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10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12 SAN JOSE DIVISION

13 IN RE: HIGH-TECH EMPLOYEE
 14 ANTITRUST LITIGATION
 15 THIS DOCUMENT RELATES TO:
 16 ALL ACTIONS

Master Docket No. 11-CV-2509-LHK

**NOTICE OF MOTION AND MOTION
 FOR ATTORNEYS' FEES,
 REIMBURSEMENT OF EXPENSES, AND
 SERVICE AWARDS**

Date: July 9, 2015
 Time: 1:30 pm
 Courtroom: Room 8, 4th Floor
 Judge: Honorable Lucy H. Koh

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on July 9, 2015 at 1:30 pm., or as soon thereafter as this matter may be heard, before the Honorable Lucy H. Koh, United States District Court for the Northern District of California, located in Courtroom 8, on the 4th Floor of the Robert F. Peckham Federal Building, 280 South 1st Street, San Jose, California, Plaintiffs will, and hereby do, move the Court pursuant to Federal Rule of Civil Procedure 23(h)(1) and 54(d)(2) for an order awarding:

1. Attorneys' fees to Class Counsel in the amount of \$81,125,000, which is approximately 19.5% of the total Settlement Fund of \$415,000,000, and below the Ninth Circuit's benchmark of 25%;
2. Unreimbursed expenses Class Counsel necessarily incurred in connection with the prosecution of this action after accounting for partial reimbursement of expenses through the preceding settlements with Intuit, Inc., Lucasfilm Ltd., and Pixar; and
3. Service awards of up to \$160,000 for each of the five Court-appointed Class Representatives.

This motion is based on this Notice of Motion and the accompanying Memorandum of Points and Authorities; the Declaration of Kelly M. Dermody; the Declaration of Brendan P. Glackin; the Declaration of Dean M. Harvey; the Declaration of Brian T. Fitzpatrick; the Declaration of Eric L. Cramer; the Declaration of James J. Sabella; and the Declarations of Class Representatives Mark Fichtner, Siddharth Hariharan, and Daniel Stover; argument by counsel at the hearing before this Court; any papers filed in reply; and all papers and records in this matter.

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

This case began with an investigation by the Antitrust Division of the United States Department of Justice (“DOJ”). After investigating the facts and reviewing expert submissions by Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc., Lucasfilm Ltd., and Pixar (collectively, “Defendants”), the DOJ closed its investigation of Defendants’ anti-solicitation agreements without seeking restitution of any kind. That might have been the end of the story. Indeed, for the seven months following public disclosure of the DOJ’s investigation, it was. Then, five courageous software engineers and former employees of Defendants retained Class Counsel to take up the challenge of prosecuting a precedent-setting and challenging class action that picked up where the DOJ left off. Their first attorneys at Lieff, Cabraser, Heimann & Bernstein LLP (“LCHB”) assembled a team of co-counsel, who together litigated this action relentlessly for four years. The result of these efforts is an historic recovery for a wage suppression case. Class Counsel went toe-to-toe with one of the most well-financed group of Defendants ever assembled, defeating motions to dismiss; completing massive discovery, including taking over 100 depositions; assembling a factual and expert record that the Court recognized was without precedent;¹ litigating two rounds of class certification and succeeding in certifying a class of over 64,000 high-tech workers; beating back two attempts at Ninth Circuit intervention; defeating motions for summary judgment; and briefing and arguing countless novel and complex issues. Class Counsel took huge risks, invested an enormous amount of time and money, and secured a cash recovery for the Class that exceeds any recovery previously achieved in comparable cases.

Class Counsel seek only approximately 19.5 percent of the settlement fund.² This is a reasonable percentage in light of all the circumstances. *Vizcaino v. Microsoft Corp.*, 290 F.3d

¹ Order Granting Plaintiffs’ Supp. Mot. for Class Certification, Dkt. 531, at 69 (“This Court could not identify a case at the class certification stage with the level of documentary evidence Plaintiffs have presented in the instant case.”).

² This requested percentage locks in Class Counsel’s prior request of a 25% benchmark fee in connection with the previously-rejected \$324.5 million, ensuring that Class members receive all of the benefit of the additional monies Class Counsel secured in the instant \$415 million settlement.

1 1043, 1048-50 (9th Cir. 2002). Class Counsel seek \$1,184,810.98 in unreimbursed out-of-pocket
 2 expenses that Class Counsel necessarily incurred (Class Counsel incurred total out-of-pocket
 3 expenses of over \$4,884,655.29 prosecuting this action, however \$3,699,844.31 in costs were
 4 previously reimbursed from the earlier settlements with Intuit, Lucasfilm, and Pixar). Finally,
 5 Class Counsel seek service awards in an amount up to \$160,000 each to the current Class
 6 Representatives, as well as to the estate of Brandon Marshall, to compensate them for their
 7 substantial time and effort, the significant risks they undertook on behalf of the Class with no
 8 guarantee that they would receive anything in return, and the valuable public service they
 9 provided to enforce the nation's antitrust laws.

10 **II. BACKGROUND**

11 **A. The United States Department of Justice Investigated Defendants' Conduct** 12 **and Declined to Seek Any Penalties**

13 In 2009, the Antitrust Division of the United States Department of Justice ("DOJ") began
 14 investigating the recruiting practices of Defendants. (Glackin Decl., ¶ 7.) The DOJ reviewed
 15 Defendants' records, including email communications; interviewed witnesses; and reviewed
 16 detailed "white papers" assembled by lawyers and economic experts retained by Defendants. The
 17 DOJ concluded that Defendants reached and implemented a series of bilateral agreements to
 18 restrain competition for labor in violation of Section One of the Sherman Act.

19 The DOJ could have prosecuted these violations as felonies, subjecting each corporate
 20 defendant to fines of up to \$100,000,000, and subjecting individuals to fines of up to \$1,000,000
 21 and/or imprisonment not exceeding 10 years. 15 U.S.C. § 1. In addition, the DOJ had the
 22 authority under the federal Criminal Fine Enforcement Act to seek to fine each Defendant twice
 23 the gross amount gained by the Defendant from the violation, or twice the gross amount of the
 24 loss suffered by the victims. 18 U.S.C. § 3571(d). For example, the DOJ successfully used the
 25 Criminal Fine Enforcement Act to obtain a fine of \$500,000,000 from AU Optronics Corporation
 26 of Taiwan for conspiring with other LCD manufacturers.³

27
 28 ³ See <http://www.justice.gov/atr/public/criminal/sherman10.pdf>. The DOJ's investigation into the LCD Panel price-fixing cartel resulted in 14 guilty pleas. LCHB was Co-Lead Class counsel in the private LCD case and prosecuted the case to verdict for Plaintiffs at trial. It remains the most

1 But, after reviewing the facts and the challenges of this case, the DOJ declined to seek
2 penalties of any kind. Instead, the DOJ closed its investigation by filing stipulated proposed final
3 civil judgments in which Defendants denied any wrongdoing. (Glackin Decl., ¶ 7.) Subsequent
4 civil plaintiffs could not even use the stipulated proposed final judgments as *prima facie* evidence
5 of Defendants' alleged misconduct, because the DOJ closed its investigation before taking any
6 testimony. 15 U.S.C. § 16(a). This was not an inviting setting for the private bar to step in.

7 **B. Class Counsel Investigated the Potential Case and Assessed Its Significant**
8 **Risks**

9 LCHB opened an investigation the same day the DOJ filed the stipulated judgments:
10 September 24, 2010. (Declaration of Kelly M. Dermody, Ex. 12, filed herewith.) For over seven
11 months thereafter, LCHB investigated the facts, interviewed several leading econometricians and
12 labor economists, and assessed the feasibility of proving liability and damages on a class-wide
13 basis. LCHB attorneys and staff devoted over 334 hours to pre-filing investigation. (Glackin
14 Decl., ¶ 9.)

