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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JUAN BARRIENTOS MARTINEZ and JESUS MARTINEZ GUTIERREZ, individually and on behalf of all others similarly situated, Plaintiffs, v. AUVIL FRUIT COMPANY, INC. Defendant.	NO. 2:16-cv-0356-RMP **PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT** Noted for Hearing: October 9, 2018 at 1:30 p.m. With Oral Argument Class Action

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I. INTRODUCTION

Plaintiffs respectfully request that the Court grant final approval of the class action settlement they reached with Auvil Fruit Company, Inc. ("Auvil" or "Defendant"). The settlement requires Auvil to pay $2,500,000 for a non-reversionary settlement fund for the benefit of the Class, to pay 4.5% of all piece-rate earnings for each worker on a going forward basis beginning January 1, 2018 to account for non-productive work time, to revise its timekeeping policies to ensure compliance with the law, and to provide employment rights training for all supervisors and managers.

The settlement is an excellent result for the Class. It appears to be the largest wage and hour class action settlement for farm workers in Washington state history. Qualified Class Members will receive payments for over 100% of their actual damages. The reaction of the Class has been positive, as many Class Members have submitted claim forms, no Member has objected, and only one Member has requested exclusion.

Settlement Administrator Simpluris, Inc. ("Simpluris") successfully implemented the notice program, providing notice by mail to almost 90% of the Settlement Class in addition to text messages to Class Members and a Facebook campaign. Class Counsel also purchased radio advertisements about the settlement on three Spanish-language radio stations in the region where Class

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Members work. Simpluris has fielded calls from Class Members and maintained a settlement website through which Class Members can submit an online claim form, access case documents, and stay apprised of deadlines. The multi-faceted notice program is the best notice practicable under the circumstances to reach the migrant and seasonal workers who comprise the Class, and it satisfies due process.

Plaintiffs ask that the Court grant final approval of the settlement by: (1) finding it to be fair, adequate, and reasonable; (2) determining that adequate notice was provided to the Class; and (3) approving the requested attorneys' fees, costs, settlement administration expenses, and Class representative service awards.

II. STATEMENT OF FACTS

On May 15, 2018, this Court granted preliminary approval of the settlement. ECF No. 53. The settlement requires Auvil to pay $2,500,000 (the "Common Fund Payment") to establish a non-revisionary settlement fund for the benefit of the Class, which is made up of the approximately 4,295 farm workers whom Auvil has identified as Class Members in this action. *See* ECF No. 48 at 19 (Settlement Agreement § III.C.1); Declaration of Marc C. Cote in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ("Cote Decl."), ¶¶ 3–5.

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Under the Settlement Agreement, Class Members who submit Claim Forms by the deadline will be "Qualified Class Members" and will receive a pro rata share of the Net Class Fund. ECF No. 48 at 21 (§§ III.A.11, III.E.4-5). If approved by the Court, Plaintiffs will each receive a service award of $10,000 from the Common Fund Payment. *Id*. at 22 (§ III.I). In addition, the Settlement Administrator will receive a Settlement Administration Expenses Award of up to $49,000. *Id.* at 24 (§ III.J.10). If approved, Class Counsel will receive a benchmark 25% attorney fee award and a costs payment of $10,066.23. *See id.* at 22 (§ III.H); Cote Decl., ¶ 28. The remaining amount, approximately $1,795,933.77 (the "Net Class Fund"), will be distributed directly to Qualified Class Members. *Id*. at 21 (§§ III.E.4-5).

Each Qualified Class Member's Settlement Award will be the Member's aggregate proportional share of the Net Class Fund based on his or her hours worked in piecework activities. *See id*. Qualified Class Members are expected to receive payments of between approximately 132% and 151% of their actual damages. Cote Decl., ¶ 6. The average payment per Qualified Class member is expected to be over $1,000. Declaration of Cassandra Cita Regarding Notice and Settlement Administration ("Simpluris Decl."), ¶ 17; Cote Decl., ¶ 7.

After the Court granted preliminary approval, Simpluris commenced the notice program. Pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C.

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§ 1715, Auvil sent notice of the settlement to the United States Attorney General and the attorneys' general of all states in which any Class Member resides on May 11, 2018. *See* Cote Decl., ¶ 8.

Simpluris initially mailed 4,136 court-approved settlement notices to Class Members. Simpluris Decl., ¶ 7. Prior to mailing, the addresses were updated using a National Change of Address ("NCOA") database. *Id*. ¶¶ 6–7. Simpluris received 687 notices returned by the USPS as undeliverable, five of which had a forwarding address, and Simpluris performed a "skip trace" search and found new addresses for the other 682 returned notices. *Id*. ¶ 8. Simpluris then re-mailed notices to the updated addresses. *Id*. As of August 22, 2018, only 370 notices (about 10% of the initial mailings) remain undeliverable. *Id*.

Simpluris also created a settlement website that contains the full settlement notice, in Spanish and English, as well as an online claim form Class Members can use to make a claim. Simpluris Decl., ¶ 10. Simpluris also manually sent text messages with a link to the settlement website to each Class Member for whom Auvil possessed a phone number. *Id*. ¶ 9. In addition, Simpluris publicized the settlement on Facebook, with advertisements targeted to farm workers in the areas of Wenatchee, Chelan, Orondo, Brewster, Quincy, and Vantage. *Id*. ¶ 11. Auvil also posted a copy of the notice at each of its orchards and at its offices and collected completed claim forms at its offices. *See* ECF No. 48 at 34.

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Class Counsel also purchased radio advertisements regarding the Settlement for the following Spanish-language radio stations in the areas where Auvil workers reside: KOZI Community Radio 93.5 FM, 100.9 FM, & 1230 AM (Sunday Spanish program), La Nueva KWLN 103.3 & 92.1 FM, KZUS FM 92.3 & 92.9, and KZML 95.9. Cote Decl., ¶ 9.

