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MICHAEL NOZZI, et al.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL NOZZI, et al.,

Plaintiff,

v.

HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, et al.,

Defendants.

Case No. 2:07-cv-00380-PA-FFM)

[Honorable Percy Anderson]

PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS; MEMORANDUM OF LAW; DECLARATIONS AND EXHIBITS IN SUPPORT

Date: **January 29, 2018**
Time: **1:30 P.M.**
Place: **Courtroom 9A**

TO DEFENDANTS AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on January 29, at 1:30 p.m., in Courtroom 7 of the United States District Court for the Central District of California, 350 W. 1st Street, Courtroom 9A, 9th Floor, Los Angeles, California 90012, Plaintiffs will, and hereby do, move for an award of attorneys' fees and costs pursuant to the terms of the Settlement Agreement and Preliminary Approval Order in this case.

This motion is based upon this Notice of Motion and Motion, all Declarations and exhibits submitted in support of it, the papers and pleadings on file in this action, and upon such other and further evidence and argument as the Court deems necessary or convenient at the time of the hearing on this matter.

DATED: September 18, 2017

Respectfully submitted,

KAYE, McLANE, BEDNARSKI & LITT, LLP
PUBLIC COUNSEL

By: /s/ Barrett S. Litt
Barrett S. Litt
Attorneys for Plaintiffs

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I. INTRODUCTION

Class Counsel seek an award of 30 % of the Class Fund (somewhere between $2,700,000 and $2,820.000 depending on the size of the available fund) plus an award of litigation and expert costs in the amount of $167,350.61 (exclusive of class administration costs), out of a total class fund of between $9 Million and $9.4 Million. Said fees would be paid separately from payments made to class members pursuant to the provisions of the settlement agreement. The settlement agreement provides as follows regarding money distributions to class members and Class Representatives from available funds after payment of attorney's fees and costs, and class administration costs, subject to the final approval of the Court:

a. Payment of $5,000 to Nidia Pelaez, the designated Class Representative, in addition to her rent reimbursement. Ms. Pelaez will receive this additional amount under the Settlement Agreement because of the role that she played in the litigation. There will also be a payment to Named Plaintiff Michael Nozzi of $1,000 (inclusive of his rent reimbursement) as compensation for his individual damages claim and for his more limited role in initiating the class action (but not ultimately acting as a class representative).

b. Payment to the members of the class who filed claims for payment of the amount of additional rent that each Damages Class Member paid as a result of the reduced HACLA subsidy (to be proportionately reduced if the total claims filed by Damages Class Members exceed the funds available for payment to them).

c. To the extent that the filed claims do not total the amount available for distribution to Damages Class Members, the excess funds will not be paid out and will be retained by HACLA's insurers. However, in no event will the total funds paid out to Damages Class Members, or organizations that assist Section 8 tenants, be less than $2,000,000. (This is so that, if not enough Class

Members file claims to total $2,000,000, the difference between the amount claimed and $2,000,000 will be paid to organizations to be agreed upon that help Section 8 tenants.)

In addition, the parties have agreed to the entry of an injunction as follows, which provides (and has effectively provided) a substantial non-monetary benefit to the injunctive relief class members:

a. In any future notices to Section 8 tenants, related to the Voucher Payment Standard, Defendant HACLA shall simply and plainly communicate the information provided in non-technical, language that would be reasonably understandable to Section 8 tenants, at a language level commensurate with the average educational level of Section 8 tenants, and without assuming prior knowledge. The notice shall reasonably explain the known, likely or potential impact on the tenant of the action that is the subject of the notice.

b. Any notice within the next three years regarding reduction of the Voucher Payment Standard shall be provided to Class Counsel before it is sent, and shall be subject to the approval of Class Counsel before it is communicated to Section 8 tenants, which approval shall not be unreasonably withheld.

c. When communicating any new notices to tenants (other than a notice of reduction of VPS to which sub-paragraph (a) above applies), HACLA will use language reasonably understandable to Section 8 tenants. For purposes of the Settlement Agreement, the Parties agree that existing notices that have been historically sent regularly to tenants without challenge, such as the RE 38 notice, notices sent to tenants when HACLA approves a rent increase requested by the landlord, when there is a bedroom downsizing, meet this standard.

II. DESCRIPTION OF PLAINTIFFS' CLAIMS

The Court is very familiar with Plaintiffs' claims since they have been addressed twice by the Ninth Circuit and by this Court's ruling on the Motion for Class Certification. In light of these extensive court rulings, the claim is described only briefly.

Plaintiffs are Section 8Housing Choice Voucher Participants whose rental contributions were increased as a result of HACLA's reduction in the rental subsidy it provided to them in the period June 1, 2005, through April 30, 2007. Plaintiffs challenged the legal sufficiency of the notice they were provided for this reduction on the ground that they were entitled to a legally sufficient and understandable notice, and they contended that the notice sent indicating that HACLA was reducing the Voucher Payment Standard did not meet that standard. The Ninth Circuit ultimately granted Plaintiffs summary judgment on liability on due process and mandatory duty grounds (under 42 U.S.C. §1983 and Govt. Code §815.6) in *Nozzi v. HACLA*, 806 F.3d 1178 (9th Cir. 2015) ("*Nozzi II*"), and remanded the matter for further proceedings regarding class certification and remedy. The Court certified injunctive relief and damages classes, Dkt. 245. While cross summary judgment motions were pending on the appropriate remedy, the parties reached a settlement, subject to the final approval of this Court, and these proceedings followed.

III. ANALYSIS OF THE FACTORS IN DETERMINING AN APPROPRIATE ATTORNEYS' FEE AWARD.

Although not mandated by the Ninth Circuit, courts often consider the following factors when determining the benchmark percentage to be applied: (1) the result obtained for the class; (2) the effort expended by counsel; (3) counsel's experience; (4) counsel's skill; (5) the complexity of the issues; (6) the risks of non-payment assumed by counsel; (7) the reaction of the class; and (8) comparison with counsel's lodestar. *See, e.g., In re Heritage Bond Litigation*, 2005 WL 1594403 at 18*; In re Quintus Sec. Litig.*, 148 F.Supp.2d 967, 973-74 (N.D.Cal.2001). Because this provides a useful framework for analyzing the appropriate fee award here, counsel will employ that framework in analyzing the requested fee here, although we will reverse the order of discussion.

A. THE COMPLEXITY OF THE ISSUES

This was unquestionably a complex case. First, class actions are generally considered one of the most complex types of litigation. "It is common knowledge that class action suits have a well-deserved reputation as being most complex. The

requirement that counsel for the class be experienced attests to the complexity of the class action." *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). Second, civil rights cases, even if not class actions, are generally considered complex litigation. Indeed, Congress recognized the complexity of civil rights cases when the civil rights attorneys' fee statute (42 U.S.C. §1988) was passed in 1976. The legislative history states, "It is intended that the amount of fees awarded under S. 2278 (42 U.S.C. §1988) be governed by the same standards which prevail in other types of equally complex federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature." S.Rep.No. 94-1011, 1976 U.S.Code Cong. & Admin.News at 5913.

1. The Legal Issues Here Were Complex And Novel.

The issues in this case involve complex issues of constitutional law in a novel context where there was little direct authority on the question of whether the HUD regulation mandating one year's advance notice constituted a property interest for purposes of the due process clause. Similarly, there were disputes over what kind of showing Plaintiffs had to make to establish that the notice was not understandable and violated due process. (In the first appeal, the Court found disputed facts regarding the adequacy of notice and remanded for consideration under *Mathews v. Eldridge*.) The novelty and complexity are established by the fact that the case was twice dismissed by the District Court pursuant to Defendants' summary judgment motion on liability, only to prevail both times on appeal (the first time resulting in a remand for further proceedings and the second time resulting in a grant of summary judgment to Plaintiffs). Even after winning summary judgment on liability, there were uncertainty and pending cross summary-judgment motions on whether the violation here resulted in the right to monetary compensation for the increased rent. The case, by the time the Final Approval Motion is heard, will have gone on for nearly twelve years (including the pre-filing work and unsuccessful efforts to resolve the case before filing). Extensive paper discovery and depositions occurred; obtaining class data was heavily litigated (prior to the Ninth Circuit's grant of summary judgment on the second appeal.)

2. The Management of the Case was Challenging.

While the liability case did not present a particular management challenge, the remedy analysis did. The HACLA data was not well suited to answer the questions that needed to be answered to identify class members, for whom there were numerous reasons for exclusion. Many hours were required of both Plaintiffs' counsel and their expert, Brian Kriegler (reflected in the tens of thousands in expert fees advanced to Dr. Kriegler's firm, Econ One). Mr. Litt, who has extensive experience in the use of data in class actions, considers the challenges of identifying class members and their loss among the most challenging he has experienced. See Declaration of Barrett S. Litt, ¶¶ 38-39 (hereafter "Litt Dec.")..

Similarly, the briefing regarding remedy presented novel and complex issues on which there was little directly applicable law. Whether Plaintiffs were entitled to the rent differential between what their rental contribution would have been absent the violation and what they actually paid was vigorously contested. Plaintiffs claimed that the defective notice was the equivalent of no notice, was void *ab initio* and rendered the increased rental requirement unlawful while Defendants contended to the contrary. Because there was a paucity of directly applicable case law, it was difficult to reliably determine the likely outcome of that dispute.

3. Reaching A Settlement Was Difficult.

Another example of complexity, and counsel's skill, arose during settlement discussions. The Defendants' position was that any money could only come from the insurance companies. At the first mediation, there was little movement from the insurance companies, and HACLA's position was that it would not (and could not) make any contribution. Only after that mediation, when Plaintiffs' counsel made a policy limits demand, did movement occur that ultimately resulted in a settlement, and then several knotty issues had to be resolved before settlement could be reached. Litt Dec., ¶31.

B. THE RISKS OF NON-PAYMENT WERE SUBSTANTIAL

There was substantial risk of non-payment facing plaintiffs' counsel. While Plaintiffs were not concerned about their ability to collect if they were successful (although, as noted, Defendants contended that they could not, and even were not allowed to, use funds other than insurance funds to pay judgment), the risk lay in establishing that the underlying conduct was illegal and, if so, what the appropriate remedy was. This was discussed at some length in the previous section, and will not be repeated here. Additionally, seeking seven figure amounts of money from government entities carries inherent risks because factors other than economic risk-benefit analysis (i.e., politics) are involved. See Litt Dec. ¶30

Further, class actions are inherently risky for a variety of reasons. Most cases filed as a class action are not certified and many that are can still result in a loss, or in only a partial success. Thus, there is an added level of risk in any class action. See Litt Dec. ¶¶68 to 70. This case was taken with full recognition that, because there were not cases previously finding a property interest in the kind of advance notice here, the case was on the high end of the risk spectrum, and with the expectation that, if successful, it would result in a significant fee enhancement. Litt Dec. ¶30.

