HONORABLE CATHERINE SHAFFER
Department 11
Noted on Motion Calendar: March 6, 2015 at 10:00 a.m.
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

JOHANNES ROMATKA, ZACHARIAH SHUGART, and THOMAS BUSCH, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

BRINKER INTERNATIONAL PAYROLL COMPANY, L.P., a Delaware Limited Partnership; MAGGIANO'S HOLDING CORPORATION, a Delaware Corporation dba "MAGGIANO'S LITTLE ITALY,"

Defendants.

NO. 13-2-14937-1 SEA

PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Plaintiffs Johannes Romatka, Zachariah Shugart, and Thomas Busch respectfully submit this motion for final approval of the class action settlement reached with Defendants Brinker International Payroll Company, L.P. and Maggiano's Holding Corporation. In this Court's Order Granting Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, the Court preliminarily approved the settlement as "fair, reasonable and adequate." The settlement is an excellent result for the class and sub-classes of hourly Maggiano's restaurant workers in this case. It provides substantial relief for the workers who otherwise would have faced several obstacles to achieving success in continued litigation. For the reasons set forth in this motion and in the papers previously submitted in support of preliminary approval, Plaintiffs respectfully request that the Court grant final approval of the settlement by: (1) approving the settlement agreement as fair, adequate, and reasonable for the certified settlement class; (2) approving the award of attorneys' fees and costs; (3) approving the award of settlement administration expenses; (4) approving the class representative incentive awards; and (5) determining that adequate notice was provided to the settlement class.

II. AUTHORITY AND ARGUMENT

When considering a motion for final approval of a class action settlement under Civil Rule 23, the court's inquiry is to determine whether the settlement is "fair, adequate, and reasonable." *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 188, 35 P.3d 351 (2001) (quoting *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993)). In evaluating whether a class settlement is "fair, adequate, and reasonable," courts generally reference the following criteria, with differing degrees of emphasis: the likelihood of success by plaintiff; the amount of discovery or evidence; the settlement terms and conditions; recommendation and experience of counsel; future expense and likely duration of litigation; recommendation of neutral parties, if any; number of objectors and nature of objections; and the presence of good faith and the absence of collusion. *Pickett*, 145 Wn.2d at 192 (citing 2

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Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 11.43 "General Criteria for Settlement Approval" (3d ed. 1992)). This list is "not exhaustive, nor will each factor be relevant in every case. . . . 'The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case.'" *Id.* at 189 (quoting *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982)).[1]

The approval of a settlement agreement "is a delicate, albeit largely unintrusive inquiry by the trial court." *Pickett*, 145 Wn.2d at 189. Although the Court possesses some discretion in determining whether a class action settlement should be approved,

> [T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

Id. (quoting *Officers for Justice*, 688 F.2d at 625). Moreover, as the Washington Supreme Court observed in *Pickett*, "it must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution." *Id.* at 190 (quoting *Officers for Justice*, 688 F.2d at 625). In the end, "[s]ettlement is the offspring of compromise; the question [courts] address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).

A. The Settlement Is Fair, Adequate, and Reasonable

As this Court preliminarily concluded, the settlement between the parties is fair, adequate, and reasonable. The settlement provides for payment of $900,000 for alleged violations of the Washington automatic service charge disclosure law (RCW 49.46.160), rest

[1] Civil Rule 23 is essentially identical to its federal counterpart, Federal Rule of Civil Procedure 23. Thus, federal cases interpreting the analogous federal provision are "highly persuasive." *Pickett*, 145 Wn.2d at 188.

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break law (WAC 296-126-092), and other Washington wage and hour laws.[2] This appears to be the largest settlement on record in a case involving RCW 49.46.160. The relevant criteria for settlement approval favor final approval of this settlement, as described below.

