HONORABLE BENJAMIN H. SETTLE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA

STEVEN EILERMAN, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

MCLANE COMPANY, INC. DBA MCLANE/NORTHWEST, a Washington Corporation,

Defendant.

Case No.: 3:16-CV-05303-BHS

PLAINTIFF'S UNOPPOSED MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS AND ENHANCEMENT AWARD TO CLASS REPRESENTATIVE

NOTE ON MOTION CALENDAR: MAY 17, 2017

HAMMONDLAW, P.C.
1829 REISTERSTOWN RD., SUITE 410
BALTIMORE, MD 21208
TEL: 310-676-6766

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I. INTRODUCTION

In conjunction with Plaintiff Steven Eilerman's ("Plaintiff") motion for final approval, Plaintiff hereby moves this Court for an award of $232,500 in attorneys' fees and $13,291.28 in itemized litigation costs, and an enhancement award to the Plaintiff/Class Representative in the amount of $5,000 for the service he has rendered to the Class throughout the litigation resulting in a substantial class settlement. These amounts are allocated by the Settlement Agreement and Defendant McLane Company, Inc. dba McLane Northwest ("Defendant" or "McLane") does not oppose these proposed payments. As set forth below, the Court should approve these amounts because they are fair, reasonable, and adequate.

The fees sought fall well within the range of reasonableness under the facts and circumstances of this case, where Plaintiff obtained a non-reversionary $775,000 settlement for 250 current and former truck drivers employed by Defendant, of which approximately $512,500 will automatically be paid out to Class Members after the payment of attorneys' fees and costs, and Plaintiff's enhancement award, and administration fees, and where Class Counsel's actual lodestar fees incurred will be, by the time of final approval, very close to the amount of the fees requested, and where the requested costs were actually and reasonably incurred. The Class Representative's requested enhancement award is also reasonable and should be approved because class representatives in class action litigation are eligible for reasonable participation payments to compensate them for the risks assumed and efforts made on behalf of the Class. Accordingly, the Court should award the requested attorneys' fees and costs and the enhancement award for Class Representative, in full.

II. CLASS COUNSEL'S REQUEST FOR AN AWARD OF ATTORNEYS' FEES AND COSTS IS WELL SUPPORTED

A. Legal Standard

In class actions, courts may award attorneys' fees and costs that are authorized by law or the parties' agreement. *See* Federal Rule of Civil Procedure 23(h). Since Plaintiff's claims are

based on substantive Washington law, Washington law provides the basis for their entitlement to an award of attorneys' fees. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). Here, Plaintiff's counsel are entitled to recover their attorneys' fees and costs under Revised Code of Washington ("RCW") 49.46.090 (employee who recovers for violations of minimum wage and overtime laws is entitled to "costs and such reasonable attorney's fees as may be allowed by the court"); and RCW 49.52.070 (employer who willfully withholds wages "shall be liable in a civil action . . . for twice the amount of wages unlawfully [withheld] . . . together with costs of suit and a reasonable sum for attorney's fees").

Apart from their claims for fees under Washington law, Class Counsel are also entitled to receive their fees and costs because they created a substantial benefit for the class. *Mills v. Elec. Auto-Lite Co*., 396 U.S. 375, 392, 394-395 (1970) (courts award the cost of litigating "where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself…[and] in cases where the litigation has conferred a substantial benefit on the members of an ascertainable class"); *Lewis v. Anderson*, 692 F.2d 1267, 1270 (9th Cir. 1982) (the "substantial benefit doctrine ... permits a plaintiff to recover attorneys' fees if his action has conferred a substantial benefit upon a class").

Under the Ninth Circuit and Washington law, in the context of class action settlements, the Courts have the discretion to choose either the percentage-of-the-fund method or the lodestar method to determine reasonable attorneys' fees. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998); *Bowles v. Wash. Dep't of Ret. Sys*., 847 P.2d 440, 450-51 (1993). Where the settlement results in a shared pool of money to be distributed among the class and the attorneys – a "common fund" – Washington law generally favors the percentage method in calculating fees. *See Vizcaino*, 290 F.3d at 1047; *see also Bowles*, 847 P.2d at 451.

B. <u>The Fee Amount Allocated By the Settlement Agreement Is Reasonable Under the "Percentage of the Fund" Method</u>

Under the "percentage of the fund" approach, "'a lawyer who recovers a common fund for

the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.'" *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003) (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). Under Washington law, the benchmark award in common fund cases is 25% of the recovery obtained, with 20-30% as the usual range. See *Bowles*, 847 P.2d at 450-51. The Ninth Circuit echoes this approach. *Vizcaino,* at 1047 (citing *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989)). The amount of attorneys' fees sought here – 30% of the total fund – is well within the range deemed reasonable under the "percentage of the fund" method in similar cases.

In addition to ensuring that the fees are the product of a fair and reasonable negotiation, the Ninth Circuit has articulated a non-exhaustive list of factors for evaluating the reasonableness of a fee request including: (1) the results achieved; (2) the risks of litigation; (3) the skill required and the quality of the work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases. *Vizcaino*, 290 F.3d at 1048-50. Each of these factors supports approval of the requested attorneys' fees.

