GRADSTEIN & MARZANO, P.C.
HENRY GRADSTEIN (89747)
hgradstein@gradstein.com
MARYANN R. MARZANO (96867)
mmarzano@gradstein.com
DANIEL B. LIFSCHITZ (285068)
dlifschitz@gradstein.com
6310 San Vicente Blvd., Suite 510
Los Angeles, California 90048
T: 323-776-3100

SUSMAN GODFREY L.L.P.
STEPHEN E. MORRISSEY (187865)
smorrissey@susmangodfrey.com
STEVEN G. SKLAVER (237612)
ssklaver@susmangodfrey.com
KALPANA SRINIVASAN (237460)
ksrinivasan@susmangodfrey.com
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067-6029
T: 310-789-3100 F: 310-789-3150

[Additional Counsel for Plaintiff on Signature Page]
Co-Lead Class Counsel

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

FLO & EDDIE, INC., a California corporation, individually and on behalf of all others similarly situated,

Plaintiff,

v.

SIRIUS XM RADIO INC., a Delaware corporation; and DOES 1 through 10,

Defendant.

Case No. CV13-05693 PSG (GJSx)

NOTICE OF MOTION AND MOTION BY PLAINTIFF FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

Date: March 13, 2017
Time: 1:30 p.m.
Place: Courtroom 6A

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on March, 13, 2017, at 1:30 p.m., or as soon thereafter as the matter may be heard, before the Honorable Philip S. Gutierrez, United States District Judge, in Courtroom 6A at the First Street Federal Courthouse, located at 350 W. 1st Street, Los Angeles, CA 90012, Plaintiff Flo & Eddie, Inc. ("Plaintiff" or "Flo & Eddie") will, and hereby does, move this Court for an award of attorneys' fees in the amount of 30% of the total Class settlement amount, including all past and future royalties paid to the Class, as, if and when paid by Sirius XM; $1,533,549.99 in costs and expenses; and $25,000 to each of the two principals of the Plaintiff as an incentive award to compensate them for their time and efforts incurred in connection with this litigation.

Under governing Supreme Court and Ninth Circuit law, the fee request is fair and reasonable when measured against exceptional and very substantial benefits conferred on the Class, the risks of litigation, the strong public policy recognizing the importance of attracting competent counsel to litigate complex cases such as this action on a contingent basis, the time and expense incurred in litigation this hard fought case and the fact that no recovery would have been obtained for the Class but for the services of Class Counsel on behalf of the Class.

This Motion is based upon: (1) this Notice of Motion and Motion; (2) the accompanying Memorandum of Points and Authorities; (3) the Declarations of Henry Gradstein and Steven G. Sklaver; (4) all of the records, pleadings, and papers filed in this action; and (5) upon such other documentary and oral evidence and argument as may be presented to the Court at or prior or the hearing of this Motion.

DATED: December 30, 2016

GRADSTEIN & MARZANO, P.C.
Henry Gradstein
Maryann R. Marzano
Daniel B. Lifschitz

SUSMAN GODFREY L.L.P.
Stephen E. Morrissey
Steven G. Sklaver
Kalpana Srinivasan
SUSMAN GODFREY L.L.P.
Rachel S. Black, *Admitted PHV*
1201 Third Avenue, Suite 3800
Seattle, WA 98101
Telephone: (206) 516-3880
Fax: (206) 516-3883
rblack@susmangodfrey.com

SUSMAN GODFREY L.L.P.
Michael Gervais, *Admitted PHV*
1301 Avenue of the Americas, 32nd Fl.
New York, NY 10019
Telephone: (212) 729-2015
Fax (212) 336-8340
mgervais@susmangodfrey.com

By: */s/Steven G. Sklaver*
Steven G. Sklaver
Co-Lead Class Counsel

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

FLO & EDDIE, INC., a California corporation, individually and on behalf of all others similarly situated,

Plaintiff,

v.

SIRIUS XM RADIO INC., a Delaware corporation; and DOES 1 through 10,

Defendant.

Case No. CV13-05693 PSG (GJSx)

[PROPOSED] ORDER FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

Date: March 13, 2017
Time: 1:30 p.m.
Place: Courtroom 6A

Plaintiff in this class action have moved for an award of attorneys' fees, costs and expenses, and reimbursement to the principals of the named plaintiff for their time and expenses spent on the litigation. Upon due considerations of the application by plaintiff and all of the papers, pleadings and files in this action, and good cause appearing therefor, the Court hereby GRANTS the motion.

I. ATTORNEYS' FEES

In a case where plaintiff's counsel have through their efforts created a common fund, courts usually base the fee award on a percentage of the fund recovered for the class, but then cross-check the reasonableness of the percentage to be awarded by reviewing the attorneys' fees lodestar multiplier. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). The Ninth Circuit uses a 25% benchmark in common fund cases, and "in most common fund cases, the award exceeds that benchmark," with a 30% award being the norm "absent extraordinary circumstances that suggest reasons to lower or increase the percentage." *In re Omnivision Techs. Inc.*, 559 F. Supp. 2d 1036, 1047-48 (N.D. Cal. 2007) (quotation omitted).

The requested award is equal to 30% of the recovery to the Class. After considering the evidence and all of the pertinent factors set forth in *Vizcaino*, 290 F.3d at 1047-50, and subsequent cases, the Court finds plaintiff's' fee request to be fair and reasonable under both the percentage method and the lodestar cross-check. Among other factors, plaintiff's counsel achieved an exceptional result for the Class, the request is commensurate with market rates for contingency fee cases, the case was unusually risky for plaintiff's counsel and undertaken entirely on a contingency basis.

The reasonableness of this fee is confirmed by the lodestar cross-check, which results in a multiplier between .91 and 3.57, and likely lower than that due to the ongoing work required of Class Counsel to implement and administer the

Settlement, as set forth in the Declarations of Henry Gradstein and Steven G. Sklaver In Support of Plaintiff's Motion for an Award of Attorneys' Fees and Expenses, is well within the range of reasonableness. *See Vizcaino*, 290 F.3d at 1052-54 (approving a fee award of $27,127,800, which equaled 28% of the cash settlement fund and which resulted in a 3.65 multiplier); *Milliron v. T-Mobile USA*, 423 F. App'x 131, 135 (3d Cir. 2011) ("we have approved a multiplier of 2.99 in a relatively simple case"); *In re Cadence Design Sys., Inc. Sec. & Derivative Litig.*, No. C–08–4966 SC, 2012 WL 1414092, at *5 (N.D. Cal. April 23, 2012) (awarding counsel "more than 2.88 times its lodestar amount"); *Been v. O.K. Industries, Inc.*, No. CIV-02-285-RAW, 2011 WL 4478766, at *11 (E.D. Okla. 2011) (citing a study "reporting average multiplier of 3.89 in survey of 1,120 class action cases" and finding that a multiplier of 2.43 would be "per se reasonable"). Accordingly, plaintiff's counsels' request for a fee award of 30% of the money paid to the Class, as, if and when received by the Class is hereby GRANTED, which includes an award of $7,650,000 from the minimum amount initially guaranteed by the Settlement (= 30% x $25,500,000).

II. EXPENSES

Plaintiff's counsel are entitled to recover their "out-of-pocket expenses that would normally be charged to a fee paying client." *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994). Plaintiff's counsel have submitted adequate support for the $1,533,549.99 in expenses they incurred over the past three years for which reimbursement is sought. Accordingly, the motion for reimbursement is hereby GRANTED.

III. INCENTIVE AWARDS

Besides his or her *pro rata* share of the common fund, a named plaintiff can recover his reasonable costs and expenses directly relating to his or her representation of the class. *See In re Online DVD-Rental Antitrust Litig.*, No. 12-

15705, 2015 WL 846008 (9th Cir. Feb. 27, 2015) (affirming $5,000 incentive awards for each of the nine class representatives where each unnamed class member received $12). In this case the requested awards represent a very small fraction of the settlement fund. Plaintiff's counsel have submitted a declaration of Steven G. Sklaver summarizing the principals of the named plaintiff's time and expenses related to their representation of the Class in this matter. Good cause being shown therefor, the request for payment of $25,000 each to Howard Kaylan and Mark Volman, the principals of the named plaintiff, is hereby GRANTED.

IV. CONCLUSION

Based on the foregoing findings and conclusions, the Court hereby ORDERS as follows:

A. The Settlement Fund Escrow Agent is AUTHORIZED and DIRECTED to pay 30% of all money paid into the Settlement Fund for attorneys' fees to Class Counsel;

B. The Royalty Fund Escrow Agent is AUTHORIZED and DIRECTED to pay 30% of all money paid into the Royalty Fund for attorneys' fees to Class Counsel;

C. The Settlement Fund Escrow Agent is further AUTHORIZED and DIRECTED to pay from the Settlement Fund:

(i) $1,533,539.99 for reimbursement to costs and expenses to Class Counsel;

(ii) $25,000 each to Howard Kaylan and Mark Volman, the principals of the named plaintiff

The foregoing amounts shall include interest thereon at the same rate as earned by the Settlement Fund and Royalty Fund.

For the initial payment of attorneys' fees to Class Counsel, the Settlement Fund Escrow Agent is AUTHORIZED and DIRECTED to compute the amount

paid into the Settlement Fund as also including an additional $500,000 that Sirius XM has agreed to make available to the Class for the payment of notice of administration costs, but which does not necessarily have to be paid into the Settlement Fund.

These amounts shall be paid by the Escrow Agent to a bank account designated by Class Counsel. Class Counsel shall be responsible for the distribution of all funds to the appropriate parties.

The Court shall retain continuing jurisdiction over the Settlement Fund and Royalty Fund and the foregoing parties and counsel for purposes of supervising such distributions.

IT IS SO ORDERED.

Dated: _____

By:_____
PHILIP S. GUTIERREZ
United States District Judge

GRADSTEIN & MARZANO, P.C.
HENRY GRADSTEIN (89747)
hgradstein@gradstein.com
MARYANN R. MARZANO (96867)
mmarzano@gradstein.com
DANIEL B. LIFSCHITZ (285068)
dlifschitz@gradstein.com
6310 San Vicente Blvd., Suite 510
Los Angeles, California 90048
T: 323-776-3100

SUSMAN GODFREY L.L.P.
STEPHEN E. MORRISSEY (187865)
smorrissey@susmangodfrey.com
STEVEN G. SKLAVER (237612)
ssklaver@susmangodfrey.com
KALPANA SRINIVASAN (237460)
ksrinivasan@susmangodfrey.com
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067-6029
T: 310-789-3100 F: 310-789-3150

[Additional Counsel for Plaintiff on Signature Page]
Co-Lead Class Counsel

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

FLO & EDDIE, INC., a California corporation, individually and on behalf of all others similarly situated,

Plaintiff,

v.

SIRIUS XM RADIO INC., a Delaware corporation; and DOES 1 through 10,

Defendant.

Case No. CV13-05693 PSG (GJSx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION BY PLAINTIFF FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

Date: March 13, 2017
Time: 1:30 p.m.
Place: Courtroom 6A

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

In this ground-breaking class action, previously described by the Court as "one of first impression" and undaunted by "Sirius XM's aggressive litigation tactics,"[1] Court-appointed Co-Lead Class Counsel Gradstein & Marzano, P.C. ("GM") and Susman Godfrey L.L.P. ("SG"), recovered a guaranteed payment of $25.5 million for the benefit of the Class, a settlement amount which may increase up to $99.5 million depending on the outcome of appellate proceedings which Class Counsel will continue to litigate for as long as it takes. Class Counsel respectfully apply for an award of attorneys' fees equal to 30% of the gross settlement amount in light of the exceptional results and unique facts and risks associated with this case. The 30% fee request applies to the entire recovery obtained for the Class, which includes both the agreed upon guaranteed payment of $25.5 million and the additional cash and royalties paid to Class members, as, if and when received by the Class. This is not a coupon settlement – only cash will be disbursed to the Class and Class Counsel's proposed fee award is tied exclusively to the money paid to the Class.

This action has represented a monumental undertaking by Class Counsel, who collectively devoted, as of November 30, 2016, more than 14,600 hours to the prosecution and settlement of the cases brought on behalf of the Class in three different jurisdictions from coast-to-coast. As the Court is aware, the litigation was exceptionally hard-fought. Pursuing this litigation through the Settlement – signed just 36 hours before commencement of the trial in California and after all pre-trial preparations had been completed, including significant mock jury testing – involved unique uncertainties and challenges, including: litigating untested liability

[1] September 8, 2016 Order on Summary Judgment (Dkt. 411) at 6; May 25, 2015 Order on Class Certification (Dkt. 225) at 24. All capitalized terms used in this memorandum shall have the meaning set forth in the Stipulated Class Action Settlement, Dkt. 666-4.

theories, tackling the relevant legal issues in multiple courts across the country, demonstrating that claims could be maintained on a classwide basis, establishing a damages model to capture the harm to the Class, and facing numerous motions and appeals that continue as of the filing of this motion.

The settlement reflects these efforts: it provides the Class with a recovery totaling up to $99.5 million. Even as the issue of liability proceeds through the appellate courts, the settlement protects the Class by guaranteeing an initial fund for past royalties ($25 million) and notice and administration costs ($500,000). It provides up to $15 million in additional past royalties based on the outcome of various appeals, $5 million of which Plaintiff contends has already been earned as a result of the New York appeal.[2] On a per-play basis, and ignoring the benefits of the notice and administration costs that Sirius XM has also agreed to pay, a $25 million settlement represents an award of $15.68 per play, the $30 million recovery represents an award of $18.82 per play, and the maximum $40 million recovery of past royalties would represent $25 per play. These are significant per-unit royalties in the industry, and on par with the non-class settlement achieved by the Major Record Labels, which had significant leverage in negotiating with Sirius XM. Dkt.

[2] A recent decision by the New York Court of Appeals held that Plaintiff's unfair competition law claims against Sirius XM under New York law remains viable, *see Flo & Eddie, Inc. v. Sirius XM Inc.*, 2016 NY Slip. Op. 08480 at 35 (N.Y. Ct. App. Dec. 20, 2016) ("[S]ound recording owners may have other causes of action, such as unfair competition, which are not directly tied to copyright law. . .; [t]hus, even in the absence of a common law right of public performance, plaintiff has other potential avenues of recovery"). Plaintiff contends that as a result of this decision, the Class is now entitled to an additional payment of $5 million in past royalties, such that the minimum guarantee provided for in the Settlement to the Class is now $30.5 million.

The parties are presently meeting and conferring about this issue pursuant to Local Rule 7-3, and plan to raise it with the Court, if a dispute remains, in due course. *See also* Settlement at 32 (§ X.D) (parties' agreement that this Court retains exclusive jurisdiction to implement and enforce the Settlement).

666-2 at ¶ 21.

The settlement also includes a Royalty Program which, depending on the outcome of the appeals, could provide compensation to Class members for all future Sirius XM performances over the next ten years. The Class could not have obtained these additional benefits even if Plaintiff had prevailed at trial and on appeal. Under the Royalty Program, Sirius XM will receive a ten-year license through January 1, 2028 in exchange for making additional cash royalty payments to the Class at up to a 5.5% royalty rate. The royalties negotiated by Class Counsel are the highest obtained by any direct licensor for pre-1972 sound recordings with Sirius XM. As part of this motion, Class Counsel is not requesting a fee based on any estimated value of the Royalty Program, but rather seeks a fee award based on the *actual* additional cash paid to Class members from the Royalty Program, as, if and when it results in additional payments to members of the Class.

Class Counsel faced and overcame substantial risks to achieve this Settlement. Class Counsel invested over ***$9.8 million in time and money*** into these cases against Sirius XM, with the real possibility of getting nothing in return. Class Counsel undertook this litigation on a wholly contingent basis, with no assurance either of payment or recouping expenses. Given all of these facts, Class Counsel submits that an award of 30% is appropriate. *See, e.g., Downey Surgical Clinic, Inc. v. Optuminsight, Inc.*, Case No. CV 09-5457 PSG (JCx), 2016 WL 5938722, at *10 (C.D. Cal. May 16, 2016) (finding "[t]he substantial amount of resources expended on a case where Counsel may have recovered nothing also weighs in favor of finding that the 30% fee is appropriate"); *Luna et al. v. Universal City Studios, LLC*, Case No. CV 12-09286 PSG (SSx) (C.D. Cal. Sept. 13, 2016) (Dkt. 99, attached as Ex. 3 to the Declaration of Steven G. Sklaver "Sklaver Decl.") (holding 30% fee award reasonable given the large settlement recovery, the risks related to certification, and the length of litigation pursued on a contingency); *Hightower v. JPMorgan Chase Bank, N.A.*, Case No. CV 11-1802 PSG (PLAx), 2015 WL

9664959, at *10-11 (C.D. Cal. August 4, 2015) (approving 30% award); *see also Schulein et al. v. Petroleum Dev. Corp., et al.* ("*PDC*"), Case No. CV 11-1891 AG (ANx) (C.D. Cal. March 16, 2015), Dkt. 261 (approving 30% award from $37.5 settlement fund).

Class Counsel also seeks reimbursement for $1,533,549.99 in costs and expenses already incurred and payment of $25,000 for each of Flo & Eddie's founders and principals, Howard Kaylan and Mark Volman, to compensate them for their time and efforts incurred in connection with this litigation.

II. FACTUAL BACKGROUND

As this Court has recognized, this case ventured into unchartered territory in seeking a legal determination that Sirius XM's public performance of pre-1972 sound recordings owned by members of the Class without authorization violated state copyright law and constituted conversion, misappropriation and unfair competition. *See, e.g.* Dkt. 411 at 6. Class Counsel, working on behalf of Flo & Eddie, sought to cement the law through this case, filed here in August 2013, and parallel actions brought in New York and Florida filed in August and September 2013 respectively. *See* Declaration of Henry ("Gradstein Decl.") ¶ 6.[3]

At every step of the way, Class Counsel was met with fierce resistance by Sirius XM to litigate every conceivable issue and repeatedly revisit the Court's rulings. *See, e.g.*, Dkt 225 at 24. Class Counsel began researching the question of pre-1972 sound recordings and to what protection they were entitled in February 2013. Gradstein Decl. ¶ 3. Class Counsel spoke and met with various owners of pre-1972 sound recordings in the spring of 2013, deciding ultimately Flo & Eddie would best serve the interests of the Class. *Id.* The key liability questions were tested through early summary judgment motions in this Court, New York and

[3] SG first entered its appearance on March 17, 2016 (Dkt. 274-276), and the Court appointed SG as co-lead class counsel on May 16, 2016 (Dkt. 308).

Florida. Class Counsel researched, developed and briefed the liability arguments, laying out the legal basis for finding an exclusive performance right for these sound recordings under the respective states' laws and determined that Sirius XM's conduct constituted unfair competition, misappropriation, and conversion. In California, this Court heard oral argument on September 15, 2014 and granted summary judgment against Sirius XM on liability, finding violations of California Civil Code § 980(a)(2); California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200l; misappropriation and conversation. Dkt. 117. Plaintiff subsequently obtained a favorable ruling in New York on liability and Sirius XM obtained a favorable ruling in Florida. Gradstein Decl. ¶ 7.

Class Counsel thereafter sought to certify a class of owners of pre-1972 recordings whose sound recordings had been exploited in California without authorization. In support of their motion, Class Counsel engaged in the necessary discovery, deposing 15 fact and expert witnesses, propounding and responding to 11 sets of discovery requests, and reviewing millions of pages of documents. Gradstein Decl. ¶¶ 7-8. Following a hearing in May 2015, the Court certified the class of sound recording owners. Dkt. 225.

The Court's decision on summary judgment and certification triggered ongoing challenges and efforts to revisit those rulings up until the eve of trial. Sirius XM unsuccessfully moved to certify the Court's summary judgment order for interlocutory appeal. Dkts. 159. Sirius XM also sought reconsideration of the Court's ruling, which was denied. Dkt. 175. Following the Court's ruling on certification, Sirius XM immediately sought to stay the case so it could take up an interlocutory appeal. The Ninth Circuit denied the petition and Sirius XM's follow-up for rehearing or reconsideration *en banc*.

Sirius XM, in its bid to decertify the class, took 19 depositions of absent class members, who collectively produced thousands of pages of documents. Class Counsel traveled throughout the country—including to Florida, New York, New

Jersey, North Carolina, Tennessee, Louisiana, Illinois, Mississippi, South Carolina, and Oregon—to prepare for, attend and defend such depositions. Sklaver Decl. ¶25.

After this Court approved the form and manner of class notice submitted by Plaintiff, Dkt 294, Sirius XM filed a petition for writ of mandamus with the Ninth Circuit on that issue. It was denied. Sirius XM then filed a motion for decertification of the class three months before trial. Dkt 334. Sirius XM also filed a summary judgment motion that sought to revisit the damages model previously approved by the Court on class certification. Dkt. 335. Prior to trial, Sirius XM continued to contest that liability had been found on a classwide basis and insisted it could present individualized defenses to the jury for class members. As a result, Plaintiff was forced to engage in substantial efforts to litigate the scope of trial, including briefing 18 motions *in limine*, preparing designations and objections for nearly two dozen witnesses, preparing competing jury instructions, and conferring regarding the admissibility of the parties' hundreds of exhibits.

At the same time, Class Counsel, planning for a trial on the issue of damages, devoted enormous resources to its damages case. Class Counsel developed a damages model based on the revenues Sirius XM generated by exploiting Plaintiff's sound recording. That model was adopted by the Court on class certification (Dkt 225) and defended on summary judgment (Dkt. 411) and in motions *in limine* (Dkt. 577). Class Counsel worked vigorously to pursue discovery from Sirius XM to understand the damages scope and along with its damages expert, invested many hours to analyze and normalize the data. Class Counsel also prepared its damages expert twice for depositions and deposed Sirius XM's damages expert twice, including weeks before trial. Sklaver Decl. ¶¶ 11-12.

In addition to the work in California, Class Counsel continued to advance the cases in New York and Florida, preparing for appeals in the Second and Eleventh Circuit and then on certified questions to the highest state court in New York and Florida. Gradstein Decl. ¶¶ 9-10. A full chronology of the major activity in those

cases is included in the Gradstein Declaration. *Id.* ¶ 11. The decision from the New York state court has now returned that matter back to the Second Circuit, before which supplemental briefing has now been ordered, due January 16, 2017. *See* footnote 2 *supra* and *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, Case No. CV 15-1164, United States Court of Appeals for the Second Circuit, Dec. 29, 2016 Order (Dkt. 209) (attached as Ex. 8 to the Sklaver Decl.)

Class Counsel also made substantial efforts to resolve the case. In 2015, Class Counsel participated in a mediation of the nationwide claims against Sirius XM, which was unsuccessful. Gradstein Decl. ¶ 11. Settlement discussions did not resume in earnest until shortly before trial. During the weeks leading up to trial, Class Counsel devoted significant resources to negotiating and drafting a complex Settlement Agreement that achieves a nationwide resolution of the dispute, and executed the Settlement Agreement only after concluding that it reflected the best possible result for the Class.

III. ARGUMENT

Given the untested legal theories advanced and developed by Class Counsel on behalf of the Class in this case, the fact that litigation in this action was taken to the brink of trial, after extensive and hard-fought discovery and briefing, and the heightened risks associated with this action requiring national strategic planning, Class Counsel seek an attorneys' fees award of 30% of the recovery for the Class. This includes a fee award of $7,650,000 from the initially guaranteed $25.5 million cash benefit provided to the Class (= 30% x $25.5 million) and 30% of any additional funds that Sirius XM pays to the Class as a result of the Settlement. Such an award is reasonable given the particular facts and circumstances of the case.

Courts in this Circuit and in California recognize that a fee award in a case in which a recovery is made for the Class need not be limited to the value of attorney hours actually worked. In *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268

(9th Cir. 1989), the Ninth Circuit explained:

> Since the Supreme Court's 1885 decision in *Central Railroad & Banking Co. of Ga. v. Pettus*, [113 U.S. 116 (1885)], it is well settled that the lawyer who creates a common fund is allowed an *extra* reward, beyond that which he has arranged with his client, so that he might share the wealth of those upon whom he has conferred a benefit. The amount of such a reward is that which is deemed "reasonable" under the circumstances.

Id. at 271 (citation omitted).

"In a case where plaintiffs' counsel have through their efforts created a common fund, courts usually base the fee award on a percentage of the fund recovered for the class, but then cross-check the reasonableness of the percentage to be awarded by reviewing the attorneys' fees lodestar multiplier." *PDC*, Case No. CV 01891-AG (ANx), Dkt 261 (March 16, 2015 Order) at 1 (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9 Cir. 2002) and awarding 30% of the $37.5 million settlement fund) (attached as Ex. 6 to the Sklaver Decl.); *see also Spann v. J.C. Penney Corp.*, Case No. CV 12-0215 FMO (KESx), 2016 WL 5844606, at *12 (C.D. Cal. Sept. 30, 2016) (stating that the percentage method is "typically" used under California law when a common fund is created). "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." *Lopez v. Youngblood*, Case No. CV 07-0474-DLB, 2011 WL 10483569, at *3 (E.D. Cal. Sept. 2, 2011). The percentage approach is also favored because it is consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated by a percentage of the recovery. *See Matter of Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992). Finally, use of the percentage-of-

recovery method decreases the burden imposed on the court by avoiding a detailed and time-consuming lodestar analysis and assures that class members do not experience undue delay in receiving their share of the settlement. *See In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378-79 (N.D. Cal. 1989).

As to the percentage award sought here, the facts and nature of this particular litigation are consistent with cases granting fee awards in excess of the 25% benchmark and in line with the 30% fee sought here. "Under the percentage method, California has recognized that most fee awards based on either a lodestar or percentage calculation are 33 percent and has endorsed the federal benchmark of 25 percent." *Spann*, 2016 WL 5844606, at *12 (quoting *Smith v. CRST Van Expedited, Inc.*, Case No. CV 10-1116-IEG (WMCx), 2013 WL 163293, at *5 (S.D. Cal. Jan. 14, 2013)); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D. Cal. 2010) (explaining that "in most common fund cases" the award "*exceeds*" the 25% benchmark) (emphasis added).

A. A Fee Award Equal To 30% Of The Recovery For The Class is Fair and Reasonable

The Ninth Circuit has identified a number of factors "courts may consider in assessing a request for attorneys' fees that was calculated using the percentage-of-recovery method," *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954 (9th Cir. 2015), including: "(1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases." *Dudum v. Carter's Retail, Inc.*, Case No. CV 14-00988-HSG, 2016 WL 7033750, at *7 (N.D. Cal. Dec. 2, 2016). "In addition, a court may cross-check its percentage-of-recovery figure against a lodestar calculation." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 955. All these factors support a finding that the requested 30% award is reasonable.

1. Class Counsel Achieved Excellent Results for the Class.

In a fee award determination, the "most critical factor is the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983); *Vizcaino v. Microsft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002) ("[e]xceptional results are a relevant circumstance"); *Spann*, 2016 WL 5844606, at *12 ("The result achieved is a significant factor to be considered in making a fee award.") (quoting *In re Heritage Bond Litig.*, Case No. ML 02–1475-DT, 2005 WL 1594403, at *19 (C.D. Cal. June 10, 2005). Here, Class Counsel diligently worked to obtain favorable rulings, including an affirmative determination on the underlying issue of liability and then certification of the class. Class Counsel developed a damages model – correlating with the underlying law – that was adopted by the Court and vigorously pursued the factual support to analyze and calculate damages, through the brink of trial. The resulting settlement that only tenacious and thorough litigation could achieve was groundbreaking in the industry.

Moreover, Class Counsel was pitted against a wealthy corporate foe, represented by highly skilled lawyers at leading national law firms who vigorously litigated every aspect of the case. After more than three years of hard-fought litigation that included two petitions to the Ninth Circuit and a petition for rehearing *en banc*, Class Counsel reached a settlement with Sirius XM that provides a *minimum* of $25.5 million in cash and a potential total $99.5 million cash fund. *See* Dkt. 666-4 (Settlement) § IV.A.1 ($25 million for past damages) and § VII (up to $500,000 for notice and administration costs); *see also* Dkt. 666-2 (Declaration of Michael Wallace) ¶¶ 15-16 (regarding future royalty payments). The $25.5 million is guaranteed regardless of the outcome of various appeals. The royalty payment of up to a 5.5% royalty rate for ten years is the *highest* royalty rate negotiated by any of the independent record labels who chose to settle directly with Sirius XM after class certification, and only one of those direct licenses expressly provided compensation for *past* use of Pre-1972 Sound Recordings (for the year

2015). *Id.* ¶ 20.

