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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Norman Zwicky; George Abarca; Vikki Osborn; and Elizabeth Stryks-Shaw, for themselves and on behalf of all others similarly situated, Plaintiffs, v. Diamond Resorts International, Inc.; Diamond Resorts Management, Inc.; Troy Magdos; and Kathy Wheeler, Defendants.	Case No.: 2:20-cv-02322-DJH **MOTION FOR ATTORNEYS' FEES, COSTS AND SERVICE AWARDS** Date: February 8, 2023 Time: 10:00 a.m. Courtroom: 605 (ASSIGNED TO THE **HONORABLE DIANE J. HUMETEWA**)

Pursuant to Fed. R. Civ. P. 23(h)(1), Fed. R. Civ. P. 54(d)(2), LRCiv. 54.2, and the Settlement Agreement, Class Counsel hereby move for an award of Attorneys' Fees, Costs, and Service Awards to be paid out of the Settlement Fund.

I. INTRODUCTION

Class Counsel have secured an excellent recovery for the Settlement Class by negotiating a $13,000,000 (with no reverter) settlement with defendants Diamond Resorts International, Inc. ("DRI"), Diamond Resorts Management, Inc. ("DRM"), Troy Magdos ("Magdos"), and Kathy Wheeler ("Wheeler") (collectively "Defendants"). To achieve this

result, Class Counsel have worked on an entirely contingent basis for nearly nine years without compensation of any kind. The Settlement was obtained as a direct result of Class Counsel's hard work, relentless advocacy, substantial commitment of financial resources, and continual risk-taking throughout the last nine years. Accordingly, Class Counsel respectfully request an award of attorneys' fees of $3,250,000, or 25% of the Settlement Fund, and reimbursement of litigation expenses of $22,335.45.

The Ninth Circuit has observed that while 25 percent may serve as a benchmark for fee awards in common fund cases, in "most common fund cases, the award exceeds that benchmark." *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D. Cal. 2010) (citations omitted). Despite achieving what Class Counsel believe is an excellent result for the Settlement Class after nearly nine years of litigation, Class Counsel are only seeking the benchmark 25 percent fee. The fee requested is warranted for several reasons.

To begin, the size of the recovery secured for the Settlement Class is high relative to alleged damages. The settlement amount is equal to approximately 37 percent of the maximum non-trebled damages (as estimated by Class Counsel) due to the Class if the Court or jury were to categorically reject all of Defendants' challenges to the merits and damages claims. As detailed below, many courts in the Ninth Circuit have awarded the same or a higher percentage of fees for recovery of smaller percentages of a class's estimated damages.

Class Counsel's risk-taking also justifies the requested fee. During nearly nine years of litigation, Class Counsel will have rendered close to 2,300 hours of professional services by the time this matter is concluded and advanced $22,335.45 in expenses (with a commitment to subsidize necessary future expenses in far greater amounts), all with the recognition that they would have received no compensation or reimbursement for that investment if the case had failed. (Exhibit 1, Declaration of Jon L. Phelps in Support of Motion for Attorneys' Fees, Costs, and Service Awards ("JLP Decl.") ¶¶ 15, 28, 38; Exhibit 2, Declaration of Edward L. Barry ("ELB Decl.) ¶¶ 12, 17). While all class actions risk the inability to certify a litigation class and the unpredictability of juries, this case faced far

more substantial hurdles than most at each stage of the litigation. Indeed, for reasons explained herein, this litigation provides a case study in persistence and perseverance, even when the prospects for financial recovery were—at the outset—entirely uncertain and speculative.

The benchmark fee is warranted considering the depth and quality of Class Counsel's representation of the Settlement Class. Prior to bringing this action, Class Counsel litigated an Inspection Action in the Maricopa County Superior Court (the "Inspection Action") to determine if there was any factual basis for the claims brought in this action. Premiere Vacation Collection Owners Association ("Premiere") vigorously defended all aspects of the Inspection Action. When Zwicky obtained a favorable outcome in the Inspection Action regarding the scope of documents and information that Zwicky was entitled to receive and review, Premiere appealed the ruling to the Arizona Court of Appeals, with the appellate court ultimately upholding the trial court's grant of summary judgment as to the ability of Zwicky to receive the documents sought in the Inspection Action. *Zwicky v. Premiere Vacation Collection Owners Ass'n*, 244 Ariz. 228, 232, ¶ 21 (App. 2018). Upon remand, Zwicky received documents and information that served as the basis for the instant Complaint and sought for the court in the Inspection Action to delineate a procedure to use such documents in this putative class action.

Upon filing this action, Plaintiffs faced no fewer than seven motions to dismiss; amended their complaint three times; and reviewed more than 3,500 electronic documents produced by Defendants in discovery in this action (in addition to over 1,300 pages produced in the Inspection Action). Counsel's investigation included review and scrutiny of over 2,000 pages of additional records, such as extensive SEC filings, voluminous records on file with the Arizona Department of Real Estate, documents available on the PACER system in other federal litigation involving Diamond Resorts International, certain documents generated in connection with consumer fraud proceedings brought by the Arizona Attorney General's Office, documents from the Chapter 11 proceedings of Defendant's predecessor, and related inquiries.

