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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

EDGAR DIAZ and JOE TRIGO, individually and on behalf of all others similarly situated, Plaintiffs, vs. TAK COMMUNICATIONS CA, INC.; TAK COMMUNICATIONS, INC.; and DOES 1-25, inclusive, Defendants.	Case No: RG20064706 CLASS ACTION *Assigned for All Purposes to Judge Winifred Smith, Dept. 21* **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS AND COLLECTIVE ACTION SETTLEMENT** Date: April 23, 2021 Time: 10:00 a.m. Reservation Number: R-2228006 Date Action Filed: June 12, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

I. INTRODUCTION

Plaintiffs Edgar Diaz and Joe Trigo, on behalf of themselves and all others similarly situated ("Plaintiffs"), seek final approval of the settlement of this wage and hour class, collective, and representative action against Defendants TAK Communications CA, Inc. and TAK Communications, Inc. ("TAK").[1] The Parties have settled this matter in a Class Action Settlement Agreement and Release ("Settlement")[2] to resolve numerous claims that almost certainly never would have been prosecuted as individual actions, and in doing so, provide substantial benefit to the members of the Class.

The basic terms of the Settlement are as follows: (1) the non-reversionary, Gross Settlement Amount is $1,200,000.00; (2) the Net Settlement Amount of approximately $709,369.86 will be available for distribution to Participating Individuals (i.e., those Class Members who do not opt out of the Settlement and Opt-in Plaintiffs who have filed an opt in consent form) proportionally based on the number of shifts that they worked for TAK as a percentage of the total shifts worked by all Participating Individuals; (3) the individual service awards to Plaintiffs Diaz and Trigo in the amount of $10,000.00 each for their efforts on behalf of the Class; (4) a sum of $35,000.00 for penalties under the California Private Attorneys General Act ("PAGA"), California Labor Code § 2699;[3] (5) the actual costs and expenses of the Settlement Administrator, Heffler Claims Group ("Heffler"), of $27,500.00; (6) 33.33% of the Gross Settlement Amount ($399,999.99) for attorneys' fees; and (7) reimbursement of actual costs to Plaintiff's Counsel, currently estimated to be $16,880.15. The average award for each of the 703 Participating Class Members is over $1,004.62.[4]

[1] Defendants do not oppose this Motion.

[2] The Settlement was previously filed as Exhibit 1 to the Declaration of Carolyn Hunt Cottrell in Support of Plaintiffs' Motion for Preliminary Approval of Class and Collective Action Settlement, Certification of Settlement Class, Approval of Notice of Settlement, and Setting of Hearing for Final Approval.

[3] Of this amount, $26,250 is to be paid to California Labor and Workforce Development Agency ("LWDA"), while $8,750 is to be distributed to the Participating Class Members in addition to and as part of the Net Settlement Amount. (Declaration of Carolyn Hunt Cottrell in Support of Plaintiffs' Motion for Final Approval of Class and Collective Action Settlement ["Cottrell Decl."], ¶ 36, n. 1.)

[4] The average recovery for the California Class Members is $940.31 and for the 86 Opt-In Plaintiffs is $1,466.05. (Declaration of Scott M. Fenwick of Heffler Claims group in Support of Proposed Class Notice ["Fenwick Decl."], ¶ 10.) The actual average recoveries are higher than the numbers provided here, as the averages are calculated by Heffler based on the assumption that Class Counsel would be awarded the maximum amount of costs (i.e., $20,000) pursuant to the Settlement. (*See* Cottrell Decl. at ¶ 42.)

The Court granted preliminary approval of this Settlement on December 11, 2020, and the response of the Settlement Class has been overwhelmingly positive. There have been ***zero objections, zero opt-outs, and zero disputes*** regarding workweeks. (Cottrell Decl. ¶ 34.)

The Settlement satisfies all of the criteria for final settlement approval under California and federal law and falls well within the range of reasonableness. Accordingly, Plaintiffs request that the Court: (1) finally approve the settlement, (2) finally approve Plaintiffs Diaz and Trigo as Class Representatives, (3) finally approve Schneider Wallace Cottrell Konecky LLP ("SWCK") and Berger Montague P.C. ("BM") as Class Counsel, (4) certify the Settlement Class;[5] (5) finally approve service awards in the amount of $10,000.00 to Plaintiff Diaz and $10,000.00 to Plaintiff Trigo; (6) finally approve an award of attorneys' fees to Class Counsel in the amount of 33.33% of the Gross Settlement Amount ($399,999.99), plus reimbursement of Class Counsel's out-of-pocket expenses ($16,880.15); (7) finally approve Heffler as Settlement Administrator and approve the costs of settlement administration of $27,500.00; and (8) approve the proposed implementation schedule, set forth in the Notice of Motion, for relevant dates and deadlines regarding the administration of Settlement.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiffs' Class Claims.

