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Class Counsel

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CURTIS HANSON, on behalf of himself, all others similarly situated, and the general public,

Plaintiff,

v.

WELCH FOODS INC.,

Defendant.

Case No. 3:20-cv-02011-JCS

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARD

Date: April 15, 2022, 9:30 a.m.
Judge: Hon. Joseph C. Spero
Location: Courtroom F – 15th Floor

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NOTICE OF MOTION

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD: PLEASE TAKE NOTICE THAT, on April 15, 2022, at 9:30 a.m. or as soon thereafter as may be heard, Plaintiff will move the Court, the Honorable Joseph C. Spero presiding, for an Order awarding attorneys' fees and costs and a Class Representative service award. This Motion is based on this Notice of Motion; the below Memorandum; the concurrently-filed declaration of Jack Fitzgerald ("Fitzgerald Decl.") and all exhibits thereto; all prior pleadings and proceedings, including the operative December 3, 2021 Settlement Agreement (Dkt. No. 59-1, "SA"), Plaintiff's Motion for Preliminary Approval of Class Settlement (Dkt. No. 49, "PA Mot."), the Declaration of Jack Fitzgerald in Support of Plaintiff's Motion for Preliminary Approval (Dkt. No. 50, "PA Fitzgerald Decl."), and the Supplemental Declaration of Jack Fitzgerald in Support of Plaintiff's Motion for Preliminary Approval (Dkt. No. 59), as well as all related exhibits; the Court's December 13, 2021 Order Granting Preliminary Approval (Dkt. No. 60); and any additional evidence and argument submitted in support of the Motion.

ISSUES TO BE DECIDED

Whether and in what amounts to award attorneys' fees and costs and a Class Representative service award, pursuant to a proposed nationwide class Settlement that the Court preliminarily approved on December 13, 2021.

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

The Settlement Agreement's $1.5 million non-reversionary common fund is an excellent result compared to other settlements in similar cases challenging health and wellness claims on high-sugar foods. *See* PA Fitzgerald Decl. ¶ 13; *see also* PA Mot. at 19. Class Counsel also secured meaningful injunctive relief for the Class. Therefore, Class Counsel's request for fees in the amount of the "benchmark" 25% of the common fund, or $375,000, should be granted. The Court should also grant Class Counsel's request for recoverable costs in the amount of $24,196 and approve a service award of $5,000 for Class Representative, Curtis Hanson, which is reasonable in light of his contributions to the case, and in relation to the size of the Settlement.

II. ARGUMENT

A. THE COURT SHOULD GRANT CLASS COUNSEL'S REQUEST FOR FEES

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Here, Plaintiff is authorized to seek fees by agreement, *see* SA ¶ 7, and by law, *see* Cal. Civ. Code § 1780(e) ("The court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section.").[1]

"Where a settlement produces a common fund for the benefit of the entire class, courts have discretion to employ either the lodestar method or the percentage-of-recovery method," so long as "their discretion [is] exercised so as to achieve a reasonable result." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) ["*Bluetooth*"] (citations omitted). Class Counsel requests that the Court apply the percent-of-fund method and award attorneys' fees of $375,000, or 25% of the $1.5 million common fund. That amount is also justified under a lodestar-multiplier crosscheck analysis, as it represents a 1.88 multiplier to Class Counsel's $199,534 reasonably expended lodestar. Fitzgerald Decl. ¶ 9.

i. Class Counsel's Fee Request is Reasonable Under the Percent-of-Fund Method

"The use of the percentage-of-the-fund method in common fund cases is the prevailing practice in the Ninth Circuit for awarding attorneys' fees and permits the Court to focus on showing that a fund conferring benefits on a class was created through the efforts of plaintiffs' counsel." *In re Apple Inc. Device Performance Litig.*, 2021 WL 1022866, at *2 (N.D. Cal. Mar. 17, 2021) (alteration and quotation omitted). The method "confers 'significant benefits . . . including consistency with contingency fee calculations in the private market, aligning the lawyers' interest with achieving the highest award for the class members, and reducing the burden on the courts that a complex lodestar calculation requires.'" *Id.* (quoting *Tait v. BSH Home Appliances Corp.*, 2015 WL 4537463, at *11 (C.D. Cal. July 27, 2015)). By contrast, "[i]n a common fund case, a lodestar method does not necessarily achieve the stated purposes of proportionality, predictability and protection of the class." *Bolton v. U.S. Nursing Corp.*, 2013 WL

[1] This fee-shifting provision of the CLRA is mandatory, and a class action settlement renders the plaintiff a prevailing party because there is a "net monetary recovery." *See, e.g., Kim v. Euromotors West/The Auto Gallery*, 149 Cal. App. 4th 170, 181 (2007).