The requested fee is also reasonable when compared to the lodestar incurred by Class Counsel over the course of nearly nine years of litigation. (Decl. JLP ¶¶ 15-31; ELB Decl. ¶¶ 12-14). The requested fee includes a "multiplier" of less than 3.88 on the lodestar when compared to Class Counsel's collective lodestar of $900,000 at current rates. *Id*.

Accordingly, this Court should approve attorneys' fees equal to 25 percent of the value of the Settlement Amount and reimbursement of litigation expenses in the sum of $22,335.45. The requested amounts are fair and reasonable.

II. PROCEDURAL HISTORY

Plaintiff provided a detailed summary of the claims, allegations, and procedural history in the Unopposed Motion for Preliminary Certification of Class for Settlement Purposes Only, Preliminary Approval of Settlement, and Approval of Notice (Doc. 129) and the Unopposed Renewed Motion for Preliminary Approval of Settlement, Approval of Notice (Doc. 144), which Plaintiff incorporates herein by reference.[1] On November 15, 2022, in a comprehensive order analyzing the settlement, claims and class, this Court granted "the preliminary certification of class for settlement purposes only." (Doc. 136 at 31). On September 6, 2023, in a subsequent order analyzing the settlement, claims and proposed notice, this Court granted preliminary approval of the Settlement Agreement and Release, appointed JND Legal Administration as the Settlement Administrator, and approved the Notices to be provided to the Class Members. (Doc. 149 at 14-17). The Final Approval Hearing is scheduled for February 8, 2024. (*Id*. at 16).

III. LEGAL RGUMENT

A. Applicable Legal Standards Governing the Award of Attorneys' Fees in Common Fund Cases.

It is well-established that "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The purpose of this principle is that "those who benefit from the creation of the fund should share the

[1] Additionally, the Court discussed the background of this case at length in its prior orders (Docs. 102 at 1-5; 136 at 1-4; 149 at 2-3).

wealth with the lawyers whose skill and effort helped create it." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("*WPPSS*").

"Under Ninth Circuit law, the district court has discretion in common fund cases to choose either the percentage-of-the-fund or the lodestar method." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (citing *WPPSS*, 19 F.3d at 1295-96). Nevertheless, "[b]ecause the benefit to the class is easily quantified in common-fund settlements, [the Ninth Circuit has] allowed courts to award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011). Utilizing "this calculation method, courts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure." *Id.* (citing *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir.1990)). While courts typically use the percentage of the fund method, "where awarding 25% of a 'megafund' would yield windfall profits for class counsel in light of the hours spent on the case, courts should adjust the benchmark percentage or employ the lodestar method instead." *Id.* (citing *Six Mexican Workers*, 904 F.2d at 1311). The recovery in this case, while substantial under the circumstances, is by no means a "megafund." *In re Optical Disk Drive Products Antitrust Litig.*, 959 F.3d 922, 932 (9th Cir. 2020) ("We have not identified a bright-line definition for 'megafund,' but the first-round settlements here yielded a $124.5 million common fund, and there is no question that a common fund of this size qualifies." (citing *Vizcaino*, 290 F.3d at 1047); *see also* 5 William B. Rubenstein, Newberg on Class Actions § 15:81 (5th ed. 2012) (noting that "[m]ost courts define mega-funds as those in excess of $100 million").

The second potential approach is "the lodestar/multiplier method." *WPPSS*, 19 F.3d at 1294 n.2. Under this approach, "the district court first calculates the 'lodestar' by multiplying the reasonable hours expended by a reasonable hourly rate." *Id.* (citation omitted). After calculating the lodestar, a "court may then enhance the lodestar with a 'multiplier,' if necessary, to arrive at a reasonable fee." *Id.* (citation omitted). Some of the

factors a court may consider in determining a lodestar multiplier are:

> 1) the time and labor required; 2) the novelty and difficulty of the questions involved; 3) the requisite legal skill necessary; 4) the preclusion of other employment due to acceptance of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) the time limitations imposed by the client or the circumstances; 8) the amount at controversy and the results obtained; 9) the experience, reputation, and ability of the attorneys; 10) the "undesirability" of the case; 11) the nature and length of the professional relationship with the client and; 12) awards in similar cases.

Van Vranken v. Atlantic Richfield Co., 901 F.Supp. 294, 298 (N.D. Cal. 1995) (citing *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir.1975)). "Multipliers in the 3–4 range are common in lodestar awards for lengthy and complex class action litigation." *Id.* (citations omitted).

While this Court may use either method, "the primary basis of the fee award remains the percentage method." *Vizcaino*, 290 F.3d at 1050. There is indeed a "general trend towards the percentage of the fund method to award class attorneys' fees." *Craft v. Cty. of San Bernadino*, 624 F. Supp. 2d 1113, 1123 (C.D. Cal. 2008) (citations omitted). Ultimately, the percentage "method aligns the interests of counsel and the class by allowing class counsel to directly benefit from increasing the size of the class fund." *Id.* (citations omitted).

