGEMENT GROUP, INC. d/b/a QSI QUALITY SERVICE INTEGRITY; THE VINCIT COMPANY, LLC d/b/a THE VINCIT GROUP and VINCIT ENTERPRISES,

Defendants.

Case No.: 3:19-cv-01353-JCS

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

Date: March 18, 2022
Time: 9:30 a.m.
Judge: Hon. Joseph C. Spero
Ctrm.: G, 15th Floor

Filed: March 13, 2019
Trial Date: None

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

NOTICE IS HEREBY GIVEN that on March 18, 2022, at 9:30 a.m. by remote videoconference via the online platform Zoom, https://cand-uscourts.zoomgov.com/j/1619260804?pwd=RE5qWDhGOTdWWTZUOFlOKzhNc3pjZz09, Webinar ID: 161 926 0804, Password: 050855, Dial in: US: +1 (669) 254-5252 or +1 (646) 828-7666, International numbers: https://cand-uscourts.zoomgov.com/u/advFLxrTkx, before Magistrate Judge Joseph C. Spero of the United States District Court, Northern District of California, Plaintiffs David Chavez and Vincent Slaughter ("Plaintiffs") move the Court for an Order awarding Class Counsel reasonable attorneys' fees and costs and awarding Plaintiffs service awards.

Specifically, Plaintiffs move this Court for an Order awarding Class Counsel reasonable attorneys' fees of $1,416,666.52 plus reimbursement of actual out-of-pocket costs of $34,384.78. Plaintiffs also move for an Order granting service awards in the amount of $12,000 for the Class Representative Plaintiff David Chavez, and in the amount of $10,000 for the Class and Collective Representative Plaintiff Vincent Slaughter, to be paid out of the Gross Settlement Amount in recognition of their considerable service to the Class and Collective.

Plaintiffs bring this Motion pursuant to Federal Rule of Civil Procedure 23(h) and 29 U.S.C. § 216(b) of the Fair Labor Standards Act. This motion is based on the accompanying Memorandum of Points and Authorities; the Declaration of Carolyn H. Cottrell in Support of Plaintiffs' Motion for Attorneys' Fees and Costs and For Service Awards ("Cottrell Decl.") and the exhibits attached thereto; the Declaration of David Chavez ("Chavez Decl."); the Declaration of Vincent Slaughter ("Slaughter Decl."); such oral argument as may be heard by the Court; and all other papers on file in this action.

Date: November 18, 2021

Respectfully submitted,

/s/ Carolyn Hunt Cottrell
Carolyn Hunt Cottrell

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Attorneys for Plaintiffs and the Putative Class, Collective, Aggrieved Employees, and State of California

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I. INTRODUCTION

Plaintiffs David Chavez and Vincent Slaughter and their counsel move the Court for recovery of attorneys' fees and costs, as well as approval of incentive awards to Plaintiffs for their hard-fought efforts and significant results obtained for the benefit of the Class and Collective.[1] Class Counsel Schneider Wallace Cottrell Konecky LLP ("Class Counsel" or "SWCK") worked with Plaintiffs to litigate this action in order to achieve a complex and intricate non-reversionary Class and Collective Settlement of $4,250,000, which the Court preliminarily approved.[2] This Settlement will bring substantial relief to thousands of Sanitation Workers,[3] who would otherwise be unlikely to obtain relief.

Starting almost three years ago, Class Counsel and Plaintiffs diligently worked to rectify Defendants' unlawful wage and hour practices both within this State and nationwide, and continued to vigorously litigate this action in this Court on behalf of not just Plaintiffs, but for workers nationwide.[4] Class Counsel successfully defeated multiple motions on the pleadings, moved for conditional certification of the nationwide collective, conducted extensive discovery and depositions, performed hundreds of hours of interviews with Sanitation Workers, and analyzed data and documents obtained through those interviews as well documents and data produced by Defendants. After doing so, Class Counsel engaged in a lengthy mediation and subsequent months of arms'-length negotiations with Defendants to come to terms on the Settlement. Class Counsel and Plaintiffs have ensured – subject to this Court's final settlement approval – that thousands of Sanitation Workers will be substantially compensated.

To-date, Class Counsel has spent over 1,997 hours litigating the case, for a lodestar of $1,291,655, which compared to the requested fees of $1,416,666.52, results in a multiplier of 1.097.

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

[2] The "Settlement" or "Settlement Agreement" refers to the Class Action Settlement Agreement and Release, including its First, Second, and Third Amendments, filed at ECF 134-2, 141-1, 147-1, 153-1.

[3] The estimated Individual Settlement Payments provided in the Notice of Settlement were based on a one-third award of $4,250,000, though the Settlement Agreement sets aside one-third of the Gross Settlement Amount ($4,250,000 plus any interest accrued on the Gross Settlement Amount, which was funded on September 7, 2021) for attorneys' fees. *See* ECF 142-2, ¶¶ 27-28; Cottrell Decl.,¶ 28.

[4] Defendants refers to Stellar Management Group VII, LLC ("SMGVII"; Stellar Management Group, Inc. d/b/a QSI Quality Service Integrity ("SMGINC"); and The Vincit Company, LLC d/b/a The Vincit Group and Vincit Enterprises ("Vincit") (collectively, "Defendants").

This multiplier will continue to decrease with the additional work that Class Counsel will complete on behalf of the Class and Collective through the approval process. Moreover, Class Counsel's rates are reasonable and have recently and repeatedly been approved by the courts.

Class Counsel's request for a one-third fee award is within the typical range of attorneys' fees awarded in this Circuit. The fees sought here are reasonable compensation for the work performed, particularly given the risk of nonpayment, the skill and effort required to prosecute this risky case, and the excellent result achieved for the Class. Class Counsel's out-of-pocket costs of $34,384.78 are also documented and reasonably incurred in litigating this case. Both the fees and costs sought are reasonable and warranted under the facts of the case and well-established law.

After proposed fees, costs, and service awards, and assuming all 6,551 Sanitation Workers choose to opt-in to the Settlement, the average net recovery is approximately $936 per class member and $191 per collective member. This result is excellent, particularly in light of the class members' relatively short tenures – approximately 15.43 workweeks per class member and 25.6 workweeks per collective member, on average – during their employment.

This exceptional result did not come without extensive effort, skill and substantial risk. While Plaintiffs were confident that class-wide evidence would support their claims that Defendants had a common practice of discouraging full reporting of overtime and denying off-duty meal and rest periods, bringing a class action case based on "pattern and practice" allegations like these was a risky proposition. Indeed, obtaining class certification of a pattern and practice claim—even when meritorious—is difficult without facially unlawful policies. Despite these risks, Class Counsel devoted themselves to vigorously prosecuting these claims throughout this action.

Furthermore, Defendants put up a staunch defense, including multiple motions on the pleadings to attempt to dismiss this action or part of it. If not for Plaintiffs' Counsel's considerable effort and skill in uncovering key evidence and effectively rebutting Defendants' arguments, this Action may well have been dismissed, potentially leaving the Class Members with no recovery at all. In addition, settlement negotiations were protracted and intensive. Indeed, the parties participated in months of arms-length negotiations, followed by further negotiations to amend the Settlement three times. The

Settlement was reached only after extensive investigation, written discovery, multiple depositions, motion practice, and months of negotiation.

Finally, Plaintiffs seek the Court's approval of service awards of $12,000 for Plaintiff Chavez and $10,000 for Plaintiff Slaughter, to recognize the vital role that they played in obtaining substantial relief for their fellow Sanitation Workers, as contemplated by the Settlement Agreement. Unlike their fellow Sanitation Workers, Plaintiffs agreed to general releases, which only further emphasizes the reasonableness and appropriateness of these requested service awards. For the reasons set forth below, the Court should award the proposed service awards for the Plaintiffs as fair and reasonable compensation for their efforts in bringing and prosecuting this matter for the benefit of the Class and Collective.