5700403, at *5 (N.D. Cal. Oct. 18, 2013) (citation omitted).

"The Ninth Circuit has explained that, when calculating attorneys' fees as a percentage of a common settlement fund, 25% of the fund is the presumptively reasonable 'benchmark.'" *Viceral v. Mistras Grp., Inc.*, 2017 WL 661352, at *3 (N.D. Cal. Feb. 17, 2017) (citing *Bluetooth*, 654 F.3d at 942). This "benchmark need only be adjusted 'when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors.'" *Cortez v. United Nat. Foods, Inc.*, 2019 WL 955001, at *7 (N.D. Cal. Feb. 27, 2019) (quoting *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)). Downward departures are generally warranted only "where there is no 'realistic risk of nonrecovery.'" *See Johnson v. Quantum Learning Network, Inc.*, 2017 WL 747462, at *4 (N.D. Cal. Feb. 27, 2017) (quoting *In re Quantum Health Res.*, 962 F. Supp. 1254, 1257-58 (C.D. Cal. 1997)).

When deciding if a departure from the 25% benchmark is appropriate, courts may consider "(1) the result achieved; (2) the risk involved in the litigation; (3) the skill required and quality of work by counsel; (4) the contingent nature of the fee; and (5) awards made in similar cases." *In re Lidoderm Antitrust Litig.*, 2018 WL 4620695, at *3 (N.D. Cal. Sept. 20, 2018) (quotation omitted); *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-48 (9th Cir. 2002). Here there are no factors "counseling against the application of the 25% benchmark, nor does the record . . . reflect that a departure from this benchmark is warranted," *see Cortez*, 2019 WL 955001, at *7. "On the contrary, an application of the factors noted above demonstrates that the award is eminently reasonable." *See West v. Circle K Stores, Inc.*, 2006 WL 8458679, at *6 (E.D. Cal. Oct. 20, 2006).

a. The Result Achieved

"With respect to the first factor, the overall result and benefit to the class from the litigation is the most critical factor in granting a fee award." *Larsen v. Trader Joe's Co.*, 2014 WL 3404531, at *9 (N.D. Cal. July 11, 2014) (citing *In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008)). And "[t]he 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." *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1055-56 (9th Cir. 2019) (alteration and emphasis in original omitted) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 946 (9th Cir. 2003)).

Considering its monetary and injunctive relief, the Settlement here is an excellent result achieved by Class Counsel for the Class, supporting its requested fee. *See Larsen*, 2014 WL 3404531, at *9 (factor favored final approval where "[c]lass members who ha[d] made claims w[ould] receive cash" and "[t]he Settlement Agreement also provide[d] the equitable relief that [defendant] will stop using the disputed labels," both of which the court found to be "significant benefits to the class").

First, the Settlement's monetary relief is entirely in the form of an all-cash, non-reversionary common fund, which is the gold standard for class action settlements because it provides the most transparent and concrete value to class members while minimizing the chances and impact of collusion. *See Rodriguez v. W. Pub'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) ("cash . . . is a good indicator of a beneficial settlement"); *cf. In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liab. Litig.*, 895 F.3d 597, 611 (9th Cir. 2018) ("A reversion can benefit both defendants and class counsel, and thus raise the specter of their collusion . . . ."). Also, the amount of the relief is substantial in relation to estimated damages, representing a recovery of between 134.9% and 238.1% of the putative California Class's damages, and between 16.2% and 28.6% of theoretical damages for a nationwide class. *See* PA Fitzgerald Decl. ¶ 12. These amounts are greater in proportion than several other settlements of related actions regarding sugary foods. *See id.* ¶ 13.