C. THE EFFORT EXPENDED BY COUNSEL.

Including the investigation time, and pre-litigation settlement efforts, counsel litigated this case for nearly twelve years. A partial list of the work performed (or to be performed) includes: 1) extensive investigation of the underlying circumstances, including communicating directly with class members; 2) extensive (albeit unsuccessful) attempts to settle the case pre-filing; 3) preparation of the complaint and amended complaint and extensive legal research related to framing the issues; 4) the Rule 26 conference and report; 5) propounding discovery related to liability, which included extensive analysis of the relevant documents and several depositions; 6) litigating the first round of summary judgment motions, which included several hearings in the District Court; 7) successfully appealing the grant of summary judgment to Defendants, which

required opening and reply briefs and all the other work attendant on an appeal in the Ninth Circuit; 8) returning to the District Court and continuing to litigate the case, which involved further discovery, heavily contested efforts contested to obtain class data from HACLA's data bases, and again opposing (unsuccessfully) Defendants' renewed summary judgment motion ; 9) again successfully appealing the grant of summary judgment to Defendants, which this time resulted in a grant of summary judgment to Plaintiffs; 10) successfully opposing Defendants' petition for a writ of certiorari, which Opposition the Court requested after Plaintiffs decided not to file one unless requested; 11) filing and winning a successful motion to certify both an injunctive relief and a damages class; 12) obtaining the class databases and retaining experts to analyze the data in a way that would allow identification of class members and their damages, which was an extremely complex endeavor (for which Plaintiffs' counsel have advanced over $100,000; 13) filing and defending against cross-motions for summary judgment on the appropriate damages remedy; 14) preparation of an extensive mediation brief and two full day mediation sessions; 15) negotiation and preparation of lengthy settlement documents, including settlement agreement, preliminary approval order, class notice and claim forms; 16) obtaining bids from qualified settlement administrators and ongoing work with the selected Class Administrator, JND; 17) yet to be done responses if objections are filed, Motion For Final Approval and proposed Final Approval Order; 18) Final Approval Hearing; and 19) continuing contact with class members offering information and assistance as requested..

D. THE RESULT OBTAINED FOR THE CLASS

This case was hard fought, as we have already described. The class members are by definition low income individuals of little means. All work was performed on a contingent fee basis. The settlement was the result of arm's length negotiations entered into only after plaintiffs won summary judgment on liability and contested class certification. Even then it required extensive settlement efforts.

The financial terms of the settlement are very favorable to class members. It is likely that every class member who files a claim will receive the full amount of his or her rental differential (the difference between the tenant's rental contribution absent the reduction in subsidy and the rental contribution the tenant actually made). Only if the claims rate reaches well over 50% would there begin to be a slight downward adjustment of class damages (depending on how many claims are filed). In addition, the settlement includes an injunctive relief order that ensures that HACLA provides understandable notice in the future.

This is a very favorable result for the class members and was the result of counsel's extensive and uncompensated effort over many years.

E. COUNSEL'S EXPERIENCE

Class Counsel are highly experienced litigators in the fields of civil rights and class actions. The first set of counsel is Mr. Litt and attorneys in his office. Mr. Litt is a well-known civil rights lawyer in the Los Angeles area, and has extensive class action and civil rights experience, as his Declaration and CV attached to it attest. He likely has more civil rights class action experience than any attorney practicing in the Central District. The attorneys associated with him who worked on the case (primarily Paul Estuar when he was with Mr. Litt) are also experienced in these areas. Mr. Litt's CV contains a variety of attestations to his skill, experience and reputation, several from judges in this District.

The other set of counsel are attorneys with Public Counsel, the largest pro bono law firm in the country. The Declaration of Anne Richardson, who has 28 years of civil rights and class action experience and is the current Director of Public Counsel's Consumer Law Project, addressees the Public Counsel attorneys' work on this case.

All of the appointed class counsel (Mr. Litt, Ms. Richardson and Ms. Carroll) are well-known and highly regarded civil rights and public interest lawyers, and all have extensive experience dealing both with civil rights and class action litigation, as do the other primary attorneys (Paul Estuar, Lisa Jaskol and Patrick Dunlevy) who worked on the case. See Litt and Richardson Declarations.

F. COUNSEL'S SKILL

As addressed above, Plaintiffs' counsel in this case are highly skilled attorneys in the field of civil rights and civil rights class actions. Their performance in this case, and its successful outcome, attest to their skill level.

G. THE REACTION OF THE CLASS

As of the time of this writing, Plaintiffs' counsel has not yet received a final report of the number of claims, opt-outs, or objections filed. That information will be provided in connection with the final approval hearing. However, as of September 15, 2017, the Claims Administrator reports receiving 1493 claims (approximately 12.5% of the 11,870 class members), with a value of $1,338,753.60 (approximately 22% of the approximately $9.2 Million class fund after fees), four opt-outs, and no objections. Litt Decl., ¶32. "The negligible number of opt-outs and objections indicates that the class generally approves of the settlement." *In re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 456 (C.D. Cal. 2014) (citing *Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming the approval of a class action settlement where 90,000 members received notice and 45 objections were received).

IV. THE AMOUNT REQUESTED BY PLAINTIFFS' COUNSEL IS REASONABLE

In this case, plaintiffs' counsel seek an award of $2,700,000-$2,820,000 (30% of the available fund of $9 Million-$9,4 Million), plus costs. Costs are significant, primarily due to the large cost of expert work to analyze the class data to determine class membership and damages, totaling approximately $167,350.61, and mediation costs.

It is well established in the Ninth Circuit that, while the court has discretion to use either a percentage of the fund or a lodestar approach in compensating class counsel (*see, e.g., Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989); *In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291, 1295 (9th Cir. 1994), the percentage of the fund is the typical method of calculating class fund fees. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002) ("the primary

basis of the fee award remains the percentage method"). While most circuits leave the method used to the discretion of the trial court, "[m]ost federal courts use the percentage of the fund approach in awarding attorneys' fees in common fund classes" *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 586 F.Supp.2d 732, 748 (S.D.Tex. 2008). Thus, we discuss the requested fee based upon that method. We provide lodestar information as a cross-check, and can provide greater detail if the Court wishes.

A. THE PERCENTAGE OF THE FUND METHOD OF CALCULATING FEES IS THE BETTER METHOD TO CALCULATE FEES AND SUPPORTS THE FEE REQUEST HERE.

Class action litigation is risky by its very nature. In a Federal Judicial Center 1996 report, titled "Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules" ("FJC Report"), the Report authors studied the outcomes of four federal districts and concluded that 31.7% or less of the filed class cases resulted in successful class outcomes for plaintiffs. This does not account for the degree of success (i.e., some cases could have resulted in minimal or partial success, and they would still be in the successful claim category). Thus, an outcome such as that obtained in this case is the exception, not the rule. The FJC Report also examined the awarded fees and concluded that "attorneys' fees were generally in the traditional range of approximately one-third of the total settlement."

Courts and commentators recognize that the percentage of the fund approach is preferred because it more closely aligns the interests of the counsel and the class, i.e., class counsel directly benefit from increasing the size of the class fund and working efficiently. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002) ("lodestar method is merely a cross-check on the reasonableness of a percentage figure, and it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a

reasonable fee, since the lodestar method does not reward early settlement.") [1]; Silber and Goodrich, *Common Funds and Common Problems: Fee Objections and Class Counsel's Response*, 17 RevLitig 525, 534 (1998) (the percentage approach avoids numerous drawbacks of the lodestar approach and is preferable because "the attorneys will receive the best fee when the attorneys obtain the best recovery for the class. Hence, under the percentage approach, the class members and the class counsel have the same interest -- maximizing the recovery of the class."). The Supreme Court has recognized that "the calculation of [reasonable] attorney's fees under the "common fund doctrine" … is based on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900, 104 S. Ct. 1541, 1550, 79 L. Ed. 2d 891 (1984).

Among the drawbacks to the lodestar method listed by Silber & Goodrich are that the lodestar method increases the amount of fee litigation; lacks objectivity; can result in churning, padding of hours, and inefficient use of resources. When the lodestar method is used, class counsel may be less willing to take an early settlement since settlement reduces the amount of time available for the attorneys to record hours. Finally, the lodestar method inadequately responds to the problem of risk. *Id*. at pp.529-532. *See also Vizcaino*., 290 F.3d at 1050 ("it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee"); *Mashburn v. National Healthcare, Inc.*, 684 F.Supp.

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[1] *See also Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1266-67 & fn.3, 1271 (D.C.Cir.1993) (noting that the lodestar approach "encourages significant elements of inefficiency" by giving attorneys an "incentive to spend as many hours as possible" and "a strong incentive against early settlement"; the percentage approach "more accurately reflects the economics of litigation practice"; "the monetary amount of the victory is often the true measure of success, and therefore it is most efficient that it influence the fee award"; accordingly, "we join the Third Circuit Task Force and the Eleventh Circuit, among others, in concluding that a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases"); *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir.1991) (holding in a reversionary common fund case "that the percentage of the fund approach is the better reasoned in a common fund case. Henceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class.");

679, 689-91 (M.D.Ala.1988) (cataloguing criticisms of the lodestar approach to fee calculation); *Manual for Complex Litigation* 4th Ed. §14.121 (2004) ("in practice, the lodestar method is difficult to apply, time consuming to administer, inconsistent in result, …capable of manipulation, …[and] creates inherent incentive to prolong the litigation").

Silber and Goodrich advocate that class fund fees should not diminish on a percentage basis, as some courts have done, because that undermines the full alignment between class counsel and the class. This is because, if the percentage of fees go down as the size of the fund goes up, a substantial increase in the size of the fund may be only marginally beneficial to the class counsel while it may be extremely beneficial to the class, with the result being that the economic interests of the class and counsel become misaligned. They also reviewed two studies of fee awards in common fund cases. One study was the FJC Report discussed above. The other study, done by National Economic Research Associates, an economics consulting firm, in 1994, found that attorneys' fees in these class actions averaged approximately 32% of the recovery, regardless of the case size, and averaged 34.74% when the fees and expenses were added together. Silber and Goodrich, *supra,* at 545-546. Silber and Goodrich conclude with the observation that a 33% fee award is both reasonable, and in line with the general market for contingent fee work. *Id*. at 546-549.

Alignment of the class' and Class Counsel's interests is best accomplished by awarding a percentage of the fund in the normal contingent fee range. In this way, class counsel are incentivized to maximize the recovery. In defining a 'reasonable fee' in representative actions, the law should 'mimic the market.' *Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) ("When a fee is set by a court rather than by contract, the object is to set it at a level that will approximate what the market would set."). Attorneys "regularly contract for contingent fees between 30% and 40%." *In re Remeron Direct Purchaser Antitrust Litigation*, 2005 WL 3008808, 16 (D.N.J. 2005)(citing cases), making the requested fee her highly reasonable in relation to the market for contingent fees.

The 30% figure sought here compares favorably with the general percentage of recovery awarded in cases around the country. *See* Silber and Goodrich, *supra* (summarizing available data and recommending that a 33% of the fund fee award is both reasonable, and in line with the general market for contingent fee work); *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 303 (3rd Cir. 2005), citing three studies ("[O]ne study of securities class action settlements over $10 million ... found an average percentage fee recovery of 31%; a second study by the Federal Judicial Center of all class actions resolved or settled over a four-year period ... found a median percentage recovery range of 27-30%; and a third study of class action settlements between $100 million and $200 million ... found recoveries in the 25-30% range were 'fairly standard.'") (citations omitted).

