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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

HOWARD CLARK, individually, on behalf of all others similarly situated, and the general public,

Plaintiff,

v.

S.C. JOHNSON & SON, INC., a Wisconsin Corporation; DOES 1-1000, inclusive,

Defendants.

Case No. RG20067897

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEYS' FEES, COSTS, AND INCENTIVE AWARD

Date: December 7, 2021
Time: 10:00 a.m.
Dept.: 23
Judge: Hon. Michael M. Markman

Reservation Number: A-20067897-002

PUBLIC-REDACTS MATERIALS FROM CONDITIONALLY SEALED RECORD

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I. INTRODUCTION

Plaintiff and Class Representative Howard Clark ("Plaintiff"), by and through his undersigned counsel of record ("Class Counsel"), hereby respectfully moves this Court for entry of an Order granting an award of attorneys' fees to Class Counsel in the amount of $411,529.12.[1] Class Counsel's fee request is fair, reasonable, and supported by California law. The Settlement[2] in this Action provides for a non-reversionary Settlement Fund in the amount of $1.3 million (Marron Decl., Ex. 1 ¶ 2.33) in addition to injunctive relief requiring Defendant S.C. Johnson & Son, Inc. ("Defendant" or "S.C. Johnson") to remove the allegedly misleading "non-toxic" claims from the Windex Product packaging and Website. Marron Decl., Ex. 1 ¶ 4.5.

In addition to attorneys' fees, Class Counsel are requesting that the Court award their costs reasonably incurred in the prosecution of this Action in the amount of $17,470.88. Thus, Class Counsel is seeking a total fee and expense award of $429,000. This amount amounts to one-third (33%) of the $1.3 million Settlement Fund, a sum that is in line with fees typically awarded in class action litigation in California and elsewhere. *See Laffitte v. Robert Half Int'l, Inc.* (2016) 1 Cal. 5th 480, 485-86, 506 (affirming one-third percentage-based fee award to class counsel); *Chavez v. Netflix, Inc.* (2008) 162 Cal. App. 4th 43, 66, n.11 ("fee awards in class actions average around one-third of the recovery"). Furthermore, Plaintiff Clark is seeking an incentive award in the amount of $2,500 for his efforts in representing the Settlement Class in this action.

In light of the excellent results achieved in this litigation, including both monetary and future injunctive relief, Plaintiffs' Motion for Attorneys' Fees, Costs, and Incentive Award should be granted.

II. CLASS COUNSEL ARE ENTITLED TO AN AWARD OF REASONABLE FEES

A. The CLRA Requires Fees to Be Awarded to a "Prevailing Plaintiff"

Plaintiff brought claims against S.C. Johnson under California's Consumer Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.* ("CLRA"). The CLRA provides the "court ***shall award court costs and***

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[1] Class Counsel have expended 640.6 total hours prosecuting this Action, including an estimated 80 hours of post-application work. *See* Declaration of Ronald A. Marron filed concurrently herewith ("Marron Decl."), ¶ 16. With a total lodestar of $382,348.50 (Marron Decl., ¶ 19) the requested fee of $409,771.11 results in a modest positive multiplier of 1.0763. Marron Decl., ¶ 22.

[2] Capitalized terms used herein are defined in the Settlement Agreement, which is attached as Exhibit 1 to the concurrently filed Marron Declaration.

attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section." Cal. Civ. Code § 1780(e) (emphasis added). "The legislative policy to allow prevailing plaintiffs reasonable attorneys' fees is clear. Section 1780 provides remedies for consumers who have been victims of unfair or deceptive business practices. The provision for recovery of attorney's fees allows consumers to pursue remedies in cases . . . where the compensatory damages are relatively modest." *Hayward v. Ventura Volvo* (2003) 108 Cal. App. 4th 509, 512 (internal citation omitted). This provision is "integral to making the CLRA an effective piece of consumer legislation, increasing the financial feasibility of bringing suits under the statute," *Broughton v. Cigna Healthplans* (1999) 21 Cal. 4th 1066, 1086, and must "be liberally construed and applied to promote [the statute's] underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." *See* Cal. Civ. Code § 1760; *accord Hayward*, 108 Cal. App. 4th at 512-13. A fee award to prevailing plaintiffs in a CLRA action is thus mandatory, even when resolved before trial. *See Kim v. Euromotors West/The Auto Gallery* (2007) 149 Cal. App. 4th 170, 178-79, 181.

