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Others Similarly Situated

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SHAUNA BARNARD, an individual, on behalf of herself and all others similarly situated, all other aggrieved employees, and on behalf of the general public,

Plaintiff,

v.

COREPOWER YOGA LLC, a Colorado Limited Liability Company, and DOES 1 through 50, Inclusive,

Defendant.

Case No. 4:16-cv-03861 (HSG)

HON. HAYWOOD S. GILLIAM, JR.
Courtroom: 2 - Oakland Courthouse, 4th Floor

CLASS ACTION

NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES AND CLASS REPRESENTATIVE SERVICE AWARD

Hearing Date
Date: February 15, 2018
Time: 2:00 p.m.

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NOTICE OF MOTION

TO ALL PARTIES AND ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at 2:00 p.m. on February 15, 2018 in Courtroom 2 of the above entitled Court located at 1301 Clay Street, Oakland, CA 94612, Plaintiff Shauna Barnard, and all others similarly situated, by and through their counsel of record, will move this Court and respectfully request an Order awarding the requested attorneys' fees, reimbursement of litigation expenses, and class representative service award.

This motion is based upon this notice of motion and unopposed motion, on the supporting memorandum of points and authorities, the Declarations of David C. Hawkes and Derek J. Emge, the exhibits attached thereto, and upon such other oral and/or documentary evidence as shall be presented at the hearing on Plaintiffs' motion and that the court may consider.

DATED: October 26, 2017

DAVID C. HAWKES, ESQ.

_/s/ David Hawkes_______________
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Attorneys for Plaintiff Shauna Barnard

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I. INTRODUCTION

Following significant discovery and multiple mediations, the parties to this class action lawsuit negotiated a $1,400,000, common-fund settlement on behalf of 1,870 non-exempt employees who worked for Defendant Corepower Yoga ("Corepower" or "Defendant") between April 4, 2015 and September 11, 2017. This is a non-reversionary settlement where all Class Members will receive direct settlement payments averaging $482 per Class Member. As a term of the Settlement, the parties agreed to an award of attorneys' fees for class counsel of 30% of the class award, or $420,000, and reimbursement of litigation expenses up to $20,000. Here, Plaintiff Shauna Barnard ("Plaintiff") seeks the Court's approval for fees of $420,000 and the reimbursement of actual litigation expenses in the amount of $19,865.77 out of the common fund.

The requested attorneys' fees award is reasonable and appropriate when analyzed either as a percentage of the common fund or under a lodestar analysis. The requested litigation cost award is reasonable as it is comprised of costs paid to third parties, which are also of the nature typically charged to clients.

Finally, Plaintiff respectfully requests that the Court approve payment of a class representative service award to her in the amount of $10,000. This amount is reasonable in light of the time Plaintiff devoted to the class recovery, the individual risk she undertook to bring about the Settlement, and the significant benefit she conveyed to Class Members.

II. THE FEE AWARD SOUGHT HERE IS REASONBLE UNDER EITHER A PERCENTAGE-OF-BENEFIT OR LODESTAR ANALYSIS

Courts recognize two methods for calculating attorneys' fees in civil class actions: the percentage of the benefit method and the lodestar/multiplier method. *Wershba v. Apple Computer* 91 Cal. App. 4th 224, 254 (2001). The trial court retains discretion "to choose one method over another...." *Chavez v. Netflix, Inc*. 162 Cal. App. 4th 43, 65-66 (2008).

> Regardless of whether attorneys' fees are determined using the lodestar method or awarded based on a "percentage-of-the-benefit" analysis under the common fund doctrine, "'[t]he ultimate goal. . . is the award of a 'reasonable' fee to compensate counsel for their efforts, irrespective of the method of calculation." *Consumer Privacy Cases* (2009) 175 Cal. App. 4th 545, 557-558.

