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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CANAN SCHUMANN, individually and on behalf of all similarly situated, **Plaintiff,** v. **AMAZON.COM SERVICES LLC; AMAZON.COM, INC.,** a foreign corporation, **Defendants**.	**No. 20-cv-01751-JR** **PLAINTIFF'S *UNOPPOSED* MOTION FOR AWARD OF ATTORNEY FEES, EXPENSES, AND COSTS, ADMINISTRATION EXPENSES, AND SERVICE AWARD TO PLAINTIFF** **Fed.R.Civ.P. 54(d)(2) & 23(h)**

Pursuant to Local Rule 7-1, Plaintiff's counsel certifies that they have conferred in good faith with Defendants' counsel before submitting this motion. Defendants do not oppose this motion. Plaintiff requests that the Court consider this Motion at the hearing already set in this case for September 13, 2023 at 10 am.

Pursuant to Local Rule 54-1(c), Plaintiff's counsel certifies that the word count, excluding caption, signature block, exhibits and certifications, does not exceed 3,000 words.

MOTION

Plaintiff moves the Court to award:

1. One-third ($5,333,333.33) of the Maximum Settlement Amount of $16,000,000.00 as attorney fees and nontaxable expenses;
2. $4,423.00 for costs;
3. up to $150,000 in settlement administration expenses; and
4. Service Award to plaintiff of $20,000.00.

This Motion is supported by the declaration of David Schuck and the case record, including counsel's declarations supporting the Settlement. ECF 39-41. The amounts requested are in line with the amounts awarded in *Swearingen v. Amazon.com*, No. 19-CV-1156-JR (ECF 126).[1] By awarding these amounts, Class Members' recoveries will not be reduced.

1. Attorney Fees

Requests for attorney fees must be made by a motion pursuant to Federal Rules of Civil Procedure 54(d)(2) and 23(h), and notice of the motion must be available to class members. The Court sets a deadline for class members to object after the motion for the fees and supporting documents have been filed. *Mercury*, 618 F.3d 988, 993 (9th Cir.2010). "Allowing class members an opportunity thoroughly to examine counsel's fee motion, inquire into the bases for various charges and ensure that they are adequately documented and supported is essential for the protection of the rights of class members." *Id.* at 994. The Notice advised Class Members of the attorney fees and costs sought. This motion with supporting declaration will be available on the settlement website. Class Members have been directed to the settlement website repeatedly to gain information, submit claim forms and change of addresses.

Where there is a common fund, "courts have discretion to employ either the lodestar

[1] *Swearingen* asserted similar claims as here for an earlier class period. This case continued the class period.

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method or the percentage-of-recovery method." *Bluetooth*, 654 F.3d at 942. The court must exercise its discretion to achieve a "reasonable" result. *Id*. Because reasonableness is the goal, "mechanical or formulaic application of either method, where it yields an unreasonable result, can be an abuse of discretion." *Fischel v. Equitable Life Assurance,* 307 F.3d 997, 1006 (9th Cir.2002).

In a common-fund settlement, "the benefit to the class is easily quantified." *Bluetooth*, 654 F.3d at 942. The Ninth Circuit allows "courts to award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar." *Id*. Courts typically calculate one-quarter of the fund as the "benchmark", but providing adequate explanation of any "special circumstances" justifying a departure to award fees. *Six Mexican Workers v. Ariz. Citrus Growers,* 904 F.2d 1301, 1311 (9th Cir.1990); *accord Paul, Johnson, Alston & Hunt v. Graulty,* 886 F.2d 268, 272 (9th Cir.1989). The percentages vary depending on the facts of the case, and in "most common fund cases, the award exceeds that benchmark." *Knight v. Red Door,* 2009 WL 248367 (N.D.Cal.2009); *see also Activision,* 723 F.Supp. 1373, 1377-78 (N.D.Cal.1989) ("nearly all common fund awards range around 30%").

"When considering the risks posed in litigation, the risk of loss in a particular case is a product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits. In cases where recovery is uncertain, an award of one third of the common fund as attorneys' fees has been found to be appropriate." *Demmings v. KKW Trucking*, 2018 WL 4495461*15 (D.Or. 9/19/2018).