15 The case presented several critical challenges. First, Defendants' agreements involved
16 non-price restraints on competition for labor, unlike a conventional cartel to fix prices in a
17 downstream product market. This created a host of issues by itself. Because the DOJ only
18 alleged that Defendants entered into certain bilateral agreements not to solicit each other's
19 employees, a civil litigant would have to quantify the effect of the agreements—and potentially
20 each agreement individually—despite other substantial avenues of competition (such as
21 applications in response to job postings). During the pre-filing investigation, Class Counsel
22 anticipated Defendants would argue that their agreements should be subject to the rule of reason,
23 rather than the *per se* rule, because of the labor context and the unusual nature of the restriction at
24 issue. Class Counsel knew Defendants would also likely contend that the rule of reason applied
25 because their restrictions related to technology collaborations. If Defendants prevailed in
26 requiring the rule of reason, a plaintiff would have to prove both market power in a relevant
27 antitrust market and that the anticompetitive effects of the restraints outweighed their

28 recent jury verdict for plaintiffs seeking damages in an antitrust class action in the Northern
District of California.

1 procompetitive virtues. In effect, a plaintiff might have to try its case against the social benefit
2 of the iPhone, Pixar movies, Photoshop, and Intel microchips. In retrospect it might seem
3 obvious given the discovery and expert record that has been developed that the *per se* rule
4 applies; but back in 2010, Class Counsel only knew that no such trial had ever before been
5 attempted.

6 With respect to damages, assessing the impact of a reduction in solicitations (or “cold
7 calls”) on employee pay is a very different and more challenging task than assessing the impact of
8 a price-fixing cartel on the price of a product. This would be particularly true given the variety of
9 job titles at issue across seven different companies, nationwide. A plaintiff would have to delve
10 into the structure of how compensation worked within and across seven large companies, and
11 prove the relationship between increased solicitations and increased pay across all members of a
12 proposed class. This had never before been attempted in litigation, much less accomplished.

13 Second, in addition to the legal complexities, Class Counsel knew the resources of the
14 Defendants would be essentially limitless. No civil action had ever before been attempted against
15 the combined resources of these seven companies, which together have a market capitalization of
16 well over a trillion dollars. Defendants would certainly spare no expense or effort in defending
17 the case. This concern would be felt with particular urgency to the individual named plaintiffs,
18 who would be filing suit not only against the most powerful companies in their industry, but also
19 against their own prior (and potentially future) employers.

20 Third, Class Counsel knew that obtaining monetary relief would require certifying a class
21 of employment-related damages claims under Federal Rule of Civil Procedure 23(b)(3), a
22 daunting undertaking given shifting Rule 23 standards over the past several years. A nationwide
23 class of tens of thousands of employees, asserting antitrust claims, across multiple companies,
24 and across a variety of different positions, had never before been certified. A plaintiff would
25 need to demonstrate methodologies that would support a finding that evidence common to the
26 class as a whole would predominate in demonstrating impact, and would need to demonstrate
27 methodologies for calculating damages on a class-wide basis. This would (and did) require
28 millions of dollars of expert analysis, supported by facts developed during wide-ranging

1 discovery. As this Court knows, the examples of employee classes certified to bring Sherman Act
2 damages claims are few and far between; none of them, successful or not, involved a class of this
3 size and scope.

4 **C. Class Counsel Were The Only Firms to Take On The Challenge and Agree to**
5 **Prosecute a Private Action**

6 The challenges of this case are most eloquently demonstrated by the fact that no other
7 firms or plaintiffs came forward to prosecute it. To “‘open[] the door of justice’ to individuals
8 harmed by antitrust violations while at the same time penalizing antitrust violators, Congress
9 chose to allow individuals to serve as private attorneys general in antitrust actions” (Order
10 Granting Plaintiffs’ Supp. Mot. for Class Certification, Dkt. 531 at 13, quoting *Brunswick Corp.*
11 *v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477,486 n.10 (1977).) Private antitrust actions serve “the
12 high purpose of enforcing the antitrust laws,” (*id.*, quoting *Zenith Radio Corp. v. Hazeltine*
13 *Research, Inc.*, 395 U. S. 100, 130-31 (1969)), and “provide a significant supplement to the
14 limited resources available to the Department of Justice for enforcing the antitrust laws and
15 deterring violations,” (*id.*, quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979)).

16 In the over seven months following the DOJ’s stipulated proposed final judgments with
17 Defendants, no cases were filed addressing the alleged misconduct. On May 4, 2011, LCHB
18 filed a class action on behalf of individual and representative plaintiff Siddharth Hariharan.
19 Going beyond the DOJ’s allegations, the complaint charged that the bilateral agreements were
20 part of a common understanding among all seven Defendants. (Compl. ¶¶ 48-85.) LCHB’s own
21 independent investigation found the relationship among the bilateral agreements in the
22 overlapping members of Defendants’ boards of directors, and by analyzing the timing and terms
23 of Defendants’ secret agreements. (*Id.*) This made possible joint and several liability among
24 Defendants for all bilateral agreements at issue, and set the stage for methodologies that could
25 demonstrate impact and damages on a class-wide basis. The complaint also explained the market
26 at issue (skilled technical labor), and the economic mechanisms by which the misconduct harmed
27 members of the class. (*Id.* ¶¶ 35-47, 83-85.)
28

1 Upon investigating the similar claims of Mark Fichtner, Daniel Stover, Brandon Marshall,
2 and Michael Devine, LCHB filed four additional cases, and invited the firms of Berger &
3 Montague, P.C., and Grant & Eisenhofer P.A. to participate in the case on behalf of Plaintiffs. In
4 contrast to typical antitrust actions, no other law firm, and no other plaintiffs, filed cases asserting
5 claims based on these agreements.⁴ The Court consolidated the five cases on September 12, 2011
6 (Dkt. 64), and Plaintiffs filed a Consolidated Amended Complaint the next day (Dkt. 65). The
7 Joseph Saveri Law Firm joined the case in June 2012, after Mr. Saveri departed LCHB.

8 **D. Class Counsel Prosecuted This Case Tenaciously and with Great Skill on**
9 **Behalf of the Class**

10 Defendants began by challenging the pleadings while seeking to stay discovery. All
11 Defendants jointly, and Lucasfilm separately, moved to dismiss Plaintiffs' claims. (Dkts. 79 &
12 83.) Class Counsel successfully argued that the Consolidated Amended Complaint pled plausible
13 violations of the Sherman Act, that plaintiffs suffered antitrust injury, and that Lucasfilm could
14 not assert a defense under the "federal enclave doctrine" (this appears to have been the first time
15 the "federal enclave doctrine" had ever been invoked to defend against an antitrust claim). (Dkt.
16 91 and 92.) The Court denied the motions to dismiss, with the exception that Plaintiffs' UCL
17 claim for restitution and disgorgement was dismissed for failure to allege a vested interest. (Apr.
18 18, 2012 Order; Dkt. 119.)

19 Having obtained the DOJ production, Class Counsel then aggressively sought discovery.
20 Class Counsel served 75 document requests, in response to which Defendants collectively
21 produced over 325,000 documents (over 3.2 million pages). (Glackin Decl., ¶ 26.) Discovery
22 was hard-fought. Prosecuting these discovery requests required extensive conferences and
23 follow-up with Defendants' counsel regarding search terms, custodians, and search protocols, and
24 regular requests to the Court when Defendants' responses were lacking or incomplete.

25 Class Counsel also prepared and took 101 depositions of fact, 30(b)(6) and expert
26 witnesses, during which Class Counsel introduced 1,423 exhibits. (Glackin Decl., ¶¶ 4, 27, 29,

27 _____
28 ⁴ Indeed, it was not until years later, after *settlement* of the case, that other firms and plaintiffs
sought to bring claims based on similar alleged agreements uncovered and made public by Class
Counsel's efforts.

