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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DEBRA WOLF, individually and on behalf of all other similarly situated individuals,

Plaintiff,

v.

THE PERMANENTE MEDICAL GROUP, INC., a California corporation,

Defendant.

No. 3:17-cv-05345-VC

CLASS ACTION

NOTICE OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, LITIGATION/SETTLEMENT ADMINISTRATION EXPENSES, AND CLASS REPRESENTATIVE SERVICE AWARDS, AND CORRESPONDING MOTION

Date: September 6, 2018
Time: 10:00 a.m.
Courtroom: 4
450 Golden Gate Avenue, 17th Floor
San Francisco, California 94102
Judge: Hon. Vince Chhabria

NOTICE OF MOTION AND MOTION

To the Clerk of Court and all interested parties:

PLEASE TAKE NOTICE THAT on Thursday, September 6, 2018, at 10:00 a.m., or as soon thereafter as counsel may be heard, in Courtroom 4 of this Court, located at 450 Golden Gate Avenue, 17th Floor, San Francisco, California 94102, before the Honorable Vince Chhabria, Plaintiff Debra Wolf, on behalf of herself and all those similarly situated ("Class Members") will and hereby do move this Court for an award of $737,500 in attorneys' fees, reimbursement of up to $40,000 in litigation expenses and settlement administration expenses in an amount not to exceed $35,000, and Class Representative service awards of $7,500 to Named Plaintiff Debra Wolf and $2,500 to opt-in Plaintiff Natty Medrano.

As more fully discussed in the following memorandum in support of the motion, this motion is made on the grounds that the requested fee is reasonable under the common fund doctrine, as it represents 25% of the settlement fund and is consistent with applicable Ninth Circuit authority and with fees awarded in similar cases in this District. In addition, the requested fee is appropriate under the lodestar cross-check method. Further, the requested litigation and settlement administration expenses were all necessarily and properly incurred, and the requested Class Representative service awards are reasonable and mark an appropriate payment to the Named Plaintiff and recognizes their time, effort, and inconvenience, as well as the risk they were exposed to in asserting their and others' rights in this litigation.

The motion is based on this notice of motion and motion; the memorandum in support of the motion; the Declaration of Jason J. Thompson filed in support of this motion; the Declaration of Jahan C. Sagafi filed in support of this Motion; the parties' Notice of Joint Motion and Joint Motion for Preliminary Approval of Class Action Settlement, Conditional Certification of Class, Approval of Class Notice, and Setting of Final Approval Hearing (Dkt. 87) (as well as the corresponding Memorandum in Support of Joint Motion for Preliminary Approval of Class Action Settlement, Conditional Certification of Class, Approval of Class Notice, and Setting of Final Approval Hearing (Dkt 89); and the accompanying Declaration of Kevin Stoops (Dkt. 89-2)); the parties' Settlement Agreement (Dkt. 89-1); and the Court's Order Granting Preliminary Approval of the Parties' Settlement (Dkt. 98); all matters of which the Court may take notice; and any oral and documentary evidence presented at the hearing on the motion.

Dated: July 5, 2018

Respectfully Submitted,

/s/ *Kevin J. Stoops*___
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DEBRA WOLF, individually and on behalf of all other similarly situated individuals,

Plaintiffs,

v.

THE PERMANENTE MEDICAL GROUP, INC., a California corporation,

Defendant.

Case No. 17-cv-05345-VC

CLASS ACTION

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEYS' FEES, LITIGATION/SETTLEMENT ADMINISTRATION EXPENSES, AND CLASS REPRESENTATIVE SERVICE AWARDS

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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

After investigation, significant discovery, contested litigation, and extensive arms-length mediation and negotiation, Plaintiff Debra Wolf, and opt-in Plaintiff Natty Medrano, on behalf of themselves and approximately 1,700 similarly situated "Teleservice Representatives" ("TSRs") working remotely and in Defendant, The Permanente Medical Group, Inc.'s ("TPMG") San Jose, Vallejo and Sacramento, California call center locations (hereinafter the "Class Members"), and TPMG negotiated a $2,950,000 common fund settlement. The entirety of this fund will be paid out by TPMG, with no money reverting to the company. From this common fund, Class Counsel seek an attorneys' fee award of 25%, or $737,500, plus litigation/settlement administration expenses and class representative service awards.

