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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

R. ROSS and C. ROGUS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

HEWLETT PACKARD ENTERPRISE COMPANY, a Delaware corporation, (formerly HEWLETT-PACKARD COMPANY)

Defendant.

CASE NO.: 18CV337830

Assigned for all purposes to the Honorable Sunil R. Kulkarni

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND PAYMENT OF SERVICE AWARDS; MEMORANDUM OF POINT AND AUTHORITIES IN SUPPORT THEREOF

Filed concurrently herewith:
1. Declaration of Caleb Marker;
2. Declaration of Susan Ellingstad;
3. Declaration of Rocio Ross;
4. Declaration of Claudia Rogus.

Date: April 27, 2023
Time: 1:30 P.M.
Department: 1

Date Action Filed: November 8, 2018

(REPRESENTATIVE/CLASS ACTION)

TO THE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on April 27, at 1:30 p.m., or as soon thereafter as the matter can be heard, in Department 1 of the above-entitled Court, located at 191 North First Street, San Jose, California, Plaintiffs Rocio Ross and Claudia Rogus ("Plaintiff"), individually and on behalf of the Settlement Class, will move, and hereby does move, for:

(a) an Order awarding Class Counsel attorneys' fees in the amount of $2,833,333.33 and reimbursement of litigation expenses in the amount of $416,326.96; and

(b) Service Awards of $15,000 for Class Representative Rocio Ross and $15,000 for Class Representative Claudia Rogus.

This motion is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities, the Settlement Agreement, the Declarations of Caleb Marker and Susan Ellingstad, the Declarations of Rocio Ross and Claudia Rogus, and all documents and arguments submitted in support thereof.

Respectfully submitted,

ZIMMERMAN REED LLP

Dated: March 14, 2023 By: /s/ Caleb Marker

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Class Counsel respectfully ask this Court to grant their unopposed motion for payment of attorneys' fees, reimbursement of expenses, and payment of service awards to the Named Plaintiffs. Class Counsel obtained a comprehensive settlement on behalf of 1,735 Class Members who Plaintiffs assert were paid less than their male peers while employed by Defendant. The Settlement creates a valuable common fund of monetary benefits in the amount of $8.5 million and is the product of more than four years of hard-fought complex, class action litigation. Class Counsel achieved this result in the face of a staunch defense, with the omnipresent risk that—due to the contingent nature of the engagement—Class Counsel would receive nothing.

In accordance with the terms of the Settlement Agreement and pursuant to California Rule of Court 3.769(b), Class Counsel respectfully ask this Court to approve attorneys' fees of $2,833,333.33, plus expenses of $416,326.96. Plaintiffs also respectfully request that this Court grant service awards of $15,000 to each of the two Named Plaintiffs for their time and efforts on behalf of the Class. To date, only one Class Member has objected to the Settlement, out of approximately 1,735 settlement Class Members, which weighs strongly in favor of the Court's approval.[1]

II. SUMMARY OF THE LITIGATION AND SETTLEMENT NEGOTIATIONS

A. Class Counsel Diligently Litigated the Case.

Plaintiffs filed their Complaint on November 8, 2018, asserting that HPE underpaid its female employees on the basis of sex in violation of the California Equal Pay Act ("CEPA"), the California Labor Code, and the California Unfair Competition Law ("UCL"). In the more than four years since filing the case, Class Counsel diligently prosecuted the matter, opposing Defendant's demurrer and motion to strike and engaging in extensive discovery, which involved multiple document productions and review of thousands of documents. Class Counsel deposed corporate executives as well. In expert discovery, Plaintiffs analyzed extensive data for expert reports in preparation for their class certification

[1] *Kifafi v. Hilton Hotels Ret. Plan*, 999 F. Supp. 2d 88, 101 (D.D.C. 2013) (finding that the "small number of objections weighs in favor of the requested fee" where only five class members objected out of a class of nearly 23,000).

motion. The full history of this litigation is set forth in more detail in Class Counsel's declarations and in the Motion for Preliminary Approval. *See* Declaration of Caleb Marker in Support of Motion for Attorneys' Fees, Reimbursement of Expenses, and Payment of Service Awards ("Marker Decl.") ¶¶ 3–17; Declaration of Susan Ellingstad in Support of Motion for Attorneys' Fees, Reimbursement of Expenses, and Payment of Service Awards ("Ellingstad Decl.") ¶¶ 14–31.