1 44.) To accomplish this within the ambitious schedule, depositions were often double, triple, and
2 quadruple-tracked for the same days (with class counsel taking depositions in four different
3 locations simultaneously). (*Id.* ¶ 16.) This included March 29, 2013, a day in which Class
4 Counsel took five depositions simultaneously. (*Id.*) Defendants opposed depositions of many of
5 their chief executives, but Class Counsel successfully pushed back and took testimony from every
6 relevant chief executive and other senior managers. These depositions yielded critical testimony,
7 such as the admission by Pixar’s Ed Catmull that the competition he hoped to avoid “messes up
8 the pay structure. It does. It makes it very high That’s just the reality we’ve got. And I do
9 feel strongly about it.” (Order Granting Plaintiffs’ Supp. Mot. for Class Certification, Dkt. 531 at
10 51 (quoting Catmull Depo. at 179).) Class Counsel also deposed Defendants’ human resources
11 and other personnel relevant to proving impact and damages to the proposed class. In addition,
12 class counsel deposed individuals with knowledge of collaborative commercial activities among
13 the Defendants, in order to prepare for, and address, possible defenses arising out of a potential
14 application of the rule of reason.

15 Class Counsel also served 28 subpoenas on third parties, negotiating the production of
16 8,809 pages of documents. Class Counsel submitted a Freedom of Information Act request to the
17 DOJ, and then filed a complaint for injunctive relief against the DOJ when the DOJ refused to
18 provide documents in response to the request. *Lieff, Cabraser, Heimann & Bernstein, LLP v.*
19 *United States Dept. of Justice*, Case No. 11-cv-5105-HRL, Dkt. 1 (N.D. Cal. Oct. 18, 2011).
20 Defendants also propounded document requests, in response to which Plaintiffs produced over
21 31,000 pages, and took the depositions of the Named Plaintiffs. (*Id.*) Defendants served 34
22 subpoenas on third parties, including the then-current and former employers of the Named
23 Plaintiffs. (*Id.*) Defendants’ subpoenas resulted in 1,834 pages of documents produced, which
24 Class Counsel also reviewed. (*Id.*)

25 With expert assistance, Class Counsel analyzed vast amounts of computerized employee
26 compensation and recruiting data, including approximately 80,000 files of employment-related
27 data exceeding 50 gigabytes. (Glackin Decl., ¶ 26.) As generally described in the Declaration of
28 Brendan Glackin and as reflected in the Court file, Class Counsel retained four experts and

1 numerous consultants to review and analyze this data, documents produced in the action,
2 deposition testimony, and other relevant facts; apply their relevant expertise to those facts; and
3 form opinions regarding a range of assigned tasks. Those experts included Dr. Edward Leamer of
4 the University of California, Los Angeles, who provided six expert reports consisting of 433
5 pages of analysis. Defendants deposed Dr. Leamer four times. Class Counsel retained Dr. Kevin
6 Hallock of Cornell University, who provided two expert reports consisting of 232 pages of
7 analysis. Defendants deposed him twice. Class Counsel also retained Dr. Alan Manning of the
8 London School of Economics, who provided one expert report, and Dr. Matthew Marx of the
9 Sloan School of Management at the Massachusetts Institute of Technology, who provided two
10 expert reports. Defendants deposed them as well.

11 Class Counsel and their experts also reviewed and analyzed the expert analysis
12 Defendants submitted. Defendants retained seven experts, who collectively submitted a total of
13 1,733 pages of expert reports, including detailed and extensive quantitative analyses. Plaintiffs'
14 experts assessed these reports and provided responses to them. Class Counsel deposed
15 Defendants' experts, including three depositions of Dr. Murphy.

16 The Court provisionally denied the motion on April 5, 2013. Although finding the Rule
17 23(a) factors satisfied, and finding proof of damages and the conspiracy to be admissible and
18 common, the Court requested further briefing on whether the Rule 23(b)(3) predominance
19 standard was met with respect to impact. (Apr. 5, 2013 Order Granting in Part, Denying in Part
20 Motion for Class Certification, Dkt. 382.) The Court acknowledged that the documentary
21 evidence Class Counsel assembled "weighs heavily in favor of finding that common issues
22 predominate over individual ones for the purpose of being able to prove antitrust impact." (*Id.* at
23 33.) However, the Court found the partial record available at the time of the original motion to be
24 inadequate: "the Court believes that, with the benefit of discovery that has occurred since the
25 hearing on this motion, Plaintiffs may be able to offer further proof to demonstrate how common
26 evidence will be able to show class-wide impact to demonstrate why common issues predominate
27 over individual ones." (*Id.* at 45.)
28

1 This was a critical moment in the prosecution of the case, and one that highlighted the
 2 risks Class Counsel undertook in the representation. As of April 5, 2013, Class Counsel had
 3 devoted thousands of hours to prosecuting the action with no guarantee of any compensation.⁵
 4 Class counsel had also incurred substantial out-of-pocket costs, primarily to outside economic
 5 experts and consultants. No settlements had been obtained; there was no guarantee the class and
 6 Class Counsel would ever receive a nickel of this investment back. Class Counsel responded to
 7 the denial of class certification by renewing and redoubling their efforts, investing substantially
 8 more time and out-of-pocket costs, in another effort to certify the proposed class. Between April
 9 6, 2013 (when the Court denied class certification), and October 24, 2013 (when the Court
 10 granted class certification), Class Counsel devoted thousands of additional hours of attorney and
 11 staff time, and substantial additional out-of-pocket costs.⁶

12 Class Counsel filed a Supplemental Motion for Class Certification to address the Court's
 13 request. (Dkts. 418 & 455.) Class Counsel marshaled additional documentary evidence,
 14 testimony, and expert analyses. (Decl. of Dean M. Harvey, Dkt. 418-1; Decl. of Lisa J. Cisneros,
 15 Dkt. 418-2; Leamer Supp., Dkt. 418-4; Hallock Rpt., Dkt. 418-3; Decl. of Anne B. Shaver, Dkt.
 16 456; and Leamer Supp. Reply, Dkt. 457.) This included the addition of Dr. Kevin Hallock as an
 17 expert witness, who was the Donald C. Opatrny '74 Chair of the Department of Economics, the
 18 Joseph R. Rich '80 Professor, Professor of Economics and Human Resource Studies, and Director
 19 of the Institute for Compensation Studies at Cornell University. Class Counsel submitted
 20 additional evidence that the no-cold calling agreements at issue in this case were designed
 21 substantially to disrupt recruiting of Technical Class employees. Accordingly, Class Counsel
 22 focused their supplemental briefing and analysis on demonstrating impact to all or nearly all of
 23 the Technical Class. Defendants opposed the motion and submitted supplemental briefing, expert
 24 reports, and documents in support of their opposition. (Opp. to Supp. Mot. for Class Cert., Dkt.
 25 439; Decl. of Christina Brown, Dkt. 445; Decl. of Lin Kahn, Dkt. 446; Murphy Supp. Rpt., Dkt.
 26 440; Shaw Rpt., Dkt. 442.) Class Counsel deposed Defendants' experts and submitted another

27
 28 ⁵ LCHB alone had invested well over 11,000 hours by that time. (Glackin Decl., ¶¶ 9, 18, 32.)

⁶ LCHB alone invested thousands of hours in this period. (Glackin Decl., ¶ 46.)

1 extensive set of materials with their reply in support of class certification, including an additional
2 expert analysis by Dr. Leamer. (Dkt. Nos. 455-58.)

3 On October 24, 2013, the Court granted Plaintiffs' Supplemental Motion for Class
4 Certification and certified the proposed Technical Class. (Dkt. 531.) As the Court's detailed
5 analysis demonstrated, class certification was made possible by virtue of the extensive evidentiary
6 and expert record Class Counsel assembled. (*Id.*)

7 Plaintiffs reached settlements with Defendants Lucasfilm and Pixar, and with Defendant
8 Intuit, and presented them to the Court on September 21, 2013. (Dkt. 501.) On October 30,
9 2013, the Court granted preliminary approval. (Dkt. 540.) Plaintiffs' Motions for Final
10 Approval, Attorneys' Fees and Costs, and Service Awards with respect to those settlements have
11 been resolved, after a hearing on May 1, 2014. (Dkts. 915 & 916.)

