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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

KRISTIN SWEARINGEN, Plaintiff, v. AMAZON.COM SERVICES, INC. and AMAZON.COM INC., Delaware corporations, and, AMAZON.COM.DEDC, LLC, a Delaware limited liability company, Defendants.	Case No. 3:19-cv-01156-JR **Class Counsel's motion for award of attorney fees and expenses, Plaintiff's motion for approval of settlement administration expenses, and Plaintiff's motion for approval of service payment**

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Counsel for the parties have conferred regarding the subject of this motion. Defendant takes no position on the motion.

MOTION

Plaintiff and her counsel move the Court for an Order:

1. Awarding one third of the gross settlement ($6,000,000) to class counsel in the above-captioned case as attorney fees, costs, and nontaxable litigation expenses;
2. Approving up to $150,000 in accrued and reasonably anticipated settlement administration expenses; and
3. Approving a service payment to the named plaintiff of $20,000.

This motion is supported by the Declaration of Jon M. Egan submitted herewith.

I. Attorney fees

Requests for attorney fees must be made by a motion pursuant to Federal Rules of Civil Procedure 54(d)(2) and 23(h), and notice of the motion must be served on all parties and class members. Fed. R. Civ. P. 23(h). When settlement is proposed along with a motion for class certification, notice to class members of the fee motion ordinarily accompanies the notice of the settlement proposal itself. Advisory Committee Notes to Fed. R. Civ. P. 23(h). The deadline for class members to object to requested fees must be set after the motion for the fees and documents supporting the motion have been filed. *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993 (9th Cir. 2010). "Allowing class members an opportunity thoroughly to examine counsel's fee motion, inquire into the bases for various charges and ensure that they are adequately documented and supported is essential for the protection of the rights of class members." *Id.* at 994.

In considering the amount of attorney fees for class counsel where there is a common fund, "courts have discretion to employ either the lodestar method or the

percentage-of-recovery method." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011). Under either method, the court must exercise its discretion to achieve a "reasonable" result. *Id.* Because reasonableness is the goal, "mechanical or formulaic application of either method, where it yields an unreasonable result, can be an abuse of discretion." *Fischel v. Equitable Life Assurance Soc'y of the U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002).

"Because the benefit to the class is easily quantified in common-fund settlements, the Ninth Circuit has allowed courts to award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011). Applying this calculation method, courts typically calculate one quarter of the fund as the "benchmark" for a reasonable fee award, providing adequate explanation in the record of any "special circumstances" justifying a departure. *Six (6) Mexican Workers v. Ariz. Citrus Growers,* 904 F.2d 1301, 1311 (9th Cir.1990); *accord Powers,* 229 F.3d at 1256–57; *Paul, Johnson, Alston & Hunt v. Graulty,* 886 F.2d 268, 272 (9th Cir.1989). The exact percentage varies depending on the facts of the case, and in "most common fund cases, the award exceeds that benchmark." *Knight v. Red Door Salons, Inc.,* 2009 WL 248367 (N.D.Cal.2009); *see also In re Activision Sec. Litig.,* 723 F.Supp. 1373, 1377–78 (N.D.Cal.1989) ("nearly all common fund awards range around 30%").

"When considering the risks posed in litigation, the risk of loss in a particular case is a product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits. In cases where recovery is uncertain, an award of one third of the common fund as attorneys' fees has been found to be appropriate." *Demmings v. KKW Trucking, Inc.*, No. 3:14-CV-0494-SI, 2018 WL 4495461, *15 (D. Or.

Sept. 19, 2018) (internal citations and quotations omitted).