1 A lodestar fee amount is determined by multiplying the reasonable hours expanded by a
2 reasonable hourly rate. The court may then enhance the lodestar amount with a multiplier. *Wershba,*
3 *supra,* 91 Cal. App. 4th at 254. As explained below, Plaintiff's current aggregate lodestar is $401,265.50
4 and is expected to increase by the time this litigation has been concluded, including preparation for and
5 attendance at the Final Fairness Hearing.[1]

6 In addition, lawyers responsible for creating a common fund are entitled to a fee from that
7 fund. *Fischel v. Equitable Life Assur. Society of U.S.* (9th Cir. 2002) 307 F.3d 997, 1006.[2]
8 The fee is premised on the notion of unjust enrichment: If a group garners a benefit without paying those who produced it for them, they will be unjustly enriched at their lawyers'
9 expense. As the Supreme Court has explained: Since [the late nineteenth century], this Court has recognized consistently that a litigant or a lawyer who recovers a common fund
10 for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. The common-fund doctrine reflects the traditional
11 practice in courts of equity, and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees. The doctrine rests on
12 the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund
13 involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the
14 suit. *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 (citations omitted).[3]

15

16 Empirical studies show that whether the percentage method or lodestar method is used, fee
17 awards in class actions average around one-third of the recovery. *Chavez v. Netflix, Inc.*, *supra*, 162 Cal.
18 App. 4th at p. 66, fn. 11 [quoting *Shaw v. Toshiba America Information Systems, Inc.* (E.D.Tex. 2000)
19 91 F.Supp.2d 942, 972]. *See also In re Activision Securities Litigation* 723 F.Supp. 1373, 1379 (N.D.
20 Cal. 1989). (Special Master's review of class action settlements demonstrated that courts have
21 historically awarded fees in the range of 20% to 50% of the settlement.)

22

23 [1] Declaration of Derek J. Emge in Support of Motion for Final Approval of Class Action Settlement and Motion for Attorneys' Fees, Litigation Expenses and Class Representative Service Award ("Emge Decl.") [filed concurrently
24 herewith], ¶ 11; Declaration of David C. Hawkes in Support of Motion for Final Approval of Class Action Settlement and Motion for Attorneys' Fees, Litigation Expenses and Class Representative Service Award ("Hawkes
25 Decl.") [filed concurrently herewith], ¶¶11-13.

[2] California courts rely upon federal authority where there is no contrary California authority. *See, Vasquez v.*
26 *Superior Court* 4 Cal. 3d 800, 820 (1971); *La Sala v. American Sav. & Loan Ass'n* 5 Cal. 3d 864, 872 (1971).

[3] *See also Manual for Complex Litigation* at §14.121 ("The common-fund exception to the American Rule is
27 grounded in the equitable powers of the courts under the doctrines of *quantum meruit* and unjust enrichment.") (citation omitted).

28

In defining a reasonable fee, the Court should mimic the marketplace for cases involving a significant contingent risk such as this one. Our legal system places unique reliance on private litigants to enforce substantive provisions of employment law through class actions. See *Gentry v. Superior Court* 42 Cal. 4th 443, 450-56 (2007) (confirming the public importance of private enforcement of overtime laws through class actions). Therefore, attorneys providing these substantial benefits should be paid an award equal to the amount negotiated in private bargaining that takes place in the legal marketplace. *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 338, *rehg. denied*, 446 U.S. 947 (1980).

When applying either the percentage-of-the-benefit analysis or a lodestar cross-check to the case at hand, Class Counsel's attorneys' fee application for 30% of the common fund is quite reasonable.