12 On November 7, 2013, Defendants sought review of the Court's class certification order
13 by the Ninth Circuit. (Ninth Cir. Case No. 13-80223, Dkt. 1.) The United States and California
14 Chambers of Commerce filed amicus briefs, urging the Ninth Circuit to grant the petition and
15 reverse the Court's order. (*Id.*, Dkts. 8 and 9.) Class Counsel opposed the petition (*Id.*, Dkt. 10),
16 and the Ninth Circuit denied Defendants' petition on January 15, 2014 (Dkt. 594).

17 The Settling Defendants filed individually and collectively for summary judgment (on the
18 grounds that Plaintiffs had not marshaled sufficient evidence that each of the defendants had
19 participated in a single multilateral conspiracy to suppress compensation), for exclusion of the
20 testimony of two of Plaintiffs' experts, Dr. Edward Leamer and Dr. Matthew Marx under
21 *Daubert*, and to strike portions of Dr. Leamer's reply report as improper rebuttal. (Dkts. 554,
22 556, 557, 559, 560, 561, 564, & 570.) Class Counsel responded with another set of voluminous
23 materials and legal analysis, including reports from two additional experts Class Counsel
24 retained: Dr. Alan Manning, Professor of Economics at the London School of Economics (one of
25 the world's leading authorities on employer market power); and Dr. Matthew Marx, Associate
26 Professor of Technological Innovation, Entrepreneurship, and Strategic Management at the
27 Massachusetts Institute of Technology Sloan School of Management. (Dkts. 600-608.)
28

1 The Court denied all motions for summary judgment. (Dkts. 771 & 788.) The Court
2 granted in part and denied in part the motions to exclude Dr. Leamer's testimony and strike
3 portions of his reply report. (Dkt. 788.) Class Counsel filed a motion for application of the *per se*
4 standard with supporting evidence (Dkt. 830) and Defendants opposed it (Dkt. 887). Defendants
5 moved *in limine* to exclude various categories of evidence (Dkt. 855), and class counsel opposed
6 their motions (Dkt. 882). Class Counsel also moved to compel production of a document, the
7 identity of which remains under seal (Dkt. 789-2), and Defendants opposed it (Dkt. 878-1). Class
8 Counsel also prepared extensively for trial, including by retaining a highly-experienced jury
9 consultant to assist with jury research and selection. (Glackin Decl., ¶¶ 88-92.)

10 On May 22, 2014, Plaintiffs Mark Fichtner, Siddharth Hariharan, and Daniel Stover
11 moved the Court to preliminarily approve a settlement agreement with Settling Defendants
12 providing for a settlement fund of \$324,500,000. The Court denied preliminary approval on
13 August 8, 2014. (Dkt. 974.) Thereafter, the parties resumed arm's-length negotiations with the
14 assistance of mediator Hon. Layn Phillips (Ret.), while continuing to litigate pre-trial matters.
15 Class Counsel filed a reply in support of its motion for application of the *per se* standard (Dkt.
16 988), and Defendants requested leave to file a supplemental opposition (Dkts. 990 & 990-1),
17 which Class Counsel Opposed (Dkt. 992). Class Counsel also filed a motion to unseal all papers
18 associated with its motion to compel. (Dkt. 991.)

19 On September 4, 2014, Defendants filed a Petition for a Writ of Mandamus with the Ninth
20 Circuit, seeking an order directing the Court to preliminarily approve the \$324,500,000
21 settlement. (9th Cir. Case No. 14-72745, Dkt. 1.) On September 22, 2014, the Ninth Circuit
22 issued an order stating that Defendants' "petition for a writ of mandamus raises issues that
23 warrant a response," ordered Plaintiffs to file a response, set a date for Defendants' reply, and
24 ordered that upon completion of briefing the matter be placed on the next available merits panel
25 calendar for oral argument. (9th Cir. Dkt. 2; Dkt. 993.) Class Counsel opposed Defendants'
26 petition (9th Cir. Dkts. 4 & 6), and Defendants filed a reply (9th Cir. Dkt. 10). Putative amici
27 curiae Chamber of Commerce of the United States of America, California Chamber of
28 Commerce, and economic scholars filed motions for leave to file amici curiae briefs in support of

1 the petition (9th Cir. Dkts. 8 & 9), which the Ninth Circuit referred to the panel to be assigned to
2 hear the merits of the petition (9th Cir. Dkt. 15). Class Counsel opposed the motions for leave to
3 file amici curiae briefs. (9th Cir. Dkts. 13 & 16.) The Ninth Circuit scheduled oral argument on
4 the petition for March 13, 2015. (9th Cir. Dkt. 19.)

5 The parties' arms-length negotiations continued, and on January 7, 2015, Defendants
6 agreed to a settlement that created a common fund of \$415,000,000. This amount was
7 \$90,000,000 more than Defendants previously agreed to pay, and \$35,000,000 more than the
8 \$380,000,000 referenced by the Court in denying the parties' earlier settlement (Dkt. 974 at 7,
9 n.8). Up to this time, Plaintiffs and Defendants had continued to engage in the conferences
10 regarding pre-trial disclosures and the authentication of business records and potential depositions
11 related thereto, and other issues. (Glackin Decl., ¶ 94.)

12 **E. Class Counsel Obtained an Historic and Unprecedented Recovery**

13 The settlement fund achieved here—a total of \$415,000,000—is substantial, particularly
14 in light of the very real risk that a jury could find no liability or award no damages, and any jury
15 verdict would be subject to appellate review. When combined with the \$20 million received from
16 Plaintiffs' previous settlements with Defendants Pixar, Lucasfilm, and Intuit, the result for the
17 Class in this litigation will total \$435 million.

18 A relevant point of comparison is with the outcomes achieved by the United States
19 Department of Justice ("DOJ") and the California Attorney General ("CA AG"). This action was
20 preceded by a DOJ investigation concerning the same alleged misconduct at issue in this case.
21 While the DOJ has the power to seek civil fines and/or restitution, it declined to do so here.

22 In addition, after the Court certified the proposed class in this action, the DOJ and the CA
23 AG filed cases against eBay Inc. regarding an alleged agreement between eBay and Intuit not to
24 poach each other's employees, which later became a no-hire agreement between the companies.
25 *State of California v. eBay Inc.*, Case No. 12-CV-5874-EJD-PSG, Dkt. 55-5, ¶¶ 25-42 (N.D. Cal.
26 May 1, 2014) ("CA AG Case"); *United States v. eBay Inc.*, Case No. 12-CV-5869-EJD, Dkt. 36,
27 ¶¶ 14-25 (N.D. Cal. June 4, 2013) ("DOJ Case"). The alleged agreement there covers broader
28 conduct than at issue in this case, and it lasted longer—from 2006 through 2011. (CA AG Case,

1 Dkt. 55-5, ¶ 41.) The DOJ and the California AG settled that case. The proposed settlement with
2 the DOJ is very similar to the previous settlement between the DOJ and the Defendants here:
3 while eBay agrees to modify its behavior going forward, eBay did not pay any money, either in
4 the form of penalties or compensation to victims. (DOJ Case, Dkt. 57 and 57-1.) The proposed
5 settlement with the CA AG includes a monetary component of \$3.75 million, \$2.375 million of
6 which will be distributed among approximately 13,990 claimants. The proposed settlement also
7 includes a release of the proposed class's claims. (CA AG Case, Dkt. 55, at 6.) On August 29,
8 2014 Judge Davila preliminarily approved the proposed settlement. (CA AG Case, Dkt. 62.)
9 Plaintiffs here obtained a substantially larger recovery than the AG deal, whether measured on an
10 aggregate or per-Class-member basis (\$6,437.50 per Class member here versus \$268.05 per class
11 member in the case before Judge Davila).⁷ The fact that the settlement reflects a discount on
12 single damages is not a mark against it; this is the point of settlements.