This fee is consistent with applicable Ninth Circuit authority and with fees awarded in similar cases in this District, and its reasonableness is confirmed by the lodestar cross-check. The requested award is eminently reasonable under the common fund doctrine. *See Blum v. Stenson*, 465 U.S. 886, 900 n. 16 (1984). Class Counsel have obtained a very strong result for the Class Members, in terms of both monetary relief and changes to company practices. Here, each Class Member who does not opt out will automatically receive a check without having to file a claim form. Unsurprisingly, the Class Member response has been overwhelmingly positive: out of 1,701 notice packets mailed out, only 7 Class Members have opted out, and no objections have been made. (Exh. 1, Thompson Decl. ¶ 37). [1]

The Settlement allows Class Counsel to seek reimbursement of litigation expenses of up to $40,000. To date, Class Counsel have incurred $31,313.53 in litigation expenses. (*Id.* at ¶ 41; Exh. 2, Sagafi Decl. ¶ 26). The costs were all incurred in connection with the prosecution of the action and the execution of the settlement and are reasonable and proper. Class Counsel will continue to incur costs beyond this amount for the benefit of the Class (e.g., through traveling to the Final Fairness Hearing and in connection with the settlement administration process). Plaintiff's reply brief in support of this motion,

[1] The opt-out and objection period ends July 23, 2018. Plaintiff will provide updated opt-out and objection information as well as Class Counsel's updated lodestar and litigation expenses, with their reply brief to be filed after the opt-out/objection deadline.

to be filed fourteen days before the final approval hearing, will update the costs incurred. Further, the Settlement allows reimbursement to the settlement administrator, Simpluris, Inc., in an amount not to exceed $35,000. The activities already underway and those yet to be conducted (including distribution of settlement proceeds) are necessary to effectuate notice of the settlement and proper distribution of the settlement fund to the Class Members. To the extent litigation and/or settlement administration expenses falls short of the above maximum amounts, the surplus funds will be distributed to the Class Members.

Finally, to recognize the time and effort the Named Plaintiff and the opt-in Plaintiff expended for the benefit of the Class Members, the results they made possible for the Class, and the risks they accepted by leading the litigation, Plaintiff requests Class Representative service awards in the amount of $7,500 to Named Plaintiff Debra Wolf and in the amount of $2,500 to opt-in Plaintiff Natty Medrano. Given their significant contributions to Class Counsel's efforts, culminating in the pending $2,950,000 settlement, the risks they incurred, the substantial time and resources they committed, and viewed in light of well-established standards for such awards, the amounts sought are reasonable. (Exh. A, Thompson Decl. ¶¶ 32-34).

II. ARGUMENT

A. ATTORNEYS' FEE AWARDS AS PERCENTAGE OF COMMON FUND SETTLEMENTS

Federal Rule of Civil Procedure 23(h) provides that, "[i]n a certified class action, the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement." *Fed. R. Civ. P.* 23(h). "Attorneys' fees provisions included in proposed class action 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, 964 (9th Cir. 2003) (internal quotation marks omitted).

In "common fund cases" like this one, a court has discretion to award attorneys' fees as either a percentage of such common fund or by using the lodestar method. *Id.* at 967-968. The percentage of the fund method is appropriate for several reasons. The percentage method comports with the legal marketplace, where plaintiffs' counsel's success is frequently measured in terms of the results they have

achieved. *See Swedish Hosp. Corp. v. Shalala,* 1 F.3d 1261, 1269 (D.C. Cir. 1993) (in common fund cases, "the monetary amount of the victory is often the true measure of [counsel's] success"). By assessing the fee in terms of the benefit to the class, the percentage method "more accurately reflects the economics of litigation practice" which, "given the uncertainties and hazards of litigation, must necessarily be result-oriented." *Id*. (internal quotations and citations omitted).

In general, people who lack the resources to hire counsel by the hour typically secure legal representation by agreeing to payment of the fee in the form of a percentage of any future recovery. The percentage of the fund approach mirrors this aspect of the market and, accordingly, reflects the fee that would have been negotiated by the class members in advance, had such negotiations been feasible, given the prospective uncertainties and anticipated risks and burdens of the litigation. *See, e.g., Paul, Johnson, Alston & Hunt*, 886 F.2d at 271; *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007).