B. Class Counsel Engaged in Arm's-Length Settlement Negotiations for Nearly a Year.

The Parties engaged in exhaustive, informed, and arm's-length negotiations that lasted nearly a year. Marker Decl. ¶¶ 8–12; Ellingstad Decl. ¶¶ 22, 28. Eventually, the Parties agreed to mediate the matter with Tripper Ortman. The Parties conducted two full-day sessions before Mr. Ortman on January 28 and February 14, 2022. Unable to reach agreement, Mr. Ortman presented the Parties with a mediator's proposal of $8.5 million. The Parties agreed to the monetary proposal but further negotiated the other terms until finally reaching the present Settlement. Marker Decl. ¶ 8; Ellingstad Decl. ¶ 22.

C. Preliminary Approval

The Settlement Agreement was executed and submitted to the Court in September 2022, along with a Motion for Preliminary Approval, which included supporting declarations and exhibits. A hearing on the motion was held on October 20, 2022 at which Counsel and this Court further discussed the proposed allocation of the Settlement Fund. Counsel then submitted a supplemental declaration including further explanation of Plaintiffs' expert's analysis. The Court granted preliminary approval on November 3, 2022. *See* Order (Nov. 3, 2022).

D. Supervision of Settlement Notice and Responding to Class Member Inquiries

After the Court preliminarily approved the Settlement, Class Counsel worked closely with the Settlement Administrator to effectuate notice to Class Members. These efforts included reviewing and drafting the language and format of the website, revising the Notice forms, communicating with Class Members, and monitoring Class Members' responses to the Notice Program. Marker Decl. ¶ 16; Ellingstad Decl. ¶ 26.

The Court-approved Class Notice fully informed Class Members of Counsel's request for fees, costs, and service awards. A copy of this motion will be available on the settlement website in advance of the deadline for Class Members to comment or object on the settlement and this request. At the time

of this motion, no Class Member has objected to Counsel's request for fees, costs, or class representative service awards. Marker Decl. ¶ 17; Ellingstad Decl. ¶¶ 55, 65. Plaintiffs will address any objections to this motion, if necessary, in a reply brief.

E. The Value of the Settlement

As noted above and explained in greater detail in the Motion for Preliminary Approval, the total monetary value of the Settlement is $8.5 million. The distribution to the Settlement Class will be made through direct payments to Class Members. As required by the California Rule of Court 3.769(b), Class Counsel disclosed, in the Settlement Agreement and in the Motion for Preliminary Approval, that Defendant agreed not to oppose any fee request of one-third of the Settlement Fund (*i.e.*, $2,833,333.33). Settlement Agreement (SA), Declaration of Caleb Marker in Support of Preliminary Approval ("Marker Prelim. App. Decl."), Ex. I ¶ 6.1.

III. LEGAL ARGUMENT

A. The Requested Attorneys' Fees are Reasonable.

Class Counsel's fee request for $2,833,333.33, plus expenses, is appropriate under the percentage-of-recovery method—a conclusion confirmed by a lodestar cross-check, which shows the request is approximately half of Class Counsel's collective lodestar. The $8.5 million total monetary value of the Settlement, the real risk of loss and non-payment after years of work that Class Counsel devoted to this case, the experience and skill Class Counsel applied in achieving settlement, and the substantial benefits Class Counsel negotiated for the Class, all support the requested award. The requested "award of one-third the common fund [is] in the range set by other class action lawsuits," and is supported by public policy considerations. *Laffitte v. Robert Half Int'l, Inc.*, 1 Cal. 5th 480, 488 (2016) (approving one-third fee request out of $19 million settlement). This fee request is consistent with the historic benchmark for fees in common fund cases and with the Supreme Court's decision in *Laffitte*.

This Court has considerable discretion to grant Class Counsel's reasonable fee request. "Fees approved by the trial court are presumed to be reasonable, and the objectors must show error in the award." *Id.* at 488 (citations omitted). There are two generally accepted methods for determining an award of attorneys' fees under California law: (1) the percentage-of-the-recovery method; and (2) the lodestar-multiplier method. The Court should apply the percentage method because this settlement

results in a common fund. "[T]he goal under either the percentage or lodestar approach [is] the award of a reasonable fee to compensate counsel for their efforts." *Id.* at 504.