The fees, costs, and service awards sought are justified by the substantial efforts of Class Counsel and the Plaintiffs, the risk involved, and the strong result for the Class. For the reasons discussed herein, the requested awards are appropriate and reasonable under applicable law. Accordingly, Plaintiffs respectfully request that the Court grant this motion.

II. OVERVIEW OF CLASS COUNSEL'S WORK

Since filing the Complaint, almost three years ago, Class Counsel has vigorously litigated the Action, devoting over 1,997 hours to the prosecution of this Action, representing an estimated lodestar amount of $1,291,655. *See* Cottrell Decl., ¶ 36. The procedural history of this action has been well documented in prior briefs, including in Plaintiffs' Motion for Preliminary Approval of Settlement. ECF 134. For purposes of this Motion, Plaintiffs break down the case chronologically to focus on the specific work projects at each stage of the case here.

A. Motions on the Pleadings and the Jurisdictional Discovery Process.

The protracted pleadings stage in this action was both lengthy and hard fought. On March 13, 2019, Plaintiff Chavez filed a Class and Collective Action alleging violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 et seq., ECF 1.[5] Cottrell Decl., ¶ 9.

Defendants filed multiple motions on the pleadings in this matter, which Plaintiffs vigorously opposed, and which this Court denied. Defendants first filed a motion to dismiss for lack of personal jurisdiction on May 6, 2019. ECF 18. Following full briefing, the Court subsequently denied Defendants' motion on June 28, 2019, and granted Plaintiff's request to conduct jurisdictional discovery, ECF 28-29; *see also* ECF 40. Accordingly, Plaintiff Chavez propounded written, jurisdictional discovery requests, including 17 requests for production of documents and 19 special interrogatories on each Defendant on August 8, 2019. Cottrell Decl., ¶ 10. The Parties met and conferred extensively regarding the scope of Plaintiff's requests and appeared before this Court for a discovery conference; as a result, Plaintiffs were granted the opportunity to conduct jurisdictional depositions of Defendants' corporate witnesses. ECF 28-29, 35-36, 39-41. In October 2019, Plaintiff took limited depositions of SMGVII's Rule 30(b)(6) witness, Juanisela Hamilton; SMGINC's Rule 30(b)(6) witness, Jeffrey W. Bryant; and Vincit's Rule 30(b)(6) witnesses, Rebecca Hulgan and Tammy Way. Cottrell Decl., ¶ 10. The jurisdictional discovery process concluded on October 30, 2019. *Id.*

Defendants subsequently filed a renewed motion to dismiss for lack of personal jurisdiction on November 22, 2019, ECF 45, which Plaintiff Chavez opposed, employing the thoroughly conducted jurisdictional discovery in his briefing. *See* ECF 47. The Court permitted further briefing on Defendants' motion, and Defendants and Plaintiff Chavez filed a sur-reply and sur-sur-reply, respectively, in January 2020. *See* ECF 55, 56, 57. Ultimately, the Court denied Defendants' renewed motion on February 21, 2020. ECF 63. Undeterred, on March 6, 2020, Defendants filed a motion for

[5] On March 14, 2019, David Chavez filed a complaint pursuant to the Labor Code Private Attorneys General Act of 2004 ("PAGA") in the California Superior Court of Sonoma County ("State Action") against Defendants. *See* ECF 54-5, at pp. 7-28. On May 6, 2019, Defendants Vincit and QSI filed a motion to quash service for lack of personal jurisdiction, which was granted. *See Id.*, at pp. 30-31; ECF 54-3, at p. 7. For purposes of the Settlement, the Parties agreed to dismiss the State Action without prejudice, and to stipulate to amend the First Amended Complaint to assert claims under the PAGA and Labor Code Section 2802. Settlement, ECF 134-2, ¶ 14. The State Action was subsequently dismissed. *See* ECF 139, ¶ 9; Cottrell Decl., ¶ 9, n. 1.

leave to file motion for reconsideration on Defendants' renewed motion to dismiss, ECF 64, which Plaintiff Chavez opposed, and was denied on April 1, 2020. ECF 73.

On May 1, 2020, Defendants also moved for partial summary judgement on the grounds that Plaintiff Chavez does not have a FLSA claim and for lack of subject matter jurisdiction, ECF 76, which was denied without prejudice to refile on May 11, 2020, allowing to Plaintiffs to proceed to file their anticipated amended complaint. ECF 81. On May 21, 2020, Plaintiffs filed a First Amended Complaint to add named Plaintiff Vincent Slaughter as a named collective and class representative. ECF 83.

On June 4, 2020, Defendants again filed yet another motion to dismiss, this time for lack of personal jurisdiction as to out-of-state putative FLSA collective members based on *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017). ECF 84. Following robust briefing and oral argument, the Court denied Defendants' motion on August 5, 2020. ECF 103.

B. Formal and Informal Discovery, Mediation, and Conditional Certification.

Following the Court's order opening of the formal discovery process, ECF 41-42, on December 20, 2019, Plaintiffs propounded non-jurisdictional written discovery requests, including 76 requests for production of documents and 18 special interrogatories to each Defendant. Cottrell Decl., ¶ 11. Plaintiffs also served three third-party subpoena duces tecum to Foster Farms, Perdue Foods, and La Mexicana LLC in October 2020. *Id.* Plaintiff Chavez served similar written discovery requests in the State Action as well. *Id.*, ¶ 12.

Defendant SMGVII similarly propounded written discovery requests on Plaintiff Chavez, including 48 requests for production of documents, 24 special interrogatories, 17 requests for admission, and 1 demand for inspection, as well as a similar set of discovery requests in the State Action. *Id.*, ¶ 13. In both actions, Plaintiff Chavez submitted extensive responses and specified objections to these requests on April 14, 2020, and further amended responses on June 12, 2020. *Id.*

Numerous, lengthy meet and confer efforts, including meet and confer calls that took hours at a time, convened between the Parties in both actions. *Id.*, ¶ 14. As a result, Defendants produced over

27,100 documents in this Action, along with hundreds of documents in the State Action,[6] including their general policies, time records, payroll records, schedules, and personnel records, and Plaintiff Chavez produced over 100 documents in this Action. *Id.*, ¶ 16.

Plaintiffs additionally completed extensive outreach with Sanitation Workers, including nearly 100 in-depth interviews, which covered topics including dates and locations of work, hours of work, pre-shift and post-shift off-the-clock work, meal and rest breaks, and reimbursement of work-related expenses. *Id.*, ¶ 15; ECF 141 at pp. 2-5. Multiple Sanitation Workers that completed interviews also provided additional documents to Plaintiff's counsel. Cottrell Decl., ¶ 15. Through this process, Plaintiffs garnered substantial factual background regarding the alleged violations, which Class Counsel utilized to build their case and to assess Defendants' potential exposure in this action. *Id.*; ECF 141 at pp. 2-10.

On July 7, 2020, Defendants substituted their former counsel, Hopkins & Carley, ALC, with Defendants' current counsel, Goodwin Procter LLP. ECF 96-97. Plaintiffs worked with Defendants' new counsel to come up to speed in this action, and the Parties subsequently agreed to participate in private mediation. Cottrell Decl., ¶ 18. The Parties then engaged in pre-mediation informal discovery, including additional documents and data regarding payroll, timekeeping, policies, and additional data points regarding the proposed Class and Collective. *Id.*[7]

Plaintiffs received extensive informal discovery in advance of mediation, including additional job descriptions, timekeeping and break policies, and time and pay records for a sampling representing 20% of the Class employed by SMGINC and Vincit, which Defendants had previously refused to produce in formal discovery. *Id.*, ¶ 17. Defendants also provided class-wide figures, including the total number of Sanitation Workers, average hourly rates, and additional data points, ahead the mediation, to enable Plaintiffs' counsel to evaluate damages on a Class and Collective basis. *Id*. Plaintiffs' counsel completed an exhaustive review of these documents, and used the information and data from them to

[6] Upon Defendants' insistence, Plaintiffs agreed to stipulate that any discovery produced in this action and the State Action could not be interchanged, and as a result there was some overlap of discovery produced in the two actions. Cottrell Decl., ¶ 12.