13 **III. ARGUMENT**

14 **A. The Requested Fee is Reasonable and Appropriate**

15 Class Counsel have litigated this challenging case relentlessly for four years, through
16 motions to dismiss, extensive fact and expert discovery, two rounds of class certification, two
17 rounds of appellate briefing, and motions for summary judgment, securing an historic recovery of
18 \$415,000,000 (in addition to the \$20,000,000 previous achieved). Under these circumstances, it
19 would be appropriate for the Court to award the 25 percent "benchmark" applied in the Ninth
20 Circuit, or, indeed, to award fees in excess of 25 percent. Nevertheless, Class Counsel is limiting
21 its fee request on behalf of all Class Counsel to a maximum of approximately 19.5 percent. This
22 request is modest and manifestly reasonable, particularly in light of Ninth Circuit law regarding
23 attorneys' fees in class cases that are designed to ensure that class counsel have proper incentives
24 to take on difficult cases and pursue class members' best interests. Class Counsel assumed
25 substantial risks and devoted substantial resources in pursuing a recovery for the Class, and Class
26 Counsel litigated this case efficiently. Class Counsel should be properly rewarded for doing so

27 _____
28 ⁷ Excluding deductions of proposed amounts for attorneys' fees and costs, plaintiff service
awards, claims administrator costs, and the reserve fund, the per capita number is \$5,071.53,
compared to a per capita net recovery in the eBay case of \$169.76.

1 and succeeding.

2 **1. Class Counsel are Entitled to a Fee Under the Common Fund Doctrine**

3 The common fund doctrine applies in the Ninth Circuit. *Staton v. Boeing Co.*, 327 F.3d
4 938, 967 (9th Cir. 2003). Under the doctrine, counsel have an equitable right to be compensated
5 for their successful efforts in creating a common fund. *Staton*, 327 F.3d at 968; *Boeing Co. v.*
6 *Van Gemert*, 444 U.S. 472, 478 (1980) (“ . . . a litigant or a lawyer who recovers a common
7 fund . . . is entitled to a reasonable attorney’s fee from the fund as a whole”); *In re Wash. Pub.*
8 *Power Supply System Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) (same).

9 **2. The Court Should Calculate Class Counsel’s Fee As a Percentage of**
10 **the Common Fund**

11 The most appropriate way to calculate a reasonable fee where, as here, contingency fee
12 litigation has produced a common fund, is the percentage-of-the-fund method. *Blum v. Stenson*,
13 465 U.S. 886, 900 n.16 (1984); *Vizcaino*, 290 F.3d at 1047; *Six Mexican Workers v. Ariz. Citrus*
14 *Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (common fund fee is generally “calculated as a
15 percentage of the recovery”). The percentage method comports with the legal marketplace in
16 other contingency fee cases, where counsel’s fee is typically based upon a percentage of any
17 recovery. *See* Fed. Judicial Ctr., *Awarding Attorneys’ Fees & Managing Fee Litig.* at 73 (2005)
18 (percentage method “helps ensure that the fee award will simulate marketplace rates, since most
19 common fund cases are the kinds of cases normally taken on a contingency fee basis, by which
20 counsel is promised a percentage of any recovery”). (*See also* Declaration of Brian T. Fitzpatrick
21 (“Fitzpatrick Decl.”), ¶¶ 3, 8-9 (referencing empirical study where percentage of the fund
22 recovery used as basis for fees in 88% of 688 settlements reviewed).)

23 The percentage-of-the-fund method aligns class counsel’s interests with those of the class,
24 and properly incentivizes capable counsel, not to only accept challenging cases, but to push for
25 the best result that can be achieved for the class. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A.*
26 *Inc.*, 396 F.3d 96, 122 (2d Cir. 2005) (percentage method “directly aligns the interests of the class
27 and its counsel”) (citation omitted); *see also* Fitzpatrick Decl., ¶ 9. Moreover, the percentage-of-
28 the-fund method encourages efficiency and discourages waste. The lodestar method, by contrast,

1 encourages counsel to bill time and to create opportunities to bill time.⁸ (See Fitzpatrick Decl., ¶
 2 11.) Calculating the fee here as a percentage-of-the-fund, rather than merely as a function of
 3 counsel's billed time, rewards class counsel for assuming the risks of this case and efficiently
 4 prosecuting it.

5 **3. A Fee of Approximately 19.5 Percent is Significantly Less Than the**
 6 **Benchmark Fee of 25 Percent and is Reasonable**

7 In the Ninth Circuit, the "benchmark" fee in a common fund case is 25 percent of the fund
 8 created. *Vizcaino*, 290 F.3d at 1047. (See also Fitzpatrick Decl., ¶ 12.) A court should depart
 9 from the benchmark only if there are "special circumstances" justifying the departure. *In re*
 10 *Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) (citations omitted).
 11 Courts in the Ninth Circuit often award fees that are in excess of the 25 percent benchmark. See,
 12 e.g., *Vizcaino*, 290 F.3d at 1050 (affirming 28 percent award); *In re Omnivision Techs., Inc.*, 559
 13 F. Supp. 2d 1036, 1047 (N.D. Cal. 2007) ("[I]n most common fund cases, the award exceeds that
 14 [25%] benchmark."). (See also Fitzpatrick Decl., ¶ 20 (empirical study showed approximately
 15 one-half of all class settlements in the Ninth Circuit awarded attorneys' fees of between 25-30%
 16 of the common fund).⁹) Here, Class Counsel seek less than the 25 percent benchmark:
 17 approximately 19.5% of the \$415,000,000 common fund. This requested amount is also well

18 ⁸ The lodestar method's emphasis on time has drawn substantial criticism. *In re Apple*
 19 *iPhone/iPod Warranty Litig.*, 2014 U.S. Dist. LEXIS 52050, at *8 (N.D. Cal. Apr. 14, 2014)
 20 ("Whatever merits the lodestar method might have, particularly outside the context of a common
 21 fund case, it has also been subject to heavy criticism by commentators and in the courts.")
 22 (citation omitted). Among other things, awarding fees based on the lodestar method "does not
 23 encourage efficiency." *In re Activision Secs. Litig.*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1989).
 24 Instead, as the Ninth Circuit observed, "the lodestar method creates incentives for counsel to
 25 expend more hours than may be necessary on litigating a case so as to recover a reasonable fee."
 26 *Vizcaino*, 290 F.3d at 1050 n.5; see also *In re Activision*, 723 F. Supp. at 1378 (noting that
 27 lodestar approach "encourages abuses such as unjustified work and protracting the litigation").

28 ⁹ See also, e.g., *Castaneda v. Burger King Corp.*, 2010 U.S. Dist. LEXIS 78299 (N.D. Cal. Jul.
 12, 2010) (33%); *Dyer v. Wells Fargo Bank, N.A.*, 2014 U.S. Dist. LEXIS 150129, at *14-17
 (N.D. Cal. Oct. 22, 2014) (25%); *Larsen v. Trader Joe's Co.*, 2014 U.S. Dist. LEXIS 95538, at
 *31-32 (N.D. Cal. July 11, 2014) (28%); *Vedachalam v. Tata Consultancy Servs., Ltd.*, 2013 U.S.
 Dist. LEXIS 100796, at *4-5 (N.D. Cal. July 18, 2013) (awarding 30% and citing cases where
 30% awarded); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 U.S. Dist. LEXIS 6607, at *47
 (N.D. Cal. Jan. 14, 2013) (30%); *Kramer v. Autobytel, Inc.*, 2012 U.S. Dist. LEXIS 185800, at
 *13 (N.D. Cal. Jan. 27, 2012) (25%); *Garner v. State Farm*, 2010 U.S. Dist. LEXIS 49482, at *6
 (N.D. Cal. Apr. 22, 2010) (30%); *Knight v. Red Door Salons, Inc.*, 2009 U.S. Dist. LEXIS 11149
 (N.D. Cal. Feb. 2, 2009) (30%); *In re Omnivision*, 559 F. Supp. 2d at 1048 (28%); *In re*
Activision, 723 F. Supp. at 1377 (30%).