1. Plaintiffs' Likelihood of Success Supports Final Approval

The existence of risk and uncertainty to Plaintiffs "weighs heavily in favor of a finding that the settlement was fair, adequate, and reasonable." *See Pickett*, 145 Wn.2d at 192. In the absence of a settlement, the class would face significant hurdles to relief, including challenges to class certification and motions to compel arbitration for individual class members. Defendants have maintained that employees of the Bellevue Maggiano's restaurant were subject to mandatory arbitration agreements that, Defendants argued, precluded participation in a class action. If Defendants obtained an order requiring class members who had signed arbitration agreements to arbitrate their claims on an individual basis, it could have eliminated the damages claims of hundreds of class members in this case.

Likewise, Defendants have maintained that class members received adequate rest breaks and that kitchen staff employees did not perform off-the-clock work. If Defendants were able to convince a jury that Plaintiffs' allegations were overstated or unfounded, Defendants could effectively reduce the recoverable damages or eliminate them altogether.

Defendants also vigorously disputed Plaintiffs' damages theory, particularly for the Automatic Fee Sub-Class. Because it is an issue of first impression, the question of damages available for violations of the service charge disclosure requirement in RCW 49.46.160 does not have a clear answer. This Court or an appellate court could have rejected Plaintiffs' proposed approach, reducing the potential damages for the Automatic Fee Sub-Class.

[2] The terms of the settlement are described in Plaintiffs' Motion for Preliminary Approval, and the settlement agreement itself is included as Exhibit 1 to the Declaration of Marc C. Cote in support of Plaintiffs' Motion for Preliminary Approval ("Cote Preliminary Approval Decl.").

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Finally, there is a substantial risk of losing inherent in any jury trial. And even if Plaintiffs did prevail, any recovery could be delayed for years by an appeal. This settlement provides substantial monetary relief to class members without further delay.

Indeed, the settlement provides an excellent and immediate recovery for class members who submit valid claims. Based on the claims rate thus far, Plaintiffs anticipate receiving approximately 250 valid claims.[3] Declaration of Marc C. Cote in Support of Final Approval ("Cote Final Approval Decl."), ¶ 3. These individuals will share in $649,913.83, distributed proportionally based on their hours worked in each class and sub-class. *See* Cote Preliminary Approval Decl., Ex. 1 at Ex. A (Settlement Agreement Notice) at 3. Assuming 250 eligible class member claims, the average payment will be $2,599.66. Cote Final Approval Decl., ¶ 4. This amount is *higher* than the estimated amount of an average award (not including interest or potential exemplary damages under RCW 49.52.070) had Plaintiffs and the eligible class members successfully proved Defendants' liability for disgorgement of all services charges paid for violations of RCW 49.46.160, Defendants' liability for failure to provide any rest breaks during the class period, and Defendants' liability for failure to pay for any of the alleged off-the-clock kitchen staff meeting time. *Id.* Based on Plaintiffs' calculations of the potential damages available if Plaintiffs proved liability on a classwide basis, the average class member could have received approximately $1,912.80 (not including interest or exemplary damages under RCW 49.52.070). *Id.* Thus, the settlement may provide *a better outcome* than the eligible class members could obtain even if they were successful in proving their claims at trial.

The settlement agreement provides substantial relief to eligible settlement class members without further delay and uncertainty.

2. The Settlement Terms and Conditions Support Final Approval

As described in more detail in Plaintiffs' preliminary approval motion, the settlement terms and conditions provide for comprehensive relief. Defendants have agreed to pay

[3] Plaintiffs will file a supplemental submission addressing the final claim and exclusion numbers, any objections, and average payment amounts by February 17, 2015.

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$900,000 for the benefit of the Settlement Class, which will include $649,913.83 in payments to eligible class members. Each eligible class and sub-class member will receive a settlement award based on the number of hours worked in each class and sub-class in proportion to the total hours worked by all employees in each class and sub-class. Cote Preliminary Approval Decl., Ex. 1 at ¶ 4.d.-f.

