

Zelle Hofmann Voelbel & Mason, LLP

<u>2012 Rates:</u>	<u>Years of Experience</u>	<u>Rate</u>
	Partners	
	38	\$800
	26	685
	23	650
	22	640
	Associates	
	9	500
	4	435
	3	415
	2	405
	1	395
	Paralegals	210-290

37. In addition, the rates charged by counsel in *Apple Inc. v. Samsung Electronics Co. Ltd.*, N.D. Cal. No. 11-cv—01846-LKK (PSG), support the rates requested here. In that case, according to the declaration filed by Diane C. Hutnyan on July 22, 2012 (Dkt. No. 1275), Quinn Emanuel Urquhart & Sullivan LLP, counsel for defendant Samsung, charged median partner rates of \$821 per hour and median associate rates of \$448 per hour.

38. The foregoing data shows that the non-contingent rates requested by Plaintiffs' Counsel's attorneys for their work on behalf of Plaintiffs as part of their lodestar calculation are well within the range of non-contingent rates charged by comparably qualified attorneys for reasonably similar work.

39. As noted, the hourly rates set forth above are those charged where full payment is expected promptly upon the rendition of the billing and without consideration of factors other than hours and rates. If any substantial part of the payment were to be contingent or deferred for

1 any substantial period of time, for example, the fee arrangement would be adjusted accordingly to
2 compensate the attorneys for those factors.

3 **The Number Of Hours Is Within The Expected Range**

4 40. Based on my review of the materials noted above, and my extensive experience
5 with comparable class action cases, the number of hours expended by Plaintiffs' Counsel here
6 appears to be in the ballpark for a case of this broad scope, extreme complexity, long duration,
7 fierce resistance, and stakes involved. I do not purport to have done a time entry by time entry
8 type review of counsel's time records or to have reviewed parts of the file not listed above. I
9 have, however, reviewed a sample of the time allocations for the principal Plaintiffs' Counsel
10 firms and they appear to be quite reasonable to me. In addition, the vigorous defense tendered by
11 Wal-Mart, which was represented by two high caliber law firms, supports this view, as does the
12 exceptional work performed by all Plaintiffs' Counsel, as set forth in detail in the Declaration of
13 Lawrence Artenian. It also appears that Plaintiffs' Counsel have exercised significant billing
14 judgment, both by carefully auditing their time records and by taking an across-the-board 5%
15 reduction to account for any unreasonable duplication or other non-compensable time.

16 **The Lodestar/Multiplier Is Reasonable**

17 41. In my opinion, the ____ lodestar-multiplier reflected in a 33.3% percentage-based
18 fee and in counsel's lodestar-based fee also is consistent with the legal marketplace and
19 eminently reasonable. My opinion is based on the following factors: (a) the exceptional results
20 obtained for the class; (b) the extremely complex nature of this long-lasting litigation, and the
21 difficulties and obstacles overcome; (c) the great risk counsel took in pursuing this case on a
22 wholly contingent basis; (d) preclusion of other employment; (e) the public service performed;
23 (f) a comparison to the lodestar multipliers applied in comparable cases; and (g) the contingent
24 fees charged in the private marketplace.

25 42. Most of these factors have been discussed previously (§§ 18-27) and will not be
26 discussed again here; instead, the Court is respectfully referred to the cited paragraphs. Other
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1 factors, however, are relevant primarily to a lodestar-multiplier determination, and they too
2 demonstrate that the multiplier applied here by a 33.3% fee is reasonable. Those factors include:

3 **43. The Preclusion of Other Employment.** A lodestar enhancement also is
4 appropriate when taking on a case proves so burdensome that it diminishes the law firm's "book
5 of business." See *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1218 (2008) (affirming
6 multiplier based in part on "the burden imposed on class counsel" by a case that "had consumed
7 well over 2,100 hours of professional time, which in a small firm such as [theirs] comprises a
8 significant amount of billing.") That appears to be precisely what happened to Wagner Jones
9 here. See Wagner Decl., ¶ 7.