Plaintiff is the prevailing party under the CLRA because the lawsuit achieved its main litigation objective: requiring S.C. Johnson to remove the allegedly misleading "non-toxic" claims from the Product packaging and its consumer facing Website. Marron Decl., Ex. 1 ¶ 4.5. Moreover, the Settlement provides restitution to the Settlement Class Members by way of the $1.3 million Settlement Fund. Marron Decl., Ex. 1 ¶ 2.33.. Indisputably, the Class is the "prevailing party." *See Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal. App. 4th 140, 153 ("It is settled that plaintiffs may be considered 'prevailing parties' for attorney's fees purposes [under the CLRA] if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." (quotation omitted; emphasis in original)); *Parkinson v. Hyundai Motor America* (C.D. Cal. 2010) 796 F.Supp.2d 1160, 1169 ("A plaintiff is the prevailing party if he or she obtained a 'net monetary recovery' or 'realized its litigation objectives,' including pursuant to a settlement agreement.") (citing *Kim,* 149 Cal.App.4th at 179).

B. Class Counsel Are Entitled to Attorneys' Fees Under the Common Fund Doctrine

Courts have long recognized the "common fund" doctrine, under which attorneys who create a common fund for a group of persons may be awarded their fees and costs to be paid out of the fund.

Laffitte, 1 Cal.5th at 488-89; *see also Serrano v. Priest* (1977) 20 Cal. 3d 25, 35. "[A] plaintiff or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees." *Vincent v. Brand* (9th Cir. 1977) 557 F.2d 759, 769. "This rule…is designed to prevent unjust enrichment by distributing the costs of litigation among those who benefit from the efforts of the litigants and their counsel." *In re Omnivision Tech., Inc.* (N.D. Cal. 2008) 559 F. Supp. 2d 1036, 1046 (citing *Paul, Johnson, Alston & Hunt v. Graulty* (9th Cir. 1989) 886 F.2d 268, 271); *see also Lofton v. Wells Fargo Home Mortg.* (2018) 27 Cal. App. 5th 1001, 1016. "Courts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method." *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254. The California Supreme Court, along with "the overwhelming majority of federal and state courts," has held "that when class action litigation establishes a monetary fund for the benefit of the 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." *Laffitte*, 1 Cal. 5th at 503.

Here, the Settlement provides for a non-reversionary Settlement Fund in the amount of $1.3 million in addition to valuable injunctive relief requiring S.C. Johnson to remove the disputed "non-toxic" claims from the Product packaging and its Website. Accordingly, Plaintiff seeks final approval of an award of fees and expense of $429,000, which amounts to one-third (33%) of the Settlement Fund. As discussed further below, Class Counsel's requested fees are reasonable and supported under either the percentage of recovery or lodestar method.

III. CLASS COUNSEL'S REQUESTED FEES ARE FAIR AND REASONABLE

There are two primary methods for calculating attorney fees in class actions: (1) the lodestar/multiplier method; and (2) the percentage of recovery method. *Wershba*, 91 Cal. App. 4th at 254. If class counsel creates a "common fund" or "common benefit," either in cash or other consideration that is easily monetized, then it is typical for the court to award class counsel fees based on a percentage of the common fund, i.e., the "percentage-of-the-fund" or "percentage" approach. *See Laffitte*, 1 Cal. 5th at 494 ("federal and state courts alike have increasingly returned to the percent-of-fund approach in common fund cases" (citation and alteration omitted)); *Priest*, 20 Cal. 3d at 35, 35 n.5. Here, a common

fund exists that is certain, allowing for a straightforward application of the percentage approach. The percentage method "means that the court simply awards the attorneys a percentage of the fund sufficient to provide class counsel with a reasonable fee." *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1029. In applying the percentage approach, California's state trial courts have awarded percentage fees of 30%-45%, with many common fund cases resulting in fee awards of 33 1/3%. *See Chavez*, 162 Cal. App. 4th at 66, n.11 ("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." (quotation omitted)).[3]

Thus, absent extraordinary circumstances that suggest lowering or increasing the percentage, a well-settled reasonable fee based on a common fund as regularly awarded by California state courts under the percentage method is 33.33%. Here, Class Counsel requests attorneys' fees and expenses in the total amount of 33% of the $1.3 million Settlement Fund.

