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and the Putative Class*

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

JEFF FULLER, an individual, on behalf of  
himself and other persons similarly situated,

Plaintiffs,

v.

ZEP, INC., a Delaware corporation; ACUITY  
SPECIALTY PRODUCTS, INC., and DOES 1  
through 100, inclusive,

Defendants.

Case No. 4:18-cv-02672-JSW

Assigned to: *Hon. Jeffrey S. White*

**CLASS ACTION**

**NOTICE OF MOTION AND UNOPPOSED  
MOTION FOR ATTORNEYS' FEES AND  
COSTS**

Final Approval Hearing:

Date: January 17, 2020

Time: 9:00 a.m.

Place: Courtroom 5, Oakland Courthouse

**TO THE COURT AND ALL INTERESTED PARTIES:**

PLEASE TAKE NOTICE that on January 17, 2020, at 9:00 a.m., or as soon thereafter as the  
matter may be heard before the Honorable Jeffrey S. White, in Courtroom 5, 2<sup>nd</sup> floor of the U.S.  
District Court, Northern District located in the Oakland Courthouse at 1301 Clay Street, Oakland,

1 California, Plaintiff JEFF FULLER and Class Counsel will and hereby do move the Court for an  
2 Order approving of the requested attorneys' fees and cost award in this matter, as part of the final  
3 fairness / final approval process, as follows:

- 4 1. Approving payment of attorneys' fees to Class Counsel in the amount of \$525,000;
- 5 2. Approving payment of litigation costs to Class Counsel in the amount of \$14,608.77;

6 This motion is brought pursuant to Rule 23(h) of the *Federal Rules of Civil Procedure* and the  
7 Court's Preliminary Approval Order (D.E. 53), as well as pursuant to the Court-approved Class Notice  
8 disseminated on October 3, 2019. The motion will be based upon this Notice, the Memorandum of  
9 Points and Authorities set forth below; the Declarations of Alejandro P. Gutierrez, Daniel J. Palay, and  
10 Brian D. Hefelfinger filed concurrently herewith, all of the pleadings, papers, and documents  
11 contained in the file of the within action; and such further evidence and argument as may be presented  
12 at or before the hearing on the Motion.

13 This Motion is *unopposed* by Defendants.

14  
15 Dated: November 12, 2019

**PALAY HEFELFINGER, APC**

16  
17 By:   
18 DANIEL J. PALAY  
19 Attorneys for Plaintiffs and the Class  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Class Counsel have obtained, by commencing and litigating this wage-and-hour class action, a  
4 non-reversionary, cash and injunctive relief settlement (the “Settlement”; D.E. 46-1, at pp. 11-53) of  
5 \$1,500,000 in immediate cash, and then further monetary payment to Settlement Class Members, over  
6 time, that is roughly 6X the value of the alleged wrongfully taken commissions, plus another 50% of  
7 the value indefinitely thereafter (so long as employed), plus the introduction of new sales programs  
8 available for use at Defendant’s business. (Palay Decl., ¶ 11, 14). All of these benefits obtained  
9 through the litigation were negotiated for the benefit of a Class of 289 sales representatives.

10 This is a highly favorable recovery obtained in the face of substantial risk, particularly since  
11 Class Members were subject to arbitration agreements with an express class action waiver. The  
12 recovery obtained for the Class here was achieved largely through the skill and effective advocacy of  
13 Class Counsel.

14 The Court has preliminarily approved the Settlement, finding that its terms – including those  
15 that provide for Class Counsel fees of \$525,000, paid from the Settlement Fund, and expenses not to  
16 exceed \$20,000 – “have no obvious deficiencies.” Notably, not a single Class Member has objected to  
17 the fees and costs requested in the Class Action Settlement. The request for \$525,000 to paid from the  
18 Gross Settlement Amount also is supported by Ninth Circuit precedent and the record of effort  
19 expended herein.

20 Accordingly, Class Counsel respectfully request an award of attorneys’ fees in the amount of  
21 \$525,000, plus expenses in the amount of \$14,608.77.

22 **II. STATEMENT OF ISSUES TO BE DECIDED**

23 (1) Whether an award of attorneys’ fees of \$525,000 is reasonable in light of the difficulty,  
24 risk, novelty and complexity of this case, the skill involved and the size of the \$1,500,000 initial  
25 common fund, plus other monetary and non-monetary value created; and

26 (2) Whether reimbursement of the \$14,608.77 in out-of-pocket litigation costs expended by  
27 Class Counsel to prosecute this litigation is proper.



1           **III.     STATEMENT OF FACTS**

2           The preliminary approval motion filed in this action (D.E. 46), granted with approval by the  
3 Court on August 19, 2019, describes in detail the comprehensive and difficult work performed by  
4 Class Counsel to overcome the significant risks presented by this litigation and to create the \$1.5  
5 million initial Settlement fund for the benefit of the class.

6           Plaintiff and the Settlement Class Members (together, referred to as the “Plaintiffs” in this  
7 brief) work/ed as commission-only outside salespersons in the United States of America, between the  
8 dates of May 7, 2014 and the present for defendant ZEP, Inc., which offers various cleaning and  
9 chemical solutions for retail, food & beverage, industrial & institutional, and vehicle care customers.  
10 In this action, the Plaintiffs allege, inter alia, that Defendants violated California state wage and hour  
11 laws, and generally applicable principles of contract law (including the duty of good faith and fair  
12 dealing), with regard to the payment of commission and the taking of accounts from Class Members.  
13 (Palay Decl. ISO Prelim. Approval, D.E. 46-1, ¶ 5). Specifically, Plaintiff alleges that Defendants  
14 unlawfully took accounts from its commission sales representatives in violation of both the law and in  
15 violation of its contracts with the Class. (*Id.* at ¶ 5-6). The Defendants has denied the allegations of the  
16 Plaintiff. (Dkt. No. 38).

17           The parties first attended private mediation, presided over by Steven J. Rottman, on November  
18 20, 2018. Thereafter, the parties continued negotiating. A further in-person meeting between the  
19 parties and all counsel was conducted on February 14, 2019 in Los Angeles. Thereafter, a second  
20 mediation session with Mr. Rottman took place on April 1, 2019. A memorandum of understanding  
21 was executed at the second (final) meeting, and the parties completed a long-form Joint Stipulation of  
22 Settlement thereafter. (D.E. 46-1, ¶¶ 8-11).

23           Since preliminary approval was granted in this matter, an extensive amount of work has been  
24 done to educate the class members regarding the nature of the settlement, to facilitate an understanding  
25 of the affected accounts, to explain the new sales programs and account policies obtained by the  
26 negotiations, and to generally answer the questions of class members with respect to the Settlement  
27 and their continued (or former) employment with ZEP. (Palay Decl. ISO Motion for Fees, “Palay  
28 Decl.,” ¶ 15).

1 The negotiated Settlement in this represents an excellent value for the Class Members. As  
2 detailed herein, the Settlement is the best possible outcome of this matter given the substantial risks  
3 and delays associated with litigation, and given the business risks and factors facing the Defendants as  
4 well as the Settlement Class Members. Even years of litigation would be unlikely to yield a better  
5 result. (D.E. 46-1, ¶ 17-22). As such, approval of the fees and costs requested is warranted.