The average eligible class member recovery here is more favorable than in many settlements approved by this court and other courts. *See, e.g., Perna v. Oki Developments, Inc.*, King County Case No., 11-2-28347-0 SEA (granting final approval of settlement of automatic service charge claims in which class payment for approximately 400 class members was $35,000); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (approving settlement amounting to 30 percent of the damages estimated by the class expert; court noted that even if the plaintiffs were entitled to treble damages the settlement would be approximately 10 percent of the estimated damages); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (approving a settlement estimated to be worth between 1/6 and 1/2 the plaintiffs' estimated loss); *In re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) (approving settlement amounting to nine percent of estimated total damages). Based on the claims rate so far, Plaintiffs estimate that each class member who submits a valid claim will receive over 100 percent of their potential damages for alleged violations of RCW 49.46.160, rest break violations, and kitchen staff off-the-clock work violations, not including potential exemplary damages under RCW 49.52.070 or interest.

The manner in which settlement funds will be allocated is simple and efficient. Eligible class members who submit a valid and timely claim form will receive a check for their proportionate shares of the class and sub-class funds to which they are entitled. Cote Preliminary Approval Decl., Ex. 1 at ¶ 4.d.-f. The settlement fund is non-reversionary, and any funds for checks that remain uncashed after 120 days will be donated as *cy pres* monies to the Legal Foundation of Washington. *Id.* ¶ 8.n.

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In sum, the relief that the settlement agreement provides is significant and fair.

3. The Positive Recommendation and Extensive Experience of Counsel Support Final Approval

"When experienced and skilled class counsel support a settlement, their views are given great weight." *Pickett*, 145 Wn.2d at 200 (citing *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983)). Class counsel in this case, who are experienced and skilled in class action litigation, support the settlement as fair, reasonable, adequate, and in the best interests of the class and sub-classes. Cote Final Approval Decl. ¶¶ 2, 5, and 12-14. Indeed, given Class counsel's knowledge and experience in litigating class actions and Class counsel's thorough evaluation of the strengths and weaknesses of this case, counsel believe this settlement is an excellent result.

4. Future Expense and Likely Duration of Litigation Support Final Approval

Another factor for the Court to consider in assessing the fairness of a settlement is the expense and likely duration of the litigation had a settlement not been reached. *Pickett*, 145 Wn.2d at 188; *Officers for Justice*, 688 F.2d at 625. This settlement guarantees a substantial recovery for the class and sub-classes while obviating the need for lengthy, uncertain, and expensive class certification briefing, pretrial practice, trial, and appeals. Even if the class and sub-classes prevailed against Defendants at trial, Defendants would likely appeal any adverse rulings, thereby delaying relief to the class for an indefinite amount of time and running up expenses in the form of attorneys' fees and litigation costs.

5. The Reaction of the Class Supports Final Approval

A court may appropriately infer that a class action settlement is fair, adequate, and reasonable when few class members object to it. *See Pickett*, 145 Wn.2d at 200-01 (citing cases). Here, the deadline to opt out or object to the Settlement is February 3, 2015. To date, the response to the settlement has been resoundingly positive. As of January 19, 2015, no Settlement Class Member has objected to the settlement, and only one Settlement Class

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Member—who is currently a Maggiano's manager—has opted out of the settlement. Declaration of Jennifer Boschen ("Boschen Decl."), ¶ 2.[4] Plaintiffs will update this information for the Court and respond to any objections by February 17, 2015.

6. The Presence of Good Faith and the Absence of Collusion Support Final Approval

In determining the fairness of a settlement, the Court should consider the presence of good faith and absence of collusion on the part of the parties. *Pickett*, 145 Wn.2d at 201. Here, there have been no allegations of collusion or bad faith. Furthermore, the United States Supreme Court has held, "[o]ne may take a settlement amount as good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining . . . ." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999). "A presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced capable counsel after meaningful discovery." *Hughes v. Microsoft Corp.*, No. C98-1646C, 2001 WL 34089697, at *7 (W.D. Wash. Mar. 26, 2001); *In re Phenylpropanolamine (PPA) Products Liability Litig.*, 227 F.R.D. 553, 567 (W.D. Wash. 2004) (approving settlement entered into in good faith, following arm's-length and non-collusive negotiations).