[7] In advance of mediation, the Parties also entered into a Tolling Agreement on August 19, 2020, which tolled the statute of limitations on any FLSA claims of putative Collective Members and memorialized the Parties' agreement to suspend formal motion practice. Cottrell Decl., ¶ 18.

prepare for mediation. *Id*. In the months leading up to the mediation, Counsel spent significant time pursuing and analyzing additional discovery going to the merits of the claims and the calculation of damages. *See id.*

The Parties attended mediation before Mark S. Rudy, a very experienced and highly regarded mediator in class action cases, on September 24, 2020. *Id*., ¶ 19. The case did not settle that day and the Parties continued to litigate the Action. *Id.*

On October 21, 2020, Plaintiff Slaughter moved for conditional certification of the Collective to facilitate nationwide notice pursuant to 29 U.S.C., § 216(b), on behalf of a nationwide collective of non-exempt employees of Defendants. ECF 116. Throughout September and October 2020, the Parties continued to meet and confer over various outstanding discovery issues, including the scheduling of Defendants' Rule 30(b)(6) witnesses and Defendants' production of amended written responses. Cottrell Decl., ¶ 20. Soon thereafter, the Parties settled the Action and agreed to stay the case pending settlement. *Id*.; *see also* ECF 118-119.

C. Settlement, Amendments to Settlement, Amendments of the Pleadings, Preliminary Approval of Settlement, and Subsequent Notice.

Throughout the mediation process, the Parties engaged in serious and arm's-length negotiations, culminating in a mediator's proposal. Cottrell Decl., ¶ 21. Following extensive arm's length negotiations, the Parties eventually accepted the mediator's proposal on October 30, 2020. *Id*. The Parties extensively met and conferred over the detailed terms of the settlement for purposes of executing a memorandum of understanding, and eventually agreed to instead memorialize those terms in a long-form settlement. *Id*., ¶ 22. The Parties finalized the long-form settlement agreement on March 12, 2021, which was executed on that same day. *Id*.; Settlement, ECF 134-2.

Defendants agreed to pay a non-reversionary Gross Settlement Amount of $4,250,000 plus interest to settle all aspects of this Action and the State Action. Settlement, ECF 134-2, ¶ 2.q. Pursuant to the Settlement, Defendants paid $4,250,000 into an interest-bearing Qualified Settlement Fund following preliminary approval of the Settlement. *See* ECF 153, ¶ 9; Cottrell Decl., ¶ 28.

The Net Settlement Amount, which is the amount available to pay settlement awards to the Class Members, is defined as the Gross Settlement Amount less: the PAGA Settlement Amount

($30,000.00)[8]; Court-approved enhancement payments awarded to the Class Representatives (up to $12,000.00 for Plaintiff Chavez and up to $10,000 for Plaintiff Slaughter); the Settlement Administrator's fees and costs (estimated not to exceed $85,000); and any attorneys' fees and costs awarded to Plaintiff's counsel (fees of up to one third of the Gross Settlement Amount, or approximately $1,416,666.52, plus costs not to exceed $50,000). Settlement, ECF 134-2, ¶ 2.r.

Plaintiffs moved for preliminary approval of the Settlement on March 12, 2021, which was unopposed. *See* ECF 134, 136. The Court held a hearing on Plaintiffs' motion on April 16, 2021, during which the Court ordered supplemental materials be filed, including briefing regarding Plaintiffs' damages and interviews with Sanitation Workers, amended pleadings, amended settlement and amended settlement notices. *See* ECF 138. On May 6, 2021, the Court granted the Parties' stipulation for leave to file a Second Amended Complaint, which included additional claims under the PAGA, Labor Code Section 2802, and revisions to the Class and Collective member definitions to reflect those settled in this action *See* ECF 139, 140. Following the Parties' extensive meet and confer efforts, Plaintiffs subsequently filed an unopposed supplemental brief detailing Plaintiffs' damages analysis and results from Plaintiffs' interviews with Sanitation Workers, and attached the Parties' amended settlement, settlement notices, and proposed amended preliminary approval order on May 7, 2021. *See* Cottrell Decl., ¶ 23; ECF 141, 142. The first Amendment to Class Action Settlement Agreement and Release ("First Amendment"), executed on May 7, 2021, revised, *inter alia*, the Class, Collective, and Aggrieved Employees' definitions to exclude corporate office employees, modified language regarding FLSA and PAGA releases, and corrected associated deadlines pursuant to the Court's direction. ECF 141-1.

The Court held a case management conference on July 2, 2021, and addressed further concerns regarding the Settlement and ordered that further supplemental materials be filed. ECF 144. The Parties again extensively met and conferred, and on July 30, 2021, Plaintiffs filed a supplemental

[8] The Parties agreed to allocate $30,000.00 of the Gross Settlement Amount to the settlement of the PAGA claims, which the Parties believe in good faith is a fair and reasonable apportionment. Settlement, ECF 134-2, ¶¶ 2.x, 29.c. The Settlement Administrator shall pay 75%, or $22,500.00, of this amount to the LWDA, and 25%, or $7,500.00, the "Net PAGA Amount," shall remain as part of the Net Settlement Amount. *Id.*, ¶ 29.c.

statement, including a second amendment to the Settlement, and amended proposed notices and preliminary approval order. Cottrell Decl., ¶ 24; ECF 146. The Second Amendment to Class Action Settlement Agreement and Release ("Second Amendment"), executed on July 30, 2021, revised the Class, Collective, and Aggrieved Employees' definitions to exclude administrative workers, office clerk workers, and corporate office employees, and revised the total number of settlement shares allocated to individuals who were former employees and were also releasing Labor Code Section 203 waiting time penalties. ECF 147-1. The Court subsequently granted the Parties' stipulation for leave to file a Third Amended Complaint, which revised the definitions of the Class, Collective, and Aggrieved Employees accordingly. *See* ECF 145, 148, 149. The Third Amended Complaint was filed on August 5, 2021. ECF 149.

The Court subsequently preliminarily approved the Settlement on August 25, 2021. ECF 151. However, during Defendants' process of compiling class data for purposes of the notice administration, Defendants informed Plaintiffs that due to Defendants' restructuring effective January 1, 2021, non-exempt employees of other entities not parties to this matter became employees of Defendant Stellar Management Group VII, LLC as of January 1, 2021. *See* ECF 153, ¶ 11. On September 24, 2021, the Parties subsequently stipulated to amend the Settlement to avoid significant dilution of the Settlement fund due to Defendants' restructuring. *Id.*, ¶¶ 12-13. The Third Amendment to Class Action Settlement Agreement and Release ("Third Amendment"), executed on September 22, 2021, revised the definitions of and release periods applicable to qualifying Class and Collective members and Aggrieved Employees to only include employees through December 31, 2020. ECF 153-1.

The Court subsequently issued an amended order preliminarily approving the revised Settlement on September 27, 2021 (ECF 154), and the Parties have proceeded with notice administration. Cottrell Decl., ¶ 25. Notices of Settlement were sent via regular mail to 6,551 Sanitation Workers[9] and additionally via electronic mail to 5,794 of those Sanitation Workers on October 19, 2021. *Id.*, ¶ 26. That same day, the settlement website pursuant to the Settlement and the Court's order went live. *Id.*,

[9] Originally, the total number of class and collective members was estimated to include approximately 5,923 Sanitation Workers as of late September 2020. *See* ECF 134, 141. Based on the revised class and collective list provided by the Defendants to the Settlement Administrator, the total number of class members is 1,901, and collective members is 4,650. Cottrell Decl., ¶ 26, n. 4.