1. The Requested Fees are Reasonable Under the Percentage of the Common Fund Method.

The California Supreme Court has held that an award of attorneys' fees may be based *solely* on a percentage of the common fund created. *Laffitte*, 1 Cal. 5th at 503 ("[W]hen class action litigation establishes a monetary fund for the benefit of class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created."). The *Laffitte* court described the "recognized advantages of the percentage method," including "ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation." *Id.* This ruling accords with the "overwhelming majority of federal and state courts." *Id.*; *see, e.g.*, *Aichele v. Los Angeles*, No. CV 12-10863-DMG, 2015 WL 5286028, at *5 (C.D. Cal. Sept. 9, 2015) ("Many courts and commentators have recognized that the percentage of the available fund analysis is the preferred approach in class action fee requests because it more closely aligns the interests of the counsel and the class, *i.e.*, class counsel directly benefit from increasing the size of the class fund and working in the most efficient manner.").[2]

The common fund doctrine is generally applicable "where plaintiffs' efforts have effected the creation or preservation of an identifiable fund of money out of which the fees will be paid." *Jordan v. Dep't of Motor Vehicles*, 100 Cal. App. 4th 431, 446–47 (2002) (citing *Serrano v. Priest*, 20 Cal. 3d 25,

[2] *See also Knight v. Red Door Salons, Inc.*, No. 08-01520, 2009 WL 248367, at *5 (N.D. Cal. Feb. 2, 2009) (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002)) (noting that the "use of the percentage method in common fund cases appears to be dominant"); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1374–77 (N.D. Cal. 1989) (collecting authority and describing benefits of the percentage method over the lodestar method); *Morales v. Conopco, Inc.*, No. 16-6464, 2016 WL 6094505, at *7 (E.D. Cal. 2016) ("Because of the ease of calculation and the pervasive use of the percentage of recovery method in common fund cases, the court thus adopts this method."); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1260, 1271 (D.C. Cir. 1993) ("[A] percentage of the fund method is the appropriate mechanism for determining the attorney fees award in common fund cases."); *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) ("[W]e believe that the percentage of the fund approach is the better reasoned in a common fund case.").

37–38 (1977)). Courts prefer the percentage method because it confers "significant benefits…including consistency with contingency fee calculations in the private market, aligning the lawyers' interests with achieving the highest award for the class members, and reducing the burden on the courts that a complex lodestar calculation requires." *Tait v. BSH Home Appliances Corp.*, No. SACV 10-0711-DOC, 2015 WL 453746, at *11 (C.D. Cal July 27, 2015).

When applying a percentage-of-the-fund methodology, it is not unusual for a court to award fees of one-third of the common fund. *See, e.g.*, *In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 557 n.13 (2009) ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery."); *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008) (same); *In re Cal. Indirect Purchaser X-Ray Film Antitrust Litig.*, No. 960886, 1998 WL 1031494, at *8–9 (Alameda Super. Ct. Oct. 22, 1998) (awarding 30% of fund and citing eleven other awards ranging from 30% to 45%).[3]

[3] A non-exhaustive list of other cases awarding a percentage of the common fund of one-third or more include: *Laffitte*, 1 Cal. 5th at 506 (affirming 1/3 fee); *Ethridge v. Universal Health Servs.*, No. BC391958 (L.A. Super. Ct. ("LASC")) (33% award); *Magee v. Am. Residential Servs. LLC*, No. BC423798 (LASC) (33% award); *Blue v. Coldwell Banker Residential Brokerage Co.*, No. BC417335 (LASC) (33% award); *Silva v. Catholic Mortuary Servs., Inc.*, No. BC408054 (LASC) (33% award); *Mares v. BFS Retail & Comm. Operations LLC*, No. BC375967 (LASC) (33% award); *Blair v. Jo-Ann Stores, Inc.*, No. BC394795 (LASC) (33% award); *Kenemixay v. Nordstroms, Inc.*, No. BC318850 (LASC) (50% award); *Barrett v. St. John Companies*, No. BC 354278 (LASC) (33% award); *Clymer and Benton v. Candle Acquisition Co.*, No. BC328765 (LASC) (33% award); *Dunlap v. Bank of America, N.A.*, No. BC328934 (LASC) (33% award); *Case v. Toyohara Am. Inc.*, No. BC328111 (LASC) (33% award); *Sunio v. Marsh USA, Inc.*, No. BC328782 (LASC) (33% award); *Chalmers v. Elecs. Boutique*, No. BC306571 (LASC) (33% award); *Crandall v. U-Haul Int'l., Inc.*, No. BC178775 (LASC) (40% award); *In re Cal. Indirect Purchaser X-Ray Film Antitrust Litig*, No. 960886, 1998 WL 1031494, at *9 (Alameda Cnty. Super. Ct. Oct. 22, 1998) (setting forth a survey of awards approved by trial courts in common fund cases, including *In re Milk Antitrust Litig.*, No. BC070061 (LASC 1998) (33-1/3% award)); *In re Facsimile Paper Antitrust Litig.*, Nos. 963598, 964899, 967137 (San Francisco Cnty. Super Ct. ("SFSC") 1997) (33-1/3% award); *In re Liquid Carbon Dioxide Cases*, J.C.C.P 3012 (San. Diego Cnty. Super. Ct. ("SDSC") 1996) (33-1/3% award); *In re Cal. Indirect-Purchaser Plasticware Antitrust Litig.*, Nos. 961814, 963201, 963590 (SFSC 1995) (33-1/3% award); *Abzug v. Kerkorian*, CA-000981 (LASC 1990) (45% award); *Haitz v. Meyer*, No. 572968-3 (Alameda Cnty. Super. Ct. 1990) (45% award); *Steiner v. Whittacker Corp.*, CA 000817 (LASC 1989) (35% award); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2013 U.S. Dist. LEXIS 6607, at *47 (N.D. C al. Jan. 14, 2013) (30% of $68 million settlement fund); *Pokorny v. Quixtar, Inc.*, No. C 07-0201 SC, 2013 U.S. Dist. LEXIS 100791, at *5-7 (N.D. Cal. July 18, 2013) (29.5% of $55 million common fund); *Castenada v. Burger King Corp.*, No. 08-cv-4262-WHA, 2010 WL 2735091, at *5 (N.D. Cal. Jul. 12, 2010) (33% award); *Antonopulos v. N. Am. Thoroughbreds, Inc.*, No. 87-0979G(CM), 1991 WL