A court "may demonstrate that its use of" the percentage method is reasonable "by conducting a cross-check using the" lodestar method. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015) ("*DVD-Rental*"). "If a comparison between the percentage and lodestar calculations produces an imputed multiplier far outside the normal range, thereby indicating that the percentage fee will reward counsel for their services at an extraordinary rate even accounting for the factors customarily used to enhance a lodestar fee, the trial court will have reason to reexamine its choice of a percentage." *Van Lith v. iHeartMedia + Entm't, Inc.*, 2017 WL 4340337, at *15 (E.D. Cal. Sept. 29, 2017) (citation and quotations omitted). "Thus, although not required, a lodestar cross-check may assist the court in evaluating the reasonableness of the . . . attorney's fees request." *Id.* (citation

and quotations omitted).

B. The Requested Fee Award is Reasonable under the Percentage-of-Recovery Method.

To reiterate, the Ninth Circuit has established a fee award of 25 percent as a "benchmark" in common fund cases. *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 273 (9th Cir. 1989). That benchmark, however, is the starting point from which the fee "may be adjusted up or down." *Pointer v. Bank of Am., N.A.*, 2016 WL 7404759, at *14 (E.D. Cal. Dec. 20, 2016) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998)).

Factors that may justify departure from the benchmark include: (1) the result obtained; (2) the risk involved in the litigation; (3) the contingent nature of the fee; (4) counsel's efforts, experience, and skill; and (5) awards made in similar cases." *Pointer*, 2016 WL 7404759, at *14 (citing *Vizcaino*, 290 F.3d at 1048-50). In "most common fund cases, the award exceeds that [25 percent] benchmark." *Vasquez*, 266 F.R.D. at 491 (citing *Knight v. Red Door Salons, Inc.*, 2009 WL 248367, at *6 (N.D. Cal. Feb. 2, 2009)); *see also In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377 (N.D. Cal. 1989) ("nearly all common fund awards range around 30%").

1. Class Counsel Believe that the Results Achieved Are Excellent

The "most critical factor" in evaluating reasonable attorneys' fees "is the degree of success obtained" by class counsel. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983); *see also Vizcaino*, 290 F.3d at 1048. After nearly nine years of vigorous litigation and settlement negotiations, Class Counsel has achieved an excellent result for the Settlement Class. The $13 million Settlement provides meaningful and definite monetary recovery. In addition, the Class Members who remain members in the "Premiere" Association (or successor) will benefit from important non-monetary provisions of the Settlement, which imposes appropriate specific corporate-governance and related fiduciary standards in the future imposition of assessments for common expenses. (No fees are sought for the non-monetary benefits to the Class.)

Class Counsel undertook a detailed quantitative analysis that established a

maximum non-trebled damages estimate of $35 million if all of Defendants' challenges to the merits and damages claims were rejected. That analysis, together with supporting documentation comprised the Indirect Corporate Cost Work-Up. (Doc. 144-12). The methodology used in preparing the Indirect Corporate Cost Work-Up is addressed in detail in the Unopposed Renewed Motion for Preliminary Approval of Settlement, Approval of Notice (Doc. 144 at 15-17).

With maximum damages to the Settlement Class of $35 million, the Settlement amount of $13 million equals over 37 percent of the alleged damages incurred by Class Members. This is an excellent result. Indeed, courts in the Ninth Circuit characterize settlements as "an excellent recovery for the class" when they represent similar percentages of hard losses. *See Edwards v. Nat'l Milk Producers Fed'n*, 2017 WL 3623734, at *7 (N.D. Cal. June 26, 2017) ("almost 30% of total damages suffered deemed "excellent"); *In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, at *9-10 (N.D. Cal. Aug. 17, 2018) (holding that "results obtained in the Settlement are exceptional" when it provided "14.5% of the projected recovery that Settlement Class Members would be entitled to if they prevailed"); *In re Veritas Software Corp. Sec. Litig.*, 2005 WL 3096079, at *5, 13 (N.D. Cal. Nov. 15, 2005) (holding that class counsel "achieved an excellent settlement for the class members" when it represented "approximately 20%" of damages), *aff'd in part and vacated in part (on other grounds)*, 496 F.3d 962 (9th Cir. 2007). Similarly, the Central District of California described a settlement providing "36% of the class' total net loss" as nothing less than "exceptional." *In re Heritage Bond Litig.*, 2005 WL 1594403, at *19 (C.D. Cal. June 10, 2005).

Notably, Defendants have argued that their Inventory Recovery and Assignments ("IRAA") contributions are offsets to liability. (Doc. 144 at 12-13). If accepted by a jury, the offsets would reduce the maximum damages to the Settlement Class to $17 million. Thus, the Settlement amount of $13 million equals over 76 percent of the alleged damages incurred by Class Members should Defendants prevail on their offset defense. While Plaintiffs dispute this argument, they acknowledge that Defendants would continue to raise

it if the case were to proceed. Additionally, Defendants have asserted that the Indirect Corporate Costs were legitimately imposed under the existing management contract, represent fair and reasonable charges for services rendered, and are not fraudulent in any way. If the jury were to accept these contentions the result would be a zero verdict.