1. *The Settlement Was the Product of a Fair and Reasonable Negotiations*

Where, as here, "the parties are compromising precisely to avoid litigation, the court need not inquire into the reasonableness of the fees even at the high end with precisely the same level of scrutiny as when the fee amount is litigated." *Staton*, 327 F. 3d at 966. Rather, the court must ensure that the fees to be paid to class counsel are fair and proper. *Id*.

Here, the Settlement was a product of intensive, adversarial negotiations between the parties, who were assisted by a highly skilled mediator, the Hon. Edward Infante (Ret.). Declaration of Julian Hammond In Support of Plaintiffs' Motion for Award of Attorneys' Fees and Costs and Enhancement Award to Class Representative, filed herewith ("Hammond Fee Decl.") ¶¶ 13-16. Notably, the parties spent months prior to filing the complaint and the mediation investigating and developing the factual record for this case, analyzing the strengths and

weaknesses of Plaintiff's claims and Defendant's defenses, reviewing information provided by Defendant, drafting detailed mediation briefs, and interviewing Class Members. Hammond Fee Decl. ¶¶ 7-14. Following a full-day mediation in San Francisco, the parties spent months engaging in settlement discussions, including numerous follow-up meet and confers via e-mail and telephone, and only executed the Settlement Agreement after several additional months of drafting and revising. Id. ¶¶ 15-16; Declaration of Craig Ackermann In Support of Plaintiff's Motion for Attorneys' Fees and Costs and In Support of Plaintiff's Forthcoming Motion for Final Approval of Class Action Settlement ("Ackermann Decl.") filed herewith, ¶ 21.

Thus, the settlement agreement was finalized only after months of contested negotiations and with the aid of a highly experienced mediator. Id. ¶ 16. Class Counsel's interests were aligned with the interests of the Class throughout settlement negotiations, and the proposed fee award does not involve any collusion or conflict impairing the Class's interests.

2. *The Result Achieved*

Courts recognize that the result achieved is an important factor to be considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("[T]he most critical factor is the degree of success obtained."); see also *Vizcaino*, 290 F.3d at 1048, 1050. The Settlement Fund represents approximately 73% of Class Counsel's estimate of the full value of the Class's potential recovery on the core claims for failure to pay hourly and separately for rest break time. Hammond Fee Decl. ¶ 18; Dkt. 38 at ¶ 35 and Exhibit 2 thereto. The 250 Class Members will enjoy substantial monetary relief from the approximately $512,500 Net Settlement Fund that will be available for distribution, amounting to an average recovery per class member of nearly $3,100 gross and $2,050 net. Hammond Fee Decl. ¶ 17; Ackermann Decl. ¶ 13. These amounts compare favorably with the amounts recovered for class members in similar trucker wage and hour cases alleging unpaid rest breaks. Ackermann Decl. ¶ 18. The Settlement will provide immediate compensation to the Settlement Class and will avoid the substantial risks of less or no recovery

presented by continued litigation. Hammond Fee Decl. ¶ 19; Ackermann Decl. ¶ 20. This analysis demonstrates that the settlement is adequate and unquestionably reasonable.

3. *The Risks of Litigation*

Plaintiff's complaint alleges causes of action for (a) Defendant's failure to pay hourly and separate wages for time spent on statutory rest periods apart from and in addition to their piece-rate pay, (b) failure to pay rest breaks at the overtime rate, (c) failure to pay all wages due and payable for compensable time associated with rest periods, (d) failure to issue accurate itemized wage statements, and (e) failure to pay all wages due at established pay periods. Hammond Fee Decl. ¶ 8. Plaintiff also alleges that he is entitled to double damages for Defendant's willful violation of Washington's wage and hour laws. Id.

Plaintiff faced three significant hurdles to prevail on his claims: (a) Defendant's argument that Plaintiff's state law claims are, or may be, preempted by federal law; (b) the risk that Defendant could defeat class certification; and (c) the risk that Defendant could win on the merits. Hammond Fee Decl. ¶ 9; Ackermann Decl. ¶¶ 14-16. These hurdles each presented a serious risk to Plaintiff's ability to prevail on the class claims.

First, Defendant asserted that Plaintiff's claims are subject to preemption based on the Federal Aviation Authorization Administration Act ("FAAAA").[1] Hammond Fee Decl. ¶ 9.a; Ackermann Decl. ¶ 14. While Plaintiff relied on the *Dilts* decision, where the Ninth Circuit held that the FAAAA does not preempt state meal and rest break laws,[2] Defendant argued that *Dilts* is factually distinguishable because Class Members spend at least half of their time outside of Washington State, whereas plaintiffs in *Dilts* drove routes solely intrastate. *Dilts v. Penske*

[1] The FAAAA provides that a state "may not enact or enforce a law…related to a price, route, or service of any motor carrier…with respect to the transportation of property." 49 U.S.C. § 14501(c)(1).

[2] Before the *Dilts* decision, courts held that the FAAAA preempted state law regarding meal and rest breaks. For example, in *Burnham v. Ruan Transp.*, Case No. SACV 12-0688 AG (ANx), 2013 WL 4564496 (C.D. Cal. Aug. 16, 2013), a California federal district court granted a defendant's motion for summary judgment based on FAAAA preemption in a case where the plaintiff-drivers alleged minimum wage claims for unpaid non-driving time that were identical to Plaintiff's claims asserted in the instant case.