This percentage approach aligns the incentives of the class members and their counsel and thus encourages counsel to spend their time efficiently and to focus on maximizing the size of the class's recovery, rather than their own lodestar hours. *In re Activision Sec. Litig*., 723 F. Supp. at 1375; *see State of Fla. v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990) (recognizing a "recent ground swell of support for mandating a percentage-of-the-fund approach in common fund cases"). By contrast, the lodestar multiplier method creates a disincentive for early settlement, since counsel's lodestar will necessarily be low early in the litigation. *Vizcaino*, 290 F.3d at 1050 n.5.

In the Ninth Circuit, 25 percent of the common fund is the "benchmark" for an attorneys' fees award in "mega-fund" class actions in the $50-200 million range. *See, e.g., Vizcaino*, 290 F.3d at 1047. The Ninth Circuit has instructed that district courts are entrusted with wide discretion to approve fees above or below that benchmark, based on the circumstances of the case. *See id.* at 1048 ("The 25% benchmark rate, although a starting point for analysis, may be inappropriate in some cases."); *In re Am. Apparel, Inc. S'holder Litig.*, No. 10 Civ. 06352, 2014 WL 10212865, at *23 (C.D. Cal. July 28, 2014) ("[I]n most common fund cases, the award exceeds the benchmark"). Where the common fund is below the $50 million "mega-fund" threshold, an award above the 25% benchmark is particularly appropriate. In fact, "in class action common fund cases the better practice is to set a percentage fee and that, absent

extraordinary circumstances that suggest reasons to lower or increase the percentage, the rate should be set at 30%." *In re Activision Sec. Litig.*, 723 F. Supp. at 1378. However, "[s]election of the benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002). Under *Vizcaino* the relevant factors are: (1) results achieved; (2) risks of litigation; (3) whether there are benefits to the class beyond the immediate generation of a cash fund; (4) whether the percentage rate is above or below the market rate; (5) the contingent nature of the representation and the opportunity cost of bringing the suit; (6) reactions from the class; and (7) a lodestar cross-check. *Id.* at 1048-52.

B. CLASS COUNSEL'S FEE REQUEST FOR 25% OF THE COMMON FUND IS APPROPRIATE UNDER THE *VIZCAINO* FACTORS

1. The "Results Achieved," "Risks of Litigation," and "Benefits to the Class" Factors

Class Counsel achieved a superb result for the class, which includes both monetary and non-economic benefits. To begin, a $2,950,000 class settlement is an excellent result considering the best possible recovery for the off-the-clock claims were for 4 to 6 minutes per day of unpaid work. (Dkt. 36-1, Stoops Decl. ¶ 23). The unpaid time is commonly called "boot up" or "shut down" time, which is the time it takes each class member to start their computers and open the necessary computer programs before each workday and to complete the reverse process at the end of each workday. It is also worth noting that this is not a claims-made settlement fund with a reversion of unpaid funds to Defendant, which typically results in less value being conveyed to class members, since not all class members file claims. All dollars here are being paid out in this settlement.

Second, TPMG vigorously refuted the Plaintiffs' claims with myriad legal defenses, including a *de minimis* doctrine defense and challenges to Plaintiffs' California labor code claims based on collective bargaining agreement preclusion. (Dkt. 36-1, Stoops Decl. ¶ 21). TPMG's victory on any one of these defenses would have eviscerated or eliminated liability or damages. TPMG also contested liability based on its rounding policy, whereby workers were paid as of the start of their shift as long as they were clocked in within a 6-minute window before or after their scheduled shift. (*Id.*). Again, this defense would have eliminated all damages. The settlement is a testament to Class Counsel's diligence and skill in overcoming

those factual and legal defenses.

Furthermore, TPMG contested class certification, arguing that each Class Member was instructed how to submit alleged unpaid time, that each Class Member had individualized experiences with boot up and shut down, and that each Class Member's actual work experience varied from week to week, defeating both the commonality and predominance elements of Rule 23(a) and (b)(3) as well as the similarly situated requirement of §216(b) of the Fair Labor Standards Act ("FLSA"). (*Id.*). All these defenses had the potential to end this class action.