Further supporting the requested award is that none of the warning signs for a settlement that may be influenced by improper favorable treatment of class counsel exists here. The class was certified through a contested motion, not by agreement, and the merits of the case were heavily litigated, including a contested petition for a writ of certiorari. Class counsel are not receiving a disproportionate distribution of the settlement, the payment of fees is not separated from the class funds and therefore counsel cannot receive excessive fees in exchange for an unfair class settlement, and the fund established, whether fully claimed or not, is a substantial one sufficient to substantially compensate class members for their losses (and to refund the full principle if the claims rate is in the 50-60% range. *See, e.g., In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 946-947 (9th Cir. 2011).

While the Ninth Circuit has set a benchmark of 25% as a percentage of the fund, (*see Six Mexican Workers v. Arizona* Citrus *Growers*, 904 F.2d 1301, 1311 (9th Cir.1990) (establishing benchmark percentage of 25% of the fund as normal class counsel percentage of fund award)), this is an across the board benchmark, which is often adjusted upward or downward depending upon the assessment of the results, and the size of the fund. For cases under $10 Million, the percentage is usually adjusted upward,

generally to 30% or more. *See, e.g., Hicks v. Toys "R' Us-Delaware, Inc.*, 2014 WL 4670896, at *1 (C.D. Cal. Sept. 2, 2014) (awarding 30% of the fund in a $4 Million settlement where the Court found little risk "in any even arguably meritorious California wage and hour class action," such as the case before the court there, and citing *In re Omnivision Technologies, Inc.*, 559 F.Supp.2d 1036, 1047–48 (N.D.Cal.2007) ("nearly all common fund awards range around 30% ... [and] absent extraordinary circumstances that suggest reasons to lower or increase the percentage, the rate should be set at 30%"); *Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 297 (N.D.Cal.1995) ("the cases ... in which high percentages such as 30–50 percent of the fund were awarded involved relatively smaller funds of less than $10 million" and concluding that, "30 % is a common percentage award" in such cases); *Cicero v. DirecTV, Inc.*, 2010 WL 2991486, at *6 (C.D. Cal. Jul. 27, 2010) ("a review of California cases in other districts reveals that courts usually award attorneys' fees in the 30-40% range in wage and hour class actions that result in recovery of a common fund under $10 million"); I*n re: Cathode Ray Tube (Crt) Antitrust Litigation.*, 2016 WL 721680 (N.D. Cal. 2016) (awarding $173,025,000 fee, 30 % of over $575,000,000 megafund, in light of the eight year length of the case, the uncertain state of the applicable class action and antitrust law and the outstanding result). [2]

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[2] Numerous other cases support a 30% or higher fee. *See, g.g., Bostick v. Herbalife Int'l of Am., Inc.*, 2015 WL 12731932 (C.D. Cal. May 14, 2015) (awarding 30% of the gross settlement fund of $17.5 Million reached before class certification motion was filed, considering *inter alia* the monetary benefit to the class "in light of the complex factual and legal issues involved in the case," the intangible benefit of the injunctive relief obtained, the contingent nature of the representation and the risk of loss, the high level of skill and quality of class counsel's work in a complex case); *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 449 (E.D. Cal. 2013) (awarding 33% of gross settlement fund where class counsel created a roughly proportional gross settlement fund in wage-and-hour case); *Wren v. RGIS Inventory Specialists*, 2011 WL 1230826, at *1 (N.D. Cal. Apr. 1, 2011) (awarding over 40% of settlement fund in wage-and-hour case, observing that throughout "the course of the litigation Class Counsel successfully defended against [Defendant's] attempts to dismiss Plaintiffs' claims and to decertify the classes and pursed Plaintiffs' claims until the point of settlement"); *In re Pac. Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (finding district court did not abuse its discretion when awarding

B. THE FUND HERE IS THE AVAILABLE FUNDS TO BE CLAIMED, INCLUDING FEES, COSTS AND MONEY THAT MAY REVERT TO DEFENDANTS IF NOT CLAIMED.

The Ninth and other Circuits have explained that all funds recovered should be aggregated into a common fund in a class action settlement, even where the defendant pays attorneys' fees directly to class counsel as opposed to paying all sums directly into a fund, and even where funds revert to the defendant to the extent they are not claimed. Thus, in claims made or class reversion cases in this Circuit where there is a maximum fund, and unclaimed funds revert to the defendant, attorney's fees are awarded based on the gross settlement fund. See *Williams v. MGM-Pathe Commun. Co.*, 129 F.3d 1026 (9th Cir.1997) (reversing award of attorneys' fees because trial court failed to base fee award on the entire settlement, rather than the amount claimed). Other circuits are in accord.[3]

33% fee award in light of "the complexity of the issues and the risks").); *Franco v. Ruiz Food Prod., Inc.*, No. 1:10-CV-02354-SKO, 2012 WL 5941801, (E.D. Cal. Nov. 27, 2012) (approving 33% of the Maximum Settlement Fund "in two year old wage-and-hour action, in part, because the "case was actively litigated and significant time was spent on discovery," and, "[o]verall, the specialized skill of Class Counsel in this area of the law was generally an asset to the Class Members and the quality of work performed was good"); *In re Heritage Bond Litig.*, No. 02-ML-1475-DT, 2005 U.S. Dist. LEXIS 13555, at *65 (C.D. Cal. June 10, 2005) ("[t]he experience of Class Counsel also justifies the [33%] fee award requested"); "); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377 (N.D. Cal. 1989) ("nearly all common fund awards range around 30%").

[3] *See Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1295 (11th Cir.1999) (distribution of attorneys' fees are to be based upon the funds available to eligible claimants, whether claimed or not; affirming a fee award nearly twice the amount actually claimed by the class from the fund); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2nd Cir. 2007) (the "entire Fund… is created through the efforts of counsel at the instigation of the entire class"; an "allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not"); *Landsman & Funk, P.C. v. Skinder-Strauss Associates*, 639 Fed. Appx. 880, 884 (3d Cir. 2016) (holding that the lower court "properly relied on the entire fund as the appropriate benchmark for assessing the size of the fund created" for the purpose of calculating a fee award, as opposed to calculating fees based on the amount claimed by class members); *cf Boeing Co. v. Van Gemert*, 444 U.S. 472, 480, 100 S. Ct. 745, 750, 62 L. Ed. 2d 676 (1980) (observing that absent class members' "right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel").

Fees, litigation costs and class administration costs are included in determining the size of the fund. *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003) ("constructing a hypothetical 'fund' by adding together the amount of money Boeing would pay in damages to members of the class …, the amount of fees provided to various counsel, the cost of the class action notices paid for by Boeing, and a gross amount of money ascribed to all the injunctive relief contained in the agreement"; court accepted the concept but not its application there); *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 245 -246 (8th Cir. 1996)(although "technically" defendant would pay fees directly rather than their being paid "out of the class' recovery… in essence the entire settlement amount comes from the same source"; even if "the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class' recovery", and, "[a]ccordingly, the direct payment of attorney fees by defendants should not be a barrier to the use of the percentage of the benefit analysis"), citing *In re General Motors*, 55 F.3d 768, 821 (3rd Cir. 1995) (the "rationale behind the percentage of recovery method also applies in situations where, although the parties claim that the fee and settlement are independent, they actually come from the same source"); *In re Cendant Corp. PRIDES Litigation*, 243 F.3d 722, 734 (3rd Cir. 2001) ("[t]hough this is not a traditional common-fund case, because the unclaimed portion of the settlement fund is returned to Cendant and because the plaintiffs who recover may not be affected by the attorneys' fee award (depending on the number of plaintiffs who recover rights from the fund), use of the percentage-of-recovery method is appropriate in this case").

C. ALTHOUGH A LODESTAR CROSS-CHECK IS UNNECESSARY, IT MORE THAN SUPPORTS THE FEE REQUESTED HERE.

A lodestar cross-check is not required in this circuit, and, in a case such as this, is likely not a useful reference point. *See, e.g., Glass v. UBS Financial Services, Inc.*, 2007 WL 221862, 16 (N.D.Cal. 2007). In *Glass*, no lodestar cross-check was required by the Court where an early settlement resulted in exceptional results for the class even though some class members and the New York attorney general objected to the 25% of the fund request as excessive. The *Glass* Court awarded fees of $11,250,000 where, as here, the

$45 Million fund was subject to a reversion for unclaimed funds so that the actual fund could end up being substantially less than the theoretical fund. Here, the case was heavily litigated, and, as of this motion, there have been no objections. Litt Decl., ¶32.

In discussing the lodestar, we use current rates to adjust for delay in payment. *See, e.g., Missouri v. Jenkins,* 491 U.S. 274, 282, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) ("an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise—is within the contemplation of the statute [42 U.S.C. § 1988]"); *Barjon v. Dalton,* 132 F.3d 496, 502–03 (9th Cir. 1997) ("the district court may choose to apply either the attorney's current rates to all hours billed or the attorney's historic rates plus interest"). Generally, for a "fee award to be reasonable, it must be based on current, rather than historic, hourly rates." *Charlebois v. Angels Baseball LP*, 993 F. Supp. 2d 1109, 1119 (C.D. Cal. 2012) (lodestar award in settled class action, citing *Missouri v. Jenkins*). The *Charlebois* Court went on to note that the increase to current rates

> "is justified by comparable increases in the market. *See Coles v. City of Oakland,* No. C03–2961 THE, 2007 WL 39304, *7 (N.D.Cal. Jan. 4, 2007) (rejecting defendants' argument that rate increases should not surpass the rate of inflation and stating 'the focus of the rate analysis is to ensure that fees are awarded at 'prevailing market rates in the relevant community,' and such rates may be affected by factors other than inflation, such as attorneys' additional years of experience or changes in the legal market') (quoting *Blum v. Stenson,* 465 U.S. 886, 895, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)); *Parker v. Vulcan Materials Co. Long Term Disability Plan,* No. EDCV 07–1512 ABC (OPx), 2012 WL 843623, *7 (C.D.Cal. Feb. 16, 2012) (approving as reasonable an approximate 10 percent increase between 2011 rates and 2012 rates and because '[i]t is common practice for attorneys to periodically increase their rates for various reasons, such as to account for expertise gained over time, or to keep up with the increasing cost of maintaining a practice'); *LaPeter v. Canada Life Ins. Co. of Am.,* No. CV06–121–

S–BLW, 2009 WL 1313336 *3 (D.Idaho May 11, 2009) ('It is typical for rates to increase on a yearly basis and, also, for associates' and paralegals' rates to increase as they gain more experience.')."