The percentage method is particularly appropriate in contingency litigation, as it "provides a credible measure of the market value of the legal services provided." *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 49 (2000). The percentage method encourages the successful attorney to accept the contingency risk and delay in payment, the importance of which California courts have repeatedly emphasized. *See, e.g.*, *Ketchum v. Moses*, 24 Cal. 4th 1122, 1136 (2001) ("[L]awyers generally will not provide legal representation of a contingent basis unless they receive a premium for taking that risk.") (internal quotations and citation omitted); *Lealao*, 82 Cal. App. 4th at 47 ("[A]ttorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private…legal marketplace, as it will otherwise be economic for defendants to increase injurious behavior." *Melendres v. Los Angeles*, 45 Cal. App. 3d 267, 273 (1975) ("There must always be a flavor of generosity in the awards…in order that an appetite for efforts may be stimulated.").

Here, the percentage-of-the-fund method is most appropriate because the Settlement resulted in the creation of an identifiable non-reversionary $8.5 million common fund from which settlement awards, notice and administration costs, attorneys' fees and expenses, and service awards will be paid. Class Counsel's request is reasonable as the fee requested represents 33.33% of the common fund, which is well within the range often approved by courts for similar sized settlements.

Plaintiffs' fee request is consistent with fee requests approved by California courts, including the California Supreme Court. *See Laffitte*, *supra* (approving a one-third contingency fee request from $19 million settlement fund); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 457–58, 463 (9th Cir. 2000) (upholding fee award of 33.33% of settlement); *Bickley v. Schneider Nat'l Carriers, Inc.*, 2016 WL 6910261 (N.D. Cal. Oct. 13, 2021) (awarding one-third of $28 million settlement fund); *Marshall v. Northrop Grumman Corp.*, 2020 WL 5668935 (C.D. Cal. Sept. 18, 2020), *appeal dismissed* 2021 WL 1546069 (9th Cir. Feb. 16, 2021) (awarding one-third of $12.375 million settlement fund); *Waldbuesser v. Northrop Grumman Corp.*, 2017 WL 6914818 (C.D. Cal. Oct. 24, 2017) (awarding one-third of $16.75 million settlement fund); *Lusby v. GameStop Inc.*, No. C12-03783 HRL, 2015 WL 1501095, at *9 (N.D. Cal. Mar. 31, 2015) (awarding one-third of common fund in wage and hour action); *Burden v.*

427893, at *4 (S.D. Cal. May 6, 1991) (awarding one-third); *In re Public Serv. Co. of New Mexico*, No. 910536M, 1992 WL 278452, at *12 (S.D. Cal. July 28, 1992) (awarding one-third)).

SelectQuote Ins. Servs., 2013 WL 3988771, at *4 (N.D. Cal. Aug. 2, 2013) (same); *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 450 (E.D. Cal. 2013) (same); *Barnes v. Equinox Group*, 2013 WL 3988804, at *4 (N.D. Cal. Aug. 2, 2013) (same); *Hightower v. JPMorgan Chase Bank, N.A.*, 2015 WL 9664959, at *11 (C.D. Cal. 2015) (approving 30% fee request in part because "the risk of no recovery for Plaintiffs, as well as for Class Counsel, if they continued to litigate, were very real"); *Garner v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 1687829, at *2 (N.D. Cal. Apr. 22, 2010) (approving 30% fee request and emphasizing that "Class Counsel prosecuted this case on a purely contingent basis, agreeing to advance all necessary expenses, knowing that they would only receive a fee if there were a recovery"); *In re Nuvelo, Inc. Sec. Litig.*, 2011 WL 2650592, at *2 (N.D. Cal. July 6, 2011) (approving 30% fee request and noting, "It is an established practice to reward attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing at all"); *Kanawi v. Bechtel Corp.*, 2011 WL 782244, at *2 (N.D. Cal. Mar. 1, 2011) (approving 30% fee request, reasoning that "[s]uch a practice encourages the legal profession to assume such a risk and promotes competent representation for plaintiffs who could not otherwise hire an attorney").