The additional millions in cash payments to be paid to the Class based on the appellate proceedings and any royalties paid through the Royalty Program is part of the recovery to the Class, and the attorneys' fee award requested here of 30% applies to those future payments as, if and when made to the Class. Any future payments will be the result of both Class Counsel's prior litigation efforts, the future work that will be needed to prosecute the appeals, and the terms of the Settlement that Class Counsel obtained. Courts have recognized it is appropriate to award fees based on future payments actually made that result from the efforts of counsel, and this is the typical structure of how contingent fee arrangements are entered into in the private marketplace. *See, e.g,* Sklaver Decl. ¶¶ 15-16; *see also Rosenfeld, Meyer & Susman v. Cohen*, 191 Cal.App.3d 1035, 1044-1045 (1987) (fees are calculated as a share of clients' future income on entertainment projects negotiated by counsel); *Shiya v. National Committee of Gibran*, 381 F.2d 602, 607-608 (2d Cir. 1967) (affirming judgment that contingent fee applied to future royalties); *Waugh v. Q. & C. Co.*, 16 F.2d 363 (7th Cir. 1926) (attorney was entitled to receive percentage of future royalties received as a result of settlement of litigation).

2. Class Counsel Assumed Considerable Litigation Risks.

Risk, novelty, and difficulty of the issues presented are important factors in determining a fee award. *Vizcaino*, 290 F.3d at 1048, *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d at 1299-1300. This factor also weighs in favor of a 30% fee award because the case involved numerous sophisticated and risky factual, legal and damages-related issues.

Class Counsel pursued this case in the absence of any controlling, on-point precedent. Gradstein Decl. ¶¶ 3-5. No Court had ever squarely addressed whether California law provides owners of pre-1972 sound recordings with statutory or common law claims based on the public performance of their sound recordings.

Only after Class Counsel overcame the vigorous opposition of Sirius XM did Class Counsel secure such a ruling—which Class Counsel then defended after Sirius XM filed motions for reconsideration and for interlocutory appeal. *Id.* Sirius XM challenged almost every legal and factual aspect of Plaintiff's case and damages theory—often multiple times and twice seeking Ninth Circuit review. It opposed Plaintiff's motion for class certification, *see* Dkt. 193, sought Ninth Circuit review of the certification, and moved for decertification at the close of discovery, *see* Dkt. 345. And even as the parties prepared for trial, Sirius XM stated it planned once again to move to decertify the Class and repeatedly reserved its appellate rights to try again on these issues in the Ninth Circuit, just as it already had in the Second and Eleventh Circuits in the parallel actions. Amid the intense activity in this Court, Class Counsel also litigated actively the cases pending in New York and Florida, which also faced a lot of risk. Gradstein Decl. at ¶¶ 9-11; *see also Flo & Eddie, Inc. v. Sirius XM Inc.*, 2016 NY Slip. Op. 08480 (N.Y. Ct. App. Dec. 20, 2016) (holding, *inter alia*, that public performance of pre-1972 sound recordings does not provide a basis for a copyright claim under New York common law but unfair competition claims remain viable).

3. <u>This Case Required A High Degree of Skill and Legal Work.</u>

The "prosecution and management of a complex ... class action requires unique legal skills and abilities." *Spann*, 2016 WL 5844606, at *13 (quoting *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008)). Here, the complexity of issues, the skill required, and the high quality of Class Counsel's work weigh in favor of a 30% fee award.

The quality of opposing counsel is also relevant in evaluating the quality of the work done by Class Counsel. *See, e.g.*, *Destefano v. Zynga, Inc.*, No. 12-CV-04007-JSC, 2016 WL 537946, at *17 (N.D. Cal. Feb. 11, 2016). Here, Sirius XM was represented by two nationally renowned law firms over the course of this case, and its lead attorney has been ranked as one of the country's top 10 trial lawyers.

Sirius XM's counsel vigorously opposed Plaintiff at every stage of the litigation. The quality of Sirius XM's counsel and that Class Counsel achieved a favorable settlement for the Class in face of such formidable legal opposition is a measure of the quality of Class Counsel's work on this case.

4. Class Counsel Handled This Case On a Pure Contingent Fee Basis.

"With respect to the contingent nature of the litigation—the fourth factor—courts tend to find above-market-value fee awards more appropriate in this context given the need to encourage counsel to take on contingency-fee cases for plaintiffs who otherwise could not afford to pay hourly fees." *Destefano*, 2016 WL 537946, at *18. "Moreover, when counsel takes on a contingency fee case and the litigation is protracted, the risk of non-payment after years of litigation justifies a significant fee award." *Id.* This factor also weighs in favor of a 30% fee award because Class Counsel handled the case exclusively on a contingent fee basis for over three years and "took the risk that they would never be paid for their time or reimbursed for costs." *Spann*, 2016 WL 5844606, at *13.

5. The Requested 30% Award Is At or Below the Percentage Awarded in Similar Cases—Including Contingent Fee Agreements Negotiated in Non-Class Litigation By Sophisticated Parties.

Courts often look at fees awarded in comparable cases to determine if the fee requested is reasonable. *Vizcaino*, 290 F.3d at 1050 & n.4. Courts also should look to "what the market pays in similar cases." *In re RJR Nabisco, Inc. Sec. Litig.*, MDL No. 818 (MBM), 1992 WL 210138, at *7 (S.D.N.Y. Aug. 24, 1992). This fact is highly relevant to determining the appropriateness of the award because the Court's ultimate task is to "approximate the reasonable fee that a competitive market would bear." *Johnson v. City of New York*, Case No. CV 08–3673 (KAM)(LB), 2010 WL 5818290, at *4 (E.D.N.Y. Dec. 13, 2010) (citing *McDaniel*

v. County of Schenectady, 595 F.3d 411, 420 (2d Cir. 2010)). Here, such a comparison strongly supports the 30% attorneys' fee request.

If this were not a class action but a commercial business dispute governed by a contingency fee arrangement with the attorneys advancing all expenses, something both SG and GM have handled frequently, the customary contingent fee arrangement would have been in the range of 30 to 45 percent of the recovery. *See* Sklaver Decl. ¶¶ 15-16; Gradstein Decl. ¶ 20. As one Court has expressly held: "[T]he requested fee is far less than the 45% that Susman Godfrey would obtain on the open market under its standard contingency fee arrangement in which expenses are advanced." *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *17 (S.D.N.Y. Sept. 9, 2015) (approving fee award when cross-checked against lodestar resulted in a 4.87 multiplier). *See also In re M.D.C. Holdings Sec. Litig.*, No. CV89-0090 E (M), 1990 WL 454747, at *7 (S.D. Cal. Aug. 30, 1990) ("In private contingent litigation, fee contracts have traditionally ranged between 30% and 40% of the total recovery."); *In re RJR Nabisco, Inc. Sec. Litig.*¸ 1992 WL 210138, at * 7 ("In private contingency fee cases, lawyers routinely negotiate agreements for between 30% and 40% [ ] of the recovery." *Id.* (gathering authorities); *Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998) (approving 38 percent fee and noting typical contingent fee contracts of 33 to 40 percent); *McGee v. Cont'l Tire N. Am., Inc.*, 2009 WL 539893, at *16 (D. N.J. Mar. 4, 2009) ("Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation."). Thus, the customary contingent fee recognized by the caselaw and in the private marketplace supports the 30% fee requested in this case.

"Nationally, the average percentage of the fund award in class actions is approximately one-third." *Multi-Ethnic Immigrant Workers Org. Network v. City of Los Angeles*, Case No. CV 07-3072 AHM FMMx, 2009 WL 9100391, at *4 (C.D. Cal. June 24, 2009). Looking at other complex class action cases, a 30% fee award is on par with fees previously awarded. *See e.g.*, *Morris v. Lifescan, Inc.*, 54 Fed.

Appx. 663, 664 (9th Cir. 2003) (affirming 33% award where "district court noted that class counsel achieved exceptional results in this risky and complicated class action despite [defendant's] vigorous opposition throughout the litigation"); *Vizcaino*, 290 F.3d at 1052–53 (table addressing percentage–based fee awards in common fund cases of $50–200 million from 1996 to 2001; percent awarded ranged from 2.8% to 40%); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454 (9th Cir. 2000), *as amended* (June 19, 2000) (upholding 33 1/3% fee award); *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming fee award equal to 33% of fund); *Bickley v. Schneider Nat'l Carriers, Inc.*, No. 4:08-CV-05806-JSW, 2016 WL 6910261, at *4 (N.D. Cal. Oct. 13, 2016) (approving 33.3% fee award); *Vasquez*, 266 F.R.D. at 491 (noting that "[t]he typical range of acceptable attorneys' fees in the Ninth Circuit is 20% to 33 1/3% of the total settlement value, with 25% considered the benchmark"); *In re Apollo Group Inc. Sec. Litig.*, No. CV-04-2147-PHX-JAT, 2012 WL 1378677, at *7 (D. Ariz. Apr. 20, 2012) (33.3% fee held "more than reasonable"); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. MDL 3:07-md-1827 SI, 2011 WL 7575003, at *1 (N.D. Cal. Dec. 27, 2011) (awarding 30% of the $405 million settlement fund); *In re Heritage Bond Litig.*, 2005 WL 1594403, at *20-21 (awarding 33 1/3% in attorneys' fees where "[v]arious issues litigated in th[e] case concerned relatively uncharted territory."); *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n. 11 (2008) ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.") (citation omitted).

B. The Lodestar Cross-Check Confirms The Reasonableness Of The Requested Fees.

"As a final check on the reasonableness of the requested fees, courts often compare the fee counsel seeks as a percentage with what their hourly bills would amount to under the lodestar analysis." *Omnivision*, 559 F. Supp. 2d at 1048. But

because the lodestar method "creates incentives for counsel to expend more hours than may be necessary on litigating a case," the "lodestar method is merely a cross-check on the reasonableness of a percentage figure." *Vizcaino*, 290 F.3d at 1050 n.5. The lodestar method is calculated "by multiplying the reasonable hours expended by a reasonable hourly rate" *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995).

Here, the lodestar "cross-check" confirms that the requested percentage-of-recovery fee amount is reasonable. Through November 30, 2016, and excluding all time spent in connection with this fee motion, Class Counsel has devoted 14,627.30 hours to the litigation, totaling $8,356,877.80 in reasonable fees. *See, e.g.* Sklaver Decl. ¶¶ 17-20 & Ex. 1. An award of 30% of the recovery for the Class, whether at the low end ($25.5 million, resulting in a negative multiplier) or the high end ($99.5 million, resulting in less than a 3.58 multiplier) confirms that the requested 30% recovery is reasonable. The subsequent appeals that Class Counsel will undertake to ensure more funds are paid to the Class will require substantial additional legal work and will decrease the already-reasonable 3.58 multiplier.

1. The Number of Hours Devoted By Class Counsel To This Litigation is Reasonable.

Under the lodestar method, courts first look at the number of hours spent by counsel on the case. Class Counsel has submitted the Declarations of Henry Gradstein and Steven Sklaver attesting to the total hours of attorneys at their respective firms, hourly rates, experience, and efforts to prosecute this action. *See* Gradstein Decl. ¶¶ 14-15; Sklaver Decl. ¶¶ 17-20 & Ex. 1. Through November 30, 2016, Class Counsel has collectively spent 14,627.3 hours of attorney and litigation support time on this action and on the related New York and Florida actions included in the Settlement. This does not include time Class Counsel will spend in the future overseeing the notice to class members, drafting the motion for final approval of the settlement, preparing for and attending the fairness hearing,

addressing any supplemental submissions, assisting class members with the claims process, overseeing administration of the Settlement fund through the selected royalty administrator and addressing ownership issues, and briefing and arguing the appeals in this case and in New York and Florida. This ongoing work will add significant time and expense. Sklaver Decl. ¶ 20.

The hours that Class Counsel devoted to this action were reasonable and necessary. Class Counsel's hard work, tenacity and commitment ultimately paid off, resulting in a Settlement that provides substantial monetary relief for the Class.

2. Class Counsel's Hourly Rates are Reasonable.

Class Counsel's hourly rates are also reasonable, and this is confirmed by a number of data points, including the private market, where sophisticated clients have hired and paid Class Counsel the same hourly rates requested here and market reports. Gradstein Decl. ¶ 14 & Sklaver Decl. ¶ 18. Neither GM nor SG are exclusively class action law firms; both firms have sophisticated commercial clients who pay the exact same hourly rates requested in this motion. *Id.* As this Court recently recognized in awarding the same law firm used by Sirius XM (O'Melveny & Myers) fees based on rates ranging between $870 and $975 for partners and between $415 and $655 for associates, "[c]ourts have recognized that payment of fees by the client supports their reasonableness and appropriateness. *See, e.g.*, *Kilopass Tech., Inc. v. Sidense Corp.*, 82 F. Supp. 3d 1154, 1167 (N.D. Cal. 2015); *Stonebrae, L.P. v. Toll Bros.*, No. C-08-0221-EMC, 2011 WL 1334444, at *6 (N.D. Cal. Apr. 7, 2011), *aff'd*, 521 F. App'x 592 (9th Cir. 2013)." Order re Plaintiff's Motion for Attorney's Fees and Costs at 6, *Colony Cove Properties, LLC v. City of Carson*, Case No. CV 14-03242-PSG (PJWx) (Aug. 15, 2016) (attached as Ex. 4 to the Sklaver Decl.). *See also In re Hi-Crush Partners L.P. Sec. Litig.*, Case No. CV 12-8557 (CM), 2014 WL 7323417, at *14 (S.D.N.Y. Dec. 19, 2014) (finding class counsel's rates reasonable where the "rates billed by Lead Counsel (ranging from $425 to $825 per hour) for attorneys, are comparable to peer plaintiffs and defense-

side law firms litigating matters of similar magnitude.")

Numerous courts in class action cases have also specifically approved SG's hourly rates as reasonable. *See, e.g., In re Animation Workers Antitrust Litig.*, Case No. CV 14-4062-LHK, 2016 WL 6663005, at *6 (N.D. Cal. Nov. 11, 2016); *PDC*, Case No. CV. 11-1891 (AG) (C.D. Cal.) (Dkt. 261) (March 16, 2015 Order) (attached as Ex. 6 to Sklaver Decl.); *In re: Korean Air Lines Co., Ltd. Antitrust Litigation*, MDL No. 1891, Case No. 07-5107-SJO (AGRx), 2013 WL 7985367 (C.D. Cal. Dec. 23, 2013); *Fleisher*, 2015 WL 10847814, at *17-18.

Counsel's reasonable hourly rates are determined by the "prevailing" market rates in the "relevant community," which are the rates a lawyer of comparable skill, experience, and reputation could command in the forum in which the district court sits. *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008). "In Los Angeles, hourly rates between $485 and $750 are common," and in 2014, standard partner rates among top Los Angeles firms ranged from $490 to $975. *Chambers v. Whirlpool Corp.*, Case No. CV 11-1733 FMO (JCGx), 2016 WL 5922456, at *14 (C.D. Cal. Oct. 11, 2016).

The 2015 Real Rate Report Snapshot (2015 Real Rate Report), offers a few relevant data points for fees in the Central District. *See also Vahan Eksouzian, et al. v. Brett Albanese, et al.*, Case No. CV 13-00728-PSG (AJWx), Dkt 196 (October 23, 2015 Order) (considering the 2014 Real Rate Report) (attached as Ex. 5 to the Sklaver Decl.). First, the Report states the median rate for all intellectual property lawyers in Los Angeles is $622.50 for partners and $416.50 for associates. *Real Rate Report* at 106. The third quartile for this category is $758.67 for partners and $581.09 for associates. *Id.* For litigators working on intellectual property matters related to technology and telecommunications matters – outside of patent and trademark – in Los Angeles, the median hourly rate is $610 for partners and $377.50 for associates. *Real Rate Report* at 65. The third quartile for this category is $750 hour for partners and $495 for associates. *Id.* Thus, the requested

hourly fees here fall within the range of hourly rates for intellectual property lawyers working in Los Angeles.

Additionally, declarations from Class Counsel establish the hourly rates—which, with one exception, range from $350 to $700—are fair, reasonable, and market-based. *See Bouman v. Block*, 940 F.2d 1211, 1235 (9th Cir. 1991) (the submission of "declarations stating that the rate was the prevailing market rate in the relevant community [was] ... sufficient to establish the appropriate rate for lodestar purposes"). Class Counsel are highly-respected members of the bar with extensive experience in prosecuting high-stakes complex litigation, including class actions, intellectual property, and complex business cases, both on a contingent fee basis and in matters where they are hired to prosecute or defend cases on an hourly basis Sklaver Decl. ¶¶ 17-20; Gradstein Decl. ¶ 18.

3. The Lodestar Multiplier is Reasonable and Acceptable.

Multiplying the hours spent by Class Counsel on the litigation by their respective hourly rates amounts to a lodestar $8,356,877.80, as of November 30, 2016. Gradstein Decl. ¶ 13-15; Sklaver Decl. ¶ 17. Dividing that lodestar, which is necessarily lower than where it will be at the end of all the appeals and settlement administration — including the Royalty Program which is to be administered over 10 years — into the 30% requested fee award yields a multiplier ranging from a negative figure (.92) to a maximum of 3.57.[4]

The minimum .92 multiplier—based on the $25.5 million minimum cash settlement—is at the very low end of the range of multipliers that courts regularly approve as fair and reasonable. *See, e.g.*, *Vizcaino*, 290 F.3d at 1051-52 (affirming fee award where the lodestar multiplier was a positive 3.65 multiplier and including table of multipliers ranging up to 8.5 times).

The maximum multiplier of 3.57 – which will necessarily be driven down

[4] Minimum case: ($25,500,000 * 30%) / $8,356,877.80 = .91
Maximum case: ($99,500,000 * 30%) / $8,356,877.80 = 3.57

through the substantial work that lies ahead to help achieve the maximum payment authorized under the Settlement – is also fair and reasonable, given the complexity of the litigation, the diligent and skillful work by class counsel, the risk of nonpayment, and the pendency of the case for over three years. A 3.57 multiplier is "well within the range of multipliers that courts have allowed." *Steiner v. Am. Broad. Co.*, 248 Fed. Appx. 780, 783 (9th Cir. 2007) (approving fee award that constituted lodestar multiplier of approximately 6.85); *see Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers."); *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, Case No. CV 05-11148-PBS, 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009) (approving attorneys' fee award "which represents a multiplier of about 8.3 times lodestar"); *In re Enron Corp. Sec., Derivative & Erisa Litig.*, 586 F. Supp. 2d 732, 798–99 (S.D. Tex. 2008) (approving fee of $688 million—a lodestar multiplier of 5.2—and acknowledging that "[lodestar] multipliers above 4 have become relatively common over the last dozen years.").

Moreover, the requested fees are reasonable in light of the contingent nature of the representation and the high risk faced by class counsel in this case of first impression. "The prospect of handsome compensation is held out as an inducement to encourage lawyers to bring such suits." *Dolgow v. Anderson*, 43 F.R.D. 472, 494 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1970).

C. Class Counsel Are Entitled To Recover Their Reasonable Costs and Expenses.

Class Counsel also requests reimbursement in the amount of $1,533,549.99 for out-of-pocket expenses reasonably and necessarily incurred in connection with the prosecution of this action and the New York and Florida actions. "The common fund doctrine provides that a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a

claim is entitled to recover from the fund the costs of his litigation...." *Carter v. Anderson Merchandisers, LP*, Case No. CV 08-0025-VAP (OPx), 2010 WL 1946757, at *3 (C.D. Cal. May 11, 2010) (quoting *Vincent*, 557 F.2d at 769); *see Omnivision*, 559 F. Supp. 2d at 1048 ("Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters.") (citing *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)).

The litigation expenses incurred in this litigation are described in the accompanying Declarations. *See* Gradstein Decl. ¶¶ 16-17; Sklaver Decl. ¶¶ 21-23 & Ex. 2. They are the type of expenses typically billed by attorneys to paying clients in the marketplace and include such costs as fees paid to experts and expenses relating to the engagement of a mediator, computerized research and other research services; court filing and service costs; deposition and court reporter costs; printing, copying, and shipping costs; technology support costs; a mock trial; and travel costs including airfare, meals, and lodging. The expenses also include expenditures paid to specialist appellate counsel who were paid by Class Counsel on an hourly basis. These expenses were reasonable and necessary to prosecute this litigation, and were advanced without assurance they would be recouped. *Id.* "The fact that Class Counsel was willing to expend their own money, where reimbursement was entirely contingent on the success of this litigation, is perhaps the best indicator that the expenditures were reasonable and necessary." *Fleisher*, 2015 WL 10847814, at *23.[5]

[5] Class Counsel reserves the right to seek reimbursement of any post-application fees, costs, and expenses incurred as part of the ongoing implementation of the Settlement. *See, e.g*, *PDC*, Case No. CV 11-1891 AG (ANx) Dkt. 315 (March 14, 2016 Order) (granting reimbursement of fees and expenses incurred by class counsel after initial application filed and ruled upon) (attached as Ex. 7 to Sklaver Decl.)

D. An Award To Compensate To the Named Plaintiff Is Appropriate.

Class Counsel seeks an incentive award of $25,000 to each of Flo & Eddie's principals, Howard Kaylan and Mark Volman, to compensate them for their efforts supporting this litigation since the inception of this case in 2013, and for undertaking the risks that their efforts would not produce a successful result and they would face professional backlash in the music industry for commencing suit. "Incentive awards are fairly typical in class action cases. Such awards are discretionary and are intended to compensate class representatives for work done on behalf of the class." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). This is not a case where the named plaintiff had little or no involvement. The discovery obligations imposed on Messrs. Kaylan and Volman included traveling to, preparing for, and appearing for deposition (in Mr. Volman's case, two depositions), responding to interrogatories and requests for admission, producing documents, and traveling to Los Angeles to prepare for trial. Messrs. Kaylan and Volman remained fully involved and expended considerable time and energy throughout the course of the litigation, including assisting Class Counsel with the prosecution of Class claims and communicating with other Class members. Absent the incentive award, Messrs. Kaylan and Volman will recover no more than other Class members based on their pro-rata sound recordings, despite undergoing personal sacrifices in bringing this suit on behalf of the Class. Sklaver Decl. ¶ 24.

A total incentive award of $50,000 amounts to .2% of the $25.5 million guaranteed cash settlement. Courts have approved similar and higher incentive awards in numerous cases. *See, e.g.*, *Friedman v. Guthy-Renker, LLC*, Case No. CV 14-6009-ODW (AGRx), 2016 WL 6407362, at *8 (C.D. Cal. Oct. 28, 2016) (approving $57,500 incentive awards to four named plaintiffs, constituting 0.22% of the total award); *Van Vranken*, 901 F. Supp. at 299-300 (awarding $50,000 to a lead plaintiff); *In re High-Tech Employee Antitrust Litig.*, Case No. CV 11-02509-LHK, 2015 WL 5158730, at *17 (N.D. Cal. Sept. 2, 2015) (awarding class

representatives between $80,000 and $120,000).

IV. CONCLUSION

For each of the foregoing reasons, Class Counsel respectfully submits the Court should approve the fee application and award Class Counsel attorneys' fees in the amount of 30% of the total settlement amount recovered for the Class, including all past and future royalties paid to the Class, as, if and when paid by Sirius XM, $1,533,549.99 in litigation costs and expenses, and service awards in the amounts proposed.

DATED: December 30, 2016

GRADSTEIN & MARZANO, P.C.
Henry Gradstein
Maryann R. Marzano
Daniel B. Lifschitz

SUSMAN GODFREY L.L.P.
Stephen E. Morrissey
Steven G. Sklaver
Kalpana Srinivasan

SUSMAN GODFREY L.L.P.
Rachel S. Black, *Admitted PHV*
1201 Third Avenue, Suite 3800
Seattle, WA 98101
Telephone: (206) 516-3880
Fax: (206) 516-3883
rblack@susmangodfrey.com

SUSMAN GODFREY L.L.P.
Michael Gervais, *Admitted PHV*
1301 Avenue of the Americas, 32nd Fl.
New York, NY 10019
Telephone: (212) 729-2015
Fax (212) 336-8340
mgervais@susmangodfrey.com

By: */s/Steven G. Sklaver*
Steven G. Sklaver
Co-Lead Class Counsel

Responses, Replies and Other Motion Related Documents

2:13-cv-05693-PSG-GJS Flo & Eddie Inc v. Sirius XM Radio Inc et al

(GJSx),DISCOVERY,MANADR,PROTORD,STAYED

UNITED STATES DISTRICT COURT for the CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing

The following transaction was entered by Sklaver, Steven on 12/30/2016 at 10:56 PM PST and filed on 12/30/2016

Case Name: Flo & Eddie Inc v. Sirius XM Radio Inc et al
Case Number: 2:13-cv-05693-PSG-GJS
Filer: Flo & Eddie Inc
Document Number: 670

Docket Text:
MEMORANDUM in Support of NOTICE OF MOTION AND MOTION for Attorney Fees [669] filed by Plaintiff Flo & Eddie Inc. (Sklaver, Steven)

2:13-cv-05693-PSG-GJS Notice has been electronically mailed to:

Brandon C Butler bbutler@wcl.american.edu

Bruce S Meyer bruce.meyer@weil.com

Cassandra L Seto cseto@omm.com, sbrown@omm.com, shwilliams@omm.com, swatson@omm.com

Christopher J Cox chris.cox@weil.com, benjamin.marks@weil.com, bruce.rich@weil.com, john.gerba@weil.com, Todd.Larson@weil.com, tricia-dresel-2470@ecf.pacerpro.com

Daniel A Kohler dxk@msk.com, daniel-kohler-2119@ecf.pacerpro.com, sgd@msk.com, sunni-donmoyer-6213@ecf.pacerpro.com

Daniel M Petrocelli dpetrocelli@omm.com, cseto@omm.com, lrakow@omm.com, mpocha@omm.com, pmcnally@omm.com

David Marroso dmarroso@omm.com, megansmith@omm.com

Drew E Breuder dbreuder@omm.com

Evan Seth Cohen esc@manifesto.com

Henry D Gradstein hgradstein@gradstein.com, dlifschitz@gradstein.com, ssummers@gradstein.com

John R Gerba john.gerba@weil.com

Jon A Pfeiffer pfeiffer@pfeifferlaw.com, lo@ptfzlaw.com

Kalpana Srinivasan ksrinivasan@susmangodfrey.com, ecf-131869ec243e@ecf.pacerpro.com, ecf-28e56f2d9a69@ecf.pacerpro.com, lquenzel@susmangodfrey.com, mwilliams@susmangodfrey.com

M Randall Oppenheimer roppenheimer@omm.com

Marc Ellis Mayer mem@msk.com, marc-mayer-5880@ecf.pacerpro.com, sgd@msk.com, sunni-donmoyer-6213@ecf.pacerpro.com

Maryann R Marzano mmarzano@gradstein.com, hgeller@gradstein.com

Michael Gervais mgervais@susmangodfrey.com

Peter I Ostroff postroff@sidley.com, laefilingnotice@sidley.com, peter-ostroff-2188@ecf.pacerpro.com, sgeanopulos@sidley.com

R Bruce Rich bruce.rich@weil.com

Rachel S Black rblack@susmangodfrey.com, ecf-009165bc539e@ecf.pacerpro.com, jgrounds@susmangodfrey.com

Rollin A Ransom rransom@sidley.com, laefilingnotice@sidley.com, rallemand@sidley.com, rollin-ransom-2336@ecf.pacerpro.com

Russell J Frackman rjf@msk.com, jlo@msk.com

Sean A Commons scommons@sidley.com, dkelly@sidley.com, laefilingnotice@sidley.com, sean-commons-1061@ecf.pacerpro.com

Stephen E Morrissey smorrissey@susmangodfrey.com, ecf-6aa2c17d572f@ecf.pacerpro.com, ecf-c6f8f2700dc0@ecf.pacerpro.com, hdaniels@susmangodfrey.com, nkustok@susmangodfrey.com

Steven G Sklaver ssklaver@susmangodfrey.com, eball@susmangodfrey.com, ecf-9f8dc9551d55@ecf.pacerpro.com, ecf-d2dbeeed8fe0@ecf.pacerpro.com

Todd Larson todd.larson@weil.com, MCO.ECF@weil.com

Vision L Winter vwinter@omm.com

2:13-cv-05693-PSG-GJS Notice has been delivered by First Class U. S. Mail or by other means BY THE FILER to :

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:C:\Users\hdaniels\Desktop\Flo&Eddie\3. Memorandum of P&A ISO Mot Attorney Fees.pdf

Electronic document Stamp:
[STAMP cacdStamp_ID=1020290914 [Date=12/30/2016] [FileNumber=22769962-0] [9f9b01f139e3626610dca69cceccd64fdf9bed52166e846d3e6a65c8bc0160a622279095ea087590d00826a2b8f2596346f38f27ce3f9cd7872a9072fca2442a]]

GRADSTEIN & MARZANO, P.C.
HENRY GRADSTEIN (89747)
hgradstein@gradstein.com
MARYANN R. MARZANO (96867)
mmarzano@gradstein.com
DANIEL B. LIFSCHITZ (285068)
dlifschitz@gradstein.com
6310 San Vicente Blvd., Suite 510
Los Angeles, California 90048
Tel: 323-776-3100

SUSMAN GODFREY L.L.P.
STEPHEN E. MORRISSEY (187865)
smorrissey@susmangodfrey.com
STEVEN G. SKLAVER (237612)
ssklaver@susmangodfrey.com
KALPANA SRINIVASAN (237460)
ksrinivasan@susmangodfrey.com
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067-6029
Tel: 310-789-3100
Fax: 310-789-3150

Co-Lead Class Counsel

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

FLO & EDDIE, INC., a California corporation, individually and on behalf of all others similarly situated,

Plaintiff,

v.