1 within the Ninth Circuit practice, with the vast majority of fee awards being between 25-35% of
2 the fund (*see* Fitzpatrick Decl., ¶ 19), and approximately 80% of fee awards constituting over
3 20% of the fund (*id.*, at ¶ 20). Even among settlements exceeding \$400 million, the percentage
4 requested here is consistent with the mean and median for fee awards in such cases in the Ninth
5 Circuit. (*See* Fitzpatrick Decl., ¶ 21 (mean and median awards of 17.8% and 19.5%, respectively
6 in settlements exceeding \$400 million).)

7 Courts in the Ninth Circuit consider a number of factors in determining whether there is
8 any basis to stray from the benchmark, including: (1) the results achieved; (2) the risks of
9 contingency representation; (3) the complexities of the case and skill and effort required of
10 counsel; (4) awards in similar cases; and (5) whether counsel devoted substantial time requiring
11 counsel to forgo other work. *Vizcaino*, 290 F.3d at 1048-50. Consideration of these factors here
12 confirms that there is no basis for any further downward departure from the benchmark. To the
13 contrary, the circumstances would support an award of the benchmark fee, or indeed an award
14 well in excess of the benchmark.

15 **a. Class Counsel Achieved a Record-Setting Recovery**

16 This is an unusual case in that it involves antitrust claims brought by employees against
17 their employers, seeking to recover lost compensation. There appear to be a total of seven such
18 cases ever resolved, including this one. (*See* Exhibit A, attached hereto.) The recovery here is—
19 by a substantial margin—the largest ever achieved. The \$415,000,000 common fund is more than
20 five times the previous record of \$73,075,000. (*Id.*) A comparison of average net class member
21 recoveries further illustrates the successful outcome here. The average Class member will
22 recovery will be \$5,071.53, which is more than three times the previous record of \$1,430.17.
23 (*Id.*) In addition, the restriction at issue here did not involve direct price restraints, or an alleged
24 conspiracy to directly suppress pay by exchanging wage information, such as those previously
25 litigated. The only directly analogous case is *eBay*, which resulted in total settlements of
26 \$3,750,000 and an average net class member recovery of \$169.76. The aggregate recovery here
27 is ***over a hundred times*** the recovery in *eBay*, and the average net class member recovery here is
28 ***nearly thirty times greater***. The historic recovery achieved here supports the requested fee.

1 *Vizcaino*, 290 F.3d at 1049.

2 **b. The Fee Was 100% Contingent**

3 Courts have long recognized that the public interest is served by rewarding attorneys who
4 assume representation on a contingent basis with an enhanced fee to compensate them for the risk
5 that they might be paid nothing at all for their work. *See In re Wash.*, 19 F.3d at 1299
6 (“Contingent fees that may far exceed the market value of the services if rendered on a non-
7 contingent basis are accepted in the legal profession as a legitimate way of assuring competent
8 representation for plaintiffs who could not afford to pay on an hourly basis regardless whether
9 they win or lose.”); *Vizcaino*, 290 F.3d at 1051. Class Counsel prosecuted this case on a purely
10 contingent basis, and agreed to advance all necessary expenses. This assumption of risk justifies
11 a fee paid as a percent of recovery.

12 **c. This Action Required Unusual Effort and Skill**

13 The effort and skill displayed by counsel and the complexity of the issues involved are
14 additional factors used in determining a proper fee. *Vizcaino*, 290 F.3d at 1048; *In re Omnivision*,
15 559 F. Supp. 2d at 1046-47. These factors strongly support the reasonableness of the fee
16 requested here. This case is anything but cookie cutter in the class action field. Not only because
17 of the unusual combination of antitrust claims in an employment context, but also because of the
18 extraordinarily difficult and novel issues involved in showing how a reduction in employee
19 solicitations had an impact across a class of tens of thousands of employees across seven
20 employers, nationwide.

21 Class Counsel assembled a team of four law firms with resources and talent necessary to
22 wage this difficult fight. (*See, e.g.*, Dermody Decl., ¶¶ 3-8; Declaration of Eric C. Cramer, ¶¶ 2-
23 8; Declaration of James J. Sabella, ¶ 2.) Class Counsel contended with numerous complex and
24 precedent-setting issues at every stage, any one of which could have sunk the case entirely. The
25 Court’s Order on Defendants’ Motions to Dismiss was the first time a Court had ever assessed
26 whether agreements not to recruit each other’s employees could potentially violate the Sherman
27 Act. The Court’s two class certification orders—the first denying and the second granting class
28 certification—are a testament to the factual and expert record Class Counsel worked relentlessly

1 to create and that made certification possible. Class Counsel also briefed a host of other complex
2 issues, such as the application of the *per se* or rule of reason standard of review.

3 Class Counsel developed affirmative expert testimony and identified lines of attacking
4 Defendants' experts. Class Counsel worked with Dr. Leamer as he provided six expert reports,
5 and defended Dr. Leamer's four depositions. Dr. Leamer's work in this action received the
6 American Antitrust Institute's 2014 Outstanding Antitrust Litigation Achievement in Economics
7 Award.¹⁰ Class Counsel also deposed defense expert Dr. Kevin Murphy twice, Defendants'
8 primary expert in opposition to class certification, obtaining key admissions. Class Counsel
9 worked with Dr. Hallock as he provided two expert reports, and defended Dr. Hallock in two
10 depositions. Class Counsel also deposed Dr. Hallock's defense counterpart, Dr. Kathryn Shaw
11 (Defendants' other expert in opposition to class certification), eliciting testimony that assisted the
12 Court in concluding that Dr. Shaw's analysis was "unpersuasive," "conclusory and contrary to the
13 overwhelming evidence in the record." (Class Cert. Order at 68.) At the merits stage, the parties
14 marshalled a total of ten experts: four experts for Plaintiffs and six for Defendants. Class Counsel
15 worked with all four Plaintiffs' experts during the drafting of their merits expert reports, defended
16 their depositions, and deposed the six merits experts for Defendants.

17 The roles of the four firms were sometimes co-extensive, as each firm had substantial
18 responsibility for reviewing the voluminous documentary record here. Each firm has described
19 its work in greater detail in separate declarations.

20 LCHB conducted the pre-filing investigation and brought the case at the request of the
21 Class Representatives. Glackin Decl. ¶¶ 7-15. As Lead or Co-Lead Counsel since inception,
22 LCHB has handled or supervised nearly all aspects of the litigation, with the exceptions of
23 document review performed independently by other firms and certain depositions. *Id.*, ¶ 2.

24
25 ¹⁰ See <http://www.antitrustinstitute.org/content/2014-antitrust-enforcement-award-winners> ("Dr.
26 Leamer's work helped demonstrate that, even in a post-*Dukes* environment, economic analysis
27 can help determine if a class action is the appropriate vehicle for employees to seek redress for
28 alleged harms.") The other finalists for the award included the United States Department of
Justice's experts in the e-books trial against Apple Inc., et al., and the United States Department
of Justice's expert in the successful trial against Bazaarvoice, Inc. regarding an alleged
anticompetitive merger. See [http://www.antitrustinstitute.org/content/aai-2014-antitrust-
enforcement-award-finalists-announced](http://www.antitrustinstitute.org/content/aai-2014-antitrust-enforcement-award-finalists-announced).

1 LCHB researched, drafted, served, and filed almost every pleading in this matter, including
 2 virtually all major briefs. *Id.* This includes oppositions to Defendants' motions to dismiss, both
 3 motions for class certification and replies in support, and the consolidated opposition to
 4 Defendants' motions for summary judgment. This work included researching, compiling, and
 5 filing substantial documentary evidence, all of which was handled by LCHB attorneys and
 6 support staff. The Declaration of Brendan Glackin contains a more complete description of the
 7 work performed by LCHB.

8 JSLF came into the case in 2012. LCHB and JSLF divided document review work
 9 approximately equally. LCHB took about half of the fact depositions, and JSLF took most of the
 10 balance. JSLF contributed to assembling facts and testimony relevant to various major briefs and
 11 Plaintiffs' discovery responses. JSLF wrote the first drafts of certain briefs and provided inserts,
 12 comments, and edits to others. LCHB and JSLF jointly conducted settlement negotiations. JSLF
 13 drafted settlement documents and assisted in the settlement and claims process.