"Several courts in the Ninth Circuit have held in wage and hour class actions that a 30% or higher award is appropriate." *Bell v. Consumer Cellular, Inc.*, No. 3:15-CV-941-SI, 2017 WL 2672073, *12 (D. Or. June 21, 2017). *See, Rabin v. PricewaterhouseCoopers LLP*, No. 16-CV-02276-JST, 2021 WL 837626, at *3 (N.D. Cal. Feb. 4, 2021) (awarding 35% of $11.65 million common fund); *Morris v. Lifescan, Inc.*, 54 F. App'x 663, 664 (9th Cir. 2003) (affirming award of 33% of $14.8M); *In re Pac. Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming award of one third of $12M); *Slayman v. FedEx Ground Package System, Inc.*, 3:14-cv-01663-HZ at Dkt. 71 (D. Or. Oct. 21, 2016) (awarding all of requested 30% of $15.5M); *Davidoff v. R.L.K. and Company*, Multnomah County Case No. 19CV45422 (Oct. 5, 2021 Order by Judge Lucero approving one-third attorney fee to this same class counsel in $4.5 million class action settlement); *Bell, supra*, citing *Deaver v. Compass Bank*, No. 13-CV-00222-JSC, 2015 WL 8526982, *9 (N.D. Cal. Dec. 11, 2015); *Lusby v. GameStop Inc.*, 2015 WL 1501095, *4 (N.D. Cal. Mar. 31, 2015); *Burden v. SeleciQuote Ins. Servs.*, 2013 WL 3988771, *5 (ND Cal Aug 2, 2013); *Barbosa v. Cargill Meat Sols. Corp.*, 297 FRD 431, 450 (E.D. Cal. 2013); *Franco v. Ruiz Food Prod., Inc.*, No. 1:10-CV-02354-SKO, 2012 WL 5941801, *18 (E.D. Cal. Nov. 27, 2012); *Garcia v. Gordon Trucking, Inc.*, 2012 WL 5364575 (E.D. Cal. Oct. 31, 2012); *Romero v. Producers Dairy Food Inc.*, 2007 WL 3492841, *4 (E.D. Cal. Nov. 14, 2007).

That includes courts in this District. *See, e.g.*, *Perkins v. Singh*, No. 3:19-CV-01157-AC, 2021 WL 5085119, at *1 (D. Or. Nov. 2, 2021) (approving 33% of common fund); *Demmings v. KKW Trucking, Inc.*, No. 3:14-CV-0494-SI, 2018 WL 4495461, at *15 (D. Or. Sept. 19, 2018) ("In cases where recovery is uncertain, an award of one third of the common fund as attorneys' fees has been found to be appropriate.") (citation omitted).

When using the percentage method, one quarter is the "benchmark" fee award, but the Court may adjust this amount upward or downward when "special circumstances" warrant a departure. *In re Bluetooth*, 654 F.3d at 942. For example, when faced with a "mega-fund" settlement of $100 million or more, courts often award less than the 25% benchmark. *Reyes v. Experian Info. Sols., Inc.*, 856 F. App'x 108, 111 (9th Cir. 2021) Courts must place in the record the relevant special circumstances supporting a departure from the benchmark. *In re Bluetooth*, 654 F.3d at 942. Factors that a court may consider in making such a departure include: (1) the result obtained; (2) the effort expended by counsel; (3) counsel's experience; (4) counsel's skill; (5) the complexity of the issues; (6) the risks of nonpayment assumed by counsel; (7) the reaction of the class; (8) non-monetary or incidental benefits, including helping similarly situated persons nationwide by clarifying certain laws; and (9) comparison with counsel's lodestar. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002); *In re Heritage Bond Litig.*, 2005 WL 1594403, at *18 (C.D. Cal. June 10, 2005).

Here, plaintiff's counsel seeks an award of one third ($6,000,000) of the gross settlement fund ($18,000,000). Factors to be considered in justifying this upward departure are discussed as follows.

A. The result obtained

The parties agreed to a gross Settlement figure of $18,000,000. This is believed to be the second highest wage-and-hour settlement in Oregon history, which qualifies as an excellent result.

This factor therefore supports the requested award.