10 **44. The Public Service Performed by Plaintiffs' Counsel.** The public interest
11 served by Plaintiffs' lawsuit also supports the fee sought. See *State v. Meyer* (1985) 174
12 Cal.App.3d 1061, 1073 (the "public service element . . . and motivation to represent consumers
13 and enforce laws" may justify lodestar enhancement). In this case, Plaintiffs' Counsel have
14 enforced California's wage laws against one of the world's largest corporations. The
15 fundamental importance of these laws has been repeatedly recognized. See *Sav-On Drug Stores,*
16 *Inc. v. Superior Court*, 34 Cal.4th 319, 340 (2004). An award of the requested fee also will
17 encourage other attorneys to take on similar cases and deter Wal-Mart and other employers from
18 engaging in similar unlawful practices. See, e.g., *Chabner v. United of Omaha Life Ins. Co.*,
19 1999 U.S. Dist. LEXIS 16552 (N.D. Cal. 1999) at *19-21, *aff'd*, 225 F.3d 1042 (9th Cir. 2000).

20 **45. The Lodestar Multipliers Applied in Other Cases.** A comparison to the lodestar
21 multipliers applied in other cases also shows that a __ lodestar enhancement is well within the
22 range of multipliers applied in comparable cases. See, e.g., *Vizcaino v. Microsoft Corp.*, 290 F.3d
23 at 1050 (looking to multipliers awarded in comparable cases as evidence of reasonableness).
24 Indeed, it is quite modest: significantly greater multipliers -- 4.0 and above -- have often been
25 applied in fee awards from common funds. See also *Van Vranken v. Atlantic Richfield Co.*, 901
26 F.Supp. 294, 298 (N.D. Cal. 1995) ("multipliers in the 3 – 4 range are common lodestar awards
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in lengthy and complex class action litigation"). As the court observed in *In re Nasdaq Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 489(S.D.N.Y. 1998):

The percentage fee award in this case represents a multiplier of approximately 3.97 times Plaintiffs' Counsel's lodestar of \$36,191,751. A multiplier of 3.97 is not unreasonable in this type of case. Indeed, as noted by the Honorable Leonard B. Sand, "In recent years multipliers of between 3 and 4.5 have become common." *Rabin v. Concord Assets Group, Inc.*, [1991-92 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,471 (S.D.N.Y.1991) (applying a 4.4 multiplier), quoting *O'Brien v. National Property Analysts*, 88 Civ. 4153, Tr. p. 72 (S.D.N.Y. July 27, 1989).

Numerous other fee awards confirm this point. For example, in *Craft v. County of San Bernardino*, 624 F.Supp.2d 1113, 1125 (C.D. Cal. 2008), the Central District, citing a multitude of cases, upheld a common fund award that equated to a lodestar multiplier of 5.2 :

A 25% of the fund award will result in a multiplier of approximately 5.2. While this is a high end multiplier, there is ample authority for such awards resulting in multipliers in this range or higher, *See, e.g., In Re Merry-Go-Round Enterprise, Inc.* (Bankr.D.Md.2000) 244 B.R. 327 (40% award for \$71 million fund awarded, resulting in a cross-check multiplier of 19.6); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, 2005 WL 1213926 (E.D.Pa.) (\$100 Million class fund in antitrust case, with an award of 20% of the fund, which amounted to a multiplier of 15.6); *In re Rite Aid Corp. Sec. Litig.*, 146 F.Supp.2d 706 (E.D.Pa.2001) (in \$193 Million fund, Plaintiffs' Counsel awarded fee of 25% of fund, which amounted to \$48 Million and represented a multiplier of 4.5-8.5, which the court described as "handsome but "unquestionably reasonable"); *In re Cendant Corp. PRIDES Litigation*, 243 F.3d 722, 732 (3rd Cir.2001) (5.7% of \$341,500,000 settlement awarded, resulting in multiplier of 7); *In re Rite Aid Corp. Sec. Litig.*, 362 F.Supp.2d 587 (E.D.Pa.2005) (25% of \$126,800,000 fund awarded; multiplier of 6.96); *In Re IDB Communication Group, Inc., Sec. Litig.*, No. 94-3618 (C.D.Cal. Jan. 17, 1997) (Hupp, J.), cited at 19 Class Action Reports 472-73 (1996) (16.5% of \$83 Million fund awarded; multiplier of 6.2); *In re RJR Nabisco*, 1992 WL 210138 (25% of \$72.5 Million fee awarded; multiplier of 6); *In re Charter Communications, Inc., Securities Litigation*, 2005 WL 4045741, 18 (E.D.Mo.2005) (20% of fund awarded in recovery of \$146,250,000, multiplier of 5.61); *Roberts v. Texaco, Inc.*, 979