In obtaining the $2,950,000 settlement, Class Counsel worked extensively and convincingly.[2] First, Class Counsel worked hard to understand and unpackage the rounding policy. In many instances, the unpaid pre- or post-shift time was less than 6 minutes. However, Class Counsel eventually rendered TPMG's rounding policy defense completely moot. Specifically, Class Counsel figured out that although TPMG's policy resulted in Class Members being paid from their start of shift time, regardless of exactly when they clocked in as long as it was within a 6-minute widow before or after the scheduled start of shift, *lost time still existed* and could be *proven*. The ability to explain how the rounding policy did not erase the unpaid time to the mediator was critical, and took the first few hours of mediation. Likewise, Class Counsel spent extensive time researching and briefing the merits of TPMG's collective bargaining agreement defenses and provided detailed memorandum to the mediator the outlined how Plaintiffs would overcome said defenses.

Furthermore, Class Counsel spent numerous hours in personal interviews with the Named Plaintiff, opt-in Plaintiff, and many other opt-in plaintiffs to understand their workday and experiences and to identify arguments supporting commonality and predominance to support the class certification argument. (Dkt. 36-1, Stoops Decl. ¶ 14). Class Counsel retained expert economist David Breshears of Heming Morse, LLP to assist with data analysis, statistics, and damage calculations – all of which activities were important for both liability and class certification purposes.

[2] A more detailed description of Class Counsels' work was set forth in the Parties' Memorandum in Support of Joint Motion for Preliminary Approval of Class Action Settlement, Conditional Certification of Class, Approval of Class Notice, and Setting of Final Approval Hearing (Dkt. 36), and the accompanying Declaration of Kevin Stoops (Dkt. 36-1).

These examples demonstrate the quality of work performed and attention to detail by Class Counsel. The Class directly benefited from that level of work; *importantly*, the Class Members benefited above and beyond a case where counsel simply negotiated a "split-the-baby" compromise to the number of claimed unpaid minutes of boot up and shut down time. To the contrary, Class Counsel provided top-notch representation throughout the case and counsel for both Parties vigorously and intensely negotiated every aspect of the settlement. Moreover, these examples illustrate the challenging conditions facing the Class and why the first three *Vizcaino* factors – the "results achieved[3]," "risks of litigation," and "benefits to the class" – mitigate in favor of Class Counsel's 25% attorneys' fee request.

It is also worth noting that the superior settlement results were obtained swiftly.[4] The relatively short timetable from filing suit to settlement reflects the experience, ability and work expended by class counsel.

2. The "Market Rate" and "Contingent Nature and Opportunity Costs" Factors

The fourth and fifth *Vizcaino* factors also support Class Counsel's fee request. For example, the Named Plaintiff and opt-in Plaintiff retained Class Counsel pursuant to a 40% contingent fee agreement. (Exh. A, Thompson Decl. ¶¶ 24-25). The contingent fee structure is designed to recognize a fee premium for the fact that counsel commonly assume the risk of nonpayment for their work, waiting years to be paid, and forgoing other work, including perhaps hourly work. *See, e.g., Vizcaino*, 290 F.3d at 1051 ("Indeed, 'courts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases.'"). The 40% fee agreed to by the Named and opt-in Plaintiffs is a common market rate for litigation of this nature. Class Counsel's fee request seeks a significantly lower fee of 25%.

Second, the "opportunity cost" factor also is a relevant consideration. *See e.g., Parks v. Eastwood Ins. Servs., Inc.*, 240 Fed. App'x 172, 175 (9th Cir. 2007) (approving increase to lodestar multiplier because "[p]reclusion from seeking other employment is a proper basis for enhancement."). Specifically,

[3] The "results achieved" factor is often cited as the most important factor to consider in deciding fee requests. *See In re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036. 1046 (N.D. Cal. 2008).

[4] Northern District Judge Charles Breyer noted the benefit of a swift result when deciding class counsel's fees in *In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, And Products Liability Litigation*, MDL No. 2672, ECF No 3396, Order Granting Plaintiffs' Motion For Attorneys' Fees And Costs Relating To The 3.0- Liter Consumer And Reseller Dealer Settlement.