Logistics, LLC, 769 F.3d 637 (9th Cir. 2014). Hammond Fee Decl. ¶ 9.a. Defendant further pointed to recent Congressional efforts to retroactively expand the scope of FAAAA preemption to state meal and rest break laws as applied to truck drivers. Id.; Ackermann Decl. at ¶ 14. Plaintiff recognize that if this legislation was successful, his claims would be worthless. Hammond Fee Decl. ¶ 9.a; Ackermann Decl. ¶ 14.

Second, Defendant contended that Plaintiff would lose at the class certification stage because individual issues would predominate. Hammond Fee Decl. ¶ 9.b; Ackermann Decl. ¶ 15. Specifically, McLane argued (a) that each Class Member would have to prove that his or her compensation did not pay for rest breaks separately and hourly; (b) that each Class Member would have to prove that he or she was unable to take a rest break at all in Washington State in order to seek compensation at the overtime rate; and (c) that the differences amongst the Class in the hours worked each day, and thus the number of unpaid rest breaks incurred by each Class Member, would raise insurmountable individualized issues. Hammond Fee Decl. ¶ 9.b. Defendant pointed to a number of federal courts in California that denied class certification in piece-rate wage and hour claims for unpaid rest breaks. Ackermann Decl. ¶ 15.

Third, Defendant contended that Plaintiff would lose on the merits on both his unpaid rest break and overtime claims. Hammond Fee Decl. ¶ 9.c; Ackermann Decl. ¶ 16. Specifically, Defendant argued (a) that Class Members were compensated for time spent on rest breaks; (b) that it provided a mechanism through which Class Members could request, and receive, additional pay; (c) that any rest breaks incurred outside of Washington State are not compensable, because Washington state law does not apply out of state;[3] (d) that Class Members are not entitled to overtime because they received their rest breaks, albeit unpaid ones, so this time is not

[3] Plaintiff relied on *Bostain v. Food Express, Inc*., 159 Wash. 2d 700, 713 (2007) in which the Washington Supreme Court held that Washington's overtime statute covers hours worked both within and without Washington by a Washington-based employee. Defendant argued that *Bostain* does not bind this Court in light of the Ninth Circuit's recent decision in *Sam Francis Found. v. Ebay, Inc*., 784 F.3d 1320, 1323 (9th Cir. 2016).

compensable at the overtime rate; and (e) that under Washington law, Class Members are not entitled to overtime pay because their effective hourly rate is "reasonably equivalent" to the overtime rate required under Washington law.[4] Hammond Fee Decl. ¶ 9.c; Ackermann Decl. ¶ 16. Further, McLane argued that *even if* it did fail to pay separately and hourly for rest breaks, damages would only accrue from July 16, 2015, the date the Washington Supreme Court confirmed in *Demetrio v. Sakuma Bros. Farms, Inc.,* 183 Wash.2d 649 (2015) that an employer's obligation to pay wages for rest periods extends to piece-rate workers under Washington law.[5] Hammond Fee Decl. ¶ 9.c; Ackermann Decl. ¶ 16. Finally, McLane argued that it cannot be held liable for double damages because (a) prior to the date the *Demetrio* decision was issued Washington law was unsettled as to piece-rate workers rest breaks, so there was no "bona fide dispute as to the obligation of payment." Hammond Fee Decl. ¶ 9.d; Ackermann Decl. ¶ 16; *Wingert v. Yellow Freight Systems, Inc.,* 146 Wash. 2d 841, 848 (2002); and (b) Class Members agreed to Defendant's compensation scheme and cannot now avail themselves of double damages under RCW 49.52.070.[6]

The $775,000 settlement amount represents an excellent result in light of these significant risks and uncertainties that Plaintiff faced in continuing litigation. Hammond Fee Decl. ¶ 19; Ackermann Decl. ¶ 17.

4. *The Skill Required and the Quality of the Work*

The "'prosecution and management of a complex national class action requires unique

[4] See RCW 49.46.130(2) ("An individual employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act (49 U.S.C. Sec. 3101 et seq. and 49 U.S.C. Sec. 10101 et seq.), if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week.")

[5] Plaintiff alleged that Washington law was settled prior to *Demetrio* because as stated by the *Demetrio* court the "only reasonable interpretation" for the applicable regulation, Washington Administrative Code 296-131-020(2), "requires pay [for rest breaks] separate from the piece rate." *Demetrio*, 183 Wash. 2d at 656 (emphasis in original). Furthermore, the Supreme Court in *Sakuma* ruled that three opinions, each of which was decided prior to the liability period in this action, "*Wingert*, *Sacred Heart*, and *Pellino* – applied rest breaks paid 'on the employer's time' to hourly workers [and] they guide our analysis." *Demetrio*, 183 Wash. 2d at 658.

