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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JIMMY GREER,

Plaintiff,

v.

DICK’S SPORTING GOODS, INC.,

Defendant.

No. 2:15-CV-01063-KJM-CKD
ORDER

On August 27, 2019, the court preliminarily approved settlement of this wage and hour class action. Now, in separate motions, plaintiff moves for (1) final approval of the class action settlement and (2) an award of attorney fees and costs. Mot. Approval, ECF No. 81; Mot. Fees, ECF No. 80. As explained below, the court GRANTS both the motions.

I. BACKGROUND

Plaintiff Jimmy Greer filed this class action on March 19, 2015, alleging defendant Dick’s Sporting Goods, Inc. (“DSG”) violated multiple provisions of the California Labor Code and California Business and Professions Code section 17200. Compl., ECF No. 1-1; Not. of Removal, ECF No. 1; First Am. Compl., ECF No. 14 (filed Oct. 1, 2015). On April 13, 2017, the court granted Greer’s opposed motion for class certification, certifying the following two classes: (1) a “Security Check Class” arising from Greer’s allegations that DSG employees were required

1 to wait, while off the clock, for inspection of their personal belongings before exiting the store, and
2 (2) a “Business Reimbursement Class,” arising from Greer’s claim that DSG employees were
3 required to purchase apparel but were not reimbursed for their purchases. Class Cert. Order, ECF
4 No. 45. On July 28, 2017, the Ninth Circuit denied DSG’s petition for permission to appeal the
5 court’s class certification order. ECF No. 51. This court then denied DSG’s motion to stay the
6 case pending the California Supreme Court’s resolution of two questions certified to that court by
7 the Ninth Circuit. ECF No. 54 (motion to stay); Stay Order, ECF No. 64.¹ On March 15, 2018,
8 after resolving the parties’ disagreements and requiring several modifications, the court approved
9 the class notice form and issued a class notice plan. Not. Order, ECF No. 70. On March 26, 2019,
10 Greer moved for preliminary approval of his settlement with DSG. Mot. Prelim. Approval. ECF
11 No. 73. On August 27, 2019, the court granted Greer’s unopposed motion for preliminary approval.
12 Prelim. Approval Order; ECF No. 77.

13 A. Preliminary Settlement Approval

14 As a functional matter, a review of a proposed class action settlement generally
15 involves two hearings: (1) an initial hearing to determine whether certification and preliminary
16 approval of the settlement is justified and, (2) after notice has been provided to the class, a final
17 fairness hearing to determine whether final approval is appropriate. Manual for Complex Litig.,
18 Fourth § 21.632 (2004). The court held the preliminary approval hearing on June 28, 2019, and,
19 as noted, issued the approval order thereafter. *See generally* Prelim. Approval Order. The court
20 preliminarily approved the following proposed settlement terms: (1) defendant will pay a gross

21
22 ¹ The California Supreme Court has by now resolved the two questions certified by the Ninth
23 Circuit. *See Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (2018) (holding Fair Labor Standards
24 Act’s *de minimis* doctrine does not apply to California unpaid wages claims); *Frlekin v. Apple*, 8
25 Cal. 5th 1038 (2020) (holding time employees spent waiting for and undergoing exit searches was
26 “employer-controlled activity” and compensable as “hours worked”). The holding in *Troester*
27 does not affect the result here, because as the court previously found, even if the *de minimis*
28 doctrine applied, there would be common questions regarding whether the class satisfied the
doctrine’s requirements. Class Cert. Order at 12–13. In addition, the holding in *Frlekin* does not
affect the result here, because the parties had previously agreed they would “conduct discovery on
the amounts of times [class members] spent on security checks,” Stay Order at 4 (citing Stay
Opp’n ECF No. 58, at 6; Stay Reply, ECF No. 61, at 10), and the proposed settlement takes
account of plaintiffs’ security inspection claims.

1 settlement amount of \$2,900,000; (2) from that total, \$10,000 for plaintiff’s class representative
2 enhancement award; (3) \$65,000 in settlement administration costs; (4) a proposed attorneys’ fee
3 award of 33 percent of the gross settlement (\$966,667) and \$200,000 in expenses. *Id.* at 2. The
4 court also preliminarily approved distributing a net settlement of \$1,658,333 to the settlement
5 class, which includes “All persons who worked at Defendant’s California retail stores in non-
6 exempt positions at any time during the period from: (1) March 18, 2011 to January 31, 2015 (the
7 ‘Security Check Class’); and (2) March 18, 2011 to April 13, 2017 (the ‘Business Reimbursement
8 Class’).” *Id.* at 2 (citing Prelim. Approval Mot. at 8). The settlement is a non-reversionary
9 settlement, with each settlement class member receiving on average \$155.00. *Id.* at 2.

10 B. Reservations in the Preliminary Approval Order

11 Although the court preliminarily approved the settlement, the court expressed
12 concerns about the following terms. First, the court noted “it cannot provide assurance the full
13 \$10,000 award sought is likely to be awarded” because plaintiff had not provided enough
14 evidence to explain why the incentive award should be significantly larger than the average class
15 award and represent a significant portion of the overall gross settlement amount. *Id.* at 10.
16 Second, the court observed plaintiff’s request for 33 percent of the gross settlement toward
17 attorneys’ fees was largely unsupported; thus, the court said it would expect the final motion to
18 provide full support for this request. *Id.* at 11. The court also ordered the parties to revise the
19 notice to ensure the definitions tracked those in the prior notice, to clarify class members need
20 only state the basis for their objection, and to allow class members to express objections in person
21 at a final approval hearing. *Id.* at 14. Lastly, the court ordered plaintiff to provide an opt-out
22 form for class members, inform class members where they can obtain a copy of the settlement
23 and advise them when plaintiff and counsel file their motions for approval of attorneys’ fees and
24 costs and the proposed incentive award. *Id.* at 14–15. Plaintiff revised the class notice and on
25 September 18, 2019, the court approved the revised notice and set the notice schedule. Class
26 Notice Order, ECF No. 79.