Class Counsel worked exceptionally hard over a relatively short period of time – one year – to bring this settlement to completion. Class Counsel devoted significant time towards legal research, discovery, damage analysis, negotiations, among other things. The hundreds of hours worked on this case had to be pulled away from other files, which is exactly what the *Vizcaino* "opportunity cost" factor assesses.

Based on review of the results achieved and other common fee awards in FLSA cases, 25% is a fair and reasonable fee amount in this case.[5] It strikes an appropriate balance of the Class Members' recovery and Class Counsel's risks – namely the contingent nature and opportunity cost of their retention. It also serves as a reasonable approximation of a market rate fee. In common fund settlements of less than $50 million, such as this one, a higher percentage is often awarded by the district court and affirmed by the Ninth Circuit. *See, e.g., In re Pacific Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming award of 33% of $12 million common fund); *In re Activision Sec. Litig.,* 723 F. Supp. at 1375 (awarding 32.8% of $3.5 million common fund); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 460 (9th Cir. 2000) (affirming award of 33.3% of $1.725 million). In fact, attorneys representing a class "routinely recover attorneys' fees in the range of 20 to 40 percent of the common fund." *In re Quantum Health Res., Inc.,* 962 F. Supp. 1254, 1258 (C.D. Cal. 1997). In fact, "[i]n most common fund cases, the award exceeds the benchmark" of 25 percent. *In re Am. Apparel, Inc. S'holder Litig.,* No. 10 Civ. 6352, 2014 WL

[5] Many courts in this Circuit and across the country have awarded class counsel fees well above 25% of the common benefit fund in other FLSA class action cases. *See, e.g., Boyd v. Bank of Am. Corp.*, No. 13 Civ. 0561, 2014 WL 6473804, at *9 (C.D. Cal. Nov. 18, 2014) (approving fee award of 36% of common fund settlement in wage and hour case); *Birch v. Office Depot, Inc.*, No. 06 Civ. 1690 (S.D. Cal. Sept. 28, 2007) (awarding a 40% fee on a $16 million settlement); *In re Heritage Bond Litig.*, No. 02 Civ. 1475, 2005 WL 1594403, at *18 (C.D. Cal. June 10, 2005) (approving fees of 33.33% of approximately $28 million common fund); *Clark v. Ecolab, Inc.*, 2010 WL 1948198 at *8 (S.D.N.Y. May 11, 2010) (approving attorneys' fees of $2 million from the $6 million common fund in a FLSA collective action and noting that attorneys' fee percentages of one-third are "reasonable and consistent with the norms of class litigation in [the Second] circuit."); *Wineland v. Casey's Gen. Stores, Inc.*, 267 F.R.D. 669, 677 (S.D. Iowa 2009) (approving attorneys' fees of 33 1/3% of total settlement fund of $6.7 million, plus $150,000 in costs, in FLSA collective action on behalf of class approximately 11,400 convenience store employees); *Smith v. Krispy Kreme Doughnut Corp.*, 2007 WL 119157 at * 2 (M.D.N.C. Jan. 10, 2007) (noting, "in this jurisdiction, contingent fees of one-third (33.3%) are common."); *Bredbenner v. Liberty Travel, Inc.*, 2011 WL 1344745 at *21 (D.N.J. Apr. 8, 2011) (analyzing cases from district courts throughout the country in common fund cases where attorneys' fee awards "generally range anywhere from nineteen percent (19%) to forty-five percent (45%) of the settlement fund," and noting that most of the cases awarded attorneys' fees at the level of 33.3% of the common fund.).

10212865, at *23 (C.D. Cal. July 28, 2014); *see also Boyd*, 2014 WL 6473804, at *9 (approving fee award of 36% of common fund).

3. The "Reaction of the Class" Factor

The reaction by Class Members confirm the settlement results were exceptional and that the requested fee award is appropriate. Class Member response has been overwhelmingly positive: out of 1,701 notice packets mailed out, only 7 Class Members have opted out, and no objections have been made. (Exh. A, Thompson Decl. ¶ 37).