A. Class Counsel's Fee Request is Appropriate Under the Percentage Method

Under the percentage-of-the-benefit method, the "court simply awards the attorneys a percentage of the fund sufficient to provide class counsel with a reasonable fee." *Hanlon v. Chrysler Corp.,*150 F.3d 1011, 1029 (9th Cir. 1995). In diversity actions based on state laws, courts apply state law to determine the right to fees and the method for calculating fees. *See, Mangold v. Cal.Public Util. Comm'n,* 67 F.3d 1470, 1478 (9th Cir. 1995) ("Exiting Ninth Circuit precedent has applied state law in determining not only the right to fees, but also in the method of calculating the fees."); *Rodriguez v. Disner* 688 F.3d 645, 653 n.6 (9th Cir. 2012) ("If … we were exercising our diversity jurisdiction, state law would control whether an attorney is entitled to fees and the method for calculating such fees.").

California law is in accord with federal law on the issue of awarding attorneys' fees from a common fund. *See, 21st Century Ins. Co., v. Superior Court* 47 Cal.4th 511, 520 (2009) ("when a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff … for the benefit of all results in the creation … of a fund, such plaintiff … may be awarded attorney's fees out of the fund."). With respect to the reasonableness of the percentage to award class counsel, a common set of factors are to be reviewed under the percentage-of-the-benefit analysis. *Dept. of Trans. v. Yuki* 31 Cal. App. 4th 1754, 1771 (1995). No rigid formula applies and each factor should be considered only where appropriate. *Id.* The relevant factors include: (1) the result obtained; (2) the

time and labor required of the attorneys; (3) the contingent nature of the case, and the consequent delay in the payment of fees to Class Counsel; (4) the extent to which the nature of the litigation precluded other employment by the attorneys; (5) the experience, reputation, and ability of the attorneys who performed the services and the skill they displayed; and (6) the informed consent of the clients to the fee agreement. *See Serrano v. Priest* 20 Cal. 3d 25, 49 (1997).

Each of the relevant factors supports the reasonableness of Class Counsel's fee request here.

1. Counsel Achieved a Superior Result

As discussed in Plaintiff's Motion for Preliminary Approval of Class Action Settlement, the Settlement provides substantial relief for the class. Counsel who obtain "substantial relief" are entitled to full compensation for their efforts, even if some contentions were rejected or some sought-after relief was denied. *See Schwarz v. Sec. of Health & Human Servs.* 73 F.3d 895, 901-901 (9th Cir. 1995).

In consideration for a release of all class claims arising out of the Second Amended Complaint, Defendant agreed to stipulate to class certification for settlement purposes and to pay into a settlement fund the amount of $1.4 million. There are 1,870 members of the class who will share in this recovery.

Each Class Member taught yoga classes and Plaintiff contends they were not paid for all of their time worked, including pre and post class duties in the studio, preparation of music and sequences for each class, work performing required "programming" duties, and driving between studios. Plaintiff also contends Class Members were not provided with meal and rest periods and not reimbursed for work-related expenses such as mileage for driving between studios, music subscription services, cell phone and/or music storage and playback devices used for yoga classes.

Defendant contests liability and disputes whether a class could be certified. Specifically, Defendant vigorously asserts that its policies and practices complied at all times with all applicable wage and hour laws and that its yoga instructors were properly paid and reimbursed. Defendant has maintained that its yoga teachers were paid on an hourly basis rather than a per-class basis, that all hours reported were paid, and that all alleged unpaid activities were completed by Class Members "on the clock" during their work shifts. Defendant further denies that its instructors were required to drive between studios or required to incur the alleged unreimbursed business expenses. Defendant has also

consistently and steadfastly asserted that Plaintiff would be unable to achieve class certification on any of the class claims. If litigation continued, Defendant would contest class certification by arguing that individualized inquiries predominate over common issues regarding whether a particular Class Member suffered any of the alleged violations, thus precluding certification. Defendant would also argue that there exists no common unlawful policy, Plaintiff could not prove that class treatment would be manageable, and/or Plaintiff's claims are atypical of the claims alleged because she was uniquely situated.