#### 6 **IV. LEGAL ARGUMENT**

##### 7 **A. Legal Standard for Granting Attorney's Fees**

8 Rule 23(h) of the Federal Rules of Civil Procedure provides that, “[i]n a certified class action,  
9 the court may award reasonable attorney’s fees and nontaxable costs that are authorized by law or by  
10 the parties’ agreement.” *Fed.R.Civ.P.* 23(h). Concurrently, Plaintiffs’ request for an award of  
11 attorneys’ fees is authorized under California law. *See Labor Code* § 2699.

12 It has long been recognized that a lawyer who “recovers a common fund for the benefit of  
13 persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a  
14 whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). This rule, known as the common fund  
15 doctrine, is firmly rooted in American case law. The purpose of this doctrine is to avoid unjust  
16 enrichment so that “those who benefit from the creation of the fund should share the wealth with the  
17 lawyers whose skill and effort helped created it.” *In re Washington Pub. Power Supply Sys. Sec.*  
18 *Litig.*, 19 F.3d 1291, 1300 (9<sup>th</sup> Cir. 1994). Rule 23, subsection (h), relates that “[i]n a certified class  
19 action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law  
20 or by the parties' agreement” (*i.e.*, the stipulation of settlement). Because Rule 23 provides that  
21 “[n]otice of the motion must be served on all parties and, for motions by class counsel, directed to  
22 class members in a reasonable manner,” this request for fees and costs shall be posted to Class  
23 Counsel’s website page concerning this class action case, as well as to the claims administrator (CPT  
24 Group) website. (Palay Decl., ¶ 16).

25 In cases such as this, where the class benefit can be monetized with a reasonable degree of  
26 certainty, a percentage of the benefit approach may be used. *In re Consumer Privacy Cases*, 175  
27 Cal.App.4<sup>th</sup> 545, 557-58 (2009). The Supreme Court has recognized “the advantages of the  
28 percentage method—including relative ease of calculation, alignment of incentives between counsel

1 and the class, a better approximation of market conditions in a contingency case, and the  
2 encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the  
3 litigation” so that California courts have “discretion to forgo a lodestar cross-check.” *Laffitte v. Robert*  
4 *Half Int'l Inc.*, 1 Cal.5<sup>th</sup> 480, 506 (2016) (affirming trial court’s approval of one-third of the settlement  
5 as attorney’s fees).

6 The Ninth Circuit has similarly permitted courts to award attorney's fees using this method “in  
7 lieu of the often more time-consuming task of calculating the lodestar.” *Bluetooth Headset Products*  
8 *Liability Litigation*, 654 F.3d 935, 942 (9<sup>th</sup> Cir. 2011). This District has articulated that, “Where  
9 attorneys must depend on a lodestar approach there is little incentive to arrive at early settlement.” *In*  
10 *re Activision Securities Litigation*, 723 F.Supp.1373, 1376 (N.D.Cal. 1989) (collecting authority and  
11 describing benefits of the percentage method over the lodestar method).

12 Under the percentage method, California has recognized that most fee awards based on either a  
13 lodestar or percentage calculation are 33 percent and has endorsed the federal baseline or benchmark  
14 of 25 percent. *In re Consumer Privacy Cases*, 175 Cal.App.4<sup>th</sup> at 556 n. 13.

15 The Ninth Circuit has approved a “benchmark” percentage of 25%, and courts may adjust this  
16 figure upwards or downwards. *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311  
17 (9<sup>th</sup> Cir.1990)). In most common fund cases, “the award exceeds th[e] benchmark.” *In re Omnivision*  
18 *Technologies, Inc.*, 559 F.Supp.2d 1036, 1047 (N.D.Cal.2008). Percentage awards of 30 percent are  
19 common. *See In re Activision Sec. Litig.*, 723 F.Supp. 1373, 1377 (N.D.Cal.1989) (“ . . . nearly all  
20 common fund awards range around 30% . . . ); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9<sup>th</sup>  
21 Cir. 2002) (20–30% is the usual range . . . [The] Ninth Circuit cases echo this approach.”). Usually,  
22 50% of the fund is the upper limit on a reasonable fee award from a common fund, although  
23 “somewhat larger percentages are not unprecedented.” 4 Conte & Newberg, *Newberg on Class*  
24 *Actions* (4th ed. 2002) § 14:6.

25 The Ninth Circuit has set forth five factors as relevant criteria for evaluating the reasonableness  
26 of a fee request: (1) the results achieved; (2) the risks of litigation; (3) the skill required and the quality  
27 of work; (4) the contingent nature of the fee and the financial burden carried; and (5) awards made in  
28 similar cases. *See Vizcaino*, 290 F. 3d at 1048-50. These factors support final approval of Class

1 Counsel's 25% fee request.

2           **B. The Requested Award Is Warranted and Reasonable In Light of the Extraordinary**  
3           **Results Achieved by Class Counsel, the High-Quality of Work Performed, and Other**  
4           **Relevant Factors.**

5           Here, the requested \$525,000 as stipulated in the Settlement agreement is to be paid from the  
6 initial settlement sum, and for sake of simplicity will not be funded by future disbursements paid to  
7 class members under the continuing commission obligations of the Settlement. Accordingly, the  
8 percentage of fees compared to the total monetary value obtained by the Settlement is actually far less  
9 than 25%. *See* D.E. 46-1, ¶ 40 (the Settlement terms require that Defendants continue paying  
10 commissions generated by the reassigned accounts on an ongoing, go-forward basis, at 100% for five  
11 years, and then 50% thereafter. [Settlement, at § XII.A.]. Considering these amounts, plus the additional  
12 sales programs that were negotiated for the settlement class members, the overall "value" of the Settlement  
13 obtained is a benefit conferred on the class which is significantly higher – perhaps five to ten times – than  
14 the face value of the \$1.5M common fund that is *initially* being disbursed under the Settlement.).

15           **1. The Exceptional Results Achieved Support the Requested Fee.**

16           The most important factor in granting a fee award is the degree of success counsel achieved for  
17 the class. *See Vizcaino*, 290 F.3d at 1048; *Six (6) Mexican Workers*, 904 F.2d at 1311. To measure that  
18 success, "the factor given the greatest emphasis is the size of the fund created, because 'a common  
19 fund is itself the measure of success . . . [and] represents the benchmark from which a reasonable fee  
20 will be awarded.'" *Manual for Complex Litigation*, § 14.121 (quoting *Newberg on Class Actions* §  
21 14:6 at 547, 550).