4. The "Lodestar Cross-check" Factor

As explained above, the fairest way – and the way that best promotes efficiency in litigation – to calculate a reasonable fee when contingency fee litigation has produced a common fund is by awarding Class Counsel a percentage of the total fund. *See, e.g., Blum*, 465 U.S. at 900 n.16; *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. Cal. 1990) (common fund fee is generally "calculated as a percentage of the recovery"); *Paul, Johnson, Alston & Hunt v. Graulty,* 886 F.2d 268, 272 (9th Cir. 1989); *Morganstein v. Esber*, 768 F. Supp. 725, 728 (C.D. Cal. 1991). Nonetheless, even when awarding fees under a common fund method, a lodestar cross-check is an important criteria for courts to consider before approving a requested award under Rule 23. *See 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.").

Under the lodestar cross-check method, the lodestar is calculated by multiplying the reasonable hours expended by a reasonable hourly rate. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986). The court may then apply a multiplier to the lodestar to arrive at a reasonable fee. *Blum*, 465 U.S. at 888. The appropriate multiplier is determined in light of certain factors, including:

> (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the requisite legal skill necessary; (4) the preclusion of other employment due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount at controversy and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and awards in similar cases.

Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975); *see also Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1029 (9th Cir. 1998) (a lodestar figure "may be adjusted upward or downward to account for several factors including the quality of the representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment") (citing *Kerr*).

Here Class Counsel's current lodestar is approximately $176,633. Because Class Counsel will continue to perform work on this case for the benefit of the Class after filing this motion (through Final Approval and settlement administration), Class Counsel estimates that it will incur an additional $50,000 to $75,000 in lodestar through completion of this litigation.[6] California law requires that "an attorney fee award should ordinarily include compensation for *all* the hours *reasonably spent*, including those relating solely to the fee." *Ketchum v. Moses*, 24 Cal. 4th 1122, 1133, 104 Cal. Rptr. 2d 377, 17 P.3d 735 (2001) (emphasis added).

The work performed by Class Counsel was required to achieve the results obtained in this case. Furthermore, the work was assigned to proper level of staff and attorneys. The charts attached as Tab A to the Declaration of Jason J. Thompson (Exh. A) and Tab A to the Declaration of Jahan Sagafi (Exh. 2), summarize Class Counsel's hours, rates, and work performed. Class Counsel will bring the underlying time records to the Final Approval hearing.[7] These charts provide an excellent foundation for the court to ensure that there is no inflated lodestar billings when considering a fair and reasonable multiplier in his case.[8]

The requested fee amount of $737,500 approximately equates to a modest 3.0 multiplier, and quite possibly a lower multiplier depending on how much work Class Counsel is required to perform through completion of this case. California courts have found such a multiplier to be reasonable in comparable cases. *See Vizcaino* at 1051 (approving 3.65 multiplier and citing recent cases approving multipliers as

[6] Class Counsel will provide the Court with updated lodestar information at the time of the Final Approval hearing.

[7] If the records are required, Class Counsel requests an *in camera* review to protect the work product and privileges in the event final approval is denied, or reversed on appeal. *Lane v. Facebook, Inc*., 696 F.3d 811, 819-20 (9th Cir. 2012).

[8] Class Counsel will review the data and charts with the Court at the Final Approval hearing.

high as 19.6); *Steiner v. Am. Broad. Co*., 248 Fed. App'x 780, 783 (9th Cir. 2007) (approving 6.85 multiplier). *see also* Newberg, *Attorney Fee Awards,* § 14.03 at 14-5 (1987) ("[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied."); *Rabin v. Concord Assets Group, Inc*., No. 89 Civ. 6130, 1991 WL 275757 (S.D.N.Y. 1991) (4.4 multiplier) ("In recent years multipliers of between 3 and 4.5 have become common.") (internal quotations and citations omitted); *In re the PMI Group, Inc. Securities Litig*., No. 08 Civ. 1405 (N.D. Cal. Dec. 16, 2010) (4.76 multiplier); *Teeter v. NCR Corp*., No. 08-297 (C.D. Cal. Aug. 6, 2009) (4.61 multiplier); *Doty v. Costco Wholesale Corp.,* No. 05-3241 (C.D. Cal. May 14, 2007) (9.07 multiplier); *The Music Force, LLC v. Viacom, Inc.,* No. 04-8239 (C.D. Cal. Aug. 8, 2007) (6.43 multiplier); *In re IDB Communications Group, Inc. Sec. Litig.,* No. 94 Civ. 3618-RG (C.D. Cal. Jan. 17, 1997) (6.2 multiplier). In fact, a summary of common multipliers in class actions was recently filed in the Volkswagen MDL 2672 pending in this Court. That summary reveals the mean (3.36) and median (2.7) multipliers in super-mega-fund settlements, which of course are far larger than this case. (*In Re: Volkswagen, supra,* ECF No 3396, Exhibit B, Professor William Rubenstein Declaration at ¶ 36).