Plaintiffs Edgar Diaz and Joe Trigo filed an initial action, *Diaz, et al. v. TAK Communications CA, Inc., et al*. (hereinafter, "*Diaz-Federal*"), in California District Court, Eastern District of California, Case No. 2:20-at-00481, against TAK on May 18, 2020, asserting claims as a collective action under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA") and a class action pursuant to California Labor laws. (*Id*. at ¶ 20.)[6] On June 12, 2020, Plaintiff Diaz filed a separate action against TAK in this Court, to assert claims for penalties under the PAGA. (*Id.* at ¶ 21.)

B. Pre-Mediation Efforts.

Following the filing of the state and federal actions, TAK informed Plaintiffs of the existence

[5] The Settlement Class is defined as all current and former hourly, non-exempt employees who worked as Technicians for Defendants in the state of California between May 22, 2019 and August 4, 2020. (Settlement, ¶ 2.b; Cottrell Decl. at ¶ 38.)

[6] The Parties subsequently agreed to a Tolling and Dismissal Agreement ("Tolling Agreement") on June 26, 2020, whereby Plaintiffs agreed to dismiss their Class and Collective action without prejudice in federal court, and TAK agreed that no statute of limitations on any claim would run against Plaintiffs while the agreement is in effect (except those claims that are already barred by any applicable statute of limitations). (Cottrell Decl. at ¶¶ 22-23.) Plaintiffs entered a notice of voluntary dismissal without prejudice pursuant to Rule 41(a)(1)(A)(i) of the *Diaz-Federal* action *on* June 29, 2020. (*Id.* at ¶ 24.)

of arbitration agreements purportedly executed by all named plaintiffs and opt-in plaintiffs. (*Id*. at ¶ 22.) The Parties subsequently agreed to attend mediation early on in these actions. (*Id*.) The Parties engaged in extensive informal discovery leading up to mediation. (*Id*. at ¶ 25.) Plaintiffs' counsel completed extensive investigation of Class and Collective Members' claims, including approximately 40 in-depth interviews, covering topics including dates and locations of work, hours of work, off-the-clock work, meal and rest breaks, and reimbursement of work-related expenses. (*Id*.) Through the outreach process, Plaintiffs obtained additional documents from Technicians and garnered substantial factual background regarding the alleged violations outlined in the state and federal complaints, which Plaintiffs' counsel utilized to build their case and to assess TAK's potential exposure. (*Id*. at ¶ 26.)

TAK also produced documents and information on an informal basis to facilitate mediation. (*Id*. at ¶ 27.) TAK produced job descriptions, employee handbooks detailing Defendants' company policies, schedules, billing rates and associated piece-rates, training materials, time data analysis reports, and timekeeping and payroll records for 50% of the proposed Class, as well as other information necessary for a damages analysis. (*Id.*) TAK also provided class-wide figures, including the total number of Technicians, average hourly rates, and additional data points to enable Plaintiffs' counsel to evaluate damages on a Class and Collective basis. (*Id.*) Plaintiffs' counsel completed an exhaustive review of such documents, and used the information and data from them to prepare for mediation. (*Id.*)

C. Settlement and Amended Pleading.

On August 4, 2020, the Parties conducted a full day mediation session, which was remotely held before well-respected and highly-skilled employment law mediator Francis "Tripper" Ortman. (*Id*. at ¶ 29.) In preparation for the mediation, Plaintiffs performed a detailed damages analysis with the assistance of Class Counsel's in-house data analyst, and the Parties met and conferred on several occasions to make sure they were prepared to engage in good faith, arms' length settlement negotiations. (*Id*. at ¶ 28.) The Parties reached a settlement in principle at the mediation and executed a confidential memorandum of understanding of the substantive terms of the settlement that day. (*Id*. at ¶ 29.) The Parties fully executed the long-form settlement agreement on October 6, 2020. (*Id*. at ¶ 30; *see* Settlement.)

Pursuant to the Settlement, on October 7, 2020, the Parties stipulated for an order granting Plaintiffs leave to amend the operative complaint to add FLSA claims and California state law claims for the alleged violations of federal and California labor laws asserted in the Complaint filed

in the *Diaz-Federal* action, Dkt. No. 1, promptly after execution of the Parties' long-form version of the settlement agreement. (*Id.* at ¶ 31.) The Court granted the Parties' Request, and Plaintiffs filed their First Amended Complaint ("FAC") on November 5, 2020. (*Id.*)[7]

D. Preliminary Approval of Settlement.

On November 17, 2020, Plaintiffs filed their Motion for Preliminary Approval of Class and Collective Action Settlement, Certification of Settlement class, Approval of Notice of Settlement, and Setting of Hearing for Final Approval. (*Id.* at ¶ 32.) The Court granted preliminary approval on December 11, 2020. (*Id.*)