The settlement here is the result of extensive, arm's-length negotiations between experienced attorneys who are highly familiar with class action litigation in general and with the legal and factual issues of this case in particular. Counsel for both parties are particularly experienced in the litigation, certification, trial, settlement, and claims processing of wage and hour cases. *See* Cote Preliminary Approval Decl. ¶¶ 15-19.

[4] Four other individuals submitted both claim forms and exclusion requests due to language barriers or confusion about the forms, but Class Counsel has contacted them to confirm their intent to file a claim for a share of the settlement. Boschen Decl., ¶ 3. Three of these individuals have confirmed their intent to submit a claim, and one has been unreachable thus far. *Id.* Plaintiffs propose processing this individual's claim based on the timely submitted claim form. *Id.*

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This settlement was the result of several months of intensive discovery, briefing of discovery disputes, and a motion to dismiss. Counsel spent a considerable amount of time engaging in discovery, reviewing documents, interviewing witnesses, and analyzing legal issues. *See Hanlon*, 150 F.3d at 1027 (finding no basis to disturb the settlement in the absence of any evidence suggesting that the settlement was negotiated in haste or in the absence of information). After several months of extensive discovery, analysis of potential damages, and analysis of potential class membership in light of Defendants' arbitration agreements with several class members, the parties began discussing settlement in May 2014. Cote Preliminary Approval Decl. ¶ 8. The parties exchanged settlement offers and legal and factual analysis the next two months, culminating in mediation on July 23, 2014. *Id*. ¶¶ 8-9. An initial CR 2A settlement agreement was reached after a marathon, fifteen-hour mediation with respected mediator Teresa Wakeen. *Id*. ¶ 9. The parties then negotiated the final terms of the settlement agreement, notice, claim form, and exclusion form over the next two months. *Id.* At all times the negotiations were adversarial, non-collusive, and at arm's length. *Id.*

For these reasons, final approval of the settlement is appropriate.

B. Settlement Class Members Received the Best Notice Practicable

This Court has determined that the notice program in this case meets the requirements of due process and applicable law, provides the best notice practicable under the circumstances, and constitutes due and sufficient notice to all individuals entitled thereto. Order Granting Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, ¶¶ 8-9. This notice program has been fully implemented by Terrell Marshall Daudt & Willie PLLC ("TMDW"). *See* Boschen Decl. ¶¶ 2-10.

Defendants provided TMDW with a list containing the names, last known address, social security number, total hours worked, banquet/delivery hours worked, and kitchen hours worked for each Settlement Class member (the "Class List"). Boschen Decl. ¶ 5. After receiving the Class List and the Court's order granting preliminary approval, TMDW caused

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notice to be sent directly through first-class mail using the most recent contact information available. Boschen Decl. ¶ 6. In total, TMDW has caused notice to be sent to 849 Settlement Class members. *Id.*

The notice program, as implemented by TMDW, has been successful. Boschen Decl. ¶ 7. Although several notice packets were initially returned as undeliverable due to address changes, TMDW attempted to locate updated mailing addresses by performing a "skip trace" search using the online locator program, People Map, or used the forwarding address provided by the U.S. Postal Service. *Id.* TMDW immediately re-mailed notices to all Settlement Class members for whom TMDW obtained an updated address. *Id.* TMDW will continue this procedure until the deadlines for claims, exclusion requests, and objections have passed. *Id.* Of the initial notice packets mailed, only approximately 45 (5%) did not reach their intended targets (after accounting for second mailings).[5] Boschen Decl. ¶ 8.

TMDW also set up a notice website with information about the settlement, including a link to the settlement notice, to ensure Settlement Class members have full information. *See* http://tmdwlaw.com/maggianossettlement/. TMDW has answered all telephone calls and inquiries from Settlement Class members. Boschen Decl. ¶ 9. If an inquiry requires legal advice or is beyond the knowledge of the person answering the inquiry, TMDW's claims administration staff forwards the inquiry to an attorney. *See id.*

In sum, the notice program approved by this Court and implemented by TMDW has provided adequate notice of these proceedings to all parties entitled to such notice and has