The California Supreme Court has observed that, among other benefits, the percentage approach (i) aligns the interests of class counsel and the class in achieving favorable resolution of the case, (ii) encourages counsel to seek early settlement and to avoid unnecessarily prolonging the litigation, (iii) more accurately reflects the results achieved, and (iv) is consistent with the private market, where contingent fee attorneys are compensated on such a basis. *Laffitte*, 1 Cal. 5th at 503-04. Trial courts have discretion to conduct a lodestar cross-check or use other means to evaluate the reasonableness of the requested percentage fee. *Id.* at 506.

Under both the percentage-of-the-fund and the lodestar method, the amount of attorneys' fees is not limited to the number of hours actually billed. Rather, courts may consider several factors in determining the appropriate fee award, including:

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[3] *See In re Cal. Indirect Purchaser X-Ray Film Antitrust Litig.* (Alameda Sup. Ct. Oct. 22, 1998) No. 960886, 1998 WL 1031494, at *9 (citing *In re Milk Antitrust Litig.* (L.A. Sup. Ct. 1998) No. BC070061 (33⅓% award); *In re Facsimile Paper Antitrust Litig.* (San Francisco Sup. Ct. 1997) Nos. 963598, 964899, and 967137 (33⅓% fee award); *In re Liquid Carbon Dioxide Cases* (San Diego Sup. Ct. 1996) J.C.C.P. 3012 (33⅓% award); *In re California Indirect-Purchaser Plasticware Antitrust Litig.* (San Francisco Sup. Ct. 1995) Nos. 961814, 963201, and 963590 (33 ⅓% fee award) (Garcia, J.); *Abzug v. Kerkorian* (L.A. Sup. Ct., Nov. 1990) No. CA-000981 (45% fee of $35 million class action settlement); *Haitz v. Meyer, et al.* (Alameda Sup. Ct., Aug. 20, 1990) No. 572968-3 (45% fee award); *Steiner v. Whittacker Corp.* (L.A. Sup. Ct., March 13, 1989) No. CA 000817 (Reporter's Transcript) (awarding fee of 35% of a $17.75 million recovery in a securities class action)).

(1) the time and labor required of the attorneys;

(2) the contingent nature of the fee agreement, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award;

(3) the extent to which the nature of the litigation precluded other employment by the class counsel;

(4) the novelty or difficulty of the questions involved, and the skill displayed in presenting them;

(5) the experience, reputation, and ability of the attorneys who performed the services;

(6) the amount involved and the results obtained; and

(7) the informed consent of the clients to the fee agreement.

See, e.g., Priest, 20 Cal. 3d at 49; *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1810 n.21; *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 556. No rigid formula is available, and each factor should be considered only if appropriate. *See Dep't of Transp. v. Yuki* (1995) 31 Cal. App. 4th 1754, 1771.

As discussed above, the total Settlement Fund is $1.3 million. Class Counsel's fee request in the amount of 33% of the total Settlement Fund is reasonable under both the percentage of the fund and the lodestar approach.

A. The Claims Against S.C. Johnson Required Substantial Time and Labor

Prosecuting and settling these claims demanded considerable time and labor, making this fee request reasonable. Since its inception, Class Counsel have devoted 640.6 attorney and staff hours (including estimated additional hours) to resolve this case. Marron Decl., ¶¶ 19-22. Throughout this process, however, Class Counsel ensured that the work was coordinated to maximize efficiency and minimize duplication of effort. Marron Decl., ¶ 12. Moreover, Class Counsel negotiated a settlement only after devoting a substantial amount of time investigating the claims against S.C. Johnson. *Id*. Class Counsel also expended significant resources researching and developing the legal claims at issue. *Id*.

Settlement negotiations also consumed significant time and resources. Marron Decl., ¶ 13. Specifically, the Parties' mediation required substantial preparation facing experienced defense counsel and a seasoned mediator. *Id.* Substantial time and resources were also dedicated to conducting

confirmatory discovery and working with Plaintiff's damages expert. Marron Decl., ¶ 12. Finally, a significant amount of time was devoted to negotiating and drafting the Settlement Agreement and to the preliminary approval process, and to all actions required thereafter pursuant to the preliminary approval order. Marron Decl., ¶ 13. Class Counsel also worked with notice experts to develop and implement an adequate and far-reaching notice plan. *Id.* at ¶ 12. Each of the above-described efforts was essential to achieving the Settlement before the Court. *Id.* at 13. Thus, the time and resources devoted to this Action readily justify the requested fee.