22           In the present case, Class Counsel achieved a superb result for the class, negotiating a  
23 phenomenal non-reversionary \$1,500,000 initial settlement fund for payment to 289 class members,  
24 with further commissions being paid over time. Even after deducting the proposed awards of fees and  
25 incentives, the fund is large enough to provide an average share of \$3,088.24 *per class member*. (D.E.  
26 46-1, at ¶¶ 33-34). As noted at preliminary approval in this case, the data revealed that commissions  
27 generated by "re-assigned" accounts in this matter totaled approximately \$653,000 for the period of April  
28 2018 through April of 2019. For the estimated class size of 289 individuals, this means the average

1 Individual Commission Loss attributable to each Settlement Class Member is approximately \$2,259.52,  
2 and therefore the payment contemplated by the Settlement exceeds such actual loss amounts. This  
3 arguably represents a full recovery of the at-issue commissions that were disputed in the case. *Id.*  
4 This is an exceptional result. *See In re Oracle Securities Litigation*, 852 F. Supp. at 1459 (N.D.Cal.,  
5 May 24, 1994) (settlement recovering 24.5% of damages “relatively good” and “respectable”; a  
6 recovery of 77% of estimated damages would be “remarkable”); *see also, In re Heritage Bond Litig.*,  
7 2005 WL 1594403, \*19 (C.D. Cal Jun. 10, 2005) (settlement recovering 36% of estimated damages  
8 “an exceptional result” awarding 33.3% of the fund in fees). The recovery in the present case is even  
9 more compelling given the substantial litigation risks in this case, including the fact that many Class  
10 Members had entered into arbitration agreements with ZEP containing class action waivers.

11 Further, the structure of the settlement, which is an opt-out only settlement without any  
12 reversion, also supports the fee request. Because all of the class members who do not opt out of the  
13 settlement will receive a settlement payment without having to submit a claim form, and because no  
14 portion of the class fund will revert to ZEP, the Settlement avoids the possibility of a highly  
15 disproportionate fee in relation to the actual monetary recovery of the class. The fact that Class  
16 Counsel are not receiving a disproportionate distribution of the Settlement and that the payment of  
17 fees is not separated from the class funds are further indicia of the success achieved for the Class.

18 Finally, the negotiated Settlement herein requires Defendant to pay ongoing Account Residuals  
19 (Settlement, § XXII. A.), to provide Account Protection as well as a new Contract (Settlement, §  
20 XXII. B.), New Sales Programs (Settlement, § XXII. C.), and the return of certain season, equipment  
21 and “sister” accounts (Settlement, § XXII. D.) The monetary value of these negotiated terms is well  
22 into the millions of dollars. (Palay Decl., ¶ 14). However, given the administrative burdens and  
23 judicial oversight required for obtaining ongoing disbursements of commissions, fees, and costs, on an  
24 ongoing basis (i.e., while continuing and future commissions under the Settlement are paid), the  
25 parties negotiated for all fees and costs to simply be paid out of the initial Settlement fund of \$1.5M.  
26 (Palay Decl., ¶¶ 11,14).

27 In short, Class Counsel achieved exemplary results for the class and amply deserve a  
28 reasonable, 35% share of the initial fund that their work created, which is far less than 25% of the

1 overall monetary recovery that the Settlement provides. As discussed below, courts routinely award  
2 fees of 30% and up in cases where far, far less was achieved.

### 3 **2. The Risks Involved Support the Requested Fee.**

4 The next factor justifying the requested fee is the substantial degree of risk faced by Class  
5 Counsel. *See Vizcaino*, 290 F.3d at 1048. To achieve the result they accomplished for the class, Class  
6 Counsel took on and overcame a series of very significant risks. As an initial matter, ZEP was  
7 represented by an experienced and well-resourced defense firm, who vehemently contested liability.  
8 (Gutierrez Decl., ¶ 2). Class Counsel's ability to obtain the Settlement with such formidable legal  
9 opposition confirms the quality of Class Counsel's representation of Plaintiffs. The quality of opposing  
10 counsel is important in evaluating the quality of Class Counsel's work. *See, e.g., In re Equity Funding*  
11 *Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977).

12 Further, many Class Members who worked for ZEP since approximately late 2011 are subject  
13 to arbitration agreements with an express class action waiver. From that time forward, most of the  
14 ZEP sales representatives were presented with arbitration agreements as part of their continuing  
15 employment. (Palay Decl., ¶ 28). Recent Supreme Court precedent has further held that such a class  
16 action waiver would likely have been enforceable and, as such, the arbitration agreement(s) would  
17 likely have caused a major litigation hurdle in Plaintiffs' case. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612  
18 (2018).

19 ZEP has demonstrated through the litigation and negotiating process that its counsel are  
20 extensively versed in litigating class action matters, including several attacks on the pleadings filed in  
21 the case, as well as in arguments concerning the enforceability of employment arbitration provisions  
22 as well as the claims and defenses themselves. (Palay Decl., ¶ 28). Here, if the arbitration agreements  
23 were found to be enforceable, it could have deterred Class Members from pursuing claims on their  
24 own given the costs of arbitration and the requirement that they pursue their claims individually.

25 Class Counsel gave substantial consideration to the impact that ZEP's arbitration agreements  
26 could have on this litigation and concluded that the provisions created what would have been an  
27 enormous hurdle to class certification. (*Id.*). While Class Counsel believe that class certification of  
28 this action would be appropriate regardless of whether there was a settlement, they also recognize that

1 ZEP would be able to assert numerous arguments in opposition to a motion for class certification,  
2 including the existence of the arbitration agreements, which if successful, could have resulted in no  
3 recovery whatsoever for the vast majority of Class Members.

4 Also, proceeding with litigation would have imposed ongoing, substantial additional  
5 expenditures of time and resources, including substantial additional preparation and discovery, such as  
6 depositions of experts, the presentation of percipient and expert witnesses at trial, voluminous  
7 documentary evidence and the preparation and analysis of expert reports. Notably, Class Counsel  
8 previously litigated against ZEP in wage and hour litigation, and related arbitrations, which indeed  
9 “fractured” into many, many arbitrations necessitating extensive and time consuming litigation throughout  
10 the State. *See, e.g., Britto v. Zep, Inc.*, Alameda County Superior Court Case No. VG-10553718; *Aguilar*  
11 *v. Zep Inc.*, N.D. Cal. Case No. 13-CV-00563-WHO. (Palay Decl., ¶ 30). In the *Britto* and *Aguilar*  
12 matters, and related arbitrations, Class Counsel represented many of the same sales representatives that are  
13 putative class members herein. More importantly, for purposes of this motion and the requested fees,  
14 Class Counsel can, *based on firsthand knowledge involving past litigation with ZEP*, attest to the results  
15 obtained herein and the comparative efficiency of resolving the issues through the class action procedure  
16 rather than as many arbitrations. (Palay Decl., ¶ 30).

17 Further, the Settlement was agreed to in light of Plaintiffs’ recognition that, should they  
18 surmount the various hurdles of prosecuting their case, ZEP would undoubtedly appeal orders relating  
19 to class certification, arbitration, and/or the substantive merits of the case.