B. Counsel's experience and skill

Plaintiff's counsel is both skilled and experienced in the area of wage-and-hour class

and collective actions. He has specialized in this area for the past 18 years, and he has been recognized as having "unique expertise in the area of wage-and-hour litigation." *Wright v. Soniq Servs., Inc.*, No. 3:17-CV-01990-AC, 2018 WL 4997678, at *3 (D. Or. Aug. 16, 2018), *report and recommendation adopted,* No. 3:17-CV-01990-AC, 2018 WL 4996574 (D. Or. Oct. 15, 2018); Declaration of Jon M. Egan at ¶¶ 4–7.

This factor therefore supports the requested award.

C. The novelty and complexity of the issues

This case involved novel and complex issues of law and fact. These included difficult legal issues of first impression in Oregon wage-and-hour law (and the court's well-reasoned order on rounding will serve as valuable precedent to future litigants). Also involved in this case were multiple novel statutory and regulatory interpretations, the extent of a state's implicit adoption of federal standards, and the retroactive application of state-court decisions (which the Ninth Circuit's acceptance of discretionary appeal shows was an issue upon which reasonable legal minds can differ). Over 7 million lines of payroll data were produced and processed, for over 15,000 Oregon employees.

This factor therefore supports the requested award. *See, e.g.*, *Mockler v. Skipper*, 942 F. Supp. 1364, 1367 (D. Or. 1996) ("Undisputably, this was a case which required the special skills and the extensive experience that counsel for Mockler has. Every aspect and every phase of this action was vigorously contested by a pair of counsel for the defendants who brought to the defense the special skills and the extensive experience that counsel for Mockler has. Counsel for Mockler was required to address complex issues, and counsel for Mockler obtained excellent results for her.").

D. The risks of nonpayment assumed by counsel

Plaintiff's counsel represents all of his class and collective action clients, including

plaintiff in this case, on a contingency basis, fronting all costs for plaintiff and the class, and assuming all risks of nonpayment. The novelty and complexity of the legal issues involved in the case increased the risk of loss beyond that associated with many wage-and-hour cases. *See, e.g.*, *VanValkenburg v. Oregon Dep't of Corr.*, No. 3:14-CV-00916-MO, 2017 WL 2495496, at *7 (D. Or. June 9, 2017) (complexity of legal issues increased risk of loss beyond that associated with many similar cases). This case resolved after more than three years of vigorous litigation by nationally recognized defense counsel, who represented a deep-pocketed defendant. This factor therefore supports the requested award.

E. The reaction of the class

There were 10,779 total class members identified in defendant's payroll records. [1] There were 1,659 returned notices by mail, of which 1,057 were able to be resent to an updated mailing address. 100 of those resent notices were returned as undeliverable. Thus, there was a mailing deliverable rate of 94%. Of the 10,778 email notices sent, there were 764 that were returned as undeliverable. Of those, 259 were able to be resent, with only 34 of those returned. Thus, there was an email deliverable rate of 95%. Of the 10,453 text notices sent, 3,438 were returned as undeliverable. Of those, 1,776 were able to be resent, with 1,026 of them returned. Thus, there was a text message deliverable rate of 74%. Combining all of the notice delivery methods, there were only 9 class members who were unable to be reached by any method—an aggregate deliverable rate of 99.92%.

January 13, 2023 was the deadline for class members to opt out. Of the 10,779 total

[1] All of the settlement administration figures provided for our case to date are supported by paragraph 12 of the Declaration of Jon M. Egan filed herewith.

class members, four timely opted out. That is a participation rate of 99.96%.

January 13, 2023 was also the deadline for eligible class members to file claim forms. Of the 7,396 claim-eligible class members, 2,746 timely submitted claims. [2] Thus, 37.1% of eligible claimants submitted claims, for 37.8% of the claimable funds.

This is an exceptional result for an opt-in wage-and-hour settlement, particularly given the size of the class in this case. *Chambery v. Tuxedo Junction Inc.*, No. 12-cv-06539-EAW, 2014 WL 3725157, at *6 (W.D.N.Y. July 25, 2014) (noting that a 37% claims rate "is an unusually high participation rate for a 'claims made' settlement agreement."). *See also*, *Brandenburg v. Cousin Vinny's Pizza, LLC*, No. 3:16-CV-516, 2019 WL 6310376, at *3 (S.D. Ohio Nov. 25, 2019) ("Moreover, as stated above, the opt-in/claims rate in this case is above average at over one third of the class joining the case or filing claims."); *Bautista v. Harvest Mgmt. Sub LLC*, No. CV1210004FMOCWX, 2014 WL 12579822, at *9 (C.D. Cal. July 14, 2014) (comparing its claim rates of 25% and 11% with other wage-and-hour class settlements of 25.3%, 15.05%, 7.8%, and 8.9%).

