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3 **UNITED STATES DISTRICT COURT**
4 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

5 **JOSE RODRIGUEZ, on behalf of himself and**
6 **all others similarly situated,**

7 **Plaintiff,**

8 **v.**

9 **DRAFT FOODS GROUP, INC., A Virginia**
10 **corporation, and DOES 1 through 100,**
11 **inclusive,**

12 **Defendants.**

1:14-cv-01137-LJO-EPG

**ORDER TO SUPPLEMENT THE
RECORD WITHIN 14 DAYS WITH
EVIDENCE SUPPORTING REQUEST
FOR ATTORNEYS' FEES**

13 Before the Court is Plaintiff's motion for final approval of the class action settlement in
14 this case (Doc. 51) and his companion motion for the award of attorneys' fees (Doc. 52). The assigned
15 Magistrate Judge issued Findings and Recommendations ("F&Rs") that final approval of the settlement
16 be granted, and that Plaintiff's motion for attorneys' fees be granted in part. (Doc. 80.) Plaintiff filed
17 objections to the Magistrate Judge's recommendation to award a lesser amount of attorneys' fees than
18 those requested by Plaintiff. (Doc. 82.)

19 Plaintiff seeks \$583,275 in attorneys' fees, which amounts to 33.3 percent of the gross
20 settlement fund value of \$1,750,000. In considering this request, the magistrate judge applied the
21 percentage-of-the-fund method for calculating an award of attorneys' fees and employed the lodestar
22 method as a cross-check. The magistrate judge noted the 33.3 percent attorneys' fee requested by
23 Plaintiff exceeded the federal benchmark of 25 percent, but considering the benefit to the class, the
24 risks involved, the contingent nature of the litigation, and awards made in similar cases, the 33.3
25 percent requested was reasonable. However, in cross-checking the reasonableness of the percentage
requested under the lodestar method, the magistrate judge found the hourly rate sought by Plaintiff's

1 counsel (between \$525 and \$700 per hour) was too high and did not comport with the hourly rates of
2 similarly experienced attorneys in this district. *See* Doc. 80, 21:5-10 (citing *Millan v. Cascade Water*
3 *Servs., Inc.*, No. 1:12-cv-01821-AWI-EPG, 2016 WL 3077710, at *7 (E.D. Cal. June 2, 2016); *Rosales*
4 *v. El Rancho Farms*, No. 1:12-cv-01934-AWI-JLT, 2015 WL 4460918, at *24 (E.D. Cal July 21,
5 2015); *Archer v. Gibson*, No. 1:12-cv-00261-LJO-JLT, 2015 WL 9473409, at *13-14 n.6 (E.D. Cal
6 Dec. 28, 2015) (awarding hourly rate of \$325 for attorney with more than 25 years of experience).)
7 After a downward adjustment of Plaintiff's counsel's hourly rate to a range of \$350 to \$400, the
8 magistrate judge calculated the lodestar to be \$243,777. Then, considering the pertinent factors and
9 applying Plaintiff's counsel's requested multiplier of 1.84, the total adjusted lodestar was \$448,549.69.
10 This amount is 25.6 percent of the total \$1,750,000 settlement amount, and thus the lodestar cross-
11 check did not support the 33.3 percentage of the fund requested. The magistrate judge concluded that,
12 "[a]lthough this percentage is less than the 33.3 percent of the total fund requested, it is an appropriate
13 award given the hours counsel expended, the Fresno hourly rates, the size of the class, the complexity
14 of the issues presented, the overall success, the skill with which the case was prosecuted, the substantial
15 legal risks associated with Plaintiffs' claims, and the financial risks borne by Plaintiffs' counsel." (Doc.
16 80, 24:20-24.)

17 Plaintiff objects to the downward adjustment of his counsel's hourly rates noting he had
18 submitted examples of other class action settlement approvals in this division of the Eastern District
19 awarding the same attorney hourly rates requested here. In fact, Plaintiff's counsel themselves have
20 received approval in this division of their requested hourly rate. *See Owens v. Kraft Foods Global,*
21 *Inc.*, No. 1:10-cv-02062-AWI-SMS (approving \$700 per hour for R. Duane Westrup); *Miller v. Adecco*
22 *USA, Inc.*, No. 2:13-cv-01321-TLN-CKD, 2015 WL 4730176 (E.D. Cal. Aug. 10, 2015) (approving
23 \$525/hour for associates and \$700/hour for R. Duane Westrup); *Taylor v. FedEx Freight, Inc.*, No.
24 1:13-cv-01137-DAD-BAM, 2016 WL 6038949, at *7 (E.D. Cal. Oct. 12, 2016) (approving \$525/hour
25 for senior associates and \$700/hour for senior partner R. Duane Westrup). Plaintiff notes the cross-

1 check is not required, and, moreover, the 33.3 percent of the total settlement is nonetheless reasonable
2 as it is commensurate with a number other wage-and-hour case settlement approvals. Alternatively,
3 Plaintiff argues that even if the hourly rates are subject to a downward adjustment as the magistrate
4 judge recommended, a higher multiplier should be applied, which would then support the 33.3
5 percentage of the settlement to be awarded as attorneys' fees.