2. Other Factors Support Plaintiffs' Request for Fees.

There is no definitive set of factors California courts require to be considered in determining the reasonableness of an attorneys' fee award. However, federal courts assessing fee requests under California standards have utilized factors including: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases. *See Hendricks v. Starkist Co.*, 2016 WL 5462423, at *11 (N.D. Cal. Sept. 29, 2016) (citing *Vizcaino*, 290 F.3d at 1048–50). Other courts have additionally considered reactions from the class and a lodestar cross-check. *See Barnes v. Equinox Group, Inc.*, 2013 WL 3988804, at *4 (N.D. Cal. Aug. 2, 2013).

i. The Monetary Results Achieved by this Settlement Support Plaintiffs' Request.

"When determining the value of a settlement, courts consider the monetary and non-monetary benefits that the settlement confers." *Taylor v. Meadowbrook Meat Co.*, 2016 WL 4916955, at *5 (N.D. Cal. Sept. 15, 2016). Here, the settlement provides $8.5 million to the Settlement Class of approximately 1,735 current and former employees of Defendant. *See* Marker Decl. ¶ 11. After deductions for payment

to the Settlement Administrator, Class Counsel's fees and expenses, and incentive payments to the Named Plaintiffs ($15,000 per Plaintiff), the balance of the Settlement will be distributed to the Class Members. *Id.* at ¶¶ 33–36. Importantly, no funds will revert to Defendant—any unclaimed funds will be redistributed to participating Class Members. SA ¶¶ 5.6–5.7.

ii. The Risk of Litigating this Case was Substantial.

There are many risks inherent in litigating a class action. *See Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1166 (C.D. Cal. 2010) ("The most important factor is the risk of nonpayment, which was significant in this contingency class action."). For this reason, courts routinely find this factor supports a higher fee request.[4] In this case, Plaintiffs, Class Members, and Class Counsel faced multiple risks which could potentially lower the available recovery to a negligible amount or even nothing.

iii. Counsel Have Significant Experience in this Area.

Prosecuting class actions requires an "extraordinary commitment of time, resources, and energy from Class Counsel," and, many times, settlement "simply [is not] possible but for the commitment and skill of Class Counsel. *Garner*, 2010 WL 1687829, at *2. This is particularly so where a case "raised numerous novel and complex issues of both law and fact, and required a considerable effort from Class Counsel simply to be put in a position to file suit, let alone litigate [the] case successfully." *Id.* Relatively few cases have been litigated under CEPA, and Counsel's experience litigating employment class actions made this settlement possible. Counsel routinely litigate claims under state and federal Fair Labor Standards Acts and Equal Pay Acts and have a deep understanding of the underlying legal issues, the standards of proof, the strengths and weaknesses of these types of cases and the risks of litigation. Counsel also have substantial experience working with experts and evaluating damages in order to make informed decisions regarding the potential value of recoveries to the class. Marker Decl. ¶¶ 18, 24, 25; Ellingstad Decl. ¶¶ 5–13. Class Counsel's skill and extensive experience contributed to the highly favorable settlement in this case.

[4] *See Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 261 (N.D. Cal. 2015) (noting that "when counsel takes cases on a contingency fee basis, and litigation is protracted, the risk of non-payment after years of litigation justifies a significant fee award"); *Hensley v. Eckerhart*, 461 U.S. 424, 448 (1983) ("Attorneys who take cases on contingency, thus deferring payment of their fees until the case has ended and taking upon themselves the risk that they will receive no payment at all, generally receive far more in winning cases than they would if they charged an hourly rate.").