27 Accounting for these concerns, the court proceeds to determine whether to grant
28 final approval of the settlement.

1 II. LEGAL STANDARD

2 There is a “strong judicial policy” favoring settlement of class actions. *Class*
3 *Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). Nonetheless, to protect absent
4 class members’ due process rights, Rule 23(e) of the Federal Rules of Civil Procedure permits the
5 claims of a certified class to be “settled . . . only with the court’s approval” and “only after a
6 hearing and only on a finding [that the agreement is] fair, reasonable, and adequate” Fed. R.
7 Civ. P. 23(e). To determine whether a proposed class action settlement is fair, reasonable and
8 adequate, courts consider several factors as relevant, including: (1) [T]he strength of the
9 plaintiff’s case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the
10 risk of maintaining class action status throughout the trial; (4) the amount offered in settlement;
11 (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and
12 view of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class
13 members of the proposed settlement. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934,
14 944 (9th Cir. 2015) (quoting *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir.
15 2004)); *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) (noting, at
16 preliminary approval stage, courts consider whether “the proposed settlement appears to be the
17 product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not
18 improperly grant preferential treatment to class representatives or segments of the class, and falls
19 within the range of possible approval”) (citations omitted). These factors substantively track
20 those provided in 2018 amendments to Rule 23(e)(2), under which the court may approve a
21 settlement only after considering whether:

22 (A) the class representatives and class counsel have adequately represented the
23 class;

24 (B) the proposal was negotiated at arm’s length;

25 (C) the relief provided for the class is adequate, taking into account:

26 (i) the costs, risks, and delay of trial and appeal;

27 (ii) the effectiveness of any proposed method of distributing relief to the
28 class, including the method of processing class-member claims;

1 (iii) the terms of any proposed award of attorney’s fees, including timing of
2 payment; and

3 (iv) any agreement required to be identified under Rule 23(e)(3); and

4 (D) the proposal treats class members equitably relative to each other.

5 Fed. R. Civ. P. 23(e)(2)(A)–(D). The Rule 23(e)(2) factors took effect on December 1, 2018 and,
6 as an advisory note to the Rule 23(e) amendment recognizes, “each circuit has developed its own
7 vocabulary for expressing [] concerns” regarding whether a proposed settlement is fair,
8 reasonable and adequate. Fed. R. Civ. P. 23(e) advisory committee’s note. Accordingly, the
9 newly codified factors are not intended “to displace any factor, but rather to focus the court and
10 the lawyers on the core concerns of procedure and substance that should guide the decision
11 whether to approve the proposal.” *Id.*; *see also* 4 Newberg on Class Actions § 13:14 (5th ed.)
12 (2019) (noting Rule 23(e) amendments in 2018 “essentially codified [federal courts’] prior
13 practice”). Moreover, the Advisory Committee warned against allowing “[t]he sheer number of
14 factors [to] distract both the court and the parties from the central concerns that bear on review
15 under Rule 23(e)(2).” Fed. R. Civ. P. 23(e) advisory committee’s note. Here, the court draws on
16 the Ninth Circuit’s longstanding guidance as still relevant and the Rule 23(e)(2) factors as
17 applicable to resolve this motion.

18 III. DISCUSSION

19 A. Final Approval

20 For the reasons articulated below, the court finds class counsel and class
21 representatives have adequately represented the class. Whether “the class representatives and class
22 counsel have adequately represented the class” and whether “the proposal treats class members
23 equitably relative to each other” factor into the court’s assessment of whether the proposed
24 settlement is fair, reasonable and adequate. Fed. R. Civ. P. 23(e)(2)(A)–(D).

25 1. Adequacy of Class Counsel’s Representation of Class

26 As discussed in the court’s previous order above, class counsel undertook significant
27 discovery in this case and successfully moved for class certification. Prelim. Approval Order at 9.

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1 Then and now, there is nothing before the court indicating class counsel has not adequately
2 represented the class.

3 2. Adequacy of Class Representatives' Representation of Class

4 As part of the court's analysis of whether class representatives have adequately
5 represented the class, the court closely analyzes any potential enhancement payments to the class
6 representative. To that end, a proposed agreement should "not improperly grant preferential
7 treatment to class representatives or segments of the class" *In re Tableware Antitrust Litig.*,
8 484 F. Supp. 2d at 1080. In determining whether to approve an enhancement payment, courts
9 may consider the following factors: (1) the risk to the class representative in commencing suit,
10 both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class
11 representative; (3) the amount of time and effort spent by the class representative; (4) the duration
12 of the litigation; and (5) the personal benefit, or lack thereof, enjoyed by the class representative
13 as a result of the litigation. *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal.
14 1995). Various courts in this circuit, including this court, have adopted the *Van Vranken* factors.
15 *See Zaskorn v. Am. Honda Motor Co., Inc.*, 2:11-CV-02610-KJM, 2015 WL 3622990, at *17
16 (E.D. Cal. June 9, 2015).

17 a) Risk of Commencing Suit

18 On the first factor, plaintiff argues the \$10,000 enhancement payment is justified
19 because he undertook reputational risk by litigating claims against a former employer, which could
20 impact his ability to find employment in the future if a potential employer conducts a screening to
21 determine whether he has filed suit. Mot. Fees at 30–31. This factor favors providing plaintiff with
22 an enhancement payment.

23 b) Notoriety or Personal Difficulties

24 With respect to the second factor, neither the record nor plaintiff himself indicate
25 the case led to plaintiff's notoriety or personal difficulties. Accordingly, this factor does not favor
26 the court granting plaintiff an enhancement payment.