[6] "...the benefits of this section shall not be available to any employee who has knowingly submitted to such violations."

legal skills and abilities.'" *In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, Case No. 02-ML-1475, 2005 U.S. Dist. LEXIS 13627, at *39 (C.D. Cal. Jun. 10, 2005) (citation omitted). Class Counsel has extensive background in complex litigation and experience litigating and settling similar wage and hour class actions. Hammond Fee Decl. ¶¶ 3-5; Ackermann Decl. ¶¶ 7-11. Barry Goldstein also acted as Class Counsel's settlement consultant. Hammond Fee Decl. ¶ 15; Ackermann Decl. ¶ 24. Mr. Goldstein is a nationally acclaimed employment class action attorney with more than 45 years of experience practicing employment law. Hammond Fee Decl. ¶ 15; Ackermann Decl. ¶ 24. Class Counsel's vigorous handling of the case to this point demonstrates their skill in litigating the issues presented by Plaintiff's complaint. Despite the early stage of the litigation, and the considerable risk of recovering nothing at all, Class Counsel obtained an excellent settlement that has resulted in a non-reversionary $775,000 Settlement Fund, of which approximately $512,200 will be distributed automatically to Class Members. Hammond Fee Decl. ¶ 17.

5. *The Contingent Nature of the Requested Fee*

Whether class counsel take a case on a contingency fee basis is a factor in determining the appropriateness of a fee award. See *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994) ("*WPPSS*") ("It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases."); see also *Vizcaino*, 290 F.3d at 1051, quoting *WPPSS*, 19 F.3d at 1300 (courts "'routinely have enhanced the lodestar to reflect the risk of non-payment in common fund cases.'"); *Chemical Bank v. City of Seattle*, 19 F.3d 1291, 1299 (9th Cir. 1994) ("[i]t is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases.") Contingency fee cases are risky because attorneys are paid nothing for their time unless the action is successful, and the substantial costs that are advanced would not be repaid

if the case were unsuccessful. And, unlike attorneys who are paid on a monthly basis and have the ability to withdraw from a case if they go unpaid, Class Counsel committed themselves to prosecuting the case despite the risk that they would neither recoup their advanced costs nor be paid for their time and resources. Hammond Fee Decl. ¶ 21; Ackermann Decl. ¶ 26. Class Counsel took this case on a contingent basis, and expended approximately 351 hours, and approximately $13,291 in reasonable litigation costs, with no guarantee of payment. Hammond Fee Decl. ¶ 24; Ackermann Decl. ¶ 26. Class Counsel have been involved in many cases in which recovery has been delayed for years, or where the class obtained nominal or no recovery, despite excellent efforts on its part. Hammond Fee Decl. ¶ 22.

Additionally, the litigation resulted in Class Counsel foregoing other employment. See *Vizcaino*, 290 F.3d at 1050. Because Class Counsel must maintain appropriate attorney and staff-to-case ratios, taking this case required that Class Counsel turn away other potential fee-generating work. Hammond Fee Decl. ¶ 22.

6. *Awards in Similar Cases*

Here, Plaintiff's Counsel seek an award of 30% of the common fund for their attorneys' fees –less than percentages routinely awarded by district courts in the Ninth Circuit in similar cases, including this Court in *Randolph v. Centene Management Company, LLC,* Case No. 3:14-cv-05730-BHS (W.D. Wash. Nov. 28, 2016) (order approving attorneys' fees of 33% in $4.5 million settlement for overtime claims). See also *Talamantes v. PPG Industries, Inc.*, Case No. 13-cv-4062-WHO (N.D. Cal. Jan. 1, 2016) (order approving attorneys' fees of 33.3% of $5 million settlement in wage misclassification case); *Lusby v. GameStop Inc.*, Case No. C12-03783 HRL, 2015 WL 1501095, at *9 (N.D. Cal. Mar. 31, 2015) (awarding fees equal to one-third of $750,000 settlement for overtime and meal break penalties); *Bennett v. SimplexGrinnell LP*, Case No. 11-cv-1854-JST (N.D. Cal. Sept. 3, 2015) (order approving attorneys' fees of 38.8% of $4.9 million settlement in prevailing wage case), at 10; *Lee v. JPMorgan Chase & Co.*, Case No. 13-cv-511-

JLS, ECF No. 95 at 14-18 (C.D. Cal. Apr. 28, 2015) (approving attorneys' fee of one-third of $2.4 million settlement in misclassification case); *Boyd v. Bank of Am.*, Case No. 13-cv-561-DOC, 2014 WL 6473804, at *10-11 (C.D. Cal. Nov. 18, 2014) (awarding one-third of $5.8 million settlement in misclassification case); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491-492 (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%).

Further, courts in the Western District of Washington routinely award fees amounting to 30% or more of the common fund in complex class actions, including this Court in *Ikuseghan v. MultiCare Health System*, Case No. 3:14-cv-05539-BHS (W.D. Wash. Aug. 16, 2016) (30%); See also *Dennings v. Clearwire Corp.*, Case No. C10-1859JLR, 2013 U.S. Dist. LEXIS 64021 (W.D. Wash. May 3, 2013) (35.78%); *Morris v. Lifescan, Inc.,* 54 F. App'x 663, 664 (9th Cir. 2003) (33%); *R.H. v. Premera Blue Cross et al*., Case No. 2:13-cv-00097-RAJ (W.D. WA, Jan. 21, 2015) (35%); *A.D. v. T-Mobile USA, Inc. Employee Benefit Plan et al*., Case No. 2:15-cv-00180-RAJ (W.D. Wash. Jan. 5, 2017) (35%).