E. The Settlement Notice Process.

The Parties agreed on a finalized Class Notice, which incorporates information regarding oral objections, exclusions, and disputes, and Heffler mailed the Class Notice to 703 recipients on January 22, 2021. (*See id.* at ¶ 34; Fenwick Decl. at ¶¶ 9-10.) Heffler performed skip tracing and other methods for notices that were returned as undeliverable to obtained updated address information for these individuals, and are continuing to do so. (*Id.* at ¶ 13.) Heffler also established a website, which Class Counsel reviewed and approved, and which went live on January 21, 2021. (*Id.* at ¶ 6.) Heffler also established a toll-free call center for handling Class Member inquiries. (*Id.* at ¶ 7.) The opt-out and objection deadline was March 15, 2021. (*Id.*) To date, there have been no objections, no requests for exclusion, and no disputes regarding work history. (*Id.* at ¶¶ 11-12.) Heffler estimates the maximum settlement payment for all Participating Individuals at $2,002.05 and the average payment at $1,004.62. (See *id.* at ¶ 10; *supra,* n. 4.)

F. Final Approval of Settlement.

If final approval is granted, the Effective Date of the Settlement will occur when the Court's order approving the Settlement is final, and there is no further recourse by an appellant or objector who seeks to contest the Settlement. (See Cottrell Decl. at ¶¶ 48-49.) Thereafter, Heffler will calculate payroll taxes, prepare tax reporting documents, mail individual settlement payments to the Participating Class Members, facilitate payment to the LWDA for its share of PAGA penalties, pay the Service Awards to the Named Plaintiffs, and pay any award of fees and costs to Class Counsel pursuant to the final implementation schedule. (*See id.* at ¶ 56.) Class Members do *not* have to submit a claim form to receive an award under the Settlement, and Settlement checks will be negotiable for 180 days following issuance (*Id.* at ¶ 41.) Any funds from uncashed checks for

[7] During the course of the litigation, 86 Technicians have submitted opt-in consent forms that have been filed as an exhibit to Plaintiffs' FAC. (Cottrell Decl. at ¶ 31.)

Participating Class Members will be redistributed either to the Class and Collective Members who cashed their checks if the total residual amount is equal to or greater than $50,000, or revert to *cy pres* beneficiary Legal Aid at Work if the total residual amount is less than $50,000. (*Id.* at ¶¶ 50-52.)

III. CLASS-ACTION SETTLEMENT APPROVAL PROCEDURE

A class action may not be dismissed, compromised, or settled without the approval of the court.[8] Here, the Court has already granted preliminary approval, notice has been mailed to the Settlement Class, and the Settlement Class has responded favorably. With this Motion, Plaintiffs request that the Court take the final step in the settlement approval process by granting final approval of the Settlement, the service payment, and Plaintiffs' application for payment of Counsel's attorneys' fees and costs, which is being filed concurrently with this Motion. (*See* California Rule of Court 3.769).

IV. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT

A. The best practicable notice was provided to the Settlement Class in accordance with the Court-approved notice process.

Notice of a class action settlement is adequate where the notice is given in a "form and manner that does not systematically leave an identifiable group without notice." (*Mandujano v. Basic Vegetable Prod., Inc.* (9th Cir. 1976) 541 F.2d 832, 835.) The notice should be the best "practicable under the circumstances including individual notice to all members who can be identified through reasonable effort." (*Torrisi v. Tucson Elec. Power Co*. (9th Cir. 1993) 8 F.3d 1370, 1374; *Wershba*, 91 Cal.App.4th at 251 [the standard is whether the notice has a reasonable chance of reaching a substantial percentage of the class members].) Sending individual notices to settlement class members' last-known addresses constitutes the requisite effort. (*Grunin v. International House of Pancakes* (8th Cir. 1975) 513 F.2d 114, 121.)

Here, pursuant to the Court's December 11, 2020 order granting preliminary approval, the Class Notice was mailed to the Settlement Class in accordance with the terms of the Settlement. (*See* Fenwick Decl. at ¶¶ 9-10; Cottrell Decl. at ¶ 58.) The Class Notice provides a description of the case and the proposed Settlement, informs Settlement Class Members of their individual workweeks and estimated Individual Settlement Payment, explains how Settlement Class Members

[8] (See California Civil Code § 1781(f); California Rule of Court 3.769; *see also* Federal Rule of Civil Procedure 23(e).) The California Supreme Court has authorized and urged California's trial courts to use Federal Rule of Civil Procedure Rule 23 and federal case law for guidance in considering class action issues. (*Green v. Obledo* (1981) 29 Cal.3d 126, 145-46.)

can receive payment under the Settlement or exercise their right to opt-out, object, or dispute their workweeks, and identifies Class Counsel. (Fenwick Decl., Ex. A; Cottrell Decl. at ¶ 59.) Heffler set up a toll-free number, as well as a website, for Class Member inquiries, and, following the initial mailing to all potential Settlement Class Members, just 42 notices were returned as undeliverable. (See *supra*, Section II.E.)

Heffler followed all of the procedures set forth in the Court-approved notice plan. Reasonable steps have been taken to ensure that all members of the Settlement Class receive the Notice Packets. Accordingly, the notice process satisfies the "best practicable notice" standard.