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1 c) Time and Effort Spent

2 To determine the third factor, the amount of time and effort spent by the class
3 representative, the court will examine “‘evidence demonstrating the quality of plaintiff’s
4 representative service,’ such as ‘substantial efforts taken as class representative to justify the
5 discrepancy between [his] award and those of the unnamed plaintiffs.’” *Flores*, 2018 WL 6981043,
6 at *1 (quoting *Reyes v. CVS Pharmacy, Inc.*, No. 1:14-CV-00964-MJS, 2016 WL 3549260, *15
7 (E.D. Cal. June 29, 2016)). Courts in this circuit have concluded a plaintiff is allowed an
8 enhancement payment due to “substantial efforts taken as class representative” when the plaintiff
9 has undertaken at least 30 to 40 hours of work. *Emmons v. Quest Diagnostics Clinical*
10 *Laboratories, Inc.*, 2017 WL 749018, at *8 (E.D. Cal. Feb. 27, 2017) (awarding enhancement
11 payment of \$8,000 to each plaintiff when each conducted 30 to 40 hours of work); *Rodriguez v.*
12 *Kraft Foods Group, Inc.*, 2016 WL 5844378, at *16 (E.D. Cal. Oct. 5, 2016) (awarding
13 enhancement payment of \$10,000 to plaintiff who conducted 40 hours of work on case).

14 Courts will also consider the “proportion of the [representative] payment[s] relative
15 to the settlement amount, and the size of each payment.” *In re Online DVD-Rental Antitrust Litig.*,
16 779 F.3d 934, 947 (9th Cir. 2015) (awarding \$5,000 enhancement payment, which was 417 times
17 greater than average award but only .17 percent of gross settlement); *see also Patel v. TransUnion,*
18 *LLC*, 2018 WL 1258194, *3, 7–8 (N.D. Cal. Mar. 11, 2018) (awarding enhancement payment of
19 \$10,000, 25 times the average award and 0.125 percent of gross settlement); *Emmons*,
20 2017 WL 749018 at *8 (E.D. Cal. Feb. 27, 2017) (awarding enhancement payment of \$8,000, 14.5
21 times average award and 0.3 percent of gross settlement); *Rodriguez*, 2016 WL 5844378 at *16
22 (awarding enhancement payment of \$10,000, approximately 11 times average award and less than
23 0.5 percent of gross settlement); *Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1265 (C.D.
24 Cal. 2016) (awarding enhancement payment of \$10,000, approximately 100 times average award
25 and less than 0.25 percent of gross settlement).

26 The court noted its doubts about awarding plaintiff the \$10,000 requested incentive
27 award in its preliminary approval of the parties’ settlement agreement. Prelim. Approval Order at
28 9. The award is significantly larger than the average \$155 award each class member is expected to

1 receive, nearly 65 times higher, but it represents only 0.003 percent of the overall \$2,900,000 gross
2 settlement amount. The court evaluates plaintiff's request for a \$10,000 enhancement payment
3 based on the new information from plaintiff and on the enumerated *Van Vranken* factors;
4 ultimately, the court finds these factors show the enhancement payment is reasonable.

5 Plaintiff argues the enhancement payment is commensurate with his overall efforts
6 on behalf of the class. Plaintiff estimates, under oath, he spent between 75 and 85 hours in the
7 prosecution of this lawsuit. Jimmy Greer Decl. ¶ 10, ECF No. 80-2. In the beginning stages of this
8 case, plaintiff conducted multiple conferences with his attorneys regarding the factual bases for his
9 claims, during which plaintiff learned more about this kind of litigation and his role as the
10 representative plaintiff. *Id.* ¶ 3. Then, plaintiff states he reviewed the draft of the complaint for
11 accuracy and contacted his attorneys regularly to discuss the progress of the case. *Id.* ¶ 4. During
12 the discovery phase, plaintiff prepared answers to defendant's discovery requests, providing
13 counsel copies of relevant documents and reviewing attorney questions stemming from defendant's
14 discovery requests. *Id.* ¶ 5. Plaintiff also participated in a day-long deposition on February 3, 2016
15 and reviewed the transcript for accuracy afterwards. *Id.* ¶ 6. While his attorneys prepared the
16 motion for class certification, plaintiff produced a declaration in support of the motion and spoke
17 with fellow employees of defendant. *Id.* ¶ 7. Prior to and during mediation, plaintiff assisted his
18 attorneys by providing information related to unreimbursed uniform expenses and assisted with the
19 mediation brief; plaintiff also consulted his attorney throughout the mediation. *Id.* ¶ 8. Plaintiff
20 reviewed the terms of the settlement, evaluating it to determine whether the outcome was fair,
21 reasonable, and adequately compensates the class. *Id.* ¶ 9. Finally, plaintiff argues the general
22 release, which requires him to waive all claims arising out of his employment, is broader than the
23 release of other class members and accounts for the greater value of his enhancement payment. *Id.*
24 ¶ 11. These documented extensive efforts and plaintiff's broad waiver of claims support a
25 significant enhancement payment.

26 d) Duration of Litigation

27 As for the fourth factor, litigation duration, this case was protracted. Plaintiff first
28 filed the case on March 19, 2015 in Sacramento County Superior Court and defendants removed

1 the case to this court May 15, 2015. *See* Not. of Removal. Nearly four years of motion practice
2 before this court and mediation followed, including cross-motions for class certification, cross-
3 motions to strike, a motion to stay, and a motion for approval of class notice. *See* ECF Nos. 23,
4 24, 29, 35, 54, 55. The parties did not move for preliminary approval of the class action
5 settlement until March 26, 2019. *See* Prelim. Approval Order. For this reason, the fourth factor
6 favors the court granting an enhancement payment to plaintiff.

7 e) Personal Benefit

8 On the fifth factor, personal benefit to the class representative, plaintiff argues the
9 enhancement payment is appropriate because he “will not gain any benefit that he [or she] would
10 receive as an ordinary class member.” Mot. Fees at 31 (quoting *In re Toys “R” Us FACTA Litig.*,
11 295 F.R.D. 438, 472 (C.D. Cal. 2014) (alteration in original)). As noted, plaintiff also agrees to
12 release all claims against defendant, a considerably broader release than that of other class
13 members. Mot. Fees at 31. Therefore, the fifth factor favors granting an enhancement payment.