B. The Issues Involved Required the Skill of Highly Talented Attorneys

This was not a simple case. The quality of Class Counsel's legal work conferred a substantial benefit on the Settlement Class in the face of significant litigation obstacles. S.C. Johnson contended that the class is not entitled to any damages because Plaintiff would be unable to determine the price premium associated with the "non-toxic" labeling claims. If Plaintiff had rejected the Settlement and continued to litigate this Action through trial and appeal, there would have been a significant risk that no monetary recovery would have been obtained. While acknowledging the strengths and weakness of the Parties' respective positions, the Settlement has reached a difficult but fair accord.

In any given case, the skill of legal counsel should be commensurate with the novelty and complexity of the issues, as well as the skill of the opposing counsel. Class Counsel has extensive experience handling complex consumer class actions. Marron Decl., ¶ 10 & Ex. 2 [Marron Firm Resume]. As noted above, Class Counsel has already devoted a substantial amount of time, plus costs, to litigating this Action, and are committed to overseeing the Settlement and this litigation through to its successful conclusion. Litigation of this Action required counsel trained in class action law and procedure as well as the acquisition and analysis of a significant amount of factual and legal information. Class Counsel possess these attributes, and their participation added value to the representation of this Settlement Class. The record demonstrates that the Action involved complex and novel challenges, which Class Counsel met at every juncture.

In evaluating the quality of representation by Class Counsel, the Court should also consider opposing counsel. Here, S.C. Johnson was represented by extremely capable counsel from Morrison & Foerster— a prestigious and well-respected national law firm— who defended this case vigorously.

Indeed, S.C. Johnson believed that it had meritorious substantive defenses to Plaintiff's claims but recognized that these endpoints are achievable only after considerable further expense.

Litigation of this magnitude has been and would continue to be very costly for both Parties and the outcome uncertain.[4] Defendant's arguments would pose a serious threat that total damages could be minimized or eliminated and litigation would involve substantial motion practice, numerous depositions, and costly additional expert involvement. "[A]voiding a trial and inevitable appeals in this complex . . . suit strongly weigh in support of approval of the Settlement, rather than prolonged and uncertain litigation." *Rodriguez v. West Publ'g Corp.* (C.D. Cal. Sept. 10, 2007) 2007 U.S. Dist. LEXIS 74767, at *27-28. The class claims in this Action are difficult and complex and this factor supports approval of the requested fee.

C. Class Counsel Achieved a Successful Result

As discussed in detail in the concurrently filed memorandum in support of final approval of the Settlement, the monetary relief obtained on behalf of the Settlement Class is reasonable given the risks of the litigation and favorable to the class. *See* Mem. in Supp. of Mot. for Final Approval, § V.C. Plaintiff's damages expert determined that the sales price of the Products did not increase significantly after the addition of the "non-toxic" claims and total sales increased at about the same rate as the number of households in the United States. *See* Declaration of Dr. Alan Goedde filed in Support of Plaintiff's Renewed Motion for Preliminary Approval filed on April 19, 2021 ("Goedde Decl."), ¶¶ 11, 15, 17, 23, 27. If Plaintiff prevailed in showing the sales increase of the Products is attributable to the "non-toxic" claim—a result far from assured—total damages in the Action would be approximately [redacted] (Defendant's increased sales revenue). *See id.*, ¶ 27. Thus, the $508,111.35 expected to be distributed to Settlement Class Members represents approximately [redacted]% of damages ***potentially*** available, a figure well within the range of reasonableness. *See* Mem. in Supp. of Mot. for Final Approval, § V.C (citing cases). Further, the injunctive relief agreed to by Defendant will result in the removal of the "non-toxic"

[4] As noted in Plaintiff's accompanying memorandum of points and authorities in support of final approval, a motion to dismiss was granted in a similar matter related to the "non-toxic" labeling of Windex Products with the court observing that "toxic" is susceptible of multiple definitions and interpretations by consumers, rejecting allegations that toxic ingredients are present in sufficient concentration to cause harm. *See Rivera v. S.C. Johnson & Son, Inc.*, (S.D.N.Y. Sept. 24, 2021), 2021 U.S. Dist. LEXIS 183759, at *11, 13.

marketing claims, a highly successful result that squarely addresses the alleged misconduct in this case. *See Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 946 ("The fact that counsel obtained injunctive relief in addition to monetary relief for their clients is . . . a relevant circumstance to consider in determining what percentage of the fund is reasonable as fees."). Given the significant litigation risks Class Counsel faced, the Settlement represents a successful result. Rather than facing additional years of costly and uncertain continuing litigation, the Settlement Class Members now will receive both monetary and injunctive relief.