"Several courts in the Ninth Circuit have held in wage and hour class actions that a 30% or higher award is appropriate." *Bell v. Consumer Cellular*, 2017 WL 2672073*12 (D.Or. 6/21/2017). *See*, *Rabin v. PricewaterhouseCoopers*, 2021 WL 837626*3 (N.D.Cal.2/4/2021)

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(awarding 35% of $11.65M); *Morris v. Lifescan, Inc.*, 54 F.App'x 663, 664 (9th Cir.2003) (affirming 33% of $14.8M); *Pac. Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir.1995) (affirming one-third of $12M); *Slayman v. FedEx*, No. 3:14-cv-01663-HZ (D.Or. 10/21/2016) (awarding 30% of $15.5M); *Davidoff v. R.L.K.*, Multnomah County No. 19CV45422 (10/5/2021) (one-third attorney fee in $4.5M class settlement); *Bell, supra*, citing *Deaver v. Compass Bank*, 2015 WL 8526982*9 (N.D.Cal.12/11/2015); *Lusby v. GameStop*, 2015 WL 1501095*4 (N.D.Cal.3/31/2015); *Burden v. SeleciQuote*, 2013 WL 3988771*5 (N.D.Cal 8/2/2013); *Barbosa v. Cargill Meat Sols.*, 297 FRD 431, 450 (E.D.Cal.2013); *Franco v. Ruiz Food Prod.*, 2012 WL 5941801*18 (E.D.Cal.11/27/2012); *Garcia v. Gordon Trucking*, 2012 WL 5364575 (E.D.Cal.10/31/2012); *Romero v. Producers Dairy Food*, 2007 WL 3492841*4 (E.D.Cal.11/14/2007).

That includes courts in this District. *See, e.g.*, *Perkins v. Singh*, 2021 WL 5085119*1 (D.Or. 11/2/2021) (approving 33% of fund); *Demmings,* 2018 WL 4495461*15 ("where recovery is uncertain, an award of one third of the common fund as attorneys' fees has been found to be appropriate.")

Courts must place in the record the relevant special circumstances supporting a departure from the benchmark. *Bluetooth*, 654 F.3d at 942. Factors that a court may consider in making such a departure include: (1) the result obtained; (2) the effort expended by counsel; (3) counsel's experience; (4) counsel's skill; (5) the complexity of the issues; (6) the risks of nonpayment assumed by counsel; (7) the reaction of the class; (8) non-monetary or incidental benefits, including clarification of laws; and (9) comparison with counsel's lodestar. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir.2002); *Heritage Bond Litig.*, 2005 WL 1594403*18 (C.D.Cal.6/10/2005).

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Plaintiff's counsel seeks one-third of the Maximum Settlement Amount. Factors to be considered in justifying this upward departure are discussed as follows.

A. Result Obtained

The parties agreed to a Maximum Settlement Amount of $16,000,000. This is believed to be the one of the highest wage-and-hour settlement in Oregon history, which is an excellent result. This settlement provides immediate recovery to class members without delaying and potential appeal. This factor supports the requested award.

B. Experience and Skill

Plaintiff's counsel are skilled and experienced in wage-and-hour class and collective actions, a combination of over 57 years experience in wage and hour class actions: David Schuck for over 21 years, Stephanie Brown for 20 years and Karen Moore for 19 years. ECF 39-41. They have represented over 110,000 individuals in wage and hour class and/or collective actions. Schuck Decl.¶5 (ECF-39).

This factor supports the requested award.

C. 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 that remained because the *Swearingen* case settled on appeal. Examples of the multiple novel statutory and regulatory interpretations include the extent of a state's implicit adoption of federal standards, and the retroactive application of state-court decisions (which the Ninth Circuit's acceptance of discretionary appeal in *Swearingen* shows was an issue upon which reasonable legal minds can differ). Had this case litigated, the analysis would have included over 7 million lines of payroll

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data for over 20,000 Oregon employees.[2]

This factor supports the requested award. *See*, *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. Risk of Nonpayment Assumed by Counsel

Class Counsel represents all of their clients, including plaintiff, on a contingency basis, advancing all costs and assuming all risks of nonpayment. The novelty and complexity of the legal issues involved in the case increased the risk of loss beyond that associated with many wage-and-hour cases. See, e.g., *VanValkenburg v. Oregon Dep't of Corr.*, 2017 WL 2495496*7 (D.Or. 6/9/2017) (complexity of legal issues increased risk of loss beyond that associated with many similar cases). This case resolved after vigorous litigation on the issues presented by nationally recognized defense counsel, who represented a deep-pocketed defendant. This factor supports the requested award.