Thus, applying the above standards to the facts in this case, Plaintiff's request for 30% of the total settlement amount as fees for Class Counsel is well within the zone of reasonable attorneys' fees awards for the quality of services Class Counsel rendered and the results they obtained for the Class.

C. The Fee Amount Allocated By the Settlement Agreement Is Also Well Within The Zone Of Reasonableness Under The Lodestar Method

The amount of attorneys' fees sought here is also reasonable under the "lodestar" method, which "provides a check on the reasonableness of the percentage award." *Vizcaino*, 290 F.3d at 1050; see also *Shaffer v. Cont'l Cas. Co*., 362 F. App'x. 627, 631 (9th Cir. 2010) (affirming district court's decision to use the lodestar method to cross-check the percentage method). As set forth below, reasonableness may be gleaned from the fact that Class Counsels' fee application requests an award that represents a modest multiplier of only 1.15 to Class Counsel's lodestar to date,

which is also well within the range approved by the courts. Ackermann Decl. ¶ 27.

"The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Camacho v. Bridgeport Fin., Inc*., 523 F.3d 973, 978 (9th Cir. 2008). "That figure may then be increased or reduced by the application of a 'multiplier' after the trial court has considered other factors concerning the lawsuit." See *Hensley v. Eckerhart*, 461 U.S. at 433.

Applying the first step of this analysis, Class Counsel have expended at least 351 hours in this litigation for a lodestar of at least $201,518. Hammond Fee Decl. ¶ 24 and **Exhibit 1**; Ackermann Decl. ¶ 22; Declaration of India Lin Bodien in Support of Plaintiff's Motion for Attorneys' Fees and Costs ("Bodien Decl.") ¶ 8. These time summaries and declarations accurately reflect the extensive work class counsel necessarily performed in this complex litigation and are the best evidence of the time that this case has required. See *Perkins v. Mobile Housing Bd*., 847 F.2d 735, 738 (11th Cir. 1988) (counsel's "[s]worn testimony that, in fact, it took the time claimed is evidence of considerable weight on the issue of the time required in the usual case"). Indeed, trial courts may even use "rough" estimations, so long as they apply the correct standard. *Fox v. Vice*, 563 U.S. 826, 838 (2011).[7]

1. *The Hours Expended by Class Counsel Are Reasonable*

Class Counsel's hours reflect time spent on tasks that "would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest..." *Moore v. Jas. H. Matthews & Co*., 682 F.2d 830, 839 (9th Cir. 1982). Class Counsel also took reasonable steps to minimize duplication among the firms and among the attorneys in each firm. Hammond Fee

[7] As the Supreme Court has stated, "The fee applicant ... must, of course, submit appropriate documentation to meet 'the burden of establishing entitlement to an award.' But trial courts need not, and indeed should not, become green-eye-shade accountants. The essential goal in shifting fees ... is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time." *Fox,* 563 U.S. at 838 (citations omitted). To ensure there is no waiver of the attorney-client privilege or work product protection, Class Counsel have provided summaries of their lodestar fees and litigation expenses.

Decl. ¶ 23; Bodien Decl. ¶ 6. Further, the lodestar amount does not include additional time that that Class Counsel will spend filing this motion and the final approval motion, attending the final approval hearing, responding to class member's questions, in overseeing administration of the settlement, and submitting any final reports that may be required by the Court. Hammond Fee Decl. ¶ 23.

Class Counsel extensively investigated and researched the facts and circumstances underlying the pertinent issues and applicable law. Hammond Fee Decl. ¶¶ 6-7; Bodien Decl. ¶ 6. This investigation and research included discussions and interviews between Class Counsel, Plaintiff and putative class members. Hammond Fee Decl. ¶ 7; Ackermann Decl. ¶ 23; Bodien Decl. ¶ 6. After Defendant removed the Complaint, and filed its answer, the Parties stipulated to vacate the class certification motion deadline, and then entered into a protective order to facilitate the exchange of information with Defendant prior to and in preparation for mediation. Hammond Fee Decl. ¶ 11. Class Counsel reviewed and analyzed data provided by Defendant including (a) class size, (b) number of days worked by the Class, (c) the average number of hours worked per day (and thus the number of statutorily required rest breaks), (d) the number of overtime hours worked during the Class Period, and (e) Class Members' effective average hourly rate of pay. Hammond Fee Decl. ¶ 12; Ackermann Decl. ¶ 19; Bodien Decl. ¶ 8. Class Counsel assessed Defendant's maximum liability, drafted a detailed mediation statement, and prepared for and attended the full-day mediation. Hammond Fee Decl. ¶ 13-14; Ackermann Decl. ¶ 23; Bodien Decl. ¶ 8. Following the mediation, the parties continued to negotiate through the mediator, and finalized the settlement agreement only after over three months of hard fought negotiations. Hammond Fee Decl. ¶ 16; Ackermann Decl. ¶ 23; Bodien Decl. ¶ 8.

Further, as discussed above, Class Counsel took this case on a contingent basis. "It must be kept in mind that lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the

fee." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). Given this absence of incentive to spend unnecessary hours, the Court should defer to Class Counsel's professional judgment concerning the number of hours reasonably required to reach a successful resolution of the case.