14 f) Conclusion

15 Overall, the *Van Wranken* factors support granting the requested enhancement
16 payment here. Plaintiff has adequately addressed the court’s concerns outlined in the preliminary
17 approval order by providing sufficient information on his own efforts, as well as relevant authority
18 supporting approval of the enhancement payment. The payment is in line with decisions in this
19 district where similar circumstances existed. *See Emmons*, 2017 WL 749018 at *8; *Rodriguez*,
20 2016 WL 5844378, at *16. Additionally, the enhancement payment represents a small percentage
21 of the gross settlement amount, 0.03 percent. This small percentage, along with all of plaintiff’s
22 efforts, offsets the fact the enhancement payment is 64 times the average settlement in this case.
23 As a result, the court finds it is reasonable to award plaintiff the enhancement payment of \$10,000.

24 3. Settlement Negotiations Conducted at Arm’s Length

25 After analyzing both the briefing and arguments made at the final approval hearing,
26 the court finds the settlement negotiations were conducted at arm’s length. “The court may approve
27 [settlement] only after a hearing and only on finding that it is fair, reasonable, and adequate after
28 considering whether [. . .] the proposal was negotiated at arm’s length.” Fed. R. Civ. P. 23(e)(2)(B);

1 *see also In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1080 (considering whether “proposed
2 settlement appears to be the product of serious, informed, non-collusive negotiations”).

3 As noted in the court’s order granting preliminary approval, the parties’
4 participation in mediation “tends to support the conclusion that the settlement process was not
5 collusive.” *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA (EMC), 2012 WL
6 5878390, at *6 (N.D. Cal. Nov. 21, 2012). Mr. Mark Rudy, an experienced wage and hour
7 mediator, mediated this action and although mediation did not result in settlement, Mr. Rudy
8 helped the parties analyze the issues and risks here. Mot. Approval at 22. Experienced counsel
9 represented the parties throughout the negotiations, which further demonstrates the negotiations
10 were arms’-length and fair. *Id* (citing Perez Decl. ¶¶ 12–14, Ex. 1). During the final fairness
11 hearing, the parties emphasized Mr. Rudy’s active involvement throughout this action, even at the
12 conclusion of the mediation, and noted that his proposal drove the final settlement terms. *See*
13 Hr’g Minutes, ECF No. 82. Moreover, the negotiations were lengthy as a result of defendants’
14 efforts to seek approval from senior officials in their corporation. *Id*. This factor weighs in favor
15 of final approval.

16 4. The Proposed Relief Is Adequate

17 For the reasons set forth below, the court finds the proposed relief here is
18 adequate. Under Rule 23, the court determines whether the proposed relief is adequate,
19 considering in part “the costs, risks, and delay of trial and appeal.” Fed. R. Civ. P. 23(e)(2)(C)(i);
20 *see also Churchill Vill., LLC*, 361 F.3d at 575 (courts should address strength of plaintiff’s case;
21 risk, expense, complexity, and likely duration of further litigation; risk of maintaining class action
22 status throughout trial; extent of discovery completed and stage of proceedings).

23 Plaintiff estimates defendant’s maximum potential exposure was approximately
24 \$17.2 million, comprising a maximum potential amount for the security inspection claim of
25 \$1,427,717.00, a maximum potential amount for the business expense claim of \$2,140,000.00, a
26 maximum potential amount for the wage-statement claim of \$1,380,850.00, and a waiting-time
27 penalty claim of \$12,244,072.50. Mot. Approval at 21. Plaintiff analyzed the potential of factors
28 affecting his case to discount these amounts, including, but not limited to the following: the

1 strength of defendant’s defenses, the risk of losing dispositive motions, the risk of losing at trial.
2 *Id.* at 17. Upon conducting this analysis, plaintiff concludes that a settlement amount of \$2.8
3 million, which represents 17 percent of defendant’s maximum potential exposure, is a fair and
4 reasonable settlement. *Id.* at 21.

5 In the court’s preliminary approval order, the court considered whether the
6 proposed relief was adequate by considering “the costs, risks, and delay of trial and appeal.”
7 Prelim. Approval Order at 5–8. The court did not at that point express concerns about the
8 proposed settlement and found the recovery appeared reasonable. *Id.* at 8. The final settlement
9 numbers and terms remain the same as they were when the court preliminarily approved the class
10 action settlement and there is no basis to doubt the reasonableness of the settlement at the time.

11 Courts also account for the effectiveness of any proposed method of distributing
12 relief to the class, including the method of processing class-member claims, when deciding
13 whether the proposed relief is adequate. Fed. R. Civ. P. 23(e)(2)(C)(ii). In its preliminary
14 approval order, the court outlined the proposed agreement’s method of allocating relief to the
15 class. Prelim. Approval Order at 12. The court also approved issuing \$65,000 in settlement
16 administration costs to the settlement administrator as part of the settlement. *Id.* at 2. With its
17 motion here, plaintiff includes a declaration from the case manager with the court appointed
18 settlement administrator, ILYM Group, Inc. *See* Nathalie Hernandez Decl., ECF No. 81-2. Ms.
19 Hernandez outlines the notice process and includes an official invoice for ILYM Group, Inc.’s
20 settlement administration costs of \$65,000. *Id.*, Ex. B. The court can identify no deficiencies in
21 the administrator’s bill.

22 Finally, class members’ collective response to the settlement further demonstrates
23 the proposed relief is adequate. No class members objected to the settlement and only 15 people,
24 representing a mere 0.15 percent of the settlement class, opted out of the class. Mot. for Approval
25 at 13, 23; Hernandez Decl. ¶¶ 6–7. This is a “strong indicator that a settlement is fair and
26 reasonable,” and thus adequate. Mot. for Approval at 23 (citing *Churchill Village, LLC v.*

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1 *General Electric*, 361 F.3d 566 (9th Cir. 2004) (“affirming settlement approval where 45 of
2 approximately 90,000 notified class members objected and 500 opted out.”)).