[5] Class counsel learned today that 15 additional packets were not originally delivered by the mailing service because they were "undeliverable as addressed" based on the addresses in Defendants' class list. *See* Boschen Decl. ¶ 6. Class counsel obtained alternative addresses for these individuals through a skip trace, mailed the notice packets to the alternative addresses, and will attempt to reach each of these class members by phone to ensure they receive the notice packets and are aware of their rights. *Id.* Plaintiffs propose allowing late-filed claims, up until the date of the final approval hearing, March 6, 2015, for these 14 individuals. This approach is well-supported. Indeed, "[u]ntil the fund created by the settlement is actually distributed, the court retains its traditional equity powers" over the class settlement plan, including the authority to approve "late claims." *See Zients v. LaMorte*, 459 F.2d 628, 630-31 (2d Cir. 1972) (allowing untimely claimants to receive payments from settlement fund); *see also In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1128 (9th Cir. 1977) (citing *Zients* in support of conclusion "that the district court had discretion to grant late claims").

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satisfied the requirements of CR 23 and the requirements of constitutional due process. As of January 19, 2015, over ninety-five percent of the Settlement Class members have been provided with notice of the Settlement by mail. *See* Boschen Decl. ¶ 8.

C. The Payment of Attorneys' Fees and Costs Is Fair and Reasonable

"Attorneys' fees provisions included in proposed class action settlement agreements are, like every other aspect of such agreements, subject to the determination whether the settlement is 'fundamentally fair, adequate, and reasonable.'" *Staton v. Boeing Co*., 327 F.3d 938, 963 (9th Cir 2003) (quoting Fed. R. Civ. P. 23(e)). "Under Washington law, the percentage-of-recovery approach is used in calculating fees in common fund cases." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (citing *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 72, 847 P.2d 440 (1993)). Public policy supports this approach. "When attorney fees are available to prevailing class action plaintiffs, plaintiffs will have less difficulty obtaining counsel and greater access to the judicial system. Little good comes from a system where justice is available only to those who can afford its price." *Bowles*, 121 Wn.2d at 71.

In common fund cases, "the size of the recovery constitutes a suitable measure of the attorneys' performance." *Id.* at 72. This is a common fund case. Thus, the percentage-of-recovery approach should be used to calculate fees. Courts in the Ninth Circuit also often perform a lodestar "cross-check" of the percentage method. *Vizcaino*, 290 F.3d at 1047, 1051; *see also In re Bluetooth Headset Prods. Liab.*, 654 F.3d 935, 942 (9th Cir. 2011). Here, Plaintiffs' counsel's request for fees is reasonable under both the percentage-of-recovery approach and the lodestar approach.

1. <u>Percentage-of-Recovery Analysis Supports Counsel's Fee Request</u>

The attorneys' fees award requested by Plaintiffs' counsel is reasonable under the "percentage-of-recovery" approach. The benchmark in Washington is 25 percent of the fund. *See Bowles*, 121 Wn.2d at 72 (noting that fee awards in common fund cases are "often in the range of 20 to 30 percent").

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Here, Class counsel seek $225,000 in fees and costs, which amounts to 25 percent of the common fund.[6] Because the fee request is for exactly 25 percent of the common fund, it is reasonable under the "percentage-of-recovery" method. Moreover, the notice to the class stated that "Class Counsel will seek payment of their attorneys' fees and costs in the amount of $225,000," and no Settlement Class member has objected to this request to date.[7] For these reasons, Class counsel's request for fees and costs should be granted.