Because the requested fee is not based on the lodestar, "a less exhaustive cataloging and review of counsel's hours" is involved than where the fee is based on a lodestar directly. *See, e.g., Victoria Secret Stores, LLC*, 2008 WL 8150856, at *9 (C.D. Cal. July 21, 2008) and cases cited therein. Nonetheless, we provide detailed timesheets in the event the Court wishes to review them. All the time records submitted were contemporaneously maintained with two exceptions.[4]

For purposes of the lodestar cross-check, the tables below show each person for whom time has been billed, that person's position and years of practice, the hours worked (through August 31, 2017) and the hourly rate used to bill for that person's time (using current rates) for the firms in which Mr. Litt worked during the pendency of the case (which changed over the course of the twelve years of work) and for Public Counsel. Some qualifications and explanations are in order. The Litt firms had eleven billers who billed under 15 hours on the case; all of those were eliminated. Paul Hughes is listed

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[4] As is explained in the Anne Richardson Declaration, the time records of two Public Counsel attorneys could not be located. Hernán Vera's records are no longer available. Mr. Vera left his position as Executive Director of Public Counsel in 2014 and has submitted a Declaration attesting that his reconstructed time is correct. Lisa Jaskol left Public Counsel in 2016 to become a Superior Court judge, and her contemporaneous time records cannot be found; she has similarly submitted a Declaration that the reconstructed time is correct. While contemporaneous time records are preferred, reconstructed records are acceptable when adequately supported. *See, e.g., United States v. $12,248 U.S. Currency*, 957 F.2d 1513, 1521 (9th Cir.1991) (accepting "reconstructed records developed by reference to litigation files and other records"); *Rosenfeld v. U.S. Dep't of Justice*, 904 F. Supp. 2d 988, 1005 (N.D. Cal. 2012) ("'[b]asing the attorneys' fee award in part on reconstructed records developed by reference to litigation files and other records' is an established practice in this circuit") (quoting *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1473 (9th Cir.1983). Here, the reconstructed time constitutes a small percentage (approximately 6%) of the lodestar (otherwise based on contemporaneous time records). The file in this case establishes that massive time was spent by both sides litigating it.

under the Litt firms but is actually a partner in the appellate section at Mayer Brown (and co-director of the Yale Law School Supreme Court Clinic); Mr. Litt associated him in specifically to work on the (successful) opposition to the Petition for Certiorari given his experience and expertise in opposing such petitions. His hours are based on the bill he sent to Mr Litt after the Supreme Court activity ended. The $730 rate charged for Mr. Hughes, who regularly does retained work, is his current standard rate for retained work at Mayer Brown. The Litt firm also has billed for Patrick Dunlevy, who had worked on the case when he was at Public Counsel and was brought in by Mr. Litt to assist after Mr. Dunlevy left Public Counsel. Each of the billers for the Litt firms, and an explanation of the role they played, is discussed in Mr. Litt's Declaration. All Litt firm time was contemporaneously recorded. See Litt Dec., ¶¶28, 31.

LITT FIRM BILLERS					
Biller	**Position**	**Years Practice (Grad Yr)**	**Rate**	**Hours**	**Total**
Barrett S. Litt	Attorney	48 years (1969)	$1150	1189	$1,367,350
Paul Estuar	Attorney	24 years (1993)	$765	516.1	$394,816.50
Pat Dunlevy	Attorney	25 years (1992)	$750	324	$243,000
Paul Hughes	Attorney	9 years (2008)	$730	60	$43,800
Stacey Brown	Attorney	11 years (2006)	$600	22.1	$13,260
Julia White	Sr. Paralegal		$335	504.1	$168,873.50
Miguel Villafuerte	Jr. Paralegal		$150	42.3	$6,345
Charla Gray	Law Clerk		$200	39.8	$7,960
James Debergh	Law Clerk		$200	27.1	$5,420
Jonathan Dale	Law Clerk		$200	29.5	$5,900
TOTAL					**$2,256,725**

PUBLIC COUNSEL BILLERS					
Biller	**Position**	**Years Practice (Grad Yr)**	**Rate**	**Hours**	**Total**
Hernán Vera	Attorney	23 Years (1994)	$750	160.6	$120,450
Lisa Jaskol	Attorney	29 Years (1988)	$850	75.6	$64,260
Anne Richardson	Attorney	28 Years (1989)	$850	146.7	$124,695
Stephanie Carroll	Attorney	13 Years (2004)	$640	945.8	$605,312
Pat Dunlevy	Attorney	25 years (1992)	$750	195	$146,250
Adelaide Anderson	Attorney	2010 (7 years)	$540	19.9	$10,746
TOTAL					**1,071,713**

Based on these hourly rates (which are the rates these attorneys would seek in an awarded statutory fee motion), the lodestar through August 31, 2017 is $3,328,438. This does not account for the remaining work, which includes work done after August 31 on this motion, the yet to be drafted motion for Final Approval and Order, responses to objections to the extent necessary, and ongoing work with the Class Administrator and class members as needed (which time will be provided for the Final Approval Hearing).

D. THE HOURS SPENT ON THE CASE ARE REASONABLE

The hours spent by Plaintiffs' counsel to assess the lodestar cross-check are reasonable. Hours are reasonable if "at the time rendered, [they] would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest in the pursuit of a successful recovery . . . ." *Moore v. James H. Matthews & Co.*, 682 F.2d 830, 839 (9th Cir. 1982) (internal quotations omitted); *see also Ramon v. County of Santa Clara*, 173 Cal. App. 4th 915, 925 (Cal. Ct. App. 2009). In making that determination, courts must look at "the entire course of the litigation, including pretrial matters, settlement negotiations, discovery, litigation tactics, and the trial itself . . . ." *Vov. Las Virgenes Municipal Utility Dist*., 79 Cal.App.4th 440, 447 (2000); *see also Peak-Las Positas Partners v. Bollag*, 171 Cal. App. 4th 101, 114 (2009) (fees reasonable because of complexity of issues, results obtained, and defendants' aggressive litigation).

As the Ninth Circuit has recognized, civil rights lawyers working without payment from their clients have little to gain from "churning" a case. "[L]awyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). Accordingly, they should be fully compensated for taking the steps that they reasonably believe are necessary to *win* the case: "By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; ***after all, he won, and might not have, had he been more of a slacker.***" *Id.* (emphasis added).

Counsel have presented detailed evidence of the time spent litigating this case for the past twelve years. *See* Exhibit C to Litt Declaration. The substantial time spent was justified in the context of this litigation. In any event, since this is a percentage of the fund fee claim, any unnecessary hours do not increase Plaintiffs' fee.

E. THE HOURLY RATES THAT PLAINTIFFS' COUNSEL WILL RECEIVE UNDER THE 30% FEE AWARD ARE REASONABLE.

The listed rates in the foregoing table are amply supported. The evidence submitted attests to the skill, experience and reputations of the lead attorneys in this case. Lead counsel Mr. Litt has been recognized as a Super Lawyer every year between 2005 and the present, is named in Best Lawyers In America, and was described in 2014 by one court in this District as "one of the leading civil rights attorneys in the country." See Litt Declaration, ¶¶ 5, 12. His CV identifies numerous certified class actions in which he has been the, or one of the, lead counsel as well as pending class actions. Ms. Richardson has provided evidence of her skill, experience and reputation. She has been a Super Lawyer every year since 2004. The experience and qualifications and reputation of the lawyers is addressed in the accompanying Litt and Richardson Declarations.

The Declaration and supporting exhibits of Mr. Litt and Carol Sobel have provided ample citations from a variety of sources to support the rates used for the lodestar comparison. (As their Declarations explain, both Mr. Litt and Ms. Sobel have been identified by courts as experts on attorney fee rates in Southern California.)

The submitted evidence includes numerous attorney fee awards in civil rights cases (either direct fee awards or lodestar cross-checks in class actions) and consumer class actions using or awarding rates comparable to those requested here (or in which rates are comparable to those requested after accounting for the general increase in rates in Los Angeles in intervening years). In addition, Plaintiffs identified numerous commercial rate awards or commercial fees charged to clients at similar or higher rates. Congress expressly recognized that fees in federal civil rights cases should be comparable to those in complex federal civil litigation. *See City of Riverside v. Rivera*, 477 U.S. 561, 575-76 (1986) ("Congress made clear that it 'intended that the amount of fees awarded under [§1988] be governed by the same standards which prevail in other types of equally complex Federal litigation.'" (citing S. Rep. No. 94-1011, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913)).

In this lodestar cross-check, whose purpose is to "alert[]the trial judge that when the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award"(*In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 306, 60 Fed. R. Serv. 3d 851 (3d Cir. 2005), as amended, (Feb. 25, 2005), the Court need not make an independent determination that each rate is reasonable. The Court is essentially ensuring that Plaintiffs' counsel do not receive a "windfall." *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig.*, 553 F. Supp. 2d 442, 467 (E.D. Pa. 2008), *as corrected* (Apr. 9, 2008).

Whether the Court would award these rates in this case in a pure statutory fee motion is not the issue in this motion because, while multipliers are generally not available (see *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 553–57, 130 S. Ct. 1662, 1673–75, 176 L. Ed. 2d 494 (2010)) in statutory fee cases, they are expected, indeed required, in successful class action litigation where the fund is sufficient. *See, e.g., In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299–300 (9th Cir. 1994) (reversing denial of risk multiplier in class action; noting that, "[i]f 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" and that "courts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases," and distinguishing common fund cases from fee shifting awards because the class pays the attorneys from the common fund); *Fischel v. Equitable Life Assur. Soc'y of U.S.*, 307 F.3d 997, 1008 (9th Cir. 2002) ("It is an abuse of discretion to fail to apply a risk multiplier… when (1) attorneys take a case with the expectation that they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence that the case was risky."); *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 741 (9th Cir. 2016) ("the district court must apply a risk multiplier to the lodestar" where the foregoing conditions exist). This case was taken with the expectation that of a risk enhancement; discounted hourly rates would not reflect that risk; and the case was indisputably risky.

While the foregoing cases do not identify a benchmark multiplier, "[e] mpirical evidence of multipliers across many cases demonstrates that most multipliers are in the relatively modest 1–2 range," which "counsels in favor of a presumptive ceiling of 4, or slightly above twice the mean." Rubinstein, *Newberg on Class Actions* § 15:87 (5th ed.).[5]

Class Counsel seek a fee award of $2,700,000 to $2,820,000 depending on the size of the fund available after defense litigation attorneys' fees and costs, plus an additional

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[5] In practice, many cases have awarded multiplier above four where the Court found it appropriate. *See Craft v. Cnty. of San Bernardino*, 624 F. Supp. 2d 1113, 1125 (C.D. Cal. 2008) (multiplier of 5.2 in $25.5 Million settlement based on award of 25% of fund, collecting cases with high multipliers). Multipliers above two are common where the fund supports it. *See, e.g.,Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (risk multiplier appropriate on percentage of fund award in megafund settlement resulting in 28.5% of the fund and a multiplier of 3.65). *Vizcaino* contains an Appendix listing percentage and multipliers in several megafund cases, and is enlightening on the norm even in megafund cases. It lists 46 cases, the smallest of which is a $53 Million fund, and the largest of which is a $193 Million fund. Of those 46 cases, 30 received a multiplier (eight with a multiplier between 1.2-1.8, twelve with a multiplier between 2.0-2.5, six with a multiplier between 3.0-3.6, three with a multiplier between 4.0-6.2, and one with a multiplier of 19.6). Despite the fact these were mega-fund cases, where percentages of the fund are generally smaller, ten awarded percentages of the fund between 30-40%.

$167,350.61 through August 31, 2017 (to be supplemented with a final accounting) for litigation costs. The total hours in the case through August 31, 2017 are 4297.60. The lodestar through August 31, 2017, using Plaintiffs' counsel claimed rates, is $3,328,438. Plaintiffs estimate an additional 200 plus hours for the work performed after August 31 on the fee motion, the final approval motion and order and related work.

Thus, if the rates submitted are used to calculate the lodestar, the award Plaintiffs' counsel will receive is in the range of 80% of the lodestar. Even using substantially lower rates, the multiplier would likely be under 1.5. Plaintiffs' counsel have addressed the risk in class actions generally, the risks in this case given the absence of clear authority on the property interest in advance notice under the HUD regulation, and the expectation of a substantial multiplier if the case were successful.