3 Overall, this factor weighs in favor of approval.

4 5. The Settlement Treats Class Members Equitably

5 The settlement treats class members fairly. The settlement class includes all
6 people who worked at DSG during the period from: (1) March 18, 2011 to January 31, 2015
7 (“Security Check Class”); and (2) March 18, 2011 to April 13, 2017 (“Business Reimbursement
8 Class”). Settlement Agreement ¶ 5, ECF No. 73-1. The members’ respective shares of each
9 class fund will be allocated on a pro-rata basis according to the number of weeks each class
10 member worked. Calculating respective shares in this manner is fair and treats class members
11 equitably. The class members’ collective responses, which as reviewed above included no
12 objections and minimal opting out of the settlement, suggests the settlement treats all class
13 members equitably. Mot. for Approval at 13, 23; Hernandez Decl. ¶¶ 6–7.

14 As noted above, the class representative will receive a different, higher amount
15 from the other class members. The court has analyzed this payment separately and finds the
16 enhancement payment does not preclude final approval of the settlement.

17 6. Conclusion

18 For the foregoing reasons, the court finds the settlement is “fair, reasonable, and
19 adequate” and grants final approval.

20 B. Attorneys’ Fees, Costs and Expenses

21 “The district court has discretion in common-fund cases to award attorneys’ fees in
22 the amount of a percentage of the common-fund or using the lodestar method.” *Kakani v. Oracle*
23 *Corp.*, No. C 06-06493 WHA, 2007 WL 4570190, at *2 (N.D. Cal. Dec. 21, 2007). Rule 23
24 permits a court to award “reasonable attorney’s fees . . . that are authorized by law or by the
25 parties’ agreement.” Fed. R. Civ. P. 23(h). Even when the parties have agreed on an amount, the
26 court must award only reasonable attorney’s fees. *Bluetooth*, 654 F.3d at 941. In diversity
27 actions, the Ninth Circuit “has applied state law in determining not only the right to fees, but also
28 in the method of calculating fees.” *Mangold v. Cal. Public Util. Comm’n*, 67 F.3d 1470, 1478

1 (1995); *Rodriguez v. Disner*, 688 F.3d 645, 653 n.6 (9th Cir. 2012); *Schiller*, 2012 WL 2117001,
2 at *15 (“In diversity actions such as this, the Ninth Circuit applies state law to determine the right
3 to fees and the method for calculating fees.”).

4 The California Supreme Court has held: “when a number of persons are entitled in
5 common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all
6 results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded
7 attorney’s fees out of the fund.” *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977). California courts
8 employ both the percentage-based method and the lodestar method for calculating attorney’s fees
9 in common fund actions. *See Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 26 (2000). A
10 California appellate court recently stated the goal “is the award of a ‘reasonable’ fee to
11 compensate counsel for their efforts, irrespective of the method of calculation. It is not an abuse
12 of discretion to choose one method over another as long as the method chosen is applied
13 consistently using percentage figures that accurately reflect the marketplace.” *In re Consumer*
14 *Privacy Cases*, 175 Cal. App. 4th 545, 557–58 (2009) (internal quotation marks and citations
15 omitted).

16 1. Ninth Circuit Benchmark

17 Based on an analysis framed by the Ninth Circuit benchmark, the court finds the
18 attorneys’ fees requested here are reasonable. The Ninth Circuit has generally set a 25 percent
19 benchmark for the award of attorneys’ fees, and “courts may adjust this figure upwards or
20 downwards if the record shows special circumstances justifying a departure.” *Ontiveros*, 303
21 F.R.D. at 372 (internal quotation marks omitted) (citing *In re Bluetooth Headset Prods. Liab.*
22 *Litig.*, 654 F.3d 935, 942 (9th Cir. 2011)); *see also In re Nat’l Collegiate Athletic Ass’n Athletic*
23 *Grant-in-Aid Cap Antitrust Litig.*, 768 F. App’x 651, 653 (9th Cir. 2019) (“We have permitted
24 awards of attorneys’ fees ranging from 20 to 30 percent of settlement funds, with 25 percent as
25 the benchmark award.”). Federal courts apply state law in determining attorneys’ fees. *Mangold*,
26 67 F.3d at 1478. California state courts more often deem awards of up to 33 percent reasonable
27 and less often expressly refer to a 25 percent benchmark. *See In re Consumer Privacy Cases*, 175
28 Cal. App. 4th 545, 557 n.13 (2009) (noting fees of up to one-third are frequently awarded and

1 “[a] fee award of 25 percent is the benchmark award that should be given in common fund
2 cases”) (internal quotation and alteration marks omitted); *Seguin*, 2018 WL 1919823, at *6 (citing
3 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002)).

4 Plaintiff requests attorneys’ fees in the amount \$966,667, which as noted
5 represents approximately 33 percent of the non-reversionary settlement fund. Mot. Fees at 9.
6 The court expressed concerns in the preliminary approval of the class action settlement, observing
7 the request for attorneys’ fees was “largely unsupported” and calling on plaintiff’s counsel to
8 “properly support the request” by providing the court with the information necessary to grant fees
9 of this percentage. Prelim. Approval Order at 11.

10 In response, plaintiff provides the declaration of counsel Raul Perez. *See* Raul
11 Perez Decl., ECF No. 80-1. The court reviews the contents of this declaration in the section
12 below, where it conducts a lodestar cross-check of the proposed attorneys’ fees amount. Plaintiff
13 also provides California authority in support of its position a 33 percent award is fair and
14 reasonable. *See, e.g., Laffitte v. Robert Half Int’l Inc.*, 231 Cal. App. 4th 860, 871 (2014) (“33 1/3
15 percent of the common fund is consistent with, and in the range of, awards in other class action
16 lawsuits”); *Chavez v. Netflix, Inc.*, 162 Cal. App 4th 43, 66 n.11 (2008) (“Empirical studies show
17 that, regardless whether the percentage method or the lodestar method is used, fee awards in class
18 actions average around one-third of the recovery.”). In addition, plaintiff argues attorneys’ fees
19 of 33 percent is reasonable given the persuasive decisions of other judges in this district. *See,*
20 *e.g., Emmons*, 2017 WL 749018, at *7 (awarding attorneys’ fees of approximately 33 percent in
21 wage and hour case); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D. Cal.
22 2010) (“[E]xact percentage [awarded] varies depending on the facts of the case, and in most
23 common fund cases, the award exceeds that benchmark.”). The request here is in line with other
24 awards made within this circuit and within California, supporting its reasonableness.