2. Lodestar Analysis Supports Counsel's Fee Request

While the "percentage-of-recovery" approach provides an independent ground for granting the fee request, a "cross-check" under the lodestar method also demonstrates that counsel's request is reasonable. *See Laguna v. Coverall N. America, Inc.*, 753 F.3d 918, 922 (9th Cir. 2014) (holding that district court "prudently cross-checked the award amount against the alternative" method for calculating fees), *vacated on other grounds* 772 F.3d 608. Under the lodestar method, the court first calculates the lodestar by multiplying the reasonable hours expended by a reasonable hourly rate. *See Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597-99, 675 P.2d 193 (1983). The court may then enhance the lodestar with a multiplier, if necessary, to arrive at a reasonable fee. *See id*; *Vizcaino*, 290 F.3d at 1052-54 (approving multiplier of 3.65 and citing a survey of class settlements from 1996-2001 indicating that most multipliers range from 1.0 to 4.0).

i. Counsel have spent a reasonable number of hours on this case

Here, Class counsel's requested fee and cost award of $225,000 represents a modest multiplier of approximately 1.25 on their lodestar through January 19, 2015 (after subtracting $10,466.09 in costs from the total award). Class counsel have reasonably devoted over 630 hours to the investigation, development, litigation and resolution of this case (not including fees

[6] Class counsel do not seek additional reimbursement of litigation costs beyond the common fund percentage award even though costs are generally awarded in addition to percentage fee awards. *See Bowles*, 121 Wn.2d at 70-74 (affirming common fund fee award of $1.5 million and separate costs award of $17,000).

[7] Plaintiffs will post this motion on the settlement website and will respond to any objections by February 17, 2015.

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for notice and claims administration), incurring over $168,796 in lodestar fees at current hourly rates through January 19, 2015.[8] *See* Cote Final Approval Decl. ¶¶ 6-8. This includes time spent investigating the claims of the class members, conducting discovery, researching and analyzing legal issues, briefing two discovery motions and a response to a motion to dismiss, calculating damages, interviewing witnesses, preparing for mediation, engaging in settlement negotiations, working on preliminary approval briefing, and working on this final approval briefing. *Id.* ¶¶ 6-8. After mediation, Class counsel worked extensively with Brinker's counsel to iron out the final settlement agreement, the settlement notice, claim forms, and exclusion forms. *Id*. Class counsel then prepared a motion for preliminary approval and supporting documents and this motion for final approval and supporting documents. *Id*. Based on their experience with similar cases, Class counsel expect to incur an additional $6,250 seeing this case through final approval (not including additional settlement administration fees and expenses), for a total lodestar of approximately $175,046. *Id.* ¶ 9. Thus, by the time a final judgment is entered and the settlement funds are distributed, any multiplier will be reduced substantially.

Throughout this case, Class counsel prosecuted the claims of the employees efficiently and effectively. Knowing it was possible they would never be paid for their work, counsel had no incentive to act in a manner that was anything but economical. *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) ("[L]awyers are not likely to spend unnecessary time on contingency cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee."). That said, counsel took their charge seriously and endeavored to represent the interests of the class members to the greatest extent possible. The work Class counsel performed was reasonable and necessary to ensure the successful prosecution and settlement of this complex action.

[8] Of this total, Defendants paid $6,783.50 in relation to two discovery orders. Cote Preliminary Approval Decl. ¶ 20.

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ii. Counsel's hourly rates are reasonable

"Where the attorneys in question have an established rate for billing clients, that rate will likely be a reasonable rate." *Bowers*, 100 Wn.2d at 597; *see also Broyles v. Thurston County*, 147 Wn. App. 409, 195 P.3d 985 (2008) ("The presumptive reasonable hourly rate for an attorney is the rate the attorney charges.") Washington courts regularly apply an attorney's current rate for all work performed, regardless of when the work was performed, as a means of compensating for the delay in payment. *Steele v. Lundgren*, 96 Wn. App. 773, 785-86, 982 P.2d 619 (1999) ("Allowing such an adjustment encourages attorneys to take potentially risky cases with clients who may not be able to afford to pay an attorney and allows public interest lawyers to benefit as would attorneys in private practice.").

Here, Class counsel's lodestar calculations are based on reasonable hourly rates. Class counsel's lodestar was calculated based on counsel's current hourly billing rates for similar matters, $300 for Mr. Cote and $400 for Mr. Marshall. These are the rates that counsel charge clients paying by the hour and thus are presumptively reasonable. *See Bowers*, 100 Wn.2d at 597.