E. Class Reaction

There were 22,035 individuals designated by Defendant as class members.[3] As of July 31, 2023, the Settlement Administrator received over 5,250 claim forms for those in Group B.[4] There have been no objections and only 14 requests for exclusion.

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[2] *Swearingen* had 7 million lines of data for over 15,000 Oregon employees. ECF-117 p.5

[3] Schuck Decl.¶4 (figures will be updated for Final Approval)

[4] 8,503 total claims submitted; some claimants do not qualify for Group B.

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Notices reached the class members. The Notice was mailed to all class members. There were 2,604 returned Notices by mail, of which 1,948 were resent to an updated address. 178 of those resent Notices were again returned. There was a deliverable rate of 99.19%. Of the 21,946 email notices sent, there were 747 that were returned. There was an email delivery rate of 96.6%. Of the 21,946 text notices, 1,581 were returned. There was a text message delivery rate of 92.8%. With delivery rates over 90%, this evidences a high confidence that Class Members received the Notice.

This is an exceptional result for a combination opt-out/in[5] wage-and-hour settlement. *Chambery v. Tuxedo Junction Inc.*, 2014 WL 3725157*6 (W.D.N.Y. 7/25/2014) (37% claims rate "is an unusually high participation rate for a 'claims made' settlement."). *See Brandenburg v. Cousin Vinny's Pizza*, 2019 WL 6310376*3 (S.D. Ohio 11/25/2019) ("the opt-in/claims rate … is above average at over one third of the class joining the case or filing claims."); *Bautista v. Harvest Mgmt. Sub LLC*, 2014 WL 12579822*9 (C.D.Cal. 7/14/2014) (comparing claim rate of 25% and 11% with other wage-and-hour class settlements of 25.3%, 15.05%, 7.8%, and 8.9%).

Commentators have noted the usual low rates of claims in similar cases. 2 MCLAUGHLIN ON CLASS ACTIONS § 6:24 (16th ed. Supp. 10/2019) ("Claims-made settlements typically have a participation rate in the 10-15 percent range."); Getman & Getman, *Winning the FLSA Battle: How Corporations Use Arbitration Clauses to Avoid Judges, Juries, Plaintiffs, and Laws*, 86 ST. JOHN'S L. REV. 447, 451 (2012) (opt-in rate "seldom tops thirty percent"); Charlotte S. Alexander, *Would an Opt In Requirement Fix the Class Action Settlement? Evidence from the Fair Labor Standards Act*, 80 MISS. L.J. 443, 466 (2010) (reporting average opt-in rate in FLSA cases of 15%); Andrew C. Brunsden, *Hybrid Class Actions, Dual Certification, and Wage Law*

[5] All class members qualify for Group A with no claim form requirement.

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Enforcement in the Federal Courts, 29 Berkley J. Emp. & Lab. L. 269, 292–94 (2008) (nationwide opt-in average of 15.71%); Lampe & Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, 20 LAB.LAW. 311, 314 (2005) ("Commentators generally find that…the opt-in rate—*i.e.*, the percentage of persons falling within the definition of the putative class who file consents to join the action—is typically between 15 and 30 percent….")

August 8, 2023 is the deadline for class members to object to the settlement or the proposed requests for attorney fees, administration expenses, or service payment. To date, no class members have objected to the settlement. Schuck Decl.¶4.c.

Counsel will update the Court with the final counts of those submitting claim forms, requesting exclusion and objection in requesting final approval. This factor supports the requested award.