20 All of these risk factors favor approval of the fee requested.

### 21 **3. The Complexity and Novelty of the Issues Support the Requested Fee.**

22 This litigation would have been complex. As noted, the existence of ZEP’s arbitration policy  
23 would have complicated matters greatly. Prior ZEP wage/hour litigation involving Class Counsel  
24 resulted in “fractured” litigation spanning state court, federal court, and arbitral forms. For example, if  
25 ZEP had moved to dismiss this action and compel arbitration pursuant to the arbitration agreements –  
26 as it did in *Britto v. ZEP* – litigating the enforceability of the agreements could have likely involved  
27 years of litigation. This is especially so given the fact that the U.S. Supreme Court has upheld  
28 arbitration agreements with class waiver language. *Epic Sys. Corp. v. Lewis, supra*; *see also Ozga v.*

1 *U.S. Remodelers, Inc.*, 2010 WL 3186971, at \*3 (N.D.Cal. Aug. 9, 2010) (upward deviation from the  
2 benchmark was warranted because of “risk in prosecuting this case given the uncertain state of  
3 California law in similar wage and hour cases”); *Garcia v. Gordon Trucking, Inc.*, 2012 WL 5364575,  
4 10 (E.D.Cal. 2012) (case required “substantial skill in litigating complex legal issues, particularly in  
5 light of the uncertainty in California law” as related to plaintiff’s claims (approving fees of 33% of  
6 total gross settlement amount).

7 Further, the calculation of the “commissions owed” component of the Class Members’  
8 compensation (*i.e.* whether the appropriate measure would have been the actual commissions  
9 generated and given to inside sales during the relevant period, versus historical performance when the  
10 accounts were handled by the Class Members), would have presented a potentially complex issue.  
11 (Palay Decl., ¶ 32). *See, e.g., Morales v. Stevco, Inc.*, 2013 WL 1222058, \* 3 (E.D. Cal. 2013)  
12 (“California wage and hour law is extremely complex and the statutory/administrative language can be  
13 particularly difficult to parse. This factor weights in favor of a higher [fee] award” (approving fees of  
14 30% of gross settlement amount.”))

15 Accordingly, given the complexity of the issues, the requested fee is appropriate. *See In re*  
16 *Pacific Enterprises Securities Litigation*, 47 F.3d 373, 379 (9<sup>th</sup> Cir. 1995) (holding fees justified  
17 “because of the complexity of the issues and the risks”); *Morris v. Lifescan, Inc.* 54 Fed.Appx. 663,  
18 2003 WL 133119, at \*1 (9<sup>th</sup> Cir. 2003) (affirming district court’s award of 33% of settlement in risky  
19 and complicated class action with vigorous opposition). Here, the requested fees of \$525,000 are only  
20 taken from the initial \$1,500,000 settlement fund obtained and not from the future payments to Class  
21 Members in the form of continuing and future commissions, which further warrants the request.

#### 22 **4. The Skill Required and the Quality of Work Support the Requested Fee.**

23 Class Counsel have demonstrated substantial skill, diligence, efficiency, and high quality of  
24 work in achieving the proposed Settlement and its creation of a common fund initially paying out  
25 \$1,500,000. *Cf. Knight v. Red Door Salons, Inc.*, 2009, WL 248367, at \*6 (N.D.Cal. Feb. 2, 2009)  
26 (“The sizeable recovery of \$500,000 is some testament to Plaintiffs’ counsel’s skill. This factor  
27 supports the [30%] requested fee.”)

28 Class Counsel obtained this excellent result within the 18-month duration of this action, but



1 without the necessity of going through trial and appeals. This means that Class Members will not have  
2 to wait years to be paid their earned wages, or to benefit from the negotiated commission payouts or  
3 new account policies under the Settlement. The distribution of the initial payment of commissions via  
4 the class settlement fund is a substantial benefit in and of itself. “Early settlements benefit everyone  
5 involved in the process and everything that can be done to encourage such settlements - especially in  
6 complex class action cases - should be done.” *In re M.D.C. Holdings Sec. Litig.*, No. CV89-0090,  
7 1990 WL 454747, at \*7 (S.D. Cal. Aug. 30, 1990) (awarding 30% of common fund, even where  
8 “Class counsel obtained this result in a very short period of time”).

9 Here, Class Counsel demonstrated that they were able to develop a compelling case,  
10 notwithstanding ZEP’s arguments that the case could not be successfully prosecuted through trial as a  
11 class action due to, among other things, many of the Class Members being subject to arbitration  
12 agreements as well as substantive affirmative defenses asserted. That Class Counsel successfully  
13 negotiated settlement in the case, avoiding further expenditure of resources by the parties and the  
14 Court further shows their skill and efficiency. This is precisely the type of “exceptional result” that  
15 “should be fully rewarded.” *Glass v. UBS Fin. Svcs. Inc.*, 2007 WL 221862, at \*16 (N.D. Cal. Jan. 26,  
16 2007) (“Class counsel’s prompt action in negotiating a settlement while the state of the law remained  
17 uncertain should be fully rewarded.”). Notably, the *Glass* court found that because the early  
18 settlement resulted in a significant benefit to the class, there was no need to conduct a lodestar cross-  
19 check. *Id.*; see also *Palacios v. Penny Newman Grain, Inc.*, 2016 WL 8730677 (E.D.Cal. 2016)  
20 (Finding the fee request as percentage of the common fund “reasonable because counsel obtained an  
21 early settlement and favorable result per class member, while avoiding costs and uncertainties of  
22 litigation.”)

23 Class Counsel’s recovery for the Class is a direct result of their legal acumen and diligence.  
24 They exercised great strategic skill in settling and should not have their fee diminished because they  
25 were diligent and efficient. Class Counsel are highly experienced wage and hour class action litigators  
26 and have litigated over 20 wage-and-hour class actions and have brokered seven and eight-figure  
27 settlements in several of those cases. (Palay Decl. ¶¶ 12-13). They have been appointed as Class  
28 Counsel on numerous occasions.

1 This experience allowed Class Counsel to focus the factual and legal issues and seek resolution  
2 as well as participate in the mediations and negotiations that led to this Settlement. *See In re Heritage*  
3 *Bond Litigation, supra*, 2005 WL 1594403, \*19 (experience of Plaintiff’s Counsel justified 33% fee  
4 award); *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 449 (E.D.Cal. July 2, 2013)  
5 (approving fee in amount of 33 percent of class recovery in part because case “required specialist  
6 skills to litigate the legal theories relating to wage and hour law and labor law at issue in the case”);  
7 *Franco v. Ruiz Food Prods., Inc.*, 2012 WL 5941801 at \*16 (E.D.Cal. Nov. 27, 2012) (“specialist  
8 skills” are required “to litigate the legal theories relating to wage and hour law and labor law”  
9 (awarding fees of 33% of settlement amount).

10 Obtaining the Settlement was a demanding process, including preparation of multiple  
11 mediation briefs, exchange draft contract provisions, completing analyses of sales and commission  
12 revenues on a nationwide basis for use in damages models and once settlement was achieved,  
13 preparing the Joint Stipulation. Class Counsel negotiated each aspect of the Settlement. *See Palay*  
14 *Decl.*, ¶ 6-8. In settling the action, Class Counsel were able to obtain an extraordinarily favorable  
15 result for the Class despite the difficult challenges. *Palay Decl.*, ¶ 9.