Where Plaintiffs' counsel obtain an expeditious and "excellent result" in a "complex and risky case", they are entitled to a fully compensatory award. *See Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, 2005 WL 1213926 (E.D. Pa. May 19, 2005). This was a risky, exceptionally protracted and complex case, where there was a substantial risk that Plaintiffs would not prevail, and, even if they prevailed on liability as they ultimately did, there remained a risk that that a court would not award monetary damages based on the claim of entitlement to the difference between the rental contribution the tenant actually and the lowered rental contribution they should have been paying during the one year notice period , regardless of individual circumstances (an issue unresolved at the time of settlement). The "skill and experience brought to bear by counsel throughout the year[s] they spent actively litigating this case" justifies a substantial fee award, a conclusion reinforced "by the high caliber of Plaintiffs' counsels' work in this case." *Id.*

F. FAILING TO AWARD THE FEES AND COSTS REQUESTED WOULD FRUSTRATE THE PURPOSES OF CLASS ACTIONS IN THE CONTEXT OF THIS SETTLEMENT.

As *Lopez v. Youngblood*, No. CV-F-07-0474 DLB, 2011 WL 10483569, at *14 (E.D. Cal. Sept. 2, 2011) explained, "[w]here… class members are receiving a substantial monetary recovery, and the interests of the class members and counsel are aligned, i.e.,

class counsel is not receiving an unreasonable proportion of the total recovery," the court should consider that "one important purpose of the class action device is that defendants should not benefit from their wrongdoing, and should be deterred from doing so by being vulnerable to class actions to remedy their wrongful conduct." (Citing, Richard A. Posner, *Economic Analysis of Law* 626–27 (5th ed.1998) ("the most important point from an economic standpoint is that the violator be confronted with the costs of his violation-this achieves the allocative purpose of the suit not that he pays them to his victims"); John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 2–3 (Columbia Law. Sch. Ctr. for Law & Econ. Studies, Working Paper No. 293, 2006) (available at http://ssrn.com/abstract_id=893833). *See also Myriam Gilles, Exploding The Class Action Agency Costs Myth: The Social Utility Of Entrepreneurial Lawyers, University of Pennsylvania Law Review,* 155 U. Pa. L. Rev. 103 (November 2006).

V. THE COSTS ARE REASONABLE.

Plaintiffs seek $167,350.61 in costs, which are primarily for expert and mediation costs (plus other chargeable costs). See Litt Dec. ¶ 68; Exhibit D. These costs, primarily reimbursement for out of pocket costs for experts, mediation and litigation costs, are reasonable, and the Court should award costs (exclusive of class administration) in that amount (as supplemented by costs to be supplemented for the Final Approval hearing). Nontaxable cost reimbursement is authorized by Rule 23(h), and "include[s] counsel's out-of-pocket expenses that would normally be charged to a fee paying client." *Newberg on Class Actions* §16:10 (5th ed.). In class actions, expenses that "are of the type that law firms typically bill to their clients … include such things as: mediator fees, expert fees, computer research, photocopying, postage, meals, and court filing fees"). *Yang v. Focus Media Holding Ltd.*, 2014 WL 4401280, *19 (S.D.N.Y. 2014).

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court award 30%

of the class fund as attorneys' fees plus litigation, consulting and expert costs in the amount of $167,350.61.

Dated: September 18, 2017

Respectfully Submitted,

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL NOZZI, et al., Plaintiff, v. HOUSING AUTHORITY OF THE CITY OF LOS ANGELES, et al., Defendants.	Case No. 2:07-cv-00380-PA-FFM) [Honorable Percy Anderson] **[PROPOSED] ORDER AWARDING CLASS FUND ATTORNEYS' FEES** **Date: January 29, 2018** **Time: 1:30 P.M.** **Place: Courtroom 9A**

I. INTRODUCTION

Class Counsel seek an award of 30 % of the Class Fund plus an award of litigation and expert costs in the amount of $____ (exclusive of class administration costs), out of a total class fund of between $9 Million and $9.4 Million (depending on the amount of the primary carrier's insurance remaining after costs of defense). Based on the terms of the Said fees would be paid separately from payments made to class members pursuant to the provisions of the settlement agreement.

Plaintiffs' counsel secured a settlement of nearly $10 Million plus an injunction after nearly twelve years of litigation and pre-filing efforts to resolve the case. For the reasons stated below, the Court finds this award appropriate.

II. DESCRIPTION OF PLAINTIFFS' CLAIMS

The Court is very familiar with Plaintiffs' claims since they have been addressed twice by the Ninth Circuit and by this Court's ruling on the Motion for Class Certification. In light of these extensive court rulings, the claim is described only briefly. A more detailed analysis of the claims may be found in *Nozzi v. HACLA*, 806 F.3d 1178 (9th Cir. 2015) ("*Nozzi II*").

Plaintiffs are Section 8 Housing Choice Voucher Participants whose rental contributions were increased as a result of HACLA's reduction in the rental subsidy it provided to them in the period June 1, 2005, through April 30, 2007. Plaintiffs challenged the legal sufficiency of the notice they were provided for this reduction on the ground that they were entitled to a legally sufficient and understandable notice, and they contended that the notice sent indicating that HACLA was reducing the Voucher Payment Standard did not meet that standard. The Ninth Circuit ultimately granted Plaintiffs summary judgment on liability on due process and mandatory duty grounds (under 42 U.S.C. §1983 and Govt. Code §815.6) and remanded the matter for further proceedings regarding class certification and remedy. *See Nozzi II.* The Court certified injunctive relief and damages classes, Dkt. 245. While cross summary judgment motions were pending on the appropriate remedy, the parties reached a settlement, subject to the final approval of this Court, and these proceedings followed.

III. ANALYSIS OF THE FACTORS IN DETERMINING AN APPROPRIATE ATTORNEYS' FEE AWARD.

Although not mandated by the Ninth Circuit, courts often consider the following factors when determining the benchmark percentage to be applied: (1) the result obtained for the class; (2) the effort expended by counsel; (3) counsel's experience; (4) counsel's skill; (5) the complexity of the issues; (6) the risks of non-payment assumed by counsel; (7) the reaction of the class; and (8) comparison with counsel's lodestar. *See, e.g., In re Heritage Bond Litigation*, 2005 WL 1594403 at 18*; In re Quintus Sec. Litig.*, 148 F.Supp.2d 967, 973-74 (N.D.Cal.2001). Because this provides a useful framework for analyzing the appropriate fee award here, the Court employs that framework in analyzing the requested fee here, although we will reverse the order of discussion.

A. THE COMPLEXITY OF THE ISSUES

This was a complex case. First, class actions are generally considered one of the most complex types of litigation. "It is common knowledge that class action suits have a well-deserved reputation as being most complex. The requirement that counsel for the class be experienced attests to the complexity of the class action." *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). Second, civil rights cases, even if not class actions, are generally considered complex litigation.Congress recognized the complexity of civil rights cases when the civil rights attorneys' fee statute (42 U.S.C. §1988) was passed in 1976. The legislative history states, "It is intended that the amount of fees awarded under S. 2278 (42 U.S.C. §1988) be governed by the same standards which prevail in other types of equally complex federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature." S.Rep.No. 94-1011, 1976 U.S.Code Cong. & Admin.News at 5913.

1. The Legal Issues Here Were Complex And Novel.

The issues in this case involve complex issues of constitutional law in a novel context where there was little direct authority on the question of whether the HUD regulation mandating one year's advance notice constituted a property interest for purposes of the due process clause. Similarly, there were disputes over what kind of

showing Plaintiffs had to make to establish that the notice was not understandable and violated due process. (In the first appeal, the Court found disputed facts regarding the adequacy of notice and remanded for consideration under *Mathews v. Eldridge*. After the previous trial court again granted summary judgment to the Defendants, the Ninth Circuit, applying the *Mathews* factors, granted summary judgment to Plaintiffs.) The novelty and complexity of the case are established by the fact that it was twice dismissed by the District Court pursuant to Defendants' summary judgment motion on liability, only to prevail both times on appeal (the first time resulting in a remand for further proceedings and the second time resulting in a grant of summary judgment to Plaintiffs). Even after winning summary judgment on liability, there were uncertainty and pending cross summary-judgment motions on whether the violation resulted in the right to monetary compensation for the increased rent. The case, by the time the Final Approval Motion is heard, will have gone on for nearly twelve years (including the pre-filing work and unsuccessful efforts to resolve the case before filing). Extensive paper discovery and depositions occurred; obtaining class data was heavily litigated (prior to the Ninth Circuit's grant of summary judgment on the second appeal). The case was strongly contested at every step.

2. The Management of the Case was Challenging.

While the liability case did not present a particular management challenge, the remedy analysis did. According to Plaintiffs' counsel, the HACLA data was not well suited to answer the questions that needed to be answered to identify class members, for whom there were numerous reasons for exclusion. Many hours were required of both Plaintiffs' counsel and their expert, Brian Kriegler (reflected in the tens of thousands in expert fees advanced to Dr. Kriegler's firm, Econ One). Class counsel considers the challenges of identifying class members and their loss among the most challenging he has experienced. See Declaration of Barrett S. Litt, ¶¶ 38-39.

Similarly, the briefing regarding remedy presented novel and complex issues on which there was little directly applicable law. Whether Plaintiffs were entitled to the rent

differential between what their rental contribution would have been absent the violation and what they actually paid was vigorously contested. Plaintiffs claimed that the defective notice was the equivalent of no notice, was void *ab initio* and rendered the increased rental requirement unlawful while Defendants contended to the contrary.

3. Reaching A Settlement Was Difficult.

Another example of complexity, and counsel's skill, arose during settlement discussions. The Defendants' position was that any money could only come from the insurance companies. At the first mediation, there was little movement from the insurance companies, and HACLA's position was that it would not (and could not) make any contribution. Only after that mediation, when Plaintiffs' counsel made a policy limits demand, did movement occur that ultimately resulted in a settlement, and then several knotty issues had to be resolved before settlement could be reached.

B. THE RISKS OF NON-PAYMENT WERE SUBSTANTIAL

There was substantial risk of non-payment facing plaintiffs' counsel. While Plaintiffs were not concerned about their ability to collect if they were successful (although, as noted, Defendants contended that they could not, and even were not allowed to, use funds other than insurance funds to pay any judgment), the risk lay in establishing that the underlying conduct was illegal and, if so, what the appropriate remedy was. This was discussed at some length in the previous section, and will not be repeated here. Additionally, seeking seven figure amounts of money from government entities carries inherent risks because factors other than economic risk-benefit analysis (i.e., politics) are involved. See Litt Dec. ¶30

Further, class actions are inherently risky for a variety of reasons. Most cases filed as a class action are not certified and many that are can still result in a loss, or in only a partial success. Thus, there is an added level of risk in any class action. See Litt Dec. ¶¶68 to 70. This case was taken with full recognition that, because there were not cases previously finding a property interest in the kind of advance notice here, the case was on

the high end of the risk spectrum, and with the expectation that, if successful, it would result in a significant fee enhancement. Litt Dec. ¶30.