¶ 26. The notice period is set to expire on December 23, 2021. *Id.*, ¶ 27. To date, no Sanitation Workers have objected to or requested exclusion from the settlement. *See id.*

III. ARGUMENT

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

In a class action settlement, the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement. Fed. R. Civ. P. 23(h). Courts have the power to award reasonable attorneys' fees and costs where, as here, a litigant proceeding in a representative capacity secures a "substantial benefit" for a class of persons. *See e.g., Staton v. Boeing Co.*, 327 F. 3d 938, 967 (9th Cir. 2003); *Hendricks v. Starkist Co*, No. 13-cv-00729-HSG, 2016 U.S. Dist. LEXIS 134872, at *34 (N.D. Cal. Sep. 29, 2016). The two methods for determining reasonable fees in the class action settlement context are the "percentage of recovery" method and the "lodestar method." *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1170 (C.D. Cal. 2010); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998).

It is settled law in the Ninth Circuit that a district court may award attorney fees based on a percentage of the common fund when a settlement results in the creation of a fund that will inure to the benefit of class members. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Hanlon*, 150 F.3d at 1029.[10] Courts within the Ninth Circuit generally prefer the percentage approach to other methods for awarding attorney fees, such as a lodestar calculation. *See* Thomas E. Willing, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 4, 71 (1996) (noting that the Northern District of California has determined fees by percentage of recovery 6:1 over the lodestar approach); *see also, e.g., Vizcaino*, 290 F.3d at 1047

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

(approving the percentage method for determining fees in a common-fund case); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (same); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D. Cal. 2010) (applying the percentage approach—even when the lodestar would have dictated a larger fee award—because "a percentage of the common fund [to assess fees] is particularly appropriate when each member of a certified class has an undisputed and mathematically ascertainable claim"). The percentage-of-the-fund method is appropriate where – as it is here – the amount of the settlement is fixed without any reversionary payment to the defendant. *See Thieriot v. Celtic Ins. Co.*, No. C 10-04462 LB, 2011 U.S. Dist. LEXIS 44852, at *15 (N.D. Cal. Apr. 21, 2011) (citing *Chu v. Wells Fargo Investments, LLC*, Nos. C 05-4526 MHP, C 06-7924 MHP, 2011 U.S. Dist. LEXIS 15821, 2011 WL 672645, at *4 (N.D. Cal. Feb. 16, 2011)).

Accordingly, the Court should employ the percentage of recovery method in this case and award Class Counsel their requested fee of one-third of the Gross Settlement Fund.

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

"The typical range of acceptable attorneys' fees in the Ninth Circuit is 20% to 33 1/3% of the total settlement value, with 25% considered the benchmark." *Vasquez*, 266 F.R.D. at 491-492 (granting 33.3% fee award and collecting cases) (citing *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000)); *Hanlon*, 150 F. 3d at 1029; *Staton*, 327 F. 3d at 952; *Shaw v. Amn Servs.*, No. 3:16-cv-02816 JCS, 2019 U.S. Dist. LEXIS 239897, at *5 (N.D. Cal. May 31, 2019) (Spero, M.J.) (approving SWCK's one-third fee award); *Villalpando v. Exel Direct Inc.*, No. 3:12-cv-04137-JCS, 2016 U.S. Dist. LEXIS 182521, at *4 (N.D. Cal. Dec. 9, 2016) (Spero, M.J.) (same). However, the exact percentage varies depending on the facts of the case, and in "it is common practice to award attorneys' fees at a higher percentage than the 25% benchmark in cases that involve a relatively small — i.e., under $10 million — settlement fund." *Thieriot*, 2011 U.S. Dist. LEXIS 44852, at *17 (citing *Cicero v. DirecTV, Inc.*, No. EDCV 07-1182, 2010 U.S. Dist. LEXIS 86920, 2010 WL 2991486, at *6 (C.D. Cal. Jul. 27, 2010) (collecting cases)); *In re Pacific Enterprises Sec. Litig.*, 47 F. 3d 373, 379 (9th Cir. 1995) (affirming award of 33% of $12 million common fund).

Courts customarily approve payments of attorneys' fees amounting to one-third of the common fund, including in comparable wage and hour class actions, and courts in this District have described a one-third fee as "well within the range of percentages which courts have upheld as reasonable in other class action lawsuits." *Stuart v. RadioShack Corp.*, No. C-07-4499 EMC, 2010 U.S. Dist. LEXIS 92067, at *18 (N.D. Cal. Aug. 9, 2010); *see also Zamora v. Lyft, Inc.*, No. 3:16-cv-02558-VC, 2018 U.S. Dist. LEXIS 166618, at *10 (N.D. Cal. Sep. 26, 2018) (one-third award is "consistent with the Ninth Circuit authority and the practice in this District.").

The Ninth Circuit instructs that "[t]he 25% benchmark, though a starting point for analysis, may be inappropriate in some cases." *Vizcaino*, 290 F. 3d at 1047; *Six Mexican Workers*, 904 F. 2d at 1311 (the "benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors."). The choice of "the benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case." *Vizcaino*, 290 F. 3d at 1048. The Ninth Circuit has identified a number of factors that may be relevant in determining whether the requested fee is "reasonable" under the "circumstances of the case:" (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the Plaintiff; and (5) awards made in similar cases. *Vizcaino*, 290 F. 3d at 1048-1050 (the "*Vizcaino* factors"). Other courts have additionally considered (6) reactions from the class; and, in its discretion, (7) a lodestar cross-check. *See Barnes v. Equinox Grp., Inc.*, No. C 10-3586 LB, 2013 U.S. Dist. LEXIS 109088, at *13 (N.D. Cal. Aug. 1, 2013). The most significant of these factors is the result that counsel obtains. *See* Fed. Judicial Center, Manual for Complex Litig. § 14.121 (4th ed. 2010) (noting that this factor is accorded "the greatest emphasis"); *Knight v. Red Door Salons, Inc.*, No. 08-01520 SC, 2009 U.S. Dist. LEXIS 11149, at *14 (N.D. Cal. Feb. 2, 2009).

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

1. The Results Achieved by this Settlement Justify the Request.

"The overall result and benefit to the class from the litigation is the most crucial factor in granting a fee award." *In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008). Here,

the Settlement preliminarily approved by the Court resolves the claims of the Class Members for a total non-reversionary settlement of $4,250,000. *See* Cottrell Decl., ¶ 28. This represents approximately 63% of the nonliquidated $6.8 million total exposure for all claims at issue (i.e., excluding derivative and penalty claims), and more than 22% of the approximately $21 million total exposure that Plaintiffs calculated for all claims at issue, even assuming the unlikely scenario that 100% of all FLSA putative Collective members choose to opt-in to the Settlement. *Id.*[11]

The Settlement provides excellent recoveries—on average approximately $940 per Class Member and $191 per Collective Member (again, assuming a 100% opt-in rate). *See* Cottrell Decl., ¶ 34. This result is excellent, particularly in light of the class members' relatively short tenures – approximately 15.43 workweeks per class member and 25.6 workweeks per collective member, on average – during their employment. *Id.*, ¶ 35. As the Class Members' Individual Settlement Shares are based on their number of Workweeks, long-term Sanitation Workers will receive larger recoveries under the Settlement. Settlement, ECF 134-2, ¶ 32.a.ii. With the weighting factors provided in the Settlement, Class Members are paid three times more for each workweek they worked in California (the majority of the Workweeks) to recognize that the stronger wage and hour laws in California would result in enhanced recoveries compared to states with no wage and hour protections beyond the FLSA. *See* Settlement, ECF 134-2, ¶ 32.a.ii. Further, Class Members who are also former employees receive an additional 19 Settlement Shares to recognize their additional claims under Labor Code 203. *See* Second Amendment, ECF 147-1, ¶ 10.