25 2. Lodestar Cross-Check

26 Comparison with the lodestar method also supports approving the award of
27 attorneys’ fees. Courts are encouraged to use the lodestar method as a cross-check to evaluate the
28 reasonableness of the percentage award. *See Bluetooth*, 654 F.3d at 944–45; *Espinosa v.*

1 *California Coll. of San Diego, Inc.*, No. 17CV744-MMA (BLM), 2018 WL 1705955, at *8 (S.D.
 2 Cal. Apr. 9, 2018) (noting Ninth Circuit has also approved use of lodestar cross-checks to
 3 determine reasonableness of particular percentage recovery of common fund). In calculating the
 4 attorneys’ fees award under this method, a court must start by determining how many hours were
 5 reasonably expended on the litigation, and then multiply those hours by the prevailing local rate
 6 for an attorney of the skill required to perform the litigation. *Moreno v. City of Sacramento*,
 7 534 F.3d 1106, 1111 (9th Cir. 2008). This amount may be increased or decreased by a multiplier
 8 that reflects any factors not subsumed within the calculation, such as “the quality of
 9 representation, the benefit obtained for the class, the complexity and novelty of the issues
 10 presented, and the risk of nonpayment.” *Bluetooth*, 654 F.3d at 942 (quoting *Hanlon v. Chrysler*
 11 *Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998)). “Foremost among these considerations, however, is
 12 the benefit obtained for the class.” *Id.* at 942 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434–36
 13 (1983)); *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009)).

14 a) Lodestar Amount

15 The declaration of lead attorney, Raul Perez, provides the following breakdown of
 16 the time Capstone Law APC attorneys spent on this case and their regular rates per hour. Perez
 17 Decl. ¶ 14. Mr. Perez uses those numbers to calculate the total fees per attorney, the lodestar
 18 amount and the total hours spent, which were 1332.3.

Attorney	Title	CA Bar	Rate	Hours	Fees
Raul Perez	Partner	1994	\$725	63.1	\$45,747.50
Melissa Grant	Partner	1999	\$695	90.4	\$62,828.00
Robert Drexler	Senior Counsel	1985	\$695	309.7	\$215,241.50
Stephen H. Gamber	Fmr. Senior Counsel	1994	\$695	23.6	\$16,402.00
Stan Karas	Fmr. Senior Counsel	2002	\$595	305.6	\$181,832.00
Bevin Allen Pike	Senior Counsel	2002	\$595	119.8	\$71,281.00
Matthew Bainer	Fmr. Senior Counsel	2002	\$595	49.2	\$29,274.00
Jamie Greene	Senior Counsel	2007	\$495	47.1	\$23,314.50
Eduardo Santos	Senior Counsel	2007	\$495	29.7	\$14,701.50
Jonathan Lee	Associate	2009	\$435	214.9	\$93,481.50
Anthony Castillo	Associate	2009	\$435	33.1	\$14,398.50
Ishan Dave	Fmr. Associate	2015	\$295	46.1	\$13,599.50
Total				1332.3	\$782,101.50

27
 28 Perez Decl. ¶ 14.

1 Plaintiff's counsel also provides itemized records in support of their hours worked.
2 Perez Decl. ¶ 14; *see Hensley*, 461 U.S. at 437 (“The applicant should exercise ‘billing judgment’
3 with respect to hours worked [...] and should maintain billing time records in a manner that will
4 enable a reviewing court to identify distinct claims”) (citations omitted). The Perez declaration
5 identifies the following major tasks: pleadings, miscellaneous filings, case management; legal and
6 factual analysis of claims and defenses; written discovery and depositions; motion practice; class
7 certification; appellate practice; communications with client and class members; mediation and
8 settlement negotiations; and trial preparation. Perez Decl. ¶ 14. Plaintiff's counsel specifies how
9 many hours each attorney worked on each of these major tasks, using that number to calculate the
10 total hours and total fees for each task. *Id.*; *see also Bellinghausen v. Tractor Supply Co.*, 306
11 F.R.D. 245, 264 (N.D. Cal. 2015) (“[I]t is well established that ‘[t]he lodestar cross-check
12 calculation need entail neither mathematical precision nor bean counting . . . [courts] may rely on
13 summaries submitted by the attorneys and need not review actual billing records.’”) (citation
14 omitted).

15 Here, the case involved a number of motions, after removal from Sacramento
16 County Superior Court, ECF No. 1, including a motion to certify the class, ECF No. 23, a
17 subsequent motion to deny class certification by defendant, ECF No. 24, a petition to the Ninth
18 Circuit for permission to appeal the order granting class certification, Case No. 17-80075 Dkt.
19 No. 7, defendant's motion to stay the action pending a California Supreme Court decision, ECF
20 Nos. 57, 58, mediation, a motion for approval of proposed class notice, ECF Nos. 55, 56, 66, a
21 motion for preliminary approval of the class action settlement, ECF No. 73, and the instant
22 motions for attorneys' fees and final approval of the class action settlement, ECF Nos. 80, 81.
23 Due to the extent and significance of the motions in this heavily litigated case, the court finds
24 1332.30 hours is a reasonable number of hours to use for the lodestar cross-check.