In short, Defendant vigorously asserts that its policies and practices complied at all times with all applicable wage and hour laws and that its yoga instructors were properly paid and reimbursed. If Defendant is successful in proving either of these defenses, it would successfully preclude or significantly limit any recovery on all class claims. At a minimum, Defendant is confident that it will be successful in significantly limiting damages on the class claims via its legal and factual arguments and defenses. Defendant's viable arguments against class certification would also present a serious threat to Plaintiff's chances of achieving class certification in this litigation and are well-supported by applicable authority.

Thus, in light of Defendant's arguments related to liability and class certification, and given the differences in putative Class Members' statements regarding the number of hours worked off-the-clock, if any, and number of missed meal and rest periods, if any, this Settlement is exemplary.

While further litigation might have theoretically resulted in a greater recovery for members of the Class, it could also result in *no recovery* do to the failure to obtain certification or the failure to prove the case at trial. Accordingly, the benefits obtained under the present settlement combined with the delay, expense and hazards of such litigation make it likely that the Settlement reflects the best realistic recovery for all members of the Class. *See Linney v. Cellular Alaska P'ship* 151 F.3d 1234, 1242 (9th Cir. 1998). The immediacy of the recovery and guarantee that all Class Members will recover a significant settlement amount averaging a few thousand dollars also supports approval of the Settlement. *See In re Omnivision Techs.* 559 F.Supp.2d 1036, 1042 (N.D. Cal. 2008).

In assessing the results achieved through a class action settlement, the trial court must "recognize that settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and guard against demanding too large a settlement…" *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod's Liab. Litig.* 55 F.3d 7638, 806 (3d Cir. 1995) (quoting *Manual for Complex Litigation* 2d (1985) § 30.44). Moreover, a settlement is not judged against what might have been recovered had the plaintiff prevailed at trial; nor does the settlement need to provide anywhere near 100% of the damages sought to be fair and reasonable. *Linney v. Cellular Alaska P'ship* 151 F.3d at 1242; *Rebney v. Wells Fargo Bank* 220 Cal.App.3d 1117, 1139 (1990).

Here, the relief obtained by Class Counsel is substantial, especially in light of the obstacles the litigation presented in terms of class certification and proof of damages. Thus, the relief strongly supports the proposed 30% fee award.

2. <u>Counsel Devoted Significant Time and Labor to the Class Claims</u>

As explained more fully in Class Counsels' lodestar analysis (Section II.B.), Class Counsel accrued more than 700 hours in the present action. From filing the original Complaint in May 2016 to the final approval stage, Class Counsel has engaged in almost every conceivable litigation task, except trial and appellate work (e.g., pleadings, written discovery, meet and confers, depositions, mediation, etc.). This factor therefore supports the reasonableness of the requested fee amount.

3. <u>Counsel Assumed Substantial Risk in Pursuing this Case on a Contingency Basis</u>

Class Counsel undertook this litigation on a purely contingent basis, with no assurance of recovering expenses or attorneys' fees. Class Counsel expended considerable time and resources to prosecute the case successfully on behalf of the Class. Counsel undertook substantial risk of non-payment, and the percentage fee request here will fairly compensate Counsel for this risk. "In common fund cases, attorneys whose compensation depends on their winning the case must make up in compensation in the cases they win for the lack of compensation in the cases they lose." *Vizcaino*, 290 F.3d at 1051 (quoting *In re Wash. Pub. Power Supply Sys. Sec. Litig. (WPPSS)* (9th Cir. 1994) 19 F.3d 1291, 1300-01.

The risk Class Counsel took in litigating this case was substantial considering Defense Counsel maintained legal and factual arguments throughout the litigation that could have resulted in *no recovery* for the Class. Furthermore, the substantial time and resources devoted to this litigation has precluded Class Counsel from pursuing other, less-risky legal matters. Class Counsels' requested fees appropriately reflect their commitment to this case, which has required them to forego other cases and income, as well as accrue out-of-pocket litigation expenses.[4]

4. <u>The Case Required Substantial Skill and Counsel Produced Quality Work</u>

Class Counsel is comprised of two experienced law firms, Emge & Associates and Blanchard Krasner & French. The attorneys working on this matter have been appointed class counsel and lead counsel through both certification and settlement of numerous wage and hour and consumer class actions.[5] Class Counsels' experience in wage and hour class actions was integral in evaluating the strengths and weaknesses of the case against Defendant, as well as the reasonableness of the Settlement. These evaluations included an analysis of the applicable wage and hour law, and the probability of certifying the putative class claims.

Counsel spent significant effort and exhibited considerable skill in developing the factual and legal claims in this case, and in arguing these claims to Defense Counsel and before the magistrate judge in a settlement conference and, later, a private mediator. Through these efforts and in the face of difficult issues of fact and law, Class Counsel negotiated a favorable settlement against a well-funded and highly skilled adversary.

5. <u>Class Members' Reaction to the Proposed Fee Award Will Be Available at the Final Fairness Hearing</u>

Class Counsels' requested fee amount was fully disclosed on the Class Notice (¶¶6, 14 of the Notice approved by this Court). The present motion will be available on Class Counsel's website as referenced in the Notice so that Class Members have a fair opportunity to comment on the fee request. At the time of the Final Fairness Hearing, Class Counsel will be prepared to inform the Court whether

[4] Emge decl., ¶¶3, 4, 16; Hawkes decl., ¶¶4-9, 11, 14-18.
[5] Emge Decl., ¶2; Hawkes Decl., ¶10.

any comments to the present motion were received.

In sum, Class Counsel invested their own time and money at significant risk of non-payment in a heavily litigated case against a large corporation defended by highly-skilled attorneys. A fee award of 30% is fair compensation and fully in accord with percentage awards granted in similar actions based on California state law. A lodestar cross-check also confirms the reasonableness of the requested percentage fee, as demonstrated in the lodestar discussion, above.

B. Class Counsel's Lodestar Confirms the Reasonableness of the Fee Award

1. Reasonable Hours

Attorney Derek J. Emge (25th year of practice) accrued 296.8 hours in the present litigation, and attorney David C. Hawkes (15th year of practice) accrued 420.9 hours.[6] The total time spent by Class Counsel on this action, which began in May 2016, is 717.70 hours. This amount is reasonable for a class action of this type, especially where out of town depositions and multiple mediations were required.

Over the course of the litigation, Counsel communicated with scores of Class Members, including face-to-face meetings throughout Southern and Northern California; investigated the facts; researched claims; filed complaints (original, first amended and second amended); met with and consulted with opposing counsel to discuss the case and conduct case management; propounded numerous sets of written discovery; engaged in extensive meet and confer efforts concerning that discovery; reviewed Defendant's production of employee handbooks, training manuals and written directives pertaining to Defendant's wage and hour policies and procedures; took the deposition of Defendant's 30(b)(6) witness covering 13 distinct topics; produced nearly two thousand pages of requested documents; prepared for and defendant Plaintiff's deposition; determined rates of off-the-clock time, meal period violations and the value of business expenses incurred by Class Members from discovery documents; conducted extensive legal research; prepared for and engaged in two rounds of formal mediation; negotiated and drafted the final language of the Settlement Agreement, Class Notice

[6] Emge Decl., ¶11; Hawkes Decl., ¶¶11, 15.

1 and related documents; filed and argued the motion for preliminary approval; and performed various
2 other tasks necessary to produce the benefit this Settlement brings to the Class.[7]
3 The total number of hours generated by both Class Counsel here (717.7 hours) is roughly equal
4 to the time one litigation attorney might bill in just over four months (based upon the customary
5 standard of 2,000 billable hours per year). The fact that two firms billed no more than this amount over
6 a year of contentious litigation reflects the reasonableness of the overall quantity of hours and also
7 demonstrates the care given to avoid duplicative work.