In sum, the excellent result achieved by Class Counsel in this case, despite a vigorous defense and the presence of numerous hurdles, warrants the award of 25 percent of the common fund in attorneys' fees.

2. *The Risks of the Litigation Justify the Fee Request*

Class Counsel were already exposed to significant risk prior to filing this action. Zwicky's Inspection Action, brought to determine if the Board acted reasonably and in good faith in calculating assessments, was filed in May 2015 in an effort by Class Counsel to satisfy their Rule 11 obligations prior to bringing this action. Despite finding evidence of wrongdoing, much of what Class Counsel found in the Inspection Action was exculpatory. After obtaining a final judgment that allowed Zwicky to obtain documents and information that he believed supported the decision to bring this action, Premiere appealed the trial court's ruling to the Arizona Court of Appeals, which largely (as to the issue of production) upheld the trial court's grant of summary judgment.

Based upon the documentation Class Counsel obtained in the Inspection Action, they correctly anticipated that upon filing this action they would face a barrage of Motions to Dismiss on various legal theories including: (1) standing because the claims were derivative rather than direct; (2) the claims were time barred; (3) there were no common law or statutory fiduciary duties owed to Zwicky; (4) lack of vicarious liability; (5) the RICO claim was deficient; and (6) lack of personal jurisdiction over certain Defendants. Nevertheless, after discussing the matter with Zwicky, Class Counsel assumed the risk and filed this action, with the intention of demonstrating that Zwicky's claims were viable. This Court granted the Motions to Dismiss of Mr. Palmer and Mr. Cloobeck and granted in part the Motions to Dismiss of the remaining Defendants. This is reflective of the degree of complexity and uncertainty in Zwicky's claims.

This case was able to move forward with the RICO claims and breach of fiduciary duty claims against Defendants. Class Counsel obtained updated documentation, through discovery, regarding their damages theories for the claims that survived against the remaining Defendants.

Even after obtaining updated documentation regarding damages, substantial risk remained in litigating this case through class certification, trial and appeal. Had litigation continued, Defendants would have made intensive efforts to discredit the Plaintiffs' damage calculations and to prevent the certification of a litigation class (perhaps even pursuing an interlocutory appeal of this Court's critical ruling relating to "standing" and the derivative injury doctrine) The Ninth Circuit indeed requires courts to conduct a "rigorous analysis" when determining whether the elements of Rule 23 have been satisfied in complex class actions, which often generates an intensive battle where the outcome is highly uncertain. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011).

Furthermore, even if Plaintiffs certified a class and defeated summary judgment, they would have faced substantial risk at trial, as more fully discussed in the Renewed Motion for Preliminary Approval (Doc. 144). While Plaintiffs believe they have compelling and meritorious claims, juries can be unpredictable. *In re Auto. Refinishing Paint Antitrust Litig.*, 617 F. Supp. 2d 336, 343 (E.D. Pa. 2007) ("[L]itigation is always inherently unpredictable. '[N]o no matter how confident one may be of the outcome of litigation, such confidence is often misplaced.'" (quoting *State of W. Va. v. Chas. Pfizer & Co.*, 314 F.Supp. 710, 744 (S.D.N.Y.1970) (second alteration in original))).

This is particularly true here, where a jury would be asked to reach the somewhat counter-intuitive conclusion that the Homeowners Association engaged in conduct that was adverse to the interests of their members. Additionally, Defendants would likely appeal any adverse ruling from a jury. Indeed, Defendants have vigorously defended this case on a range of issues, any one of which—from standing to statutes of limitations—could have resulted in dismissal of this case on appeal.

Finally, even if Plaintiffs were able to see this case through trial and appeals

successfully, this litigation (which is already almost nine years old) would be staler and the costs and detriments of delay would continue to mount. Through this Settlement, Plaintiffs have obtained a substantial recovery for over twenty-six thousand Class Members and thus beaten the long odds they faced throughout.

In sum, Class Counsel assumed substantial risk when they filed the Inspection Action and this lawsuit and, despite extraordinary efforts and results in the litigation to date, much of that risk remained when Plaintiffs entered into the Settlement Agreement. The assumption of that risk warrants the award of the requested attorneys' fees.