25 The court next turns to the hourly rates plaintiff's counsel provides as part of its
26 lodestar cross-check. In Mr. Perez's declaration, he outlines the qualifications and experience of
27 Capstone Law APC to support its attorneys' hourly rates. Perez Decl. ¶¶ 11–13. The declaration
28 provides a number of examples of federal and state courts approving Capstone's rates, but

1 plaintiff has not provided and the court has not located any instances in which this court or a
2 sister court in the Eastern District has approved the rates proposed here. *Id.* ¶ 15. The rates
3 proposed by plaintiff, namely \$695 to \$725 for partners and \$595 to \$695 for senior counsel, are
4 high for this district. Courts in the Eastern District of California have “previously accepted as
5 reasonable for lodestar purposes hourly rates of between \$370 and \$495 for associates, and \$545
6 and \$695 for senior counsel and partners.” *Milburn v. PetSmart, Inc.*, No. 1:18-CV-00535-DAD-
7 SKO, 2019 WL 5566313, at *8 (E.D. Cal. Oct. 29, 2019) (citing, *inter alia*, *Gong-Chun v. Aetna*
8 *Inc.*, No. 1:09-cv-01995-SKO, 2012 WL 2872788, at *23 (E.D. Cal. July 12, 2012) (awarding
9 between \$300 and \$420 per hour for associates, and between \$490 and \$695 per hour for senior
10 counsel and partners)); *Turk v. Gale/Triangle, Inc. et al.*, No. 2:16-cv-00783-MCE-DB, ECF No.
11 33 (E.D. Cal. Sept. 21, 2017) (approving hourly rates in the \$400/hour range, with rates of up to
12 \$675 for partners) (citations omitted); *Garcia v. Gordon Trucking, Inc.*, No. 1:10-CV-0324-AWI-
13 SKO, 2012 WL 5364575, at *9 (E.D. Cal. Oct. 31, 2012) (approving rates of \$650 per hour,
14 based on attorneys’ skill, risks and percentage award); *see also Z.F. v. Ripon Unified Sch. Dist.*,
15 No. 2:10-cv-00523-TLN-CKD, 2017 WL 1064679, at *3 (E.D. Cal. Mar. 21, 2017) (“Prevailing
16 hourly rates in the Eastern District of California are in the \$350–\$550/hour range for experienced
17 attorneys with over 15 years of experience in civil rights and class action litigation.”).

18 Associates Jonathan Lee and Anthony Castillo, each with rates of \$435 per hour,
19 have practiced law for approximately eleven years, and former associate Ishan Dave, whose rates
20 were \$295 per hour, has practiced law for approximately five years. Perez Decl. ¶ 14. As noted
21 above, courts in the Eastern District have previously accepted hourly rates for associates between
22 \$370 and \$495 for lodestar purposes, though lower rates are more commonly approved. *Milburn*,
23 2019 WL 5566313, at *8 (E.D. Cal. Oct. 29, 2019) (noting courts previously accepted hourly
24 rates of between \$370 and \$495 but some courts in district approved only lower rates); *In re Taco*
25 *Bell Wage and Hour Actions*, 222 F. Supp. 3d 813, 838–40 (E.D. Cal. 2016) (courts in Eastern
26 District have found \$350 to \$400 per hour for attorneys with twenty or more years of experience,
27 \$250 to \$350 per hour for attorneys with less than fifteen years’ experience, and \$125 to \$200 per
28 hour for attorneys with less than two years’ experience reasonable); *Reyes v. CVS Pharm., Inc.*,

1 No. 1:14-cv-00964-MJS, 2016 WL 3549260, at *12–13 (E.D. Cal. June 29, 2016) (awarding
2 between \$250 and \$380 for attorneys with more than twenty years of experience, and between
3 \$175 and \$300 for attorneys with less than ten years’ experience). Based on the prevailing rates,
4 the court finds \$435 is a reasonable hourly rate for Jonathan Lee and Anthony Castillo and \$295
5 is a reasonable hourly rate for Ishan Dave. The court will not change the rate applied to the work
6 of Melissa Grant, Robert Drexler, Stephen H. Gamber, Stan Karas, Bevin Allen Pike, Matthew
7 Bainer, Jamie Greene, and Eduardo Santos. Perez Decl. ¶ 14. Each of these attorneys were either
8 partner or senior counsel during this case, with rates between \$495 and \$695 per hour. *Id.*

9 Mr. Perez has approximately 25 years of experience as an attorney and his hourly
10 rate is \$725. Perez Decl. ¶ 14. Another court in this district declined to approve the rate of \$700
11 an hour for an attorney with more than 30 years’ experience in class action cases and instead held
12 \$695 per hour to be “reasonable.” *Milburn*, 2019 WL 5566313, at *9. Recently, this court
13 applied the reasoning of *Milburn* and also declined to use an hourly rate of \$700 for an attorney
14 with 30 years of experience, given the fee landscape in this district. *See Smothers v. NorthStar*
15 *Alarm Services LLC*, No. 2:17-cv-00548-KJM-KJN, 2020 WL 1532058, at *9 (E.D. Cal. Mar. 31,
16 2020) (applying \$695 per hour to lodestar calculation for attorney with 30 years’ experience).
17 The court will continue to follow this reasoning here. This reduces Mr. Perez’s total fees for the
18 lodestar calculation to **\$43,854.50**.

19 After calculating the total fees of each attorney, including the reduction in Mr.
20 Perez’s fees, the total lodestar amount is **\$780,208.50**, down from **\$782,101.50** plaintiff initially
21 requested.

22 To reach plaintiff’s counsel’s total requested fee of \$966,667 requires applying a
23 multiplier of approximately **1.24** to the adjusted lodestar amount of \$780,208.50. The Ninth
24 Circuit has accepted multipliers within this range. *See, e.g., Vizcaino*, 290 F.3d at 1050–51, 1051
25 n.6 (reviewing approved fees from 24 cases and finding 20 of 24 fell within the 1.0–4.0 range,
26 and 13 of 24 fell within the 1.5–3.0 range). This court evaluates the factors discussed in
27 *Bluetooth* to determine whether a 1.23 lodestar multiplier is justified here. *See In re Bluetooth*,
28 654 F.3d at 946 (citing relevant factors as “the quality of representation, the benefit obtained for

1 the class, the complexity and novelty of the issues presented, and the risk of nonpayment”)
2 (quoting *Hanlon*, 150 F.3d at 1029).

3 b) Bluetooth Factors

4 First, plaintiff’s counsel represented the class through a multi-stage litigation and
5 negotiation process, which included both mediation and multiple motions before this court. This
6 factor demonstrates a modest positive multiplier to the lodestar amount is acceptable. *See In re*
7 *Bluetooth*, 654 F.3d at 942.