Commentators have further noted the usual low rates of claims in similar cases. 2 MCLAUGHLIN ON CLASS ACTIONS § 6:24 (16th ed. Supp. Oct. 2019) ("Claims-made settlements typically have a participation rate in the 10–15 percent range."); Julius Getman & Dan Getman, *Winning the FLSA Battle: How Corporations Use Arbitration Clauses to Avoid Judges, Juries, Plaintiffs, and Laws*, 86 ST. JOHN'S L. REV. 447, 451 (2012) (noting that the opt-in rate "seldom tops thirty percent"); Charlotte S. Alexander, *Would an Opt In Requirement Fix the Class Action Settlement? Evidence from the Fair*

[2] The reaction of the class was even greater than indicated by these figures. There were 3,794 total claims submitted by class members; some of those claimants were not eligible for either of the penalty subclasses and so have been excluded from these figures.

Labor Standards Act, 80 MISS. L.J. 443, 466 (2010) (reporting average opt-in rate in FLSA cases of 15%); Andrew C. Brunsden, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 BERKELEY J. EMP. & LAB. L. 269, 292–94 (2008) (noting a nationwide opt-in average of 15.71%).); Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, 20 LAB. LAW. 311, 314 (2005) ("Commentators generally find that … the opt-in rate—*i.e.*, the percentage of persons falling within the definition of the putative class who file consents to join the action—is typically between 15 and 30 percent … .").

February 6, 2023 is the deadline for class members to object to the settlement or the proposed requests for attorney fees, administration expenses, or service payment. To date, none of the class members have objected to any aspect of the settlement. Egan Dec. at ¶ 12. We will, of course, update the Court once the objection deadline has passed.

This factor therefore supports the requested award.

F. Non-monetary or incidental benefits, including helping similarly situated persons nationwide by clarifying certain laws

The Court in this case made the first published interpretation of Oregon law regarding timeclock rounding. That interpretation will help workers throughout the state who are subject to wage theft through illegal rounding policies.

This factor therefore supports the requested award.

G. The effort expended by class counsel, and comparison with counsel's lodestar

1. Standard for lodestar cross-check

In doing a lodestar cross-check, the Court is doing a higher-level analysis, not the detailed lodestar analysis required by the lodestar method of calculating attorney fees.

The standard is described well in *Demmings v. KKW Trucking, Inc.*, No. 3:14-CV-0494-SI, 2018 WL 4495461, at *16 (D. Or. Sept. 19, 2018): "In doing the lodestar cross check, the Court is not performing the detailed lodestar analysis it would have performed if it used the lodestar method to calculate Plaintiff's attorney's fees. For example, the Court will not analyze counsel's time entries in detail for duplicative billing, billing for administrative tasks, or block billing. The cross check is performed at higher level, to ensure the percentage-of-recovery method does not result in a fee that is unreasonable. But it does not require spending the amount of time that is required when performing the lodestar method of fee calculation—otherwise using the percentage-of-recovery method would not allow for the time-savings the Ninth Circuit anticipated when allowing the method in lieu of the often more time consuming task of calculating the lodestar." *Id.* (citations omitted). The Court considers the total hours asserted and a reasonable hourly rate. *Id.*