3. *The Skill Required and the Quality of the Work Justifies the Fee Request*

For nearly nine years, Class Counsel have leveraged their resources, experience, and knowledge to vigorously prosecute Plaintiffs' case. Expending nearly 2,300 hours, Class Counsel served requests for production and interrogatories in the Inspection Action; searched and reviewed over 1,300 pages of electronic documents produced by Premiere in the Inspection Action; obtained summary judgment in the Inspection Action; prevailed on appeal in the Inspection Action as to entry of summary judgment; defeated (to various degrees) multiple motions to dismiss in this action; searched and reviewed thousands of pages of public records documents; reviewed more than 3,500 pages of electronic documents produced by Defendants in this action; served requests for admission, interrogatories, and requests for production; participated in an all-day mediation; and engaged in months of post mediation negotiations refining the agreement reached in mediation. *Cf. Aguilar v. Wawona Frozen Foods*, 2017 WL 2214936, at *5 (E.D. Cal. May 18, 2017) (holding that a one-third fee is warranted by the opposition encountered, 1,600 hours invested by the class counsel, 50,000 pages of documents reviewed, four depositions, and two mediations conducted prior to settlement).

Each of the steps taken successfully by Class Counsel was indispensable to securing the $13 million Settlement for the Settlement Class as opposed to a minimal or nonexistent recovery. As the Court weighs the skill and quality of the lawyering provided to Plaintiffs in this litigation, it should consider how Class Counsel handled these critical inflection

points along with the quality of Class Counsel's filings, the preparedness and performance of Class Counsel during hearings and all other indicia of the quality of the lawyering. Class Counsel respectfully submit that, due to their creativity and tenacity in litigating this case and the general high level of advocacy they provided on behalf of the Settlement Class, the requested benchmark 25% fee award is warranted. Class Counsel also submit that the extensive background and experience of Attorney Edward Barry in timeshare litigation has contributed significantly to the result.

4. *The Contingent Fee Nature of the Case and the Financial Burden Carried by Class Counsel Justify the Fee Request*

The purely contingent nature of Class Counsel's representation supports the requested fee. During the last nearly nine years, by the time this matter is concluded, Class Counsel will have invested over $837,000 dollars in attorney and paralegal time at current rates and $22,335.45 in out-of-pocket costs (with a commitment to advance future costs, in far greater amounts, as necessary), with the understanding that they would only be compensated if they succeeded in recovering substantial damages for the Settlement Class. (Decl. JLP ¶¶ 15-31, 38; ELB Decl. ¶¶ 12-14, 17). In so doing, Class Counsel assumed a real financial risk that they would never receive compensation for their nearly nine years of work in this case. The fact that a significant commitment of labor and resources of two small law firms was carried for such a long period strongly supports the reasonableness of the requested fee percentage. *See Vizcaino*, 290 F.3d at 1050 (endorsing upward adjustment of the fee when "counsel's representation of the class—on a contingency basis—extended over eleven years, entailed substantial expense, and required counsel to forgo significant other work, resulting in a decline in the firm's annual income.").

Indeed, courts have consistently recognized the need to reward plaintiffs' counsel who accept a case on a contingent fee basis because of the evident risk of non-payment they face:

> It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. *See* Richard Posner, *Economic Analysis of Law* § 21.9, at 534-35 (3d ed. 1986). Contingent fees

> that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose. As the court observed in *Behrens v. Wometco Enter., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988), "if this 'bonus' methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing."

WPPSS, 19 F.3d at 1299-300; s*ee also Fischel v. Equitable Life Assurance Soc'y*, 307 F.3d *997*, 1008 (9th Cir. 2002) ("This provides the 'necessary incentive' for attorneys to bring actions to protect individual rights and to enforce public policies."); *Vizcaino*, 290 F.3d at 1051 ("courts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases."). Indeed, the demands and risks of complex class actions overwhelm the resources—and thus deter participation—of many plaintiffs' firms.

Accordingly, Class Counsel should be rewarded for taking on this time-consuming, expensive, and high-risk contingent fee case. Other courts in this Circuit have held that "where recovery is uncertain, an award of one-third of the common fund as attorneys' fees has been found to be appropriate." *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 449 (E.D. Cal. 2013). *A fortiori*, approving the benchmark fee of 25 percent of the common fund in the present case is fair and equitable.

5. *Fee Awards Made in Similar Cases Justify the Request Here*

Fee awards in similar cases strongly support Class Counsel's request for a benchmark fee after securing a Settlement that comprises 37 percent of the maximum non-trebled damages that could be awarded to the Class. Indeed, courts in the Ninth Circuit have frequently awarded a higher percentage in fees to lawyers who obtained settlement amounts that comprised substantially similar, or even lower, portions of the claimed damages. *See, e.g., Syed v. M-I, L.L.C.*, 2017 WL 3190341, at *4, 6-8 (E.D. Cal. July 26, 2017) (awarding one-third in fees when the common fund represented 35% of damages); *Torres v. Pick-A-Part Auto Wrecking*, 2018 WL 3570238, at *5, 7 (E.D. Cal. July 23, 2018) (awarding one-third in fees when the common fund represented between 5% and 44% of damages); *Carter v. San Pasqual Fiduciary Trust Co.*, 2018 WL 6174767, at *11 (C.D. Cal. Feb. 28, 2018) (awarding one-third in fees when the common fund represented 35%

of damages); *Boyd v. Bank of Am. Corp.*, 2014 WL 6473804, at *9-12 (C.D. Cal. Nov. 18, 2014) (awarding one-third in fees when the common fund represents 36% of damages); *Moreyra v. Fresenius Med. Care Holdings, Inc.*, 2013 WL 12248139, at *3-4 (C.D. Cal. Aug. 7, 2013) (awarding one-third in fees when the common fund represented 32% of damages).