8 **2. <u>Reasonable Hourly Rates</u>**

9 The reasonable market value of an attorney's services is the measure of a reasonable hourly rate.
10 *Ketchum v. Moses* 24 Cal. 4th 1122, 1139 (2001). A reasonable hourly rate is one that is prevailing in
11 the community for similar work. *PLCM Group, Inc. v. Dexler* 22 Cal. 4th 1084, 1095 (2000). The
12 relevant community is generally defined as "the forum in which the district court sits." *Barjon v. Dalton*
13 132 F.3d 496, 500 (9th Cir. 1997).
14 The hourly rates counsel used in their lodestar submission are all justified as the prevailing
15 hourly rates relevant to those counsel. In the case at hand, Derek J. Emge's reasonable hourly rate is
16 $650/hr.; and David C. Hawkes' reasonable hourly rate is $495/hr.[8] There is substantial evidence to
17 support Class Counsels' hourly rates,[9] as demonstrated in surveys conduct by <u>The Real Rate Report</u> for
18 2016 with respect to attorney billing rates in San Francisco, California.[10] Courts routinely use survey
19 data in assessing the reasonableness of attorney's hourly rates. *See Fish v. St. Cloud State Univ.* 295
20 F.3d 849, 852 (8th Cir. 2002); *American Petroleum Inst. v. United States EPA* 72 F.3d 907, 912 (D.C.
21 Cir. 1996); *Martin v. University of South Alabama* 911 F.2d 604, 607 (11th Cir. 1990). The hourly rates
22 requested here fall squarely within the average rates billed by counsel on cases in San Francisco.[11]
23
24 [7] Emge Decl., ¶¶6-10; Hawkes Decl., ¶15.
[8] It is well-settled that Plaintiff's Counsels' compensation in the present class action is to be set at the *current* billing
25 rates to allow for the time expended on the case (or by using historic rates and adding interest or another
enhancement). *See Welch v. Metropolitan Life Ins. Co.* 480 F.3d 942, 947 (9th Cir. 2007). As such, Plaintiff's
26 Counsels' hourly rates are to be set at Counsels' current rate.
[9] *See* Emge Decl., ¶¶12-14; Hawkes Decl., ¶¶11-13.
27 [10] Attached to Emge Decl. as Exhibit "A."
[11] Emge Decl., ¶13.
28

1 As such, The Real Rate Report provides compelling evidence that the aforementioned hourly
2 rates of Plaintiff's Counsel are quite reasonable.
3 Additionally, counsels' proposed hourly rates have been recently approved by both federal and
4 state courts in California. For example, in a similar wage and hour class action, the San Diego Superior
5 Court recently approved Mr. Hawkes' hourly rate of $495 (Hon. Richard E.L. Strauss in *Cardinal v.*
6 *Nifty After Fifty LLC*, Case No. 37-2015-00015664-CU-OE-CTL).[12] Mr. Hawkes's hourly rate of $495
7 is also consistent with the market rate, as it is the same rate that is charged for services billed to and paid
8 by the firm's clients on an hourly basis for, among other matters, prosecuting and defending
9 employment litigation and defending class action litigation.[13] Similarly, Mr. Emge's hourly rate of $650
10 was approved in class action settlement, including by Hon. John A. Houston, Southern District of
11 California in *Santiago v. Delaware North Companies Sportservice, Inc.,* Case No. 3:15cv00269 JAH
12 (WVG); by Hon. Fernando M. Olguin, Central District of California in *Spann v. J.C. Penney*
13 *Corporation,* Case No. SACV120215 FMO (KESx); by Hon. Larry A. Burns, Southern District of
14 California in *Cortes v. Market Connect Group, Inc.,* Case No. 14cv784-LAB (DHB); and by Hon. Joan
15 M. Lewis, San Diego Superior Court in *Pech v. Moneytree, Inc.* Case No. 37-2014-20466-CU-OE-
16 CTL.[14]
17 **3. The Requested Multiplier is Reasonable**
18 The requested fee award yields an approximate multiplier of 1.047. *See* Emge Decl. ¶15 (total
19 lodestar of $401,265.50 divided into requested fee of $420,000 = 1.047 multiplier). In the Ninth Circuit
20 and elsewhere, courts regularly approve percentage-based awards where the lodestar cross-check yields
21 a multiplier of even greater than 3.0. *See e.g., Vizcaino I,* 142 F. Supp.2d at 1305-06 (approving 3.67
22 lodestar multiplier); *Van Vraken v. ARCO,* 901 F.Supp.294, 299 (N.D. Cal. 1995) (approving 3.6
23 multiplier); *In re Rite Aid Corp. Sec Litig.,* 146 F.Supp.2d 706, 736 (E.D. Pa. 2001) (finding that a
24 "lodestar multiple in the range of 4.5 to 8.5" is "unquestionably reasonable" under the cross-check
25 approach); *Weiss v. Mercedes-Benz of N.Am.,* 889 F.Supp. 1297, 1304 (D.N.J. 1995)(approving 9.3