D. The Claims Presented Serious Risk

The Settlement is particularly noteworthy given the combined litigation risks. As discussed, S.C. Johnson raised substantial and meritorious defenses such as failure to prove that there is a price premium associated with the "non-toxic" labels. Success under these circumstances represents a genuine milestone.

The $1.3 million Settlement Fund is substantial, given the complexity of the litigation and the significant risks and barriers that loomed in the absence of Settlement. Any of these risks could easily have impeded, if not altogether derailed, this Action if it were not for Plaintiff's and Class Counsel's successful prosecution of these claims. The recovery achieved by this Settlement must be measured against the fact that any recovery by Plaintiff and Settlement Class Members through continued litigation could only have been achieved if: (i) Plaintiff was able to certify a class and establish liability and damages at trial; and (ii) the final judgment was affirmed on appeal. The Settlement is an extremely fair and reasonable recovery for the Settlement Class in light of S.C. Johnson's defenses, and the challenging and unpredictable path of litigation that Plaintiff and the class would have faced absent the Settlement. Marron Decl., ¶ 14.

E. Class Counsel Assumed Considerable Risk to Pursue this Action on a Pure Contingency Basis

In undertaking to prosecute this case on a contingent fee basis, Class Counsel assumed a significant risk of nonpayment or underpayment. Marron Decl., ¶ 18. That risk warrants an appropriate fee. Devoting more than a year in time and costs to this action necessarily limited Class Counsel's ability to take on other employment. *Serrano*, 20 Cal. 3d at 49 (finding that one of the factors that weighs in

favor of granting a request for attorneys' fees is the "the extent to which the nature of the litigation precluded other employment by the attorneys"). And, there was significant risk that Class Counsel, despite committing these resources, would not have received any compensation for their services. Class Counsel's ability to collect compensation was entirely contingent upon prevailing. The substantial risk of non-recovery inherent in class action litigation is well-documented.

When attorneys undertake litigation on a contingent basis, a fee that is limited to the hourly fee that would have been paid by a fee-paying client, win or lose, is not a reasonable fee by market standards.

> A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher 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.

Ketchum v. Moses (2001) 24 Cal.4th 1122, 1132 (quoting the Hon. Richard Posner's Economic Analysis of Law (4th ed. 1992)); *see also Greene v. Dillingham Constr. NA., Inc.* (2002) 101 Cal. App. 4th 418, 428-29 ("[T]he Supreme Court has reaffirmed that contingent risk is a valid consideration in determining whether to apply a fee enhancement in cases where attorney fees are authorized by statute . . . ."); *Rader v. Thrasher* (1962) 57 Cal. 2d 244, 253 ("a contingent fee contract, since it involves a gamble on the result, may properly provide for a larger compensation than would otherwise be reasonable" (quotation and alteration omitted)).

Class Counsel litigated this matter on a contingent basis and placed their own resources at risk to do so. Marron Decl., ¶ 18. Additionally, public policy concerns – in particular, ensuring the continued availability of experienced and capable counsel to represent classes of injured plaintiffs holding small individual claims – support the requested fee. The progress of the Action to date shows the inherent risk faced by Class Counsel in accepting and prosecuting the Action on a contingency fee basis. Despite Class Counsel's effort in litigating this Action, Class Counsel remains completely uncompensated for the time invested in the Action, in addition to the substantial expenses that were advanced. Marron Decl., ¶ 18. There can be no dispute that this case entailed substantial risk of nonpayment for Class Counsel.