Second, the Settlement's injunctive relief is significant, requiring Welch to abandon its "heart healthy" advertising for at least two years. *See* SA ¶ 6. This was no small concession from Welch, which spent many years and significant money developing scientific support for the claim. But by reducing or eliminating the suggestion that Welch's 100% Grape Juices are heart healthy, this injunctive relief "provides substantial *health* benefits to all purchasers of Defendant's [products] in light of the evidence offered by Plaintiff[s] about the health effects of [added sugar]." *See Guttmann v. Ole Mexican Foods, Inc.*, 2016 WL 9107426, at *3 (N.D. Cal. Aug. 1, 2016) (emphasis added) (record citation omitted). Indeed, the Honorable Lucy H. Koh recently held that similar relief Class Counsel obtained—requiring Kellogg to, *inter alia*, remove or modify "heart healthy" claims on certain cereals—"provides health benefits to all purchasers of Defendant's products." *Hadley v. Kellogg Sales Co.*, 2021 WL 5706967, at *2 (N.D. Cal. Nov. 23, 2021); *see also Bruno v. Quten Research Inst., LLC*, 2013 WL 990495, at *4 (C.D. Cal. Mar. 13, 2013) ("[T]here is a high value to the injunctive relief obtained" where "[n]ew labeling

practices affecting hundreds of thousands of [units] per year . . . bring a benefit to class consumers, the marketplace, and competitors who do not mislabel their products."); *Good Morning to You Prods. Corp. v. Warner/Chappell Music, Inc.*, 2016 WL 6156076, at *4 (C.D. Cal. Aug. 16, 2016) (factor "weigh[ed] heavily in favor of an upward departure from the benchmark" where "the settlement has substantial monetary and nonmonetary components").

Third, the Settlement offers benefits to those who would not otherwise see them because the Settlement Class is comprised of purchasers nationwide, rather than in California only. While it is possible that, absent settlement, some Settlement Class Members could eventually see relief if additional lawsuits were brought in other states, other Settlement Class Members would be left without remedies, since some states preclude class actions and others require individual proof of reliance for consumer fraud claims, making them impossible to adjudicate on a class basis. That "Class Counsel successfully negotiated direct payments for a class of individuals that in all likelihood may have never received any compensation or redress for the conduct complainted [sic] of" further weighs in favor of granting Class Counsel's fee request here. *See Burnthorne-Martinez v. Sephora USA, Inc.*, 2018 WL 5310833, at *3 (N.D. Cal. May 16, 2018).

b. The Contingent Nature of the Representation and Risk Involved in the Litigation

Class Counsel here "assume[d] substantial risk in litigating this action on a contingency fee basis, and incurr[ed] costs without the guarantee of payment for its litigation efforts." *See Schneider v. Chipotle Mexican Grill, Inc.*, 2020 WL 511953, at *9 (N.D. Cal. Jan. 31, 2020); *see also* Fitzgerald Decl. ¶¶ 2, 11. "[W]hen 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." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 261 (N.D. Cal. 2015) (citing *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994)). "[C]ourts tend to find above-market-value fee awards more appropriate in this context given the need to encourage counsel to take on contingency-fee cases for plaintiffs who otherwise could not afford to pay hourly fees." *Id.* (citation omitted).

Besides the inherent risk in all contingency fee litigation, "food labeling claims are difficult to maintain" where plaintiffs "would need to prove that Defendant's labels . . . were misleading entirely by

virtue of the product containing" an allegedly harmful nutrient]. *See Guttmann*, 2016 WL 9107426, at *3. Evincing the difficulty in establishing liability on these claims, there are numerous examples of California courts in and outside this district initially certifying food labeling cases, then later decertifying or granting defendants summary judgment. *See, e.g.*, *Allen v. ConAgra Foods, Inc.*, 2020 WL 4673914 (N.D. Cal. Aug. 12, 2020) (granting defendant's motion for summary judgment after having previously decertified several state subclasses); *Ries v. Ariz. Beverages USA LLC*, 2013 WL 1287416 (N.D. Cal. Mar. 28, 2013) (granting defendant's motion for summary judgment and decertifying class); *Brazil v. Dole Packaged Foods, LLC*, 2014 WL 5794873 (N.D. Cal. Nov. 6, 2014) (decertifying damages class); *Werdebaugh v. Blue Diamond Growers*, 2014 WL 7148923 (N.D. Cal. Dec. 15, 2014) (same); *Morales v. Kraft Foods Group, Inc.*, 2017 WL 2598556 (C.D. Cal. June 9, 2017) (decertifying class and granting defendant partial summary judgment); *Zakaria v. Gerber Prods. Co.*, 2017 WL 9512587 (C.D. Cal. Aug. 9, 2017) (decertifying class and granting defendant summary judgment), *aff'd* 755 F. App'x 623 (9th Cir. 2018).