Finally, Simpluris established a toll-free telephone number dedicated to answering calls from Class Members. *Id*. ¶ 3. In Simpluris's opinion, the notice program is the best notice practicable. *Id*. ¶ 13.

The reaction of Settlement Class Members to this Settlement has been positive so far. *See* Cote Decl., ¶ 10. The deadline for opting out of or objecting to the Settlement is September 10, 2018. To date, no Class Members have objected to the Settlement, and only one has opted out. *Id*. ¶¶ 10–11; Simpluris Decl., ¶¶ 14–15. The one exclusion request is from an individual who filed a lawsuit against Auvil involving similar claims after this lawsuit was filed and settled the lawsuit individually. Simpluris Decl., ¶ 14; Cote Decl., ¶ 11.

Simpluris has received 1,715 Claim Forms, of which 1,327 have already been validated. Simpluris Decl., ¶ 16. Class Members have submitted 388 Claim Forms via the settlement website, and Simpluris is in the process of verifying the validity of those online Claim Forms. *Id.* Thus, the current claims rate is between 32% (validated claims) and 41% (all claims). *See id.* In wage and hour

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class actions, the claims rate typically falls within the range of 10% to 30% of the settlement class. *Id.* The typical rate is likely even lower for cases involving migrant or seasonal workers like this one.

On August 16, Auvil notified Class Counsel that the company had inadvertently omitted approximately 159 Class Members from the Class list provided for settlement administration. Cote Decl., ¶ 4. Using data received from Auvil, Class Counsel quickly compiled a spreadsheet with contact information and estimated awards for these individuals and provided it to Simpluris. *Id*. On August 21, Simpluris issued supplemental notice to these Class Members by mail and text message. Simpluris Decl., ¶ 12. Auvil has agreed to pay any additional notice and administration costs related to these 159 Class Members in excess of the $49,000 anticipated in the Settlement Agreement. Cote Decl., ¶ 4. To ensure these Class Members have a reasonable opportunity to submit Claim Forms, Plaintiffs propose processing and paying claims even if Claim Forms are submitted after the September 10 deadline.

III. AUTHORITY AND ARGUMENT

This Court has broad discretion to approve a proposed settlement. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 942, 944 (9th Cir. 2015) (noting standard of review is "clear abuse of discretion" and appellate court's review is "extremely limited"). When considering a motion for final approval of

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a class action settlement, a court must determine whether the settlement is "fundamentally fair." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1988). A settlement merits final approval, when "the interests of the class are better served by the settlement than by further litigation." *Manual for Complex Litigation* (Fourth) ("MCL 4th") § 21.61, at 309 (2004).

A. The Settlement satisfies the criteria for final approval.

In deciding whether to grant final approval, courts consider several factors, including: (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a government participant; and (8) the reaction of the class members to the proposed settlement. *In re Online DVD-Rental*, 779 F.3d at 944. All of these factors support settlement approval here.

1. <u>The strength of Plaintiffs' case.</u>

Plaintiffs continue to believe they have a strong case but are also pragmatic in their awareness of the risks inherent in litigation. At the time the case settled, the Washington Supreme Court had not yet decided whether agricultural employers like Auvil were obligated to separately pay piece-rate workers for time

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spent in non-piece-rate activities, or whether they could average piece-rate pay across the week and satisfy minimum wage compliance by paying no less than a workweek average of minimum wage. By entering the settlement, both sides determined a compromise resolution on that issue was the best approach.

On May 10, the Washington Supreme Court issued its opinion on the separate pay issue in *Carranza v. Dovex Fruit Co.*, 416 P.3d 1205 (2018). In a 5-4 decision, the Court held that "Washington law require[s] agricultural employers to pay pieceworkers for time spent performing activities outside of piece-rate picking work (e.g., 'Piece Rate Down Time' and similar work)." *Id.* at 1207–08. The Court held that "agricultural workers may be paid on a piece-rate basis only for the hours in which they are engaged in piece-rate picking work" and that "[t]ime spent performing activities outside the scope of piece-rate picking work must be compensated on a separate hourly basis." *Id.* Although the *Carranza* plaintiffs' argument on this issue was successful, counsel for Dovex Fruit Company (the same lawyers who represent Auvil here) continue to assert that Dovex need not pay for the non-productive work time for which the plaintiffs seek compensation. Cote Decl., ¶ 12. Dovex's (and Auvil's) counsel argue that because the Washington Supreme Court did not explicitly determine the scope of the tasks included in "piece-rate picking work," the claims of Dovex workers are limited to the tasks the district court determines are outside of "piece-rate picking

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work." *Id.* Although Plaintiffs' Counsel (here and in *Carranza*) strenuously argue that the tasks at issue are clearly not part of "piece-rate picking work," the fact that Dovex is still making this argument suggests at least some risk remains for those claims.

Furthermore, one of the primary disagreements during settlement negotiations in this case was the amount of work time Auvil's piece-rate workers spent outside of piecework activities, and Plaintiffs faced the risk that a jury would not accept their calculations.

In addition, Auvil has argued that it was not obligated to separately pay its pieceworkers for rest breaks before the Washington Supreme Court decided that issue in *Lopez Demetrio v. Sakuma Brothers Farms, Inc.*, 183 Wn.2d 649, 355 P.3d 258 (2015), seizing on the Court's statement in *Lopez Demetrio* that "we take no position on the retroactivity of this rule." *Id.* at 659. Although Plaintiffs strongly believe the *Lopez Demetrio* opinion applies retroactively, Auvil would have pursued its argument absent a settlement.

Finally, Auvil has asserted that it accurately recorded all hours worked and has vehemently denied that any unlawful conduct was willful.

The reality that Class Members could end up recovering a fraction of the Settlement Agreement's benefits at trial was significant enough to convince

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Plaintiffs and their counsel that the Settlement reached with Auvil outweighs the gamble and expense of further litigation.