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[12] Hawkes Decl., ¶12.
27 [13] Hawkes Decl., ¶12.
[14] Emge Decl., ¶14.
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multiplier); *aff'd* 66 F.3d 314 (3d Cir. 1995); *see generally Wershba,* 91 Cal.App.4th at 255 ("Multipliers can range from 2 to 4, or even higher.").

As explained by the California Supreme Court, a multiplier is justified due to the inherent risks in prosecuting a class action matter on a contingency basis:

> A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because of the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans…[citation omitted.] A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions…" *Graham v. Daimler Chrysler Corp.* (2004) 34 Cal.4th 553, 580.

In light of the substantial risk Counsel undertook by bringing this action on a contingency basis, the factual and legal complexity of the case, the excellent result obtained, and comparison with lodestars and multipliers awarded in similar actions, the requested lodestar fee and multiplier are reasonable.

C. Class Counsels' Request for Reimbursement of Expenses Is Also Reasonable

The Settlement Agreement provides that Defendant will not object to Plaintiff's application of actual costs (not to exceed $20,000) and such costs approved by the Court shall be paid out of the Common Fund. The Court-approved Class Notice stated: *Class Counsel will ask the Court to approve…reimbursement of litigation costs and expenses advanced by Class Counsel of up to $20,000.* Since this litigation began, Class Counsel incurred out-of-pocket expenses of $19,865.77.[15] All claimed costs sought to be reimbursed were reasonably necessary to the conduct of the litigation. "Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit from the settlement." *In re Media Vision Tech. Sec. Litig*. 913 F.Supp. 1362, 1366 (N.D. Cal. 1996) (*citing Mills v. Elec. Auto-Lite Co.* (1970) 396 U.S. 375, 391-92. The expenses must be relevant to the litigation and reasonable in amount. *Id.* at 1266.

Class Counsels' expenses to date include the following categories: (1) filing fees; (2) service fees; (3) deposition reporting and transcripts; (4) travel; (5) copy charges; (6) excess postage costs; and (7) mediation expenses. Class Counsel put forward these out-of-pocket expenses without assurance they

[15] Emge Decl., ¶16; Hawkes Decl., ¶14.

would be repaid. These expenses were necessary to secure the resolution of this litigation. *See In re Immune Response Sec. Litig*. 497 F.Supp.2d 1166, 1177-78 (S.D. Cal. 2007) (finding that costs such as filing fees, photocopy costs, travel expenses, postage, telephone and fax costs, computerized legal research fees, and mediation expenses are relevant and necessary expenses in a class action litigation).

For these reasons, Class Counsels' request for reimbursement of litigation expenses of $19,865.77 is reasonable.