Class counsel set their rates for attorneys and staff members based on a variety of factors, including among others: the experience, skill and sophistication required for the types of legal services typically performed; the rates customarily charged in the markets where the legal services are typically performed; and the experience, reputation and ability of the attorneys and staff members. The rates charged for attorneys and staff members working on this matter range from $100 to $400 per hour, with the majority of the work performed by Mr. Cote at his regular hourly rate of $300. *See* Cote Final Approval Decl. ¶¶ 6, 10, and 11.

Recently, both state and federal courts have found rates significantly higher than these were reasonable for the work performed in counsel's respective communities by attorneys of similar skill, experience, and reputation. *See* Cote Final Approval Decl. ¶ 15 and Ex. 1 (Judge

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Coughenour granting attorneys' fees award based on rates ranging from $100 to $600, including a rate of $575 for Mr. Marshall); Ex. 2 (Judge Robart approving as reasonable rates ranging from $175 to $600); Ex. 3 (Judge Spector approving fee request based on rates ranging from $100 to $760); Ex. 4 (Judge Washington approving fee request based on rates ranging from $100 to $760); Ex. 5 (Judge Lasnik approving Plaintiffs' counsel's fee request based on rates ranging from $180 to $650).

iii. A lodestar multiplier is appropriate

Washington courts recognize that an upward adjustment (or "multiplier") to an attorney's lodestar is warranted based on the contingent nature of success or the quality of work performed. *See, e.g., Carlson v. Lake Chelan Cmty. Hosp.*, 116 Wn. App. 718, 742-43, 75 P.3d 533 (2003) (affirming application of 1.5 multiplier to lodestar).

A multiplier is appropriate here due to the contingent nature of success. This was a risky case for Class counsel. When they agreed to represent Plaintiffs and the potential class on a contingency fee basis, counsel knew they were facing a substantial risk, but they strongly believed Plaintiffs' claims had merit. While any class action is risky, this case presented substantial risks that could have resulted in a complete dismissal or an order compelling individual arbitration—eliminating the possibility of a recovery for hundreds of potential class members. From the beginning of the case, Defendants argued that Plaintiffs and other potential class members were barred from litigating in court as a result of mandatory arbitration agreements that purportedly precluded class action litigation. And the central claims in the case—that Defendants violated RCW 49.46.160 by failing to disclose that they were retaining automatic service charges from their employees—presented issues of first impression that no Washington appellate court has considered. Counsel worked throughout the case with no guarantee of being compensated for their time and effort even though there was a substantial risk of nonpayment. Based on the risks involved in this case, a multiplier is appropriate.

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In addition to the risk factor, this Court has another independent ground for application of a multiplier: the quality of work performed. Class counsel performed high-quality work, resulting in an excellent settlement for Defendants' low-wage restaurant employees. Class counsel succeeded by taking an aggressive approach to discovery, which resulted in orders compelling production of relevant documents, and by performing excellent work in opposition to a motion to dismiss, which resulted in a complete denial of the motion. Class counsel also ensured that settlement discussions would include a remedy for *all* class members, regardless of whether a class member had signed a mandatory arbitration agreement that purportedly precluded participation in a class action. In light of recent case law allowing enforcement of mandatory arbitration agreements that preclude participation in class actions, *see AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), this was a remarkable result. Finally, this settlement appears to be the largest settlement on record in a case involving RCW 49.46.160. Cote Preliminary Approval Decl., ¶ 14. The quality of the work that led to this settlement warrants a multiplier.

3. Class Counsel's Out-of-Pocket Expenses Were Reasonably Incurred

Class counsel have also expended $10,466.09 in costs to date. Cote Final Approval Decl., ¶ 16. The litigation expenses Class Counsel incurred in this case include but are not limited to the following: (1) filing and service, (2) copying and mailing expenses; (3) computer research expenses; (4) deposition expenses; and (5) mediation expenses. *See id*. These out-of-pocket costs were reasonable and necessary to secure the successful resolution of this litigation. *See In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1177-1178 (S.D. Cal. 2007) (finding that costs such as filing fees, photocopy costs, travel expenses, postage, telephone and fax costs, computerized legal research fees, and mediation expenses are relevant and necessary expenses in a class action litigation). As noted, Class counsel do not seek additional reimbursement of litigation costs beyond the common fund percentage award even though cost

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awards are generally awarded in addition to percentage fee awards. *See Bowles*, 121 Wn.2d at 70-74.