Courts recognize the fairness of awarding reasonable multipliers in common fund cases because of the equitable notion that those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it. *Chem. Bank v. City of Seattle (In re Wash. Pub. Power Supply Sys. Sec. Litig.)*, 19 F.3d 1291, 1300 (9th Cir. 1994) (citing *Boeing,* 444 U.S. at 478). "[I]n the common fund context, 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." *Id*. (quoting *Skelton v. General Motors Corp*., 860 F.2d 250, 254 (7th Cir. 1988)). As the California Court of Appeals recognized, a common fund fee springs from the theory "that those who benefit from the creation of the fund must share the wealth with the lawyers whose skills created it." *Ramos v. Countrywide Home Loans, Inc.*, 82 Cal. App. 4th 615, 628 n.3, 98 Cal. Rptr. 2d 388, 396 (2000). Here the lodestar crosscheck confirms that Class Counsel's request for a 25% fee of $737,500, and a 3.0 multiplier, represents a fair and reasonable fee for the work performed in this case.

C. CLASS COUNSEL'S LITIGATION EXPENSES AND THE SETTLEMENT ADMINSITRATION EXPENSES SHOULD BE REIMBURSED IN FULL AS THEY ARE REASONABLE, WERE NECESSARILY INCURRED, AND BENEFITTED THE CLASS.

Pursuant to the settlement, Class Counsel may seek reimbursement of litigation expenses of up to $40,000 and settlement administration expenses will be paid to the settlement administrator in an amount not to exceed $35,000. Any unused amounts (that fall below these thresholds) will be distributed to the Class Members.

"Attorneys who create a common fund for the benefit of a class are entitled to be reimbursed for their out-of-pocket expenses incurred in creating the fund so long as the submitted expenses are reasonable, necessary and directly related to the prosecution of the action." *In re Optical Disk Drive Prods. Antitrust Litig.*, 2016 U.S. Dist. LEXIS 175515, at *62-63 (N.D. Cal. Dec. 19, 2016); *Leonard v. Baumer (In re* United Energy Corp. Sec. Litig.), 1989 WL 73211, at *6 (C.D. Cal. March 9, 1989) (quoting Newberg, Attorney Fee Awards § 2.19 (1987)); *Vincent*, 557 F.2d at 769 ("[T]he doctrine is designed to spread litigation costs proportionately among all the beneficiaries so that the active beneficiary does not bear the entire burden alone and the 'stranger' beneficiaries do not receive their benefits at no cost to themselves.").

To date, Class Counsel have incurred $31,313.53 in costs. (Exh. 1, Thompson Decl. ¶ 41; Exh. 2, Sagafi Decl. ¶ 26). The expenses, including discovery costs, mediator fees, and fees to the expert economist, were all incurred in connection with the prosecution of the action and the execution of the settlement and are reasonable and proper. (Exh. 1, Thompson Decl. ¶ 43; Exh. 2, Sagafi Decl. ¶ 26). All of the litigation expenses were necessary in connection with the prosecution of this litigation and were made for the benefit of the Class. No Class Member has objected to the request for litigation expenses. Accordingly, the litigation expenses are reimbursable. *See In re UEC Corp. Sec. Litig.*, Fed. Sec. L. Rep. P 94, 376; *In re GNC Shareholder Litig.*, 668 F. Supp. 450, 452 (W.D. Pa. 1987); Conte, Attorneys' Fee Awards, § 2.08 at 50-51 (2d ed. 1977).

Class Counsel will continue to incur costs beyond this amount for the benefit of the Class (e.g., through traveling to the Final Fairness Hearing and in connection with the settlement administration

process). Further, the Settlement allows reimbursement to the settlement administrator, Simpluris, Inc., in an amount not to exceed $35,000. The activities already underway and those yet to be conducted (including distribution of settlement proceeds) are necessary to effectuate notice of the settlement and proper distribution of the settlement fund to the Class Members.