F.Supp. 185, 197 (S.D.N.Y.1997) (fee award of approximately 16.7% of the fund, multiplier of 5.5, plus fund set aside to compensate for post-settlement work); *Di Giacomo v. Plains All Am. Pipeline*, Nos. H-99-4137, H-99-4212, 2001 U.S. Dist. LEXIS 25532, at 31, 2001 WL 3463337 at 10 (S.D.Tex. Dec. 18, 2001) (awarding 30% of \$29.5 Million fund; multiplier of 5.3); *In re Beverly Hills Fire Litigation*, 639 F.Supp. 915 (E.D.Ky.1986) (fee of \$4,121,926 in settlement of \$14 Million; multiplier of 5 for lead counsel); *Kuhnlein v. Department of Revenue*, 662 So.2d 309, 315 (Fla.1995) (class fund award of 10% of \$188,100,000, resulting in multiplier of approximately 15, reduced by Fla. Supreme Court to multiplier of 5 times lodestar, because lodestar was proper method under Florida law); *In re Xcel Energy, Inc. Sec., Derivative & ERISA Litig.*, 364 F.Supp.2d 980 (D.Minn.2005) (25% of \$80M settlement; multiplier of 4.7); *Wilson v. Bank of Am. Natl. Trust & Savs. Assn.*, No. 643872 (Cal.Sup.Ct.9/16/82) (multiplier of 10 times then hourly rate of \$150), cited in *Newberg*, 14:6, p. 578, F3d 373, 378-379. The 25% is substantially below the average class fund fee fn.87; *Cosgrove v. Sullivan*, 759 F.Supp. 166, 167 n. 1 (S.D.N.Y.1991) (1% of \$100 Million right to Medicare reimbursement awarded, resulting in multiplier of 8.74). (Emphasis added.)

See also, e.g., *In re Rite Aid Corp. Secs. Litig.* 396 F.3d 294, 298-99 (3d Cir. 2005 (“Performing a lodestar cross-check to confirm the fees’ reasonableness, the court found a ‘handsome,’ yet ‘fairly common’ lodestar multiplier of 4.07 based upon 12,906 hours billed since the fee application in *Rite Aid I* at an hourly rate of \$605.”); *Vizcaino*, 290 F.3d at 1052-1054 (Appendix of 34 common fund cases between 1996 and 2001, showing lodestar multipliers ranging from 0.6 to 19.6); *In re WorldCom, Inc. Litig.*, 388 F.Supp.2d 319 (S.D.N.Y. 2005) (common fund award equivalent to 4.0 multiplier); *Maley v. Del Global Technologies Corp.*, 186 F.Supp.2d 358, 371 (S.D.N.Y. 2002 (“modest” multiplier of 4.65 “fair and reasonable”); *In re Linerboard Antitrust Lit.*, 2004 WL 1221350, at *16 (E.D. Pa. June 2, 2004) (noting that “during 2001-2003, the average multiplier approved in common fund class actions was 4.35 and during 30 year period from 1973-2003, the average multiplier approved in common fund class actions was 3.89. Stuart J. Logan, et al., *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Reports 167 (2003).”).

46. To summarize, in my opinion, the lodestar cross-check supports the fairness and reasonableness of awarding Plaintiffs' Counsel 33.3% of the settlement fund as their reasonable attorneys' fees for securing that fund.