D. The Settlement Administration Expenses Award Is Reasonable

The Settlement Agreement also provides for the payment of $16,086.17 in settlement administration expenses. Cote Preliminary Approval Decl., Ex. 1 at ¶ 7.e. To minimize the costs of the notice process, Class counsel administered notice rather than hiring a third party notice administrator to do so. Cote Final Approval Decl. ¶ 17. To date, Class counsel have incurred a total of $11,035.45 for settlement administration expenses and fees in providing class members notice of the settlement, performing skip traces and re-mailing notice packets, handling class member phone inquiries about the settlement, and processing claims. *Id.* ¶ 18. Class Counsel anticipate incurring approximately $9,784 in additional fees and costs to handle additional claims administration duties, to answer class member questions, to issue checks, to issue all required tax documents, and to perform all necessary tax reporting duties. *Id.* ¶ 19. Class counsel have retained Dahl Administration LLC to handle settlement payments and tax processing, and Class counsel will pay Dahl from the settlement administration expenses award. *Id.*

These settlement administration expenses and fees are reasonable and necessary to inform class members of the settlement, process claims, issue settlement payments, and handle all tax reporting duties. The total amount of settlement administration expenses and fees TMDW expects to incur exceeds the requested amount. Thus, Plaintiffs' request for approval of the settlement administration expenses award should be granted.

E. The Requested Class Representative Incentive Awards Are Reasonable

Modest service awards compensating named plaintiffs for work done on behalf of the class attempt to account for financial or reputational risks associated with litigation and promote the public policy of encouraging individual plaintiffs to undertake the responsibility of

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representative lawsuits. *See Rodriguez*, 563 F.3d at 958-59; *Hartless v. Clorox Co*., 273 F.R.D. 630, 646-47 (S.D. Cal. 2011) ("Incentive awards are fairly typical in class actions."). The requested service awards—$4,000 each for Zachariah Shugart and Johannes Romatka, who represent the Settlement Class and Automatic Fee Sub-class, and $1,000 for later-named class representative Thomas Busch, who represents the Settlement Class and Kitchen Employee Sub-class—are modest under the circumstances, and well in line with awards approved by federal courts in Washington and elsewhere. *See, e.g., Pelletz v. Weyerhauser Co.*, 592 F. Supp. 2d 1322, 1329-30 & n.9 (W.D. Wash. 2009) (approving $7,500 service awards and collecting decisions approving awards ranging from $5,000 to $40,000). These awards will compensate Plaintiffs for their time and effort in stepping forward to serve as class representatives, assisting in the investigation, keeping abreast of the litigation, and approving the settlement terms after consulting with Class counsel.

III. CONCLUSION

The Settlement is fair, adequate, and reasonable. Indeed, the payment of $649,913.83 to the Settlement Class is outstanding in light of the recoveries potentially available under the law and the risks of continued litigation. This appears to be the largest settlement on record for a case involving the Washington automatic service charge statute, RCW 49.46.160. As for attorneys' fees and costs, an award to Class counsel of $225,000 in fees and litigation expenses is appropriate given the substantial work counsel performed and the successful resolution achieved on behalf of the Settlement Class. An award of $16,086.17 for settlement administration expenses is also appropriate based on the costs and work required to administer the notice, claims, settlement payment, and tax reporting process. The requested service awards of $4,000 each for Plaintiffs Johannes Romatka and Zachariah Shugart and $1,000 for later-named Plaintiff Thomas Busch are reasonable given their service to the litigation and the interests of the class. For these reasons, Plaintiffs respectfully request that the Court enter the Proposed Order Granting Final Approval of Class Action Settlement submitted herewith.

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RESPECTFULLY SUBMITTED AND DATED this 20th day of January, 2015.

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