IV. CLASS COUNSEL'S RATES AND HOURS EXPENDED ARE FAIR AND REASONABLE

Class Counsel's lodestar of $382,348.50 (including estimated additional hours) is summarized in the concurrently filed Marron Declaration. *See* Marron Decl., ¶ 19. This lodestar is based on 640.6 total hours of work (542.7 attorney hours and 17.9 paralegal hours). *Id.* Class Counsel also estimates spending at least 80 hours on post-application work at a blended rate to, among other tasks: finalizing and filing the final approval papers; preparing for and appearing at the hearing on the final approval motion; working with the Settlement Administrator and monitoring the distribution of funds to the class members, responding to Class Member inquired; responding to any potential objector(s); and anticipated appellate work, if necessary. *Id*. Class Counsel's lodestar is supported by fair and reasonable rates, approved by other Courts. *Id*. at ¶¶ 26-29 & Exs. 3-4.

A. Class Counsel's Rates Are Reasonable and Have Been Approved by Numerous Courts

Courts look to prevailing market rates in the community in which the court sits. *Schwarz v. Sec'y of Health & Human Servs.* (9th Cir. 1995) 73 F.3d 895, 906; *see also Camancho v. Bridgeport Fin., Inc.* (9th Cir. 2008) 523 F.3d 973, 979; Manual for Complex Litig., Fourth, § 14.122 ("The rate should reflect what the attorney would normally command in the relevant marketplace."). Class Counsel's rates are reasonable because they are in line with hourly rates charged by attorneys of comparable experience, reputation, and ability for similar complex consumer protection class action litigation. *See Ketchum*, 24 Cal. 4th at 1133; *see also Blum v. Stenson* (1984) 465 U.S. 886, 895 (to assist the court in calculating the lodestar, Plaintiffs must submit "satisfactory evidence . . . that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonable comparable skill, experience and reputation."). Moreover, calculating the lodestar using Class Counsel's current billing rates is appropriate given the deferred nature of counsel's compensation. *See Fischel v.Equitable Life Assur. Soc'y of the United States* (9th Cir. 2002) 307 F.3d 997, 1010 (attorneys must be compensated for delay in payment); *In re Washington Pub. Power Supply Sys. Sec. Litig.* (9th Cir. 1994) 19 F.3d 1291, 1305 (explaining the court may compensate for a delayed payment "by applying the attorneys' current rates to all hours billed during the course of the litigation.").

Here, Class Counsel attaches as Exhibit 2 to the Marron Declaration the firm's current resume detailing Class Counsel's experience in prosecuting class actions. Marron Decl., ¶ 10 & Ex. 2. Additionally, Class Counsel's requested rates and hours are listed in the lodestar chart showing work by timekeeper. *See* Marron Decl., ¶ 19.[5] These rates have been approved by numerous state and federal courts and are in line with the prevailing market rates for attorneys of similar experience, skill, and reputation. *See* Marron Decl., ¶¶ 26-29 & Exs. 3-4. Class Counsel's requested rates (and lodestar) are as follows:

Timekeeper	Position	Rate Requested	Hours Expended	Total
Ronald A. Marron	Partner	$815	149.2	$121,598
Michael Houchin	Senior Associate	$550	371.8	$204,490
Lilach Halperin	Associate	$490	21.7	$10,633
Tiana Castro	Paralegal	$225	17.9	$4,027.50
Estimated Post-Application Work		Blended Rate of $520	80	$41,600
		TOTALS	**640.6**	**$382,348.50**

B. Class Counsel's Hours Expended Are Reasonable

Class Counsel is entitled to be compensated for reasonable time spent at all points in the litigation. Courts should avoid engaging in an "*ex post facto* determination of whether attorney hours were necessary to the relief obtained." *Grant v. Martinez* (2d Cir. 1992) 973 F.2d 96, 99. The issue "is not whether hindsight vindicates an attorney's time expenditures, but whether at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." *Id.*

Here, Class Counsel expended a total of 542.7 attorney hours and 17.9 paralegal hours to date. *See* Marron Decl., ¶ 19. This includes, among other tasks, time billed for investigating the claims and drafting pleadings; confirmatory discovery; expert work; researching, drafting, and editing a mediation