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

The contingent nature of litigating a class action and the financial burden assumed by Class Counsel typically justifies a higher percentage of the fund since counsel litigates with no payment and no guarantee that the time or money expended will result in any recovery.[5] As with virtually all work handled by Class Counsel, they accepted this case on a fully contingent basis, with no payment up front, and have borne the expenses, costs, and risks associated with litigating this case. Plaintiffs' attorneys who accept cases on contingent bases typically spend years litigating while incurring significant out-of-pocket expenses for experts, transcripts, document production, and mediator fees without receiving any ongoing payment for their work. Sometimes these fees and expenses are recovered, but sometimes they are not. As noted in *Vizcaino* and other cases, substantial fee awards encourage counsel to accept risky cases on behalf of clients who would be hard pressed or totally unable to pay hourly rates and would therefore not otherwise have genuine access to the courts. By incentivizing plaintiffs' attorneys to take on risky, high-stakes, and important litigation, and devote themselves to it wholly, fee awards serve an important public purpose and extend access to top legal talent to employees who may otherwise never be able to confront large corporations such as Defendant, who is represented by top-rate attorneys.

v. The Reaction of the Class Supports Plaintiffs' Fee Request.

"It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class action settlement are favorable to the class members." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D.

[5] *Bower v. Cycle Gear Inc.*, 2016 WL 4439875, at *7 (N.D. Cal. Aug. 23, 2016) (awarding 30% of common fund for fees and noting that counsel had litigated the action for almost two years with no payment and no guarantee of recovery); *see also Hendricks*, 2016 WL 5462423, at *12 (finding that enhancement from 25% benchmark was warranted because class counsel carried a substantial financial burden both in advancing out-of-pocket costs and in representing plaintiff and the class members on a contingency basis); *Hightower v. JPMorgan Chase Bank, N.A.*, 2015 WL 9664959, at *10 (C.D. Cal. Aug. 4, 2015) ("[A]ny law firm undertaking representation of a large number of affected employees in wage and hour actions inevitably must be prepared to make a tremendous investment of time, energy, and resources with the very real possibility of an unsuccessful outcome and no fee recovery of any kind.") (internal quotations and citations omitted); *Vizcaino*, 290 F.3d at 1051 ("[A]ttorneys 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.").

Cal. 2004) (citations omitted).

In accordance with the Settlement's approved notice plan, the Administrator sent over 1,800 notices to Class Members via email and U.S. mail. Full claim statistics will be submitted in the form of a declaration from the Administrator, in support of Plaintiffs' forthcoming Motion for Final Approval, but at the time of this filing, the Administrator reports that only one objection and six requests for exclusion have been received. The objection does not mention the attorneys' fee request. Marker Decl. ¶ 17; Ellingstad Decl. ¶¶ 27, 55. The limited number of objections weighs in favor of Plaintiffs' request. *See In re Cendant Corp., Derivative Action Litig.*, 232 F. Supp. 2d 327, 328 (D.N.J. 2002) ("[T]he extremely small number of complaints that have arisen regarding the proposed attorneys' fees in the Settlement Agreement…weighs in favor of approval of the requested attorneys' fees."); *Kifafi*, 999 F. Supp. 2d at 101 (noting the "small number of objections weighs in favor of the requested fee").

3. The Lodestar Method Confirms the Reasonableness of Class Counsel's Requested Fees.

California courts have the discretion to employ or decline to employ a "lodestar cross-check" on a request for a percentage of the fund award. *Laffitte*, 1 Cal. 5th at 5050. However, the California Supreme Court in *Laffitte* has now made clear that this cross-check is not required. *Id.*

The lodestar method calculates the fee by multiplying the number of hours expended by counsel by an hourly rate. *Laffitte*, 1 Cal. 5th at 489. While it may be used as a cross-check on the percentage-of-recovery method, it "does not override the trial court's primary determination of the fee as percentage of the common fund and thus does not impose an absolute maximum on the potential fee award. …[I]t is not likely to radically alter the incentives created by a court's use of the percentage method." *Id.* at 505. Class Counsel's combined lodestar, prior to the filing of this motion, is $5,412,376.50, or nearly double the requested fee of $2,833,333.33. Accordingly, Class Counsel's request of 33.33% of the total $8.5 million Settlement reflects a *negative* multiplier of 52% on the time reasonably expended by Class Counsel to litigate this case. As such, although not necessary, a lodestar cross-check supports the percentage of the recovery method in this case.

i. Class Counsel's Rates are Reasonable.

In calculating a lodestar, a court first examines the prevailing hourly rate for similar work in the pertinent geographic region. *Chodos v. Borman*, 227 Cal. App. 4th 76, 93 (2014) (citing *Serrano v.*

Unruh, 32 Cal. 3d 621, 640 n.31 (1982) (stating the value of attorney services is variously defined as the "hourly amount to which attorneys of like skill in the area would typically be entitled"); *PLCM Grp., Inc. v. Drexler*, 22 Cal. 4th 1074, 1094–95 (2000) (using prevailing hourly rate in community for comparable legal services even though a party used in-house counsel).