16 Class Counsel also spent time preparing the motion for preliminary approval of the settlement  
17 and all supporting documents, all supplemental memoranda, jointly-approved internal company  
18 memoranda, the motion for final approval, motion for fees, and motion for incentive awards, and will  
19 also spend additional time monitoring the distribution of the settlement funds. Absent Class Counsel’s  
20 exceptional efforts in this case, 289 ZEP employees would not be entitled to receive, and ZEP would  
21 not be obligated to pay, on average \$5,190 per employee in wages, fees, and prejudgment interest, plus  
22 additional sums on an ongoing basis (*i.e.*, commission residuals). In sum, prosecuting this case  
23 required a commitment of time, resources, and energy from Class Counsel, and the relief achieved  
24 simply would not have been possible but for the commitment and skill of Class Counsel.

25 Class Counsel’s skill and diligence in achieving a settlement is a factor that weighs heavily  
26 toward approving the fee requested. In addition, Class Counsel’s history of successful prosecution of  
27 similar cases, including prior wage-and-hour class action work and individual arbitrations against  
28 ZEP, made credible their commitment to pursue this action through trial and beyond. *Palay Decl.*, ¶

1 30. *See Lusby v. GameStop Inc.*, 2015 WL 1501095, at \*4 (N.D.Cal. March 31, 2015) (awarding  
2 33.33% of settlement fund where class counsel devoted itself primarily to prosecuting employment  
3 law matters and almost exclusively to class actions); *Ogbuehi v. Comcast of*  
4 *California/Colorado/Florida/Oregon, Inc.*, 2015 WL 3622999, at \*11 (E.D.Cal. June 9, 2015) (The  
5 extensive experience of class counsel in wage-and-hour class action litigation supported requested  
6 33.33 percent fee award).

##### 7 **5. The Contingent Nature of the Case Supports the Requested Fee.**

8 The burdens borne by Class Counsel in taking on the litigation is another relevant factor that  
9 justifies awarding the requested fee. *See Vizcaino*, 290 F.3d at 1050; *Six (6) Mexican Workers*, 904  
10 F.2d at 1311. Adding to the other risks discussed herein is the fact that Class Counsel undertook this  
11 litigation on a contingent-fee basis, requiring them to shoulder not only the cost of attorney time, but  
12 all the substantial costs of approximately 18 months of litigation. Palay Decl., ¶ 33.

13 Courts have long recognized the public policy of rewarding attorneys for accepting  
14 representation on a contingent fee basis. *See In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19  
15 F.3d 1291, 1299 (9th Cir.1994). This is especially true where, as here, Class Counsel have significant  
16 experience in the particular type of litigation – wage and hour class actions – at issue. Moreover,  
17 when counsel takes cases on a contingency fee basis, the risk of non-payment after years of litigation  
18 justifies a significant fee award. *See In re Heritage*, 2005 WL 1594403, at \*19 (C.D.Cal. June 10,  
19 2005) (awarding attorneys’ fees in the amount of 33 percent of the common fund based in part on the  
20 effort, skill and experience of class counsel and collecting cases regarding the same); *Hopkins v.*  
21 *Stryker Sales Corp.* 2013 WL 496358 at \*3 (N.D.Cal. 2013) (in awarding fees of 30% of the  
22 settlement, the court explained that “[c]lass [c]ounsel took a significant risk investing in this case”  
23 because it “was conducted on an entirely contingent fee basis against a well-represented [d]efendant”  
24 and because [a]ll of the financial risk of litigation was therefore assumed by [c]lass counsel, whose fee  
25 arrangement with [p]laintiffs required [c]lass [c]ounsel to bear all the costs of litigation”; *Franco v.*  
26 *Ruiz Food Prods., Inc.*, 2012 WL 5941801 at \*16 (E.D.Cal. Nov. 27, 2012) (same).

27 Here, judged relative to these risks, this factor weighs in favor of granting the present motion  
28 in full. Class Counsel performed all the described work on a pure contingency-fee basis, with no

1 guarantee that they would ever be paid for any of their work or be reimbursed for any of their out-of-  
2 pocket costs. They turned down other potentially lucrative matters to take on this large-scale case, and  
3 devoted resources to it that could have been devoted to other potentially income-generating matters.  
4 Palay Decl., ¶ 33. Class Counsel’s willingness to undertake this complicated litigation and see it  
5 through to completion, notwithstanding these burdens and the risk that they might never be paid at all,  
6 should be recognized and rewarded, in accordance with Ninth Circuit precedent. *See Vizcaino*, 290  
7 F.3d at 1049.

#### 8 **6. Fee Awards in Other Wage and Hour Class Actions Support the Fee Requested.**

9 Plaintiffs’ request for attorney’s fees in the amount of \$525,000 from the common fund, or  
10 35% of the \$1,500,000 initial cash disbursement, falls well within the range of percentages awarded in  
11 class actions in California courts and is supported by recent California Supreme Court precedent in  
12 *Laffitte v. Robert Half Int’l, Inc.*, 1 Cal.5<sup>th</sup> 480 (2016), a wage-and-hour case involving a \$19 million  
13 settlement where the California Supreme Court affirmed a one-third percentage-based fee award to  
14 class counsel. *See also Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, at 66 n.11 (2008) (noting that fee  
15 awards in class actions average around one-third of the recovery); *Vedachalam v. Tata Consultancy*  
16 *Services, Ltd.*, 2013 WL 3941319, \*2 (N.D.Cal. July 18, 2013) (in awarding 30% of the \$29,750,000  
17 settlement fund in a wage and hour class action, the court noted that “the requested fee is well within  
18 the usual range of percentages awarded in similar cases”); *Villalpando v. Excel Direct Inc.*, 2016 WL  
19 7740854, \*2 (N.D.Cal. Dec. 12, 2016) (in wage-and-hour class action, court approved fee request of  
20 \$4,500,000 representing one-third of the settlement fund); *Syed v. M-I, LLC*, 2017 WL 714367  
21 (E.D.Cal. Feb 22, 2017) (approving fee request of \$2,333,333.33 in wage-and-hour class action,  
22 representing one-third of the gross settlement).

23 As discussed above, since the Settlement hear provides for substantial, continuing commission  
24 payments to the Settlement Class members which will dwarf the initial settlement cash payment —  
25 providing for “commissions from the ‘reassigned’ accounts ... paid at 100% of the commission rate  
26 and structure that existed prior to the account’s reassignment ... from the Final Date, for five (5) years  
27 thereafter on the reassigned account [and] after five years, the Account Residuals shall thereafter be  
28 paid to the Settlement Class Member that was previously aligned with the account at the rate of 50%

1 for as long as the Settlement Class Member is employed by Zep...” (See Settlement Agreement, D.E.  
 2 46-1 at p. 28, § XII.A.). Based on the payment terms, the Settlement monetary value alone is in  
 3 excess of 6X the \$1.5M initial disbursement, meaning that Counsel’s one-time \$525,000 fee request is  
 4 a very small percentage of the overall monetary amount that the Settlement provides to Class  
 5 Members. Six times the \$1.5M initial cash disbursement equates to roughly \$9M, and the fees  
 6 requested are approximately 6% of that amount to be paid over the next six years.