C. THE EFFORT EXPENDED BY COUNSEL.

Including the investigation time, and pre-litigation settlement efforts, counsel litigated this case for nearly twelve years. The work performed (or to be performed) includes: 1) extensive investigation of the underlying circumstances, including communicating directly with class members; 2) extensive (albeit unsuccessful) attempts to settle the case pre-filing; 3) preparation of the complaint and amended complaint and extensive legal research related to framing the issues; 4) the Rule 26 conference and report; 5) propounding discovery related to liability, which included extensive analysis of the relevant documents and several depositions; 6) litigating the first round of summary judgment motions, which included several hearings in the District Court; 7) successfully appealing the grant of summary judgment to Defendants, which required opening and reply briefs and all the other work attendant on an appeal in the Ninth Circuit; 8) returning to the District Court and continuing to litigate the case, which involved further discovery, heavily contested efforts contested to obtain class data from HACLA's data bases, and again opposing (unsuccessfully) Defendants' renewed summary judgment motion ; 9) again successfully appealing the grant of summary judgment to Defendants, which this time resulted in a grant of summary judgment to Plaintiffs; 10) successfully opposing Defendants' petition for a writ of certiorari, which Opposition the Court requested after Plaintiffs decided not to file one unless requested; 11) filing and winning a successful motion to certify both an injunctive relief and a damages class; 12) obtaining the class databases and retaining experts to analyze the data in a way that would allow identification of class members and their damages, which was an extremely complex endeavor (for which Plaintiffs' counsel have advanced over $100,000; 13) filing and defending against cross-motions for summary judgment on the appropriate damages remedy; 14) preparation of an extensive mediation brief and two full day mediation sessions; 15) negotiation and preparation of lengthy settlement documents, including

settlement agreement, preliminary approval order, class notice and claim forms; 16) obtaining bids from qualified settlement administrators and ongoing work with the selected Class Administrator, JND; 17) yet to be done responses if objections are filed, Motion For Final Approval and proposed Final Approval Order; 18) Final Approval Hearing; and 19) continuing contact with class members offering information and assistance as requested..

D. THE RESULT OBTAINED FOR THE CLASS

This case was hard fought. The class members are by definition low income individuals of little means. All work was performed on a contingent fee basis. The settlement was the result of arm's length negotiations entered into only after plaintiffs won summary judgment on liability and contested class certification. Even then it required extensive settlement efforts.

The financial terms of the settlement are very favorable to class members. It is likely that every class member who files a claim will receive the full amount of his or her rental differential (the difference between the tenant's rental contribution absent the reduction in subsidy and the rental contribution the tenant actually made). Only if the claims rate reaches well over 50% would there begin to be a slight downward adjustment of class damages (depending on how many claims are filed). In addition, the settlement includes an injunctive relief order that ensures that HACLA provides understandable notice in the future.

This is a very favorable result for the class members and was the result of counsel's extensive and uncompensated effort over many years.

E. COUNSEL'S EXPERIENCE

Class Counsel are highly experienced litigators in the fields of civil rights and class actions. The first set of counsel is Mr. Litt and attorneys in his office. Mr. Litt is a well-known civil rights lawyer in the Los Angeles area, and has extensive class action and civil rights experience, as his Declaration and CV attached to it attest. The attorneys associated with him who worked on the case (primarily Paul Estuar when he was with

Mr. Litt) are also experienced in these areas. Mr. Litt's CV contains a variety of attestations to his skill, experience and reputation, several from judges in this District.

The other set of counsel are attorneys with Public Counsel, the largest pro bono law firm in the country. The Declaration of Anne Richardson, who has 28 years of civil rights and class action experience and is the current Director of Public Counsel's Consumer Law Project, addressees the Public Counsel attorneys' work on this case.

All of the appointed class counsel (Mr. Litt, Ms. Richardson and Ms. Carroll) are well-known and highly regarded civil rights and public interest lawyers, and all have extensive experience dealing both with civil rights and class action litigation, as do the other primary attorneys (Hernán Vera, Paul Estuar, Lisa Jaskol and Patrick Dunlevy) who worked on the case. See Litt and Richardson Declarations.

F. COUNSEL'S SKILL

This issue has been answered by the discussion above. Counsel in this case have demonstrated that they are highly skilled attorneys in the field of civil rights and civil rights class actions, a conclusion supported by the results in this case.

G. THE REACTION OF THE CLASS

The Claims Administrator reports receiving ____ claims (__% of the 11,870 class members), with a value of $__ (__% of the fund available for distribution to class members after fees and costs), ___ opt-outs, and __ objections. "The negligible number of opt-outs and objections indicates that the class generally approves of the settlement." *In re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA) Litig*., 295 F.R.D. 438, 456 (C.D. Cal. 2014) (citing *Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 577 (9th Cir. 2004)(affirming the approval of a class action settlement where 90,000 members received notice and 45 objections were received).

IV. THE AMOUNT REQUESTED BY PLAINTIFFS' COUNSEL IS REASONABLE

In this case, plaintiffs' counsel seek an award of $2,700,000-$2,820,000 (30% of the available fund of $9 Million-$9,4 Million), plus costs. It is well established in the Ninth Circuit that, while the court has discretion to use either a percentage of the fund or

a lodestar approach in compensating class counsel (*see, e.g., Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989); *In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291, 1295 (9th Cir. 1994), the percentage of the fund is the typical method of calculating class fund fees. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002) ("the primary basis of the fee award remains the percentage method"). While most circuits leave the method used to the discretion of the trial court, "[m]ost federal courts use the percentage of the fund approach in awarding attorneys' fees in common fund classes" *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 586 F.Supp.2d 732, 748 (S.D.Tex. 2008). Thus, the Court addresses the requested fee based upon a percentage of the fund, with a lodestar cross-check for reasonableness.

A. THE PERCENTAGE OF THE FUND METHOD OF CALCULATING FEES IS THE BETTER METHOD TO CALCULATE FEES AND SUPPORTS THE FEE REQUEST HERE.

Class action litigation is risky by its very nature. In a Federal Judicial Center 1996 report, titled "Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules" ("FJC Report"), the Report authors studied the outcomes of four federal districts and concluded that 31.7% or less of the filed class cases resulted in successful class outcomes for plaintiffs. This does not account for the degree of success (i.e., some cases could have resulted in minimal or partial success, and they would still be in the successful claim category). Thus, an outcome such as that obtained in this case is the exception, not the rule. The FJC Report also examined the awarded fees and concluded that "attorneys' fees were generally in the traditional range of approximately one-third of the total settlement."

Many courts and commentators have recognized that the percentage of the available fund analysis is the preferred approach in class action fee requests because it more closely aligns the interests of the counsel and the class, i.e., class counsel directly benefit from increasing the size of the class fund and working in the most efficient manner. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002)

("lodestar method is merely a cross-check on the reasonableness of a percentage figure, and it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement)[1]; Silber and Goodrich, *Common Funds and Common Problems: Fee Objections and Class Counsel's Response*, 17 RevLitig 525, 534 (1998) (the percentage approach avoids numerous drawbacks of the lodestar approach and is preferable because "the attorneys will receive the best fee when the attorneys obtain the best recovery for the class. Hence, under the percentage approach, the class members and the class counsel have the same interest -- maximizing the recovery of the class."). The Supreme Court has recognized that "the calculation of [reasonable] attorney's fees under the "common fund doctrine" … is based on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900, 104 S. Ct. 1541, 1550, 79 L. Ed. 2d 891 (1984).

Among the drawbacks to the lodestar method listed by Silber & Goodrich are that the lodestar method increases the amount of fee litigation; the lodestar method lacks objectivity; the lodestar method can result in churning, padding of hours, and inefficient use of resources; when the lodestar method is used, class counsel may be less willing to take an early settlement since settlement reduces the amount of time available for the attorneys to record hours; and the lodestar method inadequately responds to the problem

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[1] *See also Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1266-67 & fn.3, 1271 (D.C.Cir.1993) (noting that the lodestar approach "encourages significant elements of inefficiency" by giving attorneys an "incentive to spend as many hours as possible" and "a strong incentive against early settlement"; the percentage approach "more accurately reflects the economics of litigation practice"; "the monetary amount of the victory is often the true measure of success, and therefore it is most efficient that it influence the fee award"; accordingly, "we join the Third Circuit Task Force and the Eleventh Circuit, among others, in concluding that a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases"); *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir.1991) (holding in a reversionary common fund case "that the percentage of the fund approach is the better reasoned in a common fund case. Henceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class.").

of risk. *Id*. at pp.529-532. *See also Vizcaino*., 290 F.3d at 1050 ("it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee"); *Mashburn v. National Healthcare, Inc.*, 684 F.Supp. 679, 689-91 (M.D.Ala.1988) (cataloguing criticisms of the lodestar approach to fee calculation); *Manual for Complex Litigation* 4th Ed. §14.121 (2004) ("in practice, the lodestar method is difficult to apply, time consuming to administer, inconsistent in result, …capable of manipulation, …[and] creates inherent incentive to prolong the litigation").

In defining a 'reasonable fee' in representative actions, the law should 'mimic the market.' *Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) ("When a fee is set by a court rather than by contract, the object is to set it at a level that will approximate what the market would set.... The judge, in other words, is trying to mimic the market in legal services."). Attorneys "regularly contract for contingent fees between 30% and 40%." *In re Remeron Direct Purchaser Antitrust Litigation*, 2005 WL 3008808, 16 (D.N.J. 2005)(citing cases), making the requested fee highly reasonable in relation to the market for contingent fees.

The 30% figure sought here compares favorably with the general percentage of recovery awarded in cases around the country. *See* Silber and Goodrich, *supra* (summarizing available data showing that 32-34% is a standard range for class fees and recommending that a 33% of the fund fee award is both reasonable, and in line with the general market for contingent fee work); *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 303 (3rd Cir. 2005), citing three studies ("[O]ne study of securities class action settlements over $10 million ... found an average percentage fee recovery of 31%; a second study by the Federal Judicial Center of all class actions resolved or settled over a four-year period ... found a median percentage recovery range of 27-30%; and a third study of class action settlements between $100 million and $200 million ... found recoveries in the 25-30% range were 'fairly standard.'") (citations omitted).

Further supporting the requested award is that none of the warning signs for a settlement that may be influenced by improper favorable treatment of class counsel exists here. The class was certified through a contested motion, not by agreement, and the merits of the case were heavily litigated, including a contested petition for a writ of certiorari. Class counsel are not receiving a disproportionate distribution of the settlement, the payment of fees is not separated from the class funds and therefore counsel cannot receive excessive fees in exchange for an unfair class settlement, and the fund established, whether fully claimed or not, is a substantial one sufficient to substantially compensate class members for their losses (and to refund the full principle if the claims rate is in the 50-60% range). *See, e.g., In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 946-947 (9th Cir. 2011).

While the Ninth Circuit has set a benchmark of 25% as a percentage of the fund, (*see Six Mexican Workers v. Arizona* Citrus *Growers,* 904 F.2d 1301, 1311 (9th Cir.1990) (establishing benchmark percentage of 25% of the fund as normal class counsel percentage of fund award)), this is an across the board benchmark, which is often adjusted upward or downward depending upon the assessment of the results, and the size of the fund. For cases under $10 Million, the percentage is usually adjusted upward, generally to 30% or more. *See, e.g., Hicks v. Toys "R' Us-Delaware, Inc.*, 2014 WL 4670896, at *1 (C.D. Cal. Sept. 2, 2014) (awarding 30% of the fund in a $4 Million settlement where the Court found little risk "in any even arguably meritorious California wage and hour class action," such as the case before the court there, and citing *In re Omnivision Technologies, Inc.,* 559 F.Supp.2d 1036, 1047–48 (N.D.Cal.2007) ("nearly all common fund awards range around 30% ... [and] absent extraordinary circumstances that suggest reasons to lower or increase the percentage, the rate should be set at 30%"); *Van Vranken v. Atlantic Richfield Co.,* 901 F.Supp. 294, 297 (N.D.Cal.1995) ("the cases ... in which high percentages such as 30–50 percent of the fund were awarded involved relatively smaller funds of less than $10 million" and concluding that, "30 % is a common percentage award" in such cases); *Cicero v. DirecTV, Inc.*, 2010 WL 2991486,

at *6 (C.D. Cal. Jul. 27, 2010) ("a review of California cases in other districts reveals that courts usually award attorneys' fees in the 30-40% range in wage and hour class actions that result in recovery of a common fund under $10 million"); I*n re: Cathode Ray Tube (Crt) Antitrust Litigation.*, 2016 WL 721680 (N.D. Cal. 2016) (awarding $173,025,000 fee, 30 % of over $575,000,000 megafund, in light of the eight year length of the case, the uncertain state of the applicable class and antitrust law and the outstanding result). [2]

B. THE FUND HERE IS THE AVAILABLE FUNDS TO BE CLAIMED, INCLUDING FEES, COSTS AND MONEY THAT MAY REVERT TO DEFENDANTS IF NOT CLAIMED.

The Ninth and other Circuits have explained that all funds recovered should be aggregated into a common fund in a class action settlement, even where the defendant pays attorneys' fees directly to class counsel as opposed to paying all sums directly into a fund, and even where funds revert to the defendant to the extent they are not claimed.

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[2] Numerous other cases support a 30% or higher fee. *See, g.g., Bostick v. Herbalife Int'l of Am., Inc.*, 2015 WL 12731932 (C.D. Cal. May 14, 2015) (awarding 30% of the gross settlement fund of $17.5 Million reached before class certification motion was filed, considering *inter alia* the monetary benefit to the class "in light of the complex factual and legal issues involved in the case," the intangible benefit of the injunctive relief obtained, the contingent nature of the representation and the risk of loss, the high level of skill and quality of class counsel's work in a complex case); *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 449 (E.D. Cal. 2013) (awarding 33% of gross settlement fund where class counsel created a roughly proportional gross settlement fund in wage-and-hour case); *Wren v. RGIS Inventory Specialists*, 2011 WL 1230826, at *1 (N.D. Cal. Apr. 1, 2011) (awarding over 40% of settlement fund in wage-and-hour case, observing that throughout "the course of the litigation Class Counsel successfully defended against [Defendant's] attempts to dismiss Plaintiffs' claims and to decertify the classes and pursed Plaintiffs' claims until the point of settlement"); *In re Pac. Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (finding district court did not abuse its discretion when awarding 33% fee award in light of "the complexity of the issues and the risks").); *Franco v. Ruiz Food Prod., Inc.*, No. 1:10-CV-02354-SKO, 2012 WL 5941801, (E.D. Cal. Nov. 27, 2012) (approving 33% of the Maximum Settlement Fund "in two year old wage-and-hour action, in part, because the "case was actively litigated and significant time was spent on discovery," and, "[o]verall, the specialized skill of Class Counsel in this area of the law was generally an asset to the Class Members and the quality of work performed was good"); *In re Heritage Bond Litig.*, No. 02-ML-1475-DT, 2005 U.S. Dist. LEXIS 13555, at *65 (C.D. Cal. June 10, 2005) ("[t]he experience of Class Counsel also justifies the [33%] fee award requested"); "); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377 (N.D. Cal. 1989) ("nearly all common fund awards range around 30%").

Thus, in claims made or class reversion cases in this Circuit where there is a maximum fund, and unclaimed funds revert to the defendant, attorney's fees are awarded based on the gross settlement fund. *See Williams v. MGM-Pathe Commun. Co.*, 129 F.3d 1026 (9th Cir.1997) (reversing award of attorneys' fees because trial court failed to base fee award on the entire settlement, rather than the amount claimed). Other circuits are in accord.[3]

Fees, litigation costs and class administration costs are included in determining the size of the fund. *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003) ("constructing a hypothetical 'fund' by adding together the amount of money Boeing would pay in damages to members of the class under the agreement, the amount of fees provided to various counsel, the cost of the class action notices paid for by Boeing, and a gross amount of money ascribed to all the injunctive relief contained in the agreement"; court accepted the concept but not its application under the specifics there); *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 245 -246 (8th Cir. 1996)(although "technically" defendant would pay fees directly rather than their being paid "out of the class' recovery… in essence the entire settlement amount comes from the same source"; even if "the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class' recovery", and, "[a]ccordingly, the direct payment of attorney fees by defendants should not be a barrier to the use of the percentage of the benefit analysis"),

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[3] *See Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1295 (11th Cir.1999) (distribution of attorneys' fees are to be based upon the funds available to eligible claimants, whether claimed or not; affirming a fee award nearly twice the amount actually claimed by the class from the fund); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2nd Cir. 2007) (the "entire Fund… is created through the efforts of counsel at the instigation of the entire class"; an "allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not"); *Landsman & Funk, P.C. v. Skinder-Strauss Associates*, 639 Fed. Appx. 880, 884 (3d Cir. 2016) (holding that the lower court "properly relied on the entire fund as the appropriate benchmark for assessing the size of the fund created" for the purpose of calculating a fee award, as opposed to calculating fees based on the amount claimed by class members); *cf Boeing Co. v. Van Gemert*, 444 U.S. 472, 480, 100 S. Ct. 745, 750, 62 L. Ed. 2d 676 (1980) (observing that absent class members' "right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel").

citing *In re General Motors*, 55 F.3d 768, 821 (3rd Cir. 1995) (the "rationale behind the percentage of recovery method also applies in situations where, although the parties claim that the fee and settlement are independent, they actually come from the same source"); *In re Cendant Corp. PRIDES Litigation*, 243 F.3d 722, 734 (3rd Cir. 2001) ("[t]hough this is not a traditional common-fund case, because the unclaimed portion of the settlement fund is returned to Cendant and because the plaintiffs who recover may not be affected by the attorneys' fee award (depending on the number of plaintiffs who recover rights from the fund), use of the percentage-of-recovery method is appropriate in this case").

C. THE LODESTAR CROSS-CHECK SUPPORTS THE REQUESTED FEE.

A lodestar cross-check is not required in this circuit, and, in some cases is not necessarily useful. *See, e.g., Glass v. UBS Financial Services, Inc.*, 2007 WL 221862, 16 (N.D.Cal. 2007) (awarding requested 25% of the full fund in amount of $11,250,000 in early settlement and despite the fact that reversion provision meant that the actual claims could be far less). The Court has exercised its discretion and conducted a lodestar cross-check.

The Court has discretion to use current rates or historical rates plus interest to adjust for delay in payment when determining a reasonable rate. *See, e.g., Missouri v. Jenkins*, 491 U.S. 274, 282, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) ("an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise—is within the contemplation of the statute [42 U.S.C. §1988]"); *Barjon v. Dalton*, 132 F.3d 496, 502–03 (9th Cir. 1997) ("the district court may choose to apply either the attorney's current rates to all hours billed or the attorney's historic rates plus interest"). Current rates are generally preferable to historic rates because they reflect "comparable increases in the market." *Charlebois v. Angels Baseball*

LP, 993 F. Supp. 2d 1109, 1119 (C.D. Cal. 2012) (using current rates in lodestar award in settled class action, citing *Missouri v. Jenkins*).[4]

Because the requested fee is not based actually based on the lodestar, but on a percentage of the fund, "a less exhaustive cataloging and review of counsel's hours" is involved than where the fee is based on a lodestar directly. *See, e.g., Victoria Secret Stores, LLC*, 2008 WL 8150856, at *9 (C.D. Cal. July 21, 2008) and cases cited therein. Nonetheless, Plaintiffs' counsel provided detailed timesheets, which support the conclusion, which the record as well suggests, that several thousand hours were spent litigating this case over its nearly twelve year span.[5]

Plaintiffs provided descriptions of each biller's background, experience, qualifications and work on this case. Plaintiffs' lodestar cross-check based on their claimed rates amounts to $3,328,438 through August 31, 2017. Their hours are 4297.6 through August 31, 2017. The chart below reflects the time and hourly rate Plaintiffs are

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[4] *See also, e.g., Coles v. City of Oakland*, No. C03–2961 THE, 2007 WL 39304, *7 (N.D.Cal. Jan. 4, 2007) (rejecting defendants' argument that rate increases should not surpass the rate of inflation and stating 'the focus of the rate analysis is to ensure that fees are awarded at 'prevailing market rates in the relevant community,' and such rates may be affected by factors other than inflation, such as attorneys' additional years of experience or changes in the legal market') (quoting *Blum v. Stenson*, 465 U.S. 886, 895, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)); *Parker v. Vulcan Materials Co. Long Term Disability Plan*, No. EDCV 07–1512 ABC (OPx), 2012 WL 843623, *7 (C.D.Cal. Feb. 16, 2012) (approving as reasonable an approximate 10 percent increase between 2011 rates and 2012 rates because '[i]t is common practice for attorneys to periodically increase their rates for various reasons, such as to account for expertise gained over time, or to keep up with the increasing cost of maintaining a practice'); *LaPeter v. Canada Life Ins. Co. of Am.*, No. CV06–121–S–BLW, 2009 WL 1313336 *3 (D.Idaho May 11, 2009) ('It is typical for rates to increase on a yearly basis and, also, for associates' and paralegals' rates to increase as they gain more experience.')."

[5] The Court notes that the time of two Public Counsel attorneys was reconstructed. This time accounts for a small fraction of the time expended on the case (approximately 6%). While contemporaneous time records are preferred, reconstructed records are acceptable when adequately supported. *See, e.g., United States v. $12,248 U.S. Currency*, 957 F.2d 1513, 1521 (9th Cir.1991) (accepting "reconstructed records developed by reference to litigation files and other records"); *Rosenfeld v. U.S. Dep't of Justice*, 904 F. Supp. 2d 988, 1005 (N.D. Cal. 2012) ("'[b]asing the attorneys' fee award in part on reconstructed records developed by reference to litigation files and other records' is an established practice in this circuit") (quoting *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1473 (9th Cir.1983).

using for the lodestar cross-check through August 31, 2017.[6] Plaintiffs estimate an additional 200 plus hours for the work performed after August 31 on the fee motion, and to be performed on the final approval motion and order and related work.