There are also numerous recent examples of consumer fraud trials ending in defense verdicts. *See, e.g.*, *Allen v. Hyland's, Inc.*, 2021 WL 718295 (C.D. Cal. Feb. 23, 2021) (finding in favor of defendant following jury and bench trial on claims that homeopathic remedies were falsely advertised as effective); *Morizur v. SeaWorld Parks & Entm't, Inc.*, 2020 WL 6044043 (N.D. Cal. Oct. 13, 2020) (defense verdict after bench trial on false advertising claims concerning treatment of orcas by SeaWorld); *cf. Racies v. Quincy Bioscience, LLC*, 2020 WL 2113852 (N.D. Cal. May 4, 2020) (decertifying after trial a false advertising class action alleging misleading advertising of memory supplement and noting "the Court found Plaintiff's case at trial underwhelming").

That the case theory was risky is manifest. Two courts in this district have held that similar actions brought were implausible as a matter of law. *See Clark v. Perfect Bar, LLC*, 2018 WL 7048788 (N.D. Cal. Dec. 21, 2018), *aff'd on other grounds*, 816 F. App'x 141 (9th Cir. 2020); *Truxel v. Gen. Mills Sales, Inc.*, 2019 WL 3940956 (N.D. Cal. Aug. 13, 2019); *see also* PA Fitzgerald Decl. ¶ 15.

c. The Skill Required and Quality of Class Counsel's Work

Class Counsel needed to be skilled to prosecute this case successfully, in part because the subject matter was highly technical, requiring counsel's understanding of scientific evidence. Class Counsel also needed to be skilled because Welch "is well-financed and had facially valid defenses," *see In re Ferrero*

Litig., 583 F. App'x 665, 668-69 (9th Cir. 2014). Given these considerations, the Court should find this factor supports Class Counsel's fee request. *See Lusby v. GameStop Inc.*, 2015 WL 1501095, at *4 (N.D. Cal. Mar. 31, 2015) (factor favored approval where Class Counsel had "litigated a large number of [similar] class actions," "achiev[ed] class certification in many different scenarios," and "developed an extensive factual record to obtain the evidence needed to convince Defendant of the risks of continued litigation," and its "history of successful prosecution of similar cases made credible its commitment to pursue this action through trial and beyond"); *cf. Quiruz v. Specialty Commodities, Inc.*, 2020 WL 6562334, at *11 (N.D. Cal. Nov. 9, 2020) (multiplier warranted in part because counsel "litigated the case in a highly professional manner").

d. Awards in Similar Cases

Two courts in this district recently awarded attorneys' fees in the amount of 30% of the settlement fund in similar cases Class Counsel prosecuted challenging health claims on sugary foods. *Krommenhock v. Post Foods, LLC*, 2021 WL 2910205, at *2 (N.D. Cal. June 25, 2021); *Hadley*, 2021 WL 5706967, at *2 (awarding $3,900,000 in attorneys' fees from $13,000,000 settlement fund). These awards underscore the reasonableness of Class Counsel's request here, "especially . . . given that the percentage sought is at the presumptively reasonable benchmark amount in this Circuit," *see Bellinghausen*, 306 F.R.D. at 265; *see also Acosta v. Frito-Lay, Inc.*, 2018 WL 2088278, at *14 (N.D. Cal. May 4, 2018) (same); *Ott v. Mortg. Invs. Corp. of Ohio, Inc.*, 2016 WL 54678, at *6 (D. Or. Jan. 5, 2016) ("Given that 25% of the Settlement Fund is at the presumptively reasonable 'benchmark' in the Ninth Circuit, the amount of attorney fees requested by Class Counsel is not unreasonable.").

ii. A Lodestar Crosscheck Shows Class Counsel's Fee Request is Reasonable

Where a district court may determine fees based on a percent-of-fund method, the Ninth Circuit "has consistently refused to adopt a [lodestar] crosscheck requirement," *Farrell v. Bank of Am. Corp., N.A.*, 827 F. App'x 628, 630 (9th Cir. 2020) (collecting cases). Nevertheless, "[c]ourts in the Ninth Circuit sometimes examine the lodestar calculation as a crosscheck on the percentage fee award to ensure the reasonableness of the percentage award." *Perez v. Rash Curtis & Assocs.*, 2020 WL 1904533, at *18 (N.D. Cal. Apr. 17, 2020) (citing *Vizcaino*, 290 F.3d at 1050). "Where a lodestar is merely being used as a cross-check, the court 'may use a rough calculation of the lodestar.'" *Deluca v. Farmers Ins. Exch.*, 2020