SIRIUS XM RADIO, INC., a Delaware corporation; and DOES 1 through 10,

Defendants.

Case No. 2:13-cv-05693-PSG-GJS

DECLARATION OF HENRY GRADSTEIN IN SUPPORT OF MOTION BY PLAINTIFF FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

Date: March 13, 2017
Time: 1:30 p.m.
Place: Courtroom 6A

Hon. Philip S. Gutierrez

I, Henry Gradstein, hereby declare and state as follows:

1. I am an attorney duly licensed to practice law in the State of California and admitted to practice before the United States District Court for the Central District of California since 1979. I am a partner in the law firm of Gradstein & Marzano, P.C. ("G&M"), which has been appointed as Co-Lead Class Counsel in the above-entitled action. I have personal knowledge of the facts set forth herein, and if called upon to testify as a witness, I could and would do so competently. I make this declaration in support of Plaintiff Flo & Eddie Inc.'s ("Flo & Eddie" or "Plaintiff") Motion for a fee award.

2. At the risk of understatement, this has been long and arduous litigation. I began researching a class action in California on behalf of the owners of sound recordings fixed prior to February 15, 1972 ("pre-1972 recordings") against Sirius XM nearly four years ago, in mid-February of 2013. I spoke with numerous owners of pre-1972 sound recordings from mid-March of 2013 through July of 2013 concerning their joining as named class plaintiffs in a California action before ultimately determining Flo & Eddie, Inc. to be the lead plaintiff and class representative for the proceedings. The legal theories were untested, but we believed, then as now, that the owners of pre-1972 recordings were protected under state law and entitled to payment for the public performance of their works. We believed that the sale of a record for private enjoyment should not transfer the right to publicly perform the artistic performance embodied on it any more than the sale of a DVD transfers the right to publicly perform the movie embodied on a DVD.

3. G&M, a boutique practice utilizing its own financial resources, took on this cause on a contingency fee basis at great financial risk and against the decades' long practice of free public performance of sound recordings. Our cases were unprecedented, and G&M was the first law firm to file litigation concerning the unauthorized and uncompensated public performance of pre-1972 recordings by commercial broadcasters in any state.

4. What began as an inquiry into whether state law might protect these early recordings in an era of vanishing record sales in favor of public performance became one of the most contentious cases in the music industry, involving numerous trade organizations, records labels, artists, music industry journals, law review journals and over a dozen federal district, circuit court and state court judges in California, New York and Florida in addition to this Court. Our work resulted in literally hundreds of millions of dollars changing hands to the benefit of former class members.

5. However, while a cottage industry of litigation in multiple state and federal courts has been generated by G&M's work, and leading seminal decisions have resulted in hundreds of copyright lectures and articles examining the intersection between state and federal copyright law and the public performance right in particular, G&M, Susman Godfrey L.L.P. and other law firms working with them have to date remained entirely uncompensated. G&M alone has expended over 10,000 hours as summarized below, and hundreds of thousands of dollars in costs. For years, G&M poured earnings generated from other matters into the Flo & Eddie cases, and declined or referred to other attorneys cases which the firm otherwise would have handled. At great expense, G&M litigated against large firms with virtually unlimited resources (Weil, Gotshal & Manges LLP and O'Melveny & Myers LLP) until joining with co-class counsel Susman Godfrey in the best interests of the Class. As a result of the demands placed upon G&M's attorneys and support staff by Sirius XM's aggressive litigation tactics throughout these proceedings, this litigation dominated G&M's practice.

6. The dockets of the cases speak for themselves, but in summary, G&M instituted this class action litigation on behalf of Flo & Eddie and a putative class of owners of pre-1972 recordings on August 1, 2013. The original complaint was filed in California state court, and later removed by Defendant Sirius XM Radio, Inc. ("Sirius XM") to this Court on August 6, 2015. G&M also filed similar putative

class actions on behalf of Flo & Eddie in New York on August 16, 2013 (*Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, Southern District of New York, 13-CV-5784 (CM) and in Florida on September 3, 2013 (*Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, Southern District of Florida, Case No. 13-CV-23182 (DPG)).

7. On September 22, 2014, G&M obtained summary judgment in California on liability as to all causes of action for Sirius XM's public performance of pre-1972 recordings. On May 27, 2015, G&M obtained class certification. Shortly after the Court granted Sirius XM leave to take post-certification discovery, G&M partnered in March 2016 with the law firm of Susman Godfrey, which was approved as co-lead class counsel on May 16, 2016. After extensive post-certification motion and discovery practice, a settlement was reached the day before a class-wide trial on damages was scheduled to begin on November 15, 2016.

8. Prior to having the assistance of co-counsel, G&M propounded or responded to 11 sets of discovery requests in the California action alone (which included 162 requests for production and 42 interrogatories), and subsequently processed and reviewed tens of thousands of documents encompassing millions of pages of data produced by both Sirius XM and third parties pursuant to subpoenas. G&M additionally conducted or defended 15 separate fact and expert witness depositions prior to class certification. After the class was certified and Susman Godfrey became co-lead Class Counsel, Class Counsel conducted or defended an additional 21 depositions throughout the country (19 absent class members and two supplemental depositions of the parties' respective expert witnesses), reviewed tens of thousands of yet additional documents produced by Sirius XM encompassing millions of pages of data, defended against motions brought by Sirius XM for partial summary judgment as to damages and decertification of the class, and litigated 18 separate motions in *limine* in the final weeks before trial was scheduled to commence.

9. Prior to settlement, G&M also won summary judgment as to liability in

New York, with the actual entry of summary judgment deferred (first to allow Flo & Eddie to pursue class certification, then to permit Sirius XM to appeal on an interlocutory basis). The case was accepted by the Second Circuit and questions of state law were certified to the New York Court of Appeals, which did not issue its opinion on the matter until after the parties had settled in California. The New York Court of Appeal has now ruled that there is not a common law copyright of public performance, but has left open the question whether Sirius XM's public performance of the pre-1972 recordings constituted unfair competition.

10. Flo & Eddie lost summary judgment in Florida, but appealed the adverse ruling to the Eleventh Circuit. The Eleventh Circuit questioned the District Court's ruling against Flo & Eddie and certified questions of state law to the Florida Supreme Court. Opening and Answer briefs have now been filed, and the Reply will be filed by Flo & Eddie on January 23, 2017.

11. The following is a basic chronology of the litigation handled by counsel on behalf of the putative class members against Sirius XM in California, New York, and Florida through November 14, 2016, the date of the parties' settlement:

Case	**Date**	**Activity**
CA	8/1/13	Complaint filed
CA	8/6/13	Case removed to federal court
NY	8/16/13	Complaint filed
FL	9/3/13	Complaint filed
CA	10/9/13	Motion to change venue filed
FL	10/9/13	Motion to change venue filed
FL	10/9/13	Motion to stay case filed
CA	10/18/13	Motion to stay case filed
CA	10/21/13	Ex parte to shorten time filed
CA	10/22/13	Opposition on ex parte to shorten time filed
CA	10/23/13	Ex parte to shorten time denied

Case	Date	Activity
FL	10/23/13	Motion to extend venue/stay opposition deadlines filed
FL	10/24/13	Extension of opposition deadlines partially granted
FL	10/28/13	Opposition on motion to change venue filed
FL	10/28/13	Opposition on motion to stay case filed
NY	10/28/13	Motion to dismiss filed
NY	11/4/13	Letter seeking clarification filed
FL	11/4/13	Reply on motion to stay case filed
FL	11/5/13	Reply on motion to change venue filed
NY	1/7/13	Response letter regarding clarification filed
CA	11/8/13	Opposition on motion to change venue filed
NY	11/12/13	Opposition on motion to dismiss filed
NY	11/13/13	Amended complaint filed
FL	11/14/13	Motion to dismiss filed
FL	11/14/13	Joint scheduling and discovery report filed
CA	11/15/13	Reply on motion to change venue filed
FL	11/15/13	RFPs served by SXM
CA	11/18/13	Answer filed
NY	11/22/13	RFPs served by SXM
CA	11/25/13	Opposition on motion to stay case filed
CA	11/25/13	RFPs served by SXM
CA	12/2/13	Reply on motion to stay case filed
CA	12/2/13	Hearing on motion to change venue held
FL	12/3/13	Motion for extension of opposition filing deadline
FL	12/3/13	Motion for extension on selection of mediator
CA	12/3/13	Motion to change venue denied
CA	12/4/13	Motion to stay case denied
FL	12/4/13	Notice of order on transfer request in CA filed

Case	Date	Activity
FL	12/4/13	Order granting extension on selection of mediator
FL	12/5/13	Amended complaint filed
NY	12/6/13	Answer filed
FL	12/6/13	Motion to dismiss denied
FL	12/10/13	Designation of mediator filed
CA	12/23/13	Response to RFPs served by F&E
NY	12/23/13	Response to RFPs served by F&E
FL	12/23/13	Response to RFPs served by F&E
FL	12/23/13	Answer filed
CA	1/9/14	RFPs served by F&E
NY	1/9/14	RFPs served by F&E
FL	1/9/14	RFPs served by F&E
NY	1/10/14	Pretrial conference hearing held
NY	1/10/14	Order granting limited discovery entered
FL	1/10/14	Motion to transfer venue denied
FL	1/13/14	Motion to stay case denied
FL	1/28/14	Motion to reconsider scheduling order filed
FL	2/7/14	Opposition on reconsideration of scheduling order filed
CA	2/10/14	Response to RFPs served by SXM
NY	2/10/14	Response to RFPs served by SXM
FL	2/10/14	Response to RFPs served by SXM
CA	2/11/14	Deposition of Terrance Smith taken
CA	2/12/14	Motion to strike class allegations filed
FL	2/12/14	Reply on reconsideration of scheduling order filed
CA	2/14/14	Motion to extend time for class certification filed
FL	2/20/14	Motion to reconsider scheduling order denied
CA	2/21/14	Response to RFPs served by SXM

Case	Date	Activity
FL	2/21/14	Response to RFPs served by SXM
CA	3/3/14	Joint case management statement filed
CA	3/3/14	Opposition on class certification extension filed
CA	3/3/14	Opposition on striking class allegations filed
CA	3/10/14	Reply on striking class allegations filed
CA	3/10/14	Reply on class certification extension filed
NY	3/10.14	Telephonic conference held
FL	3/12/14	Deposition of David Frear taken
FL	3/12/14	Deposition of Terrence Smith taken
CA	3/18/14	Motion to extend class certification deadline granted
CA	3/24/14	Scheduling conference hearing held
CA	3/25/14	Discovery bifurcated
NY	3/25/14	Deposition of Evan Cohen taken
NY	3/25/14	Motion to dismiss denied
NY	3/26/15	Deposition of Howard Kaylan taken
NY	4/3/14	Initial pretrial conference hearing held
NY	4/4/14	Deposition of Mark Volman taken
NY	4/11/14	Letter regarding briefing schedule filed
FL	4/11/14	RFAs served by SXM
NY	4/15/14	Stipulated protective order entered
FL	4/18/14	Interrogatories served by SXM
CA	4/29/14	RFPs served by F&E
CA	4/29/14	Joint motion for protective order filed
NY	4/30/14	Letter regarding deposition schedule filed
FL	5/1/14	Interrogatories served by F&E
CA	5/5/14	Protective order stricken
NY	5/6/14	Deposition of Jason Pascal taken

Case	Date	Activity
NY	5/12/14	Motion to extend summary judgment deadline filed
FL	5/12/14	Response to RFAs served by SXM
FL	5/13/14	RFAs served by F&E
FL	5/12/14	Motion for protective order filed
NY	5/15/14	Motion to extend summary judgment deadline granted
FL	5/15/14	RFPs served by F&E
FL	5/15/14	Motion to extend pretrial deadlines and trial date filed
FL	5/16/14	Motion to extend pretrial deadlines and trial date denied
CA	5/19/14	Joint stipulation for protective order filed
FL	5/19/14	Response to Interrogatories served by F&E
FL	5/20/14	Interrogatories served by F&E
CA	5/29/14	Response to RFPs served by SXM
NY	5/30/14	Motion for summary judgment filed
FL	6/5/14	Response to Interrogatories served by SXM
CA	6/9/14	Motion for summary judgment filed
CA	6/10/14	RFPs served by F&E
CA	6/13/14	RFPs served by F&E
CA	6/13/14	Interrogatories served by F&E
FL	6/16/14	Response to RFAs served by SXM
CA	6/17/14	Ex parte to extend briefing schedule and page limits filed
FL	6/18/14	Motion to compel discovery responses filed
CA	6/19/14	Opposition on extending briefing schedule and page limits filed
FL	6/19/14	Response to RFPs served by SXM
FL	6/19/14	Motion for status conference filed
CA	6/20/14	Ex parte to extend briefing schedule and page limits denied
FL	6/23/14	Response to Interrogatories served by SXM
FL	6/23/14	Motion to extend expert disclosure deadline filed

Case	Date	Activity
FL	6/24/14	Opposition on extending expert disclosure deadline filed
FL	6/25/14	Motion for protective order granted
FL	6/27/14	Motion to extend expert disclosure deadline withdrawn
CA	6/27/14	Second ex parte to increase page limit on briefing filed
CA	6/30/14	Opposition on second request to increase page limit filed
CA	6/30/14	Second ex parte to increase page limit on briefing denied
FL	7/3/14	Motion for status conference granted
FL	7/7/14	Opposition on motion to compel filed
CA	7/7/14	Opposition on summary judgment filed
CA	7/7/14	Application to file under seal filed
CA	7/8/14	Application to file under seal granted
FL	7/8/14	Order setting status conference
CA	7/10/14	Response to RFPs served by SXM
NY	7/11/14	Opposition on summary judgment filed
CA	7/11/14	Stipulated protective order denied
CA	7/14/14	Reply on summary judgment filed
CA	7/14/14	Evidentiary objections on summary judgment filed
CA	7/14/14	Response to RFPs served by SXM
FL	7/14/14	Response to RFPs served by SXM
CA	7/14/14	Response to Interrogatories served by SXM
FL	7/15/14	Motion for summary judgment filed
FL	7/17/14	Order on motion to compel
FL	7/18/14	Status conference hearing held
CA	7/22/14	Request to strike reply on summary judgment filed
FL	7/25/14	Response to Interrogatories served by F&E
CA	7/30/14	Ex parte to reschedule summary judgment hearing filed
CA	7/31/14	Opposition on rescheduling summary judgment hearing filed

Case	Date	Activity
FL	7/31/14	Proposed revised scheduling order filed
CA	8/4/14	Ex parte to reschedule summary judgment hearing granted
CA	8/11/14	Opposition on summary judgment filed
NY	8/13/14	Reply on summary judgment filed
FL	8/15/14	Opposition on summary judgment filed
CA	8/18/14	Reply on summary judgment filed
CA	9/5/14	Settlement conference held
CA	9/8/14	Joint Rule 26(f) report filed
FL	9/8/14	Reply on summary judgment filed
CA	9/15/14	Oral argument hearing on summary judgment held
CA	9/22/14	Motion for summary judgment granted
NY	9/24/14	Notice of CA summary judgment order filed
FL	9/24/14	Notice of CA summary judgment order filed
CA	10/6/14	Joint case management statement filed
CA	10/15/14	Motion for interlocutory appeal/stay filed
NY	10/15/14	Notice of CA request for interlocutory appeal filed
FL	10/15/14	Notice of CA request for interlocutory appeal filed
NY	10/17/14	Notice of CA state court order on performance right filed
FL	10/17/14	Notice of CA state court order on performance right filed
NY	10/17/14	Response to notice of CA state court order filed
FL	10/17/14	Response to notice of CA state court order filed
CA	10/20/14	Scheduling conference hearing held
CA	10/21/14	Scheduling order issued
CA	10/28/14	Motion for interlocutory appeal supplemented
CA	10/30/14	RFAs served by F&E
CA	10/30/14	RFPs served by F&E
CA	10/30/14	Interrogatories served by F&E

Case	Date	Activity
CA	10/31/14	Status conference hearing held
CA	11/3/14	Opposition on motion to appeal/stay filed
CA	11/4/14	Amicus request filed
CA	11/7/14	Opposition to amicus request filed
CA	11/10/14	Reply on motion to appeal/stay filed
CA	11/10/14	Amicus request denied
NY	11/14/14	Order to show cause (denying summary judgment)
CA	11/17/14	Notice of NY summary judgment denial filed
CA	11/17/14	Motion for reconsideration filed
CA	11/20/14	Motion for interlocutory appeal/stay denied
FL	11/20/14	Motion to file supplemental briefing on liability filed
FL	11/21/14	Motion to file supplemental briefing on liability granted
FL	11/21/14	Supplemental briefing as to liability filed
NY	12/1/14	Motion for reconsideration filed
NY	12/1/14	Letter regarding reconsideration/interlocutory appeal filed
CA	12/1/14	Response to RFAs served by SXM
CA	12/1/14	Response to RFPs served by SXM
CA	12/1/14	Response to Interrogatories served by SXM
NY	12/3/14	Order directing response regarding reconsideration
FL	12/3/14	Opposition on supplemental briefing as to liability filed
NY	12/5/14	Response regarding order to show cause filed
NY	12/10/14	Opposition on motion for reconsideration filed
NY	12/11/14	Letter regarding opposition on order to show cause filed
NY	12/12/14	Motion for reconsideration denied
FL	12/15/14	Notice of NY order on reconsideration filed
FL	12/17/14	Response to notice of NY order on reconsideration filed
FL	12/18/14	Amended scheduling order entered

Case	Date	Activity
FL	12/23/14	Motion to vacate amended scheduling order filed
CA	12/24/14	Response to Interrogatories supplemented by SXM
NY	12/29/14	Opposition on order to show cause filed
FL	12/30/14	Motion to vacate amended scheduling order granted
NY	12/31/14	Letter regarding reply on order to show cause filed
CA	1/5/15	Opposition on motion for reconsideration filed
NY	1/7/15	Reply on order to show cause filed
CA	1/12/15	Reply on motion for reconsideration filed
CA	1/13/15	RFPs served by SXM
CA	1/13/15	Interrogatories served by SXM
FL	1/14/15	Response to order regarding scheduling order filed
FL	1/15/15	Report regarding proposed case schedule filed
FL	1/15/15	Order regarding scheduling entered
NY	1/15/15	Order deferring summary judgment ruling
FL	1/16/15	Motion for leave to respond regarding scheduling order filed
NY	1/26/15	Letter regarding interlocutory appeal filed
NY	1/26/15	Response letter regarding interlocutory appeal filed
FL	2/1/15	Opposition on leave to respond regarding scheduling order filed
CA	2/9/15	Ex parte for protective order quashing subpoenas filed
CA	2/10/15	Opposition to protective order quashing subpoenas filed
NY	2/10/15	Order certifying interlocutory appeal
FL	2/10/15	Notice of NY order certifying appeal filed
CA	2/11/15	Reply on protective order quashing subpoenas filed
CA	2/11/15	Ex parte for protective order quashing subpoenas granted
CA	2/11/15	Deposition of Steve Blatter taken
CA	2/12/15	Response to RFPs served by F&E
CA	2/12/15	Response to Interrogatories served by F&E

Case	Date	Activity
CA	2/13/15	Deposition of Evan Cohen taken
CA	2/18/15	Deposition of David Frear taken
CA	2/19/15	Motion for reconsideration denied
NY	2/20/15	Second Circuit petition to appeal filed
CA	2/27/15	Deposition of Mark Volman taken
CA	2/27/15	Deposition of Scott Greenstein taken
CA	3/9/15	Ex parte to force filing under seal filed
CA	3/10/15	Opposition on forced filing under seal filed
CA	3/11/15	Reply on forced filing under seal filed
CA	3/12/15	Ex parte on forced filing under seal denied
CA	3/16/15	Motion for class certification filed
CA	3/17/15	Application to file under seal filed
CA	3/18/15	Application to file under seal granted
CA	4/14/15	Motion to amend scheduling order filed
NY	4/15/15	Hearing regarding leave to appeal held
CA	4/15/15	Opposition on class certification filed
NY	4/15/15	Leave to appeal granted
CA	4/20/15	Deposition of Mike Wallace taken
FL	4/29/15	Hearing on motion for summary judgment held
CA	4/30/15	Deposition of Elliot Goldman taken
CA	5/6/15	Reply on class certification filed
CA	5/6/15	Evidentiary objections to class certification opposition filed
CA	5/7/15	Ex parte to extend class certification hearing date filed
CA	5/8/15	Opposition to extending class certification hearing date filed
CA	5/8/15	Ex parte to extend class certification hearing date granted
CA	5/8/15	Deposition of Keith Ugone taken
CA	5/18/15	Opposition on amending scheduling order filed

Case	Date	Activity
CA	5/19/15	Response to class certification evidentiary objections filed
CA	5/20/15	Request to submit supplemental authority filed
CA	5/22/15	Request to submit supplemental authority granted
CA	5/22/15	Oral argument hearing on class certification held
CA	5/27/15	Motion for class certification granted
CA	6/2/15	Motion to amend scheduling order denied
CA	6/2/15	Ex parte to stay case pending appeal filed
CA	6/3/15	Partial opposition on stay pending appeal filed
CA	6/5/15	Reply on stay pending appeal filed
CA	6/8/15	Hearing on ex parte to stay case pending appeal held
CA	6/8/15	Ex parte to stay case pending appeal granted
CA	6/10/15	Ninth Circuit petition to appeal class certification filed
CA	6/17/15	Private mediation conducted
CA	6/22/15	Opposition on petition to appeal class certification filed
FL	6/22/15	Motion for summary judgment granted
CA	7/8/15	Ex parte application to lift stay filed
CA	7/10/15	Ex parte application to intervene filed
CA	7/10/15	Opposition to ex parte application to lift stay filed
FL	7/10/15	Eleventh Circuit notice of appeal filed
CA	7/13/15	Reply on ex parte application to lift stay filed
CA	7/20/15	Ex parte application to lift stay denied
NY	7/29/15	Second Circuit opening brief filed
NY	8/5/15	7 amicus briefs filed
CA	8/10/15	Ninth Circuit petition to appeal class certification denied
CA	8/13/15	Motion for extension to submit *en banc* petition filed
NY	8/14/15	Opposition to amicus briefs filed
NY	8/20/15	2 amicus replies filed

Case	Date	Activity
NY	8/21/15	1 amicus reply filed
NY	8/23/15	1 amicus reply filed
CA	8/24/15	Ninth Circuit petition for reconsideration *en banc* filed
CA	9/1/15	Order setting scheduling conference
FL	9/1/15	Eleventh Circuit opening brief filed
FL	9/8/15	Amicus brief filed
CA	9/4/15	Request for clarification on scheduling conference filed
CA	9/8/15	Scheduling conference vacated
FL	9/21/15	Opposition to amicus brief filed
NY	9/28/15	Second Circuit opposition brief filed
NY	9/29/15	Request for extension on reply brief filed
NY	9/30/15	Request for extension on reply brief granted
FL	10/5/15	Eleventh Circuit opposition brief filed
FL	10/13/15	6 amicus briefs filed
FL	10/20/15	Opposition to amicus briefs filed
FL	10/27/15	2 amicus replies filed
NY	10/27/15	Second Circuit reply brief filed
NY	10/27/15	Requests for oral argument filed
CA	11/10/15	Ninth Circuit petition for reconsideration *en banc* denied
CA	11/12/15	Notice of Ninth Circuit *en banc* denial filed
CA	11/16/15	Order setting scheduling conference entered
CA	11/23/15	Joint stipulation to continue conference filed
FL	11/24/15	Eleventh Circuit reply brief filed
CA	11/25/15	Motion to continue stay filed
CA	11/30/15	Joint stipulation to continue conference granted
CA	12/14/15	Joint Rule 26(f) report filed
CA	12/21/15	Scheduling conference hearing held

Case	Date	Activity
CA	1/4/16	Opposition on motion to continue stay filed
CA	1/11/16	Reply on motion to continue stay filed
FL	1/14/16	Notice of supplemental authority filed
FL	1/15/16	Response regarding supplemental authority filed
CA	1/20/16	Motion to continue stay denied
CA	1/25/16	Limited post-certification discovery granted
NY	2/2/16	Second Circuit oral argument hearing held
CA	3/4/16	Response to Interrogatories served by SXM
CA	3/7/16	RFPs served by F&E
CA	3/18/16	Interrogatories served by F&E
CA	3/28/16	Unopposed motion to appoint co-counsel filed
CA	4/6/16	Deposition of David Freeman taken
CA	4/11/16	Response to RFPs served by SXM
NY	4/13/16	Second Circuit order certifying questions of state law entered
CA	4/13/16	Deposition of Leonard Fico taken
FL	4/15/16	Notice of supplemental authority filed
FL	4/15/16	Response regarding supplemental authority filed
CA	4/18/16	Response to Interrogatories served by SXM
CA	4/20/16	Notice of Second Circuit decision filed
CA	4/20/16	Response to notice of Second Circuit decision filed
CA	4/22/16	Discovery conference hearing held
CA	4/27/16	Motion to approve class notice filed
CA	4/27/16	Motion for protective order as to absent class members filed
CA	4/28/16	Deposition of Paul Tarnopol taken
CA	4/29/16	Deposition of Stuart Livingston taken
CA	5/2/16	Opposition on protective order as to absent class members filed
CA	5/4/16	Reply on protective order as to absent class members filed

Case	Date	Activity
CA	5/6/16	Request to file sur-reply regarding protective order filed
CA	5/9/16	Discovery conference hearing held and protective order denied
CA	5/9/16	Deposition of Bob Emmer taken
CA	5/11/16	Deposition of Mark DeLelys taken
CA	5/11/16	Deposition of Christian Horsnell taken
CA	5/11/16	Deposition of Sam Passamano taken
CA	5/12/16	Deposition of John Nemoy taken
CA	5/13/16	Deposition of Vince Micallef taken
CA	5/13/16	Deposition of Timothy Weston taken
CA	5/16/16	Motion to appoint co-counsel granted
CA	5/17/16	Deposition of Robert Koester taken
CA	5/19/16	Deposition of Thomas Couch taken
CA	5/20/16	Response to Interrogatories served by SXM
FL	5/20/16	Eleventh Circuit oral argument hearing held
CA	5/23/16	Deposition of Richard Nevins taken
CA	5/25/16	Deposition of Thomas Gramuglia taken
CA	5/25/16	Deposition of John McWeeney taken
CA	5/27/16	Deposition of Lars Edegran taken
CA	5/27/16	Opposition on approval of class notice filed
CA	5/30/16	Deposition of Joe Stone taken
CA	6/3/16	Deposition of Bob Irwin taken
CA	6/6/16	Deposition of Jesse Colin Young taken
CA	6/6/16	Reply on approval of class notice filed
CA	6/8/16	Response to Interrogatories served by SXM
CA	6/13/16	Discovery conference hearing held
CA	6/16/16	Motion to approve class notice granted
CA	6/20/16	Motion to compel discovery compliance filed