[5] Counsel need only submit summaries of their hours incurred; submission of billing records are not required. *See Lobatz v. U.S. W. Cellular of Cal., Inc*. (9th Cir. 2000) 222 F.3d 1142, 1148-49 (the court may rely on summaries of the total number of hours spent by counsel); *In re Quantum Health Resources, Inc.* (C.D. Cal. 1997) 962 F. Supp. 1254, 1256-57 ("the lodestar method needlessly increases judicial workload, creates disincentive for early settlement, and causes unpredictable results"); *Wershba*, 91 Cal. App. at 255 (counsel's declarations sufficient to evidence "the reasonable hourly rate for their services and establishing the number of hours spent working on the case … California law permits fee awards in the absence of detailed time sheets"); *Dunk*, 48 Cal. App. 4th at 1810 ("lodestar calculation could be based on a counsel's estimate of time spent"). At the Court's request, Class Counsel can submit itemized time sheets for *in camera* inspection.

brief; extensive negotiations and settlement discussions; attending a mediation; drafting class notices and communications with the notice provider; drafting and editing the settlement agreement; drafting the motion for preliminary approval and its supporting documents; drafting the motion for final approval and its supporting documents; and communications and meetings among the parties and counsel. Marron Decl., ¶ 20.

C. Class Counsel Is Requesting a Modest Multiplier of 1.0763

Class Counsel asks for a nominal multiplier of 1.0763. Marron Decl., ¶ 22. In determining an appropriate multiplier, courts consider "a host of 'reasonableness' factors, 'including quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment.'" *In re Bluetooth Headset Products Liability Litigation* (9th Cir. 2011) 654 F.3d 935, 942 (quoting *Hanlon*, 150 F.3d at 1029). The purpose of using the lodestar/multiplier method is to mirror the legal marketplace: counsel will not handle cases on straight hourly fees that are payable only if they win, so an enhancement helps determine a fee that is commensurate with what attorneys could expect to be compensated for similar services under these circumstances. *See San Bernardino Valley Audubon Soc'y v. San Bernardino* (1984) 155 Cal. App. 3d 738, 755 (award must be large enough "to entice competent counsel to undertake difficult public interest cases"); *Lealao v. Beneficial California, Inc.* (2000) 82 Cal. App. 4th 19, 50 (adjusted lodestar should not be significantly different from the percentage fee freely negotiated in comparable litigation).

"Multipliers can range from 2 to 4, or even higher." *Wershba*, 91 Cal. App. 4th at 255. The court in *Glendora Community Redevelopment Agency v. Demeter* (1984) 155 Cal. App. 3d 465, 479 approved a multiplier of 12. *See also Natural Gas Anti-Trust Cases, I, II, III & IV* (Cal. Super. Ct. Dec. 11, 2006) 2006 WL 5377849, at *4 ("This Court and numerous cases have applied multipliers of between 4 and 12 to counsel's lodestar in awarding fees.").

Here, Class Counsel requests a total fee award of $411,529.12, which represents the lodestar of $382,348.50 plus a nominal multiplier of 1.0763. Marron Decl., ¶ 22. This is justified in light of the factors at issue, and within the range of those approved in other cases. *See* Marron Decl., ¶¶ 26-29. In light of the meaningful injunctive relief and monetary results obtained, the efficiency with which the case was litigated, the experience and reputation of counsel, the risks associated with litigating this

action, the complexity and novelty of the issues presented, the substantial benefit to the class achieved, and the work still to be performed on settlement administration and anticipated potential appeals, the Court should find that Class Counsel's request for a 1.0763 multiplier is fair and reasonable.[6]

V. THE REQUESTED COSTS ARE FAIR AND REASONABLE

California law allows recovery of pre-settlement litigation costs in the context of a class action settlement fund. *See Serrano*, 20 Cal. 3d at 35. The recovery of costs is consistent with the common fund doctrine, which provides that when a settlement or adjudication results in the establishment of a common fund for the benefit of a class, the class, as a matter of equity, should bear the costs that made the recovery possible. *Id.*; *Lealao*, 82 Cal.App.4th at 27. Under California Code of Civil Procedure §§ 1033.5 (a)(1), (3), (4), and (7), the Court must award costs for court fees; deposition costs for transcribing, recording and travel; service of process fees; and witness fees. In addition, § 1033.5(c) provides discretion to award reimbursement of other costs if they are "reasonably necessary to the conduct of the litigation, rather than merely convenient or beneficial to its preparation." *See also Parkinson,* 796 F. Supp. 2d at 1176 (quoting *Sci. App. Int'l Corp. v. Super. Ct.* (1995) 39 Cal. App. 4th 1095, 1103); *Morris v. Affinity Health Plan, Inc.* (S.D.N.Y. 2012) 859 F. Supp. 2d 611, 624 (noting that courts universally accept that "telephone charges, postage, transportation, working meals, photocopies, and electronic research, are reasonable and were incidental and necessary to the representation of the Class").