WL 5071700, at *7 (N.D. Cal. Aug. 24, 2020) (quoting *Aguilar v. Wawona Frozen Foods*, 2017 WL 2214936, at *5 (E.D. Cal. May 19, 2017)).

"The lodestar figure is calculated by multiplying the number of hours reasonably spent by a reasonable hourly rate," after which "[c]ourts may 'adjust [the lodestar figure] upward or downward by an appropriate positive or negative multiplier reflecting a host of reasonableness factors." *Lidoderm*, 2018 WL 4620695, at *2 (quoting *Bluetooth*, 654 F.3d at 941-42 (citation omitted)). These factors "largely mirror the considerations" discussed above with respect to the percent-of-fund method, *see id.*, at *3, and include "the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues present, and the risk of nonpayment," *id.*, at *2 (quoting *Bluetooth*, 654 F.3d at 942). Based on these factors, a "lodestar multiplier is typically applied" and "[those] 'in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation.'" *Milburn v. PetSmart, Inc.*, 2019 WL 5566313, at *8 (E.D. Cal. Oct. 29, 2019) (quoting *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995)).

Here, Class Counsel's lodestar figure is $199,534, *see* Fitzgerald Decl. ¶ 9, such that Class Counsel's request for $375,000 in fees represents a 1.88 multiplier. That multiplier is reasonable under the circumstances of this case and considering the applicable factors.

a. Class Counsel's Hours are Reasonable

From the filing of the Complaint on March 23, 2020 through January 30, 2022—678 days in total, or about 22 ½ months—Class Counsel has expended 329.2 hours litigating this action, or about 177.2 hours per year, or approximately 14.8 hours per month. *Id.* This time was primarily spent investigating the case and drafting the Complaint, and engaging in fact discovery, law and motion practice, and settlement negotiations. *See Id.* ¶ 3. The Court should therefore conclude that the hours recorded by Class Counsel were reasonable and necessary to the litigation of the case, particularly in light of the result obtained for the class. *See Dashnaw v. New Balance Athletics, Inc.*, 2019 WL 3413444, at *1, *9 (S.D. Cal. July 29, 2019) (finding two plaintiffs' firms reasonably billed 359 hours and 653 hours respectively in false advertising class action that settled in private mediation "[a]fter an investigation, formal discovery, and motion briefing"); *Rosado v. Ebay Inc.*, 2016 WL 3401987, at *8 (N.D. Cal. June 21, 2016) (finding 947 hours reasonable in false advertising class action "since they include[d] the time spent on investigating the

claims, interviewing class members, drafting complaints, opposing two motions to dismiss, participating in mediation, and negotiating a complex Settlement Agreement" (record citation omitted)).

b. Class Counsel's Rates are Reasonable

"The second part of the lodestar calculation is multiplying the hours spent by a 'reasonable hourly rate for the region and the experience of the lawyer.'" *Lidoderm*, 2018 WL 4620695, at *2 (quoting *Bluetooth*, 654 F.3d at 941). "A reasonable hourly rate is one that is 'in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *James v. AT&T W. Disability Benefits Program*, 2014 WL 7272983, at *2 (N.D. Cal. Dec. 22, 2014) (quoting *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984)). Here, Class Counsel's rates are as follows:

Timekeeper	Position	Rate
Jack Fitzgerald	Partner	$825
Melanie Persinger	Partner	$625
Trevor Flynn	Senior Associate	$625
Julie Hinton	Paralegal	$205

These rates are the same as those approved by the Honorable William H. Orrick in *Krommenhock*, and Judge Koh in *Hadley*, except that the applications in those cases were based on Ms. Persinger's $600 Associate rate, since most of her work in those cases occurred before her May 2021 promotion to Partner (as reflected in her current $625 rate). *See Krommenhock*, 2021 WL 2910205, at *2; *Hadley*, 2021 WL 5706967, at *2; Fitzgerald Decl. ¶ 4 & Exs. 2-3. Moreover, these rates are consistent with rates approved for Class Counsel by courts outside this district, *see* Fitzgerald Decl. ¶ 5, and with rates approved under similar circumstances by other courts in this district, *see id.* ¶¶ 6-8.

c. The Resulting Lodestar Multiplier is Reasonable

Here, "the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment," *Bluetooth*, 654 F.3d at 942 (quotation omitted), all support the 1.88 lodestar multiplier resulting from Class Counsel's $375,000 fee request.