B. Final Approval of the Settlement is Appropriate Because it is Fair, Reasonable, and Adequate.

For final approval, a Court must ensure that "the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1027.) The decision to approve or reject a proposed settlement is committed to a court's broad discretion. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-35.) As long as the Court has sufficient information about the nature and magnitude of the claims being settled, as well as impediments to recovery, the Court should be able to make an independent assessment of the reasonableness of the terms to which the parties have agreed. (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.)) Plaintiffs provide an abundance of information regarding the claims being settled and recognize and appreciate the risks of continued litigation.

1. The terms of the Settlement are fair, and the result for the members of the Settlement Class are substantial.

A presumption of fairness exists where: (1) the settlement is reached through arms'-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. (*Dunk*, 48 Cal.App.4th at 1802.) All four of these conditions are satisfied here.

a. The Settlement was reached through arm's-length bargaining after extensive investigation, discovery, and analysis of the Class claims.

California courts recognize that "a presumption of fairness exists where . . . [a] settlement is reached through arm's-length bargaining." (*Wershba*, 91 Cal.App.4th at 245.) Here, Class Counsel investigated the applicable law and the facts in this case and extensively analyzed the potential

damages that might be recovered following the exchange of voluminous documents and information with Defendants. (Cottrell Decl. at ¶ 64.) Plaintiffs' liability and damages evaluation was premised on a careful and extensive analysis of the effects of Defendants' compensation policies and practices on Class Members' pay. (*Id.*) The Parties attended mediation with a well-respected mediator at which the Settlement was reached after numerous arm's-length settlement discussions between Class Counsel, counsel for Defendants and the mediator. (*Id*. at ¶¶ 29, 63.) Accordingly, the Settlement was agreed upon following an extensive review of the facts and law in this case. (*Id.* at ¶ 64.)

b. Class Counsel are experienced class action litigators.

In reaching the proposed Settlement, Class Counsel also relied on their substantial litigation experience in similar wage-and-hour class actions. (*Id.*) Class Counsel are experienced and respected class action litigators, including cases involving technicians for other similar cable companies.[9] Based on Class Counsel's knowledge and expertise in this area of law, Class Counsel believes this Settlement will provide a substantial benefit to the Class Members. (Cottrell Decl. at ¶ 78; Rodriguez Decl. ¶¶ 7, 52.)

c. The Settlement Class approves the Settlement.

To date, ***zero*** Settlement Class Members have objected to or opted out of the Settlement or disputed their workweek information. (Fenwick Decl. at ¶¶ 11-12.) The lack of objections and opt-outs show widespread support for the Settlement among Settlement Class Members, and give rise to a presumption of fairness. (See *Dunk*, 48 Cal.App.4th at 1801.)

2. Litigation of this action not only would delay recovery, but would be expensive, time-consuming, and would involve substantial risk.

Absent this settlement, it is estimated that Class Counsel's fees and costs would far exceed $1,000,000.00 to pursue these claims on behalf of Class Members. (Cottrell Decl. at ¶ 72.) Litigating the class claims in this action would require substantial additional discovery including the depositions of Technicians and experts, as well as the consideration, preparation, and presentation of voluminous documentary evidence and the preparation and analysis of expert reports. (*Id.*) Defendants likely have signficant resources and could use them to litigate the case for years to come, including through multiple levels of appeals. (*Id*.) In contrast, the Settlement will

[9] *See id*. at ¶¶ 4-7, 78; Declaration of Camille Fundora Rodriguez in Support of Plaintiffs' Motion for Final Approval of Class and Collective Action Settlement ["Rodriguez Decl."] at ¶¶ 1-5, Ex. A.) The previously-filed declaration of Sarah Schalman-Bergen in support of Plaintiffs' Motion for Preliminary Approval of the Settlement further describes BM's expertise.

yield a prompt, certain, and substantial recovery for Participating Individuals. (*Id.* at ¶ 73.) Such a result will benefit the parties and the court system. (*Id.*)

3. TAK would continue to contest liability on all issues.

The reasonableness of the Settlement is further underscored by the fact that Defendants have legal and factual grounds available to defend this action. (*Id.* at ¶¶ 74-76.) Defendants take the position that this case is not suitable for class treatment, that they fully complied with their obligations under the Labor Code, and that Plaintiffs and the putative Class Members are not entitled to damages, penalties, or other relief sought. (*Id.*) These defenses must be accounted for in considering the reasonableness of the Settlement.