Moreover, while use of the lodestar method may be employed as a cross-check, the Court is not required to perform an exhaustive cataloguing and review of counsel's hours. *Laffitte*, 1 Cal. 5th at 505 (citing *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000)) ("[T]rial courts…have generally not been required to closely scrutinize each claimed attorney-hour, but have instead used information on attorney time spent to 'focus on the general question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys.'"); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Action*, 138 F.3d 283, 342 (3d Cir. 1998) (agreeing with district court that "detailed time summaries were unnecessary where, as here, it was merely using the lodestar calculation to double check its fee award"); *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 451 (E.D. Cal. 2013) ("Where the lodestar method is used as a cross-check to the percentage method, it can be performed with a less exhaustive cataloguing and review of counsel's hours."); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306 (3d Cir. 2005) ("The lodestar cross-check calculation need entail neither mathematical precision nor bean counting."). Should the Court request, Class Counsel's contemporaneous billing records will be made available, for *in camera* review.

Class Counsel includes highly experienced members of the bar with national practices who have successfully brought to bear in this case their extensive experience in class actions and complex litigation. Marker Decl. ¶¶ 18–25 & Ex. A; Ellingstad Decl. ¶¶ 5–13. Their customary rates used to calculate the lodestar are squarely in line with prevailing rates in this jurisdiction and have been approved by other courts. Marker Decl. ¶¶ 33–35; Ellingstad Decl. ¶ 41. Class Counsel's rates are within the prevailing market rates in the geographical area for attorneys of comparable skill, experience, and reputation and, as noted in the attached declarations, have recently been approved by other courts.[6]

[6] Further, the rates are well within the range of rates awarded in class action litigation in California. *Banas v. Volcano Corp.*, 47 F. Supp. 3d 957 (N.D. Cal. 2014) (approving rate of $1,095); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Prods. Liab. Litig.*, No. 8:10 ml-2151-JVS-FMO, 2013 U.S. Dist. Lexis 123298 (C.D. Cal. July 24, 2013) (approving rate of $950); *In re*

ii. Class Counsel's Lodestar is Reasonable.

As explained further in the declarations of Caleb Marker and Susan Ellingstad, Class Counsel expended significant time litigating this case and securing the Settlement for the Class. Zimmerman Reed LLP expended 4,735.36 hours, for a lodestar of $3,095,696.50. Marker Decl. ¶¶ 30, 32. Lockridge Grindal Nauen P.L.L.P expended 2,923.90 hours, for a lodestar of $2,316,680.00. Ellingstad Decl. ¶¶ 38, 43–44. The total lodestar of these firms, as of March 1, 2023, equals $5,412,376.50. Class Counsel each submit declarations describing their firm's billing and breaking down the time spent throughout the course of the litigation to provide detail as to the proportion and types of tasks that required these expenditures of time and effort. *See Concepcion v. Amscan Holdings, Inc.*, 223 Cal. App. 4th 1309, 1324 (2014) (citing *Wershba v. Apple Computer*, 91 Cal. App. 4th 224, 254–55 (2001)) ("It is not necessary to provide detailed billing timesheets to support an award of attorney fees under the lodestar method."); *see also Blackwell v. Foley*, 724 F. Supp. 2d 1068, 1081 (N.D. Cal. 2010) ("An attorney's sworn testimony that, in fact, it took the time claimed '…is evidence of considerable weight on the issue of the time required.'") (citation omitted).

As detailed in Counsel's declarations, researching and filing the case, participating in law and motion practice, conducting discovery, and engaging in settlement negotiations required a sustained commitment from Class Counsel throughout the more than four years this action has been pending. Further, the current lodestar does not include the additional time that Class Counsel will incur during the approval process, settlement administration, and additional work on any appeal if necessary. As noted above, the percentage of the fund method requested in this case represents an attorney fee of approximately 52% percent of Class Counsel's lodestar expended in prosecuting this case. This illustrates the risk undertaken by Class Counsel in litigating this case on a contingent fee basis, and the financial commitment of Counsel in securing the result obtained for the Class.

B. The Requested Reimbursement of Costs is Reasonable.

Attorneys in a class action may be reimbursed for reasonable costs incurred. *Cal. Indirect Purchaser X-Ray Film Antitrust Litig.*, 1998 WL 1031494, at *11. Class Counsel request reimbursement

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High-Tech Emp. Antitrust Litig., No. 11-CV-02509-LHK, 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015) (approving rates of $975 an hour).

for reasonable expenses incurred in this litigation. These costs were necessary to the investigation, prosecution, and settlement of this action. Marker Decl. ¶¶ 45, 48; Ellingstad Decl. ¶¶ 56–60. Class Counsel also anticipate incurring additional expenses through the end of the claims process, for which Class Counsel will not seek additional reimbursement. To date, Class Counsel's reasonable expenses amount to $416,326.96. These expenses are detailed in Class Counsel's declarations, but the majority of the expenses consist of fees paid to experts and mediators. Marker Decl. ¶ 47; Ellingstad Decl. ¶¶ 56-58. While these expenses were broken down by category, line-item expenses and supporting documentation for these expenses will be made available for *in camera* review upon the Court's request.