2. *Class Counsel's Standard Rates Are Reasonable*

Class Counsel are entitled to the hourly rates charged by attorneys of comparable experience, reputation, and ability for similarly complex federal litigation. *Camacho v. Bridgeport Fin., Inc*., 523 F.3d at 979 ("the established standard when determining a reasonable hourly rate is the 'rate prevailing in the community for similar work performed by attorneys of comparable skill, experience and reputation'"). "[R]ate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate." *United Steelworkers v. Phelps Dodge Corp*., 896 F.2d 403, 407 (9th Cir. 1990). Here, Class Counsel's hourly rates are quite reasonable in light of their significant experience, expertise, and skill. Plaintiff's counsel, Julian Hammond of HammondLaw, P.C. and Craig Ackermann of Ackermann & Tilajef, have substantial experience handling complex class actions, including actions asserting claims for truck drivers' unpaid rest breaks. Hammond Fee Decl. ¶¶ 3-5; Ackermann Decl. ¶¶ 7-11. Based on their prior experience, Mr. Hammond's hourly rate is $625, and Mr. Ackermann's hourly rate is $685. Hammond Fee Decl. ¶ 25; Ackermann Decl. ¶ 23. Likewise, Barry Goldstein and Dan Edelman are highly experienced class action lawyers, and their respective hourly rates of $865 and $800 are consistent with the rates charged by lawyers of similar background and experience who practice in the area of complex civil litigation. Hammond Fee Decl. ¶ 26; Ackermann Decl. ¶ 24. The rates sought by Class Counsel's attorneys and support staff have also been approved by numerous California state and federal courts. Hammond Fee Decl. ¶¶ 30-31; Ackermann Decl. ¶ 23.

Case law from the Western District of Washington also supports Class Counsel's hourly

rates. See *Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1326-27 (2009) (approving hourly rates of $305 to $800); *In Re Starbucks Consumer Litigation,* Case No. 2:11-cv-01985-MJP (W.D. Wash. March 5, 2013) (approving hourly rates of $210 to $850); *McGuire v. Dendreon Corporation et al.*, Case No. 2:07-cv-00800-MJP (W.D. Wash. Dec. 20, 2010) (approving hourly rates of $100 to $850); *Griffith et al. v. Providence Health & Services et al.,* Case No. 2:14-cv-01720-JCC (W.D. Wash. Mar. 21, 2017) (approving hourly rates of $190 to $945).

3. *The Requested Multiplier is Reasonable*

Under the second step of the lodestar-multiplier analysis, courts often approve reasonable multipliers on class counsel's lodestar to reward counsel for accepting the contingent risk of the litigation. *Fischel v. Equitable Life Assur. Soc'y of U.S.*, 307 F.3d 997, 1008 (9th Cir. 2002) ("A district court generally has discretion to apply a multiplier to the attorney's fees calculation to compensate for the risk of nonpayment."). As the Ninth Circuit noted in *Vizcaino*:

> "[C]ourts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases. . .. 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." . . . In common fund cases, "attorneys whose compensation depends on their winning the case[] must make up in compensation in the cases they win for the lack of compensation in the cases they lose."

290 F.3d at 1051 (citation omitted). Multipliers awarded in common fund cases frequently range from 1 to 4, or even higher. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051, n.6 (9th Cir. 2002) (affirming a multiplier of 3.65 based on a survey of 24 lodestar awards, with 83% of those awards applying multipliers ranging from 1.0 - 4.0 and 54% in the 1.5 - 3.0 range); see also Newberg on Class Actions § 14:03 (3d ed. 1992) (multipliers of 1 to 4 are frequently awarded); Ackermann Decl. ¶ 27.

The result obtained by Class Counsel warrants a modest multiplier of 1.15 based on the facts that: (1) Class Counsel loaned their services out with no guarantee of being paid, (2) Class Counsel were able to resolve this case at a very early stage of the litigation, and (3) Class Counsel

obtained an excellent result. Hammond Fee Decl. ¶ 27. As discussed above, the 250 Class Members will enjoy substantial monetary relief from the approximately $512,500 Net Settlement Fund that will be available for distribution, amounting to an average recovery per class member of nearly $3,100 gross and $2,050 net. Id. ¶ 17. The Settlement will provide immediate compensation to the Settlement Class and will avoid the substantial risks of less or no recovery presented by continued litigation. Id. ¶ 19. Further, this amount does not include the substantial amount of time Plaintiffs' Counsel expects to expend in the remainder of the proceedings. Id. ¶ 23; 29.

Case law from the Western District of Washington supports Class Counsel's requested multiplier of 1.15. See *Randolph v. Centene Management Company, LLC,* Case No. 3:14-cv-05730-BHS (awarding 2.5 multiplier); *Pelletz v. Weyerhaeuser Co*., 592 F. Supp. 2d at 1325 (a "modest 1.82 multiplier requested by [counsel] falls well within the range of multipliers approved by Ninth Circuit courts."); *R.H. v. Premera Blue Cross et al.* Case No. 2:13-cv-00097-RAJ (W.D. Wash. Jan. 21, 2015) (awarding 3.3 multiplier as "well within an acceptable range"); *A.D. v. T-Mobile USA, Inc. Employee Benefit Plan et al*., Case No. 2:15-cv-00180-RAJ (W.D. Wash. Jan. 5, 2017) ("Although this award results in a multiplier of 2.23, it is still well within an acceptable range").