The Quality of Representation. As discussed above, "Class counsel provided their clients with diligent and skilled representation in this matter," including "litigat[ing] numerous complex issues[,] and their efforts produced substantial benefits for the [ ] Class." *See Lidoderm*, 2018 WL 4620695, at *3.

The Benefit Obtained for the Class. The Settlement provides Class Members with significant monetary relief in the form of a $1.5 million non-reversionary cash fund, and substantial prospective injunctive relief providing health benefits to consumers nationwide. As discussed above and previously, this compares favorably both with other settlements in similar cases, and to the Class's likely recovery at trial, particularly in light of the risks involved in continuing litigation. *See* PA Mot. at 4-5 & 19-20.

The Complexity and Novelty of the Issues Present. The scientific evidence supporting Plaintiffs' case theory was complex, requiring review of numerous scientific studies to explain in different ways the science regarding added sugar consumption. Dkt. No. 23, First Am. Compl. ¶¶ 17-36. Accordingly, this factor weighs in favor of a positive multiplier. *Cf. Palila (Loxioides bailleui) v. Hawaii Dep't of Land & Nat. Res.*, 118 F.R.D. 125, 128 (D. Haw. 1987) ("[t]he issues presented in the case were novel and complex, involving . . . scientific knowledge of the palila bird, the mouflon sheep, and the mamane-naio forest ecosystem," which "support[ed] an award based on a premium hourly rate").

The Risk of Nonpayment. "[C]ourts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994); *see also id.* at 1302, 1306 (district court abused discretion by not applying multiplier when case was "fraught with risk and recovery was far from certain"). As discussed above, and in Plaintiffs' Motion for Preliminary Approval, Class Counsel took this case on a contingency basis and faced a real risk of non-payment, as evidenced by the outcomes in *Clark* and *Truxel*. "Because counsel worked on a contingent-fee basis despite risks of litigation, this weighs in favor of awarding more than the lodestar." *See Luna v. Marvell Tech. Grp.*, 2018 WL 1900150, at *4 (N.D. Cal. Apr. 20, 2018) (applying 2.0 multiplier); *see also Lidoderm*, 2018 WL 4620695, at *3 (factor favored applying a positive multiplier where "Class Counsel litigated this action without pay for several years, even though recovery was uncertain" (quotation omitted)); *see also Quiruz*, 2020 WL 6562334, at *11 (1.95 multiplier warranted where counsel "faced a significant risk of nonpayment given the contingent nature of the representation").

* * *

Considering the relevant factors, the Court should find that a lodestar crosscheck, showing that Class Counsel's fee request represents a 1.88 multiplier to its lodestar, is reasonable. *See Corzine v. Whirlpool Corp.*, 2019 WL 7372275, at *11 (N.D. Cal. Dec. 31, 2019) ("a lodestar multiplier of 1.86 is

modest"); *see also Wilson v. TE Connectivity Networks, Inc.*, 2019 WL 4242939, at *8 (N.D. Cal. Sept. 6, 2019) (Since in "the Ninth Circuit . . . most multipliers range between 1.0 and 4.0 . . . . a multiplier of 2.38 . . . suggests that approving the award is reasonable under the lodestar method, as well." (citing *Vizcaino*, 290 F.3d at 1053-54)); *Gergetz v. Telenav, Inc.*, 2018 WL 4691169, at *7 (N.D. Cal. Sept. 27, 2018) (applying a multiplier of 2.625 "in light of the facts that Class Counsel accepted this case on a contingency basis, had to forego other work to litigate this case, and achieved a truly excellent result for the class").