14 G&E and B&M both joined the case in 2011. Both firms made contributions to document
 15 review, depositions, and brief-writing. Both firms contributed high-level and important work
 16 including comments and edits to the Rule 12 oppositions and class certification and expert papers;
 17 taking major depositions including expert depositions; and taking primary drafting responsibility
 18 for certain pre-trial submissions such as the *per se* briefs. Linda Nussbaum, then-of G&E, and
 19 Eric Cramer of B&M are both seasoned antitrust litigators who have each served many times as
 20 lead counsel in other cases, and each brought valuable strategic insights to the case. *See*
 21 *generally* Declaration of Brendan Glackin; Declaration of James Sabella; Declaration of Eric
 22 Cramer.

23 **d. A Comparison to Fee Awards in Other Cases Demonstrates the**
 24 **Reasonableness of the Fee Requested**

25 A review of fee awards in other common fund cases underscores the reasonableness of the
 26 fee requested here. Fee awards of 25% or higher are standard.¹¹ (Fitzpatrick Decl., ¶¶ 19-20.)

27 ¹¹ *See Vizcaino*, 290 F.3d at 1052 & n.9 (survey of awards in cases with class settlements between
 28 \$50-200 million); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla.
 2006) (31½% fee for settlement fund of over \$1 billion); *In re Linerboard Antitrust Litig.*, 2004

1 **4. A Lodestar-Multiplier “Cross-Check” Further Confirms the**
 2 **Reasonableness of the Fee**

3 The Court may engage in a lodestar “cross-check” when awarding a fee as a percentage of
 4 a common fund. *Vizcaino*, 290 F.3d at 1050-51. The purpose of a cross-check is not to re-
 5 calculate the fee, but is one of the tools used to ensure a reasonable fee. As “merely a cross-check
 6 on the reasonableness of a percentage figure,” *id.* at 1050 n.5, “[t]he lodestar crosscheck need not
 7 entail either mathematical precision or bean counting.” *Rieckborn v. Velti PLC*, 2015 U.S. Dist.
 8 LEXIS 13542, at *71 (N.D. Cal. Feb. 3, 2015) (citation and internal quotation and editing marks
 9 omitted); *see also Cruz v. Sky Chefs, Inc.*, 2014 U.S. Dist. LEXIS 176393, *19 (N.D. Cal. Dec.
 10 19, 2014) (same). Here, even a partial cross-check confirms the reasonableness of the fee.

11 **a. The Lodestar Reflects Efficient Prosecution of This Action**

12 The cumulative lodestar of LCHB, Berger & Montague (“B&M”), and Grant &
 13 Eisenhofer (“G&E”) to date is \$14,279,278.50 using current billing rates. *See In re Wash.*, 19
 14 F.3d at 1305 (courts apply each biller’s current rates for all hours of work performed, regardless
 15 of when the work was performed, as a means of compensating for the “delay in payment.”);
 16 *Vizcaino*, 290 F.3d at 1051 (affirming lodestar crosscheck using current billing rates). (*See also*
 17 *Dermody Decl.*, ¶ 21 (rates are LCHB’s customary rates billed to clients who have paid these rates
 18 on an hourly basis, and have been approved by numerous courts); *Cramer Decl.*, ¶ 17 (B&M’s
 19 rates have been accepted and approved by numerous courts.) The rates are “in line with those
 20 [rates] prevailing in the community for similar services by lawyers of reasonably comparable
 21 skill, experience, and reputation.” *Blum*, 465 U.S. at 895-96 n.11. The hours reflect the extremely
 22 hard work and the very efficient manner in which Class Counsel prosecuted this case. (*See*
 23 *Dermody Decl.*, ¶¶ 3-8, 16; *Glackin Decl.*; *Cramer Decl.*, ¶ 15.)

24
 25 U.S. Dist. LEXIS 10532, at *1-2 (E.D. Pa. Jun. 2, 2004) (30% fee; \$202 million fund); *In re*
 26 *Relafen Antitrust Litig.*, 2004 U.S. Dist. LEXIS 28801, at *20-21 (D. Mass. Apr. 9, 2004) (33½%
 27 fee; \$175 million fund); *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25067, at *57-58
 28 (D.D.C. July 16, 2001) (34.06% fee; \$359 million fund); *In re Sumitomo Copper Litig.*, 74 F.
 Supp. 2d 393, 400 (S.D.N.Y. 1999) (27.5% fee; \$116 million fund); *Kurzweil v. Philip Morris*
Cos., 1999 U.S. Dist. LEXIS 18378, at *2 (S.D.N.Y. Nov. 30, 1999) (30% fee; \$123 million
 fund); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 303 (3d Cir. 2005) (fee awards in the 25-
 30% range were “fairly standard” in class action settlements between \$100-200 million).

Case	Percentage of Settlement	Multiplier
<i>Beecham Corp.</i> , No. 03-4578, 2005 U.S. Dist. LEXIS 9705, at *60 (E.D. Pa. May 19, 2005)		
<i>In re RJR Nabisco, Inc. Secs. Litig.</i> , 88 Civ. 7905 (MBM), 1992 U.S. Dist. LEXIS 12702 (S.D.N.Y. Aug. 24, 1992)	25% of \$72.5 million	6

See also *New England Carpenters*, 2009 U.S. Dist. LEXIS 68419, at *9 (finding 8.3 multiplier justified where counsel “successfully achieved a mega-amount of \$350,000,000”); *Beckman*, 293 F.R.D. at 482 (noting “the settlement amount is substantial”); *In re Cardinal Health*, 528 F. Supp. 2d at 770 (finding 6 multiplier justified by “excellent recovery, considerable effort and time, and high quality of lawyering”); *In re Rite Aid Corp.*, 362 F. Supp. 2d at 590 (“Suffice it to say that, through the exercise of their considerable skill, plaintiffs’ counsel obtained a historic recovery for the class in a rare and complex kind of case where victory at trial would have been, at best, remote and uncertain.”).

c. **Class Counsel’s Costs are Reasonable and Should be Reimbursed**

“Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit[.]” *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1995) (citing *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970)). In prosecuting this case over four years, Class Counsel have incurred total out-of-pocket expenses of \$4,884,655.29. The remaining unreimbursed expenses total \$1,184,810.98.¹³ These should be awarded.

B. **The Requested Service Awards are Reasonable and Appropriate**

The purpose of service awards is to “compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation, and to reward the public service of contributing to the enforcement of mandatory laws.” *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 333 n.65 (3d Cir. 2011) (en banc) (affirming antitrust class action settlement with common fund of \$295 million, providing for service awards of \$85,000 to each of two class

¹³ LCHB understands that the Joseph Saveri Law Firm, Inc., will provide invoices regarding its incurred costs.

1 representatives) (citation and quotation omitted), *cert. denied*, 132 S. Ct. 1876 (2012). *See also*
 2 *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003) (“[N]amed plaintiffs . . . are eligible for
 3 reasonable incentive payments”).

4 The requested service awards of up to \$160,000 for each Class Representative are
 5 reasonable and appropriate here.¹⁴ First, the Class Representatives have expended substantial
 6 time and effort in assisting Class Counsel with the prosecution of the Class’s claims. They have
 7 responded to extensive document requests on their lifetime employment history well beyond their
 8 experience with Defendants here and without regard to time period (and across all variety of
 9 physical and electronic locations); produced over 31,000 pages of documents; responded to
 10 interrogatories; given full-day depositions where Defendants probed every detail of their
 11 employment histories; attended hearings and mediations; and have otherwise devoted hundreds of
 12 hours consulting with Class Counsel regarding fact development and strategy. (Fichtner Decl. ¶¶
 13 7-8; Hariharan Decl. ¶¶ 7-8; Stover Decl. ¶¶ 7-8; Harvey Decl. ¶¶ 8-9.)