The foregoing strongly demonstrates the reasonableness of the fees amount agreed upon in the Settlement. The Court should approve an award of attorneys' fees in the amount of $232,500.

D. Plaintiff's Fee Request Passes Under Heightened Ninth Circuit Standards Articulated in *Bluetooth* and *Dennis v. Kellogg*

The present Settlement also comports with the heightened standards of scrutiny for awarding attorney's fees in class actions that the Ninth Circuit articulated *in In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935 (2011) and *Dennis v. Kellogg Co*., 697 F.3d 858 (2012).

In *Bluetooth*, the Ninth Circuit vacated and remanded an award of fees by a district court in approving a class action settlement, finding that the district court did not fully assess the

reasonableness of the fee request and settlement as a whole. 654 F.3d at 943, 947. The court reasoned that the disparity between the value of the class recovery (a $100,000 *cy pres* award) and class counsel's compensation ($800,000) gave rise to an inference of unfairness. *Id.* at 938. However, *Bluetooth* is factually inapposite to the present case. In *Bluetooth,* there was no monetary benefit to the class, whereas here the settlement will result in a significant net payment to the class of approximately $512,500 and the fee award sought of $232,500 is not disproportionate to the class recovery. Further, in *Bluetooth* the court employed the lodestar method without actually determining the lodestar amount, and failed to perform a cross-check against the percentage of the common fund. *Id.* at 943. Here, Plaintiff's counsel seeks a reasonable 30% of the common fund, and the requested fee award is also reasonable under a lodestar check, as discussed above. Accordingly, *Bluetooth* poses no bar to Plaintiff's requested fees.

Kellogg, likewise, provides no reason to deny or reduce the requested fees and is factually distinguishable. In *Kellogg*, the Ninth Circuit reversed and vacated a class action settlement of false advertising claims, which was entered into three months after filing of the complaint. The settlement contained a reversion provision, only $800,000 worth of claims were made, part of the settlement included charitable donations that Defendant had in place prior to the settlement, and class counsel sought millions of dollars in fees. In rejecting the proposed award of fees, the Ninth Circuit noted that the benefits to the class were "vaporous" and class counsel's lodestar multiplier (4.3) and hourly rates were excessive (on average $2,100 per hour) which is of course greatly in excess of the range of market rates. *Kellogg*, 697 F.3d at 862. The settlement in the instant case suffers from none of the defects of the rejected *Kellogg* settlement. It consists entirely of real, hard-money payment amounts; there is no reversion to the Defendant; the lodestar multiplier is only 1.15; and the effective hourly rates to be earned by Class Counsel if the proposed award is approved would be close to their usual hourly billing rates.

III. CLASS COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED

Plaintiff also requests reimbursement from the common fund for out-of pocket expenses incurred by Class Counsel during this litigation, in the amount of $13,291.28 (including $1,000 in anticipated costs through final approval). Hammond Fee Decl. ¶ 32. In class action settlements, courts routinely allow reimbursement of expenses incurred. See, e.g., *Arthur v. Sallie Mae, Inc.*, Case No. 10-198, 2012 WL 4076119, at *2 (W.D. Wash. Sept. 17, 2012) ("The Ninth Circuit allows recovery of pre- settlement litigation costs in the context of class action settlement.") (citing *Staton*, 327 F.3d at 974); *Clark v. Payless Shoesource, Inc.*, Case No. C09-0915-JCC, 2012 U.S. Dist. LEXIS 105187, at *13 (W.D. Wash. Jul. 27, 2012) ("Where, as here, the requested costs will be paid in addition to the relief available to the class, reimbursement of reasonable costs is fully in keeping with applicable law."); *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (class counsel may recover expenses "that would normally be charged to a fee paying client").

Class Counsel has incurred $13,291.28 in reasonable litigation costs (including $1,000 in anticipated costs through final approval). Hammond Fee Decl. ¶ 32 & **Exhibit 2;** Ackermann Decl. ¶ 28. These costs are commonly taxable and reimbursed costs, including filing and other court fees, travel costs related to mediation, legal and other research charges, mediator fees, copying costs and the like. Hammond Fee Decl. ¶ 32 & **Exhibit 2;** Ackermann Decl. ¶ 28.

IV. THE CLASS REPRESENTATIVE ENHANCEMENT AWARD IS REASONABLE

The enhancement award to Plaintiff of $5,000 allocated by the Settlement is reasonable and should be approved because class representatives in class action litigation are eligible for reasonable participation payments to compensate them for the risks assumed and efforts made on behalf of the Class. See *Staton*, 327 F.3d at 976. "Incentive awards are fairly typical in class action cases. Such awards are discretionary and are intended 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."

Rodriguez v. West Publ'g Corp., 563 F.3d 948, 958-59 (9th Cir. 2009) (internal citations omitted).