D. THE REQUESTED CLASS REPRESENTATIVE SERVICE AWARDS ARE REASONABLE AND SHOULD BE GRANTED.

It is customary for "named plaintiffs . . . [to be] eligible for reasonable incentive payments" as part of a class action settlement. *Staton*, 327 F.3d at 977. Service or incentive payments constitute "an essential ingredient of any class action," because they provide an incentive to bring important cases that have a broad impact benefiting a class of individuals, not just the plaintiff. *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). These payments recognize the plaintiffs' time, effort, and inconvenience, as well as the risk they are exposed to in asserting their and others' rights in a particularly public and powerful manner. By bringing the litigation on behalf of others in addition to themselves, class representatives in employment class actions provide a valuable service to their fellow workers. More broadly, they promote the public policy goals set forth by the legislatures that enacted the underlying substantive statutes at issue. For these reasons, courts routinely approve the award of service payments to class representatives for their assistance to the class. *See, e.g.*, *Stevens v. Safeway, Inc.*, 2009 U.S. Dist. LEXIS 17119, *34-37 (C.D. Cal. Feb. 25, 2008) ($20,000 and $10,000 to two class representatives); *Glass v. UBS Financial Services, Inc.*, 2007 WL 221862, at *16-17 (N.D. Cal. Jan.26, 2007) ($25,000 each to four class representatives); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 300 (N.D. Cal. 1995) ($50,000 to one class representative).[9]

When evaluating the reasonableness of an incentive award, courts may consider factors such as "'the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has

[9] *See also Wade v. Kroger Co.*, 2008 WL 4999171, at *13 (W.D. Ky. Nov. 20, 2008) ($30,000 each to multiple class representatives); *Wright v. Stern*, 553 F. Supp. 2d 337, 342 (S.D.N.Y. 2008) ($50,000 each to 11 class representatives); *Hainey v. Parrott*, 2007 WL 3308027 (S.D. Ohio Nov. 6, 2007) ($50,000 each to four class representatives).

benefited from those actions, . . . the amount of time and effort the plaintiff expended in pursuing the litigation . . . and reasonabl[e] fear[s of] workplace retaliation.'" *Staton*, 327 F.3d at 977 (quoting *Cook*, 142 F.3d at 1016); *see also Van Vranken*, 901 F.Supp. at 299; *Silberblatt v. Morgan Stanley*, 524 F. Supp. 2d 425, 435 (S.D.N.Y. 2007) ("A class representative . . . whose future employability has been impaired may be worthy of receiving an additional payment, lest others be dissuaded.").

Here, the proposed Class Representative service awards of $7,500 to Named Plaintiff Debra Wolf and $2,500 to opt-in Plaintiff Natty Medrano (half of each payment is attributed to their service as Class Representatives with the remaining half attributed for the general release each of them executed in connection with the settlement), reflect the Named and opt-in Plaintiffs' considerable efforts in making possible a valuable settlement for the Class Members, expending significant time and effort since the inception of the case, and subjecting themselves to the risk of unfavorable treatment by future employers. (Dkt. 36-1, Stoops Decl. ¶ 36). The Named and opt-in Plaintiff each actively participated in the case by, for example, regularly discussing the facts of the case with Class Counsel and providing documents and information to Class Counsel. Each of them provided declarations and other insight in support of the case. Their participation was particularly critical in helping Class Counsel understand the nature of TPMG's policies and practices regarding pay for off-the-clock work time and timekeeping systems. *Id.* Lastly, the Named and opt-in Plaintiffs took on the burden and responsibility of leading this case despite the very real possibility of retaliation by TPMG or future potential employers (who often ask in the interview process whether an applicant has ever sued an employer). In short, their participation in the litigation carried a significant cost and was critical to its success. The case literally would not have existed without them. The requested Class Representative service awards are reasonable, especially in light of the substantial settlement amount.

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court issue an order approving Class Counsel's attorneys' fees in the amount of $737,500; up to $40,000 for reimbursement of Class Counsel's litigation expenses; up to $35,000 for settlement administration expenses, and Class Representative service awards in the amount of 7,500 for Named Plaintiff Debra Wolf and $2,500 for opt-

in Plaintiff Natty Medrano.

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Respectfully Submitted,

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