7 **7. Lack of Objection by Any Member of Class Supports Fee Award.**

8 Finally, the absence of objections from the Class to date further demonstrates the  
 9 reasonableness and fairness of the attorney's fee request. See *Hanlon v. Chrysler Corporation*, 150  
 10 F.3d 1011, 1027 (9th Cir. 1998) (“[T]he fact that the overwhelming majority of the class willingly  
 11 approved the offer and stayed in the class presents at least some positive commentary as to its  
 12 fairness”); see also *Garner v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 1687829, at \*2 (N.D.Cal.  
 13 April 22, 2010) (noting “single objection out of a sizeable class, after notice, further demonstrates the  
 14 reasonableness and fairness of [c]lass [c]ounsel's request”).

15 Here, pursuant to the Class Notice preliminarily approved by the Court and distributed to the  
 16 Class Members on October 3, 2019, the Class Members were apprised of the agreement concerning  
 17 attorneys’ fees, particularly stating:

18 2. Out of the [Settlement] Sum, ZEP will pay reasonable attorneys’ fees in a maximum amount not  
 19 to exceed \$525,000 (35% of the Sum) and actual costs incurred by Class Counsel (not to exceed  
 20 \$20,000). All payments for attorneys’ fees and costs will be paid from the Sum, which will reduce  
 21 their attorneys’ fees and costs at the hearing scheduled for \_\_\_\_\_, 2019 at  
 \_\_\_\_\_ A.M.

22 Class Notice, § IV.2. (D.E. 51, at p. 21).

23 CPT Group reports that as of the November 8, 2019 (the latest weekly report on the  
 24 administration), no Class Members have opted out of the Settlement. CPT Group further reports that  
 25 as of that same date, there have been no objections to the Settlement. Class Counsel will file a  
 26 supplemental declaration regarding the status of Class Member objections after the December 4, 2019  
 27 deadline for objecting to the Settlement.

28 ///

1           **C. The Lodestar “Cross-check” Also Supports Plaintiffs’ Fee Request.**

2           While Class Counsel are not seeking an award of fees based upon the lodestar/multiplier  
3 approach, cross-checking the fees under this doctrine confirms the reasonableness of the fee. *Craft v.*  
4 *County of San Bernardino*, 624 F.Supp.2d at 1122 (C.D.Cal. April 1, 2008) (though not required, a  
5 court may consider the lodestar in evaluating a percentage award request). The lodestar cross-check  
6 requires “neither mathematical precision nor bean-counting.” *In re Rite Aid Corp. Securities*  
7 *Litigation*, 396 F.3d 294, 306 (3d Cir. 2005). Class Counsel’s lodestar, unadjusted by a multiplier is  
8 \$259,125.00. (Palay Decl. ¶ 24; Hefelfinger Decl., Ex. A; Gutierrez Decl., ¶ 33). This is a baseline  
9 lodestar cross-check figure, as it is based on the time Class Counsel has recorded in the litigation as of  
10 November 12, 2019. Additional attorney hours and costs will be necessary over the next few months  
11 to ensure the proper administration and implementation of the Settlement. (Hefelfinger Decl., ¶ 29).

12           Class Counsel anticipates spending at least an additional fifty to one hundred (50-100) hours  
13 seeing this case through its final resolution, which includes responding to inquiries from members of  
14 the Settlement Class, drafting final approval papers, attending the final approval hearing, and  
15 communicating with the Claims Administrator. These future hours and costs should also be taken into  
16 account in considering Class Counsel’s request.

17           **1. Class Counsel’s Hourly Rates Are Reasonable.**

18           Under the lodestar method, a reasonable hourly rate “is the rate prevailing in the community  
19 for similar work performed by attorneys of comparable skill, experience, and reputation.” *Camacho v.*  
20 *Bridgeport Financial, Inc.* 523 F.3d 973, 979 (9<sup>th</sup> Cir. 2008). Ordinarily, reasonable hourly rates are  
21 based on each attorney’s *current* hourly rates. *Vizcaino*, 290 F. 3d at 1051. The relevant community  
22 is the location where the district court sits, in this case the Northern District of California. *Camacho*,  
23 523 F.3d at 979.

24           Plaintiffs and the Class were represented by two law firms experienced in wage and hour class  
25 actions on a contingency basis. The hourly rates for each law firm are set forth in the concurrently  
26 filed Class Counsel declarations and summarized in the table below.

<i>Name</i>	<i>Year Admitted to California Bar</i>	<i>Position</i>	<i>Hourly Rate Sought</i>
Alejandro P. Gutierrez	1983	Attorney	\$700
Daniel J. Palay	1997	Attorney	\$700
Brian D. Hefelfinger	2007	Attorney	\$500
Coleen DeLeon	N/A	Certified Paralegal	\$200

In terms of recent rate determinations in this District, in *Ross v. Ecolab*, C 13-05097-PJH, this Court approved Mr. Gutierrez’s hourly rate of \$700, as did the court in *Martino v. Ecolab*, 5:14-cv-04358-VC. In the *Ross v. Ecolab* matter, three attorneys with 86 collective years of experience practicing in the Northern District submitted declarations attesting to the reasonableness of Class Counsel’s hourly rates and that such rates are commensurate with those of attorneys with similar experience. This rate was justified by the high level of Class Counsel’s experience in litigating wage and hour class actions.

In addition, Class Counsel’s rates have previously been approved by California courts as reasonable in *Aguilar et al. v. Zep et al.*, USDC Case No. 13-cv-99563-WHO, another wage and hour case, where the court found in its August 2014 order granting plaintiffs’ attorneys’ fees that Mr. Gutierrez’s then-hourly rate of \$700 was reasonable. Gutierrez Decl., ¶ 21.

Further, \$200 is a reasonable hourly rate for certified paralegals in the community. The courts in this District, in *Martino v. Ecolab*, USDC Case No. 5:14-cv-04358-VC and *Ross v. Ecolab*, USDC Case No. C 13-05097-PJH each approved Ms. De Leon’s then-hourly rate of \$195. Those hourly rates increased in 2017 to \$200 an hour. (Gutierrez Decl., ¶ 31).

Class Counsel’s hourly rates are within the range of those found reasonable in employment cases in the Northern District. *See, e.g., Banas v. Volcano Corp.*, 47 F.Supp.3d 957, 965 (N.D. Cal. 2014) (finding attorney rates as high as \$1,095 an hour to be “within the prevailing market rates for similar cases in the Northern District”); *Moore v. PetSmart, Inc.*, 2015 WL 5439000, \*12 (N.D. Cal. Aug. 4, 2015) (“In this case, the relevant community is the Northern District of California where reasonable rates for partners range from \$560 to \$800, associates range from \$285 to \$510, and paralegals and litigation support staff range from \$150 to \$240”; *Taylor et al. v. West Marine Products, Inc.*, 2015 WL 2452902, \*2 (N.D. Cal. 2015), (hourly rate of \$790 reasonable for a 41-year attorney and \$625 reasonable for 12-year attorneys); *Loretz v. Regal Stone, Ltd.*, 756 F.Supp.2d 1203,

1 1211 (N.D. Cal. 2010), (hourly rates of \$775 to \$900 for partners and \$225 for a legal assistant  
2 reasonable).