6 In calculating the lodestar (including for purposes of performing a cross-check), the court must
7 determine an hourly rate multiplied by the amount of hours reasonably worked. *In re Bluetooth*
8 *Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). An attorney's hourly rate is calculated
9 according to the prevailing market rates in the relevant community and should comport with the rates
10 prevailing in the community for similar services by lawyers of reasonably comparable skill, experience,
11 and reputation. *Shirrod v. Office of Workers' Compensation Programs*, 809 F.3d 1082, 1086 (9th Cir.
12 2015). The relevant community is the forum where the district court sits. *Id.* "[T]he burden is on the
13 fee applicant to produce satisfactory evidence – in addition to the attorney's own affidavits – that the
14 requested rates are in line with those prevailing in the community for similar services by lawyers of
15 reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 n.11
16 (1984). "Affidavits of the plaintiffs' attorney[s] and other attorneys regarding prevailing fees in the
17 community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs'
18 attorney, are satisfactory evidence of the prevailing market rate." *United Steelworkers of Am. v. Phelps*
19 *Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990).

20 The magistrate judge correctly notes that generally judges in this division have determined the
21 hourly rate for competent and experienced attorneys is between \$250 and \$400. *Millan, Rosales,*
22 *Archer, supra; see also Monterrubio v. Best Buy Stores, L.P.*, 291 F.R.D. 443, 460-61 (E.D. Cal. 2013)
23 (noting \$400/hour "range" in wage-and-hour class action cases was the prevailing rate in the Eastern
24 District of California, citing cases from the Fresno division). It is not clear from the face of the case
25 authority cited by Plaintiff why a higher hourly rate was deemed the prevailing market rate in Fresno

1 other than general citation to prior cases, and the Court declines to cull the records in those cases to
2 determine what other objective evidence may have supported the award of higher hourly rates.

3 Plaintiff's counsel are located in Long Beach, California; the hourly rates requested by counsel
4 may reflect prevailing rates in that forum, but this is not determinative of the prevailing market rate in
5 Fresno, California. Because of the conflicting hourly rate determinations among wage-and-hour cases
6 in this division, Plaintiff cannot satisfy his burden to establish the prevailing market rate in the Fresno
7 division with citation to case authority alone.¹ There must be *objective support* in the record before this
8 Court – i.e., some type of local rate report and/or affidavits of local counsel – that either establish \$525
9 to \$700 is the prevailing hourly market rate in Fresno for attorneys of similar experience and skill or
10 that \$525 to \$700 is an out-of-district hourly rate that should be awarded because local counsel could
11 not be retained or the special expertise of outside-the-district counsel was necessary. *See Barjon v.*
12 *Dalton*, 132 F.3d 496, 500 (9th Cir. 1997).

13 Accordingly, IT IS HEREBY ORDERED that:

- 14 1. Within 14 days from the date of this order, Plaintiff may file evidence supporting the
15 hourly rate requested in his motion for attorneys' fees; and
- 16 2. Upon expiration of this 14 day period, the Court will consider Plaintiffs' motions and the
17 pending F&Rs thereon submitted for final decision.

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19 IT IS SO ORDERED.

20 Dated: November 22, 2016

/s/ Lawrence J. O'Neill
UNITED STATES CHIEF DISTRICT JUDGE

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24 ¹ While rate determinations in other cases, particularly those setting a rate for the plaintiff's attorney may be considered
25 satisfactory evidence of the prevailing market rate, these cases are not binding upon the Court nor do they sufficiently
satisfy the evidentiary burden of the fee applicant due to the discrepancy in hourly rate awards. *Compare* Rosales, 2015 WL
4460918, at *24 (finding prevailing hourly rate between \$225 to \$380 in wage-and-hour class action context) *with Taylor*,
2016 WL 6038949, at *7 (approving \$525/hour for senior associates and \$700/hour for senior partner R. Duane Westrup).