The highly favorable terms achieved by Class Counsel's skill and perseverance, in light of the attendant risks presented by continued litigation with Defendants, favor upward departure from the benchmark and support Class Counsel's request for a one-third award. *See, e.g., In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.*, No. 4:14-md-2541-CW, 2017 U.S. Dist. LEXIS 201108, at *6 (N.D. Cal. Dec. 6, 2017) (noting "[f]ar lesser results (with 20% recovery of damages or less) have justified upward

[11] Due to the increase in Sanitation Workers provided in the class list, as noted *supra*, n. 9, Plaintiffs adjusted their prior damages analysis to include them. *See* Cottrell Decl., ¶¶ 31-32. Based on Plaintiffs' revised analysis, the total liquidated damages for all Sanitation Workers – assuming a 100% opt-in rate for FLSA collective members – is increased from $19.7 million to $21 million. *Id.* Assuming a 50% opt-in rate for FLSA collective members, the total liquidated damages for all Sanitation Workers is increased from $16.6 million to $19.3 million. *See id.*

departures from the 25% benchmark" and collecting cases); *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 449 (E.D. Cal. 2013) (finding that a recovery of $1,290,000 for 1,837 meat-packing facility class members claiming off-the-clock and meal and rest break claims was a "favorable result").

Courts have also recognized the benefits to class members of receiving payments sooner rather than later, where litigation could extend for years on end, thus significantly delaying any payments to class members. *See California v. eBay, Inc.*, No. 5:12-cv-05874-EJD, 2015 U.S. Dist. LEXIS 118060, at *12 (N.D. Cal. Sep. 3, 2015) ("Since a negotiated resolution provides for a certain recovery in the face of uncertainty in litigation, this factor weighs in favor of settlement"); *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D. Colo. 1974) ("It has been held proper to take the bird in hand instead of a prospective flock in the bush."). This is particularly true here, where Class Counsel has ensured that Defendants would deposit the Gross Settlement Amount within 10 days of preliminary approval instead of following final approval, to allow the Sanitation Workers to immediately reap the benefit of any interest gained on the fund. Thus, this *Vizcaino* factor supports the reasonableness of the 33.33% attorneys' fee award.

2. The Risks of Litigating this Case Were Substantial.

"Risk is a relevant circumstance." *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1020 (E.D. Cal. 2019) (citing *Vizcaino*, 290 F. 3d at 1048 and awarding 33 1/3% fee). There are many risks inherent in litigating a class action: class certification, decertification, a decision on the merits, potential appeals, and inability to collect a judgment are all issues that can result in no recovery whatsoever to class members or class counsel. Courts routinely find that this factor supports a fee request above the benchmark.[12]

[12] *Hightower v. JPMorgan Chase Bank, N.A.*, No. CV 11-1802 PSG (PLAx), 2015 U.S. Dist. LEXIS 174314, at *32 (C.D. Cal. Aug. 4, 2015) (approving 30% fee request in part because "the risk of no recovery for Plaintiff, as well as for Class Counsel, if they continued to litigate, were very real"); *In re Nuvelo, Inc. Sec. Litig.*, No. C 07-04056 CRB, 2011 WL 2650592, *2 (N.D. Cal. July 6, 2011) (approving 30% fee request and noting that "[i]t is an established practice to reward attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing at all"); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 2672 CRB (JSC), 2017 U.S. Dist. LEXIS 39115, at *727 (N.D. Cal. Mar. 17, 2017) (approving 30% fee request and reasoning "[s]uch a practice encourages the legal profession to assume such a risk and promotes competent representation for Plaintiffs who could not otherwise hire an attorney").

Recovery of the damages and penalties at trial would require complete success and certification of all of Plaintiffs' claims, an uncertain feat in light of developments in wage and hour and class and collective action law as well as the legal and factual grounds that Defendants have asserted to defend this action. Cottrell Decl., ¶ 38. While Plaintiffs are confident in their ability to certify and successfully litigate the alleged claims on the merits, Plaintiffs assert complex, hybrid Rule 23 Class and FLSA Collective claims. ECF 149. Off-the-clock claims are difficult to certify for class treatment, given that the nature, cause, and amount of the off-the-clock work may vary based on the individualized circumstances of the worker. *Id.*; *see, e.g., In re AutoZone, Inc., Wage & Hour Employment Practices Litig.*, 289 F.R.D. 526, 539 (N.D. Cal. 2012), aff'd, 789 F. App'x 9 (9th Cir. 2019); *Kilbourne v. Coca-Cola Co.*, No. 14CV984-MMA BGS, 2015 U.S. Dist. LEXIS 118756, at *38-40 (S.D. Cal. July 29, 2015); *York v. Starbucks Corp.*, No. CV 08-07919 GAF PJWX, 2011 U.S. Dist. LEXIS 155682, at *79-80 (C.D. Cal. Nov. 23, 2011).

Plaintiffs further considered the potential risk that the Court would, in the end, decline to find the SMGINC and Vincit liable as joint employers, and that SMGVII would be unable to pay a full judgment alone. Cottrell Decl., ¶ 39. Though Plaintiffs have filed pleadings alleging claims of liability against SMGINC and Vincit on a joint employer basis, the issue would be heavily contested at summary judgment and/or trial(s), an argument that Defendants have previewed throughout this litigation.[13] Though SMGVII would still be liable in the event of a favorable outcome for Plaintiffs, a finding that SMGINC and Vincit are joint employers would ensure that the Class Members would be able to obtain full recovery, particularly in the event of a large award. Cottrell Decl., ¶ 39.

Moreover, Plaintiffs and Class Counsel faced the possibility that the Court could rule against Plaintiffs, on summary judgment – as the Court had denied Defendants' motion for partial summary judgment without prejudice – or at trial. *Id.*, ¶ 40. The extensive discovery conducted by Class Counsel and the mediation facilitated by an experienced mediator, enabled Class Counsel to accurately assess these legal and factual issues – and related risks – that would arise if the case proceeded to trial.

[13] *See, e.g.*, ECF 51 (stating SMGINC was not involved in the operations, time recording, or payroll practices at SMGVII's operations in California and that Vincit did not perform any sanitation services and did not have any control over operations in California).

The risk of Plaintiff and the Class and Collective receiving *no* recovery, or significantly less than the proposed Gross Settlement Amount, was substantial. *Id.* Had that occurred, Plaintiffs, other Sanitation Workers, and Class Counsel would have recovered nothing regardless of the strength of the case or the effort they put forth in litigation.

Plaintiffs, other Sanitation Workers, and their counsel faced all of these risks, and others, many of which could have resulted in no recovery. Class Counsel's perseverance in pursing the litigation for nearly three years, and their commitment to developing the employees' claims and maximizing the Class and Collective recovery in the face of these risks despite occasional setbacks, including numerous motions on the pleadings and protracted discovery disputes, warrant an increase in the benchmark to one-third of the total recovery.

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

Prosecuting class actions requires an "extraordinary commitment of time, resources, and energy from Class Counsel," and many times, settlements "simply [are not] possible but for the commitment and skill of Class Counsel." *Garner v. State Farm Mut. Auto. Ins. Co*., No. CV 08 1365 CW, 2010 U.S. Dist. LEXIS 49482, at *4 (N.D. Cal. Apr. 22, 2010). As described above, Class Counsel took on this case despite its complexity and risks, diligently prosecuted the case, and negotiated a substantial recovery. This factor also supports Class Counsel's fee request.