4. Additional risks Plaintiffs considered.

Plaintiffs would face other significant risks if the litigation were to proceed to trial, including defeating arbitration agreements that purport to require them to proceed individually in arbitration. If arbitration is not compelled, a motion for class certification requiring investigation and outreach efforts by Class Counsel to obtain supporting evidence would be vigorously contested by Defendants. (*Id.* at ¶ 75.) Plaintiffs would then need to establish class-wide liability, and prove up various issues regarding damages and penalties, which would also be vigorously disputed by Defendants. (*Id.*) Such efforts would likely take many more months, if not years, and would necessitate expert witness testimony and significant additional litigation. (*Id.*)

Additionally, Plaintiffs' derivative claims regarding waiting time penalties, accurate records, and wage statements rise and fall with Plaintiffs' other wage payment claims. (*Id.* at ¶ 76.) For example, Plaintiffs would recover nothing under Labor Code § 203 if they were unable to prove the underlying claims or defeat a "good faith" dispute defense. (*See* Cal. Code Regs. Tit. 8, § 13520.) While Plaintiffs believe that they would prevail on these issues and others, Plaintiffs recognize the risk that a fact finder may find for Defendants on one or more of these issues and may find damages to be significantly less than what Plaintiffs claim. (*Id.*)

Defendants, represented by experienced employment lawyers, raised the above arguments, and more, in mediation and would have done so in continued litigation. (*Id.* at ¶ 77.) Despite Plaintiffs' confidence in their ability to prove their claims on a Class-wide basis, any one of the above defenses, if decided in favor of Defendants, could have reduced or even eliminated any potential damages award. (*Id.*)

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5. The proposed Settlement is well within the range of reasonableness.

The Net Settlement Amount of $709,369.86 results in fair and just relief to Settlement Class Members.[10] This amount will be available to the 703 Participating Individuals, which includes the Class and Collective Members, exclusive of attorneys' fees and costs, administrative costs and other expenses, and the service awards. (Cottrell Decl. ¶¶ 36, 40.) Individual Settlement Payments are allocated based on the number of workweeks for each Participating Individual in proportion to the total workweeks for all Participating Individuals.[11] The maximum recovery for the 703 Participating Individuals is $2,002.05 and the average payment is over $1,004.62 per individual. (See Fenwick Decl. ¶ 10; *supra,* n. 4.) The result is not only within the reasonable standard, but Class Counsel believes it is quite reasonable when considering the difficulty and risks presented by continuing this litigation. (See Cottrell Decl. ¶ 62.)

This is a recovery that easily falls within the range of reasonableness. (*See*, e.g., *In Re Mego Fin. Corp. Sec. Litig.* (9th Cir. 2000) 213 F.3d 454, 459 ["'It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair.'"][citation omitted].). (See Cottrell Decl. ¶¶ 62-65.) It is well-settled that a proposed settlement is not to be measured against a hypothetical ideal result that might have been achieved. (See, e.g., *7-Eleven Owners for Fair Franchising,* 85 Cal.App.4th 1135, 1150 [quoting *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 with approval: "This court has aptly held that 'it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators."]).

The Settlement represents 36.4% of TAK's total potential exposure of approximately $3.3 million based on a best-case-scenario, and falls easily within the range of reasonableness. (Cottrell Decl. at ¶ 67-70; see also *Soto et al v. O.C. Communications, et al*., No. 17-cv-00251 (N.D. Cal. Oct. 23, 2019) (ECF No. 305) (granting final approval in a wage and hour and hour settlement involving cable installers represented by Class Counsel here where the Gross Settlement amount (inclusive of fees and costs) represented approximately 17.2% of defendant's total potential exposure); *In Re Mego Fin. Corp. Sec. Litig.* (9th Cir. 2000) 213 F.3d 454, 459 ["'It is well-settled

[10] This includes the Net PAGA Amount of $8,750.00, from which Participating Individuals who are also Aggrieved Employees will also receive a *pro rata* share. (Cottrell Decl. at ¶ 40.)

[11] (See also, Cottrell Decl. at ¶¶ 43-44, 61.)

law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair.'"] [citation omitted].)

C. The Requested Service Awards Are Reasonable And Should Be Approved.

It is well-established that representative plaintiffs are eligible for reasonable incentive payments to compensate them for the expense or risk they have incurred in conferring a benefit on other members of the class. (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412). Courts award service payments to advance public policy by encouraging individuals to come forward and perform their civic duty in protecting the rights of the class, as well as to compensate class representatives for their time, effort, inconvenience, and for any expense or risk incurred. (*In Re California Indirect Purchases* (1998) 1998 WL 1031494, at *11; *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412.)

Throughout this litigation, Plaintiffs Diaz and Trigo spent upwards of 35 hours each to work with Class Counsel and assist in the development of the case. (*See* Cottrell Decl. at ¶¶ 79-82; Rodriguez Decl. at ¶ 23; Declaration of Edgar Diaz ["Diaz Decl."] at ¶¶ 8-18; Declaration of Joe Trigo ["Trigo Decl."] at ¶¶ 8-18.) They provided extensive information and documents including pay statements and emails during Class Counsel's initial investigation and the preparation of the state and federal complaints. (Rodriguez Decl. at ¶ 23; Diaz Decl. at ¶¶ 8-10; Trigo Decl. at ¶¶ 8-10.) They also assisted Class Counsel in their preparation for mediation, answered Class Counsel's questions in developing Plaintiffs' position for mediation, and assisted with the facilitation of outreach to their fellow Class Members. (*Ibid*.) Plaintiffs Diaz and Trigo have taken part in the Settlement decision, agreed to a broader release than other Class Members, and remained apprised of the case at all times during litigation. (*Ibid*.)