Case	Date	Activity
CA	6/22/16	Ex parte application to stay class notice filed
CA	6/23/16	Ex parte application to stay class notice denied
CA	6/24/16	Petition for writ of mandamus on class notice filed
CA	6/24/16	Emergency motion for stay of class notice filed
CA	6/24/16	Motion to modify scheduling order filed
CA	6/27/16	Discovery conference hearing held
CA	6/27/16	Opposition on motion to compel filed
CA	6/28/16	Opposition on emergency motion for stay filed
CA	6/28/16	Reply on emergency motion for stay filed
CA	6/29/16	Reply on motion to compel filed
FL	6/29/16	Eleventh Circuit order certifying questions of state law entered
CA	6/30/16	Emergency motion for stay of class notice denied
CA	6/30/16	Motion to modify scheduling order denied
CA	7/5/16	Discovery conference hearing held
NY	7/6/16	State supreme court opening brief filed
CA	7/6/16	Motion for partial summary judgment filed
CA	7/14/16	Ex parte application to extend production deadline filed
CA	7/14/16	Opposition on extending production deadline filed
CA	7/18/16	Ex parte application to extend production deadline granted
CA	7/27/16	Motion for fee award filed
CA	7/29/16	Motion for decertification filed
FL	8/2/16	Motion for extension to submit opening brief filed
FL	8/3/16	Motion for extension to submit opening brief granted
CA	8/22/16	Opposition on partial summary judgment filed
CA	8/29/16	Reply on partial summary judgment filed
CA	8/31/16	Unopposed ex parte application to intervene filed
CA	8/31/16	Evidentiary objections on partial summary judgment filed

Case	Date	Activity
CA	9/1/16	Ex parte application to continue trial date filed
CA	9/2/16	Oppositions to (and motion to strike) fee award filed
CA	9/2/16	Opposition on continuing trial date filed
CA	9/2/16	Opposition on motion for decertification filed
CA	9/2/16	Evidentiary objections on fee award filed
CA	9/6/16	Reply on continuing trial date filed
CA	9/6/16	Ex parte application to intervene granted
CA	9/6/16	Ex parte application to continue trial date denied
CA	9/8/16	Motion for partial summary judgment granted in part
CA	9/12/16	Reply on motion for decertification filed
CA	9/12/16	Reply on fee award and evidentiary objections filed
CA	9/19/16	Motion for decertification denied
NY	9/19/16	State supreme court opposition brief filed
FL	9/19/16	State supreme court opening brief filed
CA	9/20/16	Opposition on motion to strike fee award filed
CA	9/21/16	Evidentiary objections on fee award filed
FL	9/22/16	Motion for extension to submit opposition brief filed
FL	9/23/16	Motion for extension to submit opposition brief granted
FL	9/23/16	Amicus brief filed
CA	9/23/16	Motion for fee award denied
CA	9/29/16	Declaration regarding notice administration filed
CA	9/30/16	18 motions in limine filed
NY	10/6/16	State supreme court reply brief filed
CA	10/7/16	Memorandums of contentions of fact and law filed
CA	10/7/16	Witness list filed
CA	10/7/16	Stipulation to expedite briefing filed
C	10/7/16	Deposition of Mike Wallace taken

Case	Date	Activity
CA	10/8/16	Joint exhibit list filed
CA	10/11/16	Stipulation to expedite briefing granted
CA	10/14/16	9 oppositions on motions in limine filed
NY	10/18/16	State supreme court oral argument hearing held
CA	10/21/16	9 oppositions on motions in limine filed
CA	10/21/16	9 replies on motions in limine filed
CA	10/22/16	Deposition of Keith Ugone taken
CA	10/24/16	Deposition designations lodged
CA	10/24/16	Proposed voir dire questions filed
CA	10/26/15	3 motions in limine granted
CA	10/26/15	1 motion in limine denied
CA	10/27/15	1 motion in limine denied
CA	10/28/16	Proposed jury instructions filed
CA	10/28/16	Proposed jury verdict filed
CA	10/28/16	Proposed special jury verdict filed
CA	10/31/16	3 motions in limine denied
CA	10/31/16	2 replies on motions in limine filed
CA	11/1/16	2 replies on motions in limine filed
CA	11/2/16	1 reply on motion in limine filed
CA	11/3/16	2 replies on motions in limine filed
CA	11/3/16	Stipulation on trial equipment filed
CA	11/3/16	Stipulation on disclosure of illustratives filed
CA	11/4/16	Stipulation on trial equipment denied
CA	11/4/16	2 replies on motions in limine filed
CA	11/4/16	Proposed amended special jury verdict filed
CA	11/3/16	Stipulation on disclosure of illustratives granted
CA	11/7/16	1 motion in limine denied

Case	Date	Activity
CA	11/7/16	Final pretrial conference hearing held
CA	11/8/16	3 motions in limine granted
CA	11/8/16	Trial briefs filed
CA	11/8/16	Joint submission on statement of case filed
CA	11/9/16	3 motions in limine granted
CA	11/9/16	1 motion in limine denied
CA	11/9/16	Witness list filed
CA	11/9/16	Amended proposed jury instructions filed
CA	11/9/16	Revised joint exhibit list filed
CA	11/10/16	Second final pretrial conference hearing held
CA	11/10/16	Revised stipulation on trial equipment filed
CA	11/14/16	Notice of settlement filed

12. I have asked staff at my firm to prepare a summary of the time and expenses invested through November 30, 2016 in this matter by G&M, including co-counsel working under our direction. This includes work performed by the law firm of Heller Waldman, P.L., who served as local counsel to G&M in Florida and assisted G&M in both substantive and administrative capacities, and Evan S. Cohen, who is Flo & Eddie's litigation and business attorney and assisted G&M in formulating the case and collecting and producing relevant documents during discovery. The billing records in this case were generated from G&M's timekeeping system and are maintained in the ordinary course of business. Time is recorded in 1/10 of an hour increments.

13. I have reviewed G&M's time records and the charts below reflect the time on each of the three matters incurred by G&M for the time period February 1, 2013 through November 30, 2016. The lodestar value of G&M attorney time through November 30, 2016 is $4,487,107.50 for the California action, $808,405.00 for the New York action and $814,905.00 for the Florida action, for a total lodestar

value of G&M time for all actions of $6,110,417.50. In addition, the lodestar values of the attorney time by Heller Waldman, P.L. and Evan Cohen are $115,336 and $48,532, respectively.

14. G&M's rates listed below are the same rates paid by various hourly clients we represent in the entertainment and other industries and thus are market tested.

15. Should the Court request further supporting documentation for these amounts, the firm is prepared to provide it.

California Action

Attorney	Total Hours Billed	Total Fees Billed
Henry Gradstein (Partner)	1609.85	$1,126,895.00
Maryann Marzano (Partner)	1654.70	$1,158,290.00
Harvey Geller (Of Counsel)	1841.80	$1,289,260.00
Robert Allen (Of Counsel)	438.55	$263,130.00
Matthew Slater (Associate)	71.80	$32,310.00
Daniel Lifschitz (Associate)	1732.60	$606.410.00

Alexander Monsef (Law Clerk)	86.50	$10,812.50
Total	7,435.80	$4,487,107.50

New York Action

Attorney	**Total Hours Billed**	**Total Fees Billed**
Henry Gradstein (Partner)	96.30	$67,410.00
Maryann Marzano (Partner)	227.10	$158,970.00
Harvey Geller (Of Counsel)	623.10	$436,170.00
Robert Allen (Of Counsel)	104.75	$62,850.00
Matthew Slater (Associate)	24.00	$10,800.00
Daniel Lifschitz (Associate)	206.30	$72,205.00

Total	1,281.55	$808,405.00

Florida Action

Attorney	**Total Hours Billed**	**Total Fees Billed**
Henry Gradstein (Partner)	158.80	$111,160.00
Maryann Marzano (Partner)	193.20	$135,240.00
Harvey Geller (Of Counsel)	529.30	$370,510.00
Robert Allen (Of Counsel)	119.00	$71,400.00
Matthew Slater (Associate)	127.40	$57,330.00
Daniel Lifschitz (Associate)	197.90	$69,265.00

Total	1,325.60	$814,905.00

Total all Matters by G&M Attorney Rate and Hours

Name	**Hourly Rate**	**Cumulative Lodestar**	**Cumulative Hours**
Henry Gradstein (Partner)	$700.00	$1,305,465.00	1,864.95
Maryann Marzano (Partner)	$700.00	$1,452,500.00	2075.00
Harvey Geller (Of Counsel)	$700.00	$2,095,940.00	2994.20
Robert Allen (Of Counsel)	$600.00	$397,380.00	662.30
Matthew Slater (Associate)	$450.00	$100,440.00	223.20
Daniel Lifschitz (Associate)	$350.00	$747,880.00	2136.80
Alexander Monsef (Law Clerk)	$125.00	$10,812.50	86.50

Total		$6,110,417.50	10,042.95

Heller Waldman P.L. (Florida action - Local Counsel)

Name	Hourly Rate	Cumulative Lodestar	Cumulative Hours
Glen Waldman (Partner)	$600.00	$38,280.00	63.8
Eleanor Barnett (Partner)	$600.00	$17,400.00	29
Jason Gordon (Partner)	$600.00	$57,120.00	95.2
Michael Sayre (Associate)	$450.00	$945.00	2.1
Mae Van Gils (Paralegal)	$215.00	$494.50	2.3
Vanessa Padreyes (Paralegal)	$215.00	$1096.50	5.1
Total		$115,336.00	197.5

Evan Cohen (Co-Counsel)

Hourly Rate	Cumulative Lodestar	Cumulative Hours

$450.00	$48,532.50	107.85
Total	$48,532.50	107.85

16. The total out-of-pocket expenses advanced or reimbursed by G&M through November 30, 2016 is $225,154.19. Each of these out-of-pocket costs was necessarily incurred and is ordinarily billed to clients and is therefore recoverable. These reasonable costs were incurred by G&M on behalf of the class for filing fees and other court fees, service of process, messenger and other delivery fees, court reporter fees, videographer expenses, expert witnesses and consultants, travel expenses, including air travel, taxis, meals and hotel accommodations, photocopying and other reproduction costs, trial electronics, computer research, parking, and other costs commonly incurred in prosecuting prospective class actions incurred by the attorneys as an indispensable aspect of their successful work on this case. Moreover, because G&M handled this litigation on a contingency fee basis, advancing many hours and costs without certainty of reimbursement, G&M had every incentive to, and did, minimize the fees and costs expended in this case whenever possible.

17. In computing the amount of the fees incurred, I have applied billing judgment to the fees and costs in this matter. G&M has sought only attorneys' fees for those legal services which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer to advance or protect Plaintiffs' interests in the pursuit of its successful outcome. It is my view that, because of G&M's extensive experience in intellectual property and business cases, we are able to handle cases more efficiently and cost effectively than less experienced firms.

18. I have been a litigator for approximately 37 years, litigating and trying a wide variety of entertainment, intellectual property and complex business cases, including a top-ten jury verdict against PBS in California and numerous other multi-

million dollar verdicts and settlements. I believe that I enjoy a good reputation among judges and have exhibited the ability to win or negotiate favorable settlements in many large and high profile cases. I have been named by The Hollywood Reporter as one of its Top 100 Power Lawyers, by Billboard Magazine as one of Music's Most Powerful Attorneys and by The Daily Journal as one of California's Top Entertainment Lawyers and a Leading Intellectual Property Attorney. Other attorneys from G&M who worked on these cases are :

a. My partner, Maryann Marzano, has over 36 years of litigation experience, including complex federal litigation matters and class action lawsuits, representing both plaintiffs and defendants. Ms. Marzano was formerly a partner of Blecher & Collins, P.C. (now Blecher, Collins & Pepperman) where she successfully represented both plaintiffs and defendants in class action matters, and has obtained monetary recoveries for clients stretching into the nine-digits. Her litigation experience includes securities, antitrust and unfair competition matters, copyright and trademark infringement matters, entertainment industry disputes and breach of contract claims, and numerous complex business litigation matters on a global basis.

b. Harvey Geller has over three decades of experience handling complex business litigation matters, with extensive experience in intellectual property, technology, internet, digital media, and entertainment matters. Mr. Geller has also been recognized by The Hollywood Reporter as one of its Top 100 Power Lawyers, by Billboard Magazine as one of Music’s Most Powerful Attorneys and by The Daily Journal as one of California's Top Entertainment Lawyers and a Leading Intellectual Property Attorney.

c. Robert Allen has over two decades of experience as an intellectual property attorney, with experience in both litigation and transactions involving copyright, entertainment, and new media. Prior to his work with G&M, Mr. Allen held senior positions in the business and legal affairs departments of Universal Music Publishing Group and PolyGram Music Publishing Group. Mr. Allen is currently a principal in the Los Angeles office of McKool Smith.

d. Matthew Slater is a senior associate at G&M with significant experience in civil litigation and intellectual property law. Prior to joining G&M, Mr. Slater was general counsel for the wireless telecommunications company Ring Plus, Inc., and an associate at the civil litigation firm Lee & Kaufman, LLP.

e. Daniel Lifschitz is an associate attorney at G&M who specializes in copyright law and intellectual property litigation. Prior to joining G&M, Mr. Lifschitz worked at the boutique entertainment and business litigation firm of Lowe & Associates, where he focused on pre-trial and appellate motion practice, including numerous cases before the California Court of Appeals, the Ninth Circuit Court of Appeals, and the United States Supreme Court.

19. I am familiar with the G&M personnel who worked on this matter. Based upon my decades of knowledge and experience, their billing rates as listed in the chart above are commensurate with their years of experience and skill, and my firm is paid these (and higher) rates by clients on a regular basis. These rates are also within the range of fees charged by similar law firms in Los Angeles for litigating complex and class action matters and for trying those cases in the district court.

20. Class Counsel seeks a 30% fee award of the recovery for the Class in this case – including both past and future royalties. Such an award is reasonable and

is less than the contingent agreements G&M typically negotiates with its clients. G&M's standard contingent fee is 33.3% before the date set for trial and 40% within 60 days of the date set for trial, with the client advancing expenses. This market-tested amount supports the fee award sought here.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 30th day of December, 2016, at Los Angeles, California.

/s/ Henry Gradstein
Henry Gradstein

Responses, Replies and Other Motion Related Documents

2:13-cv-05693-PSG-GJS Flo & Eddie Inc v. Sirius XM Radio Inc et al

(GJSx),DISCOVERY,MANADR,PROTORD,STAYED

UNITED STATES DISTRICT COURT for the CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing

The following transaction was entered by Sklaver, Steven on 12/30/2016 at 10:59 PM PST and filed on 12/30/2016

Case Name: Flo & Eddie Inc v. Sirius XM Radio Inc et al
Case Number: 2:13-cv-05693-PSG-GJS
Filer: Flo & Eddie Inc
Document Number: 671

Docket Text:
DECLARATION of HENRY GRADSTEIN IN SUPPORT OF NOTICE OF MOTION AND MOTION for Attorney Fees [669] filed by Plaintiff Flo & Eddie Inc. (Sklaver, Steven)

2:13-cv-05693-PSG-GJS Notice has been electronically mailed to:

Brandon C Butler bbutler@wcl.american.edu

Bruce S Meyer bruce.meyer@weil.com

Cassandra L Seto cseto@omm.com, sbrown@omm.com, shwilliams@omm.com, swatson@omm.com

Christopher J Cox chris.cox@weil.com, benjamin.marks@weil.com, bruce.rich@weil.com, john.gerba@weil.com, Todd.Larson@weil.com, tricia-dresel-2470@ecf.pacerpro.com

Daniel A Kohler dxk@msk.com, daniel-kohler-2119@ecf.pacerpro.com, sgd@msk.com, sunni-donmoyer-6213@ecf.pacerpro.com

Daniel M Petrocelli dpetrocelli@omm.com, cseto@omm.com, lrakow@omm.com, mpocha@omm.com, pmcnally@omm.com

David Marroso dmarroso@omm.com, megansmith@omm.com

Drew E Breuder dbreuder@omm.com

Evan Seth Cohen esc@manifesto.com

Henry D Gradstein hgradstein@gradstein.com, dlifschitz@gradstein.com, ssummers@gradstein.com

John R Gerba john.gerba@weil.com

Jon A Pfeiffer pfeiffer@pfeifferlaw.com, lo@ptfzlaw.com

Kalpana Srinivasan ksrinivasan@susmangodfrey.com, ecf-131869ec243e@ecf.pacerpro.com, ecf-28e56f2d9a69@ecf.pacerpro.com, lquenzel@susmangodfrey.com, mwilliams@susmangodfrey.com

M Randall Oppenheimer roppenheimer@omm.com

Marc Ellis Mayer mem@msk.com, marc-mayer-5880@ecf.pacerpro.com, sgd@msk.com, sunni-donmoyer-6213@ecf.pacerpro.com

Maryann R Marzano mmarzano@gradstein.com, hgeller@gradstein.com

Michael Gervais mgervais@susmangodfrey.com

Peter I Ostroff postroff@sidley.com, laefilingnotice@sidley.com, peter-ostroff-2188@ecf.pacerpro.com, sgeanopulos@sidley.com

R Bruce Rich bruce.rich@weil.com

Rachel S Black rblack@susmangodfrey.com, ecf-009165bc539e@ecf.pacerpro.com, jgrounds@susmangodfrey.com

Rollin A Ransom rransom@sidley.com, laefilingnotice@sidley.com, rallemand@sidley.com, rollin-ransom-2336@ecf.pacerpro.com

Russell J Frackman rjf@msk.com, jlo@msk.com

Sean A Commons scommons@sidley.com, dkelly@sidley.com, laefilingnotice@sidley.com, sean-commons-1061@ecf.pacerpro.com

Stephen E Morrissey smorrissey@susmangodfrey.com, ecf-6aa2c17d572f@ecf.pacerpro.com, ecf-c6f8f2700dc0@ecf.pacerpro.com, hdaniels@susmangodfrey.com, nkustok@susmangodfrey.com

Steven G Sklaver ssklaver@susmangodfrey.com, eball@susmangodfrey.com, ecf-9f8dc9551d55@ecf.pacerpro.com, ecf-d2dbeeed8fe0@ecf.pacerpro.com

Todd Larson todd.larson@weil.com, MCO.ECF@weil.com

Vision L Winter vwinter@omm.com

2:13-cv-05693-PSG-GJS Notice has been delivered by First Class U. S. Mail or by other means BY THE FILER to :

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:C:\Users\hdaniels\Desktop\Flo&Eddie\4. Declaration of Henry Gradstein ISO Mot for Attny Fees.pdf

Electronic document Stamp:
[STAMP cacdStamp_ID=1020290914 [Date=12/30/2016] [FileNumber=22769965-0] [1227c6960067f2c73561600f027627eb357eb3335e63aa03e0689f6eeebdfcf2bb145f5f4d3daa313385a513a40dbe489fdfdc4cf902983ae1a762babb7fbe95]]

GRADSTEIN & MARZANO, P.C.
HENRY GRADSTEIN (89747)
hgradstein@gradstein.com
MARYANN R. MARZANO (96867)
mmarzano@gradstein.com
DANIEL B. LIFSCHITZ (285068)
dlifschitz@gradstein.com
6310 San Vicente Blvd., Suite 510
Los Angeles, California 90048
T: 323-776-3100

SUSMAN GODFREY L.L.P.
STEPHEN E. MORRISSEY (187865)
smorrissey@susmangodfrey.com
STEVEN G. SKLAVER (237612)
ssklaver@susmangodfrey.com
KALPANA SRINIVASAN (237460)
ksrinivasan@susmangodfrey.com
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067-6029
T: 310-789-3100 F: 310-789-3150

Co-Lead Class Counsel

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

FLO & EDDIE, INC., a California corporation, individually and on behalf of all others similarly situated,

Plaintiff,

v.

Sirius XM RADIO, INC., a Delaware corporation; and DOES 1 through 10,

Defendants.

Case No. 2:13-cv-05693-PSG-GJS

DECLARATION OF STEVEN G. SKLAVER IN SUPPORT OF MOTION BY PLAINTIFF FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

Date: March 13, 2017
Time: 1:30 p.m.
Place: Courtroom 6A

I, Steven G. Sklaver, hereby declare as follows:

1. I am a partner at Susman Godfrey L.L.P. ("Susman Godfrey"), counsel of record for the Plaintiff Flo & Eddie, Inc. and the certified class (collectively, "Plaintiffs") in the above-entitled action. I have personal knowledge of the facts set forth in this declaration and, if called to testify thereto, could and would do so competently.

2. I respectfully submit this declaration in support of Plaintiff's motion for an award of attorneys' fees and costs. Susman Godfrey has significant experience with litigation and class actions, including settlements thereof. A copy of the firm's class action profile and my profile are available at www.susmangodfrey.com. The lawyers working on this case for the Class are experienced lawyers who have substantial experience prosecuting large-scale class actions and complex litigation.

3. On March 28, 2016, Flo & Eddie sought the appointment of Susman Godfrey as co-lead class counsel to assist with the completion of discovery, pretrial preparation, and trial. *See* Dkt. 278. Susman Godfrey has extensive experience litigating class action matters, including trying class action cases to a jury, and has litigated and handled at trial many intellectual property matters. By its Order dated May 16, 2016, Dkt. 308, the Court appointed Susman Godfrey as co-lead class counsel in this case pursuant to Federal Rule of Civil Procedure 23(g). Since that time, Susman Godfrey has acted as co-lead class counsel. I, along with other Susman Godfrey attorneys and co-lead class counsel Gradstein & Marzano, P.C. (G&M), have personally supervised and directed every aspect of the prosecution and resolution of this litigation on behalf of Plaintiff and the Class.

4. I have personal knowledge of the matters set forth in this declaration based on my day-to-day participation in the prosecution and settlement of this litigation, and, if called as a witness, could and would testify competently thereto.

5. In this landmark intellectual property matter, my firm was brought in to join as co-lead class counsel to help shepherd the case—which spanned over three

years—to trial. At the time Susman Godfrey joined this action, G&M already had obtained a liability ruling in favor of Plaintiff and certified a Class. However, after the case had been stayed pending a Ninth Circuit appeal, significant work and cost investment remained to prepare this case for trial including: completing discovery, securing approval of the form and manner of class notice and disseminating notice, analyzing and developing classwide damages, and preparing this case for trial.

6. Among other activities that transpired since Susman Godfrey's involvement began in early March 2016, Sirius XM engaged in a sweeping campaign of absent class member discovery. Class Counsel contacted the absent class members, prepared objections to the subpoenas, and met and conferred with Sirius XM's counsel multiple times concerning the scope of absent class member document discovery and the scope of deposition testimony. Due to disputes concerning the validity and scope of the subpoenas, the parties participated in a telephonic conference with the Court on April 22, 2016, after which time the Court directed the parties to submit written briefs. Dkts. 295; 298, 299. The Court held a discovery motion conference on May 9, 2016, and held that "only very narrowly tailored document discovery of absent class members is permitted." Dkt. 305 at 1. Class Counsel also handled further discovery disputes relating to discovery of absent class members. *See, e.g.*, Dkts. 319, 321, 328, 329, 332.

7. Class Counsel consulted and met with the subpoenaed absent class members, prepared them to testify if the absent class member agreed to allow Class Counsel to represent them during the deposition, attended their depositions (defending the deposition if representation was accepted), and conferred with them post-deposition concerning corrections or any follow-up issues or production. In total, Class Counsel attended the depositions of 19 subpoenaed absent class members in 11 different states and oversaw the production of thousands of pages of absent class member documents.

8. Class Counsel also orchestrated and implemented a Class Notice Plan to inform the class of essential details concerning class certification and opt-out requirements. On April 27, 2016, after meeting and conferring with Defendant concerning the form and manner of a proposed Class Notice Plan, Plaintiffs filed a Motion for an Order Approving the Form and Manner of Class Notice. *See* Dkt. 294. After Sirius XM filed an opposition, Dkt. 311, Plaintiffs met and conferred with Sirius XM again, and proposed a revised notice, Dkt. 313, which the Court approved. Dkt. 317. On June 24, 2016, Sirius XM filed a petition for writ of mandamus and an emergency motion to stay with the Ninth Circuit, which Plaintiffs opposed on June 28, 2016. The Ninth Circuit denied the petition on June 30, 2016, and denied the emergency motion to stay as moot. Meanwhile, the notice campaign began on June 1, 2016, and working together with the claims administrator, Class Counsel implemented a three-part notice plan consisting of a long form class notice disseminated through direct mailing; a short form class notice published in multiple editions of three separate periodicals; and a press release and development of a website setting forth essential details concerning class certification and opt-out requirements. Class Counsel responded to multiple inquiries from class members and oversaw responses to deficient opt-out requests.

9. During the months leading up to trial, Class Counsel also successfully opposed Sirius XM's motion for summary judgment, in part. On July 6, 2016, Sirius XM filed a motion for partial summary judgment, seeking judgment against Plaintiff's claims for punitive damages, disgorgement, and common law unfair competition. Dkt. 335. Plaintiff filed an opposition on August 22, 2016, Dkt. 362, and Sirius XM filed a reply on August 29, 2016. On September 8, 2016, the Court granted Sirius XM's motion in part, granting Sirius XM judgment as a matter of law on Plaintiffs' punitive damages and common law unfair competition claim. Dkt. 411.

10. Class Counsel also successfully defeated Sirius XM's motion to decertify the Class and to continue the trial date. On July 29, 2016, Sirius XM filed a Motion for Decertification, Dkt. 345. Plaintiff filed an opposition on September 2, 2016, Dkt. 396, and Sirius XM filed a reply on September 12, 2016. Dkt. 424. The Court denied Sirius XM's motion on September 20, 2016. Dkt. 432. Sirius XM filed an *ex parte* application to continue the trial date on September 1, 2016. Dkt. 379. Plaintiff filed an opposition on September 2, 2016, Dkt. 383, and Sirius XM filed a reply on September 6, 2016, Dkt. 405. The Court denied Sirius XM's motion that same day. Dkt. 408.

11. Amid all of this fact discovery and motion practice, Class Counsel was heavily engaged in expert discovery in connection with the analysis of classwide damages in this case. With the Court's authorization, Class Counsel served targeted interrogatory and document requests on the issue of damages. Class Counsel met and conferred numerous times with counsel for Sirius XM regarding the production of data and the scope of that data. Class Counsel worked extensively with the retained damages expert team to analyze the data, which included identification of the pre-1972 sound recordings played by Sirius XM over the class period, determination of which sound recordings were authorized and calculation of Sirius XM's pre-1972 revenues among other metrics. Class Counsel assisted in the preparation of the damages analysis, including depositions of both experts. Class Counsel also readied demonstratives, trial testimony, and damages summaries that could be presented at trial and conducted jury testing at an all-day mock trial.

12. Class Counsel put forth tremendous effort to prepare this case for trial, submitting extensive and complete pre-trial briefing that involved numerous hours of meeting and conferring with Sirius XM's counsel; reviewing thousands of pages of deposition testimony and preparing objections to designated testimony; and reviewing thousands of pages of exhibits and preparing objections. On October 7, 2016, after having met and conferred extensively, both parties filed a Memorandum

of Contentions of Fact and Law, a joint witness list, and a joint exhibit list. On October 24, 2016, the parties filed a joint pretrial conference order. Dkt. 563-1. The parties briefed a total of 18 motions *in limine*, designated deposition testimony from 23 witnesses, prepared competing jury instructions, verdict forms, and statements of the case, proposed voir dire questions, and designated and conferred regarding the admissibility of the parties' hundreds of exhibits, which comprised of thousands of pages. The parties submitted trial briefs on October 28, 2016. Dkts. 644, 645.