14 Second, the Class Representatives—all of whom worked in technical positions for
 15 Defendants—incurred the substantial risks of taking on leadership roles in this visible litigation
 16 against seven of the most prominent technology firms in the world. This case is unusual in that in
 17 terms of the Class Representatives, it takes the effect of an ordinary employment case and
 18 multiplies it. When a class representative is a “present or past employee” of a defendant, his or
 19 her “present position or employment credentials or recommendation may be at risk by reason of
 20 having prosecuted the suit, who therefore lends his or her name and efforts to the prosecution of
 21 litigation at some personal peril.” *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 201 (S.D.N.Y.
 22 1997).¹⁵ *See also id.* at 188 (authorizing service awards ranging up to \$85,000 in nationwide

23 _____
 24 ¹⁴ Class Counsel initially requested service awards of up to \$80,000 for each Class
 25 Representative. However, as the Court indicated it would consider the higher amount requested
 26 by Plaintiff Michael Devine for himself, in the event it makes such an award Class Counsel
 respectfully request that the other Class Representatives not be treated less favorably for their
 similar time, risk, attention, and independent judgment about supporting settlements in this
 action.

27 ¹⁵ *See also* Nantiya Ruan, *Bringing Sense to Incentives: An Examination of Incentive Payments to*
 28 *Named Plaintiffs in Employment Discrimination Class Actions*, 10 *Employment Rights and*
Employment Policy Journal 395, 396-397 (2006) (In addition to assuming responsibilities related
 to the investigation and discovery of their case, “[e]mployees, former and current, take huge risks
 when they agree to be named plaintiffs in a class action bringing legal claims of unlawful bad acts

1 employment discrimination class action from a common fund of \$115 million); *Velez v. Novartis*
2 *Pharms. Corp.*, No. 04 Civ. 09194 (CM), 2010 U.S. Dist. LEXIS 125945, at *73 (S.D.N.Y. Nov.
3 30, 2010) (granting service payments of \$125,000 to each of 26 named plaintiffs); *Ingram v. The*
4 *Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (awarding \$300,000 service payments to
5 each of four representative plaintiffs); *Beck, et al. v. Boeing Co.*, Case No. 00-CV-0301-MJP,
6 Dkt. 1067 at 4 (W.D. Wash Oct. 8, 2004) (awarding \$100,000 service payments to each of the
7 named plaintiffs). These concerns are particularly strong in this high-profile action, where the
8 Class Representatives' roles are unusually visible and easily verified by current and potential
9 employers with nothing more than a web search.

10 The Class Representatives faced additional risks because this is a multi-defendant antitrust
11 case against six (considering that Disney owns both Pixar and Lucasfilm) of the most dominant
12 technology and entertainment firms there are. In addition, Defendants served subpoenas on 27
13 other high-technology companies, each of which employed a Class Representative, seeking broad
14 categories of information regarding each Class Representative's job history, performance, and
15 personnel files. Plaintiffs' request is consistent with service payments granted in other antitrust
16 cases. *See, e.g., Marchbanks Truck Serv. v. Comdata Network, Inc.*, Case No. 07-CV-1078, Dkt.
17 713 at 8 (E.D. Pa. July 14, 2014) (approving class action settlement, including service payment of
18 \$150,000 to lead class representative); *see also In re Titanium Dioxide Antitrust Litig.*, No. 10-
19 CV-00318 (RDB), 2013 U.S. Dist. LEXIS 176099, at *8 (D. Md. Dec. 13, 2013) (granting
20 service award to lead class representative of \$125,000); *Sullivan v. DB Invs., Inc.*, Case No. 04-
21 2819 (SRC), 2008 U.S. Dist. LEXIS 81146, at *108 (D.N.J. May 22, 2008) (approving service
22 payments to class representatives, including \$85,000 to two lead representatives of direct
23 purchaser class), *affirmed en banc, Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 333 n.65 (3d Cir.
24 2011), *cert. denied*, 132 S. Ct. 1876 (2012); *Ivax Corp. v. Aztec Peroxides, LLC, et al.*, Case No.
25 02-CV-00593 (D.D.C. Aug. 24, 2005) (awarding service payments to each class representative of
26 \$100,000 each).

27
28 by employers. Retaliation, isolation, ostracism by co-workers, 'black listing' by future
employers, emotional trauma, and fear of having to pay defendants' legal fees are among the most
obvious.”).

1 Third, the class representatives should be rewarded for their “public service of
2 contributing to the enforcement of mandatory laws.” *Sullivan*, 667 F.3d at 333 n.65 (citation and
3 quotation omitted). Here, the DOJ did not obtain any fines from Defendants, or compensation for
4 any of Defendants’ employees. Without the Class Representatives’ willingness to take the risks
5 of filing class action lawsuits, no recovery would have been possible. As this Court explained,
6 the “Supreme Court has long recognized that class actions serve a valuable role in the
7 enforcement of antitrust laws.” *In re High-Tech Emp. Antitrust Litig.*, 289 F.R.D. 555, 563 (N.D.
8 Cal. 2013) (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979)); *Hawaii v. Standard Oil*
9 *Co.*, 405 U.S. 251, 262 (1972)). Solely because the Class Representatives came forward here at
10 substantial personal risk, the Defendants will pay a total of \$415,000,000 (on top of the \$20
11 million already secured) into a common fund for the benefit of the Class.

12 Finally, the requested service awards are appropriate when compared to the substantial
13 recovery achieved. Courts assessing the reasonableness of requests for service awards may
14 compare the request against the size of the settlement fund. *See, e.g., Novartis Pharms.*, 2010
15 U.S. Dist. LEXIS 125945, at *22-23 (“Plaintiffs seek, therefore, a total of \$3,775,000.00 in
16 service award payments, which represents only approximately 2.4 percent of the entire monetary
17 award of \$152.5 million (or approximately 2.1 percent of the entire value of the settlement of
18 \$175 million).”). Plaintiffs’ requested service awards here collectively represent less than 0.2%
19 of the \$415,000,000 common fund.

20 **IV. CONCLUSION**

21 For the reasons set forth above, Plaintiffs respectfully request that the Court grant the
22 motion in its entirety.
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Respectfully submitted,

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EXHIBIT A

SETTLEMENTS OF EMPLOYEE CLASS ACTIONS ASSERTING ANTITRUST CLAIMS

Case	Total Settlements	Net Class Recovery	Number of Class Members	Average Net Class Member Recovery
<i>In re: High-Tech Employee Antitrust Litig.</i> , 5:11-cv-02509-LHK (N.D. Cal.)	\$415,000,000 ¹	\$326,941,500	64,466	\$5,071.53
<i>Verdin, et al. v. R&B Falcon Drilling, USA, Inc., et al.</i> , 3:00-cv-00488-SL (S.D. Tex. Apr. 24, 2002)	\$73,075,000	\$53,549,819.00	100,000	\$535.49
<i>Cason-Merendo, et al. v. VHS of Michigan, Inc. et al.</i> , 2:06-cv-15601-GER-DAS (D. Mich. Oct. 24, 2013)	\$48,059,400	\$32,338,808.87	23,000	\$1,406.04
<i>Johnson, et al. v. Arizona Hosp. and Healthcare Ass'n, et al.</i> , 07-cv-01292-SRB (D. Ariz. Mar. 4, 2011)	\$22,400,000	\$15,848,430.38	25,000	\$633.94
<i>Masters v. Wilhelmina Model Agency, Inc.</i> 1:02-cv-04911-HB (S.D.N.Y. Sept. 16, 2009)	\$ 21,855,000	\$16,305,252.19	16,512	\$987.48
<i>Unger v. Albany Medical Center, et al.</i> , 1:06-cv-00765-TJM-DRH (N.D.N.Y. Nov. 21, 2011)	\$14,005,469	\$9,858,172.48	6,893	\$1,430.17
<i>State of California v. eBay, Inc.</i> , 5:12-cv-05874-EJD (N.D. Cal. May 1, 2014)	\$3,750,000	\$2,375,000.00	13,990	\$169.76

¹ This excludes the \$20,000,000 previously achieved through settlements with Intuit, Inc., Lucasfilm Ltd., and Pixar.
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