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

The Court made the first published interpretation of Oregon law regarding time clock rounding in *Swearingen*, which directly impacts this case. The *Swearingen* decision was on appeal when settled. This case, absent settlement, would have continued that litigation regarding time clock rounding. While this case has not directly clarified Oregon law, it will cause employers to rethink any time clock rounding practices and that Oregon law requires payment of "all wages." ORS 652.140.

G. Effort Expended By Class Counsel and Lodestar Comparison

Courts are encouraged, but not required, to consider the lodestar cross-check when evaluating fee applications. *Brinkmann v. ABM Onsite Servs-West, Inc.*, Nos. 3:17-CV-275-SI,

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3:17-CV-478-SI (9/2/2021). The fee motions "must allow 'class members an opportunity thoroughly to examine counsel's fee motion, inquire into the bases for various charges and ensure that they are adequately documented and supported.'" *Id. quoting Mercury*, 618 F.3d at 994. Class Counsel have over 60 years representing employees in wage and hour class and collective actions. ECF 39-41. Attorney Schuck (24 years) bills at $550. Attorneys Brown (20 years) and Moore (19 years) bill at $450. Schuck Decl.¶11. Based on the Oregon State Bar Economic Surveys and the Morones Survey on attorney fees, Class Counsel's hourly rates are reasonable. Schuck Decl.¶¶10-16.

1. Standard for lodestar cross-check

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,* 2018 WL 4495461*16: "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.* 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,

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"[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 (courts typically approve percentage awards based on lodestar cross-checks of 1.9 to 5.1 or even higher); *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.") "Fees 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).

The Ninth Circuit emphasized that despite often using the lodestar as a cross-check, there are weaknesses inherent in the lodestar analysis, and it need not limit the award of a reasonable attorney fee. "We do not mean to imply that class counsel should necessarily receive a lesser fee for settling a case quickly; … 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". *Vizcaino*, 290 F.3d at 1050 n.5

2. Lodestar cross-check

The loadstar cross-check in this case is low. Schuck Decl.Ex.1. However, while this case was stayed pending *Swearingen*, Counsel worked with Swearingen's counsel to preserve arguments for this case. Schuck Decl.¶5. Counsel's work supported the arguments on Appeal. Counsel also understood the significant risk taken in this case with the novel claims because they

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were also working on *Buero v. Amazon*, No. 3:19-CV-00974-MO. This settlement benefits class members and was achieved by assisting Swearingen's counsel.

The weakness of the Loadstar method for large wage and hour class actions, and the ability to settle them, fits the *Vizcaino, supra* paradigm. Reaching an early settlement that puts money into class members' pockets at a reasonable rate compared to litigation is a very good result. The fees should be awarded.

II. Costs

The Settlement Agreement provides for payment of Class Counsel's costs of $4,423.00. The Notice advised of these actual out-of-pocket costs paid in this case. Schuck Decl.¶8; Ex.2. Class Members' recoveries will not be reduced. These costs should be awarded.

III. Administration Expenses

The Settlement Agreement provides for up to $150,000 in settlement administration expenses. It is anticipated that settlement administration costs will not exceed this allocation. Any unspent portions will be distributed with the *cy pres* funds. No Class Member objected to the settlement. The Court should approve the administration expenses.

IV. Service Award

"Incentive awards are payments to class representatives for their service to the class in bringing the lawsuit." *Demmings*, 2018 WL 4495461*12. They are often taken from a common settlement fund. *Id.* Although incentive awards are "fairly typical in class action cases," they should be scrutinized carefully to ensure "that they do not undermine the adequacy of the class representatives." *Id*. Incentives can undermine the adequacy of class representation if they are grossly disproportionate, incentivize class representatives to settle without considering what may otherwise benefit the class, or are conditioned upon approving the settlement. *Id*. Incentive

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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*, 306 F.R.D. 245, 267 (N.D.Cal.2015).

Plaintiff pursued this case for the benefit of the class, postponing his recovery, searching for documents, time and effort meeting with counsel, reviewing case documents. Nothing indicates that the award undermines plaintiff's representation. The Service Award requested is similar to those granted to class representatives. No Class Member objected. The Court should approve the Service Award.

DATED: August 1, 2023.

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