Indeed, "courts routinely award attorneys' fees of one-third of the common fund." *Beaver v. Tarsadia Hotels*, 2017 WL 4310707, at *9 (S.D. Cal. Sep. 28, 2017). Moreover, "[d]istrict courts in this circuit have routinely awarded fees of one-third of the common fund or higher after considering the particular facts and circumstances of each case." *Id.* at *10; *see also Smith v. CRST Van Expedited, Inc.*, 2013 WL 163293, at *5 (S.D. Cal. Jan. 14, 2013) ("Under the percentage method, California has recognized that most fee awards based on either a lodestar or percentage calculation are 33 percent."). Here, as stated, Class Counsel are only seeking the benchmark fee of 25 percent of the common fund rather than the one-third that courts routinely award with similar outcomes.

C. The Requested Fee is Reasonable Under Lodestar Cross-Check

While "[a] lodestar cross-check is not required in this Circuit, and in some cases is not a useful reference point", a lodestar cross-check also supports granting the requested fees. *Craft*, 624 F. Supp. at 1122; s*ee also Bendon v. DTG Operations, Inc.*, 2018 WL 4976511, at *8 (C.D. Cal. Aug. 22, 2018) (cross-check discretionary). Class Counsel will have expended nearly 2,300 hours of attorney and paralegal time by the conclusion of this matter. (Decl. JLP ¶¶ 15-31; ELB Decl. ¶¶ 12-14). Class Counsel requests $3,250,000 in fees, which includes work still to be done such as preparation for and attending the final fairness hearing, responding to any possible objections, responding to Class Member inquiries, and similar or related tasks. This is anticipated to result in a lodestar multiplier of under 3.88. (Decl. JLP ¶¶ 15-31; ELB Decl. ¶¶ 12-14). This multiplier is well within the normal range applied in similar cases and is fair, reasonable and warranted given the factors the courts utilize. *See In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 768 F. App'x 651, 654 (9th Cir. 2019) (multiplier of 3.66); *Craft*, 624 F.

Supp. 2d at 1125 (approving multiplier of 5.2 and stating that "there is ample authority for such awards resulting in multipliers in this range or higher" and collecting cases awarding common fund fees with lodestar multipliers well above the multiplier here); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481–82 (S.D.N.Y. 2013) (courts regularly award lodestar multipliers of up to 8).

The lodestar cross-check involves a two-step process. The first step requires ascertaining the lodestar figure by multiplying the number of hours reasonably worked by the current hourly rate of counsel. *See Hensley*, 461 U.S. at 433. The Ninth Circuit has explained, "[t]he district court has discretion to compensate delay in payment in one of two ways: (1) by applying the attorneys' current rates to all hours billed during the course of litigation; or (2) by using the attorneys' historical rates and adding a prime rate enhancement." *WPPSS*, 19 F.3d at 1305. This Court has previously found that where counsel "has been working . . . over three years, without payment," using current rates, rather than historical rates for a lodestar calculation was the appropriate method. *Arizona, Dep't. of Law, Civil Rights Div. v. ASARCO, LLC*, 2011 WL 6951842, at * 6 (D. Ariz. Sept. 29, 2011) (finding that calculating fees based on "current hourly rate[s] appropriately compensates [counsel] for the delay in payment."), *aff'd sub nom. Arizona v. Asarco LLC*, 543 F. App'x 702 (9th Cir. 2013), *adhered to on reh'g en banc*, 773 F.3d 1050 (9th Cir. 2014). Where a lodestar is merely being used as a cross-check, a court "may use a 'rough calculation of the lodestar.'" *Bond v. Ferguson Enters.*, 2011 WL 2648879, at *12 (E.D. Cal. June 30, 2011) (quoting *Fernandez v. Victoria Secret Stores, LLC*, 2008 WL 8150856, at *9 (C.D. Cal. July 21, 2008)). Because "the lodestar cross-check calculation need entail neither mathematical precision nor bean counting," *Aguilar*, 2017 WL 2214936, at *6, a court may "rely on summaries submitted by the attorneys and need not review actual billing records." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 264 (N.D. Cal. 2015).

The hourly rates used in calculating the lodestar amount are similarly reasonable considering Class Counsel's extensive experience, skill, and rates in complex litigation.

They range from $400 for Edward Barry[2] who has been admitted to practice since 1979, $400[3] for Jon L. Phelps who has been admitted to practice since 2009, $375 for Robert M. Moore[4] who has been admitted to practice since 1989, and $350 for associate attorneys at Phelps & Moore, PLC,[5] to $175 for paralegals at Phelps & Moore, PLC.[6] (Decl. JLP ¶¶ 15-27; ELB Decl. ¶¶ 12-14). These rates are also consistent with or below the rates of other comparably experienced attorneys in the relevant marketplace. (Decl. JLP ¶ 29; ELB Decl. ¶ 13).