In addition to the usual hours-times-rate analysis of a regular lodestar calculation, "[m]ultipliers in the 3–4 range are common in lodestar awards for lengthy and complex class action litigation." *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995); *see also*, 4 NEWBERG ON CLASS ACTIONS § 14.7 (stating that courts typically approve percentage awards based on lodestar cross-checks of 1.9 to 5.1 or even higher); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 341 (3d Cir. 1998) ("[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.") (quoting 4 NEWBERG ON CLASS ACTIONS § 14.7). However, "[f]ees are not awarded for fee litigation in common fund cases because, rather than creating or preserving the common fund, the fee litigation actually depletes it." *Kinney v. Int'l Bhd. of Elec. Workers*, 939 F.2d 690, 694 n.5 (9th

Cir. 1991); *accord*, 5 NEWBERG ON CLASS ACTIONS § 15:93 (5th ed. Dec. 2020 update) (collecting cases). In other words, Class Counsel cannot earn "fees on fees." *Lesevic v. Spectraforce Techs. Inc.*, No. 19-CV-03126-LHK, 2021 WL 1599310, at *6 (N.D. Cal. Apr. 23, 2021).

The Ninth Circuit has emphasized that, despite often using the lodestar as a cross-check, there are weaknesses inherent in the lodestar analysis, and it need not limit the award of a reasonable attorney fee in any given case. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 n.5 (9th Cir. 2002) ("We do not mean to imply that class counsel should necessarily receive a lesser fee for settling a case quickly; in many instances, it may be a relevant circumstance that counsel achieved a timely result for class members in need of immediate relief. The 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," citations omitted).

2. Lodestar cross-check in this case

As identified in paragraph 11 of class counsel's declaration submitted herewith, class counsel calculates the lodestar at $1,370,622.71. This is based on 1,888 hours of attorney time at $588 per hour; 1,133 hours of paralegal time at $225 per hour; and $5,553.71 in costs and expenses. Comparing the lodestar with the requested fee award of 33% of the settlement fund yields a multiplier of 4.38. As noted above, this is in the range commonly approved by courts in this Circuit.

This factor therefore supports the requested award.

II. Settlement Administration Expenses

The settlement agreement provides for up to $150,000 in settlement administration expenses to administer this settlement for over 10,000 class members. Any unspent portions of the allotted amount will be distributed with the cy pres funds. None of the class members have objected to the requested allocation of settlement administration expenses.

The Court should therefore approve the requested allocation of settlement administration expenses.

III. Service Payment

"Incentive awards are payments to class representatives for their service to the class in bringing the lawsuit." *Demmings v. KKW Trucking, Inc.*, No. 3:14-CV-0494-SI, 2018 WL 4495461, *12 (D. Or. Sept. 19, 2018). They are often taken from a common settlement fund. *Id.* Although incentive awards are "fairly typical in class action cases," they should be scrutinized carefully to ensure "that they do not undermine the adequacy of the class representatives." *Id.* Incentive agreements can undermine the adequacy of class representation, for example, when they are grossly disproportionate, when they incentivize class representatives to settle without considering whether trial might be more beneficial to the class, or when incentive awards are conditioned upon approving the settlement agreement. *Id.* Incentive awards "are particularly appropriate in wage-and-hour actions where plaintiffs undertake a significant 'reputational risk' by bringing suit against their former employers." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 267 (N.D. Cal. 2015).

Plaintiff has pursued this case for the benefit of the class, postponing her recovery for over four years, searching for and producing documents, spending time and effort

meeting and speaking with counsel throughout the litigation, reviewing pleadings and documents, and sitting for her deposition. Nothing in the settlement or the proposed incentive award indicates that the award undermines plaintiff's representation. The $20,000 service payment sought is similar in size to incentive awards granted to class representatives, and none of the class members have objected to the requested service payment. *Id.*

The Court should therefore approve the requested service payment.

IV. Conclusion

Plaintiff and her counsel therefore move the Court for an Order:

1. Awarding one third of the gross settlement ($6,000,000.00) in the above-captioned case as attorney fees and accrued costs and litigation expenses;
2. Approving up to $150,000 in accrued and reasonably anticipated settlement administration expenses; and
3. Approving a service payment to the named plaintiff of $20,000.

Respectfully submitted this 19th day of January, 2023

JON M. EGAN, P.C.

/s/ Jon M. Egan

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