LITT FIRM BILLERS					
Biller	**Position**	**Years Practice (Grad Yr)**	**Rate**	**Hours**	**Total**
Barrett S. Litt	Attorney	48 years (1969)	$1150	1189	$1,367,350
Paul Estuar	Attorney	24 years (1993)	$765	516.1	$394,816.50
Pat Dunlevy	Attorney	25 years (1992)	$750	324	$243,000
Paul Hughes	Attorney	9 years (2008)	$730	60	$43,800
Stacey Brown	Attorney	11 years (2006)	$600	22.1	$13,260
Julia White	Sr. Paralegal		$335	504.1	$168,873.50
Miguel Villafuerte	Jr. Paralegal		$150	42.3	$6,345
Charla Gray	Law Clerk		$200	39.8	$7,960
James Debergh	Law Clerk		$200	27.1	$5,420
Jonathan Dale	Law Clerk		$200	29.5	$5,900
TOTAL					**$2,256,725**

PUBLIC COUNSEL BILLERS					
Biller	**Position**	**Years Practice (Grad Yr)**	**Rate**	**Hours**	**Total**
Hernán Vera	Attorney	23 Years (1994)	$750	160.6	$120,450
Lisa Jaskol	Attorney	29 Years (1988)	$850	75.6	$64,260
Anne Richardson	Attorney	28 Years (1989)	$850	146.7	$124,695
Stephanie Carroll	Attorney	13 Years (2004)	$640	945.8	$605,312
Pat Dunlevy	Attorney	25 years (1992)	$750	195	$146,250

[6] Patrick Dunlevy is listed twice because he initially worked on the case while at Public Counsel, and then continued to work on certain aspects of the case after he left Public Counsel.

PUBLIC COUNSEL BILLERS					
Biller	**Position**	**Years Practice (Grad Yr)**	**Rate**	**Hours**	**Total**
Adelaide Anderson	Attorney	2010 (7 years)	$540	19.9	$10,746
TOTAL					**$1,071,713**

D. The Hours Spent On The Case Are Reasonable

The 4297.6 hours spent by Plaintiffs' counsel through August 31 are reasonable. Hours are reasonable if "at the time rendered, [they] would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest in the pursuit of a successful recovery . . . ." *Moore v. James H. Matthews & Co.*, 682 F.2d 830, 839 (9th Cir. 1982) (internal quotations omitted); *see also Ramon v. County of Santa Clara*, 173 Cal. App. 4th 915, 925 (Cal. Ct. App. 2009). In making that determination, courts must look at "the entire course of the litigation, including pretrial matters, settlement negotiations, discovery, litigation tactics, and the trial itself . . . ." *Vov. Las Virgenes Municipal Utility Dist.*, 79 Cal.App.4th 440, 447 (2000); *see also Peak-Las Positas Partners v. Bollag*, 171 Cal. App. 4th 101, 114 (2009) (fees reasonable because of complexity of issues, results obtained, and defendants' aggressive litigation).

As the Ninth Circuit has recognized, civil rights lawyers working without payment from their clients have little to gain from "churning" a case. "[L]awyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). Accordingly, they should be fully compensated for taking the steps that they reasonably believe are necessary to *win* the case: "By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; ***after all, he won, and might not have, had he been more of a slacker.***" *Id.* (emphasis added).

Counsel have presented detailed evidence of the time spent litigating this case for the past twelve years. *See* Exhibit C. The substantial time spent was justified in the

context of this litigation. In any event, since this is a percentage of the fund fee claim, to the extent there were unnecessary hours, it does not increase Plaintiffs' fee.

E. THE HOURLY RATES THAT PLAINTIFFS' COUNSEL WILL RECEIVE UNDER THE 30% FEE AWARD ARE REASONABLE.

Plaintiffs have submitted evidence attesting to the skill, experience and reputations of the lead attorneys in this case, as well as evidence from a variety of sources to support the rates used for the lodestar comparison. (Both Mr. Litt and Ms. Sobel have been identified by courts as experts on attorney fee rates in Southern California.) The cited evidence includes numerous attorney fee awards in civil rights cases (either direct fee awards or lodestar cross-checks in class actions) and consumer class actions using or awarding rates comparable to those requested here (or in which rates are comparable to those requested after accounting for the general increase in rates in Los Angeles in intervening years). In addition, Plaintiffs identified numerous commercial rate awards or commercial fees charged to clients at similar or higher rates. Congress expressly recognized that fees in federal civil rights cases should be comparable to those in complex federal civil litigation. *See City of Riverside v. Rivera*, 477 U.S. 561, 575-76 (1986) ("Congress made clear that it 'intended that the amount of fees awarded under [§1988] be governed by the same standards which prevail in other types of equally complex Federal litigation.'" (citing S. Rep. No. 94-1011, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913)).

In the context of this lodestar cross-check, the Court need not make an independent determination that each rate is reasonable because the purpose of the cross-check is the limited one "of alerting the trial judge that when the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award". *In re Rite Aid Corp. Securities Litigation,* 396 F.3d 294, 306, 60 Fed. R. Serv. 3d 851 (3d Cir. 2005), as amended, (Feb. 25, 2005). Essentially, the Court determines if "the total [fee] award should be reduced to prevent a windfall." *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig.*, 553 F. Supp. 2d 442, 467 (E.D. Pa. 2008), *as corrected* (Apr. 9, 2008).

Whether the Court would award these rates in this case in a pure statutory fee motion under 42 U.S.C. § 1988 is not the issue in this motion because, unlike such motions, where multipliers are generally not available (see *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 553–57, 130 S. Ct. 1662, 1673–75, 176 L. Ed. 2d 494 (2010)), a multiplier is expected in successful class actions litigation where the fund is sufficient. *See, e.g., In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299–300 (9th Cir. 1994) (reversing as abuse of discretion denial of risk multiplier in class action; noting that a risk multiplier is the general expectation in contingent fee cases, that, "[i]f 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" and that "courts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases," and distinguishing common fund cases from fee shifting awards because the class pays the attorneys from the common fund); *Fischel v. Equitable Life Assur. Soc'y of U.S.*, 307 F.3d 997, 1008 (9th Cir. 2002) ("It is an abuse of discretion to fail to apply a risk multiplier… when (1) attorneys take a case with the expectation that they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence that the case was risky."). *See also Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 741 (9th Cir. 2016) ("the district court must apply a risk multiplier to the lodestar" where the foregoing conditions exist).

While the foregoing cases do not identify a benchmark multiplier, "[e] mpirical evidence of multipliers across many cases demonstrates that most multipliers are in the relatively modest 1–2 range," which "counsels in favor of a presumptive ceiling of 4, or slightly above twice the mean." Rubinstein, *Newberg on Class Actions* §15:87 (5th ed.).[7]

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[7] In practice, many cases have awarded multiplier above four where the Court found it appropriate. *See Craft v. Cnty. of San Bernardino*, 624 F. Supp. 2d 1113, 1125 (C.D. Cal. 2008) (multiplier of 5.2 in $25.5 Million settlement based on award of 25% of fund, collecting cases with high multipliers). Multipliers above two are common where the fund supports it. *See, e.g.,Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (risk multiplier

Class Counsel seek a fee award of $2,700,000 to $2,820,000 depending on the size of the fund available after defense litigation attorney's fees and costs, plus litigation costs, which is within the range of a reasonable multiplier by any measure.

Thus, if the rates submitted are used to calculate the lodestar, the award Plaintiffs' counsel will receive is in the range of 80% of the lodestar. Even using substantially lower rates, the multiplier would likely be under 1.5. Plaintiffs' counsel have addressed the risk in class actions generally, the risks in this case given the absence of clear authority on the property interest in advance notice under the HUD regulation, and the expectation of a substantial multiplier if the case were successful.

Where plaintiffs' counsel obtain an expeditious and "excellent result" in a "complex and risky case", they are entitled to a fully compensatory award. *See Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, 2005 WL 1213926 (E.D. Pa. May 19, 2005). This was a risky, exceptionally protracted and complex case, where there was a substantial risk that Plaintiffs would not prevail, and, even if they prevailed on liability as they ultimately did, there remained a risk that that a court would not award monetary damages based on the claim of entitlement to the difference between the rental contribution the tenant actually and the lowered rental contribution they should have been paying during the one year notice period , regardless of individual circumstances (an issue unresolved at the time of settlement). The "skill and experience brought to bear by counsel throughout the year[s] they spent actively litigating this case" justifies a substantial fee award, a conclusion reinforced "by the high caliber of Plaintiffs' counsels' work in this case." *Id.*

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appropriate on percentage of fund award in megafund settlement resulting in 28.5% of the fund and a multiplier of 3.65). *Vizcaino* contains an Appendix listing percentage and multipliers in several megafund cases, and is enlightening on the norm even in megafund cases. It lists 46 cases, the smallest of which is a $53 Million fund, and the largest of which is a $193 Million fund. Of those 46 cases, 30 received a multiplier (eight with a multiplier between 1.2-1.8, twelve with a multiplier between 2.0-2.5, six with a multiplier between 3.0-3.6, three with a multiplier between 4.0-6.2, and one with a multiplier of 19.6). Despite the fact these were mega-fund cases, where percentages of the fund are generally smaller, ten awarded percentages of the fund between 30-40%.

F. FAILING TO AWARD THE FEES AND COSTS REQUESTED WOULD FRUSTRATE THE PURPOSES OF CLASS ACTIONS IN THE CONTEXT OF THIS SETTLEMENT.

As *Lopez v. Youngblood*, No. CV-F-07-0474 DLB, 2011 WL 10483569, at *14 (E.D. Cal. Sept. 2, 2011) explained, "[w]here… class members are receiving a substantial monetary recovery, and the interests of the class members and counsel are aligned, i.e., class counsel is not receiving an unreasonable proportion of the total recovery," the court should consider that "one important purpose of the class action device is that defendants should not benefit from their wrongdoing, and should be deterred from doing so by being vulnerable to class actions to remedy their wrongful conduct." (Citing, Richard A. Posner, *Economic Analysis of Law* 626–27 (5th ed.1998) ("the most important point from an economic standpoint is that the violator be confronted with the costs of his violation-this achieves the allocative purpose of the suit not that he pays them to his victims"); John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 2–3 (Columbia Law. Sch. Ctr. for Law & Econ. Studies, Working Paper No. 293, 2006) (available at http://ssrn.com/abstract_id=893833). *See also Myriam Gilles, Exploding The Class Action Agency Costs Myth: The Social Utility Of Entrepreneurial Lawyers, University of Pennsylvania Law Review*, 155 U. Pa. L. Rev. 103 (November 2006).

V. COSTS

Plaintiffs seek $_____in costs, the bulk of which are for expert and mediation costs (plus other standardly chargeable costs). These costs, primarily reimbursement for out of pocket costs for experts, mediation and litigation costs, are reasonable, and the Court should award costs (exclusive of class administration) in that amount. Nontaxable cost reimbursement is authorized by Rule 23(h), and "include[s] counsel's out-of-pocket expenses that would normally be charged to a fee paying client." *Newberg on Class Actions* § 16:10 (5th ed.). In class actions, expenses that "are of the type that law firms typically bill to their clients … include such things as: mediator fees, expert fees, computer research, photocopying, postage, meals, and court filing fees"). *Yang v. Focus Media Holding Ltd.*, 2014 WL 4401280, *19 (S.D.N.Y. 2014).

VI. CONCLUSION

For the foregoing reasons, the Court awards Plaintiffs 30% of the class fund as attorneys' fees plus litigation, consulting and expert costs in the amount of $____.

Dated: _____ PERCY ANDERSON, Judge

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UNITED STATES DISTRICT COURT