B. THE COURT SHOULD GRANT CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF EXPENSES

"There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of reasonable litigation expenses from that fund." *Bellinghausen*, 306 F.R.D. at 265 (quoting *Ontiveros v. Zamora*, 303 F.R.D. 356, 375 (E.D. Cal. 2014)); *see also Alvarez*, 2017 WL 2214585, at *5 ("Class counsel is entitled to reimbursement of reasonable expenses." (quoting Fed. R. Civ. P. 23(h))). Here, Class Counsel seeks reimbursement of expenses in the amount of $24,301, the majority of which relates to expert damages work needed to negotiate the Settlement. *See* Fitzgerald Decl. ¶ 11 & Ex. 6.[2] Because "[t]he categories of expenses for which plaintiffs' [sic] seek reimbursement are the type of expenses routinely charged to hourly clients," the "full amount should be reimbursed," *see Larsen*, 2014 WL 3404531, at *10 (citation omitted); *see also Lidoderm*, 2018 WL 4620695, at *4 (citation omitted) (similar); Fitzgerald Decl. ¶ 12.

C. THE COURT SHOULD GRANT MR. HANSON'S REQUEST FOR A SERVICE AWARD

"In the Ninth Circuit, '[i]ncentive awards are fairly typical in class action cases,'" 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.'" *Alvarez*, 2017 WL 2214585, at *1 (quoting *Rodriguez*, 563 F.3d at 958-59). Courts "evaluate proposed incentive awards individually, using relevant factors that include 'the

[2] The only additional expenses incurred after preliminary approval were monthly Deadlines.com (calendaring software) charges. Fitzgerald Decl. ¶ 11 & Ex. 6.

actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . [and] the amount of time and effort the plaintiff expended in pursuing the litigation.'" *Brown v. Hain Celestial Group, Inc.*, 2016 WL 631880, at *9 (N.D. Cal. Feb. 17, 2016) (quoting *Staton*, 327 F.3d at 977). "An incentive award of $5,000 is considered 'presumptively reasonable' in this District." *O'Connor v. Uber Techs., Inc.*, 2019 WL 1437101, at *14 (N.D. Cal. Mar. 29, 2019) (citing *Villegas v. J.P. Morgan Chase & Co.*, 2012 WL 5878390, at *7 (N.D. Cal. Nov. 21, 2012)). In addition, "some courts have considered the ratio between the service award and class members' average recovery [in] determin[ing] the propriety of any amount awarded." *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1025 (E.D. Cal. 2019) (citing *Hopson v. Hanesbrands Inc.*, 2009 WL 928133, at *10 (N.D. Cal. Apr. 3, 2009)).

The $5,000 service award Mr. Hanson requests here is reasonable and justified by the record, which shows his active participation in the litigation, including reviewing pleadings and other relevant documents, keeping in frequent contact with Class Counsel to stay informed about the progress of the case through nearly two years of litigation, and discussing in detail settlement negotiations and the proposed settlement with counsel. Fitzgerald Decl. ¶ 13. *See Brown*, 2016 WL 631880, at *9 ($7,500 service awards to plaintiffs who had "consult[ed] with counsel, attend[ed] mediations, [were] deposed, and otherwise participat[ed] in the litigation" (record citation omitted)); *Fowler v. Wells Fargo Bank, N.A.*, 2019 WL 330910, at *8 (N.D. Cal. Jan. 25, 2019) ($7,500 award to plaintiff who had "participated in the litigation by assisting counsel in obtaining loan documents, [ ] reviewing the complaint as well as relevant motions," "responding to discovery," "attend[ing] the mediation in the case," and participating in "follow-up calls and emails with counsel" (record citations omitted)).

Moreover, the $5,000 amount requested here is just 0.3% of the Settlement Fund and is thus "significantly less than the approximately 1% of the total settlement awarded by some courts." *See Fowler*, 2019 WL 330910, at *8 (citing *Sandoval v. Tharaldson Emp. Mgmt., Inc.*, 2010 WL 2486346, at *10 (C.D. Cal. Jun. 15, 2010) (awarding $7,5000 incentive payment to named plaintiff, comprising 1% of gross settlement amount)); *see also Alvarez*, 2017 WL 2214585, at *1 (awarding a $10,000 service award per plaintiff, totaling $90,000, "constitut[ing] 1.8% of the total settlement value").

III. CONCLUSION

The Court should grant Class Counsel's request for an award of $375,000 million in attorneys' fees and $24,301 in costs and grant the Class Representative Curtis Hanson's request for a service award of $5,000.

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Respectfully Submitted,

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