C. The Requested Service Awards for Plaintiffs are Reasonable.

Plaintiffs also request a class representative service award of $15,000 per Plaintiff. The requested award is reasonable and consistent with incentive awards approved by California courts. *See, e.g.*, *Garner v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 1687832, at *17 n.8 (N.D. Cal. Apr. 22, 2010) ("Numerous courts in the Ninth Circuit and elsewhere have approved incentive awards of $20,000 or more where, as here, the class representative has demonstrated a strong commitment to the class.") (collecting cases); *Meewes v. ICI Dulux Paints*, No. BC265880 (L.A. Super. Ct. Sept. 19, 2003) (approving service awards of $50,000, $25,000, and $10,000); *Hickox-Huffman v. US Airways, Inc.*, 2019 WL 1571877, at *2 (N.D. Cal Apr. 11, 2019) (approving $10,000 payment).

Under California law, named plaintiffs are generally entitled to a service award for initiating litigation on behalf of absent class members, taking time to prosecute the case, and incurring financial and personal risk. *Clark v. Am. Residential Servs. LLC*, 175 Cal. App. 4th 785 (2009). Service awards are "fairly typical" in class action cases. *In re Cellphone Fee Termination Cases*, 186 Cal. App. 4th 1380, 1393 (2010). These 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." *Id.* at 1393–94 (citation omitted).

California courts consider several criteria in determining whether to approve an incentive award, including "1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and

effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation." *In re Cellphone Fee Termination Cases*, 186 Cal. App. 4th at 1394–95 (citing *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995)).

Named plaintiffs in employment class actions, in particular, risk harming their "reputations and future employability in the field." *Smith v. CRST Van Expedited, Inc.*, No. 10-CV-1116-IEG, 2013 WL 163293, at *6 (S.D. Cal. Jan. 14, 2013). *See also In re High-Tech Emp. Antitrust Litig.*, 2015 WL 5158730, at *17 ("[E]each of the class representatives risked significant workplace retaliation by serving as a named plaintiff."); *Lusby*, 2015 WL 1501095, at *9 ("Plaintiffs…risked having their participation in this litigation be an impediment to future employment.").

The requested service award of $15,000 per Plaintiff comprises a small fraction of the overall settlement amount—about 0.35%. *See, e.g.*, *Monterrubio v. Best Buy Stores, L.P.*, 291 F.R.D. 443, 463 (E.D. Cal. 2013) (awarding 0.62%); *Congdon v. Uber Techs., Inc.*, 2019 WL 2327922, at *10 (N.D. Cal. May 31, 2019), *appeal dismissed*, 2019 WL 4854343 (9th Cir. July 12, 2019) ("[The requested] incentive award represents just 0.25% of the total recovery, which is reasonable in light of the expenses and risks named plaintiffs have incurred in this action.").

Here, Ms. Ross and Ms. Rogus assumed personal risk by serving as class representatives and should be rewarded for their work on behalf of others who benefitted without risk to themselves. They publicly participated in litigating this lawsuit against a major technology company in an insular and geographically centralized industry, undertaking significant financial and reputational risk, as well as public notoriety, because of their advocacy. *See* Declaration of Rocio Ross ("Ross Decl.") ¶ 13; Declaration of Claudia Rogus ("Rogus Decl.") ¶ 13. They spent considerable time and effort over more than four years of litigation communicating regularly with Class Counsel, providing critical assistance to Class Counsel in investigating the claims, reviewing draft documents before filing, participating in discovery, contributing to the Settlement negotiations, and advocating for the Class. Ross Decl. ¶¶ 6–14; Rogus Decl. ¶¶ 6–14. The fact that they have incurred substantial risk and spent significant time and effort litigating this action despite receiving no personal benefit throughout its duration weighs strongly in favor of granting the requested service awards. Without their willingness to initiate this litigation, no

class recovery would have been possible. They have rendered valuable service to the class and should be awarded $15,000 each in recognition of their work and the attendant risks.

IV. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request an award of $2,833,333.33 for attorneys' fees and reimbursement of $416,326.96 in expenses, as well as Service Awards of $15,000 each to Rocio Ross and Claudia Rogus, to be paid from the Settlement Fund.

Respectfully submitted,

ZIMMERMAN REED LLP

Dated: March 14, 2023 By: _____

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