Plaintiffs' Lodestar-Based Statutory Fee Also Is Reasonable

47. For the same reasons that Class Counsel's common fund fee request is reasonable, in my opinion, their statutory fee request under California Labor Code §1194(a) in the same amount also is reasonable: the hourly rates are reasonable (see ¶¶ 32-39) and the number of hours appears to be reasonable (see ¶ 40).

48. Likewise, because it is based on largely the same factors, the ___ lodestar multiplier applied in the lodestar cross-check also results in a fee that "is within the range of fees freely negotiated in the legal marketplace in comparable litigation", as directed by *Lealao*, 82 Cal.App.4th at 50. Under California law, "[m]ultipliers can range from **2 to 4 or even higher**." *Wershba v. Apple Computers, Inc.*, 91 Cal. App. 4th 224, 254 (2001) (emphasis added). See also *Sutter Health Uninsured Pricing Cases*, 171 Cal.App.4th 495, 512 (2009)(consumer class action challenging unfair billing practices; 2.52 multiplier upheld); *Chavez v Netflix, Inc.*, 162 Cal.App.4th 43, 60 (2008) (consumer class action challenging unfair practices; 2.5 multiplier upheld).

49. I also base my opinion on several other California class actions in which I have been involved that have applied comparable lodestar multipliers in determining statutory fees:

- In *Lealao v. Beneficial California, Inc.*, 82 Cal.App.4th 19 (2000), for example, the trial court on remand awarded a **2.5** multiplier for work on the merits, even though the issue was much less complex, the case settled, and the relief was less complete than here.
- In *Thompson v. Santa Clara County Open Space Authority*, Santa Clara County Superior Court No. 1-02-CV-804474, Order re Final Approval of Class Action Settlement and For Attorneys' Fees and Litigation Expenses, filed September 21, 2009, a challenge to an invalid tax statute, the trial court determined that the

plaintiff's lodestar, which mainly consisted of appellate work, was \$2,598,122.50, to which it applied a 2.85 multiplier.

- In *Duran v. U.S. Bank*, Alameda County Superior Court No. 2001-035537, Order Granting in Part and Denying in Part Plaintiffs' Motion for Reasonable Attorneys Fees etc., filed December 16, 2010, vacated on reversal of class certification, a wage and hour class action on behalf of the bank's "outside salespersons", the plaintiffs recovered \$15 million, and the trial court awarded a reasonable fee of \$18,787,820, based on a 2.25 multiplier.
- In *Jordan v. Dept. Motor Vehicles*, JAMS Ref. No. 1100040574, Arbitration Award and Decision, dated April 14, 2004 (arbitrating fees incurred in Sacramento Superior Court Nos. 95AS05228, 01CS0006, 01CS0007), a panel of three arbitrators, including retired judges Daniel Weinstein and Charles Legge and retired Justice Edward J. Wallin, awarded plaintiffs' counsel a 5.0 multiplier (on a lodestar of \$2.6 million) for their trial court work on the merits, and a 2.5 multiplier for their appellate work.
- In *Thompson v. Santa Clara County Open Space Authority*, Santa Clara County Superior Court No. 1-02-CV-804474, Order re Final Approval of Class Action Settlement and For Attorneys' Fees and Litigation Expenses, filed September 21, 2009, a challenge to an invalid tax statute, the trial court determined that the plaintiff's lodestar, which mainly consisted of appellate work, was \$2,598,122.50, to which it applied a 2.85 multiplier.¹

These cases strongly support my opinion that the lodestar multiplier Plaintiffs request here is consistent with the legal marketplace and therefore reasonable .

50. If called as a witness, I could and would competently testify from my personal knowledge to the facts stated herein. I declare under penalty of perjury under the laws of the

1 United States that the foregoing is true and correct. Executed this 27th day of March 2017, in
2 Berkeley, California.

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4 /s/ Richard M. Pearl
RICHARD M. PEARL

5 In compliance with Local Rule 5-1(i)(3) and as the filer of this declaration and its attached
6 exhibits, I have obtained the concurrence of each other signatory to file this document.

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8 /s/ Lawrence M. Artenian

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27 ¹ Copies of the *Lealao*, *Santa Clara Transit Authority*, and *Duran* trial court fee orders will be
provided upon request of the Court.