13. As the record in this litigation demonstrates, this was a very active and hotly contested case which was settled only after legal and factual issues regarding Plaintiff's claims, the defenses thereto, and the claimed damages were thoroughly developed, investigated and tested as a result of intensive litigation. Indeed, Sirius XM has denied, and to this day continues to deny, all liability. Sirius XM planned to offer a damages model at trial based on a royalty calculated against a greatly reduced revenue base, and indicated its intention to move to decertify the Class yet again.

14. The Court held pretrial conferences on November 7, 2016 and November 10, 2016. Dkts. 639, 661. A jury trial was scheduled to begin on November 15, 2016. Less than two days before the jury trial was to begin, and after extensive arm's-length negotiations, the Parties entered into the Settlement Agreement.

15. Susman Godfrey frequently takes cases on a contingency basis. In cases like this one where the firm is advancing expenses, the firm has a standard contingency agreement, under which it receives 40% of the gross sum recovered by a settlement that is agreed upon, or other resolution that occurs, on or before the 60th day preceding any trial. Sophisticated parties and institutions have agreed to these standard market terms. The firm receives 45% of gross recoveries received thereafter, and 50% after the submission of the evidence to the fact-finder. The

requested fee here of 30% of the gross sum recovered is less than what Susman Godfrey would receive under its standard contingency agreement.

16. Class Counsel's request for an award of 30% of any recovery paid to the Class includes money paid to the Class under the Royalty Program. When Susman Godfrey handles cases on a contingency basis, its standard contingency agreement provides a recovery for the gross sum recovered, which includes future royalty payments. For example, in an intellectual property case where the client will receive past payment for infringement and an ongoing royalty, Susman Godfrey's standard contingent agreement where the firm advances expenses provides that Susman Godfrey would be paid its standard percentages (40%, 45%, or 50%, depending on when the case is resolved) which includes those same contingent percentages for all ongoing future royalty payments made. Sophisticated parties and institutions have agreed to these standard market terms.

17. According to the records of my firm and the Declaration of Henry Gradstein ("Gradstein Declaration"), filed concurrently herewith, Class Counsel performed 14,627.30 hours of work in the prosecution and settlement of this litigation, which resulted in a total attorneys' fee lodestar of $8,356,877.80. Of those hours, Susman Godfrey attorneys and support staff performed 4,279 hours of work, resulting in a total Susman Godfrey attorneys' fee lodestar of $2,082,591.50. The remainder of the lodestar is described in the Gradstein Declaration.

18. Attached as Exhibit 1 is a true and correct copy of a summary schedule indicating the amount of time spent by the partners, attorneys and other professional support staff of my firm who were involved in this litigation, and the lodestar calculation based on my firm's billing rates in effect in 2016. The schedule was prepared from contemporaneous time records regularly prepared and maintained by my firm. The hourly rates for the partners, attorneys and professional support staff in my firm included in this schedule are the same as the usual customary hourly

rates charged for their services in cases where my firm is engaged to be paid by the hour.

19. The total number of hours expended by my firm in this litigation from inception through November 30, 2016—which does not include any time spent on Plaintiffs' motion for an award of attorneys' fees and expenses—is 4,279 hours. The total lodestar for my firm is $2,082,591.50. Should the Court request further supporting documentation for these amounts, the firm is prepared to provide it.

20. The $2,082,591.50 lodestar amount does not include time my firm spent in December 2016 negotiating with Sirius XM regarding administration of the royalty program, or on the appeals in New York and Florida. Nor does this lodestar include the significant amount of time my firm anticipates it will spend in the future overseeing the notice to class members, drafting the motion for final approval of the settlement, preparing for and attending the fairness hearing, addressing any supplemental submissions, assisting class members with the claims process, overseeing administration of the settlement fund and addressing ownership issues, and briefing and arguing the appeals in this case and in New York and Florida. This ongoing work will add significant time to the work already undertaken in this case and will add significant expense.

21. Class Counsel also seeks reimbursement of approximately $1,533,549.99 in unreimbursed costs and expenses reasonably paid or incurred by Class Counsel in the prosecution and settlement of the litigation, as of December 30, 2016. Of this amount, Susman Godfrey advanced $1,308,395.80 in unreimbursed costs and expenses, and the details and categories of those Susman Godfrey expenses are summarized in Exhibit 2.

22. The expenses incurred in this action are reflected on the books and records of my firm. These books and records are prepared from expense vouchers, check records and other materials that represent an accurate recordation of the

expenses incurred. Should the Court request further supporting documentation for these amounts, my firm is prepared to provide it.

23. The expenses noted are reasonable and were incurred for items necessary to the prosecution of the litigation. The expenses were incurred largely in conjunction with discovery, the services of experts, mediation and travel. Additionally, because the expenses were incurred for the benefit of the Class and are of a type generally reimbursed in the marketplace, they should be reimbursed from the common fund prior to the payment of attorneys' fees, in the same manner as an individual client would reimburse counsel's expenses.

24. Flo & Eddie's principals, Howard Kaylan and Mark Volman, spent significant time and effort supporting this litigation. This is not a case where the named plaintiff had little or no involvement. The discovery obligations imposed on Messrs. Kaylan and Volman included traveling to, preparing for, and appearing for deposition (in Mr. Volman's case, two depositions), responding to interrogatories and requests for admission, producing documents, and traveling to Los Angeles to prepare for trial. Messrs. Kaylan and Volman remained fully involved and expended considerable time and energy throughout the course of the litigation, including assisting Class Counsel with the prosecution of Class claims and communicating with other Class members.

25. Sirius XM took 19 depositions of absent class members, who collectively produced thousands of pages of documents. Class Counsel traveled throughout the country—including to Florida, New York, New Jersey, North Carolina, Tennessee, Louisiana, Illinois, Mississippi, South Carolina, and Oregon—to prepare for, attend and defend such depositions.

26. Attached hereto and marked as Exhibit 3 is a true and correct copy of this Court's order granting final approval of class action settlement, attorneys' fees and costs, and class representative incentive awards in *Luna et al. v. Universal City*

Studios, LLC, Case No. CV 12-09286 PSG (SSx) (C.D. Cal. Sept. 13, 2016) (Dkt. 99).

27. Attached hereto and marked as Exhibit 4 is a true and correct copy of this Court's Order re Plaintiff's Motion for Attorney's Fees and Costs in *Colony Cove Properties, LLC v. City of Carson*, Case No. CV 14-03242-PSG (PJWx) (C.D. Cal. Aug. 15, 2016) (Dkt. 225).

28. Attached hereto and marked as Exhibit 5 is a true and correct copy of this Court's Order re Granting in Part and Denying in Part Plaintiff's Motion for an Award of Attorney's Fees and Costs in *Vahan Eksouzian, et al. v. Brett Albanese, et al.*, Case No. CV 13-00728-PSG (AJWx) (C.D. Cal. Oct. 23, 2015) (Dkt 196).

29. Attached hereto and marked as Exhibit 6 is a true and correct copy of Judge Guilford's order approving plaintiffs' motion for an award of attorneys' fees and expense in *Schulein, et al. Petroleum Development Corp., et al.*, Case No. CV. 11-1891 (AG) (C.D. Cal.) (C.D. Cal. March 16, 2015) (Dkt. 261).

30. Attached hereto and marked as Exhibit 7 is a true and correct copy of Judge Guilford's order approving additional payments to class counsel for time and expenses incurred after the initial application for fees was granted in the preceding paragraph in *Schulein, et al. Petroleum Development Corp., et al.*, Case No. CV. 11-1891 (AG) (C.D. Cal.) (C.D. Cal. March 14, 2016) (Dkt. 315).

31. Attached hereto and marked as Exhibit 8 is a true and correct copy of the Court's Order in *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, Case No. CV 15-1164, United States Court of Appeals for the Second Circuit, Dec. 29, 2016 Order (Dkt. 209).

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Signed this 30th day of December, 2016, at Los Angeles, California.

/s/ Steven G. Sklaver
Steven G. Sklaver

Exhibit 1

SUSMAN GODFREY L.L.P.'s FEES

Flo & Eddie, Inc. v. Sirius XM Radio, Inc.
Firm Name: Susman Godfrey L.L.P.
March 2, 2016 through November 30, 2016

Name (Status	Hourly Rate	Cumulative Lodestar	Cumulative Hours
Dolan, John F. (Paralegal)	$250.00	$8,425.00	33.70
Dunseth, William W. (Paralegal)	$270.00	$10,206.00	37.80
Tan, Joel (Paralegal)	$270.00	$91,503.00	338.90
Hogue, Brian (Associate)	$350.00	$351,995.00	1,005.70
Gervais, Michael (Associate)	$375.00	$223,162.50	592.10
Srinivasan, Kalpana (Partner)	$550.00	$277,695.00	504.90
Black, Rachel S. (Partner	$550.00	$456,225.00	829.50
Sklaver, Steven G. (Partner)	$700.00	$291,550.00	416.50
Morrissey, Stephen E. (Partner)	$700.00	$345,670.00	498.10
Seltzer, Marc M. (Partner)	$1,200.00	$26,160.00	21.80
TOTAL		**$2,082,591.50**	**4,279**

Exhibit 2

SUSMAN GODFREY L.L.P.'s EXPENSES

Flo & Eddie, Inc. v. Sirius XM Radio, Inc., Susman Godfrey Combined Expenses All Cases (through December 30, 2016)

Cost Code	Category	Total
APPEAL	Appellate Expert Fees	$269,776.13
DEPEXP	Deposition Expenses	$44,271.55
EXPERT	Expert Fees	$846,451.04
FFEE	Filing Fees	$1,025.00
HCMSGR	Messenger/Delivery Services	$9,297.75
HCTELE	Telephone & Calling Card Expenses	$463.97
MEALS	Meals (Travel)	$1,061.25
MISC	Miscellaneous Client Charges	$894.09
OSPHOT	Outside Photocopy Services	$10,821.47
PRINT	Reproduction Charges	$7,104.80
RESRCH	Research charges	$59,489.02
SECOT	Secretarial Overtime	$5,242.50
TRAVEL	Hotel & Travel Expenses	$52,497.23
TOTAL		**$1,308,395.80**

Flo & Eddie, Inc. v. Sirius XM Radio, Inc., U.S.D.C for the Central District of California, Case No. 2:13-CV-05693

Cost Code	Category	Total
DEPEXP	Deposition Expenses	$44,271.55
EXPERT	Expert Fees	$846,451.04
FFEE	Filing Fees	$1,025.00
HCMSGR	Messenger/Delivery Services	$9,297.75
HCTELE	Telephone & Calling Card Expenses	$463.97
MEALS	Meals (Travel)	$1,061.25
MISC	Miscellaneous Client Charges	$894.09
OSPHOT	Outside Photocopy Services	$10,821.47
PRINT	Reproduction Charges	$7,104.80
RESRCH	Research charges	$59,352.27
SECOT	Secretarial Overtime	$5,242.50
TRAVEL	Hotel & Travel Expenses	$52,497.23
TOTAL		**$1,038,482.92**

SUSMAN GODFREY L.L.P.'s EXPENSES

Flo & Eddie Inc. v. Sirius XM Radio Inc., U.S.D.C for the Southern District of Florida, Case No. 13-CV-23182

Cost Code	Category	Total
APPEAL	Appellate Specialist Fees	$55,000.00
TOTAL		**$55,000.00**

Flo & Eddie Inc. v. Sirius XM Radio Inc., U.S.D.C for the Southern District of New York, Case No. 13-CV-5784 (CM).

Cost Code	Category	Total
APPEAL	Appellate Specialist Fees	$214,776.13
RESRCH	Research charges	$136.75
TOTAL		**$214,912.88**

Exhibit 3

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES - GENERAL

Case No. CV 12-9286 PSG (SSx) Date September 13, 2016

Title Luna *et al.* v. Universal City Studios, LLC

Present: The Honorable Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): **Order GRANTING the Motions for Final Approval of Class Action Settlement, Attorneys' Fees and Costs, and Class Representative Incentive Awards**

Before the Court are Plaintiffs Uriel Luna, Carrie Gartin, Shaun Gartin, and Gregoria Ruiz's ("Plaintiffs") motions for final approval of class action settlement, and attorneys' fees, costs, and class representative incentive awards. Dkts. # 95, 96, 97. The Court held a final fairness hearing on September 12, 2016. Having considered the arguments in all of the submissions, the Court GRANTS Plaintiffs' motions.

I. Background

Plaintiffs worked as non-exempt employees for Defendant Universal City Studios, LLC. In October 2012, Plaintiff Uriel Luna filed a class action Complaint in the Superior Court for the County of Los Angeles, alleging various wage and hour violations under California law. Dkt. #1, Ex. A. Defendant removed the case to this Court pursuant to the Class Action Fairness Act of 2004 ("CAFA"), 28 U.S.C. § 1332(d). Dkt. #1. Following a series of amendments to the pleadings, Plaintiffs filed a Sixth Amended Complaint ("SAC"), which is the operative pleading in this case. Dkt. #49. The SAC included six wage and hour claims under California law: (1) failure to provide required meal periods; (2) failure to provide required rest periods; (3) failure to pay overtime wages; (4) failure to pay minimum wages; (5) failure to pay all wages due to discharged and quitting employees; and (6) failure to furnish accurate itemized statements. *SAC* ¶¶ 75–95. The SAC also included two derivative claims for unfair and unlawful business practices under California Business and Professions Code § 17200, and penalties under the California Labor Code Private Attorneys' General Act ("PAGA") § 2698, *et seq.* *SAC* ¶¶ 75–95.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 12-9286 PSG (SSx)	Date	September 13, 2016
Title	Luna *et al.* v. Universal City Studios, LLC		

The case was actively litigated for over two and a half years. Class counsel successfully argued a motion to compel and defended the depositions of the four named Plaintiffs. *Motion for Final Approval of Class Action Settlement* ("*Mot. for Final Approval*") 2:25–27, 3:4–6. Class counsel also interviewed approximately 98 class members about their experiences working for Defendant and retained an expert statistician to analyze a sample of timekeeping and payroll records. *Id.* 3:6–9.

In April 2015, the parties participated in a mediation session that ultimately resulted in "an agreement in principle regarding the material terms for a proposed class action settlement that would fully resolve this matter." *Id.* 3:15–20. After additional negotiations, the parties executed a "Stipulation for Settlement of Civil Action." *Id.* 3:20–22. The Court granted preliminary approval of the Settlement Agreement in July 2015, finding that the terms fell within the range of possible approval. Dkts. #82, 92. In its Order granting preliminary approval, the Court certified, for settlement purposes only, a class of:

> Plaintiffs, as well as other Parking Lot Attendants who are or were members of Amusement Areas Employees Union, Local B-192, all Food Stand Attendants who are or were members of Unitehere, Local 11, and all Commissary members of Hotel Employees and Restaurant Employees Union, Unitehere, Local 11 AFL-CIO who work or have worked for Defendant at Universal City, California at any time during the [period from August 21, 2008 through the date of entry of the Preliminary Approval Order].

Order Granting Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, ("*Preliminary Approval Order*") 2, 7, Dkt. #82. In compliance with CAFA, the Settlement Administrator mailed the Notice of Proposed Class Action Settlement to the appropriate federal and state officials, and mailed packets to 3,224 class members. *Schwartz Decl.*, ¶¶ 6–7.

In December 2015, the parties discovered that additional class members existed and sought the assistance of a mediator to determine what additional funds were needed to resolve the action. *Mot. for Final Approval* 4:3–5. On February 26, 2016, the parties reached an agreement regarding the material terms of a revised settlement. *Id.* 4:6–8. The parties executed and filed a Revised Stipulation for Settlement of Civil Action on March 31, 2016. Dkt. # 91. By Order dated April 5, 2016, the Court preliminarily approved the Revised Stipulation and all modifications made to the documents attached as exhibits to the Revised Stipulation. Dkt. # 92. Shortly thereafter, the Settlement Administrator mailed supplemental CAFA notices to the appropriate federal and state officials, and to 3,637 class members. *Mot. for Final Approval*

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 12-9286 PSG (SSx)	Date	September 13, 2016
Title	Luna *et al.* v. Universal City Studios, LLC		

4:15-20. As of July 28, 2016, the Settlement Administrator had received thirteen requests for exclusion and no objections. *Id.* 4:20–22.

Plaintiffs now seek final approval of the Settlement Agreement and the plan of allocation, as well as attorneys' fees, costs, and incentive awards. Dkts. # 95, 96, 97. Defendant does not oppose the motions.

II. Discussion

A. Final Approval of the Class Settlement

i. Legal Standard

A court may finally approve a class action settlement "only after a hearing and on finding that the settlement . . . is fair, reasonable and adequate." Fed. R. Civ. P. 23(e)(2). In determining whether a settlement is fair, reasonable, and adequate, the district court must "balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of proceedings; the experience and views of counsel; the presence of a government participant; and the reaction of the class members to the proposed settlement." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *see also Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003); *Officers for Justice v. Civil Serv. Comm'n of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982) (noting that the list of factors is "by no means an exhaustive list").

The district court must approve or reject the settlement as a whole. *See Hanlon*, 150 F.3d at 1026 ("It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness."). The Court may not delete, modify, or rewrite particular provisions of the settlement. *Id.* The district court is cognizant that the settlement "is the offspring of compromise; the question . . . is not whether the final product could be prettier smarter or snazzier, but whether it is fair, adequate and free from collusion." *Id.* The Ninth Circuit had noted that "there is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Synocor ERISA Litig.*, 516 F.3d 1095, 1011 (9th Cir. 2008).

ii. Discussion

a. Strength of Plaintiffs' Case

"An important consideration in judging the reasonableness of a settlement is the strength of plaintiffs' case on the merits balanced against the amount offered in the settlement." *See Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 488 (C.D. Cal. 2010) (internal quotation marks omitted). Although Plaintiffs believe that they have developed substantial evidence to support their claims, Plaintiffs also understand that the merits of their arguments remain vigorously contested. *Mot. for Final Approval* 10:15–18.

There remain a number of open questions as to almost all of Plaintiffs' claims. It remains undecided, for example, whether all class members are entitled to overtime pay, and whether class members are entitled to pay for time spent walking to and from their workstations and changing in and out of their uniforms. Class certification is also precarious as Plaintiffs hail from different service unions and worked for Defendant under different employment terms. The parties have provided the Court with confidential memoranda that outline their respective positions. Having reviewed the memoranda, the Court is confident that there remain ample areas of disagreement among the parties so as to counsel in favor of settlement.

Plaintiffs further point out that the proposed settlement award is a proper compromise between the risks of litigation and the guarantee of recovery. *Mot. for Final Approval* 10:22–25. The settlement requires the Settlement Administrator to distribute individual settlement payments within 24 days of the effective date of settlement. *Id.* Although Plaintiffs may not receive as much as they could have from a jury verdict, the expediency of the payment assures the Court that the settlement agreement is sound. Given the above considerations, the Court agrees with Plaintiffs that this factor weighs in favor of approving the Settlement Agreement.

b. Risk, Expense, Complexity, and Duration of Further Litigation

The second factor in assessing the fairness of the proposed settlement is the complexity, expense, and likely duration of the lawsuit if the parties had not reached a settlement agreement. *Officers for Justice*, 688 F.2d at 625. Where the parties reach a settlement before the commencement of class certification, expert witness discovery, and trial preparation, this factor generally favors settlement. *See Young v. Polo Retail, LLC*, C 02-4546 VRW, 2007 WL 951821, at *3 (N.D. Cal. Mar. 28, 2007). If the Court were to reject the settlement agreement, the parties promise more costly litigation, including motions for summary judgment, expert discovery, and trial. *Mot. for Final Approval* 11:18–21. This litigation has already been underway for more than three and a half years, including two years of active discovery, and additional discovery, trial, and a possible appeal would only push recovery further down the

road. *Id.* 11:23–28. Given these considerations, the Court agrees with Plaintiffs that this factor also weighs in favor of approving the settlement.

c. Risk of Maintaining Class Action Status Through Trial

Although the Court has certified a class, the certification was for settlement purposes only. Under Federal Rule of Civil Procedure 23(c)(1)(C), an "order that grants or denies class certification may be altered or amended before the final judgment." Fed. R. Civ. P. 23(c)(1)(C). Plaintiffs concede, and the Court concurs, that there is a risk that the Court would find that the variation in each Plaintiff's job responsibilities destroys commonality and predominance were Defendant to present the Court with a petition to decertify the class. *See* Dkt. #92. This factor thus also weighs in favor of final approval.

d. Amount Offered in Settlement

The fourth factor in assessing the fairness of the proposed settlement is the amount of the settlement. "[T]he very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice*, 688 F.2d at 624. The Ninth Circuit has explained that "it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Id.* at 625 (citations omitted). Any analysis of a fair settlement amount must account for the risks of further litigation and trial, as well as expenses and delays associated with continued litigation.

The parties have agreed to settle all claims for $1.8 million. *Mot. for Final Approval* 5:7–16. This "Total Maximum Settlement Payment" includes individual settlement payments, class counsel awards, settlement administration costs, PAGA payments, and class members' share of employee payroll taxes. *Id.* Class counsel estimates that the class's maximum damages, based on a detailed review of time and payroll records, could have been as high as $4,122,037. *Matern Decl.*, ¶ 14. The settlement amount therefore represents 43 percent of the possible recovery. The Ninth Circuit has approved of settlements well within that range. *See Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000) (affirming approval of class settlement which represented roughly one-sixth of the potential recovery). The average estimated individual settlement payment is $309.69, and the highest estimated settlement payment is $3,591.16. *Mot. for Final Approval* 10:25–27. The Court finds these amounts reasonable in light of the uncertainties associated with litigating this case through trial. Accordingly, this factor too counsels in favor of approving the settlement.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 12-9286 PSG (SSx) Date September 13, 2016

Title Luna *et al.* v. Universal City Studios, LLC

e. The Extent of Discovery Completed and the Stage of the Proceedings

This factor requires the Court to gauge whether Plaintiffs have sufficient information to make an informed decision about the merits of their case. *See Dunleavy*, 213 F.3d at 459. The more discovery that has been completed, the more likely it is that the parties have "a clear view of the strengths and weaknesses of their cases." *Young v. Polo Retail, LLC*, No. C 02-4546 VRW, 2007 WL 951821, at *4 (N.D. Cal. Mar. 28, 2007) (internal quotation marks and citations omitted).

The discovery and investigation of this action included: written discovery, including interrogatories and requests for production of documents; a motion to compel, which resulted in Defendant's production of all relevant wage and hour policies, collective bargaining agreements, and a sample of time and payroll records; the depositions of the four named Plaintiffs; interviews with 98 other class members; and the analysis of an expert statistician, who reviewed the sample timekeeping and payroll records supplied by Defendant. *Mot. for Final Approval* 2:22-3:9. The parties actively litigated the case for two and a half years before turning to mediation. *Id.* 2:22. Given the amount of discovery completed, the Court finds that Plaintiffs had enough information to make an informed decision about settlement based on the strengths and weaknesses of their case. This factor weighs in favor of granting final approval.

f. The Experience and Views of Class Counsel

The recommendations of Plaintiffs' counsel are given a presumption of reasonableness. *See, e.g.*, *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) (citation omitted). "Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pac. Enter Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995).

Here, class counsel has extensive class action experience in employment litigation. *Matern Decl.*, ¶¶ 18, 21–22. Class counsel has actively participated in every aspect of the litigation thus far, and finds the settlement to be fair, adequate, and reasonable. *Id.* ¶ 15. The Court sees no evidence to rebut the presumption that class counsel's recommendation should be regarded as reasonable. This factor thus weighs in favor of class approval.

g. The Presence of Governmental Participant

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 12-9286 PSG (SSx)	Date	September 13, 2016
Title	Luna *et al.* v. Universal City Studios, LLC		

Because no government entities are participants in this case, this factor is neutral. However, the Court observed that a notice of the settlement was provided to federal and state government officials. *See Schwartz Decl.*, ¶ 9. None have objected.

h. Class Members' Reaction to the Proposed Settlement

In evaluating the fairness, adequacy, and reasonableness of settlement, courts also consider the reaction of the class to the settlement. *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003). "It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class action settlement are favorable to the class members." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528–29 (C.D. Cal. 2004).

Of the 3,637 employees in the class, none have objected to the settlement and only thirteen, or 0.35 percent of the class, requested exclusion. *Schwartz Decl.*, ¶¶ 10, 12–13. This response is an indicator that class members find the settlement to be fair, reasonable, and adequate. *See, e.g.*, *Hanlon*, 150 F.3d at 1027 ("[T]he fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness."). This factor thus weighs in favor of approval of the settlement.

i. Fair and Honest Negotiations

Evidence that a settlement agreement is the result of genuine "arms-length, non-collusive, negotiated resolution" supports a conclusion that the settlement is fair. *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). Here, the parties negotiated the settlement with the assistance of Michael Dickstein, an experienced wage-and-hour mediator. *Matern Decl.*, ¶ 12. Further, the Court has already concluded that the negotiations were "adversarial, fair, and non-collusive." *Preliminary Approval Order* 10. The fact that the parties engaged in arms-length negotiations also counsels in favor of approval of the settlement.

j. Conclusion

Having reviewed the relevant factors and found that none counsel against approval of final settlement, the Court accordingly GRANTS Plaintiffs' motion for final approval of the class action settlement.

B. Plan of Allocation

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 12-9286 PSG (SSx) Date September 13, 2016

Title Luna *et al.* v. Universal City Studios, LLC

A plan of allocation under Rule 23 "is governed by the same standards of review applicable to the settlement as a whole; the plan must be fair, reasonable and adequate." *Vinh Nguyen v. Radient Pharma. Corp.*, SACV 11-406 DOC (MLGx), 2014 WL 1802293, at *5 (C.D. Cal. 2014). To be approved, the plan needs to have a reasonable, rational basis. *Id.*

The Settlement Agreement provides that each class member will receive a proportionate share of the settlement based on the number of weeks the class member worked for Defendant during the class period. *Matern Decl.*, Ex. A (Stipulation for Settlement of Civil Action), ¶¶ 9, 47(a)(i). Rust Consulting, Inc. ("Rust"), the settlement administrator, will determine the eligibility for, and the amounts of, each individual settlement payment. *Id.* ¶ 46(a)(iii). Rust plans to do this by dividing the net payment by the total number of compensable pay periods for all settlement class members, which will result in a "pay period value." *Id.* ¶ 47(a)(i). Rust will then take the number of pay periods for each individual class member and multiply that by the pay period value. *Id.* The average individual settlement payment is estimated at $309.69, and the highest estimated individual payment is $3,591.16. *Schwartz Decl.*, ¶ 14. Class members will not be required to submit a claim in order to share in the payment, and no portion of the net amount will revert back to Defendant. *Matern Decl.*, Ex. A, ¶ 47.

Once Defendant transfers the funds to Rust and Rust calculates the individual payments, Rust will mail the payments by first class mail to each class member's last known mailing address. *Id.* ¶ 47(a). Rust will allocate 20 percent of the payment as wages, subject to all applicable tax withholdings, and 80 percent as non-wages, not subject to tax withholdings. *Id.* The back of each check will contain a release of all claims. *Id.* ¶ 47(a)(iv). Rust will deposit all checks that remain uncashed after 180 days into the California Department of Industrial Relations Unclaimed Wages Fund. *Id.* ¶ 47(a)(iv)(1).

The Court finds that the plan of allocation is rationally grounded in a formula that will compensate class members for the weeks that they worked for Defendant and the amount that they earned during that time. The Court thus approves of the plan of allocation.