Plaintiffs Diaz and Trigo also took the significant risk of coming forward to represent the interests of their fellow employees by filing and prosecuting this action. (Cottrell Decl. at ¶ 79-82; Diaz Decl. at ¶ 15; Trigo Decl. at ¶ 15.) They have subjected themselves to risk with regards to future employment opportunities and their reputation in the community by their participation in this action. (See *ibid*; Rodriguez Decl. at ¶ 24.)

In light of the efforts they made and the risks they took in filing and prosecuting this action to obtain this $1,200,000 settlement, Plaintiffs request Service Awards of $10,000.00 each. This figure is well within the range of service awards approved in comparable cases. *See, e.g.*, *Sano v. Southland Management Group, Inc.*, No. BC489112, 2013 WL 7231686, at *3 (Cal. Super. Dec. 02, 2013) (approving two $15,000 service awards in context of class action settlement); *Benedict*

v. Reachlocal, Inc., No. BC 432721, 2011 WL 9155053 (Cal. Super. Dec. 09, 2011) (approving $12,500 and $10,000 service awards); *Wilson v. Rock-Tenn Co.*, No. BC488456, 2017 WL 9342358, at *2 (Cal. Super. Dec. 12, 2017) (approving five $10,000 service awards). Defendants do not oppose this request. Nor does the Class, as there were ***zero*** objections to the Settlement.

As a result of Plaintiffs' efforts and their willingness to step forward, the Class Members will receive significant recoveries if the Settlement is approved. (Cottrell Decl. at ¶ 80.) The requested Service Awards to Plaintiffs are reasonable and should be finally approved.

D. The Requested Attorneys' Fees And Costs Are Reasonable And Should Be Approved.

The excellent result did not come without extensive effort, skill, and substantial risk of Class Counsel. Defendants raised a myriad procedural and substantive defenses, including that class members signed arbitration agreements requiring individual arbitration. Absent the Settlement Plaintiffs would face considerable risk in challenging the arbitration agreements, preparing for class certification, and proving their claims on their merits.

For their efforts and the substantial risk they undertook in obtaining this Settlement and the considerable monetary compensation to the Class Members, Plaintiffs seek an award of thirty-three and one-third (33 1/3) percent of the Gross Settlement Amount, or $399,999.99, as well as reasonable litigation expenses of $16,880.15. (*Id.* at ¶ 84; Rodriguez Decl. at ¶¶ 37-38.) These fees and costs are warranted under the law and within the range commonly awarded in similar cases.

1. California Courts Routinely Approve Attorney's Fees Awards of One-Third of the Common Fund.

The California Supreme Court has "join[ed] the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, . . . the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created. (*Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal.5th 480, 503 [approving award of attorney's fees in the amount of one third of the gross $19 million settlement under the common-fund theory].) By awarding counsel a percentage of the total recovery, rather than fees based on hours worked, the common-fund method encourages attorneys to efficiently litigate to achieve the best results possible for the class. (*See id.* at 492-494.)

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California courts routinely uphold attorney's fees equaling one-third of the common fund.[12] Moreover, federal courts and secondary sources confirm that attorney's fees in this range are reasonable.[13] These authorities establish that Class Counsel's request for one third of the Gross Settlement Amount is well within the range customarily approved by courts in California.

2. A Requested Fee Award Is Fair and Reasonable in Light of the Excellent Result Achieved and the Risks Inherent in This Action.

Among the factors considered in determining whether the requested fee percentage is reasonable are: (1) the results achieved; (2) the risk of further litigation; (3) the skill required of plaintiff's counsel and the quality of work performed by plaintiff's counsel; (4) the contingent nature of the fee and the financial burden carried by the plaintiff; and (5) awards made in similar cases. (*Vizcaino v. Microsoft Corp*. (9th Cir. 2002) 290 F.3d 1043, 1048-50). All these factors support an award here of one-third of the common fund. (*See* Cottrell Decl. at ¶¶ 86-90.)

First, as discussed above, Class Counsel's efforts resulted in a substantial settlement by any standard, and an especially good result in light of the challenges Plaintiffs would face in litigating their claims on a representative basis. (*Id*. at ¶ 75.) The average payout per class member is over approximately $1,004.62. (*See* Fenwick Decl. at ¶ 10; *supra,* n. 4.) This result was achieved by the work and success of Plaintiffs' Counsel, who negotiated the Settlement after extensive preparation, investigation, review of Defendants' business records and data, a full mediation session, and