Class Members have been represented by highly experienced and skilled counsel who focus almost exclusively on wage and hour class actions. Cottrell Decl., ¶¶ 2-3, 5-7, 46-52. Class Counsel has been recognized as a leading plaintiffs' firm nationally for their work on behalf of employees in wage and hour litigation. *Id*., ¶ 5. Class Counsel used its skill and experience to navigate the complex provisions of the FLSA, the California Labor Code, and the wage and hour laws of the state of California where Sanitation Workers worked.[14] Accordingly, Class Counsel's expertise and skill in this area of law, coupled with their willingness to take on risky cases, justify the fee request.

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

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

The contingent nature of the fee considers "the burdens class counsel experienced while litigating the case (*e.g.*, cost, duration, foregoing other work)" and weigh in favor of granting the requested fee award. *Carlin*, 380 F. Supp. 3d at 1021. Here, Class Counsel undertook all the risk of this litigation on a completely contingent fee basis, expending time and incurring expenses with the understanding that there was no guarantee of compensation or reimbursement. The contingent nature of litigating a class action and the financial burden assumed typically justifies an increase from the 25% benchmark, as counsel litigates with no payment and no guarantee that the time or money expended will result in any recovery.[15]

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

In this case, although the risks were front and center, Plaintiffs and Class Counsel committed themselves to developing and pressing Plaintiffs' legal claims to enforce the employees' rights and maximize the class and collective recovery despite Defendants' robust defense. During the litigation,

[15] *See Hightower*, 2015 U.S. Dist. LEXIS 174314, at *31 ("any law firm undertaking representation of a large number of affected employees in wage and hour actions inevitably must be prepared to make a tremendous investment of time, energy, and resources with the very real possibility of an unsuccessful outcome and no fee recovery of any kind.") (internal quotations omitted) (citing *Vizcaino*, 290 F.3d at 1051).

Class Counsel had to turn away other cases to remain sufficiently resourced for this one. *See* Cottrell Decl., ¶ 41. Accordingly, a one-third recovery for fees is appropriate.

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

As discussed above, many, if not most, fee awards in class settlements of common fund cases in this Circuit *exceed* the 25% benchmark. The same holds true for fee awards in common fund settlements of wage and hour class and collective actions. *See, e.g., Romero v. Producers Dairy Foods, Inc.*, No. 1:05cv0484 DLB, 2007 U.S. Dist. LEXIS 86270, at *10 (E.D. Cal. Nov. 13, 2007) (in wage and hour action, stating "fee awards in class actions average around one-third of the recovery" and awarding fees in that amount) (citing 4 Newberg and Conte, Newberg on Class Actions § 14.6 (4th ed. 2007)).[16]

These similar cases further support Plaintiffs' request.[17]

[16] *See also Zamora*, 2018 U.S. Dist. LEXIS 166618, at *10-11 (noting that the settlement fund of $1.95 million was "well below the megafund range" and that "[i]n this District, fee awards of approximately 33 1/3% are typical for settlements up to $10 million.") (citing *Galeener v. Source Refrigeration & Hvac, Inc*., No. 3:13-cv-04960-VC, 2015 U.S. Dist. LEXIS 193092, at *13 (N.D. Cal. Aug. 20, 2015) (33 1/3% fee; $10 million fund) and *Bennett v. SimplexGrinnell LP*, No. 11-cv-01854-JST, 2015 U.S. Dist. LEXIS 192870, at *21 (N.D. Cal. Sep. 3, 2015) (38.8%; $4.9 million fund). Numerous courts have granted fees based on the percentage that Plaintiff requests here. *See, e.g., Shaw*, 2019 U.S. Dist. LEXIS 239897, at *5 (Spero, M.J.) (approving one-third fee award); *Villalpando*, 2016 U.S. Dist. LEXIS 182521, at *4 (Spero, M.J.) (same); *Jones, et al. v. CertifiedSafety, et al*., 3:2017-cv-02229, ECF 232 (N.D. Cal. June 1, 2020) (Chen, J.) (awarding SWCK fees based on one-third of the common fund); *Williams v. Costco Wholesale Corp.*, Case No. 02-CV-2003-IEG (AJB), 2010 U.S. Dist. LEXIS 67731, at *3, 17-18 (S.D. Cal. July 7, 2010) (awarding fees based on 40% of the common fund); *Singer v. Becton Dickinson & Co.*, No. 08-CV-821-IEG (BLM), 2010 U.S. Dist. LEXIS 53416, at *23 (S.D. Cal. June 1, 2010) (awarding fees based on one-third of the common fund) (citations omitted)); *Wren v. RGIS Inventory Specialists*, No. C-06-05778 JCS, 2011 U.S. Dist. LEXIS 38667, at *79, 84 (N.D. Cal. Apr. 1, 2011) (Spero, M.J.) (approving attorneys' fee award of just under 42% of common fund). That is particularly true for cases that resemble the one at bar, where the common fund is relatively small. *See, e.g., Cicero*, 2010 U.S. Dist. LEXIS 86920, at *7 (defining "relatively small" as less than $10 million and stating that a percentage fee of "50% is the upper limit, with 30-50% commonly awarded in case[s] in which the common fund is relatively small") (citing treatise).

[17] In *Soto, et al. v. O.C. Communications, Inc., et al.*, Case No. 3:17-cv-00251-VC, ECF 304, 305 (N.D. Cal. Oct. 23, 2019), Judge Chhabria awarded SWCK a one-third fee award for a $7.5 million settlement in a hybrid FLSA/Rule 23 wage and hour class and collective action. Judge Chhabria noted that the one-third award was "justified under the common fund doctrine, the range of awards ordered in this District and Circuit, the excellent results obtained, the substantial risk borne by Class Counsel in litigating this matter, the high degree of skill and quality of work performed, the financial burden imposed by the contingency basis of Class Counsel' representation of Plaintiffs and the Classes and Collective, and the additional work required of Class Counsel to bring this Settlement to conclusion." *Id.*

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

"It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc*., 221 F.R.D. 523, 528-29 (C.D. Cal. 2004). Thus, where no members of the class object to a proposed fee award that is communicated in the notice, such absence of objections support an increase in the benchmark rate. *See Thieriot*, 2011 U.S. Dist. LEXIS 44852, at *17 (citing *In re Omnivision Technologies, Inc*., 559 F.Supp.2d at 1048)); *see also, Shaw,* 2019 U.S. Dist. LEXIS 239897, at *1 (Spero, M.J.) (noting in an approval of SWCK's one-third fee request that no class members objected); *Villalpando*, 2016 U.S. Dist. LEXIS 182521, at *1 (Spero, M.J.) (same).

Here, Notices of Settlement, which included disclosure of the potential fee award of $1,416,666.52, were sent via regular mail and electronic mail to 6,551 Class Members, and to date, not one Class Member has objected to or requested exclusion from the settlement.[18] *See* Cottrell Decl., ¶¶ 26-27, 55, 61. The lack of objections by Class Members to the Settlement or the disclosed fee provision demonstrates the Class's approval of the result in this case and further bolsters counsel's reasonable request for fees.[19]

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

Both federal and California courts have the discretion to employ (or decline to employ) a "lodestar cross-check" on a request for a percentage of the fund fee award. However, as both the Ninth Circuit in *Vizcaino,* and the California Supreme Court in *Laffitte*, have made clear that this cross-check is not required.[20] While Plaintiffs submit that a cross-check is not necessary in this case, even if the Court were to employ one, the cross-check supports increasing the benchmark rate here.

[18] The objection deadline is December 23, 2021. Cottrell Decl., ¶ 27. Plaintiffs will provide updated data regarding objectors to the Court with their motion for final approval.

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

[20] *Vizcaino*, 290 F. 3d at 1050 & n. 5 (noting that while "primary basis of the fee award remains the percentage method," lodestar "may" be useful, but that it is "merely a cross check" and "it is widely

Class Counsel's accompanying declaration provide a summary of the lodestar, time and hourly rates, as well as descriptions of the nature of work performed. *See* Cottrell Decl., ¶¶ 43-52, Ex. A. Class Counsel's rates have been found reasonable and consistent with the market by this Court, as well as in numerous cases in this District. *Villafan v. Broadspectrum Downstream Services, Inc., et al.*, Case No. 3:18-cv-06741-LB, ECF 150 (N.D. Cal. April 9, 2021) (finding SWCK's 2021 rates "[a]s to the lodestar cross-check, the billing rates are normal and customary (and thus reasonable) for lawyers of comparable experience doing similar work."); *Shaw*, 2019 U.S. Dist. LEXIS 239897, at *3 (Spero, M.J.) (finding the 2018 "hourly rates charged by [SWCK] are within the prevailing range of hourly rates charged by attorneys providing similar services in class action, wage-and-hour cases in California" and "[t]he hourly rates of Class Counsel [SWCK] also have consistently and recently been approved as reasonable by the courts.") (collecting cases); *Wren*, 2011 U.S. Dist. LEXIS 38667, at *52-57 (Spero, J.) (approving 2010 rates of SWCK).[21]

To-date, Class Counsel has spent over 1,997 hours litigating this case, for a lodestar of $1,291,655, not including all the work remaining to bring the Settlement to a close, which Class Counsel estimates will likely result in no multiplier at all by the time the settlement is fully implemented. Cottrell Decl., ¶¶ 36, 42; *cf. Villalpando*, 2016 U.S. Dist. LEXIS 182521, at *2 (Spero,

recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case"); *Laffitte v. Robert Half Internat. Inc.*, 1 Cal. 5th 480, 505 (2016). *See also Lopez v. Youngblood*, No. cv-F-07-0474 DLB, 2011 U.S. Dist. LEXIS 99289, at *39 (E.D. Cal. Sept. 2, 2011) ("A lodestar cross check is not required in this circuit , and in a case such as this, is not a useful reference point").

[21] The hourly rates for this litigation team were also found to be reasonable in this District for purposes of a lodestar crosscheck in multiple other cases. *See, e.g., Soto, et al. v. O.C. Communications, Inc., et al.*, Case No. 3:17-cv-00251-VC, ECF 304, 305 (N.D. Cal. Oct. 23, 2019) (Chhabria, J.) (approving a one-third fee award, and in late 2019, finding that "the fee award is further supported by a lodestar crosscheck, whereby it finds that the hourly rates of [SWCK] … are reasonable, and that the estimated hours expended are reasonable."); *Jones, et al. v. CertifiedSafety, et al.*, 3:2017-cv-02229, ECF 232 (N.D. Cal. June 1, 2020) (Chen, J.) (approving a one-third fee award proposed by fee motion stating SWCK's hourly rates for purposes of lodestar cross-check); *Knapp v. Art.com, Inc.*, No. 3:16-cv-00768-WHO, ECF 89 (N.D. Cal. October 24, 2018); *Villalpando*, 2016 U.S. Dist. LEXIS 182521, at *3 (Spero, M.J.); *Winans v. Emeritus Corp.*, No. 13-cv-03962-HSG, 2016 U.S. Dist. LEXIS 3212, at *25 (N.D. Cal. Jan. 11, 2016); *Carnes v. Atria Senior Living Inc.*, Case No. 14-cv-02727-VC, ECF 115, at 4-5 (N.D. Cal. July 12, 2016); *Meza v. S.S. Skikos, Inc.*, Case No. 3:15-cv-01889-TEH, ECF 58, at 4 (N.D. Cal. May 25, 2016); *Thieriot*, 2011 U.S. Dist. LEXIS 44852, at *17 (finding SWCK's rates reasonable and citing *Cherry, et al. v. The City College of San Francisco*, Docket No. C 04-4981 WHA, ECF No. 673 (Apr. 13, 2006 order) (finding SWCK's rates to be reasonable and consistent with the market)).

M.J.) (granting SWCK's one-third fee request and noting SWCK's lodestar represented a multiplier of less than 1.05, which could result in no multiplier by the completion of settlement). The requested fee award represents a reasonable 1.097 multiplier of the estimated lodestar. Cottrell Decl., ¶ 42.

This multiplier falls well within the customary range for common fund cases like this one where class counsel has taken the case on a contingency fee arrangement. *See Vizcaino*, 290 F.3d at 1051 & n. 6 (affirming multiplier of 3.65 in a common fund case, and noting that vast majority of common fund cases result in a multiplier of between one and four); *Shaw*, 2019 U.S. Dist. LEXIS 239897, at *2 (Spero, M.J.) (approving fee award representing 2.4 multiplier or less); *Abante Rooter & Plumbing v. Pivotal Payments*, No. 3:16-cv-05486-JCS, 2018 U.S. Dist. LEXIS 232054, at *26 (N.D. Cal. Oct. 15, 2018) (Spero, M.J.) (approving fee award representing a 2.7 multiplier and citing *Vizcaino*); *Cifuentes v. Ceva Logistics U.S., Inc*., No. 3:16-cv-01957-H-DHB, 2017 U.S. Dist. LEXIS 176279, at *23 (S.D. Cal. Oct. 23, 2017) (approving one third fee award to SWCK representing a multiplier of 3); *Thieriot*, 2011 U.S. Dist. LEXIS 44852, *19 (approving one third fee award representing a 1.94 multiplier and citing *Vizcaino*); *Bolton v. United States Nursing Corp*., No. C 12-4466 LB, 2013 U.S. Dist. LEXIS 150299, at *13 (N.D. Cal. Oct. 18, 2013) (approving fee award representing a 1.5 multiplier and citing *Vizcaino*); *In re Infospace, Inc*., 330 F. Supp. 2d 1203, 1212 (W.D. Wash. 2004) ("When applying the lodestar method in common fund cases, a multiplier ranging from one to four is typically applied." (footnote omitted)); *Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1265 (C.D. Cal. 2016) (applying a 3.07 multiplier to award $13,500,000.00 in attorneys' fees).

C. Class Counsel's Costs Should Be Approved.

In addition to being entitled to reasonable attorneys' fees, the FLSA and state wage and hour laws provide for the reimbursement of costs. *See, e.g.*, 29 U.S.C. § 216(b); Fed. R. Civ. P. 23(h); Cal. Lab. Code § 1194; *see also Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (holding that attorneys may recover reasonable expenses that would typically be billed to paying clients in non-contingency matters.); *Van Vranken v. Atl. Richfield Co*., 901 F. Supp. 294, 299 (N.D. Cal. 1995) (approving reasonable costs in class action settlement); *Cunha*, 2015 WL 12697627, at *5 ("[A] private plaintiff, or [its] attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of [its] litigation . . . .").

Here, Class Counsel's current costs total $34,384.78. Cottrell Decl., ¶ 57. Under the "common fund doctrine," "attorneys may recover their reasonable expenses that would typically be billed to paying clients in non contingency matters." *Cunha*, 2015 WL 12697627, at *5. The expenses incurred in this litigation to date are described in the accompanying declaration of Carolyn H. Cottrell. *See* Cottrell Decl., ¶¶ 57-59, Ex. B. These expenses are of the type typically billed by attorneys to paying clients in the marketplace and include such costs as mediation fees, court costs, *Belaire-West* notice costs, copying and printing costs, travel expenses, and computerized research. *See id*. These costs are routinely found to be reasonable and awarded reimbursement by courts in the Ninth Circuit. *See, e.g.*, *In re Immune Response Securities Litig.*, 497 F. Supp. 2d 1166, 1177 (S.D. Cal. 2007) (awarding reimbursement for expenses for meals, hotels, and transportation; photocopies; telephone; filing fees; messenger and overnight delivery; online legal research; and mediation fees, which it found to be "reasonable and necessary").