C. Motions for Attorneys' Fees, Costs, and Incentive Award

Plaintiffs request that the following be disbursed from the settlement amount: (1) $532,800 in attorneys' fees, which constitutes 29.6 percent of the settlement amount; (2) reimbursement for litigation costs and expenses in the amount of $73,382.82; and (3) a $10,000 incentive award for each of the four named Plaintiffs. *See Mot. for Final Approval* 5:17–6:17; *Motion for Attorneys' Fees and Costs* ("*Attorneys' Fees Mot.*") 1:2–8. Class counsel asserts that

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 12-9286 PSG (SSx) Date September 13, 2016

Title Luna *et al.* v. Universal City Studios, LLC

it is entitled to recover reasonable attorneys' fees under Labor Code § 1194, California Code of Civil Procedure § 1021.5, and the common fund doctrine. *Attorneys' Fees Mot.* 1:6–8.

i. Legal Standard

Awards of attorneys' fees in class action cases are governed by Federal Rule of Civil Procedure 23(h), which provides that after a class has been certified, the Court may award reasonable attorneys' fees and nontaxable costs. The Court "must carefully assess" the reasonableness of the fee award. *See Staton*, 327 F.3d at 963; *see also Browne v. Am. Honda Motor Co., Inc.*, No. CV 09-06750 MMM (DTBx), 2010 WL 9499073, at *3–5 (C.D. Cal. Oct. 5, 2010) (explaining that in a class action case, the court must scrutinize a request for fees when the defendant has agreed to not oppose a certain fee request as part of a settlement). Courts exercising diversity jurisdiction under CAFA should apply the substantive law of the state in which they sit to the calculation of the attorneys' fee award. *Mangold v. Cal. Pub. Util. Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995).

Where litigation leads to the creation of a common fund, courts can determine the reasonableness of a request for attorneys' fees using either the common fund method or the lodestar method. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944–45 (9th Cir. 2011) (finding that when a settlement establishes a common fund for the benefit of a class, courts may use either method to gauge the reasonableness of a fee request, but encouraging courts to employ a second method as a cross-check after choosing a primary method). The Court will analyze counsel's fee request under both theories.

ii. Discussion

In its Order granting preliminary approval of the class action settlement, the Court raised concerns about what appeared to be unusually high requests for attorneys' fees and class representative service awards. *Preliminary Approval Order* 12–13. The Court has now had an opportunity to review counsel's time sheets, rates, and hours expended. Although the Court finds that class counsel's hourly rates exceed the standard of reasonableness in the Central District of California, it nonetheless concludes that counsel is entitled to recover the entire amount requested, given their diligence in pursuing this matter on behalf of the class. The Court first assesses fees under the common fund method and then, as a cross-check, turns to assess fees under the lodestar method.

a. Percentage of the Common Fund

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 12-9286 PSG (SSx) Date September 13, 2016

Title Luna *et al.* v. Universal City Studios, LLC

Under the percentage-of-recovery method, courts typically calculate 25 percent of the fund as a "benchmark" for a reasonable fee award. *See In re Bluetooth*, 654 F.3d at 942. The percentage can range, however, and courts have awarded more than 25 percent of the fund as attorneys' fees when the Court has found a higher award to be reasonable. *See Singer v. Becton Dickinson and Co.*, No. CV 08-821 IEG (BLMx), 2010 WL 2196104, at *8 (S.D. Cal. 2010) (finding an award of 33.3 percent of the common fund reasonable because class counsel took the case on a contingent basis and litigated for two years, courts routinely award between 20 to 50 percent of the total settlement amount, and no class member objected to the award); *Gardner v. GC Services, LP*, No. CV 10-997 IEG (CABx), 2012 WL 1119534, at *7 (S.D. Cal 2012) (finding that a departure from the 25 percent benchmark was reasonable where the results achieved were favorable, the risks of litigation were substantial, and the case was complex).

When assessing the reasonableness of a fee award under the common fund theory, courts consider "(1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases." *Viscaino v. Microsoft Corp.*, 290 F.3d 1043, 1048–50 (9th Cir. 2002). Plaintiffs request that the Court approve an attorneys' fee award of $532,800, which amounts to 29.6 percent of the settlement amount. *Attorneys' Fees Mot.* 11:11–13. Because Plaintiffs ask the Court to depart from the "benchmark" of 25 percent, the Court must carefully evaluate each of the five factors set out in *Viscaino*. *See Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000).

Reviewing each *Viscaino* factor in turn, the Court first finds that the results achieved in this case were favorable to the class. Plaintiffs were able to recover approximately 43 percent of the maximum possible recovery, and no class member objected to the settlement terms. Second, as detailed elsewhere, the risks of the litigation, including the risks of class certification, were real and substantial. Third, the duration of the case—lasting now for over three years—counsels in favor of a larger attorneys' fees award. Fourth, class counsel took this case on a contingent fee basis. *Matern Decl.*, ¶ 39. Fifth, the request for attorneys' fees in the amount of 29.6 percent falls below the 30 to 33 percent range allowed in similar cases. *See, e.g.*, *Knight v. Red Door Salons, Inc.*, No. 08-1520 SC, 2009 WL 248367, at *17 (N.D. Cal. Feb. 2, 2009) ("nearly all common fund awards range around 30%"); *Ingalls v. Hallmark Mktg. Corp.*, CV 09-1662 OWW (MJSx), 2011 WL 2648879, at *28–29 (E.D. Cal. June 30, 2011) (awarding attorneys' fees amounting to 30 percent of a $2.25 million settlement); *Romero v. Producers Dairy Foods, Inc.*, No. CV 05-484 DLB, 2007 WL 3492841, at *4 (E.D. Cal. Nov. 13, 2007) (awarding 33 percent of the common fund); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491–92 (E.D. Cal. 2010) (citing to wage and hour cases where courts approved awards ranging from 30 to 33 percent); *Singer*, 2010 WL 2196104, at *8 (approving an attorneys' fee award of 33.33 percent).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 12-9286 PSG (SSx) Date September 13, 2016

Title Luna *et al.* v. Universal City Studios, LLC

Given the above considerations, the Court finds class counsel's attorneys' fees reasonable under the common fund theory. The Court grants an upward departure from the 25 percent benchmark in light of the results achieved, the risk of litigation, the contingent nature of the fee, and the financial burden carried by class counsel.

b. Lodestar Cross-Check

To determine attorneys' fees under the lodestar method, a court must multiply the reasonable hours expended by a reasonable hourly rate. *In re Washington Public Power Supply System Securities Litig.*, 19 F.3d 1291, 1294 n.2 (9th Cir. 1994). The Court may then enhance the lodestar with a "multiplier," if necessary, to arrive at a reasonable fee. *Id.*

1. Reasonable Rate

The reasonable hourly rate is the rate prevailing in the community for similar work. *See Gonzalez v. City of Maywood*, 729 F.3d 1196, 1200 (9th Cir. 2013) ("[T]he court must compute the fee award using an hourly rate that is based on the prevailing market rates in the relevant community." (citation omitted)); *Viveros v. Donahue*, CV 10-08593 MMM (Ex), 2013 WL 1224848, at *2 (C.D. Cal. 2013) ("The court determines a reasonable hourly rate by looking to the prevailing market rate in the community for comparable services."). The relevant community is the community in which the court sits. *See Schwarz v. Sec. of Health & Human Servs.*, 73 F.3d 895, 906 (9th Cir. 1995). If an applicant fails to meet its burden, the Court may exercise its discretion to determine reasonable hourly rates based on its experience and knowledge of prevailing rates in the community. *See, e.g.*, *Viveros*, 2013 WL 1224848, at *2; *Ashendorf & Assocs. v. SMI-Hyundai Corp.*, CV 11-02398 ODW (PLAx), 2011 WL 3021533, at *3 (C.D. Cal. 2011); *Bademyan v. Receivable Mgmt. Servs. Corp.*, CV 08-00519 MMM (RZx), 2009 WL 605789, at *5 (C.D. Cal. 2009).

Class counsel asserts that the eight attorneys who worked on this case had hourly rates ranging from $425 to $825. *See Matern Decl.*, ¶ 33. The Court turns to the Real Rate Report as a useful guidepost to assess the reasonableness of these hourly rates in the Central District. *See Eksouzian v. Albanese*, CV 13-728 PSG (AJWx), at *4–5 (C.D. Cal. Oct. 23, 2015); *Carbajal v. Wells Fargo Bank, N.A.*, CV 14-7851 PSG (PLAx), at *5 (C.D. Cal. July 29, 2015). As Judge Fisher explained in *Hicks v. Toys 'R' Us-Delaware, Inc.*, the Real Rate Report is persuasive because it:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 12-9286 PSG (SSx) Date September 13, 2016

Title Luna *et al.* v. Universal City Studios, LLC

> identifies attorney rates by location, experience, firm size, areas of expertise, and industry, as well as the specific practice areas, . . . [and] it is based on actual legal billing, matter information, and paid and processed invoices from more than 80 companies—a much better reflection of true market rates than self-reported rates in all practice areas as part of a national survey of top firms.

No. CV 13-1302 DSF (JCGx), 2014 WL 4670896, at *1 (C.D. Cal. Sept. 2, 2014).

The 2015 Real Rate Report offers a number of relevant data points for fees in the Central District. The hourly rate for a partner who practices labor and employment law in a Los Angeles firm with fifty or fewer attorneys ranges from $240 to $367. *Real Rate Report* 128. Across all Los Angeles firms, a labor and employment litigation partner makes an hourly rate between $275 and $625. *Id.* 110. Associates in Los Angeles firms with fifty or fewer attorneys make an hourly rate from $190.30 to $275. *Id.* 128. Across all Los Angeles firms, a labor and employment litigation associate makes an hourly rate between $240 and $443. *Id.* 110. Nationwide, litigation associates in labor and employment law with three to seven years' experience earn an hourly rate between $240 and $409.42, and labor and employment litigation associates with more than seven years' experience earn an hourly rate between $240 and $442.94. *Id.* 112.

Class counsel seeks approval for the hourly rates of one litigation partner, Mr. Matthew Matern, and seven associates. All attorneys are employees of the Matern Law Group, a fifteen member firm in Manhattan Beach, California. *Matern Decl.*, ¶ 23. Mr. Matern requests approval of an hourly rate of $825. *Id.* ¶ 33. The Court finds this rate too high in light of the prevailing hourly rates for litigation partners in labor and employment law at firms with fifty or fewer employees. *See Real Rate Report* 128 (reporting an hourly rate between $240 and $367 for partners in equivalent positions). The Court nonetheless recognizes that Mr. Matern has considerable experience in class action litigation and has successfully practiced law for nearly twenty-five years, including founding his own firm. *Id.* ¶¶ 19-21. Given Mr. Matern's qualifications and his performance in this case, the Court approves of an hourly rate of $625, which is the rate in the third quartile of Los Angeles firms for labor and employment litigation partners. *See Real Rate Report* 112. For the associates, the Court adopts the national rate for the third quartile of litigation associates with similar experience levels. *Id.* Thus, the Court finds the following adjustments appropriate:

Attorney Name	Experience Level	Requested Hourly Rate	Accepted Hourly Rate (2015 Real Rate Report)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 12-9286 PSG (SSx) Date September 13, 2016

Title Luna *et al.* v. Universal City Studios, LLC

Matthew J. Matern	Partner, 21+ years	$825	$625
Launa Adolph	Senior Associate, 7+ years	$650	$445
Rania Habib	Senior Associate, 7+ years	$625	$445
Dalia Khalili	Senior Associate, 7+ years	$575	$445
Jennifer Newman	Associate, 3–7 years	$525	$410
Aubry Wand	Associate, 3–7 years	$450	$410
Nakkisa Akhavan	Associate, 3–7 years	$450	$410
Leanne Nguyen	Associate, 3–7 years	$425	$410

See Matern Decl., ¶¶ 18-34 (listing attorneys' experiences, hourly rates, and hours worked).

2. Reasonable Hours

An attorneys' fees award should include compensation for all hours reasonably expended prosecuting the matter, but "hours that are excessive, redundant, or otherwise unnecessary" should be excluded. *Costa v. Comm'r of Soc. Sec. Admin.*, 690 F.3d 1132, 1135 (9th Cir. 2012). "[T]he standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time when the work was performed." *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 839 (9th Cir. 1982).

Here, the records demonstrate that class counsel spent 940.4 hours litigating this case. *See Matern Decl.*, ¶ 33. This case originated in 2012 and has been litigated for more than three years, with more than two years of active litigation. In those years, counsel conducted legal research on Defendant's wage and hour policies; drafted and amended Complaints; engaged in written discovery and submitted a motion to compel; defended the witness depositions for all four Plaintiffs and conducted interviews with nearly 100 members of the class; and attended mediations and drafted stipulations. *Id.* ¶ 34. Class counsel estimates that they will spend fifty additional hours overseeing the settlement administration process. *Id.* Counsel provided the Court with detailed time records for the attorneys who worked on the case. *Matern Decl.*, Ex. C. After reviewing these records, the Court finds 940.4 hours reasonable.

Based on the Court's adjustment of class counsel's hourly rates, the reasonable lodestar amount is $436,593.50. The Court adjusts the attorneys' fees request as follows:

Attorney Name	Accepted Hourly Rate	Number of Hours Worked	Total Request
Matthew J. Matern	$625	197.3	$123,312.50
Launa Adolph	$445	199.0	$88,555.00

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 12-9286 PSG (SSx) Date September 13, 2016

Title Luna *et al.* v. Universal City Studios, LLC

Rania Habib	$445	39.4	$17,533.00
Dalia Khalili	$445	7.6	$3,382.00
Jennifer Newman	$410	94.2	$38,622.00
Aubry Wand	$410	309.7	$126,977.00
Nakkisa Akhavan	$410	46.3	$18,983.00
Leanne Nguyen	$410	46.9	$19,229.00
		Revised Lodestar Amount	$436,593.50

See Matern Decl., ¶ 33 (listing hourly rates and hours worked for each attorney).

3. Multiplier

The lodestar amount in this case is $436,593.50. Class counsel requests $532,800 in attorneys' fees. *See Fees Mot.* 5:8-13. The request constitutes a positive multiplier of 1.22. *See Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 244, 255 (2001) (observing that multipliers can range from 2 to 4 or even higher); *Sutter Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 512 (2009) (affirming attorney fee award with 2.52 multiplier). Given the favorable outcome for class members, the duration of the litigation, and class counsel's diligence in pursuing the case, the Court finds that a multiplier of 1.22 is justified and that an attorneys' fees award of $532,800 is reasonable.

Having assessed the reasonableness of the hourly rates, the hours worked, and the multiplier, the Court finds that the requested fee amount is reasonable under both the common fund and lodestar theories and therefore GRANTS Plaintiffs' motion for attorneys' fees.

c. Litigation Costs

In addition to attorneys' fees, class counsel requests reimbursement of expenses in the amount of $73,382.82. *Matern Decl.* ¶ 47. Because Plaintiffs' claim for attorneys' fees arises under California law, the Court applies California law on costs rather than Local Rule 54-4. *See Clausen v. M/V New Carissa*, 339 F.3d 1049, 1064 (9th Cir. 2003). Plaintiffs have provided the Court with a record of all costs incurred to date in this litigation. *See Matern Decl.*, Ex. D. The Court is satisfied that the costs are reasonable, and therefore, the Court GRANTS Plaintiffs' motion for costs in the amount of $73,382.82.

C. Motion for Incentive Payment to Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 12-9286 PSG (SSx) Date September 13, 2016

Title Luna *et al.* v. Universal City Studios, LLC

Plaintiffs Uriel Luna, Carrie Gartin, Shaun Gartin, and Gregoria Ruiz also request that the Court award each Plaintiff a Class Representative Service Award in the amount of $10,000. *Motion for Class Representative Service Awards* ("*Service Awards Mot.*") 1:3-5. "Incentive awards are fairly typical in class action cases." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (citations omitted); *see In re Toys R Us-Delaware, Inc. Fair and Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 470 (C.D. Cal. 2014). Courts have found that incentive awards are particularly appropriate in the employment context, where employees may open themselves to retaliation by their employer or co-workers. *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 187 (W.D.N.Y. 2005). When considering requests for incentive awards, courts consider five factors:

> (1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

Van Vraken v. Atl. Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995).

In its Order preliminarily approving of the class action settlement, the Court raised concerns about the amount of the service awards, given that Ninth Circuit precedent has struck down excessively high awards that appear to over-compensate Plaintiffs. *See Online DVD-Rental*, 779 F.3d at 947–48. At the time of the preliminary approval, the Court did not have before it the declarations of the four named Plaintiffs in this case. Having reviewed those declarations and the facts set out in the motion, the Court is no longer concerned that the requested service award is unreasonable. This is especially true given that the total settlement amount increased after the Court's preliminary approval and Plaintiffs' did not increase their requested service award. The service award now comprises 2.2 percent of the settlement amount, which is within the range found reasonable in *Staton. See* 327 F.3d at 976–77 (striking down a service award of 6 percent); *see also Bostick v. Herbalife Int'l of Am., Inc.*, No. CV 13-2488 BRO (RZx), 2015 WL 3830208, at *6 (C.D. Cal. June 17, 2015) ($10,000 for one named plaintiff); *Boyd v. Bank of Am. Corp.*, No. SACV 13-561 DOC, 2014 WL 6473804, at *7 (C.D. Cal. Nov. 18, 2014) ($15,000 for named plaintiff); *Gino Morena Enters., LLC*, No. CV 13-1332 JM (NLSx), 2014 WL 5606442, at *3 (S.D. Cal. Nov. 4, 2014) ($10,000 each for two named plaintiffs).

Plaintiffs performed critical litigation tasks, including assisting class counsel in investigating the case, communicating with other class members about the status of the litigation,

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 12-9286 PSG (SSx) Date September 13, 2016

Title Luna *et al.* v. Universal City Studios, LLC

and preparing and attending depositions. *Service Awards Mot.* 3:4–18. Plaintiffs also risked retaliation by their current employer or future employers who might later learn that Plaintiffs were involved in class action litigation. *Id.* 3:26–28. Because this litigation has now gone on for more than three years, and resulted in substantial recoveries for other members of the class, the Court looks favorably on the service award request. Accordingly, the Court GRANTS Plaintiffs' motion for incentive awards for the four named Plaintiffs.

III. Conclusion

For the reasons stated above, Plaintiffs' motion for final approval of class settlement and the plan of allocation, and the motions for attorneys' fees, costs, and incentive awards are GRANTED. Accordingly, it is HEREBY ORDERED AS FOLLOWS:

1. The Court approves settlement of the action between Plaintiffs and Defendant, as set forth in the Settlement Agreement as fair, reasonable, and adequate. The Parties are directed to perform their settlement in accordance with the terms set forth in the Settlement Agreement;

2. Class counsel is awarded $532,800 in attorneys' fees and $73,382.82 in costs. Additionally, each named Plaintiff is awarded $10,000. The Court finds that these amounts are warranted and reasonable for the reasons set forth in the moving papers before the Court and the reasons stated in this Order;

3. The Court approves payment in the amount of $7,500 to the California Labor Workforce Development Agency for the settlement of PAGA penalty claims and payment in the amount of $24,000 to Rust Consulting, Inc., the settlement administrator, for settlement administration costs;

4. Rust is authorized to disburse funds pursuant to the terms of the Settlement Agreement and this Order;

5. Without affecting the finality of this judgment in any way, this Court hereby retains exclusive jurisdiction over Defendant and the Settlement Class Members for all matters relating to the Litigation, including the administration, interpretation, effectuation, or enforcement of the Settlement Agreement and this order.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 12-9286 PSG (SSx)	Date	September 13, 2016
Title	Luna *et al.* v. Universal City Studios, LLC		

Exhibit 4

#202

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 14-3242 PSG (PJWx) Date August 15, 2016

Title Colony Cove Properties, LLC v. City of Carson, *et al.*

Present: The Honorable Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): Order re Plaintiff's Motion for Attorney's Fees and Costs

Before the Court is Plaintiff Colony Cove Properties, LLC's motion for attorney's fees and costs. Dkts. #202. After considering the arguments made at the hearing, as well as the moving, opposing, and reply papers, the Court GRANTS IN PART and DENIES IN PART Plaintiff's motion.

I. Background

In April 2006, Plaintiff purchased a mobilehome park in Carson, California. *Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948, 952 (9th Cir. 2011). Plaintiff contends that Defendants the City of Carson and the City of Carson Mobilehome Park Rental Review Board enacted a regulatory taking against Plaintiff's property by denying in part Plaintiff's requests in September 2007 and September 2008 to raise rents at the mobilehome park. *See generally Second Amended Complaint.*

On October 27, 2008, Plaintiff filed suit against Defendants in this Court. *See Colony Cove Props., LLC v. City of Carson, et al.*, CV 8-7065 PA (JWJx), Dkt. #1 (C.D. Cal. Oct. 27, 2008). The Court dismissed the as-applied regulatory taking claim as unripe, holding that Plaintiff was required to first seek just compensation in state court under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *Id.*, Dkt. #28 (Nov. 24, 2009). The Ninth Circuit upheld this ruling. *See Colony Cove*, 640 F.3d at 957–59. The parties then proceeded in state court. *See Colony Cove Props., LLC v. City of Carson*, 220 Cal. App. 4th 840, 863–65 (2013), *as modified on denial of reh'g* (Nov. 18, 2013). The state trial court dismissed Plaintiff's petitions for writ of administrative mandamus, and was upheld on appeal. *Id.* at 864–80.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 14-3242 PSG (PJWx) Date August 15, 2016

Title Colony Cove Properties, LLC v. City of Carson, *et al.*

Plaintiff then refiled its claims in this Court. *See* Dkt. #1. After two rounds of motions to dismiss, Plaintiff was left with its as-applied regulatory taking claim under 42 U.S.C. § 1983 for the denial of its rent-increase applications in 2007 and 2008. Dkt. #57. The case ultimately went to trial, and the jury returned a verdict in favor of Plaintiff. Dkts. #175–76, 182–84, 194–95. Plaintiff was awarded $3,336,056 in compensation. Dkts. #194–95. On May 16, 2016, the Court signed the judgment. Dkt. #200. On May 31, 2016, Plaintiff filed this motion for attorney's fees. Dkt. #202.

II. Legal Standard

Under 42 U.S.C. § 1988, the court may, in its discretion, award the prevailing party in a § 1983 action reasonable attorney's fees and costs. *See Chaudhry v. City of L.A.*, 751 F.3d 1096, 1110 (9th Cir. 2014) ("A party who prevails on a claim under § 1983 is entitled to reasonable attorneys' fees unless special circumstances would render such an award unjust."). To calculate the reasonable fee, courts apply the "lodestar" method, which is the "number of hours reasonably expended on the litigation multiplied by the reasonable hourly rate." *See id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). The lodestar computation is a presumptively reasonable amount under § 1988. *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir. 2013). The court may adjust the lodestar upward or downward based on factors first adopted in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975). *See Klein v. City of Laguna Beach*, 810 F.3d 693, 699 & n.5 (9th Cir. 2016) (discussing the *Kerr* factors). The prevailing party may also recover reasonable "out-of-pocket expenses" that would "normally be charged to a fee paying client" under § 1988. *Dang v. Cross*, 422 F.3d 800, 814 (9th Cir. 2005) (internal quotation marks omitted).

III. Discussion

Plaintiff, as the prevailing party, requests attorney's fees totaling $2,947,135.50 and costs totaling $98,818.96, for a total award of $3,045,954.46. *Mot.* 1, 25.[1] Defendants contend that the reasonable award is $1,955,380.29. *Opp.* 16–17.

A. State Court Fees and Costs

[1] Defendants contend that Plaintiff should not be found to be the prevailing party until the Court rules on Defendants' renewed motion for judgment as a matter of law. *Opp.* 1. The Court denied this motion on August 8, 2016. Dkt. #221.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 14-3242 PSG (PJWx) Date August 15, 2016

Title Colony Cove Properties, LLC v. City of Carson, *et al.*

Prior to the filing of this case, Plaintiff proceeded in state court. *Mot.* 3–7; *Opp.* 3–7. Plaintiff seeks "reasonable attorneys' fees and costs from the California state court proceedings related to the Year 1 and Year 2 applications[.]" *Mot.* 3. The total fees and costs sought for work done in the state court is $443,366.25. *Opp.* 7.

A party can be awarded attorney's fees under § 1988 for work done in an administrative agency or state court outside the § 1983 action itself. *See Rock Creek Ltd. P'ship v. State Water Res. Control Bd.*, 972 F.2d 274, 278 (9th Cir. 1992). The work done outside the § 1983 action must be a "necessary prerequisite" or an "essential step" for compensation to be awarded. *See Bartholomew v. Watson*, 665 F.2d 910, 914 (9th Cir. 1982); *Beltran Rosas v. Cty. of San Bernardino*, 260 F. Supp. 2d 990, 993 (C.D. Cal. 2003). Thus, fees and costs have been awarded under § 1988 and similar statutes where state court proceedings were an essential step because of the *Pullman* abstention rule, *see Bartholomew*, 665 F.2d at 914,[2] and where the parties were required to utilize applicable state administrative proceeding before filing a claim with the Equal Opportunity Employment Commission, *see New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 60–66 (1980), but were denied where a party was not required to exhaust state administrative remedies, *see Webb v. Bd. of Educ. of Dyer Cty., Tenn.*, 471 U.S. 234, 240–41 (1985), and where a party had the option of an administrative proceeding before proceeding to federal district court, *see Rock Creek*, 972 F.2d at 277–79.

Plaintiff argues that the Court should award fees because Plaintiff's trip to state court was a required prerequisite to the § 1983 action. *Mot.* 3–7. Under the Fifth Amendment, there is "no constitutional injury until the plaintiff has availed himself of the state's procedures for obtaining compensation for the injury, and been denied compensation." *Colony Cove*, 640 F.3d at 958 (quoting *San Remo Hotel v. City & Cty. of S.F.*, 145 F.3d 1095, 1102 (9th Cir. 1998)). Thus, for an as-applied § 1983 regulatory taking claim to be ripe, a plaintiff "must demonstrate that 'the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue,'" and "must have sought, and been denied, 'compensation through the procedures the State has provided for doing so.'" *Id.* (quoting *Williamson*, 473 U.S. at 186, 194). In other words, a plaintiff cannot bring an as-applied § 1983 regulatory taking claim in federal court without first going through state court.

Defendants argue that fees and costs are inappropriate because those cases that have allowed fees and costs are distinguishable. *Opp.* 3–7. Defendants explain that the plaintiffs in cases such as *Carey* and *Bartholomew* had a federal claim at the outset, but were required by case law or statute to use a state or administrative process. *See Carey*, 447 U.S. at 64 (plaintiffs

[2] *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 14-3242 PSG (PJWx)	Date	August 15, 2016
Title	Colony Cove Properties, LLC v. City of Carson, *et al.*		

who filed a Title VII discrimination claim with the EEOC prior to exhausting state remedies had their cases referred to the applicable state agency, and their federal case was suspended until the earlier of exhaustion or sixty days); *Bartholomew*, 665 F.2d at 912–13 (federal case in which inmates claimed that prison rules violated due process stayed pending an adjudication in state court of whether the prison rules were consistent with state law under the *Pullman* abstention doctrine). Here, in contrast, Plaintiff's as-applied § 1983 regulatory taking claim did not accrue (i.e. was unripe) until Plaintiff had sought just compensation in state court.

The Court agrees with Plaintiff that fees and costs are appropriate. Although the Court recognizes that an as-applied § 1983 regulatory taking claim does not fit neatly in either bin, the principles that animated the award of fees and costs in *Carey*, *Bartholomew*, and others apply equally here. First, courts that have declined to award fees and costs have done so on the basis that the state or administrative procedure was not mandatory. *See Webb*, 471 U.S. at 241 ("The difference between *Carey* and this case is that in *Carey* the statute that authorized fees, Title VII, also required a plaintiff to pursue available state administrative remedies. In contrast, nothing in § 1983 requires that a plaintiff exhaust his administrative remedies before bringing a § 1983 suit." (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 n.14 (1984))); *Rock Creek*, 972 F.2d at 279 ("An approach to FERC was not a condition precedent to its entry to federal court, as in *New York Gaslight Club.* Nor was the FERC decision rendered as a part of a continuing federal court action, as was the case in [*Sullivan v. Hudson*, 490 U.S. 877 (1989)]. The distinct nature of the two proceedings distinguishes them from the related and dependent proceedings involved in the cases relied on by Rock Creek.").[3] Defendants cite to no case in which the distinguishing feature was the accrual of the federal cause of action.

Second, the *Bartholomew* court, in awarding fees, compared § 1983 to Title VII, noting that both statutes have "the same broad humanitarian and remedial aspect[s]" and "the purpose of the fee award in both civil rights actions is to aid in the enforcement of those rights." 665 F.2d at 913. The Court further noted that "Congress' purpose in authorizing fee awards was to encourage compliance with and enforcement of the civil rights laws. The Fees Awards Act must be liberally construed to achieve these ends." *Id.* (quoting *Dennis v. Chang*, 611 F.2d 1302, 1306 (9th Cir. 1980)). This militates in favor of awarding fees here, as the enforcement of Plaintiff's Fifth Amendment rights, which is the basis of its § 1983 claim, necessarily included a stop in state court to seek just compensation. *See Colony Cove*, 640 F.3d at 957–59.