III. THE PROPOSED CLASS REPRESENTATIVE SERVICE AWARD IS REASONABLE

The Settlement Agreement contemplates that the named Plaintiff, Shauna Barnard, will receive a service award in the amount of $10,000.00. It is customary and appropriate to provide a service award to a named Plaintiff where that Plaintiff has performed services to the Class as its representative. *Ingram v. The Coca Cola Co.* 200 F.R.D. 685, 694 (N.D. GA 2001) ("Courts routinely approve service awards to compensate named plaintiffs for the services they provide and the risks they incurred as class representatives during the course of the class action litigation."). *See also Bell v. Farmers Ins. Exchange* 115 Cal.App.4th 715, 726 (2004)(upholding "service payments" to named plaintiffs for their efforts in bringing the case); *Clark v. American Residential Services LLC* 175 Cal. App. 4th 785, 804 (2009) (review of cases holding that named plaintiffs are generally entitled to a service award for initiating the litigation on behalf of absent class members, taking time to prosecute the case, and incurring financial and personal risk).

In the present matter, Ms. Barnard spent considerable time and effort in the prosecution of this action, including: (1) meeting in-person with and communicating via telephone and email with counsel; (2) communicating in person and via telephone and email with putative Class Members; (3) assisting in the preparation of the Complaint, First Amended Complaint and pleadings in this action; (4) responding to written discovery; (5) identifying and providing relevant documentation; (6) identifying witnesses; (7) reviewing payroll data, schedules and travel history reports with Class Counsel; (8) preparing for and being deposed; (9) assisting Class Counsel in preparation for the 30(b)(6) witness; (10) reviewing the 30(b)(6) deposition transcript to help prepare questions for day two of the deposition; (11) traveling to

Los Angeles to participate in the mediation; (12) and reviewing and signing the comprehensive Settlement Agreement.[16]

Furthermore, Ms. Barnard risked her employment status when she filed the present class action while still employed by Defendant. As the Ninth Circuit has explained, "[t]he danger of witness intimidation is particularly acute with respect to current employees…Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases held up, and other more subtle forms of influence exerted." *NLRB v. Maxwell* 637 F.2d 698, 702 (9th Cir. 1981). Ms. Barnard also incurred significant risk regarding her future employment status by the very fact that her identify as lead Plaintiff is a matter of public record and is readily available to prospective employers through a simple search of the PACER database of case filings. Further, the yoga community is made up of a small group of people who know one another. News and rumors can spread quickly, including news about an employee suing her employer. Finally, Ms. Barnard undertook the direct financial risk by bringing this class action on behalf of her co-workers. If she lost the case, she might have been forced to pay costs to CorePower.[17]

The Class Notice disclosed the amount of the requested service award. At the time of the Final Approval Hearing, Class Counsel will notify the Court whether or not there were any objections or negative comments from the Class regarding the service award amount. The proposed class representative service award is therefore appropriate and justified as part of the overall settlement and warrants final approval.

IV. CONCLUSION

This case presented a high risk to Class Counsel because Defendant had several legal and factual arguments that could have disposed of the Class claims in their entirety. In spite of this risk, Class Counsel undertook this case on a contingency basis and invested substantial time developing Plaintiff's legal claims and investigating the complex facts, with no assurance that they would be paid. Class Counsel achieved an excellent result in this case against strong opposition. The requested fee of

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[16] Emge decl., ¶17; Declaration of Shauna Barnard ("Barnard Decl.") ¶¶3-4, 6-21.
[17] Barnard Decl., ¶5.

$420,000.00 will fairly compensate Class Counsel for the risk they assumed in litigating this case. The requested reimbursement of litigation expenses of $19,865.77 is reasonable. Furthermore, the named Plaintiff Shauna Barnard invested significant time and incurred substantial risk in bringing and supporting the present action. The agreed-upon $10,000.00 service award is therefore fair and reasonable.

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Respectfully submitted,

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