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MARGARET TUMAMPOS, JONATHAN
LAM, AND CONNIE LAI ON THEIR
BEHALF AND OTHERS SIMILARLY
SITUATED,

Plaintiffs,

v.

CATHAY PACIFIC AIRWAYS LTD.,

Defendant.

CASE NO. 4:16-CV-06208-CW
Assigned for All Purposes:
Honorable Claudia A. Wilken

**PLAINTIFFS' UNOPPOSED MOTION
FOR AN AWARD OF ATTORNEYS'
FEES, EXPENSES, AND SERVICE
AWARDS FOR REPRESENTATIVE
PLAINTIFFS**

Date: September 18, 2018
Courtroom: TBD
Time: 2:30 pm

Action Filed: October 26, 2016
Amended Complaint Filed: January 27, 2017
Trial: Not Yet Set

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1 **I. INTRODUCTION**

2 After extensive motion work regarding the background facts and law, the pleadings,
3 significant formal and informal discovery, and a full-day mediation that lasted nearly twelve
4 hours with a respected retired judge, the parties reached preliminary terms of an agreement to
5 settle all of Plaintiffs' claims. The proposed settlement provides a significant benefit to members
6 of the class and was reached only after exhaustive work by Plaintiffs' counsel in researching
7 potential claims, fighting pleadings motions, analyzing class data, and attending mediation.
8 Plaintiffs also worked tirelessly to provide information regarding their claims, prepare for
9 mediation, and attend the full-day mediation.

10 The proposed Settlement Agreement and Release and the Addendum thereto (together,
11 "Settlement Agreement" or "Settlement") (which has been preliminarily approved) provides
12 concrete relief to the 445 Settlement Class Members, some of whom will receive direct cash
13 payments as high as \$4,600.00. The average cash payment to Settlement Class Members will be
14 almost \$2,800.00. Over the past nearly two years, Class Counsel have dedicated very substantial
15 time and resources to this case and, along the way, achieved significant victories. For example,
16 Plaintiffs defeated most of Cathay's motion to dismiss and strike portions of Plaintiffs' First
17 Amended Class Action Complaint ("FAC") in 2017 and achieved a very favorable result at
18 mediation. This case has been hotly contested and hard fought at every stage of the litigation, and
19 Class Counsel have devoted significant time and resources to pushing this case to mediation and
20 achieving a great result for the Settlement Class Members.

21 In light of these circumstances, the results obtained on behalf of the Class herein are
22 significant. The \$1.9 million Settlement provides certain and direct cash payments to every
23 Settlement Class Member. More than 300 Settlement Class Members will receive more than
24 \$2,000. The highest awards under the Settlement are approximately \$4,600.00. This represents a
25 significant recovery on claims that could have been imperiled at trial and on appeal. Moreover, at
26 the specific request of Class Counsel and the class representatives, the Settlement preserves,
27 without prejudice, the Settlement Class Member's right to seek refunds of previous FICA

28 ///

1 contributions made over the years to the Social Security program as California-based Cathay
2 flight attendants, including receiving those contributions made on their behalf by Cathay.

3 Class Counsel, comprised of experienced and well-qualified attorneys from well-respected
4 law firms, undertook significant risk and effort in litigating this case over the past nearly two
5 years. At the time the case was filed, Class Counsel relied on a unique legal theory that flight
6 attendants were entitled to civil penalties due to Cathay's illegal withholding of FICA and SDI
7 from their wages. The case was legally and factually complex and its prosecution was undertaken
8 on an entirely contingent basis. Class Counsel have expended in excess of 1,300 hours litigating
9 the case to date. As compensation for their substantial efforts and highly skilled work over the
10 duration of this novel and risky case and the respectable result achieved in the face of
11 considerable litigation risk, Class Counsel are requesting attorneys' fees of \$570,000.00. This
12 constitutes less than 75 percent of Class Counsel's reasonable fees and represents a significant
13 *negative multiplier*. In addition, Class Counsel incurred \$9,699.02 in unreimbursed expenses
14 invested while prosecuting the case. Class Counsel also seek service awards in the amount of
15 \$10,000 for each of the three Representative Plaintiffs.

16 For the reasons described below, Class Counsel's motion for attorneys' fees,
17 reimbursement of expenses, and service awards for Representative Plaintiffs should be granted.

18 **II. ARGUMENT**

19 **A. The Attorneys' Fees Requested by Class Counsel Are Reasonable Under Both** 20 **the Lodestar-Times-Multiplier or Percentage-of-the Fund Methods.**

21 The Ninth Circuit "has affirmed the use of two separate methods for determining
22 attorneys' fees, depending on the case. In 'common-fund' cases where the settlement or award
23 creates a large fund for distribution to the class, the district court has discretion to use either a
24 percentage or lodestar method." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998)
25 (citation omitted). Such discretion is also provided under California law. *See, e.g., Wershba v.*
26 *Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001). "The lodestar calculation begins with
27 the multiplication of the number of hours reasonably expended by a reasonable hourly rate
28 The resulting figure may be adjusted upward or downward to account for several factors"

1 *Hanlon*, 150 F.3d at 1029 (citations omitted). Under the percentage method, “the court simply
2 awards the attorneys a percentage of the fund sufficient to provide class counsel with a reasonable
3 fee.” *Id.* (citing *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 272 (9th Cir. 1989)).
4 But courts may use class counsel’s lodestar as a reality check on any percentage-of-the-fund
5 award that is requested.

6 Whether a percentage-of-the fund or lodestar method is used, the amount of the fee
7 awarded out of a common fund should be that “which is deemed ‘reasonable’ under the
8 circumstances.” *Grauly*, 886 F.2d at 271. In making such fee determinations, the Supreme
9 Court has held that “trial courts need not, and indeed should not, become green-eyeshade
10 accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to
11 achieve auditing perfection.” *Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011).

12 **B. The Lodestar Method Supports the Requested Attorneys’ Fees.**

13 “In diversity actions, the Ninth Circuit applies state law [in] determin[ing] the right to fees
14 and the method for calculating fees.” *Hartless v. Clorox Co.*, 273 F.R.D. 630, 642 (S.D. Cal.
15 2011) (citing *Mangold v. California Pub. Utils. Comm’n*, 67 F.3d 1470, 1478 (9th Cir. 1995)).
16 The primary method used for evaluating the reasonableness of attorneys’ fees in class actions
17 predicated on fee-shifting statutes is the lodestar method. *See, e.g., Lealao v. Beneficial Cal.,*
18 *Inc.*, 82 Cal. App. 4th 19, 26 (2000).

19 Under the lodestar approach, “lodestar is calculated by multiplying the number of hours
20 reasonably expended by counsel by a reasonable hourly rate.” *In re Consumer Privacy Cases*,
21 175 Cal. App. 4th 545, 556 (2009). A court may increase or decrease that amount by applying a
22 positive or negative multiplier based on, among other factors, the “‘quality of the representation,
23 the novelty and complexity of the issues, the results obtained, and the contingent risk presented.’”
24 *Id.* (citation omitted). The California Supreme Court also articulated a set of guiding factors for
25 analyzing lodestar multipliers in *Serrano v. Priest*, 20 Cal. 3d 25 (1977) (“*Serrano III*”).¹

26
27 ¹ *Serrano III* identified the following seven factors as “among” the relevant factors for
28 determining whether to adjust lodestar:

1 Similarly, under federal law, the “presumptively reasonable” lodestar fee² is first
 2 evaluated under relevant factors identified in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70
 3 (9th Cir. 1975).³ Next, the fee award may be adjusted upward or downward by a positive or
 4 negative multiplier based on those *Kerr* factors that were not subsumed in the initial lodestar
 5 evaluation. Federal courts in California have assigned multipliers based on many of the same
 6 factors applied by California state courts. *See, e.g., Grant v. Capital Mgmt. Servs., L.P.*, No. 10-
 7 cv-2471-WQH (BGS), 2014 U.S. Dist. LEXIS 29836, at *15 (S.D. Cal. Mar. 5, 2014) (applying a
 8 multiplier based in part on “the quality of representation, the benefit obtained for the class, the
 9 complexity and novelty of the issues presented, and the risk of nonpayment.”) (citations omitted).

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13 (1) the novelty and difficulty of the questions involved, and the skill displayed in presenting
 14 them; (2) the extent to which the nature of the litigation precluded other employment by the
 15 attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual
 16 victory on the merits and the point of view of establishing eligibility for an award; (4) the fact that
 17 an award against the state would ultimately fall upon the taxpayers; (5) the fact that the attorneys
 18 in question received public and charitable funding for the purpose of bringing law suits of the
 19 character here involved; (6) the fact that the monies awarded would inure not to the individual
 20 benefit of the attorneys involved but the organizations by which they are employed; and (7) the
 21 fact that in the court's view the two law firms involved had approximately an equal share in the
 22 success of the litigation.

23 *Serrano III*, 20 Cal. 3d at 49.

24 ² *Sugarman v. Ducati N. Am., Inc.*, No. 5:10-cv-05246, 2012 U.S. Dist. LEXIS 3961, at
 25 *18 (N.D. Cal. Jan. 12, 2012) (citation omitted).

26 ³ *Kerr* identifies twelve factors for analyzing reasonable attorneys' fees:

27 (1) the time and labor required; (2) the novelty and difficulty of the questions
 28 involved; (3) the skill requisite to perform the legal service properly; (4) the
 preclusion of other employment by the attorney due to acceptance of the case; (5)
 the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations
 imposed by the client or the circumstances; (8) the amount involved and the results
 obtained; (9) the experience, reputation, and the ability of the attorneys; (10) the
 ‘undesirability’ of the case; (11) the nature and length of the professional
 relationship with the client; and (12) awards in similar cases.

Kerr, 526 F.2d at 70.

1 **1. Class Counsel Have Spent a Reasonable Number of Hours on This**
 2 **Litigation at a Reasonable Hourly Rate.**

3 a. Class Counsel’s Rates Are Reasonable Based on Comparable
 4 Services Provided in the Applicable Community.

5 Class Counsel have incurred over 1,300 hours for a total lodestar of over \$780,000.00.
 6 (Declaration of Alexander M. Medina in Support of Plaintiffs’ Motion for an Award of
 7 Attorneys’ Fees, Reimbursement of Expenses, and Service Awards for Representative Plaintiffs
 8 (“Medina Decl.”), ¶¶ 21, 22; Declaration of Alfredo Bismonte in Support of Plaintiffs’ Motion for
 9 an Award of Attorneys’ Fees, Reimbursement of Expenses, and Service Awards for
 10 Representative Plaintiffs (“Bismonte Decl.”), ¶ 16.) The range of hourly rates included in Class
 11 Counsel’s lodestar is between \$500.00 and \$600.00. (*Id.*)⁴

12 Courts may determine the reasonableness of counsel’s hourly rate in part by examining
 13 “the prevailing hourly rate in the area for comparable services.” *Ketchum v. Moses*, 24 Cal. 4th
 14 1122, 1140 (2001). The relevant community for analyzing reasonable hourly rates is the “forum
 15 district” *Faigman v. AT&T Mobility LLC*, No. C06-04622 MHP, 2011 U.S. Dist. LEXIS
 16 15825, at *13 (N.D. Cal. Feb. 16, 2011) (citation omitted). “To prove the reasonableness of their
 17 rates, Class Counsel may rely upon their own declarations, fee awards in other cases and
 18 declarations of other attorneys.” *Holman v. Experian Info. Solutions, Inc.*, No. 11-cv-0180 CW
 19 (DMR), 2014 U.S. Dist. LEXIS 173698, at *12 (N.D. Cal. Dec. 12, 2014) (citations omitted); *see*
 20 *also Wershba*, 91 Cal. App. 4th at 255 (“California case law permits fee awards in the absence of
 21 detailed time sheets An experienced trial judge is in a position to assess the value of the
 22 professional services rendered in his or her court.”). This District and other districts have
 23 approved rates in other settlements for complex class action litigation that are comparable or
 24 higher than those at issue here. *See, e.g., Thomas v. Magnachip Semiconductor Corp.*, No. 3:14-
 25 cv-01160-JST, 2018 U.S. Dist. LEXIS 82801, at *12–13 (N.D. Cal. May 15, 2018) (approving
 26 attorney hourly rates ranging from \$450 per hour to \$1,000 per hour); *Johnson v. Fujitsu Tech &*

27 ⁴ Detailed summaries of the hours, rates, lodestar, and expenses incurred are set forth and
 28 discussed in the Medina and Bismonte Declarations and the attachments thereto. Complete and
 contemporaneous time and expense records for Plaintiffs’ counsel are available for the Court’s
 review upon request.

1 *Bus. Of Am., Inc.*, No. 16-cv-03698-NC, 2018 U.S. Dist. LEXIS 80219, at *19–20 (N.D. Cal.
 2 May 11, 2018) (approving hourly rate of \$600 to \$875 per hour for attorneys with more than 10
 3 years of experience); *West v. Circle K Stores, Inc.*, No. CIV. S-04-0438 WBS GGH, 2006 U.S.
 4 Dist. LEXIS 76558, at *23 (E.D. Cal. Oct. 20, 2006) (Shubb, J.) (approving attorneys’ fee in
 5 wage and hour class action that “compensates counsel at an hourly rate of approximately \$706.”).

6 Class Counsel’s rates reflect the actual and non-contingent hourly rates that they have
 7 negotiated and are currently being paid in the equivalent market for working on class action
 8 matters. (Medina Decl., ¶¶ 21, 22) In addition, the rates used by Class Counsel are supported as
 9 reasonable based upon survey information of rates charged in similarly situated complex
 10 litigation. (*Id.*; Bismonte Decl., ¶ 16.)

11 b. The Rates and Hours Expended Reflect Class Counsel’s Extensive
 12 Qualifications, the Complexity and Difficulty of the Case, and the
 Substantial Benefit Achieved for the Class.

13 i. This Case Was Litigated by Experienced and Well-
 14 Qualified Counsel.

15 The reasonableness of Class Counsel’s rates and hours are further supported by Class
 16 Counsel’s significant experience and qualifications for litigating the complex issues and claims
 17 presented in this case. Class Counsel and their firms possess several decades of experience in
 18 class action litigation as well as particular expertise related to wage and hour law and class
 19 actions. Indeed, Class Counsel include attorneys and firms with national prominence and with
 20 reputations as attorneys who zealously pursue a meritorious case through trial and appeal(s).
 21 Class Counsel’s experience and qualifications enabled them to successfully litigate this case for
 22 nearly two years while grappling with the numerous complicated issues that this case presented,
 23 and ultimately, achieve a significant result for the Class. (*See, e.g.*, Medina Decl., ¶¶ 16, 17, 19
 24 and Ex. 1 (Medina firm resumes); Bismonte Decl., ¶ 15 and Ex. 1 (Bismonte firm resumes.)

25 ii. This Litigation Was Complex, Difficult and Required
 26 Extensive Work by Class Counsel.

27 Class Counsel’s hours are also reasonable in light of the extensive work necessary to
 28 investigate, develop, and litigate the unique and complex issues underlying this litigation. This

1 case commenced nearly two years ago and asserted novel theories to recover damages and
2 penalties for Class Members as a result of Cathay's deductions of FICA and SDI taxes. The case
3 was intensely litigated from the onset and heavily challenged at every stage. (Medina Decl., ¶¶
4 2–13, 16.)

5 ***Background Facts***

6 Defendant Cathay in 2006 started hiring California-based flight attendants and upon
7 employment, regularly and systematically withheld from the wages of these employees Social
8 Security payments (FICA) as well as California State Disability Insurance payments (SDI). In
9 September 2016, Cathay notified those employees that it recently learned that since Cathay was
10 based in Hong Kong and the airplanes operated by these flight attendants were non-American
11 vessels, these Cathay employees were not authorized to make FICA or SDI contributions.
12 Accordingly, these California-based flight attendants would not be entitled to benefits under those
13 governmental programs. Cathay did, however, state that it would return to the California-based
14 flight attendants payments they made under SDI as well as provide some assistance in seeking
15 refunds of previous FICA contributions. Even Cathay admitted this was an unusual circumstance
16 requiring extensive research and investigation into this situation. (Medina Decl., ¶ 2.; Bismonte
17 Decl., ¶ 3.),

18 ***Plaintiffs' Original Complaint***

19 Plaintiff Margaret Tumamos commenced this putative class and collective action against
20 Defendant on October 26, 2016. Tumamos works as a member of Cathay's Cabin Crew (flight
21 attendants) and flies to Hong Kong from Cathay's bases in California. The central allegations in
22 Tumamos's initial Complaint were that Defendant illegally and unlawfully deducted Federal
23 Insurance Contributions Act ("FICA") and California State Disability Insurance ("SDI") taxes
24 from the wages of Cathay's Cabin Crew, and that Cathay did not provide Class Members with
25 meal and rest breaks pursuant to California law. Based on those allegations, the initial Complaint
26 alleged the following claims: (1) violations of the Fair Labor Standards Act for unlawful
27 deductions from wages; (2) failure to pay all wages due pursuant to California Labor Code
28 sections 221 and 223 and Civil Code sections 1670.5, 3275, and 3369; (3) unlawful and

1 unauthorized deductions from wages in violation of Labor Code section 221; (4) failure to timely
2 pay wages during employment in violation of Labor Code section 204; (5) failure to provide
3 accurate, itemized wage statements in violation of Labor Code section 226; (6) failure to pay all
4 wages due at the time of termination in violation of Labor Code sections 201–203; (7) failure to
5 pay contracted wages in violation of Labor Code section 223; (8) conversion; (9) promissory
6 estoppel; (10) failure to provide meal periods; (11) failure to provide rest periods; and (12) unfair
7 business practices under California Business and Professions Code section 17200 *et seq.* (the
8 “UCL”). Tumampos sought relief on her own behalf and on behalf of a class of Defendant’s
9 U.S.-based cabin crew, flight attendants, or similar titles who were employed by Defendant going
10 back four years. (Medina Decl., ¶ 3.)

11 ***Cathay Moved to Dismiss and/or Strike the Original Complaint.***

12 On January 6, 2017, Defendant filed a Motion to Dismiss the Complaint. Defendant
13 concurrently filed a Motion to Strike certain allegations in the Complaint on the same day.
14 Defendant’s motions made two principal arguments: (1) all the claims alleged in the Complaint
15 predicated on the withholding of FICA and SDI taxes were preempted by federal law and barred
16 by the California Constitution, respectively; and (2) the Complaint’s meal and rest break claims
17 failed as a matter of law because California’s meal and rest break laws do not apply
18 extraterritorially to work performed principally outside California, and Plaintiffs and the putative
19 Class Members perform most of their duties outside California on international flights to Hong
20 Kong. (Medina Decl., ¶ 4.)

21 ***Plaintiffs Filed a First Amended Complaint.***

22 After extensive research and revisions, on January 27, 2017, Tumampos, along with two
23 additional Cathay flight attendants, Connie Lai and Jonathan Lam, filed the First Amended
24 Complaint (“FAC”). The FAC refined Plaintiffs’ allegations and claims for relief and included an
25 additional claim for civil penalties pursuant to the Private Attorneys General Act (the “PAGA”)
26 predicated on the alleged violations of the California Labor Code. Plaintiffs pled the following
27 claims: (1) failure to provide meal periods; (2) failure to provide rest periods;
28 (3) failure to timely pay wages during employment; (4) failure to provide accurate itemized wage

1 statements; (5) failure to pay all wages due at the time of termination; (6) breach of contract;
2 (7) unlawful wage deductions; (8) unfair business practices; and (9) claims under the PAGA.
3 (Medina Decl., ¶ 5.)

4 ***Cathay Moved to Dismiss and/or Strike the First Amended Complaint.***

5 On February 10, 2017, Defendant filed a Motion to Dismiss and a Motion to Strike with
6 respect to the FAC. These motions relied on the same principal arguments in the initial Motion to
7 Dismiss and Motion to Strike: that claims related to unlawful withholding of FICA and SDI taxes
8 were preempted or barred under federal and state law, and that Plaintiffs' meal and rest break
9 claims failed because California's meal and rest break laws do not apply extraterritorially. The
10 parties extensively briefed these issues. (Medina Decl., ¶ 6.)

11 On April 25, 2017, the Court issued a detailed order granting in part and denying in part
12 Defendant's Motion to Dismiss. The Court dismissed Plaintiffs' meal and rest break-related
13 claims with leave to amend. The Court did not dismiss Plaintiffs' claims predicated on unlawful
14 FICA and SDI tax withholdings. The Court's order provided a mechanism for Defendant to seek
15 permission to file an early motion for summary judgment as to whether California law applies to
16 Plaintiffs' work for Cathay in connection with the remaining claims for relief. (Medina Decl., ¶
17 7.)

18 In summary, the Court's April 25, 2017 Order provided the following:

- 19
- 20 • Plaintiffs' claim for breach of contract was dismissed with leave to amend;
 - 21 • Plaintiffs' meal and rest break claims were dismissed with leave to amend.

22 Plaintiffs were permitted to amend their meal and rest break claims if they could
23 truthfully allege, without contradicting the allegations in the existing complaint,
24 facts to support a finding that they worked principally in California as well as a
25 finding that Defendant was a California employer. In the alternative, Plaintiffs
26 were granted leave to amend these claims if they could truthfully allege, without
27 contradicting the allegations in the existing complaint, that Plaintiffs were entitled
28 to relief for meal and rest period violations based only on the work performed in
California.

- 1 • Plaintiffs' eight claims for unfair business practices were dismissed with leave to
2 amend only to the extent the claims were based on the FICA and SDI
3 withholdings.
- 4 • Plaintiffs were permitted to proceed their Labor Code claims based on the
5 improper FICA and SDI withholdings. (*Id.*)

6 Rather than attempt to amend their pleading once again, Plaintiffs instead chose to move
7 forward with its unlawful deduction claims, while preserving their meal and rest break claims for
8 appeal, if appropriate. Defendant filed an answer to the FAC on June 8, 2017. (Medina Decl., ¶
9 8.)

10 ***Defendant Filed a Motion to Certify the Court's April 25 Order for Interlocutory***
11 ***Appeal and to Stay This Action.***

12 On May 23, 2017, Defendant filed a motion to certify the April 25, 2017 order for
13 interlocutory appeal and to stay the action. Plaintiffs opposed this motion, and on June 30, 2017,
14 the Court denied Defendant's motion to certify the April 25, 2017 order. (Medina Decl., ¶ 9.)

15 ***The Parties Conducted Extensive Discovery.***

16 As described above, the parties have actively litigated this action since the filing of the
17 Complaint. This case has been pending for over a year, and during that time, the parties have
18 engaged in substantial discovery. More specifically, Plaintiffs have served, and Defendant has
19 responded to, multiple written discovery requests. In addition to special interrogatories, Plaintiffs
20 propounded three sets of requests for production of documents seeking 108 categories of
21 documents on Defendant. (Medina Decl., ¶ 11.) The parties met and conferred extensively
22 regarding discovery, particularly with respect to the production of ESI and agreed upon a rolling
23 production, with the most critical documents relating to liability and Plaintiffs' potential damages
24 being produced first. As a result, Defendant produced, and Plaintiffs reviewed and analyzed,
25 thousands of pages of documents and data, including Plaintiffs' pay records, wage statements,
26 and Defendant's policy and procedure documents. In addition, Plaintiffs' counsel conducted in-
27 depth interviews of a number of putative class members, researched the developing case law
28 concerning the claims asserted in this case and the potential defenses thereto, and conducted an

1 in-depth analysis of potential class-wide damages, and extensively researched the applicable law
2 with respect to the claims asserted in the action. (*Id.*)

3 ***The Parties Participated in a Full-Day Mediation with Judge Duryee.***

4 On August 9, 2017, the parties participated in a full day of private mediation with the
5 Honorable Judge Lynn Duryee (Ret.) at the JAMS office in San Francisco. Plaintiffs Margaret
6 Tumampos, Connie Lai, and Jonathan Lam traveled significant distances to attend the mediation
7 in person. Defendant had two corporate representatives at the mediation, both of whom traveled
8 from Hong Kong. Before the mediation, both sides submitted comprehensive mediation briefs to
9 Judge Duryee setting forth the legal merits of their respective positions. Before the mediation, the
10 parties also exchanged data relating to the class members' average salary information, weeks
11 worked, and the size of the class. The issues in the mediation were aggressively contested and
12 included significant debate. The mediation began at 9:30 a.m. and did not conclude until
13 approximately 8:30 p.m. when both sides ultimately accepted a settlement along the lines of the
14 mediator's proposal. (Medina Decl., ¶ 13.)

15 The proposed settlement was reached after Plaintiffs' counsel thoroughly reviewed all the
16 evidence produced by Cathay and after arm's length bargaining by the parties. The formal and
17 informal discovery conducted in this case and the information exchanged through the parties'
18 negotiations were sufficient to reliably assess the merits of the respective parties' positions and to
19 compromise the issues on a fair and equitable basis.

20 c. **Class Counsel Has Achieved a Significant Result for the Class.**

21 The results obtained on behalf of the Class are significant. Under the Settlement, Cathay
22 agrees to pay \$1.9 million to resolve this litigation ("Gross Settlement Payment"). (Settlement
23 Agreement and Release, ¶ 3.1.) Out of the Gross Settlement Payment, settlement proceeds will
24 be distributed to Settlement Class Members after deducting attorneys' fees and litigation costs,
25 costs related to administering the Settlement, and service awards to the Representative Plaintiffs.
26 (*Id.*) Accordingly, over \$1,200,000.00 in cash will be available for *certain and direct distribution*
27 *to the entire Class*. There are no circumstances under which any portion of Cathay's payment
28 will revert to Cathay. (Medina Decl., ¶ 14.)

1 With this Settlement, Settlement Class Members will receive an average recovery of
2 almost \$2,800.00. (*Id.*) More than 390 Settlement Class Members will receive over \$1,000 and
3 more than 300 Settlement Class Members will receive over \$2,000. The highest payment to a
4 Settlement Class Member under the Settlement will be nearly \$4,700.00. (*Id.*)

5 This settlement represents a significant result for the Settlement Class Members. This
6 case presented considerable litigation risk to the Representative Plaintiffs and Class Counsel.
7 Defendant has asserted several different defenses in this case that if successful could have
8 significantly reduced or eliminated any damages or penalties that Representative Plaintiffs and
9 Class Members could have recovered. First, one of the contentious issues in this case is whether
10 California law applies to Representative Plaintiffs' and Class Members' employment. Defendant
11 took the position in its Motion to Dismiss that the protections of the California Labor Code
12 (which all of the claims are based on) do not apply to Representative Plaintiffs and Class
13 Members because of the amount of time that they spent working on California. Defendant's
14 Motion to Dismiss focused on whether Representative Plaintiffs' meal and rest breaks claims fail
15 because Representative Plaintiffs did not spend a majority of their time working in California.
16 (*See* Defendant's Motion to Dismiss, 14:25–21:16.) Defendant has indicated that it will make the
17 same arguments with respect to Representative Plaintiffs' remaining Labor Code claims, and the
18 Court's April 25 Order permitted Defendant to petition the Court to file an early motion for
19 summary judgment on this issue.

20 Second, Defendant has also argued that Representative Plaintiffs' claims premised on
21 FICA and SDI deductions are preempted or barred by federal and state law. Defendant has
22 argued that these claims are essentially claims for tax refunds (or related to claims for tax
23 refunds) and therefore are preempted by 26 U.S.C. § 7422 and the California Constitution. (*See*
24 Defendant's Motion to Dismiss, 7:14–13:5.) Defendant has relied primarily on two similar
25 district court cases in Oregon for the proposition that claims for penalties that derive from
26 deductions for FICA taxes are preempted.⁵ Currently, there are no district court cases in

27 _____
28 ⁵ *See Fredrickson v. Starbucks Corporation*, 980 F.Supp.2d 1227 (D. Or. 2013), *rev'd on other grounds*; *Marshall v. Pollin Hotels II, LLC*, 170 F.Supp. 1290, 1306–07 (D. Or. 2016).

1 California with similar holdings, although this could change at any time. And, as indicated by
2 Defendant's Motion to Certify the Court's April 25 Order for Interlocutory Appeal, Defendant
3 intends to appeal any order permitting these claims to go forward.

4 In light of these arguments and others related to limiting the amount of penalties
5 recoverable by Class Members even if liability were imposed, and the risk that they posed to the
6 success of Representative Plaintiffs' claims, the settlement represents a significant victory for the
7 Class Members. As a result, Class Counsel's "less than lodestar" request is reasonable in light of
8 the significant results obtained for the Class and the potential risks and costs of continued
9 litigation.

10 2. Class Counsel's Fee Request Amounts to a Negative Multiplier and
11 Satisfies *Serrano III* and *Kerr* Factors That Support an Upward
Adjustment.

12 The base lodestar amount, without any multiplier, is more than \$780,640.00. (Medina
13 Decl., ¶¶ 21-22; Bismonte Decl., ¶ 16.) Class Counsel's requested fees are \$570,000.00 (30
14 percent of the Gross Settlement Payment). (Settlement Agreement and Release, ¶ 3.3.) As a
15 result, the requested fees constitute a *negative multiplier* to Class Counsel's reasonable lodestar.
16 The multiplier amounts to approximately 0.73 ($\$570,000.00 \div \$780,640.00 = 0.73$), or about 73
17 percent of Class Counsel's lodestar. This "multiplier" does not account for the additional hours
18 of work that will be required to complete and administer the class settlement and otherwise bring
19 this class action to a final conclusion. Accordingly, based on Class Counsel's requested fee, the
20 proportion of Class Counsel's recoverable attorneys' fees will continue to diminish as the case
21 proceeds. (Medina Decl., ¶ 21.)

22 While Class Counsel's fee request amounts to a negative multiplier, the quality of their
23 work in this case warrants an upward adjustment. The range of multipliers awarded in the Ninth
24 Circuit is between 1 and 4, or even higher. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043,
25 1051, 1051 n.6 (9th Cir. 2002) (awarding multiplier of 3.65 and finding that most courts award
26 multipliers in the range of 1 to 4); *Steiner v. Am. Broad. Co.*, 248 Fed. Appx. 780, 783 (9th Cir.
27 2007) (awarding multiplier of approximately 6.85).

28 ///

1 Lodestar enhancements reflect the “established practice in the private legal market of
2 rewarding attorneys for taking the risk of nonpayment by paying them a premium over their
3 normal hourly rates for winning contingency cases.” *Vizcaino*, 290 F.3d at 1051 (citation
4 omitted); *see also Serrano III*, 20 Cal. 3d at 49 (including “the contingent nature of the fee
5 award” as a factor for adjusting lodestar); *see also Kerr*, 526 F.2d at 70 (including “whether the
6 fee is contingent” as a factor for determining reasonable lodestar and adjustments to lodestar).

7 Here, Class Counsel have proceeded at significant contingent risk for nearly two years
8 under circumstances where the potential outcome for the class was fraught with factual and legal
9 uncertainty given the many rulings in other cases which have been urged against Plaintiffs’
10 position on the merits in this case. Class Counsel could have taken this case to trial and faced
11 ongoing appeals and, at the end of the day, recovered nothing on behalf of the Class. To be sure,
12 the complex and uncertain nature of this case and the contentious positions of the parties over the
13 previous nearly two years are the very reasons why Class Counsel’s lodestar alone without any
14 multiplier far exceeds their fee request.

15 Class Counsel believe that their request for attorneys’ fees is reasonable and deserving of
16 final approval. Cathay has agreed not to oppose the requested amount and Class Members have
17 been given notice of the requested amount. (Class Notice, Dkt. 68-2.)

18 **C. Class Counsel’s Fee Request Is Also Reasonable Based on a “Percentage-of-the**
19 **Fund” Cross-Check.**

20 “[I]n assessing the reasonableness of a lodestar calculation, [the Ninth Circuit has] held
21 that it [is] ‘reasonable’ for the district court to compare the lodestar fee . . . to the 25%
22 benchmark, as one measure of the reasonableness of the attorneys’ hours and rates.” *McKenna*
23 *v. Sears, Roebuck and Co.*, No. 92-17038, 1997 U.S. App. LEXIS 15528, at *8 n.1 (9th Cir. June
24 25, 1997) (citing *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*,
25 109 F.3d 602, 607 (9th Cir. 1997)) (emphasis omitted). But, one court recently held:

26 [the 25% benchmark] is an across the board benchmark, which is often adjusted
27 upward or downward depending upon the assessment of the results, and the size of
28 the fund. In megafund cases, fees more commonly will be under the 25%
benchmark in this Circuit . . . In contrast, *in cases under \$10 Million, the awards*

1 *more frequently will exceed the 25% benchmark. See Van Vranken v. Atlantic*
2 *Richfield Co.*, 901 F. Supp. 294, 297 (N.D. Cal. 1995) (“the cases . . . in which
3 high percentages such as 30-50 percent of the fund were awarded involved
relatively smaller funds of less than \$10 million”).

4 *Lopez v. Youngblood*, No. CV-F-07-0474 DLB, 2011 U.S. Dist. LEXIS 99289, at *36–37 (E.D.
5 Cal. Sept. 2, 2011) (emphasis added).

6 The Ninth Circuit has identified a number of factors for analyzing whether the benchmark
7 percentage should be adjusted upward or downward: (1) the results achieved for the class; (2) the
8 risks of litigation; (3) counsel’s efforts, experience and skill; (4) the contingent nature of the fee;
9 and (5) awards made in similar cases. *Vizcaino*, 290 F.3d at 1048–50. Courts may also consider
10 adjustments to the benchmark percentage by comparing it to counsel’s lodestar. *See, e.g., Alberto*
11 *v. GMRI, Inc.*, No. CIV. 07-1895 WBS DAD, 2008 U.S. Dist. LEXIS 91691, at *33 (E.D. Cal.
12 Nov. 12, 2008); *see also Gomez v. H & R Gunlund Ranches*, No. CV F 10-1163 LJO MJS, 2011
13 U.S. Dist. LEXIS 135424, at *14 (E.D. Cal. Nov. 23, 2011) (“the ‘benchmark percentage should
14 be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that
15 the percentage recovery would be either too small or too large in light of the hours devoted to the
16 case or other relevant factors.’”) (citation omitted). Courts should consider “all the circumstances
17 of the case” in reaching a reasonable percentage. *Vizcaino*, 290 F.3d at 1048.

18 Under a percentage-of-the-fund approach, the requested attorneys’ fees in this case
19 represent 30 percent of the Gross Settlement Payment. The circumstances of this case strongly
20 favor a departure from the “benchmark” and an upward adjustment between the 25 to 33½
21 percent benchmarks typically applied in determining common fund fee applications. As
22 discussed above, in this case experienced Class Counsel performed high-quality work and
23 skillfully litigated this matter for nearly two years at significant risk. Plaintiffs’ claims were
24 based on novel theories that class members could recover penalties for illegal deductions of FICA
25 and SDI taxes, and that these claims were not preempted by federal law. The case was unique,
26 complex, and at all times hard-fought. Over the course of the case, Class Counsel risked
27 dismissal and that the Class would not be certified.

28 ///

1 Under these circumstances, Class Counsel could very well have proceeded to trial and
2 recovered nothing for Plaintiffs and the Class. Or they could have prevailed at trial and lost on
3 appeal. Through this Settlement, Class Counsel have averted the risks associated with continued
4 litigation while achieving a good result for the Class. As discussed above, the Settlement
5 provides certain and direct payments to each Settlement Class Member, and includes recoveries
6 for most class members in excess of \$1,000.00, with some Settlement Class Members receiving
7 nearly \$3,800.00. This is a very good outcome in light of the legal landscape in which this case
8 now resides.

9 Furthermore, Class Counsel have undertaken the extraordinary burden of prosecuting this
10 litigation for nearly two years without any compensation and have come out-of-pocket in the
11 amount of almost \$10,000.00. Class Counsel have provided representation on a contingency
12 basis and the time and resources dedicated to this case have required them to forgo significant
13 other work. (Medina Decl., ¶ 21.) The requested attorneys' fee award, constituting 30 percent of
14 the settlement fund, represents approximately *70 percent of Class Counsel's reasonable lodestar*.
15 Moreover, the percentage requested in this case is less than awards made in similar cases. *See,*
16 *e.g., Gomez*, 2011 U.S. Dist. LEXIS 135424, at *14 (O'Neill, J.) (awarding attorneys' fees in
17 wage and hour class action that amounted to 45 percent of the settlement fund); *see also Rippee v.*
18 *Boston Mkt. Corp.*, No. 05-cv-1359, 2006 U.S. Dist. LEXIS 101136, at *11 (S.D. Cal. Oct. 10,
19 2006) (Moskowitz, J.) (awarding a 40 percent fee on a \$3.75 million wage and hour class action).

20 For the aforementioned reasons, Class Counsel's request for attorneys' fees is fair and
21 reasonable and should be granted by the Court.

22 **D. Class Counsel's Request for Reimbursement of Expenses Is Reasonable.**

23 "There is no doubt that an attorney who has created a common fund for the benefit of the
24 class is entitled to reimbursement of reasonable litigation expenses from that fund." *West*, 2006
25 U.S. Dist. LEXIS 76558, at *25 (citations omitted). In total, as set forth in the Medina
26 Declaration, Class Counsel have incurred a total of \$9,699.02 in unreimbursed expenses
27 prosecuting this action on behalf of the Class. (Medina Decl., ¶ 23.)

28 ///

1 Under the proposed Settlement Agreement, Cathay has agreed not to object to Class
2 Counsel's expense request which is to be satisfied from the Gross Settlement Payment.
3 (Settlement Agreement and Release, ¶ 3.3.) Over the past nearly two years of litigation, Class
4 Counsel have: filed many pleadings; propounded written discovery; conducted extensive factual
5 and legal research; utilized photocopies, faxing, printing, and postage for pleadings and
6 communicating with Class Members; and paid mediation fees. (*See, e.g., Medina Decl., ¶ 23.*)

7 In light of the duration of the case and the expenses Class Counsel have incurred to
8 effectively litigate and resolve this matter, Class Counsel's request for reimbursement of costs
9 and expenses is reasonable. Class Members were given notice that Class Counsel would request
10 reimbursement of these costs and expenses. (Class Notice, Dkt. 68-2.) All these costs have been
11 adequately documented by Class Counsel and were "incurred for the benefit of the Class."
12 *Buccellato v. AT&T Operations, Inc.*, No. C10-00463, 2011 U.S. Dist. LEXIS 85699, at *6 (N.D.
13 Cal. June 30, 2011). For these reasons, Class Counsel's request for reimbursement of their costs
14 and expenses is fair and reasonable and should be approved.

15 **E. The Service Awards Requested for the Representative Plaintiffs Are**
16 **Reasonable.**

17 "Courts often award service payments to class representatives in compensation for
18 shouldering significant burdens during the litigation: retaining counsel, producing documents,
19 responding to written discovery, and conferring with counsel." *In re Wachovia Corp. "Pick-A-*
20 *Payment" Mortg. Mktg. and Sales Practices Litig.*, No. 5:09-md-02015-JF, 2011 U.S. Dist.
21 LEXIS 55351, at *23 (N.D. Cal. May 17, 2011) (citation omitted). "[A] class representative is
22 entitled to some compensation for the expense he or she incurred on behalf of the class lest
23 individuals find insufficient inducement to lend their names and services to the class action."
24 *West*, 2006 U.S. Dist. LEXIS 76558, at *26 (citation omitted). "Such payments, however, must
25 be reasonable in light of applicable circumstances, and not 'unfair' to other class members." *Id.*
26 at *27 (citation omitted).

27 In this case, Representative Plaintiffs Margaret Tumamos, Jonathan Lam, and Connie
28 Lai expended significant time and resources by actively participating in this litigation over an

1 extended period of time. (Medina Decl., ¶ 24.; Declaration of Plaintiff and Class Representative
2 Margaret Tumamos in Support of Motion for an Award of Attorneys’ Fees, Expenses, and
3 Service Awards for Representative Plaintiffs (“Tumamos Decl.”), ¶¶ 2-14; Declaration of
4 Plaintiff and Class Representative Jonathan Lam in Support of Motion for an Award of
5 Attorneys’ Fees, Expenses, and Service Awards for Representative Plaintiffs (“Lam Decl.”), ¶¶ 2-
6 14; Declaration of Plaintiff and Class Representative Connie Lai in Support of Motion for an
7 Award of Attorneys’ Fees, Expenses, and Service Awards for Representative Plaintiffs (“Lai
8 Decl.”), ¶¶ 2-13.) The Representative Plaintiffs regularly communicated with Class Counsel
9 regarding the status of the litigation, were a valuable factual resource, and prepared for and
10 participated in a full-day of mediation in San Francisco. (*Id.*) They assisted in preparing
11 disclosures under Rule 26(a); searched for and produced responsive documents; helped formulate
12 discovery requests served on Cathay; and prepared for, traveled to, and attended a nearly 12-hour
13 mediation in San Francisco. Representative Plaintiffs were also exposed to the risk of an award
14 against them personally of substantial defense costs in the event Cathay prevailed at trial or on
15 appeal.

16 The payments of \$10,000 to Representative Plaintiffs Margaret Tumamos, Jonathan
17 Lam, and Connie Lai are appropriate and justified as a negligible percentage of the overall
18 Settlement (1.5 percent). In addition, these awards are similar to service awards that have been
19 allocated to other representative plaintiffs. *See, e.g., West*, 2006 U.S. Dist. LEXIS 76558, at *28
20 (finding “plaintiffs’ enhancement payments of \$15,000 each to be reasonable.”); *Birch v. Office*
21 *Depot, Inc.*, Case No. 06-cv-1690, 2007 U.S. Dist. LEXIS 102747, at *7 (S.D. Cal. Sept. 28,
22 2007) (approving class representative service awards of \$15,000 in wage and hour class action
23 where “[p]laintiffs . . . risk[ed] [] an award of costs against them [and] greatly assisted Class
24 Counsel”); *see also In re Domestic Air Transp.*, 148 F.R.D. 297, 357–58 (N.D. Ga. 1993)
25 (awarding \$142,500 total to class representatives out of \$50 million fund); *In re Dun &*
26 *Bradstreet*, 130 F.R.D. 366, 373–74 (S.D. Ohio 1990) (awarding \$215,000 to several class
27 representatives out of an \$18 million fund).

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1 As a result, this Court should approve the requested service awards for the Representative
2 Plaintiffs.

3 **III. CONCLUSION**

4 Plaintiffs' counsel and the Class Representatives have achieved a significant victory for
5 class members in the face of uncertain legal theories and potential years of costly litigation.
6 Plaintiffs' counsel and the Class Representatives worked diligently to pursue the interests of the
7 class. The attorneys' fees that Plaintiffs' counsel seek are very reasonable and actually represent
8 a negative multiplier, given the amount of time and effort that were spent litigating these novel
9 claims. The Class Representatives worked closely with Plaintiffs' counsel, invested countless
10 hours preparing the pleadings and preparing for and attending mediation, and seek only
11 reasonable service awards for their efforts. The attorneys' fees and service awards that Plaintiffs'
12 counsel and the Class Representatives seek are in line with similar settlements that have been
13 approved in this District. For all of these reasons, the requested attorneys' fees, out of pocket
14 costs, and service awards should be approved.

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16 Dated: June 18, 2018

MEDINA McKELVEY LLP

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18 By: /s/ Alexander M. Medina
19 Alexander M. Medina
20 *Attorneys for Plaintiffs and the Class*
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