[12] *See, e.g., Asalati v. Intel Corp.* (Santa Clara Super. Ct., Oct. 29, 2018) No. 16cv302615 (approving 33.3% fee award, at a multiplier of 3.98 over lodestar); *Ochoa v. Haralambos Beverage Co.* (Los Angeles Super. Ct., Feb. 1, 2007) No. BC319588 (approving 33.3% fee award with no mention of lodestar crosscheck); *Big Lots Overtime Cases* (San Bernardino Super. Ct., JCC Proceeding No. 4283, Feb. 4, 2004) (approving award of attorney's fees of 33% of the recovery); *Davis v. The Money Store, Inc.* (Sacramento Super. Ct., No. 99AS01716, Dec. 26, 2000) (same); *Miskell v. Auto. Club of Southern Cal*. (Orange County Super. Ct., No. 01CC09035, May 27, 2003) (same); *Ojito v. Robertson's Ready Mix Concrete, Inc.*, (Super. Ct., Riverside County, Jan. 16, 2007) No. RIC420994 (approving 30% fee award with no mention of lodestar crosscheck); *Jones v. Alliance Imaging, Inc.* (Alameda County Super. Ct., No. RG05210418, Nov. 27, 2006) (approving 33% fee award with no mention of lodestar crosscheck); *Garcia v. Save Mart Supermarkets* (Stanislaus County Super. Ct., No. 312026, Aug. 3, 2004) (approving 33% fee award with no mention of lodestar crosscheck); *Terrell v. Ocean's 11 Casino, Inc.* (San Diego County Super. Ct., No. GIC795732, Feb. 10, 2004) (approving 33% fee award with no mention of lodestar crosscheck).

[13] *See Van Vranken v. Atlantic Richfield Co.,* 901 F.Supp. 294, 297-98 (N.D. Cal. 1995) ("Class Counsel have also cited 73 district court opinions in which fees in the range of 30-50 percent of the common fund were awarded."); *In Re Pacific Enter. Sec. Litig.,* 47 F.3d 373, 379 (9th Cir. 1995) (33% fee award); *Williams v. MGM-Pathe Communications Co.,* 129 F.3d 1026, 1027 (9th Cir. 1997) (33% of total fund awarded); *In Re Activision Sec. Litig.,* 723 F. Supp. 1373, 1375 (N.D. Cal. 1989) (noting that fee awards in common-fund cases "almost always hover[] around 30% of the fund created by the settlement") (cited with approval in *Lealao,* 82 Cal.App.4th at 49); *In Re Vitamins Antitrust Litig.,* 2001 WL 34312839 (D.D.C. 2001) (34.6% of $365 million recovery); Newberg on Class Actions, §11:24 (4th Ed. 2002); Manual for Complex Litigation, §14:6.

substantial negotiations. (Cottrell Decl. at ¶¶ 25-29, 66-72.)

Second, the Plaintiffs faced significant risks going forward with the litigation. (*Id.* at ¶¶ 62, 66, 74-77.) Defendants raised numerous procedural and substantive defenses throughout this litigation, any one of which, if successful, could have decimated Plaintiffs' case. (*Id.*) One key risk was the arbitration agreements raised by Defendants, which Plaintiffs would have had to overcome in order to continue litigating on a representative basis in this forum. (*Id.*) Defendants vowed to raise all of their defenses at trial and would continue to raise them on appeal. (*Id.*) Accordingly, Plaintiffs faced serious risks going forward with their cases, and it would have likely taken several more years to realize any recovery. (*Id.*)

Third, Class Counsel are experienced class action litigators. (*Id.* at ¶¶ 4-7; Rodriguez Decl. at ¶¶ 2-5.) This experience and expertise, combined with the high quality of work performed in this case by Class Counsel, resulted in the Settlement achieved. (*Ibid.*)

Fourth, Class Counsel have been representing Plaintiffs (and the State of California) in these matters on a strictly contingency basis, and had to forego opportunities to litigate other cases, incurred the risk of non-recovery after a substantial investment of time, money, and resources, and have done so since the inception of the cases without any payment or compensation. (Cottrell Decl. at ¶¶ 86-89.) This is no easy burden for any firm. (*Id.*) If, despite these hardships and risks, Class Counsel are paid only basic hourly rates multiplied by the number of hours worked on the case, they would not be fairly compensated for the hardships and serious risks they incurred. (*See* Posner, Economic Analysis of the Law, 534, 567 (4th ed. 1992) ["A contingent fee must be higher than a fee for the same legal services paid as they are performed … because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans"].)

Fifth, as discussed above, the request for attorney's fees in the amount of one third of the common fund falls well within the range accepted by state and federal courts in California in comparable wage-and-hour actions. (*Laffitte, supra,* 1 Cal. 5th at 503).

For all of these reasons, a common-fund fee award in the amount of one third of the $1.2 million common fund created by Plaintiffs and their attorneys is fair and reasonable.

3. A Lodestar Cross-Check Confirms the Reasonableness of the Fee Award.

The trial court may use an abbreviated lodestar "cross-check" for common-fund awards if the court considers it useful. (*Id.* at 504-05.) The Supreme Court expressly instructed that "the lodestar calculation, when used in this manner, does not override the trial court's primary determination of

the fee as a percentage of the common fund and thus does not impose an absolute maximum or minimum on the fee award." (*Id*. at 505.) In conducting a lodestar cross-check, the court is not "required to closely scrutinize each claimed attorney-hour." (*Id.*) An evaluation may be done by reviewing "counsel declarations summarizing overall time spent." (*Id*.)