In evaluating the payments to named plaintiffs, the factors the courts consider include:

(1) a comparison between the service awards and the range of monetary recovery available to the class (*see Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. June 7, 2001); *Roberts v. Texaco, Inc.*, 979 F.Supp. 185, 200, 203, 204 (S.D.N.Y. 1997);

(2) time and effort put into the litigation (*see Van Vranken v. Atl. Richfield Co.*, 901 F.Supp. 294, 299 (N.D. Cal. 1995); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998));

(3) whether the litigation will further the public policy underlying the statutory scheme (*see Roberts v. Texaco, Inc.*, 979 F.Supp. at 201, n. 25); and

(4) risk of retaliation (*see id*. at 202; *Cook v. Niedert*, 142 F.3d at 1016).

All of the above factors support the enhancement award requested here.

First, the requested enhancement award to the Plaintiff is comparable to awards granted in other cases. See *Pelletz*, 592 F. Supp. 2d at 1229 (award of $ 7,500); *In re Infospace, Inc.,* 330 F. Supp. 2d 1203, 1216 (W.D. Wash. 2004) (awards of $ 5,000 and $ 6,600); *In re Mego Fin. Corp. Sec. Litig*., 213 F.3d 454, 457, 463 (9th Cir. 2000) (upholding award of $5,000); *Hughes v. Microsoft Corp*., Case No. C98-1646C, NO. C93-0178C, 2001 WL 34089697, at *36-38 (W.D. Wash. Mar. 26, 2001) (approving awards of $7,500, $20,000, and $40,000); *In re Online DVD Rental Antitrust Litigation*, 779 F.3d 934, 947-948 (9th Cir. 2015) (upholding awards of $5,000 for each of nine class representatives). The requested award is modest when considered relative to the $775,000 Total Settlement Sum (approximately 0.06% of the Total Settlement Sum). The average settlement payments of $3,100 gross and $2,050 net to the Class Members represent 62% and 41%, respectively, of the requested enhancement award. Thus, the enhancement award is not greatly disproportionate to the class members' individual shares.

Second, the enhancement award is appropriate to compensate Plaintiff for the critical role he played in this case and the substantial time, effort, and risks he undertook in helping secure the

result obtained on behalf of the Settlement Class. Throughout the litigation, Plaintiff assisted and advised Class Counsel. Hammond Fee Decl. ¶ 18; *See* Dkt. 40 (Declaration of Steven Eilerman filed February 7, 2017). Plaintiff greatly assisted Class Counsel in investigating the claims, providing Class Counsel with relevant documents and class member contact information, preparing the complaint, contacting additional witnesses, and traveled to and attended the full day mediation in San Francisco. Hammond Fee Decl. ¶ 18. Plaintiff evaluated and approved the proposed settlement on behalf of the Settlement Class. Id. In total, Plaintiff spent numerous hours assisting with this case. Dkt. 40.

Third, the participation and assistance provided by the Plaintiff was critical to the success of this litigation and the enforcement of Labor Code protections. Without the named Plaintiff's commitment to come forward and serve as a Class Representative, this litigation, which challenges employers from passing on their business risks to their employees and enforces the protections of Washington state law, would not be possible. Hammond Fee Decl. ¶ 20.

Fourth, the Class Representative assumed several risks by agreeing to formally represent the Class. For one, he agreed to assume the obligation to pay Defendant's potential costs, an amount that could have totaled in the hundreds of thousands of dollars, if he did not prevail at trial. The other Class Members in this case did not assume this risk. Hammond Fee Decl. ¶ 20; Ackermann Decl. ¶ 29. Plaintiff also risked being branded a "troublemaker" and blacklisted by other employers in the trucking industry. Hammond Fee Decl. ¶ 20; Ackermann Decl. ¶ 29; *Staton*, 327 F.3d at 976 ("reasonable[e] fear [of] workplace retaliation" is a factor in assessing the proper amount of the enhancement); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1073 (9th Cir. 2000) ("[F]ear of employer reprisals will frequently chill employees' willingness to challenge employers' violations of their rights.").

Additionally, Plaintiff is entering into a general release of all potential claims against the Released Parties, which is much broader than the targeted release of claims being given by the Class Members. Hammond Fee Decl. ¶ 20; Ackermann Decl. ¶ 29. Because the requested enhancement award is moderate, commensurate with the results achieved, efforts expended and risks undertaken by the Plaintiff and consistent with awards approved by courts in similar cases, the Court should approve this service award in full.

Finally, Defendant does not oppose this reasonable enhancement award. This is further evidence of the reasonableness of the requested award. Accordingly, the $5,000 enhancement award to the Plaintiff should be finally approved.

V. CONCLUSION

For the foregoing reasons, Plaintiff and Class Counsel respectfully request that the Court grant the requested attorneys' fees and costs and approve the requested enhancement award for the Plaintiff.[8]

Dated: April 21, 2017

Respectfully submitted,

By: /s/ Julian Hammond

JULIAN HAMMOND (admitted *pro hac vice*)
HammondLaw, PC
1829 Reisterstown Road, Suite 410
Baltimore, MD 21208

Attorneys for Plaintiff and the Putative Class

[8] The proposed order granting Plaintiff's requested attorneys' fees and costs, and class representative enhancement award, will be included in the proposed order granting Plaintiff's Motion for Final Approval of Class Action Settlement and will be filed along with that motion on or before May 10, 2017.