8 Second, plaintiff’s counsel negotiated a settlement considerable in size by
9 comparison to other wage and hour cases. *See id.* (“Foremost among these considerations,
10 however, is the benefit obtained for the class.”). The settlement is approximately 17 percent of
11 defendant’s maximum total exposure, which is greater than other settlements in cases such as
12 these. *See Balderas v. Massage Envy Franchising, LLP*, 2014 WL 3610945, at *5 (N.D. Cal. Jul.
13 24, 2014) (awarding settlement of eight percent of defendant’s maximum recovery); *In re*
14 *Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) (awarding settlement
15 between six percent and eight percent of defendant’s maximum recovery). Plaintiff also
16 highlights the average settlement is approximately \$155, with the highest payment approximately
17 \$1,235. Mot. Approval at 23 (citing Hernandez Decl. ¶ 8). This average settlement is higher than
18 many wage and hour class action settlements in California. Mot. Approval at 23–24 (citing
19 *Badami v. Grassroots Campaigns, Inc.*, No. 3:07-cv-03465- JSW (N.D. Cal. Sept. 15, 2008)
20 (average settlement approximately \$195); *Sandoval v. Nissho of Cal., Inc.*, No. 37-2009-
21 00091861-CU-OE-CTL (San Diego County Super. Ct. 2009) (average settlement of
22 approximately \$145); *Fukuchi v. Pizza Hut*, No. BC302589 (L.A. County Super. Ct. 2006)
23 (average settlement of approximately \$120); *Contreras v. United Food Group, LLC*, No.
24 BC389253 (L.A. County Super. Ct. 2008) (average settlement approximately \$120); *Ressler v.*
25 *Federated Department Stores, Inc.*, No. BC335018 (L.A. County Super. Ct. 2008) (average
26 settlement approximately \$90). Additionally, plaintiff emphasizes that not a single class member
27 has objected to the settlement and less than 0.15 percent of the settlement class opted out, which
28

1 as noted above indicates the settlement is “fair and reasonable.” *See id.* This factor supports
2 adding a positive multiplier to the lodestar amount.

3 Third, neither plaintiff’s motion nor the record suggests plaintiff’s claims were
4 novel or complicated for counsel. This third factor does not support a positive multiplier to the
5 lodestar amount.

6 Fourth, plaintiff’s counsel represented the class on a contingency basis.
7 Plaintiff’s counsel had no guarantee they would receive any payment for the hours litigating this
8 case and for the costs they incurred as a result. Mot. Fees at 22. Plaintiff’s counsel points out
9 other courts have rewarded counsel who accept cases on a pure contingency basis, as has this
10 court. *Id.* at 22–23 (citing *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291,
11 1299 (9th Cir. 1994) (“It is an established practice in the private legal market to reward attorneys
12 for taking the risk of non-payment by paying them a premium over their normal hourly rates for
13 winning contingency cases.”) (citations omitted); *Ketchum v. Moses*, 24 Cal. 4th 1122 (2001)
14 (instructing courts to upwardly adjust fee compensation to ensure fees account for contingency
15 risk).

16 With one exception, all the *Bluetooth* factors support the application of a positive
17 multiplier to the lodestar amount. In addition, a multiplier of 1.24 is within the acceptable range
18 in the Ninth Circuit. With that multiplier applied here, the court finds the attorneys’ fees
19 requested are reasonable.

20 3. Request for Costs

21 The court also must determine an appropriate award of costs and expenses.
22 Fed. R. Civ. P. 23(h). “[I]n evaluating the reasonableness of costs, the judge has to step in and
23 play surrogate client.” *Ross v. Bar None Enters., Inc.*, No. 2:13-cv-00234, 2015 WL 1046117, at
24 *11 (E.D. Cal. Mar. 10, 2015) (internal quotation marks, citation omitted). “In keeping with this
25 role, the court must examine prevailing rates and practices in the legal marketplace to assess the
26 reasonableness of the costs sought.” *Id.* (internal quotation marks and citation omitted).

27 In this case, plaintiff’s counsel represents that combined unreimbursed costs total
28 \$199,609.47, and include filing fees, court reporter and transcript fees, copy charges,

1 investigation fees, mediation fees, postage fees, research fees, expert and consultant fees and
2 travel costs to hearings and mediation. Mot. Fees at 28; Perez Decl. ¶ 17. Plaintiff’s counsel
3 requests a total of \$200,000, taking account of modest additional costs and expenses for travel to
4 the final approval hearing. *Id.* Defendant has agreed to pay for these costs as part of the
5 negotiated fees. *Id.* Courts approve these sorts of costs for reimbursement. *See Barbosa*, 297
6 F.R.D. at 454 (costs associated with travel and photocopying as well as mediation fees are
7 “routinely reimbursed”); *Fontes v. Heritage Operating, L.P.*, No. 14-cv-1413-MMA (NLS),
8 2016 WL 1465158, at *6 (S.D. Cal. Apr. 14, 2016) (approving class counsel’s costs, which
9 included “court filing fees, research costs, mediation-related expenses, attorney services costs,
10 and travel expenses”). The court finds the costs requested here are reasonable.

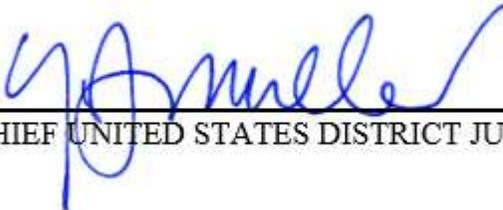
11 IV. CONCLUSION

12 For the reasons set forth above, plaintiff’s motion for attorneys’ fees, costs and
13 expenses and a class representative enhancement payment, ECF No. 80, and motion for final
14 approval of the class settlement, ECF No. 81, are GRANTED.

15 This order resolves ECF Nos. 80 and 81. The Clerk of Court is directed to CLOSE
16 the case.

17 IT IS SO ORDERED.

18 DATED: September 15, 2020.

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CHIEF UNITED STATES DISTRICT JUDGE