In conducting a lodestar cross-check, the Court first determines a lodestar value for the fees by multiplying the time reasonably spent by plaintiffs' counsel on the case by a reasonable hourly rate. (*In re Consumer Privacy Cases* (2009) 175 Cal. App. 4th 545, 556-57.) To determine whether the requested rate is reasonable, courts look to the prevailing rate for similar work in the pertinent geographic region. (*PLCM Group v. Drexler* (2000) 22 Cal. 4th 1084, 1096-97 [using prevailing hourly rate in community for comparable legal services even though party used in-house counsel].) Here, Class Counsel's hourly rates are comparable to, or less than, those charged by other class action plaintiffs' counsel and the firms defending class actions, and have been approved by numerous federal and state courts.[14]

Class Counsel's aggregate lodestar is currently estimated at approximately $456,782.50 based on approximately 823.85 hours of attorney and staff time. (Rodriguez Decl. at ¶ 29.) This is comprised of approximately $177,115.00 for SWCK and $279,666.50 for BMPC. (Cottrell Decl. at ¶ 85, Ex. B; Rodriguez Decl. at ¶ 29 [detailed breakdowns of each firm's lodestar are included in counsel's declarations].) Class Counsel's aggregate lodestar will increase as a result of preparation for and attendance at the Final Approval Hearing and the settlement administration process.

Here, Class Counsel's aggregate lodestar represents a negative multiplier to the requested fees. (Cf. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 255; *see also See Vizcaino*, 290 F.3d at 1047 [multipliers "ranging from one to four are frequently awarded . . . when the lodestar method is applied"; affirming fees where the cross-check multiplier is 3.65].) A cross-check of Class Counsel's aggregate lodestar, which results in the application of a negative multiplier, confirms that a fee award of one third of the $1.2 million Gross Settlement Amount is a more than reasonable and fair payment.

[14] In particular, Class Counsel's current hourly rates were found to be reasonable for purposes of a lodestar crosscheck by District Judge Vince Chhabria in *Soto, et al. v. O.C. Communications, Inc., et al.*, Case No. 3:17-cv-00251-VC, ECF 304, 305 (N.D. Cal. Oct. 23, 2019) ("The Court finds the [one-third] fee award is further supported by a lodestar crosscheck, whereby it finds that the hourly rates of ["SWCK"] and ["BM"] are reasonable, and that the estimated hours expended are reasonable."). (*See also Shaw, et al. v. AMN Servs., LLC* (N.D. Cal. May 31, 2019) No. 3:16-cv-02816 [conducting lodestar cross check and holding "[t]he Court further finds that the hourly rates of Class Counsel's co-counsel, ["BM"], also are within the prevailing range of hourly rates charged by attorneys providing similar services in class action, wage-and-hour cases"].)

4. The Litigation Costs Are Fair and Reasonable.

Class Counsel request reimbursement of their actual out-of-pocket expenses incurred to prosecute these actions, in the amount of $16,880.15. Attorneys are permitted to recover their litigation costs and expenses under the California Labor Code and the common-fund doctrine. (Cal. Lab. Code §§ 218.5, 226, 1194, 2699; *Serrano v. Priest* (1977) 20 Cal.3d 25, 35; *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1424 n.6.) To date, Class Counsel's costs total approximately $16,880.15 for both firms. (Cottrell Decl. at ¶ 91, Ex. C; Rodriguez Decl. at ¶¶ 37-38.) Class Counsel incurred costs including mediation fees, filing fees, online research, and service of process fees. These expenses were incidental and necessary to the effective representation of the Class Members. (Cottrell Decl. at ¶ 91; Rodriguez Decl. at ¶ 39.) They are reasonable and uncontested, and should be approved.

E. The Requested Settlement Administration Costs Are Fair and Reasonable.

Class Counsel also request that the Court approve payment of $27,500.00 for the costs necessary to administer the Settlement. Heffler's costs currently total $14,572.20, and an additional $14,000 will be incurred for the check distribution and tax work to be performed prior to the Final Approval Hearing, for an estimated total of $28,572.20. (Fenwick Decl. at ¶ 14.) Pursuant to the Settlement, the Settlement Administrator's costs are not to exceed $27,500.00. (See Settlement at ¶¶ 28(d), 2(z)). These settlement administration costs are reasonable and uncontested by the Defendants and by the Class, and should be approved.

V. THE PROPOSED IMPLEMENTATION SCHEDULE

Plaintiffs respectfully request that the Court approve the proposed implementation schedule for approval of the Settlement as set forth in the Notice of Motion and proposed order.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant this Motion for Final Approval and enter an Order consistent with the Proposed Order submitted herewith.

Respectfully submitted,

Dated: April 1, 2021

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