---

[3] "[T]he additional ripeness requirements of *Williamson County* create a takings claim exception to [the] general requirement that exhaustion is not required in § 1983 suits." *Daniels v. Area Plan Comm'n of Allen Cty.*, 306 F.3d 445, 453 (7th Cir. 2002).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 14-3242 PSG (PJWx) Date August 15, 2016

Title Colony Cove Properties, LLC v. City of Carson, *et al.*

Finally, the *Bartholomew* court noted that awarding fees protects the balance between the state and federal courts. 665 F.2d at 913 ("The federal preference for deferring to state interpretation of state law will further cooperation between state and federal courts in the protection of federal constitutional rights."). As the Supreme Court explained in *Williamson*, the Fifth Amendment does not "require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation." 473 U.S. at 194 (internal quotation marks omitted). Awarding fees for state-court proceedings encourages parties to protect their rights by first seeking just compensation in state court. *See Carey*, 447 U.S. at 63–64; *Bartholomew*; 665 F.2d at 913.[4]

The Court will therefore award Plaintiff its reasonable fees and costs for the proceedings in state court.

B. Lodestar

i. Hours Reasonably Expended

"The fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked." *United States v. $28,000.00 in U.S. Currency*, 802 F.3d 1100, 1107 (9th Cir. 2015) (quoting *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992)). "The district court . . . should exclude from this initial fee calculation hours that were not reasonably expended." *Hensley*, 461 U.S. at 434 (internal quotation marks omitted). Hours not reasonably expended are those that are "excessive, redundant, or otherwise unnecessary." *Id.* A district court may reduce hours by either conducting an hour-by-hour analysis or by making an across-the-board-percentage cut. *See $28,000.00 in U.S. Currency*, 802 F.3d at 1106.

Plaintiff's two lead attorneys, Matthew Close of O'Melveny & Myers LLP ("OMM") and Thomas Casparian of Gilchrist & Rutter ("G&R"), submitted declarations addressing the hours worked. Close states that OMM timekeepers (including attorneys and staff) spent 2,894.2 hours on this case. *Close Decl.* ¶ 23, Ex. 7 (OMM itemized billing entries). OMM, however, only submits 2,562.6 hours for consideration as hours reasonably spent. *Close Decl.* ¶¶ 18, 23.

[4] Defendants argue that Plaintiff was not pursuing a Fifth Amendment or § 1983 claim in state court because it filed a reservation pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). *Opp.* 5–6. The Court is not persuaded that the *England* reservation alters any of the analysis in this section.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 14-3242 PSG (PJWx) Date August 15, 2016

Title Colony Cove Properties, LLC v. City of Carson, *et al.*

OMM voluntarily reduced its time by 331.6 hours, which included the elimination of all hours worked by attorneys who worked on the case for twenty-five or fewer hours, all of OMM's hours from the state-court case, hours based on unsuccessful legal theories, and hours reduced through normal billing judgment. *Close Decl.* ¶¶ 19–22, Ex. 8 (OMM Reductions Summary). Close also states that OMM spent 665.2 hours in the first federal litigation (prior to going to state court), but will not seek reimbursement for those hours. *Id.* ¶ 24. Finally, he states that he and the other OMM timekeepers did their best to minimize costs, and believes that the hours submitted are reasonable in light of the complicated legal and factual elements of the case. *Id.* ¶¶ 26–31. Close notes that the hours might have been lower if not for Defendants' litigation conduct. *Id.* ¶ 30.

Casparian states that G&R timekeepers (including attorneys and staff) spent 2,621.6 hours on this case. *Casparian Decl.* ¶ 22, Exs. 6–7 (G&R Itemized Billing Entries). G&R, however, only submits 2,423.2 hours. *Id.* ¶ 22. G&R voluntarily reduced its time by 198.4 hours, which included the elimination of all hours worked by attorneys who worked on the case for twenty-five or fewer hours, hours based on unsuccessful legal theories, and hours reduced through normal billing judgment. *Id.* ¶¶ 19–22, Ex. 8 (G&R Reduction Summary). He also states that G&R spent significant time in the first federal litigation, but will not seek compensation for those hours. *Id.* ¶ 23. He states that he and the other G&R timekeepers did their best to minimize costs, and believes that the hours submitted are reasonable in light of the complicated legal and factual elements of the case. *Id.* ¶¶ 24–34.

Both attorneys state that Plaintiff has paid all but the most recent fees. *Close Decl.* ¶ 18; *Casparian Decl.* ¶ 18. Courts have recognized that payment of fees by the client supports their reasonableness and appropriateness. *See, e.g.*, *Kilopass Tech., Inc. v. Sidense Corp.*, 82 F. Supp. 3d 1154, 1167 (N.D. Cal. 2015); *Stonebrae, L.P. v. Toll Bros.*, No. C-08-0221-EMC, 2011 WL 1334444, at *6 (N.D. Cal. Apr. 7, 2011), *aff'd*, 521 F. App'x 592 (9th Cir. 2013). Plaintiff also offers an extensive discussion of its litigation conduct at each stage of the case in its opening brief. *See Mot.* 13–18.

Finally, Plaintiff submits a declaration by James King, who applied his professional opinion on the reasonableness of Plaintiff's fees. *See Viveros v. Donahoe*, No. CV 10-08593 MMM EX, 2013 WL 1224848, at *5 (C.D. Cal. Mar. 27, 2013) (relying on King's analysis in determining attorney's fees). King stated that the case was billed reasonably, especially in light of the complexity of the case and the conduct of Defendants. *King Decl.* ¶¶ 38–49. He also believes that Plaintiff's counsel exercised sound billing judgment. *Id.* ¶¶ 50–51.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 14-3242 PSG (PJWx) Date August 15, 2016

Title Colony Cove Properties, LLC v. City of Carson, *et al.*

Defendants make a number of individual challenges to the hours sought by Plaintiff. First, they argue that the Court should reduce excessive and duplicative hours related to the state court litigation:

- G&R spent 94 hours on a reply to the opposition to the petition for writ of mandate, but only spent 88.4 hours on the moving papers. Defendants recommend that the Court reduce the fee awarded for the work on the reply by 50% ($21,977.50) because replies normally take less time.

- Three G&R attorneys spent 28.2 hours preparing for and attending the hearing for the petition for writ of mandate. Defendants state that it is unclear why three attorneys were needed, and recommend striking the amount of the lowest billing attorney ($4,689.50).

- Three G&R attorneys spent 52.8 hours on the petition for rehearing. Defendants recommend reducing the award by 50% ($14,272.50) because it is not clear why three attorneys were needed, and the petition was denied.

- Three G&R attorneys spent 49.2 hours on the petition for review in the California Supreme Court. Defendants recommend that the Court reduce the hours by 50% ($10,743) because it is not clear why three attorneys were needed and the petition was denied.

- Two G&R attorneys spent 30.3 hours seeking amicus support for the California Supreme Court. Defendants recommend eliminating this fee entirely ($18,802) because the necessity of the work is unclear, the petition was denied, and no amicus brief was ever filed.

Opp. 8–9; *Ailin Decl.*, Ex. 1.

The Court does not agree with any of Defendants' requests. Defendants' heavy focus on the number of attorneys involved on the various matters is misleading. The Court's job is to determine whether hours are excessive, unnecessary, or redundant. *See Hensley*, 461 U.S.at 434. The fact that three attorneys spent, for example, 52.8 hours on the petition for rehearing is only relevant if 52.8 hours is an unreasonable amount of time to spend on a petition for rehearing, or if the three attorneys performed duplicative or unnecessary tasks. Defendants do not supply any of this information. *Cf. Chabner v. United of Omaha Life Ins. Co.*, No. C-95-0447 MHP, 1999 WL 33227443, at *4 (N.D. Cal. Oct. 12, 1999) ("Common sense dictates that a single task can

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 14-3242 PSG (PJWx) Date August 15, 2016

Title Colony Cove Properties, LLC v. City of Carson, *et al.*

be broken down over several discrete time periods and that a number of people might contribute to one end product."). Moreover, Plaintiff offers rational explanations for many of these hour allocations. *See Casparian Supp. Decl.* ¶¶ 6–11 (explaining, among other things, that Defendants' opposition to the petition for writ of mandate raised a number of new issues that needed to be addressed in the reply, and that two requests to file amicus letter briefs were submitted to the California Supreme Court). Finally, the Court does not believe that the fact that Plaintiff's petitions were denied makes them less worthy of compensation in the context of this case.

Second, Defendants argue that Plaintiff spent an excessive amount of time opposing Defendants' first motion to dismiss. *Opp.* 10. Defendants note that Plaintiff spent 157.1 hours opposing the first motion to dismiss, and 48.4 hours opposing the second motion to dismiss. *Id.* They argue that the disparity between the two amounts indicates that Plaintiff likely spent too much time on the first motion, and suggest that the Court reduce the amount awarded to the first motion by one third ($30,124.33). *Id.* After reviewing the motions and the Court's own order, the Court agrees with Defendants that 157.1 hours seems a bit high, and that the one-third reduction is fair.

Third, Defendants argue that Plaintiff's staffing was not as efficient as Plaintiff and its expert contend. *Opp.* 10–12. Specifically, Defendants challenge the amount of attorneys (four) present at the two mediation sessions and the amount of people (eight) present at trial. *Id.* Defendants recommend cutting 50% of the fees for the mediations ($13,858.75), and cutting the trial time for two of OMM's lawyers and one of G&R's lawyers ($50,326). *Id.* The Court disagrees. Plaintiff adequately explains its staffing at the mediations and trial. *Reply* 10; *Close Decl.* 6–8. Defendants also had four attorneys at the second mediation session, and the fact that one was acting in her capacity as the city attorney and one was acting in his capacity as the mayor is a distinction without a difference. And, although Plaintiff had eight *people* in the courtroom at various points throughout trial, only six of them were attorneys. Defendants themselves used five attorneys. The Court, from its own perspective, saw nothing excessive, unusual, or unnecessary about Plaintiff's representation. Finally, the Court cannot discount that Plaintiff won a difficult, technical, and complex case in which their claim was not a clear-cut winner. *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) ("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.").

Fourth, Defendants attack the fees charged for certain clerical tasks:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 14-3242 PSG (PJWx) Date August 15, 2016

Title Colony Cove Properties, LLC v. City of Carson, *et al.*

- 14 hours by two G&R employees who billed at paralegal billing rates for supposedly clerical tasks. Defendants suggest either eliminating all fees ($4,036) or reducing the fee for each hour to $100 (lowering the amount to $1,400).

- The trial work done by two OMM employees. Defendants recommend either eliminating all fees ($29,289) or reducing the fees for each hour worked to $100 (lowering the amount to $11,240).

- Fees for in-house proofreading. Defendants recommend denying all fees ($1,519.05).

Opp. 15–16. Clerical tasks should be subsumed into the firm's overhead and not billed at paralegal rates. *See Nadarajah v. Holder*, 569 F.3d 906, 921 (9th Cir. 2009); *Pierce v. Cty. of Orange*, 905 F. Supp. 2d 1017, 1031 (C.D. Cal. 2012). After reviewing the billing entries and the explanations in the reply and supplemental declarations, the Court agrees that the proofreading hours are clerical, but finds that the fourteen hours spent by the G&R employees (which involved discovery and document review work) and the trial work by the OMM employees was not merely clerical and is appropriately charged at paralegal billing rates. *See Reply* 10–11; *Close Supp. Decl.* ¶¶ 10–13; *Casparian Supp. Decl.* ¶¶ 14–17.

Fifth, Defendants challenge a number of discrete billing entries:

- One G&R attorney spent 2.4 hours preparing for a deposition. Defendants claim that the deposition occurred weeks earlier, so no fees should be awarded for this time ($1,688).

- One OMM attorney billed 2.8 hours for attending trial the day after the verdict. Defendants suggest that the Court award no fees for this ($2,170).

- OMM spent 3.1 hours on a trial brief that was never filed. Defendants recommend awarding no fees for this time ($3,022.50).

- Daniel Tully, an attorney for OMM, spent 26.3 hours researching and preparing issue modules. Defendants contend that this time was excessive, and recommends reducing it by half ($6,772.25).

- Tully spent 7.5 hours on tasks that appear to be duplicative of those performed by another OMM attorney, Dimitiri Portnoi. Defendants suggest awarding no fees for these duplicative hours ($3,862.50).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 14-3242 PSG (PJWx) Date August 15, 2016

Title Colony Cove Properties, LLC v. City of Carson, *et al.*

Opp. 9, 12. The Court disagrees that fees should be reduced for the G&R attorney or for Tully's time. Plaintiff adequately explains in reply that, notwithstanding a clerical error in the description, the G&R attorney was reviewing the deposition transcript, not preparing for it. *Reply* 11. Plaintiff also adequately explains that Tully's time was necessary and not duplicative of Portnoi's work. *See id.* 11–12. Plaintiff concedes, however, that the 2.8 hours for attending trial was erroneous and withdraws the request. *Id.* 12 n.9. The Court will also reduce the fees for the 3.1 hours spent on the unfiled trial brief; although Plaintiff states that it used the language from that brief elsewhere, and indeed lauded itself for not making a frivolous filing, the Court does not believe it has enough information to confirm the reasonableness of those hours.

The Court otherwise finds that Plaintiff's hours were hours reasonably expended.

ii. Reasonable Hourly Rate

"[T]he established standard when determining a reasonable hourly rate is the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation." *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008) (internal quotation marks omitted); *see $28,000.00 in U.S. Currency*, 802 F.3d at 1106. "To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. As we have noted, affidavits of the plaintiffs' attorneys and other attorneys regarding prevailing fees in the community, and rate determinations in other cases are satisfactory evidence of the prevailing market rate." *Camacho*, 523 U.S. at 980 (alterations, citations, and internal quotation marks omitted) (quoting *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984), and *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990)).

Close and Casparian addressed the fees sought by them and their co-workers. The fees sought for OMM ranged from $870 to $975 for the partner, $630 to $775 for the counsel, $415 to $655 for the associates, and $225 to $285 for support staff. *Close Decl.* ¶¶ 12–14. The fees sought for G&R attorneys ranged from $475 to $695 for senior partners and $420 to $540 for junior partners. *Casparian Decl.* ¶ 14. Both stated that they believed the fees sought by themselves and their co-counsel were in line with the prevailing market rates for attorneys of similar skill and reputation in the community. *Close Decl.* ¶¶ 12–16, 31–32; *Casparian Decl.* ¶¶

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 14-3242 PSG (PJWx) Date August 15, 2016

Title Colony Cove Properties, LLC v. City of Carson, *et al.*

13–16. Both attorneys also noted that Plaintiff has paid all but the most recent pending bills in full. *Close Decl.* ¶ 18; *Casparian Decl.* ¶ 18.

King also discussed the reasonableness of the hourly rates. King based his focus on fees and fee awards in the Central District of California, as well as the Northern and Southern Districts of California (which he believes compensate similarly). *King Decl.* ¶ 4; *see Shirrod v. Dir., Office of Workers' Comp. Programs*, 809 F.3d 1082, 1087 (9th Cir. 2015) ("[W]e typically recognize the forum where the district court sits as the 'relevant community' for purposes of fee-shifting statutes."). King states that the fees charged by the attorneys at OMM and G&R are in line with firms of their caliber in the relevant communities. *King Decl.* ¶¶ 37, 52–65. He cites to a number of recent cases in the Central, Northern, and Southern districts of California that accepted hourly billing rates as reasonable that are in line with those sought by OMM and G&R. *Id.* ¶¶ 56–63, 65. King also lists the partner fee rates of other comparable firms to OMM, which are similar to those sought by OMM. *Id.* ¶ 64.

The Court finds that Plaintiff has met its "initial burden of production, under which it must 'produce satisfactory evidence' establishing the reasonableness of the requested fee." *$28,000.00 in U.S. Currency*, 802 F.3d at 1105. The burden thus shifts to Defendants. *See id.* Defendants do not directly challenge any of the evidence presented. *See Opp.* 12–14. Instead, Defendants challenge the reasonableness of the rates on the ground that the fees sought by the OMM lawyers are much higher than those sought by the G&R lawyers, even though many of the G&R lawyers are more experienced than the OMM lawyers charging higher rates. *Id.* Defendants state that "[i]deally, the City would propose O'Melveny's hourly rates be reduced to rates charge for similarly experienced attorneys at G&R, which has greater expertise in the subject matter of this case." *Id.* 14. In the alternative, Defendants recommend slashing OMM's overall attorney's fees by one-third (for a reduction of $497,628.50). *Id.*

Defendants' recommendation is not well taken. Courts have recognized that fees charged at large, national firms may exceed those of smaller, local firms. *See, e.g.*, *Heller v. District of Columbia*, 832 F. Supp. 2d 32, 46–47 (D.D.C. 2011); *Tlacoapa v. Carregal*, 386 F. Supp. 2d 362, 369–70 (S.D.N.Y. 2005); *Algie v. RCA Glob. Commc'ns, Inc.*, 891 F. Supp. 875, 895 (S.D.N.Y. 1994), *aff'd*, 60 F.3d 956 (2d Cir. 1995). Moreover, Defendants hinge their arguments in large part on the greater experience of the G&R attorneys in the issues related to this case. *Opp.* 12–14. But the Court agrees with Plaintiff that the novel, complex litigation and constitutional issues justified bringing in a firm of OMM's magnitude, skill, and experience. *See Mot.* 9–10.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 14-3242 PSG (PJWx) Date August 15, 2016

Title Colony Cove Properties, LLC v. City of Carson, *et al.*

The Court thus finds that Plaintiff has proposed reasonable hourly fees for its attorneys. Plaintiff supports these fees with evidence that goes unchallenged by Defendants. *See $28,000.00 in U.S. Currency*, 802 F.3d at 1105–06. These fees are also reasonable based on the Court's own understanding of the fees charged by firms in this district. The Court therefore awards Plaintiff the fees as set forth in the Close and Casparian Declarations. *See Close Decl.* ¶¶ 12–14; *Casparian Decl.* ¶ 14.

iii. Lodestar Calculation and Kerr *Factors*

Plaintiff's requested billing rates and hours expended lead to a lodestar value of $2,947,135.50. *See Mot.* 25. Although the Court approved of all the proposed billing rates, it found that certain discrete hours were not reasonably expended and decided to deduct the following: (1) a $30,124.33 reduction for the opposition to the first motion to dismiss, (2) a $1,519.05 reduction for in-house proofreading, (3) a $2,170 reduction for time erroneously billed, and (4) a $3,022.50 reduction for the unfiled trial brief. Thus, the Court's lodestar value for Plaintiff is $2,910,299.62.

Neither party requests any upward or downward departure under the *Kerr* factors. The Court similarly believes that an upward or downward departure is not appropriate. The Court therefore awards Plaintiff $2,910,299.62 in attorney's fees.

C. Costs

Plaintiff may also recover certain reasonable expenses under § 1988. *See Dang*, 422 F.3d at 814; *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994). "The Supreme Court has provided two guidelines addressing the scope of attorney's fees as applied to litigation expenses. First, reasonable attorney's fees do not include costs that, like expert fees, have by tradition and statute been treated as a category of expenses distinct from attorney's fees. Second, reasonable attorney's fees include litigation expenses only when it is the prevailing practice in a given community for lawyers to bill those costs separately from their hourly rates." *Trustees of Const. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1258 (9th Cir. 2006) (internal quotation marks omitted) (citing *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 99–100 (1991), and *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 286–87 (1989)). Plaintiff seeks $98,818.96 in non-taxable costs, which includes "(1) local travel expenses; (2) mediation fees; (3) messenger and delivery costs; (4) copying and document-processing costs; (5) research expenses; (6) professional services/consultant fees; and (7) certain discovery-related costs." *Mot.* 23–25; *Close Decl.* ¶¶ 33–44, 46, Exs. 10–19; *Casparian Decl.* ¶¶ 35–44, Exs. 9–22. Close notes that OMM wrote off roughly 10% of costs. *Close Decl.* ¶ 46.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 14-3242 PSG (PJWx) Date August 15, 2016

Title Colony Cove Properties, LLC v. City of Carson, *et al.*

Defendants challenge three costs: (1) data hosting fees ($8,419.29), (2) graphics consultants ($1773.75), and (3) jury consultants ($5,408). *Opp.* 16. Plaintiff responds that all of these costs were reasonable, and it is the prevailing practice to bill these costs separately from hourly rates. *Reply* 12 (citing *Close Decl.* ¶¶ 33–34, and *Close Supp. Decl.* ¶¶ 14–16). Case law also supports that these costs are recoverable. *See Gilster v. Primebank*, 884 F. Supp. 2d 811, 881 (N.D. Iowa 2012), *rev'd on other grounds*, 747 F.3d 1007 (8th Cir. 2014) (jury consulting fees); *Jardin v. DATAllegro, Inc.*, No. 08-CV-1462-IEG WVG, 2011 WL 4835742, at *6–7 (S.D. Cal. Oct. 12, 2011) (document conversion); *DiBella v. Hopkins*, 407 F. Supp. 2d 537, 539–40 (S.D.N.Y. 2005) (graphics consultants). Finally, Plaintiff notes that it incurred the document conversion fees in large part because Defendants produced unusable documents in discovery. *Close Decl.* ¶ 37. The Court thus finds that these costs (as well as the rest of Plaintiff's costs) are reasonable and recoverable.

IV. Conclusion

The Court thus GRANTS IN PART and DENIES IN PART Plaintiff's motion for fees and costs under § 1988. Defendants must pay Plaintiff $2,910,299.62 in attorney's fees and $98,818.96 in costs.

IT IS SO ORDERED.

Exhibit 5

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

#189 (10/26 HRG OFF)

CIVIL MINUTES - GENERAL

Case No. CV 13-728 PSG (AJWx) Date October 23, 2015

Title Vahan Eksouzian, *et al.* v. Brett Albanese, *et al.*

Present: The Honorable Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): Order GRANTING IN PART and DENYING IN PART Plaintiffs' motion for an award of attorney's fees and costs

Before the Court is Plaintiffs Vahan Eksouzian, Cloud V Enterprises, and Vape A Cloud, Inc.'s motion for an award of attorney's fees and expenses. Dkt. #189. The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. After considering the moving, opposing, and reply papers, the Court GRANTS IN PART and DENIES IN PART Plaintiffs' motion.

I. Background

In February 2013, Plaintiffs filed suit against Defendants Brett Albanese and Cloud Vapez, Inc. for trademark and copyright infringement, among other things, arising out of Defendants' allegedly improper use of Plaintiffs' intellectual property. Dkt. #1. After extensive motions practice and discovery, the parties undertook settlement discussions. *Mot.* 3. The parties ultimately agreed to a settlement, which was incorporated into the Court's August 6, 2014 dismissal order. Dkt. #90; *see also* Dkt. #89 (stipulation of dismissal).

A little over one month later, Plaintiffs filed a motion to enforce the Settlement Agreement. Dkt. #188 ["Judge Nagle 8/7/15 Order"] at 1. Plaintiffs contended that Defendants violated various provisions of the Settlement Agreement relating to intellectual property use and failed to pay a $35,000 payment owed pursuant to the Settlement Agreement. *Id.* at 1–2. Defendants contested these allegations. *Id.* at 2. The parties again extensively litigated the issues. *Mot.* 4–7. On August 7, 2015, Judge Margaret A. Nagle granted Plaintiff's motion. Dkt. #188. On August 21, 2015, Plaintiffs brought this motion for attorney's fees and expenses. Dkt. #189.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 13-728 PSG (AJWx) Date October 23, 2015

Title Vahan Eksouzian, *et al.* v. Brett Albanese, *et al.*

II. Legal Standard

The Settlement Agreement allows "the prevailing party" in any dispute "arising out of or related to or to enforce" the Settlement Agreement to recover its "reasonable attorneys', (sic) fees, costs and expenses" incurred as a result of the dispute. *Shenkman Decl.*, Ex. 1 ["Settlement Agreement"] § VI.B. "An agreement to settle a legal dispute is a contract and its enforceability is governed by familiar principles of contract law. . . . The construction and enforcement of settlement agreements are governed by principles of local law which apply to interpretation of contracts generally." *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989). Under California Civil Code § 1717, the prevailing party in a dispute over a contract that specifically provides for fee awards shall be entitled to reasonable attorney's fees as determined by the court.

California courts typically apply the lodestar method to determine the attorney's fee award, which multiples the hours reasonably expended by the reasonable hourly rate. *See PLCM Grp. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000), *as modified* (June 2, 2000). The lodestar calculation may then be adjusted "based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided." *Id.*[1] "It is only when a plaintiff has achieved limited success or has failed with respect to distinct and unrelated claims, that a reduction from the lodestar is appropriate." *Hogar v. Cmty. Dev. Com. of City of Escondido*, 157 Cal. App. 4th 1358, 1369 (2007), *as modified* (Jan. 10, 2008). "[T]he trial court has broad authority to determine the amount of a reasonable fee." *PLCM*, 22 Cal. 4th at 1094–95.

III. Discussion

A. Prevailing Party

The threshold question is whether Plaintiffs are the "prevailing party." In *Hsu v. Abbara*, the California Supreme Court explained:

> In deciding whether there is a "party prevailing on the contract," the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs,

[1] "Under [*Serrano v. Priest*, 20 Cal. 3d 25 (1977)], the lodestar is the basic fee for comparable legal services in the community; it may be adjusted by the court based on factors including, as relevant herein, (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award." *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132 (2001).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 13-728 PSG (AJWx) Date October 23, 2015

Title Vahan Eksouzian, *et al.* v. Brett Albanese, *et al.*

> opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by a comparison of the extent to which each party has succeeded and failed to succeed in its contentions.

9 Cal. 4th 863, 876 (1995); *see also Garzon v. Varese*, No. CV 09-9010 PSG PLAX, 2011 WL 103948, at *2 (C.D. Cal. Jan. 11, 2011) (citing *Hsu*). Plaintiffs contend that they are the "prevailing party" because they "achieved every one of their litigation objectives." *Mot.* 8 (emphasis omitted). Defendants do not dispute this, but argue that "Plaintiffs cannot rightly be adjudged the prevailing party" because Plaintiff also allegedly breached the Settlement Agreement and acted unethically during the course of litigation. *Opp.* 1–2.

Regardless of whether these allegations are true, they do not affect whether Plaintiffs are the "prevailing party." *See Susilo v. Wells Fargo Bank, N.A.*, No. CV 11-1814 CAS PJWX, 2013 WL 1970064, at *3 (C.D. Cal. May 6, 2013) ("In line with this analysis, a court cannot deny fees to a successful litigant merely because that litigant exhibits unsympathetic characteristics unrelated to litigation success."); *Int'l Fid. Ins. Co. v. Draeger Const., Inc.*, No. 10-CV-04398-LHK, 2012 WL 424994, at *5 (N.D. Cal. Feb. 8, 2012) ("[W]hen the results of the litigation on the contract claims are not mixed-that is, when the decision on the litigated contract claim is purely good news for one party and bad news for the other . . . a trial court has no discretion to deny attorney fees to the successful litigant." (quoting *Hsu*, 9 Cal. 4th at 875–76)). After reviewing the briefing and Judge Nagle's August 7, 2015 order, the Court is convinced that Plaintiffs are the prevailing party and that fees are thus owed. The Court now turns to the question of the reasonable fee.

B. Reasonable Fee Calculation

i. Reasonable Hourly Rate

"The reasonable hourly rate is that prevailing in the community for similar work." *Gustafson v. U.S. Bank*, No. CV 13-5916 PSG SHX, 2014 WL 302242, at *5 (C.D. Cal. Jan. 27, 2014) (quoting *PLCM*, 22 Cal. 4th at 1095). This can take into account "the level of skill necessary, time limitations, the amount to be obtained in the litigation, the attorney's reputation, and the undesirability of the case." *Ketchum v. Moses*, 24 Cal. 4th 1122, 1139 (2001) (internal quotation marks omitted). The burden is on the fee applicant to show that its requested rates are reasonable. *See Gustafson*, 2014 WL 302242, at *5.