2. The risk, expense, complexity, and likely duration of further litigation.

Litigation would be lengthy and expensive if this action were to proceed. Indeed, the Class would have faced significant hurdles. Although the Washington Supreme Court issued an opinion favorable to the workers in *Carranza* after the settlement was reached, the risk remained at the time of settlement negotiations that the Court could have sided with the employer. This would have left the Class with no remedy at all for the minimum wage claim. Furthermore, as is evident from the *Carranza* case, Auvil may have continued arguing it did not have to separately compensate piece-rate workers for the activities at issue here had a settlement not been reached.

Even if Plaintiffs could prove Auvil failed to properly pay them for compensable non-productive work time, Auvil has forcefully argued that any damages award would be minimal because the non-productive work time was allegedly minimal. If Auvil were able to convince a jury that Plaintiffs' allegations were overstated or unfounded, Auvil could have reduced the recoverable damages—or eliminated them altogether.

With respect to the rest break claim, Plaintiffs would be left with no remedy if it were determined that *Lopez Demetrio* did not apply retroactively.

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And with respect to the timekeeping claims, Auvil has asserted that it has recorded and paid for all hours worked. Significant litigation on this issue loomed for the parties.

In sum, further litigation would have been expensive, complex, and lengthy. In the end, the parties would have conducted a lengthy, expensive jury trial that would have entailed many Spanish-speaking witnesses, requiring interpreting services. In Plaintiffs' counsel's experience, trials in cases like this can take five weeks or longer and can arouse prejudices and biases that are difficult to overcome. *See Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 672, 230 P.3d 583 (2010) ("Issues involving immigration can inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation.").

Auvil almost certainly would have appealed any judgment in Plaintiffs' favor, and Class Members would likely not have received any relief for years. This Settlement avoids these risks and provides immediate and certain relief to Qualified Class Members.

3. The risk of maintaining class action status through trial.

Although Plaintiffs are confident they would have obtained class certification, Auvil would have strenuously opposed a class certification motion. Even if a class were certified on a contested motion, Auvil likely would have

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moved to decertify after the close of discovery. While Plaintiffs anticipate the Court would have granted class certification, there was nevertheless a continued risk to maintaining class certification.

4. The amount offered in settlement.

The Settlement Agreement requires Auvil to pay $2,500,000. This appears to be the largest farm worker wage and hour class action settlement on record in Washington. Cote Decl., ¶ 13. The Common Fund Payment will be used to pay Qualified Class Members after deducting attorneys' fees, costs, settlement administration expenses, and Class representative service awards. If the Court approves the requested attorneys' fees, costs, settlement administration expenses, and Class representative service awards, the remaining $1,795,933.77 will be distributed to Qualified Class Members. *See* ECF No. 48 at 20–21 & Cote Decl., ¶ 7.

The amount of each Qualified Class Member's award will be based on the Member's aggregate proportional share of the Net Class Fund as split between the Rest Break Portion (40%) and the Minimum Wage and AWPA Portion (60%).[1] *See* ECF No. 48 at 21. All Class Members who submit Claim Forms will likely

[1] These allocations are based on calculations of the total potential damages for each claim. Cote Decl., ¶ 14.

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receive between approximately 132% and 151% of their estimated actual damages. Cote Decl., ¶ 6. These percentages are substantially above the percentage recoveries obtained in settlements approved by other courts. *See, e.g.*, *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (approving settlement amounting to 30% of the damages estimated by the class expert); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (approving a settlement estimated to be worth between 1/6 and 1/2 of the plaintiffs' estimated loss); *In re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) (approving settlement amounting to 9% of estimated total damages).

Finally, there will be no reversion to Auvil under any circumstances. ECF No. 48 at 30.

5. The extent of discovery completed and stage of proceedings.

This case settled after extensive, focused discovery that included Auvil's production of 116,671 pages of documents and data. Class Counsel reviewed thousands of pages of documents, analyzed the electronic data, and engaged in several meet-and-confer calls regarding discovery disputes, ultimately resolving most of those disputes without Court intervention. ECF No. 48 at 2–3. Entering mediation, both parties were well informed about the strengths and weaknesses of the case, and a settlement was reached after months of negotiations that followed formal mediation. *Id*.

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6. The experience of counsel.

Where Class Counsel is qualified and well informed, their opinion that a settlement is fair, reasonable, and adequate is entitled to significant weight. *See Pelletz v. Weyerhaeuser Co.*, 255 F.R.D. 537, 543 (W.D. Wash. 2009). Here, Class Counsel are highly experienced class action litigators. ECF No. 48 at ¶¶19–24; Cote Decl., ¶¶ 15–17, 26; Declaration of Toby J. Marshall in Support of Plaintiffs' Motion for Final Approval ("Marshall Decl."), ¶¶ 10–20. They have achieved significant successes for low-wage workers, including farm workers, in wage and hour class actions like this one. For example, Class Counsel Marc Cote and Toby Marshall represented the workers in *Lopez Demetrio*, where their work resulted in a unanimous Washington Supreme Court opinion in favor of the workers. ECF No. 48 at ¶ 22. Class Counsel are also Plaintiffs' counsel in *Carranza*, where their work again resulted in a Washington Supreme Court opinion in favor of the workers. *Id.* at ¶ 23; Cote Decl., ¶ 12. Based on their experience, Class Counsel believe the proposed settlement is an excellent result for the Class. Cote Decl., ¶ 17.

7. The presence of a governmental participant.

Pursuant to CAFA, Auvil notified the United States Attorney General and the attorneys' general of all states in which any Class Member resides. *See* Cote

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Decl., ¶ 8. Not a single government entity has objected to the settlement or sought to intervene. Thus, this factor supports settlement approval.

8. The reaction of Class Members.

A positive response to a settlement—as evidenced by a small percentage of objections and opt-outs—supports final approval. *See Pelletz*, 255 F.R.D. at 543–44; *Tadepalli v. Uber Techs., Inc.*, No. 15-CV-04348-MEJ, 2016 WL 1622881, at *8 (N.D. Cal. Apr. 25, 2016) (quoting *In re Omnivision*, 559 F. Supp. 2d at 1043) (observing "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"). To date, no Class Members have objected to the Settlement. Only one Class Member has requested exclusion, and he did so pursuant to an individual settlement involving the same claims. Cote Decl., ¶ 11.

The deadline for objecting or opting out of the Settlement is September 10, 2018. Plaintiffs intend to file a supplemental brief to update this information and respond to any objections by September 24, 2018.

B. Class Members received the best notice practicable.

In preliminarily approving the Settlement, this Court determined that the notice program meets the requirements of due process and applicable law, constitutes the best notice practicable under the circumstances, and is due and

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sufficient notice to all individuals entitled thereto. ECF No. 53 at 8. The notice program was fully implemented by Simpluris with the assistance of Class Counsel and Auvil. *See generally* Simpluris Decl.

The class notice adequately informed Class Members of the nature of the action and these proceedings, the terms of the settlement, the effect of the action and release of claims, and the process to submit a Claim Form to share in the settlement proceeds, to exclude themselves from the action, or to object to the settlement, as required for final approval under Federal Rule of Civil Procedure 23 and in compliance with *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010).

The notice program successfully reached Class Members. Simpluris estimates that mailed notice has reached over 89% of Class Members. Simpluris Decl., ¶ 8. The actual percentage of Class Members who received notice is believed to be even higher because many additional Class Members likely learned of the settlement through the text messaging campaign, the Facebook campaign, the settlement website, the radio announcements Class Counsel purchased, the notices posted at Auvil's orchards and offices, and word of mouth. According to the experienced Settlement Administrator, the notice program "constitutes the best notice practicable and satisfies due process." Simpluris Decl., ¶ 13.

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C. This Court should approve late claims submitted by October 31, 2018.

"Until the fund created by the settlement is actually distributed, the court retains its traditional equity powers" over the class settlement plan, including the authority to approve "late claims." *See Zients v. LaMorte*, 459 F.2d 628, 630-31 (2d Cir. 1972) (allowing untimely claimants to receive payments from settlement fund); *see also In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1128 (9th Cir. 1977) (citing *Zients* in support of conclusion "that the district court had discretion to grant late claims"). To ensure all Class Members have an adequate opportunity to submit Claim Forms, including those Class Members who were sent settlement notices in August after Defendant had inadvertently omitted them from the initial Class list, Plaintiffs request that this Court allow any late Claim Forms received by the Settlement Administrator by October 31, 2018 to be accepted as timely.

D. The proposed service awards are reasonable.

The requested service awards, which promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits, should be approved. *See Rodriguez*, 563 F.3d at 958–59 (finding service awards are appropriate to "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general"). Plaintiffs request service awards of $10,000 each for Class

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representatives Juan Barrientos Martinez and Jesus Martinez Gutierrez, both of whom assisted counsel, provided important information, attended mediation, participated in settlement negotiations, and were prepared to testify at trial. ECF No. 48 at 17.

Plaintiffs' requested service awards are appropriate and in line with awards approved by other courts. *See, e.g.*, *Pelletz*, 592 F. Supp. 2d at 1329–30 & n.9 (approving $7,500 service awards and collecting decisions approving awards ranging from $5,000 to $40,000).

E. The settlement administration expenses award is reasonable.

The Settlement Agreement also provides for a Settlement Administration Expenses Award not to exceed $49,000. ECF No. 48 at 24. For a settlement of this size—with over 4,000 Class members—$49,000 in settlement administration expenses from the common fund is reasonable, particularly in light of the work required to establish a Qualified Settlement Fund; create a settlement website with an online claim form; format settlement notices; mail notices to Class Members; manually send text message notice to all Class Members for whom telephone numbers are available; put together a Facebook advertisement campaign targeting potential Class Members; process claims received online, by mail, and at Auvil's offices; process and mail settlement payments; and handle tax reporting duties. The administration expenses to be paid from the common

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fund are reasonable and necessary to inform Class Members of the Settlement, process claims, and ensure the settlement is administered fairly. Thus, Plaintiffs request approval of a Settlement Administration Expenses Award not to exceed $49,000, with any remainder included in the Net Class Fund for distribution to Class Members.

F. The payment of attorneys' fees at the benchmark level is fair and reasonable.

"Attorneys' fees provisions included in proposed class action settlement agreements are, like every other aspect of such agreements, subject to the determination whether the settlement is 'fundamentally fair, adequate, and reasonable.'" *Staton v. Boeing Co*., 327 F.3d 938, 963 (9th Cir 2003) (quoting Fed. R. Civ. P. 23(e)). When state substantive law applies to plaintiffs' claims, attorneys' fees are to be awarded in accordance with state law. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). Because Washington law governs the central claims in the case, attorneys' fees must be awarded in accordance with Washington law. *Id*.

"Under Washington law, the percentage-of-recovery approach is used in calculating fees in common fund cases." *Id.* (citing *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 72, 847 P.2d 440 (1993)). As the Washington Supreme Court has held, "[i]n common fund cases, the size of the recovery constitutes a suitable measure of the attorneys' performance." *Bowles*, 121 Wn.2d at 72; *see also*

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Lyzanchuk v. Yakima Ranches Owners Ass'n, Phase II, Inc., 73 Wn. App. 1, 12 (1994) ("Under the percentage of recovery approach . . . attorneys are compensated according to the size of the benefit conferred, not the actual hours expended."). Because this is a common fund settlement, the "percentage of recovery approach" applies. *See Bowles*, 121 Wn.2d at 73; *Vizcaino*, 290 F.3d at 1047.

Public policy supports this approach. "When attorney fees are available to prevailing class action plaintiffs, plaintiffs will have less difficulty obtaining counsel and greater access to the judicial system. Little good comes from a system where justice is available only to those who can afford its price." *Bowles*, 121 Wn.2d at 71.

Although district courts in the Ninth Circuit have discretion in common fund cases to perform a lodestar cross-check, the "primary basis of the fee award remains the percentage method." *Vizcaino*, 290 F.3d at 1047, 1050–51 (affirming attorney fee award of 28% of the common fund, which represented a lodestar multiplier of 3.65). The Ninth Circuit and district courts in this Circuit have recognized that the percentage-of-recovery method is the appropriate method for calculating fees where, as here, counsel's effort has created a common fund. *See, e.g., In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) ("Because the benefit to the class is easily quantified in common-fund

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settlements, we have allowed courts to award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar."); *Ikuseghan v. Multicare Health Sys.*, Case No. C14-5539 BHS, 2016 WL 4363198, at *1–2 (W.D. Wash. Aug. 16, 2016) (finding percentage-of-recovery method is appropriate and awarding 30% of settlement fund). "This method aligns the interests of counsel and the class by allowing class counsel to directly benefit from increasing the size of the class fund." *Craft v. Cnty. Of San Bernardino*, 624 F. Supp. 2d 1113, 1123 (C.D. Cal. 2008).

Here, Class Counsel seek the standard, benchmark amount of 25% of the common fund for attorneys' fees. This amount is reasonable under the percentage-of-recovery approach, and a lodestar cross-check also demonstrates the reasonableness of the fee award.

1. Class Counsel's fee request is reasonable under the percentage-of-recovery approach.

The "benchmark" for a percentage fee award is "25 percent of the recovery obtained." *Vizcaino*, 290 F.3d at 1047 (quoting *Bowles*, 121 Wn.2d at 72–73) (noting "Ninth Circuit cases echo this approach"). Generally, "fees of less than 25% will be awarded in megafund cases (cases of $50 million or more)," while "[c]ases of under $10 million will often result in fees above 25%." *Craft*, 624 F. Supp. 2d at 1127.

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Here, Class Counsel request approval of the benchmark amount. Because the fee request is for exactly 25%, it is reasonable under the "percentage-of-recovery" method. *Bowles*, 121 Wn.2d at 72–73. Only in "special circumstances" is the benchmark figure "adjusted upward or downward." *Id.*

Class Members received settlement notices stating the amount and percentage of fees Class Counsel requested. *See* ECF No. 48 at 37, 39. To date, no Class Member has objected to the fee request. Cote Decl., ¶ 10.

A 25% benchmark fee is appropriate in light of the circumstances of this case. In *Vizcaino*, the court considered the following factors in upholding a 28% fee: (1) whether counsel achieved exceptional results for the class; (2) the level of risk; (3) whether counsel's performance generated benefits beyond the cash settlement fund; (4) whether the percentage rate is at or below the market rate; and (5) whether the case was litigated on a contingency basis, required counsel to incur costs, and required counsel to forgo other work. *Vizcaino*, 290 F.3d at 1048–50.

All of the *Vizcaino* factors support approval of the requested fee award. First, in determining the amount of attorneys' fees to award, a court should examine the degree of success obtained. *Vizcaino*, 290 F.3d at 1048 ("Exceptional results are a relevant circumstance."); *Manual for Complex Litigation (Fourth)* § 21.71 (the "fundamental focus is the result actually achieved

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for class members"). Class Counsel achieved exceptional results for the Class. In addition to non-monetary benefits and future policy changes to ensure compensation for non-piecework hours, Qualified Class Members are expected to receive more than 100% of the wages owed and AWPA damages available to them. Cote Decl., ¶ 6. This is a better result than Qualified Class Members could obtain by litigating the case through trial.

Second, the Ninth Circuit recognizes that the public interest is served by rewarding attorneys who assume representation on a contingent basis to compensate them for the risk that they might be paid nothing at all for their work. *Vizcaino*, 290 F.3d at 1051 (explaining that courts reward successful class counsel in contingency cases "for taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning contingency cases"). This was a risky case for Class Counsel. At the beginning of the case, Auvil asserted "there is no Washington case law that recognizes the existence" of Plaintiffs' theory for recovery of separate compensation for work performed outside of productive piecework activities. ECF No. 12 at 19. Auvil maintained it already paid for all hours worked through workweek averaging and said Plaintiffs' arguments raised "questionable liability theories" and "a novel issue of first impression." *Id.*; ECF No. 13 at 5–6. Auvil also forcefully argued that the requirement to separately pay piece-rate employees for rest breaks was only the

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law after *Lopez Demetrio* was decided but not before. *Id.* at 21. If this Court had accepted Auvil's position, Plaintiffs' rest break compensation claim for the pre-*Lopez Demetrio* period would have been dismissed.

Class Counsel prosecuted this matter on a purely contingent basis, agreeing to advance all necessary expenses and to receive a fee only if there was a recovery. Counsel invested considerable time and money to vindicate the claims of thousands of workers, with expenses totaling more than $10,000. Cote Decl., ¶ 28; Marshall Decl., ¶ 21. Class Counsel's "substantial outlay, when there is a risk that none of it will be recovered, supports the award of the requested fees" here. *In re Omnivision*, 559 F. Supp. 2d at 1047.

Third, Class Counsel's performance generated benefits beyond the cash settlement fund. In addition to negotiating the Common Fund Payment, Class Counsel convinced Auvil to provide Class Members with compensation for non-productive work on a going forward basis, beginning January 1, 2018, by paying each piece-rate employee an additional amount of not less than 4.5% of the employee's piece-rate earnings each pay period. ECF No. 48 at 19. Furthermore, through the Settlement, Class Counsel negotiated changes to Auvil's timekeeping practices so that each employee could record his or her exact start and stop time, and Auvil agreed to eliminate rounding in half-hour intervals. *Id.* at 20. Finally,

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Class Counsel negotiated a requirement that Auvil provide wage and hour law training for all orchard managers and crew bosses. *Id.*

The fourth factor looks at whether the requested percentage rate is at or below the market rate. Contingency fee percentages in individual cases are usually in the range of 33 to 40%. *See Forbes v. Am. Bldg. Maint. Co. W.*, 170 Wn.2d 157, 161-66, 240 P.3d 790 (2010) (discussing contingency fee percentages between 33.33% and 44% and reinstating trial court's order that "40 percent contingency fee based on the $5 million settlement was fair and reasonable"). The typical range for attorneys' fees awarded in common fund class action settlements is between 20 and 33%. Alba Conte et al., 4 Newberg on Class Actions § 14.6 (4th ed. 2002) (recognizing "fee awards in class actions average around one-third of the recovery"). State and federal courts regularly approve percentage awards of 30% or more for common fund settlements. *See, e.g.*, *Vizcaino*, 290 F.3d at 1047, 1050–51 (affirming attorney fee award of 28% of the common fund); *In re Mego*, 213 F.3d 457, 463 (9th Cir. 2000 (affirming award of 33% of common fund); *In re Pacific Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming award equal to 33% of fund); *Ikuseghan*, 2016 WL 4363198, at *2 (awarding 30% of common fund); *Hageman v. AT&T Mobility LLC*, No. CV 13-50-BLG-RWA, 2015 WL 9855925, at *4 (D. Mont. Feb. 11, 2015) (approving common fund percentage fee of 33%, or $15 million, from the

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common fund of $45 million); *Vandervort v. Balboa Capital Corp*., 8 F. Supp. 3d 1200, 1210 (C.D. Cal. 2014) (awarding 33% of fund); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 492 (E.D. Cal. 2010) (citing five recent wage and hour class actions where federal district courts approved attorney fee awards ranging from 30 to 33%); *Singer v. Becton Dickinson & Co.*, No. 08-CV-821-IEG (BLM), 2010 WL 2196104, at *8–9 (S.D. Cal. Jun. 1, 2010) (approving attorney fee award of 33.33% of the common fund and noting that typical range is 20% to 50% for similar wage and hour class actions); *Romero v. Producers Dairy Foods, Inc*., No. 1:05CV0484 DLB, 2007 WL 3492841, at *4 (E.D. Cal. Nov. 14, 2007) ("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" (citing 4 Newberg & Conte, *Newberg on Class Actions* § 14.6 (4th ed. 2007))).

Although a 25% common fund fee is the "benchmark," it is below the market rate for attorneys' fees in common fund cases. *See Craft*, 624 F. Supp. 2d at 1124–25 (citing study showing attorneys' fees in class actions averaged approximately 32% of the recovery and recognizing that "25% is substantially below the average class fund fee nationally"). Thus, the market rate factor shows that a 25% fee is reasonable here.

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Fifth and finally, Class Counsel litigated this case on a contingency basis, incurring substantial costs and forgoing significant other work. Cote Decl., ¶¶ 18, 28; Marshall Decl., ¶¶ 9, 21.

In sum, a benchmark fee award of 25% of the common fund is reasonable and appropriate in light of the exceptional results achieved, the risks inherent in the case, the benefits beyond the cash settlement fund, the fact that the "market rate" for class action fees is higher, and the fact that this contingency fee case has required counsel to forego other work. *See Vizcaino*, 290 F.3d at 1049–50. Thus, Class Counsel respectfully request that this Court approve a 25% fee.

2. A lodestar cross-check confirms the requested fee is reasonable.

In the Ninth Circuit, courts may use a rough calculation of the lodestar as a crosscheck to assess the reasonableness of an award based on the percentage method. *Vizcaino*, 290 F.3d at 1050 ("[W]hile the primary basis of the fee award remains the percentage method, the lodestar may provide a useful perspective on the reasonableness of a given percentage award."). The "percentage-of-recovery" approach provides an independent ground for granting the fee request, but a "cross-check" under the lodestar method also demonstrates that counsel's request is reasonable. *See id.* at 1050–51 & n.5 (cautioning that courts should reward counsel who "achieved a timely result for class members in need of immediate relief" and "the lodestar method creates incentives for counsel to expend more

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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").

Courts use a two-step process in applying the lodestar method. First, the court calculates the "lodestar figure" by multiplying the number of hours reasonably expended by a reasonable rate. *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008); *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597–99, 675 P.2d 193 (1983). Once the lodestar is determined, the court may then enhance the lodestar with a multiplier, if necessary, to arrive at a reasonable fee. *Vizcaino*, 290 F.3d at 1051 & n.6 (approving lodestar multiplier of 3.65 and citing a survey of class settlements indicating most multipliers range from 1.0 to 4.0). "This mirrors the established practice in the private legal market of rewarding attorneys for taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning contingency cases." *Vizcaino*, 290 F.3d at 1051.

i. Counsel have spent a reasonable number of hours on this case.

Here, Class Counsel's requested fee award of $625,000 represents a modest multiplier of approximately 2.2 on their current lodestar. Cote Decl., ¶ 21. Class counsel have reasonably devoted over 870 hours to the investigation, development, litigation, and resolution of this case, incurring over $280,999.50 in lodestar fees at current hourly rates through August 23, 2018 (not including fees

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that will be incurred to see the case through final approval, ensure the settlement is properly administered, and ensure Qualified Class Members receive their settlement payments). *See* Cote Decl. ¶ 21; Marshall Decl., ¶¶ 4–5. This includes time spent investigating the claims of the Class Members, conducting significant discovery, researching and analyzing legal issues, briefing legal issues, calculating damages, interviewing Class Members, participating in a Rule 34 inspection of Auvil orchards, preparing for mediation, engaging in settlement negotiations, working with the Settlement Administrator, working on preliminary approval briefing, and working on this final approval briefing. *See* Cote Decl. ¶ 22, Ex. A; Marshall Decl., ¶ 4, Ex. A.

Throughout this case, Class Counsel prosecuted the claims of the employees efficiently and effectively. Knowing it was possible they would never be paid for their work, counsel had no incentive to act in a manner that was anything but economical. *See Moreno,* 534 F.3d at 1112 ("[L]awyers are not likely to spend unnecessary time on contingency cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee."). That said, counsel took their charge seriously and endeavored to represent the interests of the class members to the greatest extent possible. The work Class Counsel performed was reasonable and necessary to ensure the successful prosecution and settlement of this complex action.

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ii. Counsel's hourly rates are reasonable.

In the common fund context, the Ninth Circuit has instructed courts to apply reasonable hourly rates for the *region* when conducting a lodestar analysis. *Online DVD-Rental*, 779 F.3d at 949; *In re Bluetooth*, 654 F.3d at 941. A district court may not adopt an informal court-wide policy of "holding the line" on fees at a certain level. *Moreno*, 534 F.3d at 1115. Counsel in this case practice throughout the state in Washington using the same hourly rates they seek here.[2] Cote Decl., ¶¶ 25–26.

[2] Furthermore, rates outside the forum may be used if local counsel is "unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case." *Camacho v. Bridgeport Fin. Servs.*, 523 F.3d 973, 979 (9th Cir. 2008) (internal quotation omitted). Here, Class Counsel are well known as committed advocates for farm workers throughout the state, having achieved strong results for farm workers in other class action cases. Class Counsel are unaware of any other attorneys in the Eastern District of Washington with their level of expertise on class action cases on behalf of immigrant farm workers other than attorneys for legal aid organizations, and attorneys of Columbia Legal Services and Northwest Justice Project have time limitations and practice restrictions that would have prevented

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"Where the attorneys in question have an established rate for billing clients, that rate will likely be a reasonable rate." *Bowers*, 100 Wn.2d at 597; *see also Broyles v. Thurston County*, 147 Wn. App. 409, 195 P.3d 985 (2008) ("The presumptive reasonable hourly rate for an attorney is the rate the attorney charges."). Thus, in assessing the reasonableness of the rates requested by Class Counsel, this Court should look at the rates Class Counsel charge hourly clients.

Courts regularly apply an attorney's current rate for all work performed, regardless of when the work was performed, as a means of compensating for the delay in payment. *Steele v. Lundgren*, 96 Wn. App. 773, 785-86, 982 P.2d 619 (1999) ("Allowing such an adjustment encourages attorneys to take potentially risky cases with clients who may not be able to afford to pay an attorney and allows public interest lawyers to benefit as would attorneys in private practice."); *see also Gates v. Deukmejian*, 987 F.2d 1392, 1406 (9th Cir. 1992) ("A fee award at current rates is intended to compensate prevailing attorneys for lost income

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them from litigating this case. Cote Decl., ¶ 27. Thus, even if Class Counsel's rates were found to be "outside-the-forum" rates, this Court should use these rates for the lodestar cross-check because available local counsel lack the experience, expertise, or specialization in farm worker class actions to achieve the results Class Counsel achieved in this case.

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they might have received through missed investment opportunities as well as lost interest.").

Here, Class Counsel's lodestar calculations are based on reasonable hourly rates. Class Counsel's lodestar was calculated based on counsel's current hourly billing rates for similar matters, $395 for Mr. Cote, $475 for Mr. Marshall, and $450 for Sean Phelan. Cote Decl., ¶¶ 23–26; Marshall Decl., ¶¶ 5–7. These are the rates that counsel charge clients paying by the hour and thus are presumptively reasonable. *See Bowers*, 100 Wn.2d at 597.

Class counsel set their rates for attorneys and staff members based on a variety of factors, including among others: the experience, skill and sophistication required for the types of legal services typically performed; the rates customarily charged in the markets where the legal services are typically performed; and the experience, reputation and ability of the attorneys and staff members. *See* Cote Decl. ¶ 24; Marshall Decl., ¶ 6. The rates charged for attorneys and staff members working on this matter range from $75 to $550 per hour, with the majority of the work performed by Mr. Cote at his regular hourly rate of $395. *See* Cote Decl. ¶ 23; Marshall Decl., ¶¶ 5–6.

Both state and federal courts have found rates significantly higher than these were reasonable for work performed in Washington by attorneys of similar skill, experience, and reputation. Marshall Decl., ¶ 7.

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iii. A lodestar multiplier is appropriate.

Courts routinely enhance the lodestar "to reflect the risk of non-payment in common fund cases." *Vizcaino*, 290 F.3d at 1051 (quoting *In re Wash. Pub. Power Supply Sys. Secs. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994)). This upward adjustment (or "multiplier") to an attorney's lodestar is often warranted based on the contingent nature of success or the quality of work performed. *See id.* at 1051 (approving multiplier of 3.65). A lodestar multiplier can also be based on the benefit obtained for the class or the complexity and novelty of the issues presented. *In re Bluetooth*, 654 F.3d at 941–42.

A multiplier is appropriate here due to the contingent nature of success. As described above, this was a risky case for Class Counsel. When they agreed to represent Plaintiffs and the potential class on a contingency fee basis, counsel knew they were facing a substantial risk, but they strongly believed Plaintiffs' claims had merit. While any class action is risky, this case presented substantial risks that could have resulted in a complete dismissal or an order denying class certification—eliminating the possibility of a recovery for thousands of workers. Counsel worked throughout the case for two years with no guarantee of being compensated for their time and effort even though there was a substantial risk of nonpayment. Based on the risks involved in this case, a multiplier is appropriate.

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In addition to the risk factor, this Court has another independent ground for application of a multiplier: the quality of work performed. Class Counsel performed high-quality work, resulting in an excellent settlement for the Class. Class Counsel succeeded by taking a strong, aggressive approach to discovery, which resulted in production of thousands of relevant documents and data that allowed them to analyze the value of the Class claims, and by patiently negotiating a settlement that provided a meaningful remedy for all Qualified Class Members. The quality of the work that led to this excellent settlement warrants a multiplier.

Foremost among the considerations in determining the appropriateness of a multiplier "is the benefit obtained for the class." *In re Bluetooth*, 654 F.3d at 941–42. Here, as described above, Class Counsel has obtained significant benefits for Qualified Class Members, including settlement payment amounting to well over 100% of the wages and AWPA damages owing to them, additional compensation for non-piecework activities, and non-monetary relief. The tremendous benefits Class Counsel obtained for the workers warrants the requested multiplier.

In the Ninth Circuit, multipliers "ranging from one to four are frequently awarded." *Vizcaino*, 290 F.3d at 1051 n.6. In *Vizcaino*, the court collected dozens of class action fee awards and found that in 83% of the cases the lodestar

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multiplier was between 1.0 and 4.0. *Id.* Courts find higher multipliers appropriate when using the lodestar method as a cross-check for an award based on the percentage method. *See, e.g., Steiner v. Am. Broad. Co., Inc.*, 248 F. App'x 780, 783 (9th Cir. 2007) (finding a multiplier of approximately 6.85 to be "well within the range of multipliers that courts have allowed" when cross-checking a fee based on a percentage of the fund); *Johnson v. Fujitsu Tech. & Bus. of Am., Inc.*, No. 16-CV-03698-NC, 2018 WL 2183253, at *7 (N.D. Cal. May 11, 2018) (finding a 4.375 multiplier to be reasonable in cross-checking a fee of 25% of a settlement fund); *McCulloch v. Baker Hughes Inteq Drilling Fluids, Inc.*, No. 1:16-cv-00157-DAD-JLT, 2017 WL 5665848, at *8 (E.D. Cal. Nov. 27, 2017) ("awarding attorneys' fees at a 25 percent benchmark of the common fund would yield a lodestar multiplier of 3.95, which is within the range of acceptable lodestar multipliers previously approved by this court and others"); *Pan v. Qualcomm Inc.*, No. 16-CV-01885-JLS-DHB, 2017 WL 3252212, at *13 (S.D. Cal. July 31, 2017) (finding a multiplier of 3.5 to be reasonable); *Craft*, 624 F. Supp. 2d at 1125 (approving fee award yielding a multiplier of 5.2 and stating "there is ample authority for such awards resulting in multipliers in this range or higher"); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 298-99 (N.D. Cal. 1995) (finding that a multiplier of 3.6 was "well within the acceptable range" and explaining that "[m]ultipliers in the 3-4 range are common"); *see also Hillson v.*

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Kelly Servs. Inc., No. 2:15-cv-10803, 2017 WL 3446596, at *6 (E.D. Mich. Aug. 11, 2017) (finding a multiplier of 4 to be reasonable in cross-checking a fee of 25% of a settlement fund); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 371 (S.D.N.Y. 2002) (finding a "modest multiplier of 4.65 is fair and reasonable" when cross-checking a fee of 33⅓% of the settlement fund); *Di Giacamo v. Plains All Am. Pipeline*, No. Civ. A. H-99-4137, 2001 WL 34633373, at *11 (S.D. Tex. Dec. 19, 2001) (finding a multiplier of 5.3 appropriate in cross-checking a fee of 30% of the settlement fund).

The 25% benchmark fee of $625,000 represents a modest multiplier of approximately 2.2 on Class Counsel's current lodestar. Cote Decl., ¶ 21. The multiplier will be reduced by the hours Class Counsel expend to see this settlement through final approval and ensure Qualified Class Members are appropriately paid their settlement awards. Because this multiplier is well within the range of reasonableness for percentage fee awards in common fund cases, this Court should approve the requested fee. Indeed, not a single Class Members has objected to the requested fee award.

G. Reimbursement of Class Counsel's litigation costs is reasonable.

For common fund settlements, litigation costs are awarded in addition to percentage fee awards. *See Bowles*, 121 Wn.2d at 70–74 (affirming common fund fee award of $1.5 million and costs award of $17,000). "Reasonable costs

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and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit from the settlement." *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996). Here, Class Counsel have incurred approximately $10,066.23 in litigation expenses. Cote Decl., ¶ 28, Ex. B; Marshall Decl., ¶ 21, Ex. B. These expenses include: (1) filing fees; (2) courier and service expenses; (3) computer research expenses; (4) mediation expenses; (5) travel expenses; (6) copying costs; and (7) radio advertisements to notify potential Class members of the settlement. *Id*. The expenses were reasonable and necessary to secure the successful resolution of this litigation and to notify potential Class Members of their right to share in the settlement proceeds. *See In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1177–78 (S.D. Cal. 2007) (finding costs such as filing fees, photocopy costs, travel expenses, postage, online legal research fees, and mediation expenses are relevant and necessary expenses in class action litigation). Class Counsel anticipate incurring additional costs through the end of the case related to travel for the final approval hearing and additional radio announcements to notify Class Members of the Settlement. Cote Decl., ¶ 28, Ex. B. Future costs are anticipated to be $479.02. *Id.* Thus, Class Counsel request reimbursement of $10,066.23 in total costs. This is less than the estimated amount stated in settlement notices issued to Class Members ($15,000). The

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remaining amount will be included in the settlement funds distributed to Qualified Class Members.

Class Counsel advanced these costs without any guarantee that they would ever be repaid and the costs were necessarily incurred. Thus, this Court should approve reimbursement of the requested costs.

IV. CONCLUSION

The $2.5 million common fund settlement is fair, adequate, and reasonable. Moreover, it is appropriate for the Court to grant an award of 25% of the common fund for attorneys' fees and $10,066.23 for costs given the high-quality work performed and successful result achieved. An award not to exceed $49,000 for settlement administrative expenses is also appropriate. Finally, service awards of $10,000 each are reasonable. Plaintiffs respectfully request that the Court enter Plaintiffs' proposed Order Granting Final Approval of Class Action Settlement.

RESPECTFULLY SUBMITTED AND DATED this 27th day of August, 2018.

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CERTIFICATE OF SERVICE

I, Marc C. Cote, hereby certify that on August 27, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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