In the second step of the analysis, a court adjusts the lodestar to consider, among other things, the result achieved, the quality of representation, the risk of non-payment, the complexity and magnitude of the litigation, and public policy considerations. *Monterrubio v. Best Buy Stores, Ltd. P'ship*, 2013 WL 12432761, at *10 (E.D. Cal. Nov. 20, 2013). To account for the foregoing factors the court applies an appropriate multiplier to the lodestar number. *Id.*

As other courts in this Circuit have found, "[m]ultipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation." *Dakota Med., Inc. v. RehabCare Grp., Inc.*, 2017 WL 4180497, at *8 (E.D. Cal. Sep. 21, 2017) (citing *Van Vranken,* 901 F. Supp. at 298); *see also* 4 Newberg on Class Actions § 14.7 (explaining that courts typically approve percentage awards based on lodestar cross-checks of 1.9 to

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[2] While Mr. Barry has historically charged $375 per hour, cases that he has taken on recently have been at $400 per hour. (Decl. JLP ¶ 13).

[3] Mr. Phelps made an upward adjustment to his rates that will be effective January 1, 2024. This was the first time Mr. Phelps made a rate adjustment since January 1, 2018 when his hourly rate increased to $350. (Decl. JLP ¶ 17).

[4] Mr. Moore made an upward adjustment to his rates that will be effective January 1, 2024. This was the first time Mr. Moore made a rate adjustment since January 1, 2018 when his hourly rate increased to $350. (Decl. JLP ¶ 18).

[5] Phelps & Moore's customary billing rate is $350 per hour for attorney time in contingent fee matters where attorney's fees may be recoverable. (Decl. JLP ¶¶ 22-26). Additionally, the current billable rates for nearly all Associate Attorneys that previously worked on this matter at Phelps & Moore is $350.00 per hour or greater. (Decl. JLP ¶¶ 19-21).

[6] This rate is effective January 1, 2024, for Phelps & Moore, PLC's paralegals.

5.1 or even higher). Indeed, a 2003 survey of 1,120 class actions showed that lodestar multipliers averaged 3.89. *Attorney Fee Awards in Common Fund Cases*, 24 Class Action Rep. 4 (2003). Similarly, the Ninth Circuit approved a multiplier of 3.64 in a lodestar cross-check as "reasonable." *See Vizcaino*, 290 F.3d at 1047-51.

D. The Expenses Are Reasonable and Should be Reimbursed

Class Counsel respectfully request to be reimbursed for reasonable litigation expenses in the amount of $23,335.45. (Decl. JLP ¶ 38; ELB Decl. ¶ 17). Under the common fund doctrine, Class Counsel are entitled to all reasonable expenses incurred while prosecuting the claims and obtaining a settlement. *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); s*ee also* H. Newberg, Attorney Fee Awards §2.19 at 69 (1986); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391 (1970). "Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit by the settlement." *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996).

The standard of reasonableness of costs "is to be given a liberal interpretation." *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. at 1368. "With the exception of routine office overhead normally absorbed by the practicing attorney, all reasonable expenses incurred in case preparation, during the course of the litigation, or as an aspect of settlement of the case, may be taxed." *Id.*

The categories of expenses for which Class Counsel seek reimbursement here are of the type routinely charged to paying clients and, therefore, should be awarded. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (holding that attorneys may recover reasonable expenses that would typically be billed to paying clients in non-contingency cases). Those categories include: filing fees, copying, postage, document storage, depositions, travel, and the cost of the mediator. Details concerning the expenses incurred by each firm in this case are listed in the accompanying declarations submitted herewith. (Decl. JLP ¶ 38; ELB Decl. ¶ 17).

These costs were necessarily incurred by Class Counsel and are particularly

reasonable in relation to the size and scope of the litigation. Indeed, the expenses for which Class Counsel seek reimbursement total less than two-tenths-of-one-percent of the Settlement Amount, well below the four-percent average in class action cases. *See In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1041 (N.D. Ill. 2011) (citing Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27, 70 (2004)). Accordingly, Class Counsel's expenses of $23,335.45 should be reimbursed.

E. The Requested Service Awards Are Reasonable

The proposed Service Awards for the Class Representatives, totaling $14,500—$10,000 for Zwicky, and $1,500 for each of the other class Representatives (who became involved in 2021)—are fair and reasonable. Each class representative has made commitments and taken action to protect the interests of the Class, and the Class has substantially benefited from the time and effort Class Representatives expended in pursing the litigation. Class Representatives were required to review pleadings, disclose documentation regarding their own injuries, take numerous phone calls from counsel, and remain available to approve negotiations and settlement offers. (Decl. JLP ¶ 47). Zwicky, particularly, has steadfastly advocated for the rights of Association owners prior to 2015, when he commenced and vigorously prosecuted the Inspection Action. (Decl. JLP ¶ 51).