Plaintiffs request a rate of $585 per hour for their attorney, Kevin Shenkman ("Shenkman") of Shenkman & Hughes. *Shenkman Decl.* ¶¶3, 6. Shenkman, a partner at the firm with thirteen years of experience, states that $585 is the rate that the firm regularly charges

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 13-728 PSG (AJWx) Date October 23, 2015

Title Vahan Eksouzian, *et al.* v. Brett Albanese, *et al.*

its clients. *Id.* ¶¶4, 6. Shenkman states that his firm has seen a recent increase in demand for its business after several notable court victories. *Id.* ¶7. He also lists several decisions which have awarded him the $585 hourly rate, as well as other decisions that awarded him his older billing rate of $550 per hour. *Id.* ¶¶8–9. Plaintiffs' motion notes that $585 is less than the hourly rates found in a 2012 San Francisco Daily Journal Article and the Laffey Matrix, *Mot.* 13, which are $797 and $661, respectively. *Shenkman Decl.*, Ex. 2 ["Laffey Matrix"], Ex. 3 ["SF Daily Journal Rates"].

Defendants dispute the requested rate on two grounds. First, they argue that the case here was not much more than a "garden variety state law breach of contract action," and courts have found the reasonable rate in similar cases to be $265 to $275 per hour, so a reasonable rate in this case is closer to $300 per hour. *Opp.* 17. They also argue that the Laffey Matrix measures rates in Washington D.C., not Los Angeles, and has received a mixed reception in this circuit. *Id.* 16–17.

The Court shares some of Defendants' concerns. Although the trademark issues in this case belie Defendants' contention that this was a mere state-law case, *see Judge Nagle 8/7/15 Order* at 3–19, it is not clear that the fees previously awarded to Shenkman & Hughes represent the appropriate rate for the representation required for this case, *see Gustafson*, 2014 WL 302242, at *5 (analyzing the rate in the community for "similar work"); *Hopkins v. Wells Fargo Bank, N.A.*, No. CIV. 2:13-444 WBS, 2014 WL 2987753, at *4 (E.D. Cal. July 1, 2014) (same); *cf. United States v. $28,000.00 in U.S. Currency*, No. 13-55266, 2015 WL 5806325, at *4 (9th Cir. Oct. 6, 2015) (noting that the district court improperly ignored evidence of rates from lawyers with the same specialty as the fee applicant).[2]

The Court is also skeptical about the propriety of the Laffey Matrix because it (a) represents hourly rates for lawyer services in Washington D.C.; and (b) does not break down rates by practice area. *See Laffey Matrix*. Although some courts have taken the Laffey Matrix into account in calculating the reasonable fee, others have found it unhelpful. *See Perfect 10, Inc. v. Giganews, Inc.*, No. CV 11-07098-AB SHX, 2015 WL 1746484, at *16 (C.D. Cal. Mar. 24, 2015) (collecting cases on both sides). The San Francisco Daily Journal does offer rates by region, but similarly fails to offer any specificity beyond that. *See SF Daily Journal Rates*. Instead, the Court finds the 2014 Real Rate Report to be a much better barometer of the reasonable rates in the Central District. As Judge Fisher explained in *Hicks v. Toys 'R' Us-Delaware, Inc.*:

[2] For example, one of the cases in which Shenkman was awarded $550 per hour was a major voting-rights case that was the first-ever trial of its kind. *Shenkman Decl.* ¶¶7–8, Ex. 4.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 13-728 PSG (AJWx) Date October 23, 2015

Title Vahan Eksouzian, *et al.* v. Brett Albanese, *et al.*

> The Court finds the 2013 Real Rate Report Snapshot (Real Rate Report), a CEB and TyMetrix publication that identifies attorney rates by location, experience, firm size, areas of expertise, and industry, as well as the specific practice areas, to be much more persuasive, as it is based on actual legal billing, matter information, and paid and processed invoices from more than 80 companies—a much better reflection of true market rates than self-reported rates in all practice areas as part of a national survey of top firms.

No. CV13-1302-DSF JCGX, 2014 WL 4670896, at *1 (C.D. Cal. Sept. 2, 2014) (footnotes omitted); *see also Tallman v. CPS Sec. (USA), Inc.*, 23 F. Supp. 3d 1249, 1258 (D. Nev. 2014) (considering the Real Rate Report); *G.B. ex rel. N.B. v. Tuxedo Union Free Sch. Dist.*, 894 F. Supp. 2d 415, 433 (S.D.N.Y. 2012) (same); *but see Hicks v. Vane Line Bunkering, Inc.*, No. 11 CIV. 8158 KBF, 2013 WL 1747806, at *9 (S.D.N.Y. Apr. 16, 2013) (critiquing the 2012 edition of the Real Rate Report), *aff'd sub nom. Hicks v. Tug PATRIOT*, 783 F.3d 939 (2d Cir. 2015), *cert. denied sub nom. Vane Line Bunkering, Inc. v. Hicks* (2015).

The 2014 Real Rate Report offers a few relevant datapoints for fees in the Central District. First, the Report states that the median rate for litigation partners in Los Angeles is $500. *Real Rate Report* at 71. Second, the Report states that partners in Los Angeles across all specialties and firm sizes with less than twenty-one years of experience have a median hourly rate of $500.91. *Id.* at 86. Third, the Report states that trademark partners have a median rate of $435 in Los Angeles. *Id.* at 144. Finally, the Report states that partners in firms with fifty or fewer lawyers have a median rate of $366.06 for general commercial litigation and $379.25 for intellectual property litigation. *Id. at* 169, 171.

After considering all of the evidence, the Court believes that $475 is a reasonable hourly rate for the services in this case. The Court recognizes that the $585 rate is what Plaintiffs charge their clients, *see Moore v. James H. Matthews & Co.*, 682 F.2d 830, 840 (9th Cir. 1982) (noting that "[b]illing rates usually reflect, in at least a general way, counsel's reputation and status (i.e., as partner, associate, or law clerk)"), and that other courts have awarded the $585 rate in the past, *see Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 980–81 (9th Cir. 2008) (considering rates in other cases). But it is not clear that Plaintiffs' counsel have received those rates for *the type of work required for this case*, and data in the 2014 Real Rate Report suggests that such rates would be a bit high. At the same time, Defendants' suggested rate of $300 is much too low. The Court believes that an hourly rate of $475 best approximates the reasonable market value for the services rendered in this case.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 13-728 PSG (AJWx) Date October 23, 2015

Title Vahan Eksouzian, *et al.* v. Brett Albanese, *et al.*

ii. Hours Reasonably Expended

Attorney's fees ordinarily cover all hours reasonably spent, but excessive, inefficient, or duplicative work does not merit compensation. *See Gustafson*, 2014 WL 302242, at *5. The fee applicant bears the burden of documenting the hours reasonably worked and submitting evidence in support of those hours. *See Salameh v. Tarsadia Hotel*, No. 09CV2739-GPC BLM, 2014 WL 3797283, at *2 (S.D. Cal. July 31, 2014). California courts however, "do not require detailed time records"; fees awards can be "based on declarations of counsel describing the work they performed and the court's own review of the number of hours reasonably spent." *Id.* (citing *Syers Properties III, Inc. v. Rankin*, 226 Cal. App. 4th 691, 698 (2014), *review denied* (Sept. 10, 2014), and *Trustees of Cent. States, Se. & Sw. Areas Pension Fund v. Golden Nugget, Inc.*, 697 F. Supp. 1538, 1558 (C.D. Cal. 1988)).

Shenkman provided a detailed accounting of his hours. *Shenkman Decl.*, Ex. 5 ["Shenkman Time Records"], Ex. 6 ["Shenkman Task Records"]; *see also Shenkman Decl.* ¶¶10–11. They amount to 255.2 total hours. *Mot.* 12. Plaintiffs contend that all of the work was necessary to the success of the litigation. *Mot.* 12. Plaintiffs also note that two categories of hours were not included in the 255.2 total. Shenkman exercised his "billing judgment" and deleted thirty hours from his time records that he felt "took only a small amount of time" or "did not appear reasonably necessary to the litigation." *Id.*; *Shenkman Decl.* ¶10. Shenkman also did not include 38.1 hours related to the declarations of Michael Hesser and Lily Harutyunyan. *Shenkman Decl.* ¶10. These declarations were determined to be false and were ultimately withdrawn. *Mot.* 15; *Judge Nagle 8/7/15 Order* at 16 n.9, 19 n.11.

Defendants bring two main objections to the hours. First, they argue that 15.7 hours should be eliminated because the hours were not spent on enforcement of the Settlement Agreement or were spent on clerical tasks. *Opp.* 17–19 (detailing these disputed hours). Second, they argue that an additional 21.9 hours should be eliminated because the hours were block billed and spent on clerical tasks. *Id.* 19–22 (detailing these disputed hours).

Plaintiffs, in their Reply, respond to these arguments. *Reply* 15–20. The Reply, however, suffers from two major problems. First, the Reply, at twenty-two pages, is nearly double the twelve-page limit in the Court's Standing Order. *See Standing Order* ¶5(c) ("Replies shall not exceed 12 pages."). Second, the Reply, which was e-filed on October 12, Dkt. #194, was late. The Standing Order states that "all reply papers due on a holiday must be filed the preceding Friday." *See Standing Order* ¶5(a). Here, the hearing date is October 26, 2015, so a reply was due by Monday, October 12. Local Rule 7-10. That day was a court holiday, https://www.cacd.uscourts.gov/clerk-services/court-holidays, so Plaintiffs' failure to file their reply by the preceding Friday, October 9, violates the Standing Order.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 13-728 PSG (AJWx) Date October 23, 2015

Title Vahan Eksouzian, *et al.* v. Brett Albanese, *et al.*

The Court, at its discretion, may refuse to consider pages or briefing that violates its standing orders. *See Sweet v. Pfizer*, 232 F.R.D. 360, 364 n.6 (C.D. Cal. 2005) (noting that the court had discretion to consider an oversized reply); *see, e.g.*, *Scientific Weight Loss, LLC v. U.S. Med. Care Holdings, LLC*, No. CV 08-2852PSG(FFMX), 2009 WL 2151365, at *5 (C.D. Cal. July 15, 2009) (declining to consider arguments outside the page limit in an oversized reply). The Court will therefore not consider the arguments made in rebuttal to Defendants' reasonable hour arguments and will not compensate Plaintiffs for those hours.

The Court is otherwise satisfied that Plaintiffs have presented hours that were reasonably expended in the course of litigation. The Court will therefore compensate Plaintiffs for 217.9 hours.[3]

iii. Other Considerations

The lodestar calculation may be adjusted, at the Court's discretion, based on a consideration of factors specific to the case. *See PLCM*, 22 Cal. 4th at 1095. This can include increasing the amount of fees. *See Chodos v. Borman*, 227 Cal. App. 4th 76, 95 (2014) (noting that multipliers have been applied in § 1717 cases), *as modified on denial of reh'g* (July 9, 2014), *review denied* (Oct. 22, 2014). Plaintiffs, however, decline to request an enhancement or multiplier of the lodestar amount:

> While the [*Serrano v. Priest*, 20 Cal. 3d 25 (1977)] factors would otherwise support application of a fee multiplier, Plaintiffs nonetheless do not request a multiplier here. Plaintiffs recognize that portions of the declaration testimony of Lily Harutyunyan and Michael Hesser were untrue, and as a consequence it is inappropriate for Plaintiffs to request a multiplier . . . .

Mot. 15.

Defendants believe that greater sanctions are necessary. They argue that Plaintiffs' introduction of perjurious declarations, and failure to immediately withdraw the declarations when Plaintiffs learned that they were untrue, should result in either dismissal of the matter or the denial of all fees. *Opp.* 10–13. Defendants also note that Judge Nagle, in her August 7, 2015 order, indicated that she would be inclined to cut any fee award in half due to the submission of the perjurious declarations. *Id.* 2–3 (citing *Judge Nagle 8/7/15 Order* at 19 n.11).

[3] The Court reached this figure by subtracting 37.3 hours from the 255.2 requested. The Court used 37.3 and not Defendants' requested 37.6 because it appears that Defendants double-challenged 0.3 hours for March 23, 2015 court correspondence. *Compare Opp.* 18, *with id.* 20.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 13-728 PSG (AJWx) Date October 23, 2015

Title Vahan Eksouzian, *et al.* v. Brett Albanese, *et al.*

Defendants rely heavily on *Franchitti v. Bloomberg, L.P.*, in which the court denied attorney's fees to the prevailing party because the party concealed information during litigation and "the importance of telling the truth in judicial proceedings is just too great." 411 F. Supp. 2d 466, 470 (S.D.N.Y. 2006). At least one California district court, however, has distinguished *Franchitti*. In *Campbell v. National Passenger Railroad Corp.*, a civil rights case, the court held that perjurious testimony did not require a denial of fees because doing so could chill the ability of victims to get competent counsel. 718 F. Supp. 2d 1093, 1097–98 (N.D. Cal. 2010). The *Campbell* court relied on the Sixth Circuit's decision in *Price v. Pelka*, which found perjury insufficient for a denial of fees where the perjurious testimony was of little value to the case, the attorney was not alleged to have contributed to the perjury, and there was concern that denying fees would chill the ability of plaintiffs to get competent counsel. 690 F.2d 98, 101–02 (6th Cir. 1982).

To the extent the Court was inclined to penalize Plaintiffs for the declarations, it believes that the denial of a multiplier is sufficient. As both the *Campbell* and *Franchitti* courts recognized, fee awards are within the sound discretion of the district court and must take into account the specific facts of the case. *See Campbell*, 718 F. Supp. 2d at 1097–98; *Franchitti*, 411 F. Supp. 2d at 469–70. Here, Plaintiffs prevailed on all main issues, and there is no indication that the declarations affected the decision-making process in any material way or that Shenkman submitted them knowing that they were false. *See Price*, 690 F.2d at 101–02. Although the Court recognizes that Judge Nagle suggested that a 50 percent fee cut may be appropriate, *see Judge Nagle 8/7/15 Order* at 19 n.11, it believes, after considering the fee application and the case in its entirety, that Plaintiffs' proposed penalty is all that needs to be done.

Two other issues must be addressed as well. First, Defendants appear to argue that fees should be reduced because Plaintiffs also breached the Settlement Agreement. *Opp.* 1–2, 4. The Court, however, does not find this a proper basis to reduce fees because it is not relevant to whether Plaintiffs were the prevailing party on *their claims* of breach. *See Susilo*, 2013 WL 1970064, at *3; *Int'l Fid. Ins. Co.*, 2012 WL 424994, at *5. Second, Plaintiffs requested an additional $1,340 for expert Andrew Freyer's witness fees. *Mot.* 16; *Shenkman Decl.* ¶4. Defendants do not appear to contest these fees in their opposition. *See generally Opp.* The Court will therefore include these fees in the fee award.

iv. Summary

The Court finds that the reasonable hourly rate is $475 per hour and that the hours reasonably expended total 217.9. The lodestar value is therefore $103,502.50. As discussed in the previous section, the Court declines to enhance or decrease the lodestar value. The Court

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 13-728 PSG (AJWx) Date October 23, 2015

Title Vahan Eksouzian, *et al.* v. Brett Albanese, *et al.*

will also add $1,340 in costs for the expert work of Andrew Freyer. The total fee award is therefore $104,842.50.

C. Waiver

The Settlement Agreement allowed the Court, and specifically Judge Nagle, to retain jurisdiction to enforce the terms of the agreement. *Settlement Agreement* § XI. Plaintiffs, who were aware that Judge Nagle planned to retire in July or August of 2015, *Opp.* 14, did not move for fees until August 7, 2015, Dkt. #189.

Defendants argue that the failure to apply for fees until after Judge Nagle's retirement constitutes "waiver" of Plaintiffs' right to such fees. *Opp.* 13–15. The Court disagrees. "Case law is clear that waiver is the intentional relinquishment of a known right after knowledge of the facts. The burden is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and doubtful cases will be decided against a waiver." *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 31 (1995) (alterations, citations, and internal quotation marks omitted), *as modified on denial of reh'g* (Oct. 26, 1995). There is nothing here that indicates that Plaintiffs, by not applying for fees prior to August, intentionally relinquished their right to request attorney's fees at a later date.

Defendants also argue that Plaintiffs should be equitably estopped from requesting fees. The Court again disagrees. Equitable estoppel requires that "(1) the party to be estopped knows the facts, (2) he or she intends that his or her conduct will be acted on or must so act that the party invoking estoppel has a right to believe it is so intended, (3) the party invoking estoppel must be ignorant of the true facts, and (4) he or she must detrimentally rely on the former's conduct." *United States v. Kim*, 797 F.3d 696, 703 (9th Cir. 2015) (quoting *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995)). Defendants claim that they relied to their detriment because they signed the Settlement Agreement under the belief that only Judge Nagle would decide issues related to enforcement. *Opp.* 14–15. But Defendants surely recognized that the unavailability of Judge Nagle (whether by retirement or unexpected occurrence) would not bar enforcement of the contract. The Court thus finds the reliance argument unpersuasive. This is simply not a case for equitable estoppel.

The Court therefore declines to find that Plaintiffs waived their right to fees or are equitably estopped from asserting their right to them.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 13-728 PSG (AJWx) Date October 23, 2015

Title Vahan Eksouzian, *et al.* v. Brett Albanese, *et al.*

IV. Conclusion

The Court therefore GRANTS IN PART and DENIES IN PART Plaintiffs' motion for attorney's fees and expenses of $150,632. Defendants must pay Plaintiffs' fees and costs in the amount of **$104,842.50**.

IT IS SO ORDERED.

Exhibit 6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

JEFFREY SCHULEIN, et al.,

Plaintiffs,

vs.

PETROLEUM DEVELOPMENT CORPORATION and DP 2004 MERGER SUB LLC,

Defendants.

AND RELATED COUNTER CLAIM

Case No. SACV 11-1891 AG(ANx)

REVISED ORDER RE PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

Hon. Andrew J. Guilford

Plaintiffs in this class action have moved for an award of attorneys' fees, costs and expenses, and reimbursement to named plaintiffs for their time and expenses spent on the litigation. There have been no objections by any of the parties or Class members to the settlement or plaintiffs' motion for an award of attorneys' fees and expenses. Upon due considerations of the application by plaintiffs and all of the papers, pleadings and files in this action, and good cause appearing therefor, the Court hereby GRANTS the motion.

I. ATTORNEYS' FEES

In a case where plaintiffs' counsel have through their efforts created a common fund, courts usually base the fee award on a percentage of the fund recovered for the class, but then cross-check the reasonableness of the percentage to be awarded by reviewing the attorneys' fees lodestar multiplier. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). The Ninth Circuit uses a 25% benchmark in common fund cases, and "in most common fund cases, the award exceeds that benchmark," with a 30% award being the norm "absent extraordinary circumstances that suggest reasons to lower or increase the percentage." *In re Omnivision Techs. Inc.*, 559 F. Supp. 2d 1036, 1047-48 (N.D. Cal. 2007) (quotation omitted).

The requested $11.25 million award is equal to 30% of the $37.5 Settlement Fund. After considering the evidence and all of the pertinent factors set forth in *Vizcaino*, 290 F.3d at 1047-50, and subsequent cases, the Court finds plaintiffs' fee request to be fair and reasonable under both the percentage method and the lodestar cross-check. Among other factors, plaintiffs' counsel achieved an exceptional result for the Class, the request is commensurate with market rates for contingency fee cases, the case was unusually risky for plaintiffs' counsel and undertaken entirely on a contingency basis.

The reasonableness of this fee is confirmed by the lodestar cross-check, which results in a multiplier of 1.22, as set forth in the Supplemental Declaration of Marc

M. Seltzer In Support of Plaintiffs' Motion for an Award of Attorneys' Fees and Expenses well within the range of reasonableness. *See Vizcaino*, 290 F.3d at 1052-54 (approving a fee award of $27,127,800, which equaled 28% of the cash settlement fund and which resulted in a 3.65 multiplier); *Milliron v. T-Mobile USA*, 423 F. App'x 131, 135 (3d Cir. 2011) ("we have approved a multiplier of 2.99 in a relatively simple case"); *In re Cadence Design Sys., Inc. Sec. & Derivative Litig.*, No. C–08–4966 SC, 2012 WL 1414092, at *5 (N.D. Cal. April 23, 2012) (awarding counsel "more than 2.88 times its lodestar amount"); *Been v. O.K. Industries, Inc.*, No. CIV-02-285-RAW, 2011 WL 4478766, at *11 (E.D. Okla. 2011) (citing a study "reporting average multiplier of 3.89 in survey of 1,120 class action cases" and finding that a multiplier of 2.43 would be "per se reasonable"). No party or Class member has objected to the application by plaintiffs' counsel for this fee award. Accordingly, plaintiffs' counsels' request for a $11.25 million fee award is hereby GRANTED.

II. EXPENSES

Plaintiffs' counsel are entitled to recover their "out-of-pocket expenses that would normally be charged to a fee paying client." *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994). Plaintiffs' counsel have submitted adequate support for the $2,466,282.05 in expenses they incurred over the past three years for which reimbursement is sought. No party or Class member has objected to reimbursement of any of these expenses. Accordingly, the motion for reimbursement is hereby GRANTED.

III. NAMED PLAINTIFFS' EXPENSES

Besides his or her *pro rata* share of the common fund, a named plaintiff can recover his reasonable costs and expenses directly relating to his or her representation of the class. *See* 15 U.S.C. § 78u-4(a)(4); *see also In re Online DVD-Rental Antitrust Litig.*, No. 12-15705, 2015 WL 846008 (9th Cir. Feb. 27, 2015) (affirming $5,000 incentive awards for each of the nine class representatives

where each unnamed class member received $12). In this case the requested awards represent a very small fraction of the settlement fund and Class members are eligible to receive compensation that will likely exceed $1,000 per limited partnership unit they owned. Plaintiffs' counsel have submitted a declaration of Marc M. Seltzer In Support of Service Awards to the Name Plaintiffs summarizing the named plaintiffs' time and expenses related to their representation of the Class in this matter. Good cause being shown therefor, the request for reimbursement to the named plaintiffs is hereby GRANTED.

IV. CONCLUSION

Based on the foregoing findings and conclusions, the Escrow Agent is AUTHORIZED and DIRECTED to pay the following amounts from the Settlement Fund:

A. $11.25 million for attorneys' fees to plaintiffs' counsel;

B. $2,466,282.05 for reimbursement to costs and expenses to plaintiffs' counsel;

C. Reimbursement to the named plaintiffs in the following amounts:

(i) Robert H. and Jane S. Barr, as Trustees of the Robert H. and Jane Barr Trust: $7,500;

(ii) Christine L. Cox, as Trustee of the Christine L. Cox Trust: $7,500;

(iii) Clay A. Cox, as Trustee of the Clay A. Cox Trust: $7,500;

(iv) Matthew S. and Katherine M. Goldsmith, as Trustees of the Matthew Shawn Goldsmith and Katherine Mary Goldsmith Living Trust: $10,000;

(v) Timothy McDonald: $10,000;

(vi) William J. and Judith A. McDonald, as Trustees of the William J. and Judith A. McDonald Living Trust: $10,000;

(vii) Jeffrey and Linda Schulein, as Trustees of the Schulein Family Trust: $7,500;

(viii) William J. Wieseler, as Trustee of the William J. Wieseler Trust: $7,500;

D. The foregoing amounts shall include interest thereon at the same rate as earned by the Settlement Fund.

These amounts shall be paid by the Escrow Agent to a bank account designated by Susman Godfrey L.L.P. Susman Godfrey L.L.P. shall be responsible for the distribution of all funds to the appropriate parties.

The Court shall retain continuing jurisdiction over the Settlement Fund and the foregoing parties and counsel for purposes of supervising such distributions.

IT IS SO ORDERED. Dated:

March 16, 2015

Andrew J. Guilford
UNITED STATES DISTRICT JUDGE

Exhibit 7

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 11-1891 AG (ANx)	Date	March 14, 2016
Title	JEFFREY SCHULEIN ET AL. v. PETROLEUM DEVELOPMENT CORP. ET AL.		

Present: The Honorable	ANDREW J. GUILFORD	
Lisa Bredahl	Not Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	

Proceedings: **[IN CHAMBERS] ORDER GRANTING MOTION FOR APPROVAL OF PAYMENTS AND DISTRIBUTIONS FROM THE SETTLEMENT FUND**

Class counsel for Plaintiffs filed a motion for approval of payments and distributions from the settlement fund in this case ("Motion"). (*See* Mot., Dkt. No. 302.) Class counsel didn't set this motion for a hearing.

The Court GRANTS the Motion.

1. BACKGROUND

Plaintiffs were individuals and entities who invested in partnership interests issued by Defendants. Plaintiffs filed a class action asserting that Defendants misrepresented or omitted important information in connection with a cash out merger. (*See* First. Am. Compl., Dkt. No. 54.) The Court granted preliminary approval of the class settlement in December 2014. (*See* Order, Dkt. No. 249.) The Court granted final approval of the class settlement and entered final judgment in March 2015. (*See* Final Order and J., Dkt. No. 263.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 11-1891 AG (ANx)	Date	March 14, 2016
Title	JEFFREY SCHULEIN ET AL. v. PETROLEUM DEVELOPMENT CORP. ET AL.		

2. ANALYSIS

In the Motion, class counsel frame their requested relief as four requests. No one has opposed any of them.

2.1 The Claims Administrator's Determinations

Class counsel asks the Court to approve the claims administrator's determinations accepting and rejecting claims.

The Court GRANTS this requested relief. The claims administrator recommends rejecting only 59 of the 3913 submitted claims. (*See* Mem. P. & A., Dkt. No. 303 at 3:14–17.) The claims administrator accepted late-but-otherwise meritorious claims, and offered those with rejected claims appropriate opportunity to remedy deficiencies. (*See id.* at 3:20–4:2.) The Court agrees with the claims administrator's recommendation that no claim received after November 30, 2015 be accepted. (*See id.* at 4:2–7.)

2.2 Payments to the Claims Administrator and Class Counsel

Class counsel asks the Court to authorize payments to the claims administrator of $55,392.08.

The Court GRANTS this requested relief. The 75-page declaration filed supporting the proposed additional payment of $55,392.08 adequately supports the request.

Class counsel also asks the Court to authorize payments to class counsel of $120,913.42.

The Court GRANTS this requested relief. Counsel submitted less support for this request than they did for the proposed payment, but the Court nonetheless finds the request appropriate.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 11-1891 AG (ANx) Date March 14, 2016

Title JEFFREY SCHULEIN ET AL. v. PETROLEUM DEVELOPMENT CORP. ET AL.

2.3 Distribution of the Net Settlement Fund to the Accepted Claimants

Class counsel asks the Court to authorize distribution of the net settlement fund to the accepted claimants. The approved claimants will receive payments as specified in an allocation plan the Court previously approved.

The Court GRANTS this requested relief.

2.4 Destruction of Paper Forms and Electronic Records

Class counsel asks the Court to authorize the claims administrator's destruction of paper proof of claim forms six months after distribution of the net settlement fund and destruction of electronic copies of claims records three years after distribution of the net settlement fund.

The Court GRANTS this requested relief.

3. DISPOSITION

The Court GRANTS the Motion.

: 0

Initials of Preparer lmb

Exhibit 8

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of December, two thousand sixteen.

PRESENT: GUIDO CALABRESI,
DENNY CHIN,
SUSAN L. CARNEY,
Circuit Judges.

- -x

FLO & EDDIE, INC., a California Corporation, individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

SIRIUS XM RADIO, INC., a Delaware Corporation,

Defendant-Appellant,

DOES, 1 THROUGH 10,

Defendants.

ORDER
15-1164-cv

- -x

On April 13, 2016, we certified to the New York Court of Appeals the following question in this case: "Is there a right of public performance for creators of sound recordings under New York law and, if so, what is the nature and scope of that right?"

On December 20, 2016, the New York Court of Appeals, in an extensive opinion, with a concurrence and a dissent, answered our question in the negative.

The parties are directed to submit a letter brief of no more than twelve pages, double-spaced, by January 16, 2017, addressing the effect of the New York Court of Appeals' decision on the appeal before us.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk