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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

JESSICA GESSELE, ASHLEY ORTIZ, NICOLE GESSELE, TRICIA TETRAULT, and **CHRISTINA MAULDIN,** both on behalf of themselves individually and, in addition, on behalf of the other similarly situated employees, Plaintiffs, vs. **JACK IN THE BOX INC.**, Defendant.	Case No. 3:14-cv-01092-HZ **Plaintiffs' and the class's motion for award of statutory attorney fees, costs, and expenses,** **Class counsel's motion for award of common-fund attorney fees, costs, and expenses, and** **Plaintiffs' motion for service payments**

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MOTION

Plaintiffs, the class members, and their counsel move the Court for an Order:

1. Awarding statutory attorney fees against defendant;
2. Awarding a common-fund attorney fee to class counsel of 40% of the class's recovery in the above-captioned case, with the class's statutory attorney fee recovery credited against that 40% (to prevent double recovery); and
3. Approving service payments to the named plaintiffs of $25,000 each.

Counsel for the parties have conferred regarding the subject of this motion, and defendant opposes the motion. This motion is supported by the Declaration of Jon M. Egan submitted herewith.

I. Introduction

Plaintiffs and the class members seek an award of statutory attorney fees for their Workers' Benefit Fund and Franchization claims. Class counsel seeks a common-fund attorney fee award of 40% of the recovery to the class, with the fee-shifting award acting as a credit against that 40% (*i.e.*, the amount deducted from the class award will be 40% *minus* the fee-shifting award paid by Jack in the Box). Plaintiffs and the class members are also entitled to an award of their taxable costs (Cost Bill submitted herewith) as well as their nontaxable litigation expenses (as part of attorney fees). Finally, the named plaintiffs seek service payments for seeing this case through 13+ years of litigation.

II. Prevailing parties

Plaintiffs anticipate that one of the parties' chief disagreements in this attorney fee briefing will be identifying the prevailing party or parties. State law governs attorney fees in diversity cases. *See Riordan v. State Farm. Mut. Auto. Ins. Co.*, 589 F.3d 999, 1004 (9th Cir. 2009). Under Oregon law, there is a prevailing party for each "claim."

O.R.S. 20.077. A "claim" is a group of operative facts, sometimes called a "transaction or occurrence." In other words, "what did the defendant do wrong?"

A given claim can have different "counts," which are "alternative theories of recovery." O.R.C.P. 16 C. These are sometimes called "causes of action" or "remedies." In other words, what does the law say happens when the defendant does that wrong? "[O]nly one claim is presented when a single set of facts gives rise to a legal right of recovery under several different remedies." *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 575 (9th Cir. 2018).

This case involved three classes, each with one claim in this case—the Workers' Benefit Fund ("WBF") class prevailed on their WBF overdeduction claim, the Shoe class prevailed on their shoe claim, and the Franchization class prevailed on its late payment of final paychecks upon franchization claim.

Similarly, there were several attorney-fee statutes ("counts") at issue in this case—unpaid wages (O.R.S. 652.200), wrongful deductions (O.R.S. 652.615), and minimum-wage/overtime (O.R.S. 653.055(4))—as well as the common-law counts. Plaintiffs and the class members received judgments in their favor in all of the fee-eligible statutory categories. However, even though plaintiffs prevailed on their shoe claim, they did not meet the requirements of the attorney-fee counts on that claim. [1] Thus, plaintiffs and the class members are entitled to, and hereby move, for an award of statutory attorney fees for their Workers' Benefit Fund and Franchization claims.

[1] Plaintiffs did not meet the elements for the ORS 652.610(3) "count" of their shoe claim, but because they did recover on the money had and received and unjust enrichment "counts" of that same shoe claim, they are prevailing parties as to that claim. *Merrick v. City of Portland*, 313 Or. App. 647, 662 (2021) ("It does not necessarily follow, however, that merely because a party does not obtain all the relief sought, that the party is not the prevailing party."), citation omitted.

III. Statutory attorney fees

Plaintiffs prevailed on statutory causes of action providing for attorney fees, as follows:

Claim(s)	Count	Statute	Attorney fee statute	Standard
WBF	Unpaid wages	652.120	652.200	Mandatory
WBF, Franchization	Late final paychecks	652.140	652.200	Mandatory
WBF	Wrongful deductions	652.615	652.615	Discretionary
WBF	Minimum-wage	653.025	653.055(4)	Discretionary
WBF	Overtime	653.261(1)	653.055(4)	Discretionary

For discretionary attorney fees, O.R.S. 20.075(1) lists eight factors that a court "shall consider … in determining whether to award attorney fees in any case in which an award of attorney fees is authorized by statute and in which the court has discretion to decide whether to award attorney fees":

> (a) The conduct of the parties in the transactions or occurrences that gave rise to the litigation, including any conduct of a party that was reckless, willful, malicious, in bad faith or illegal.
> (b) The objective reasonableness of the claims and defenses asserted by the parties.
> (c) The extent to which an award of an attorney fee in the case would deter others from asserting good faith claims or defenses in similar cases.
> (d) The extent to which an award of an attorney fee in the case would deter others from asserting meritless claims and defenses.
> (e) The objective reasonableness of the parties and the diligence of the parties and their attorneys during the proceedings.
> (f) The objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute.
> (g) The amount that the court has awarded as a prevailing party fee under ORS 20.190.
> (h) Such other factors as the court may consider appropriate under the circumstances of the case.

See also Preble v. Dep't of Revenue, 331 Or. 599, 602 (2001). If the court elects to award attorney fees under O.R.S. 20.075(1), O.R.S. 20.075(2) requires the court to consider the factors identified in subsection (1) together with the eight factors set forth in subsection (2) to determine the amount of any such award. The subsection (2) factors include:

> (a) The time and labor required in the proceeding, the novelty and

> difficulty of the questions involved in the proceeding and the skill needed to properly perform the legal services.
> (b) The likelihood, if apparent to the client, that the acceptance of the particular employment by the attorney would preclude the attorney from taking other cases.
> (c) The fee customarily charged in the locality for similar legal services.
> (d) The amount involved in the controversy and the results obtained.
> (e) The time limitations imposed by the client or the circumstances of the case.
> (f) The nature and length of the attorney's professional relationship with the client.
> (g) The experience, reputation and ability of the attorney performing the services.
> (h) Whether the fee of the attorney is fixed or contingent.

ORS 20.075(2); *See also McCarthy v. Or. Freeze Dry, Inc.*, 327 Or. 84, 85 (1998). A court satisfies the requirements of ORS 20.075(1)–(2) by including in its order a brief description of or citation to the factor or factors on which it relies when granting or denying an award of attorney fees. *McCarthy*, 327 Or. at 185. The Court is not required to make findings about irrelevant or immaterial factual matters or legal criteria. *Id.*

Oregon courts generally award statutory attorney fees based on the lodestar method, in which courts multiply the reasonable number of hours spent on the case by a reasonable hourly rate. *SPF Brewery Blocks, LLC v. Art Inst. of Portland, LLC*, No. 3:18-CV-1749-MO, 2019 WL 1497029, at *2 (D. Or. Apr. 4, 2019), citing *Strawn v. Farmers Ins. Co. of Or.*, 297 P.3d 439, 447–48 (Or. 2013). The lodestar may be adjusted based on the factors specified in O.R.S. 20.075. *Alexander Mfg., Inc. Emp. Stock Ownership & Tr. v. Ill. Union Ins. Co.*, 688 F. Supp. 2d 1170, 1181 (D. Or. 2010).

A. Whether to award attorney fees—O.R.S. 20.075(1) factors

Plaintiffs prevailed on Oregon unpaid wages, final paychecks, wrongful deductions, minimum-wage, and overtime statutes. Under O.R.S. 652.200, attorney fees for unpaid wages and late final paychecks are mandatory; the factors in O.R.S. 20.075(1) do not apply to those fees.

Under O.R.S. 652.615 and O.R.S. 653.055(4), attorney fees for wrongful deductions, minimum wages, and overtime are discretionary. These are the statutory factors in O.R.S. 20.075(1), to be evaluated in determining whether to award discretionary attorney fees:

> (1) A court shall consider the following factors in determining whether to award attorney fees in any case in which an award of attorney fees is authorized by statute and in which the court has discretion to decide whether to award attorney fees:
> (a) The conduct of the parties in the transactions or occurrences that gave rise to the litigation, including any conduct of a party that was reckless, willful, malicious, in bad faith or illegal.
> (b) The objective reasonableness of the claims and defenses asserted by the parties.
> (c) The extent to which an award of an attorney fee in the case would deter others from asserting good faith claims or defenses in similar cases.
> (d) The extent to which an award of an attorney fee in the case would deter others from asserting meritless claims and defenses.
> (e) The objective reasonableness of the parties and the diligence of the parties and their attorneys during the proceedings.
> (f) The objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute.
> (g) The amount that the court has awarded as a prevailing party fee under ORS 20.190.
> (h) Such other factors as the court may consider appropriate under the circumstances of the case.

For subsection (a), wage overdeductions and failure to pay employees minimum wages and overtime are all illegal, and the court and jury found that defendant willfully violated all of those laws. This factor favors an award of attorney fees to the class.

For subsection (b), plaintiffs' claims were objectively reasonable. Defendant's opposition to the Workers' Benefit Fund claims through and including trial was without reasonable basis in law or fact. This factor favors an award of attorney fees to the class.

For subsection (c), an award of fees in this case will deter future misconduct by encouraging employers to pay close attention to the minimum requirements of the wage-and-hour laws. It will not chill reasonable defense because the defendant is more than able to pay the requested fees. This factor favors an award of attorney fees to the

class.

For subsection (d), the award of attorney fees to a prevailing wage-claim plaintiff is crucial to deter defendants from asserting meritless defenses. Failing to do so invites defendants to wage a war of attrition, in which the same superior economic position that allowed them to violate wage-and-hour laws would insulate them from paying for the consequences of those violations. This factor favors an award of attorney fees to the class.

For subsection (e), defendant took positions and engaged in conduct that needlessly prolonged the litigation. Jack in the Box opposed and stonewalled at every stage of this case. This factor favors an award of attorney fees to the class.

For subsection (f), the parties exchanged written settlement offers in 2018 and underwent a mediation with respected Seattle mediator Teresa Wakeen on March 16, 2020. Defendant never offered even a quarter of the case's value, and it did not make any further offers after the mediation. This factor favors an award of attorney fees to the class.

Subsection (g) is not applicable, as federal courts do not award enhanced prevailing party fees under O.R.S. 20.190.

Thus, in addition to the mandatory attorney fees under O.R.S. 652.200, the factors in O.R.S. 20.075(1) support the discretionary award of fees under O.R.S. 653.055(4) and 652.615.

B. How much attorney fees to award—O.R.S. 20.075(2) factors

For Oregon claims, both those involving mandatory attorney fees, and those for which fees are discretionary but the court has determined to award them, the following additional statutory factors from O.R.S. 20.075(2) are evaluated in determining the amount of reasonable attorney fees to award:

> (2) A court shall consider the factors specified in subsection (1) of this section in determining the amount of an award of attorney fees in any case in which an award of attorney fees is authorized or required by statute. In addition, the court shall consider the following factors in determining the amount of an award of attorney fees in those cases:
> (a) The time and labor required in the proceeding, the novelty and difficulty of the questions involved in the proceeding and the skill needed to properly perform the legal services.
> (b) The likelihood, if apparent to the client, that the acceptance of the particular employment by the attorney would preclude the attorney from taking other cases.
> (c) The fee customarily charged in the locality for similar legal services.
> (d) The amount involved in the controversy and the results obtained.
> (e) The time limitations imposed by the client or the circumstances of the case.
> (f) The nature and length of the attorney's professional relationship with the client.
> (g) The experience, reputation and ability of the attorney performing the services.
> (h) Whether the fee of the attorney is fixed or contingent.
> (i) Whether the attorney performed the services on a pro bono basis or the award of attorney fees otherwise promotes access to justice.

Obviously, many of these factors overlap with each other, as well as with the federal lodestar elements and *Kerr* factors. We will therefore discuss the lodestar calculation, after which we will discuss the multiplier factors.

1. Hourly Rates

A reasonable hourly rate is determined by looking to the "prevailing market rates in the relevant community" as well as the skill, experience, and reputation of the lawyer. *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *United States v. $28,000 in U.S. Currency*, 802 F.3d 1100, 1105 (9th Cir. 2015); *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1205 (9th Cir. 2013). The party requesting the fees has the burden of producing "satisfactory evidence," in addition to the affidavits of its counsel, that the requested rates are in step with those "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Dang v. Cross*, 422 F.3d 800, 814 (9th Cir. 2005) (quoting *Blum*, 465 U.S. at 895 n.11). The best evidence of the prevailing rate in Oregon is

the periodic Economic Survey conducted by the Oregon State Bar (the "Survey"), and attorneys in this district should address the rates found therein even if requesting a departure from those rates. LR 54-3; *Roberts v. Interstate Distrib. Co.*, 242 F. Supp. 2d 850, 857 (D. Or. 2002); *Arnold v. Pfizer, Inc.*, No. 3:10-cv-01025-AC, 2015 WL 4603326, at *1 (D. Or. July 29, 2015). "[T]o compensate attorneys for a delay in payment[,] the court may apply the attorneys' current rates to all hours billed during the course of the litigation." *Stanger v. China Elec. Motor, Inc.*, 812 F3d 734, 740 (9th Cir. 2016) (internal quotation omitted).

Plaintiffs seek hourly rates of $275 for paralegal Michèle Lauzier, $495 for attorney Jim W. Vogele, and $630 for attorney Jon M. Egan. The evidence supporting those rates is outlined in paragraphs 4 through 10 of the Declaration of Jon M. Egan filed herewith ("Egan Dec.").

a. Paralegal Michèle Lauzier's $275 hourly rate is reasonable

Although the OSB Economic Survey contains no information regarding paralegal billing rates, federal judges in this District have noted that a reasonable hourly rate for a paralegal should not exceed that of a first year associate. *Knowledge Learning Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, No. 3:10-cv-00188-ST, 2011 U.S. Dist. LEXIS 57174, at *16–17, 2011 WL 2133824 (D. Or. Apr. 19, 2011) (reducing requested paralegal hourly rate from $215 and awarding hourly rate of $165 based on paralegal's extensive experience); *Nance v. May Trucking Co.*, No. 3:12-cv-01655-HZ, 2014 WL 6633111, at *4 (D. Or. Nov. 21, 2014).

The Oregon State Bar 2022 Economic Survey [2] has the following information for

[2] Though the Surveys at issue were published in 2017 and 2022, their results are from responses indicating attorneys' 2016 and 2021 hourly rates, respectively. *See, e.g.*, Q14 ("When you charged on an hourly basis, what was your usual billing rate per hour in

hourly rates of first-year Portland associates: a mean of $310, a median of $300, and a 95th percentile of $538. Adjusted for inflation, those figures today would be $362, $351, and $629, respectively. [3] Ms. Lauzier's hourly rate is well below each of those figures.

b. Attorney Jim W. Vogele's $495 hourly rate is reasonable

Plaintiffs' counsel Jim W. Vogele's hourly rate is $495 per hour. Egan Dec. at ¶ 10. Mr. Vogele was first admitted to the Bar in 1988 and has been practicing for more than 30 years. The Oregon State Bar 2022 Economic Survey has the following information for hourly rates of Portland attorneys with more than 30 years of practice experience: a median of $425 and a 95th percentile of $798. The 2017 Economic Survey was the last to report a 75th percentile rate, and it was $495. Adjusted for inflation through July 2023 (the latest month for which figures are available), those figures today would be median $497, 75th percentile $639, and 95th percentile $933, respectively. Mr. Vogele's rate is right at the inflation-adjusted median rate in the survey.

c. Attorney Jon M. Egan's $630 hourly rate is reasonable

Plaintiffs' counsel Jon M. Egan's hourly rate is $630 per hour, and he does charge that rate on the rare occasion when he bills clients by the hour. Egan Dec. at ¶¶ 5–9. The Oregon State Bar 2022 Economic Survey has the following information for hourly rates of Portland attorneys with 21 to 30 years of practice experience: a median of $450 and a 95th percentile of $697. The 2017 Economic Survey was the last to report a 75th percentile rate, and it was $475. Adjusted for inflation through July 2023 (the latest

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[2016 / 2021]?"). Calculating inflation, we therefore used January 2016 and January 2021 as the base months.

[3] Inflation calculated using the U.S. Bureau of Labor Statistics Consumer Price Index Inflation Calculator, http://www.bls.gov/data/inflation_calculator.htm. July 2023 is the latest month for which CPI-U figures are available at the time of filing. Through that date, the CPI-U rose a total of 29.028% from January 2016 and 16.862% from January 2021.

month for which figures are available), those figures today would be median $526, 75th percentile $613, and 95th percentile $815, respectively.

Attorneys with "unique expertise" qualify for rates at or above the 75th percentile. Indeed, courts in this district have overruled Magistrates' Findings & Recommendations that awarded rates at only the 75th percentile, which were not high enough for an attorney with "unique expertise." *See, e.g.*, *Topness v. Cascadia Behavioral Healthcare*, 3:16-cv-02026-AC, 2018 WL 1015536, at *3 (D. Or. Feb 22, 2018) (overruling Judge Acosta's F&R, which had awarded Craig Crispin only the 75th percentile hourly rate despite recognizing that Mr. Crispin has "unique expertise in the area of employment litigation"). This is because there is "a flaw in the Oregon State Bar survey [which] remains an excellent starting point for an assessment of market rates. But, no category contains a rate reflecting both years of experience and practice in a highly specialized area of law. While a certain amount of expertise may be presumed when looking at reasonable hourly rates for a seasoned lawyer, there is still a need to recognize a very experienced lawyer who has spent his or her entire career in a particular specialty and who … is sought out by his peers as an expert. … An award of higher than the 75th percentile is justified by Crispin's substantial experience in a complex area of law and by his recognized expertise in this area." *Id.* at *4.

Like Mr. Crispin, Mr. Egan has been recognized by this Court as having "unique expertise," albeit in an even narrower field, that of "wage-and-hour litigation." *See, e.g.*, *Wright v. Soniq Servs., Inc.*, 3:17-cv-01990-AC, 2018 WL 4997678, at *4 (D. Or. Aug. 16, 2018), *report and recommendation adopted,* 3:17-cv-01990-AC, 2018 WL 4996574 (D. Or. Oct. 15, 2018) ("Egan specializes in wage-and-hour collective and class action cases, and is a source of information for other lawyers and the media. He is a member of numerous employment and wage-and-hour associations, including the national Wage

and Hour Clearinghouse, an invitation-only professional association for attorneys whose practices are limited to representing plaintiffs in wage-and-hour litigation. Egan has unique expertise in the area of wage-and-hour litigation").

Further, Mr. Egan has unique experience in having tried four wage-and-hour class and collective action cases to juries, three of them in this federal district. *See*, *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 685 (9th Cir. 2022) (dissent) ("If trials these days are rare, class action trials are almost extinct."). Two of those trials have resulted in judgments of over one million dollars, including this one, which is the largest wage-and-hour verdict in Oregon history in either state or federal court.

When including cases resolved by settlement, Mr. Egan has handled seven wage-and-hour class and collective actions in excess of one million dollars, three over $5 million, and two over $10 million, including the second-largest wage-and-hour settlement in Oregon history ($18 million, *Swearingen v. Amazon*, 3:19-cv-01156-JR).

Mr. Egan's $630 hourly rate is therefore justified (if not below market rate).

2. Hours expended

Plaintiffs seek the award of attorney fees for 567.1 hours of attorney time by Mr. Vogele, 4,539.1 hours of attorney time by Mr. Egan and 1,034.3 hours of paralegal time by Ms. Lauzier. Those totals are broken down by task in Egan Dec. filed herewith. [4]

A court need not apportion fees between successful and unsuccessful claims when there are issues common to both. *Baldin v. Wells Fargo Bank, N.A.*, 3:12-cv-648-AC, 2016 WL 3021726, at *7 (D. Or. Apr. 12, 2016), *report and recommendation adopted,*

[4] We have excluded 411.7 hours of Mr. Egan's time and 65.9 hours of Ms. Lauzier's time that pertained only to the non-attorney-fee-bearing shoe and meal period claims. Those totals are not included in the numbers listed here.

3:12-cv-00648-AC, 2016 WL 3012025 (D. Or. May 24, 2016), *aff'd,* 704 Fed. Appx. 715 (9th Cir. 2017), citing *Bennett v. Baugh*, 164 Or. App. 243, 247 (1999) ("If there are common issues, fees need not be apportioned because 'the party entitled to fees would have incurred roughly the same amount of fees irrespective of the additional claim or claims'.").

In this case, plaintiffs and the classes were successful on their WBF claim (all counts), their Franchization claim (all counts), and their shoe claim (the common-law counts). They are therefore entitled to fees for time spent only on the WBF claims, time spent only on the Franchization claims, and time spent on the litigation as a whole that would have had to be spent regardless of which claims were at issue.

Plaintiffs' counsel has therefore removed from this fee petition all work pertaining only to former plaintiff Jason Diaz (whose claims were settled), time spent pertaining only to shoe claims, and time spent pertaining only to meal period claims. The remaining time by all timekeepers either pertained specifically to the Workers' Benefit Fund, specifically to late final paycheck claims, or addressed issues common to all claims.

The following chart summarizes the attorney and paralegal hours that were reasonably incurred in connection with this case, as well as the reasonable hourly rates sought:

Timekeeper	Rate	Hours	$
Jon M. Egan	630 / hr	4,539.1	$2,858,633.00
Jim W. Vogele	495 / hr	567.1	$280,714.50
Michèle Lauzier	275 / hr	1,034.3	$284,432.50
		Total hourly attorney fees:	$3,424,780.00

The breakdown of time by task and evidence supporting the reasonableness of the

timekeepers' respective rates are detailed further in Egan Dec.

3. Multiplier factors

Plaintiffs seek a multiplier of 2.0 in this case.

Federal courts look to state law to evaluate attorney fee multipliers in diversity cases. Oregon courts consider several factors, including whether the case was brought on a contingency fee basis, whether counsel obtained "exceptional success" for his client, "the difficulty and complexity of the issues involved in th[e] case, the value of the interests at stake, as well as the skill and professional standing of lawyers involved," and "when the attorney's payment is based on a contingency-fee arrangement". *Moro v. State*, 360 Or. 467, 491–92 (2016).

Plaintiffs obtained a judgment in the amount of $12,978,678.23, [5] the largest wage-and-hour verdict in Oregon history. By any measure, this qualifies as an excellent result.

This case involved novel and complex issues of law and fact. These included difficult legal issues of first impression in Oregon wage-and-hour law. Also involved in this case were multiple novel statutory and regulatory interpretations. Over 30,000 documents were produced in discovery, for approximately 5,000 former Oregon employees, including more than one million spreadsheet lines of payroll data. There were more than three total weeks of depositions, over 700 filed documents, two interlocutory appeals to the Ninth Circuit, and dismissal and refiling and removal, all culminating in a two-week trial and the largest wage-and-hour verdict in the history of the state.

The skill and professional standing of the lawyers involved is already subsumed in the hourly rate determination.

[5] This amount includes prejudgment interest through the date of the judgment. That full judgment amount has been accruing post-judgment interest in the amount of $1,831.86 per day since the May 23, 2023 entry of judgment and now exceeds $13 million.

That leaves the contingent nature and risk involved in this action (and thereby of the attorney fees in this action). This action was undertaken over 13 years ago on a fully contingent basis. It was known going into the case that it would involve an extraordinary amount of time, precluding plaintiffs' counsel from taking on equivalent substitute work. It was also known going in that there was substantial risk involved, both as part of the contingent nature of the recovery and as part of Jack in the Box's ongoing complete reorganization. That reorganization over the course of this case has included the total abandonment of all of its Oregon corporate stores, the purchase and then later sale of Qdoba, and the purchase of Del Taco—each of which could have resulted in large losses to the company, corporate bankruptcy, and/or the inability to collect on a substantial verdict.

Courts in this district have recognized that "[t]he *Johnson–Kerr* factors are similar to those the Oregon legislature has directed courts to consider in determining whether to award attorneys' fees, and if so, in what amount. *See* ORS § 20.075." *Graham v. Forever Young Oregon, LLC*, 3:13-cv-01962-HU, 2014 WL 4472702, at *3 (D. Or. Sept 10, 2014). We will therefore discuss the factors in the order discussed in *Kerr*.

Factor 1, the time and labor required, supports a positive multiplier. This case took 13 years, multiple appeals, and thousands of pages of briefing to resolve. And it is not finished yet—there will be at least one more appeal on the merits. Jack in the Box was at all times represented by skilled, unrelenting, and indefatigable counsel from multiple national and international law firms.

Factor 2, the novelty and difficulty of the questions involved, supports a positive multiplier. While there is not a lot of published Oregon case law regarding the specific claims at issue here, the underlying statutes are well-established. However, this case has resulted in novel rulings regarding a number of issues, which have and will continue to

guide future judges and litigants.

Factor 3, the skill requisite to perform the legal service properly, supports a positive multiplier. Specialization in wage-and-hour law allowed plaintiffs' counsel to obtain favorable rulings on admission of evidence and jury instructions that will also be defensible on appeal, as well as argue in favor of claims and counts and against defenses of a highly technical and arcane nature.

Factor 4, the preclusion of other employment by the attorney due to acceptance of the case, supports a positive multiplier. At the outset of every class action case against a publicly traded company, class counsel has to have a heart-to-heart with the putative class representatives regarding the fact that these cases can go on for over a decade, that they take a lot of work and time that could be spent on other cases, and that none of them will be getting paid until it is over, so it is imperative that they all commit together to stick it out for the long haul. As predicted, class counsel has had to limit his case load for the last 13 years because of the Jack-in-the-Box-sized hole this case has left in his calendar over that period. This factor supports a positive multiplier.

Factor 5, the customary fee, supports a positive multiplier. Oregon courts routinely award positive multipliers in similar large wage-and-hour cases.

Factor 6, whether the fee is fixed or contingent, supports a positive multiplier. This takes into account "the nature of a contingent fee practice, which includes a significant amount of time evaluating cases that are not taken, the frequent need to advance the costs of litigation, and the risk of neither receiving a fee nor being able to recover those costs in the event of a loss." *Erickson v. Farmers Ins. Co. of Oregon*, 175 Or. App. 548, 550 (2001). Class counsel represented plaintiffs on a contingent-fee basis and advanced all costs. And unlike a class settlement, this case remains subject to appeal and thus remains contingent in its entirety. That risk supports a positive multiplier.

Factor 7, time limitations imposed by the client or the circumstances, supports a positive multiplier. Defendant pulled several bait-and-switch maneuvers in the months and weeks leading up to trial and during the trial itself, proposing and then withdrawing witnesses and defenses, and changing admissions of liability and damages for different claims and counts. This strategy necessitated extra hours and overtime by plaintiffs' counsel and staff.

Factor 8, the amount involved and the results obtained, supports a positive multiplier. Plaintiffs prevailed on all of the claims and counts for which they seek attorney fees, being awarded every penny that they sought from the jury for those claims and counts. Those amounts add up to the largest wage-and-hour verdict in Oregon history. This factor therefore supports a positive multiplier.

Factor 9, the experience, reputation, and ability of the attorneys, is neutral, because it is adequately reflected in the hourly rate contained in the lodestar.

Factor 10, the undesirability of the case, supports a positive multiplier. Wage-and-hour law involves substantial amounts of math, and familiarity with spreadsheets and quantitative evaluation software that repel many lawyers. *See, e.g.*, *Malech v. Malech*, 0913, SEPT.TERM,2021, 2022 WL 2230874, at *1 (Md. Ct. Spec. App. June 21, 2022) ("Lawyers often joke that we went to law school because we aren't good at or don't like math. But sometimes math and law intersect, and when they do the results can be messy."). Further, large wage-and-hour class actions are not a popular specialty, because they are both too small and too large. If the class is not certified, the attorney has put in a lot of time into a case that they may be unable to recover, and the named plaintiffs' individual claims by nature involve relatively small values. On the other hand, if the class is certified, it represents more work and higher potential malpractice risk than many firms are prepared to handle. Every case is different, and they involve vast

amounts of data for thousands of employees, so firms find it difficult to create economies of scale or to automate many of the aspects of this area of law. There is therefore an extremely limited pool of attorneys willing and able to take on complex, high-risk wage-and-hour class and collective action litigation. This factor therefore supports a positive multiplier.

Factor 11, the nature and length of the professional relationship with the client, is neutral. Though class counsel has represented the named plaintiffs for over 13 years in this case, he did not represent them previous to that engagement.

Factor 12, awards in similar cases, supports a positive multiplier. *See, e.g.*, *Emrys v. Farmers Ins. Co. of Oregon*, No. 11 CV 0557 CC, 2020 WL 13220859, at *2 (Or. Cir. May 13, 2020) (In class action, "Plaintiffs are entitled to a 1.5 multiplier (150 percent) on attorney fees. Plaintiffs pursued this exceptionally high risk case on a contingency fee basis, for a extremely long duration. The case continues to present a high risk because of the preservation of Farmers right of appeal."); *Migis v. Autozone, Inc.*, No. 0711-13531, 2013 WL 12419983, at *6 nn.1–2 (Or. Cir. Jan. 25, 2013) (In wage-and-hour class action, "F1. The novelty and difficulty, the risks involved (including this being a zero offer case), the excellent results obtained for the plaintiff class, and the experience, efficiency, ability and skill of Plaintiff's counsel, all justify a multiplier enhancement to Plaintiff's attorneys' fees. F2. A multiplier of 2.0 applied to the adjusted lodestar amount is appropriate."); *Strawn v. Farmers Insurance Company of Oregon*, No. 9908-09080, 2005 WL 5432155 (Or. Cir. Sep. 19, 2005) (in class action, "Plaintiff's counsel obtained exceptional results on this high risk case which has taken many years. … For a determination of a reasonable statutory attorney's fee award, the court shall apply … the multiplier of 2.25" and noting the 2.0 multiplier approved in *Griffin v. Tri-Met*, 112 Or. App. 575, 584 when "there are only a limited number of attorneys willing and able to

take on complex, controversial and high risk employment cases.").

Applying the requested multiplier of 2.0 to the requested hourly rates and hours accrued yields the following aggregate statutory fee-shifting award:

Timekeeper	Rate	Hours	Multiplier	$
Jon M. Egan	630 / hr	4,539.1	2.0	$5,719,266.00
Jim W. Vogele	495 / hr	567.1	2.0	$561,429.00
Michèle Lauzier	275 / hr	1,034.3	2.0	$568,865.00
			Total attorney fees:	$6,849,560.00

IV. Costs and Nontaxable Expenses

Federal Rule of Civil Procedure 54(d) provides that, "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." Fed.R.Civ.P. 54(d). "Costs" taxable under Rule 54(d) "are limited to those set forth in 28 U.S.C. §§ 1920 and 1821." *Twentieth Century Fox Film Corp. v. Entm't Distrib.,* 429 F.3d 869, 885 (9th Cir.2005), citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 445, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987). Under 28 U.S.C. § 1920, the court may tax as costs:

> (1) Fees of the clerk and marshal;
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of this title;
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920. Rule 54 creates a presumption in favor of awarding costs to the prevailing party. *E.g., Assoc. of Mex.-Am. Educators v. State of Cal.,* 231 F.3d 572, 592–93 (9th Cir. 2000). "[I]f a district court wishes to depart from that presumption, it must explain why so that the appellate court will be able to determine whether or not the trial

court abused its discretion … [and] explain why a case is not ordinary." *Save Our Valley v. Sound Transit,* 335 F.3d 932, 945 (9th Cir.2003) (citation omitted).

For taxable costs (*i.e.*, those recoverable in a Cost Bill), the Ninth Circuit has held that they are "issue of trial procedure [and therefore] federal law should control the reimbursement of expert witnesses in federal courts sitting in diversity jurisdiction." *First Nat'l Mortg. Co. v. Fed. Realty Inv. Trust*, 631 F.3d 1058, 1070 (9th Cir. 2011) (quoting *Aceves v. Allstate Ins. Co.*, 68 F.3d 1160, 1167-68 (9th Cir. 1995)).

However, under both Oregon and federal law, nontaxable expenses are awardable as part of attorney fees, over and above the taxable costs obtainable in a Cost Bill. *See, e.g.*, *Huyck v. Shilling-Devaney*, 3:18-CV-00400-JR, 2022 WL 16924130, at *5 (D. Or. Nov. 14, 2022) ("In wage-and-hour cases, nontaxable expenses are routinely awarded as attorney fees."); Fed.R.Civ.P. 54(d)(2)(A) ("A claim for attorney's fees and related nontaxable expenses must be made by motion…").

Because plaintiffs and the class are the prevailing parties in fee-shifting claims, it is a somewhat academic exercise to apportion invoices between taxable costs and nontaxable expenses—plaintiffs are entitled to both. Thus, if the Court determines that one or more elements sought as taxable costs are for some reason not taxable under §§ 1920 or 1821, plaintiffs ask that those elements be instead awarded as nontaxable expenses.

Plaintiffs accrued the following costs and nontaxable litigation expenses related to this case:

Class notice charges	$56,604.07
Computerized legal research	$11,528.28
Fees of the clerk and marshal	$1,406.00
Miscellaneous case costs	$49.00
Photocopies/printing	$1,922.65
Postage/delivery	$767.51

Service	$135.00
Telephone calls	$56.48
Transcripts	$28,358.37
Travel/transportation	$4,692.92
Trial expenses	$11,912.58
Witness fees	$63,920.00
Total:	**$181,352.86**

In addition to the Bill of Costs filed herewith, the constituents of these categories are laid out in detail in paragraph 11 and Exhibit 1 of Egan Dec.

V. Common-fund attorney fees

Plaintiffs' and class counsel moves the Court for an award of forty percent of the class's recovery. As of today's date, that equals $5,259,212.17 (40% of judgment amount of $12,978,678.23, plus 40% of the post-judgment interest amount of $169,352.19 through today's date). The actual amount will change, because until the judgment is actually paid, the class's recovery amount will continue to increase by the daily interest accruing. Plaintiffs' and class counsel proposes that the fee-shifting award requested above act as a credit against that 40% attorney fee (*i.e.*, the amount deducted from the class award will be 40% *minus* the fee-shifting award paid by Jack in the Box)—*i.e.* if the fee-shifting award exceeds 40% of the common fund, that the fee-shifting award would not reduce the class's recovery at all.

Strawn v. Farmers Ins. Co. of Or., 297 P.3d 439, 447–48 (Or. 2013) confirms that it is proper to pay class counsel from a combination of fee-shifting and common fund sources, when—as here—both sources of fees are available. 353 Or. at 222. One source is not a limitation on the other. 353 Or. at 210 (citations omitted). Indeed, *Strawn* expressly permits a separate reasonable fee from each source. *Id.* Further, *Strawn* recognizes that in large-fund cases, the common fund percentage award is widely viewed as appropriate. 353 Or. 218–19.

In *Strawn,* counsel for the class advocated the blended approach and compared the requested lodestar award to the percentage of fee that, counsel argued, would be available in private litigation. *Strawn* recognized and re-affirmed an important holding: "In cases that result in a common fund recovery, 'the fund itself is the primary measure of success.'" *Strawn,* 353 Or. at 221, *quoting Strunk* v. *PERB,* 343 Or. 226, 246 (2007).

Strawn recognizes that fees may be adjusted upward or downward when the fund is extraordinarily large relative to the amount of time. *Id.* Class counsel could locate no Oregon case law that provided definitive guidance on the interplay between the statutory fee-shifting claim and the common fund claim, save for *Strawn*'s (a) approval of payment from both sources and (b) acknowledgment that including the fee-shifting award in the gross recovery subject to a contingent fee would amount to a form of double-counting. 353 Or. at 216, 227. Thus, class counsel's request to credit the fee-shifting award against the common-fund recovery does not double-count and results in the maximum recovery to the class.

Oregon trial courts have consistently approved percentage-of-fund fee awards of 20% to 50% in class-action settlements. *Rowden* v. *Pacific Coast Seafoods,* State of Oregon, Multnomah County Circuit Court Case No. 9310-06899 (one-third fee; fee shifting case); *Daggett* v. *Blind Enterprises of Oregon,* US District Court Case No CV-95-421-ST (D. Or.) (50 percent fee; fee-shifting case); *Shea* v. *Chicago Pneumatic Tool Co.,* State of Oregon Multnomah County Circuit Court Case No. 9509-06261 (one-third fee; common fund); *Hochstettler* v. *Comcast,* State of Oregon Multnomah County Circuit Court Case No. 0407-07245 (21 percent fee; fee-shifting case under Unlawful Trade Practices Act); *Stewart* v. *Frontier Communications,* State of Oregon Multnomah County Circuit Court Case No. 1212-16470 (20 percent fee; fee-shifting case under Unlawful Trade Practices Act); *Rausch* v. *Hartford Fin Servs Group,* US District Court

Case No. 01-CV-1529-BR, 2007 WL 671334 (D Or Feb. 26, 2007) (30 percent of common fund, based on claims made); *Razilov* v. *Nationwide Mut Ins Co,* US District Court Case No. 01-CV-1466 -BR, 2006 WL 3312024 (D Or Nov. 13, 2006) (30 percent of common fund).

The requested 40% attorney fee is a common contingent fee in the industry for cases going to trial, and it matches the rate that plaintiffs agreed to at the outset of the case. *Compare*, Egan Dec. at Ex. 3, with *Moyle v. Liberty Mut. Ret. Benefit Plan*, 10CV2179-GPC(MDD), 2018 WL 1141499, at *9 (S.D. Cal. Mar 2, 2018) ("Attorneys with comparable skill and experience, and who litigate class actions on a contingency basis routinely charge one-third of the recovery, or 40% or more if the case goes to trial."), *citing Fernandez v. Victoria Secret Stores*, LLC, No. CV 06-4149-MMM(SHx), 2008 WL 8150856, at *16 n.59 (C.D. Cal. July 21, 2008) (fees representing one-third of the recovery are justified based on study showing that standard contingency fee rates are 33% if the case settles before trial, 40% if a trial commences, and 50% if trial is completed).

It is therefore not surprising that a 40% attorney fee award "falls within the typical range of 20% to 50% awarded in similar cases." *Singer v. Becton Dickinson & Co.*, 08-CV-821-IEG (BLM), 2010 WL 2196104, at *8 (SD Cal June 1, 2010), citing, inter alia, *Birch v. Office Depot, Inc.,* Case No. 06cv1690 DMS (WMC), Doc. No. 48, ¶ 13 (S.D. Cal. Sept. 28, 2007) (awarding a 40% fee on a $16 million wage and hour class action) and *Rippee v. Boston Mkt. Corp.,* Case No. 05cv1359 BTM (JMA), Doc. No. 70, at 7–8 (S.D. Cal. Oct. 10, 2006) (awarding a 40% fee on a $3.75 million wage and hour class action). *See also*, *Ginzkey v. Nat'l Sec. Corp.*, C18-1773RSM, 2022 WL 16699092, at *1 (WD Wash Nov 3, 2022) (awarding a 40% fee on $4.65 million cash fund); *Wren v. RGIS Inventory Specialists*, No. 06-CV-5778-JCS, 2011 U.S. Dist. LEXIS 38667, at *79-*80

(N.D. Cal. Apr. 1, 2011) (awarding over 40% of settlement fund where class counsel created a roughly proportional gross settlement fund in wage-and-hour case); *In re Merry-Go-Round Enterprises, Inc.*, 244 B.R. 327 (Bankr.D.Md.2000) (40% award for $71 million fund awarded, resulting in a cross-check multiplier of 19.6); *In re S. Pac. Funding Corp. Sec. Litig.*, No. 03:98-cv-01239-MA, Dkt. # 346, Order Awarding Plaintiffs' Counsel's Attorneys' Fees and Reimbursement of Expenses (Feb. 21, 2001) (Marsh, J) (awarding 40% of cash award);

Finally, this case is not a "mega-fund" settlement of $100 million or more, in which courts often award less than the 25% benchmark. *Reyes v. Experian Info. Sols., Inc.*, 856 F. App'x 108, 111 (9th Cir. 2021).

The factors to be considered in evaluating the common-fund award are discussed as follows.

A. The result obtained

Plaintiffs obtained a judgment in the amount of $12,978,678.23, [6] the largest wage-and-hour judgment in Oregon history. This is a judgment after trial, with no reversion or reduction as would be common in a class settlement. By any measure, this qualifies as an excellent result.

This factor therefore supports the requested award.

B. Counsel's experience and skill

Plaintiffs' counsel is both skilled and experienced in the area of wage-and-hour class and collective actions. He has specialized in this area for the last 18 of his 23 total years

[6] This amount includes prejudgment interest through the date of the judgment. That full judgment amount has been accruing post-judgment interest in the amount of $1,831.86 per day since the May 23, 2023 entry of judgment. The judgment's value now exceeds $13 million.

of practice, and he has been recognized as having "unique expertise in the area of wage-and-hour litigation." *Wright v. Soniq Servs., Inc.*, No. 3:17-CV-01990-AC, 2018 WL 4997678, at *3 (D. Or. Aug. 16, 2018), *report and recommendation adopted,* No. 3:17-CV-01990-AC, 2018 WL 4996574 (D. Or. Oct. 15, 2018). See above, section III.B.1.c and Declaration of Jon M. Egan at ¶¶ 5–9.

This factor therefore supports the requested award.

C. The novelty and complexity of the issues

This case involved novel and complex issues of law and fact. These included difficult legal issues of first impression in Oregon wage-and-hour law. Also involved in this case were multiple novel statutory and regulatory interpretations, the extent of a state's implicit adoption of federal standards, and the retroactive application of state-court decisions. Over 30,000 documents produced in discovery, for approximately 5,000 former Oregon employees, including more than one million spreadsheet lines of payroll data. There were more than three total weeks of depositions, over 700 filed documents, two interlocutory appeals to the Ninth Circuit, and dismissal and refiling and removal, all culminating in a two-week trial and the largest wage-and-hour verdict in the history of the state.

This factor therefore supports the requested award. *See, e.g.*, *Mockler v. Skipper*, 942 F. Supp. 1364, 1367 (D. Or. 1996) ("Undisputably, this was a case which required the special skills and the extensive experience that counsel for Mockler has. Every aspect and every phase of this action was vigorously contested by a pair of counsel for the defendants who brought to the defense the special skills and the extensive experience that counsel for Mockler has. Counsel for Mockler was required to address complex issues, and counsel for Mockler obtained excellent results for her.").

D. The risks of nonpayment assumed by counsel

Plaintiffs' counsel represented all of the plaintiffs and class members on a contingency basis, fronting all costs and assuming all risks of nonpayment. The novelty and complexity of the legal issues involved in this case, as well as the long period of time that the case lasted, and its current posture as an uncollected judgment subject to appeal rather than a settlement, increased the risk of loss beyond that associated with many wage-and-hour cases. *See, e.g.*, *VanValkenburg v. Oregon Dep't of Corr.*, No. 3:14-CV-00916-MO, 2017 WL 2495496, at *7 (D. Or. June 9, 2017) (complexity of legal issues increased risk of loss beyond that associated with many similar cases). This case has consisted of 13+ years of vigorous litigation by nationally recognized defense counsel, who represented an obstreperous, implacable deep-pocketed defendant. And it is still not over, with at least one appeal remaining, so the entirety of the recovery remains contingent to this day. This factor therefore supports the requested award.

E. The reaction of the class

There were 5,209 total class members identified in defendant's payroll records, to whom notice was sent. There were only four opt-outs.

This factor therefore supports the requested award.

F. Non-monetary or incidental benefits, including helping similarly situated persons statewide by clarifying certain laws

The Court in this case made several rulings on matters of first impression of Oregon law. That interpretation will help workers throughout the state.

This factor therefore supports the requested award.

G. The effort expended by class counsel, and comparison with counsel's lodestar

1. Standard for lodestar cross-check

Neither Oregon law nor Ninth Circuit authority require a lodestar cross-check. *Strawn* relates that, while some courts use the lodestar as a cross-check, there is no requirement that trial courts must use the cross-check methodology. 353 Or. at 219–20. Indeed, the use of lodestar hours as a cross-check is arguably at odds with the applicable Oregon rules. Time is accounted for as just one factor among many in the applicable standards. ORS 20.075(2)(a) ("time and labor required in the proceeding, the novelty and difficulty of the questions involved … and the skill needed to properly perform the legal services"); ORCP 32M(1)(e)(i) ("time and effort expended … including the nature, extent and quality of services rendered"); RPC 1.5(1) ("time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly"). Time required—which is arguably different from time expended—is not a super-factor. It is one among many, including risk, result, and comparable fees.

Over-emphasis on the time factor creates another problem. The time in this case is dynamic, not static. The record on the fee petition stops at August 27, 2023. But class counsel will incur substantial additional time between that date and the date of the Court's award and will incur more before the case is completed. The dynamic nature of the time factor counsels against using hours as a sharp boundary on the recovery. None of the case authorities seem to address this odd feature inherent in the lodestar cross-check. To set a proper common*fund percentage, the Court must consider the amount of time reasonably spent as one of many factors. But after considering hours at the beginning, the cross-check compares the percentage of the fund against the hours. This inevitably elevates the importance of the time factor. It is why one leading treatise explains that doing so "preserves some of the worst features of the lodestar calculation." S. Rossman, C. Delbaum, A. Cohen *National Consumer Law Center: Consumer Class Actions* §19.3.4, p. 321 (8th ed. 2013).

Indeed, a number of federal courts have dispensed with or softened the formal lodestar cross-check as unhelpful. *See, e.g.*, *Silverman v. Motorola, Inc.*, 2012 WL 1597388 at *4, Case 07-cv-4507 (N.D. Ill. May 7, 2012); *AT&T Mobility Wireless Data Servs Sales Tax Litig,* 792 F.Supp.2d 1028, 1040 (N.D. Ill 2011); *HCL Partners Limited Partnership* v. *Leap Wireless Int'l,* 2010 WL 4156342 at *2 (S.D. Cal. Oct. 15,20·10) (lodestar cross check not required in Ninth Circuit); *Ogbheui* v. *Comcast of California/Colorado/Florida/Oregon, Inc.,* 303 F.R.D. 337, 351–53 (E.D. Cal. 2014) (lodestar cross-check is permissible to evaluate common fund fee in settlement, but standard is reasonableness).

We nevertheless go through the lodestar cross-check process in the event that it helps inform the Court's decision.

In doing a lodestar cross-check, the Court is doing a higher-level analysis, not the detailed lodestar analysis required by the lodestar method of calculating attorney fees. The standard is described well in *Demmings v. KKW Trucking, Inc.*, No. 3:14-CV-0494-SI, 2018 WL 4495461, at *16 (D. Or. Sept. 19, 2018): "In doing the lodestar cross check, the Court is not performing the detailed lodestar analysis it would have performed if it used the lodestar method to calculate Plaintiff's attorney's fees. For example, the Court will not analyze counsel's time entries in detail for duplicative billing, billing for administrative tasks, or block billing. The cross check is performed at higher level, to ensure the percentage-of-recovery method does not result in a fee that is unreasonable. But it does not require spending the amount of time that is required when performing the lodestar method of fee calculation—otherwise using the percentage-of-recovery method would not allow for the time-savings the Ninth Circuit anticipated when allowing the method in lieu of the often more time consuming task of calculating the lodestar." *Id.* (citations omitted). The Court considers the total hours asserted and a

reasonable hourly rate. *Id.*

In addition to the usual hours-times-rate analysis of a regular lodestar calculation, "[m]ultipliers in the 3–4 range are common in lodestar awards for lengthy and complex class action litigation." *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995); *see also*, 4 NEWBERG ON CLASS ACTIONS § 14.7 (stating that courts typically approve percentage awards based on lodestar cross-checks of 1.9 to 5.1 or even higher); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 341 (3d Cir. 1998) ("[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.") (quoting 4 NEWBERG ON CLASS ACTIONS § 14.7). However, "[f]ees are not awarded for fee litigation in common fund cases because, rather than creating or preserving the common fund, the fee litigation actually depletes it." *Kinney v. Int'l Bhd. of Elec. Workers*, 939 F.2d 690, 694 n.5 (9th Cir. 1991); *accord*, 5 NEWBERG ON CLASS ACTIONS § 15:93 (5th ed. Dec. 2020 update) (collecting cases). In other words, Class Counsel cannot count "fees on fees" in the lodestar cross-check on common-fund awards. *Lesevic v. Spectraforce Techs. Inc.*, No. 19-CV-03126-LHK, 2021 WL 1599310, at *6 (N.D. Cal. Apr. 23, 2021).

It must still be remembered, however, that the Ninth Circuit has emphasized that there are weaknesses inherent in the lodestar analysis, and it need not limit the award of a reasonable attorney fee in any given case. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 n.5 (9th Cir. 2002) ("We do not mean to imply that class counsel should necessarily receive a lesser fee for settling a case quickly; in many instances, it may be a relevant circumstance that counsel achieved a timely result for class members in need of immediate relief. The lodestar method is merely a cross-check on the reasonableness of a percentage figure, and it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case

so as to recover a reasonable fee, since the lodestar method does not reward early settlement," citations omitted).

2. Lodestar cross-check in this case

As noted above and in class counsel's declaration submitted herewith, class counsel calculates the pre-multiplier lodestar cross-check figure at $3,415,823.50 (not including amounts for fee litigation). This is based on 4,525.8 hours of attorney time by Mr. Egan at $630 per hour; 567.1 hours of attorney time by Mr. Vogele at $495 per hour; and 1,032.2 hours of paralegal time by Ms. Lauzier at $275 per hour. Comparing the lodestar with the requested fee award of 40% of the recovery to the class yields a multiplier of approximately 1.54. That is well within the typical range of common-fund lodestar cross-check multipliers.

This factor therefore supports the requested award.

VI. Service Payments

"Incentive awards are payments to class representatives for their service to the class in bringing the lawsuit." *Demmings v. KKW Trucking, Inc.*, No. 3:14-CV-0494-SI, 2018 WL 4495461, *12 (D. Or. Sept. 19, 2018). They are often taken from a common fund. *Id.* Although incentive awards are "fairly typical in class action cases," they should be scrutinized to ensure "that they do not undermine the adequacy of the class representatives." *Id.* Incentive agreements can undermine the adequacy of class representation, for example, when they are grossly disproportionate, when they incentivize class representatives to settle without considering whether trial might be more beneficial to the class, or when incentive awards are conditioned upon approving a settlement agreement. *Id.* Incentive awards "are particularly appropriate in wage-and-hour actions where plaintiffs undertake a significant 'reputational risk' by bringing suit

against their former employers." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 267 (N.D. Cal. 2015).

Plaintiffs have pursued this case for the benefit of the class, postponing their relatively small individual recoveries for over thirteen years, searching for and producing documents, spending time and effort meeting and speaking with counsel throughout the litigation, reviewing pleadings and documents, sitting for multiple depositions, refusing to compromise the claims of the class members for less than reasonable value, preparing for trial, and testifying at and attending the trial. Nothing in the judgment or the proposed incentive award indicates that this award would undermine plaintiffs' representation. The $25,000 service payments sought are similar in size to incentive awards granted to class representatives. *Id.*

The Court should therefore approve the requested service payments of $25,000 to each named plaintiff.

VII. Conclusion

Plaintiffs and their counsel therefore move the Court for an Order:

1. Awarding statutory attorney fees against defendant;
2. Awarding a common-fund attorney fee to class counsel of 40% of the class's recovery in the above-captioned case, with the class's statutory attorney fee recovery credited against that 40% (to prevent double recovery); and
3. Approving service payments to the named plaintiffs of $25,000 each.

DATED this 28th day of August, 2023

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/s/ Jon M. Egan

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