While service awards are "fairly typical in class action cases," they are discretionary sums awarded by the Court "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 v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009) (citations omitted). Indeed, courts regularly approve service awards for class representatives to "be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class." *Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1394 (2010) (quoting *Clark v. Am. Residential Servs. LLC*, 175 Cal. App. 4th 785, 806 (2009)).

Factors the courts employ to assess whether service awards are warranted and

reasonable include: (1) the actions the plaintiff has taken to protect the interests of the class; (2) the degree to which the class has benefitted from those actions; (3) the amount of time and effort the plaintiff expended in pursuing the litigation; (4) the risk to the class representative in commencing suit, both financial and otherwise; the notoriety and personal difficulties encountered by the class representative; and (5) the relationship between the service award, the total fund, and the amounts received by the individual claimants. *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003); *McNeal v. RCM Techs. (USA), Inc.*, 2017 WL 2974918, at *1 (C.D. Cal. July 12, 2017).

These factors support the reasonableness of the Service Awards. Class Representatives have engaged in dedicated work to protect the interests of the Class, including investing considerable time and energy to locate relevant documents, communicating regularly with counsel about the case both by phone and by email, making efforts to find and communicate with other putative class members, discussing the case with putative class members, making other efforts to try to find relevant documents and information and, actively participating in analysis of the claims and defenses for purposes of settlement. (JLP Decl. ¶ 47). These efforts were significant undertakings for the Class Representatives. (*Id.* ¶ 49) It is estimated that all Class Representatives have each spent over 15 hours since 2021 pursuing their claims and working with counsel to achieve these results. (*Id.* ¶ 48). For Class Representative Zwicky, his time commitment has been over 100 hours dating back to 2013 before the filing of the Inspection Action. (*Id.* ¶¶ 55-57).

There is no question that the Class Members benefitted significantly from the efforts of the Class Representatives. Zwicky put aside his own personal interests in a case that could have been settled earlier in the absence of a Class to his benefit while leaving Class Members to fend for themselves. (*See Id.* ¶¶ 53-54). Specifically, in 2016, there were overtures to Zwicky to settle his individual claim for an amount greater than he will ultimately receive in this settlement, but he declined to do so and instead supported moving forward with defending the appeal of the Inspection Action and ultimately pursuing this action. (*Id.*) If Zwicky had lost interest or given up, the results for the Class would have

been severely compromised. (*Id.* ¶¶ 58-59). Zwicky's persistence (along with dedicated efforts of his attorneys) resulted in a Settlement that will significantly benefit over 26,000 class members.

The fact that no Class Member, to date, has objected to the Settlement, the fees, or the amount of the Service Awards also supports granting the Service Awards. (*Id.* ¶ 44). Class Notices were sent to Class Members specifically informing them that Zwicky would seek a $10,000 Service Award, the other Class Representatives would each seek Service Awards of $1,500, and how to object to those proposed Service Awards. (Doc. 149 at 12-14). Since the Class Members themselves are the ones most familiar with the risks that the Class Representatives took in coming forward to represent the Class and the benefits that the Class received because of those efforts, the absence of objections supports the Service Awards. (JLP Decl. ¶ 44).

Further, the requested Service Awards do not significantly dilute the Settlement Fund. Class Representatives' Service Awards represent a very small proportion, only .11%, of the Settlement Fund. (Doc. 136 at 26). Courts regularly award service payments in this range and higher, particularly where, as here, the Service Awards will not dilute the fund and are not excessive considering the awards to class members. *See DVD-Rental*, 779 F.3d 934, 948 (approving $45,000 in service awards); *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1026 (E.D. Cal. 2019) ($45,000 service awards to four class representatives); *Nitsch v. DreamWorks Animation SKG Inc.*, 2017 WL 2423161, at *16 (N.D. Cal. June 5, 2017) (service awards of $90,000 for three named plaintiffs); *Beaver*, 2017 WL 4310707, at *7–8 ($50,000 service awards); *Van Vranken*, 901 F. Supp. at 299–300 (same); *In re Titanium Dioxide Antitrust Litig.*, 2013 WL 6577029 at *1 (D. Md. Dec. 12, 2013) (service award of $125,000 to lead class representative); *In re High-Tech Emp. Antitrust Litig.*, 2015 WL 5158730, at *17-18 (N.D. Cal. Sept. 2, 2015) ($80,000 and $120,000 service awards).

Class Representatives and Class Counsel respectfully submit that the proposed Service Awards totaling $14,500—a $10,000.00 Service Award to Zwicky and Service

Awards of $1,500.00 each to Abarca, Osborn, and Stryks-Shaw—are reasonable considering the circumstances of this case when viewed under the factors regularly employed for determining the reasonableness of Service Awards. In fact, this Court previously found the Service Awards to be reasonable. (Doc. 136 at 26-27).

IV. CONCLUSION

For all the foregoing reasons, Class Counsel respectfully request that the Court approve their application for attorneys' fees, reimbursement of litigation expenses, and payment of Service Awards to Class Representatives.

Respectfully submitted this 12th day of December, 2023.

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