Here, out-of-pocket expenses for the litigation that the undersigned Class Counsel actually incurred is $17,470.88. Marron Decl., ¶ 21. All of these expenses are either statutorily allowed, or reasonable and necessary for the successful prosecution of this case. Accordingly, the Court should grant Class Counsel's request for reimbursement of their costs in the amount of $17,470.88. *See* Cal. Civ. Proc. Code § 1033.5.

VI. THE REQUESTED INCENTIVE AWARD IS FAIR AND REASONABLE

Finally, Plaintiff respectfully requests an incentive award for his efforts in prosecuting this Action. Incentive awards "are fairly typical in class action cases," *Rodriguez v. West Publishing Corp.*

[6] Moreover, the multiplier is also reasonable because it will further diminish over time as Class Counsel conservatively estimated the additional hours required to finalize and administer the Settlement going forward.

(9th Cir. 2009) 563 F.3d 948, 958, and "serve an important function in promoting class action settlements." *Sheppard v. Consol. Edison Co. of N.Y., Inc.* (E.D.N.Y. Aug. 1, 2002) 2002 WL 2003206, at *5. Incentive awards for class representatives are routinely provided to encourage individuals to undertake the responsibilities of representing the class and recognize the time and effort spent in the case. *See In re Lorazapam & Clorazepate Antitrust Litig.* (D. D.C. Feb. 1, 2002) 205 F.R.D. 369, 369.

Such awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez*, 563 F.3d at 958-959. Incentive awards are committed to the sound discretion of the trial court and should be awarded based upon the court's consideration of: (1) the actions the class representatives took to protect the interests of the class; (2) the degree to which the class benefited from those actions; and (3) the amount of time and effort the class representatives expended in pursuing the litigation. *See, e.g.*, *Cook v. Niedert* (7th Cir. 1998) 142 F.3d 1004, 1016. These factors, as applied to this Action, demonstrate the reasonableness of the requested Service Award to Plaintiff Clark.

Plaintiff provided substantial assistance that enabled Class Counsel to successfully prosecute this Action including reviewing material filings; approving the Settlement Agreement; continuous communications with Class Counsel throughout the litigation; being on standby during mediation; and being committed to secure substantive relief on behalf of the Class. Marron Decl., ¶ 30. Plaintiff Clark was also prepared to be available for trial, if necessary. In so doing, Plaintiff was integral to forming the theory of the case, and litigating it through settlement. *Id*.

The Court should find that a $2,500 incentive award to Plaintiff Clark is reasonable and in line or comparable to those approved by other courts in California. *See Cellphone Termination Fee Cases* (June 28, 2010) 186 Cal. App. 4th 1380 ($10,000 incentive award to each class representative); *Bellinghausen v. Tractor Supply Company* (N.D. Cal. 2015) 306 F.R.D. 245, 267 (awarding a $10,000 incentive award to the named plaintiff); *Edwards v. First American Corp.* (C.D. Cal. Oct. 4, 2016) 2016 WL 8999934 (awarding a $10,000 incentive award); *Carter v. XPO Logistics, Inc.* (N.D. Cal. Oct. 18, 2019) 2019 WL 5295125, at *4 (awarding $20,000 incentive awards to each named plaintiff); *Deatrick v. Securitas Security Services USA, Inc.* (N.D. Cal. Sept. 27, 2016) 2016 WL 5394016 (finding district

courts in this circuit have recognized a $5,000 award to be "presumptively reasonable."); *Wren v. RGIS Inventory Specialists* (N.D. Cal. Apr. 1, 2011) 2011 WL 1230826, at *36 ("there is ample case law finding $5,000 to be a reasonable amount for an incentive payment.").

VII. CONCLUSION

For the foregoing reasons, Class Counsel respectfully requests that the Court award (1.) $411,529.12 in attorneys' fees; (2.) $17,470.88 in attorneys' costs; and (3.) $2,500 to Plaintiff Howard Clark as an incentive award for his efforts in this action.

Dated: November 8, 2021

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By: 

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