All of these expenses were reasonable and necessary for the successful prosecution of the Actions, and pursuant to the terms of the Settlement, Defendant does not object to the request for costs. Cottrell Decl., ¶ 60. Further, to-date, no Class Member has objected to the request for costs. *See id*., ¶ 61. Class Counsel therefore requests reimbursement of costs in the amount of $34,384.78.

D. The Court Should Approve the Service Awards to Plaintiffs Chavez and Slaughter.

Courts have broad discretion to approve service awards for class representatives, *see In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000), which "are fairly typical in class action cases," *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958 (9th Cir. 2009); *see also Staton*, 327 F. 3d at 977 ("named Plaintiffs ….are eligible for reasonable incentive payments."). The purpose of such awards is "to compensate class representatives for work done on behalf of the class [and] make up for financial or reputational risk undertaken in bringing the action…" *Rodriguez*, 563 F. 3d at 958-59. Such awards provide "inducement [for class members] to lend their names and services to the class." *In re Oracle Sec. Litig.*, No. C-90-0931-VRW, 1994 U.S. Dist. LEXIS 21593, at *2 (N.D. Cal. June 16, 1994). In evaluating the appropriateness of service awards, courts may consider "relevant factors includ[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to which

the class has benefitted from those actions….the amount of time and effort the plaintiff expended in pursuing the litigation… and reasonabl[e] fear[s of] workplace retaliation." *Staton*, 327 F. 3d at 977 (citation omitted).

Here, Mr. Chavez respectfully requests a service award of $12,000 and Mr. Slaughter respectfully requests a service award of $10,000, both reasonable service awards that would compensate them for the critical role they played in this litigation, and the time, effort, and risks they undertook in helping secure the result obtained on behalf of the Class Members.[22] *See* Cottrell Decl., ¶¶ 62-65; Chavez Decl., ¶¶ 8-9, 27-30; Slaughter Decl., ¶¶ 9-10, 28-30. Such service awards are fair when compared to the payments approved in similar cases by courts in this District.[23] *Shaw*, 2019 U.S. Dist. LEXIS 239898, at *3 (Spero, M.J.) (granting service awards of $15,000 to three named plaintiffs in their contribution to a $20 million dollar settlement); *Villalpando*, 2016 U.S. Dist. LEXIS 182130, at *4 (Spero, M.J.) (granting service awards of $15,000 to three named plaintiffs in their contribution to a $13.5 million dollar settlement); *Singer*, 2010 U.S. Dist. LEXIS 53416, at *24-26 (approving $25,000 service award in two-and-a-half-year litigation in part because plaintiff spent considerable time on the action, conducted extensive informal discovery and participated in full-day mediation). Such a service award is specifically warranted in this case, where Plaintiffs' efforts, including bringing this matter to the attention of counsel, culminated in significant relief for thousands of their fellow class members, hundreds of whom would be receiving thousands of dollars each as a result of this Settlement. *See, e.g., Roe v. Jose Torres L.D. Latin Club Bar, Inc*., No. 19-cv-06088-LB, 2020 U.S. Dist. LEXIS

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

[23] *See, e.g., Amaraut v. Sprint/United Mgmt. Co*., No. 19-cv-411-WQH-AHG, 2021 U.S. Dist. LEXIS 147176, at *29 (S.D. Cal. Aug. 5, 2021) (approving $15,000 and $10,000 service awards); *Hightower*, 2015 U.S. Dist. LEXIS 174314, at *37 (approving service awards of up to $10,000 with a total value of 1.5% of the maximum settlement amount); *Jones, et al. v. CertifiedSafety, et al.*, 3:2017-cv-02229, ECF 232 (N.D. Cal. June 1, 2020) (approving $15,000, $10,000, and $5,000 service awards in hybrid FLSA/Rule 23 wage and hour action); *Soto, et al. v. O.C. Communications, Inc., et al.*, Case No. 3:17-cv-00251-VC, ECF 304, 305 (N.D. Cal. Oct. 23, 2019) (approving $15,000 and $10,000 service awards in hybrid FLSA/Rule 23 wage and hour action); *Guilbaud v Sprint/United Management Co., Inc*., No. 3:13-cv-04357-VC, ECF No. 181 (N.D. Cal. Apr. 15, 2016) (approving $10,000 service payments for each class representative in FLSA and California state law representative wage and hour action); *Villalpando v. Exel Direct Inc.*, No. 3:12-cv-04137-JCS, 2016 U.S. Dist. LEXIS 182130, at *4 (N.D. Cal. Dec. 9, 2016) (Spero, M.J.) (approving $15,000 service awards to each of three class representatives).

156837, at *18 (N.D. Cal. Aug. 27, 2020) (considering average and range of class recovery in approving proposed service award and collecting cases).

Plaintiffs expended substantial time – roughly 89 hours or more by Plaintiff Chavez and 63 hours or more by Plaintiff Slaughter – assisting in the prosecution of the claims, including providing information and documents to counsel, assisting in the drafting of pleadings and other documents, and regularly discussing the facts and proceedings, as well as the settlement negotiations and ultimately, the settlement – with Class Counsel. *See* Chavez Decl., ¶¶ 12-26 Slaughter Decl., ¶¶ 13-27. The requested Service Award is also reasonable in light of the significant reputational risk each Plaintiffs took by publicly affiliating themselves with litigation against their employer. *See* Chavez Decl., ¶¶ 8-9, 27-30; Slaughter Decl., ¶¶ 9-10, 28-30.

Notwithstanding these risks, Plaintiffs remained in the case and saw it through to its excellent outcome, while agreeing to a general release of all claims. *See* Chavez Decl., ¶¶ 7-8, 10-11, 30; Slaughter Decl., ¶¶ 6, 9, 31. This substantial sacrifice supports the service awards sought here. *See Schaffer v. Litton Loan Servicing, LP*, No. CV 05-07673 MMM (JCx), 2012 U.S. Dist. LEXIS 189830, at *64 (C.D. Cal. Nov. 13, 2012); *Millan v. Cascade Water Servs.*, No. 1:12-cv-01821-AWI-EPG, 2016 U.S. Dist. LEXIS 72198, at *37 (E.D. Cal. May 31, 2016) (reasoning that service awards "are particularly appropriate in wage-and-hour actions where plaintiffs undertake a significant 'reputational risk' by bringing suit against their present or former employers.").

Further, perseverance in pursuing litigation on behalf of a class over the course of a lengthy period of time supports the approval of reasonable service awards. "When litigation has been protracted, an incentive award is especially appropriate." *In re Toys "R" Us-Del., Inc. Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 471 (C.D. Cal. 2014). Here, the litigation has been protracted, in large part due to necessary, lengthy negotiations regarding settlement that required constant discussions between Plaintiffs and their counsel. Plaintiffs were prepared to persevere through further litigation and trial if the Settlement had not been reached. The "duration" factor weighs in favor of the requested service awards.

In addition, in evaluating proposed service awards, courts compare the overall settlement benefits and the range of recovery available to the class members to the representative plaintiffs'

proposed service awards.[24] Here, the proposed service awards are quite modest in comparison to the overall benefits of the settlement and recovery to the class, representing less than 0.05% of the total funds that the Defendants will expend to settle this lawsuit. Cottrell Decl., ¶ 65. The modest amount of the requested service awards in relation to the excellent settlement amount weighs in favor of their appropriateness.

The service award should also be approved because the Notice of Settlement disseminated to the Class Members outlined the service award, and to date, no Class Members objected. *See Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528-29.

Plaintiffs invested significant time and effort in litigating this case on behalf of the Class Members through its successful resolution, while also incurring the reputational risk of doing so. The proposed service award, which no Class Member has currently objected to, should be finally approved.

IV. CONCLUSION

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

Date: November 18, 2021

Respectfully Submitted,

/s/ Carolyn H. Cottrell

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

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document(s) with the Clerk of the Court for the United States District Court, Northern District of California, by using the Court's CM/ECF system on November 18, 2021.

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

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