3       Alternatively, in assessing reasonableness of hourly rates, courts often refer to the *Laffey*  
4 matrix, “[a] widely recognized compilation of attorney. . . rate data” for the District of Columbia, “so  
5 named because of the case that generated the index.” *In re Chiron Sec. Litig.*, 2007 WL 4249902 at \*6  
6 (N.D. Cal. Nov. 30, 2007). The *Laffey* adjusted matrix for the period 6/1/15 to 5/31/16 determines that  
7 the average rate for attorneys with 20+ years of experience is \$796.00. Attached hereto as Exhibit B is  
8 a true and correct copy of the Laffey Matrix for the period 6/1/15 to 5/31/16. This rate, however, is  
9 tailored for the District of Columbia, which has a +24.22% locality pay differential, while the San  
10 Francisco area has a locality pay differential of +35.15%. This differential means that the \$796 figure  
11 must be adjusted upward by 9% to \$867.64. (See Ex C to Palay Decl.). Palay Decl., ¶ 36. (See *In re*  
12 *HPL Technologies, Inc. Securities Litigation*, 366 F.Supp.2d 912, 920 – 921 (N.D.Cal. April 22, 2005)  
13 explaining how to adjust *Laffey* Matrix rates.) Here, Plaintiffs’ counsels’ hourly rates are  
14 commensurate with those demonstrated in the *Laffey* Matrix even before adjusting it for locality  
15 differentials.

## 16           **2. Class Counsel’s Hours Expended Were Reasonably and Necessarily Incurred.**

17       From this case’s inception in July 2017 to the present, Class Counsel have recorded at least  
18 490 hours in litigating this matter. (See Ex. A to Gutierrez Decl.; Ex. A to Hefelfinger Decl.). Class  
19 Counsel exercised sound billing discretion by reducing the billable hours incurred, including writing  
20 off time billed by associate attorneys. Gutierrez Decl., ¶ 4, Hefelfinger Decl., ¶ 28. Class Counsel  
21 also delegated many tasks to lower-billing paralegals and associate attorneys. Gutierrez Decl., ¶ 3.

22       Because this was a contingency fee case, Class Counsel had little incentive to spend  
23 unnecessary time on tasks to inflate their fees. The hours Class Counsel spent litigating the case were  
24 limited to that necessary to pursue Plaintiffs’ claims and to procure and effectuate a class settlement.  
25 Class Counsel worked closely and in cooperation with one another to divide tasks, ensure efficient  
26 case management, and prevent duplication of efforts. Gutierrez Decl., ¶ 3. Accordingly, the hours  
27 expended were reasonably and necessarily incurred.  
28



1           **D.     A Lodestar Multiplier is Warranted**

2           The \$525,000 fee requested by Class Counsel reflects a 35% portion of the initial funds  
3 disbursed to class members, and is not taking any funds from the future commission payments that  
4 were negotiated for. Considering all of the monetary consideration provided for under the Settlement,  
5 the “percentage of the fund” is actually much lower. Compared to the lodestar amount, the fees  
6 requested represents a multiplier of 2x, which as noted will decrease in the coming months as Class  
7 Counsel continue to perform work for the Class. This multiplier is well within the range of  
8 multipliers routinely approved in this Circuit in comparable common fund settlements. In fact, a  
9 Northern District Court recently granted the same Class Counsel here a percentage the fund fee award  
10 representing a 6.57 multiplier of their lodestar, which it found “well within the range of multipliers  
11 that courts have allowed, and is warranted in this case.” *Martino v. Ecolab Inc.*, 5:14-cv-04358-VC,  
12 *Dkt. No. 97*. See also *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052, n. 6 (survey of multipliers  
13 in common fund cases as high as 19.6); *Steiner v. American Broadcasting Co., Inc.*, 248 Fed.Appx.  
14 780, 783 (9<sup>th</sup> Cir. 2007) (approving multiplier of 6.85 as falling “well within the range of multipliers  
15 that courts have allowed” and citing cases); *Craft*, 624 F. Supp. 2d at 1125 (approving percentage fee  
16 award yielding a multiplier of 5.2, noting “there is ample authority for such awards resulting in  
17 multipliers in this range or higher,” citing cases involving lodestar multipliers of up to 19.6);  
18 *Buccellato v. AT&T Operations, Inc.* 2011 WL 3348055, \* 2 (N.D.Cal. 2011) (approving 4.3  
19 multiplier in employment class action and citing cases approving multipliers of up to 9.3); *In re Rite*  
20 *Aid Corp. Sec. Litig.*, 362 F.Supp.2d 587, 589 (E.D.Pa. 2005) (25% of the settlement fund awarded,  
21 resulting in lodestar multiplier of 6.96).

22           Among the factors warranting an upward enhancement of the lodestar figure are “the quality of  
23 representation, the benefit obtained for the class, the complexity and novelty of the issues presented,  
24 and the risk of nonpayment.” *Hanlon v. Chrysler Corp*, 150 F.3d 1011, 1029 (9<sup>th</sup> Cir. 1998), citing  
25 *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9<sup>th</sup> Cir.1975). “Foremost among these  
26 considerations, however, is the benefit obtained for the class.” *In re Bluetooth Headset Products*  
27 *Liability Litigation*, 654 F.3d 935, 942 (9<sup>th</sup> Cir. 2011).

1 Here, as discussed, Class Counsel has obtained a significant recovery - \$1,500,000 in initial  
2 cash, future commissions exceeding that amount by several times, and non-monetary policy changes  
3 and sales programs implemented at the Defendant. Compared to other wage-and-hour class actions in  
4 the Northern District, this is an exemplary and rare result. *See Burden v. SelectQuote Insurance*  
5 *Services*, 2013 WL 39888771 (N.D.Cal. 2013) (court found an average award of between \$1,850 and  
6 \$3,335 per class member “quality results”); *Ching v. Siemens Industry, Inc.*, 2014 WL 2926210  
7 (N.D.Cal. 2014) (court found an average individual award of \$2,672.56 a “very favorable result”);  
8 *Covillo v. Specialty's Café*, 2014 WL 954516 (N.D.Cal. 2014) (court found an average gross recovery  
9 of \$1,477 per class member “substantial results,”) and so forth. Such per-person averages that courts  
10 have blessed, are smaller than the total value of the recover to each Settlement Class Member in this  
11 matter.

12 Moreover, a multiplier is justified due to Class Counsel having settled fairly early on in the  
13 litigation. As explained above, the decision to settle early is to be rewarded, since Class Members will  
14 now avoid the risks of additional litigation and are assured of substantial and immediate monetary  
15 recovery. The court in *Lealao* states the proposition succinctly:

16 [T]he promptness of settlement cannot be used to justify the refusal to apply a  
17 multiplier to reflect the size of the class recovery without exacerbating the disincentive  
18 to settle promptly inherent in the lodestar methodology. Considering that our Supreme  
19 Court has placed an extraordinarily high value on settlement, it would seem counsel  
should be rewarded, not punished, for helping to achieve that goal, as in federal courts.

20 *Lealao v. Beneficial Cal. Inc.*, 82 Cal. App. 4<sup>th</sup> 19, 53 (2000).

21 According to *Lealao*, to *not* apply a multiplier under these circumstances would be deleterious  
22 to California policy, as “awards that are too small [will] chill the private enforcement essential to the  
23 vindication of many legal rights and obstruct the representative actions that often relieve the courts of  
24 the need to separately adjudicate numerous claims.” *Id.* at 53; *see also Thayer v. Wells Fargo Bank*  
25 *N.A.*, 92 Cal.App.4<sup>th</sup> 819, 838 (2001) (“high-quality work may produce greater results in less time than  
26 would work of average quality, thus justifying a multiplier.” (citing Pearl, *Cal. Attorney Fee Awards*  
27 (Cont. Ed. Bar 2d ed. 1998) § 13.6 at p. 327).

28 Because of Class Counsel’s experience in employment litigation, they were able to obtain the

1 exceptional result achieved here and to avoid costly, expansive, and potentially multi-jurisdictional  
2 litigation, where other counsel without as much experience would likely have had to expend  
3 considerably more time to accomplish the same result. (Palay Decl., ¶ 23); see *Craft v. County of San*  
4 *Bernardino*, 624 F.Supp.2d 1113, 1123 (awarding percentage of the class fund resulting in a multiplier  
5 of 5.2 times the lodestar where plaintiffs’ counsel’s time was likely as low as it was due to counsel’s  
6 exceptional experience in “litigation of this type.”). The commitment of Class Counsel’s hours  
7 employed in this matter, viewed in light of the commitment that would have been required to litigate  
8 this to a conclusion, requires a substantial upward adjustment of the lodestar in order to fulfill the goal  
9 of determining a fair and reasonable fee. It is entirely appropriate to reward expeditious and efficient  
10 resolution of the disputes in this matter. See *Vizcaino*, 290 F.3d at 1050 n. 5 (class counsel should not  
11 “receive a lesser fee for settling a case quickly . . .”). Accordingly, the Court should consider the  
12 efficiency with which Class Counsel litigated this case and achieved the results sought in an expedited  
13 fashion.

14 It is also well-settled that a positive multiplier is appropriate in common fund cases to reward  
15 attorneys for the risk assumed in taking and litigating the case. “[C]ourts have routinely enhanced the  
16 lodestar to reflect the risk of non-payment in common fund cases.” *In re Wash. Public Power Supply*  
17 *System Securities Litigation*, 19 F.3d 1291, 1300 (9<sup>th</sup> Cir. 1994). “This mirrors the established practice  
18 in the private legal market of rewarding attorneys for taking the risk of nonpayment by paying them a  
19 premium over their normal hourly rates for winning contingency cases.” *Vizcaino*, 290 F.3d at 1051.

20 As set forth herein, Class Counsel not only obtained exceptional *monetary and non-monetary*  
21 relief for the Class, but bore the risks involved in the litigation, including engaging in litigation against  
22 a well-financed, large company represented by experienced and aggressive counsel who could have  
23 invoked existing arbitration agreements. The issues presented in the case were sufficiently complex  
24 and novel that Class Counsel assumed a risk of nonpayment. Class Counsel devoted time and effort  
25 litigating this case on a purely contingent basis, without pay, even though recovery was uncertain.  
26 Class Counsel also advanced thousands of dollars in out-of-pocket expenses to prosecute this action,  
27 as set forth below.

28 These factors, as well as the experience of Class Counsel in litigating wage and hour class

1 actions, justify a significant multiplier. *See Washington Pub. Power*, 19 F. 3d at 1299 – 1300  
2 (“[C]ourts have routinely enhanced the lodestar to reflect the risk of nonpayment by paying them a  
3 premium over their normal hourly rates for winning contingency cases”). It was Class Counsel’s  
4 combination of depth of experience and ability, particularly with respect to wage-and-hour class  
5 actions, that in the final analysis, produced the exceptional result here. Lead Plaintiffs’ decision to  
6 retain Class Counsel was based on their record of success in similar past cases on behalf of ZEP  
7 workers. *See Palay Decl.*, ¶ 30.

8 A lodestar-plus-multiplier cross-check supports the reasonableness of the requested 35% fee of  
9 \$525,000 given the risks borne by Class Counsel proceeding on contingency, the complexity of the  
10 case, the experience, skill, and efficiency of counsel, and the substantial benefit realized for the Class.

11 **E. Class Counsel’s Requested Expense Reimbursement is Proper.**

12 “Reasonable costs and expenses incurred by an attorney who creates or preserves a common  
13 fund are reimbursed proportionately by those class members who benefit from the settlement.” *In re*  
14 *Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996). In the present case, the  
15 litigation expenses Class Counsel incurred were necessary to secure the resolution of this litigation.  
16 Class Counsel advanced all costs without assurance that they would ever be repaid. The Settlement  
17 Agreement permits Class Counsel to seek reimbursement of their litigation costs up to \$20,000 and  
18 class notice informed class members that Class Counsel would seek an award of costs not to exceed  
19 that amount. Class Counsel is making a request for reimbursement of \$14,608.77. (*See Palay Decl.*,  
20 ¶ 38; *Gutierrez Decl.*, ¶ 18).

21 Over half of the expenses consist of fees to the mediator. The mediation negotiations in this  
22 matter spanned over two sessions, in order to negotiate all of the relevant terms and policies that  
23 would potentially affect the Class Members. The costs also include filing fees, FedEx costs and Pacer  
24 costs, which are routinely reimbursed. *See Odrick v. UnionBanCal Corp.*, 2012 WL 6019495 at \*6  
25 (N.D. Cal. Dec. 3, 2012) (in a common-fund settlement reimbursement of costs for mediation, travel,  
26 copying, mailing, legal research, and other litigation-related costs in their entirety was justified);  
27 *Knight*, 2009 WL 248367 at \*7 (same); *In re Immune Response Securities Litigation*, 497 F.Supp.2d  
28 1166, 1177 (S.D.Cal. 2007) (same).

1 Notably, Class Counsel expended these costs on a contingent basis and thus had no guarantee  
2 that they would ever be recovered. For this reason, the Court may presume that they were necessary  
3 for the litigation. For all these reasons, the Court should approve Class Counsel's request for expense  
4 reimbursement of \$14,608.77.


5 **V. CONCLUSION**

6 The settlement result in this matter is well qualified for approval of a fee award equal to 35%  
7 of the initial Settlement fund created, with no future distributions of fees required. This amounts to  
8 \$525,000 in total. The amount of the Settlement, and the total of all current and future benefits it  
9 confers upon class members are extraordinary and there are no objections to the same. The proposed  
10 award of attorneys' fees and costs to Class Counsel is reasonable and appropriate under the governing  
11 legal standards.

12 Accordingly, Class Counsel respectfully request that the Court approve fees in the amount of  
13 \$525,000 and costs in the amount of \$14,608.77.

14  
15 Dated: November 12, 2019

**PALAY HEFELFINGER, APC**

16  
17 By:  \_\_\_\_\_  
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