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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

Wendell G. Moen, Jay Davis, Donna Ventura, Gregory M. Bianchini, Alan Hindmarsh, Cal Wood and Sharon Wood, on behalf of Themselves and Others Similarly Situated,

Petitioners,

v.

Regents of University of California, and Does, 1 through 99, inclusive,

Respondents.
/

No. RG 10530492

Memorandum of Points and Authorities in Support of Petitioners' Motion for Attorneys' Fees

Date: April 10, 2020
Time: 10:00 a.m.
Dept: 21
Judge: Hon. Winifred Y. Smith
Reservation No: R-2151296

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Pursuant to California Rule of Court 3.769 and the parties' Stipulation for Class Action Settlement and Release ("Settlement Agreement"), Petitioners Wendell G. Moen, Jay Davis, Donna Ventura, Gregory M. Bianchini, Alan Hindmarsh, Calvin Wood and Sharon Wood ("Petitioners" or "Class Representatives"), submit this memorandum in support of their motion for attorneys' fees.

I. INTRODUCTION

This motion for reasonable attorneys' fees is made some eleven years after work on this case began. It included two successful trips to the Court of Appeal leading to published opinions, a successful trial on a difficult foundational issue, and over a year of mediation culminating in a settlement that fully accomplishes the goals of the action, as set forth in the accompanying motion for final approval of the settlement.

This motion seeks the $12,000,000 in fees agreed upon by the parties in the Settlement Agreement, to be paid in three installments ($5,000,000 this year, $5,000,000 next year and $2,000,000 in two years). (*See* Declaration of Andrew Thomas Sinclair, filed December 11, 2019 ("Sinclair Decl. 12/11/19"), Ex. A ("Settlement Agreement"), § XII.C.) The requested fee amount is the product of a mediator's proposal by the Hon. Maria-Elena James (Ret.), made after agreement was reached on the rest of the settlement. The proposal was based on Judge James' review of detailed billing information provided by Petitioners' counsel, as well as the substantial benefits conferred on the class.

No part of the requested award will come out of the $84,500,000 settlement fund. The total settlement is thus $96,500,000. The requested fees constitute only 12.4% of the settlement, well below the accepted 30% benchmark – and well below the 20% that counsel would be entitled to under its fee agreement with Petitioners. (Sinclair Decl.12/11/19, ¶ 32 & Ex. C.) The Court indicated in granting preliminary approval that "It preliminarily appears the request for fees and costs is reasonable." (Order, Mot. for Prelim. Approval of Class Settlement Granted (12/20/19), p. 3.)

Even where the parties agree on attorneys' fees, a court reviews whether, in light of the result, the requested fees are reasonable. The primary consideration is the lodestar – the hours worked and the rates applied. *Id.*; *see also* Dept. 21 Guidelines for Final Approval of Class Action Settlement ("Final Approval Guidelines"), ¶ 3. Here, the settlement would not have been possible without some 17,000 hours of work over 11 years by four law firms. A detailed account of the work performed is set forth in

the declarations of attorneys Andrew Thomas Sinclair, Dov M. Grunschlag, Kathleen V. Fisher and John Stember filed with this motion. (*See* Final Approval Guidelines, ¶ 3.) These declarations demonstrate that at every stage, the claims were vigorously defended by the Regents and all of counsel's work was challenging and reasonable.

The motion is also supported by the declaration of attorneys' fee expert Richard M. Pearl, who has carefully reviewed the case, including the hours spent and rates requested. He attests that the hours worked are warranted by the settlement, and the hourly rates are well within the normal and accepted range by lawyers of comparable expertise and experience in the Bay Area.

When the hours reasonably worked are multiplied by reasonable hourly rates, Petitioners' lodestar is approximately $12,147,505.50 as of February 29, 2020.[1] This lodestar is higher than the $12,000,000 cap agreed to by the parties in the Settlement Agreement, meaning that despite the extraordinary results, high contingency risks, and excellent work performed, counsel will receive a *negative* lodestar multiplier. Given that the requested fees are far below the benchmark percentages commonly applied in most class actions, the fee request is eminently reasonable by any reasonable measurement.[2] The motion should be approved.

II. THE ATTORNEYS PERFORMED A VAST AMOUNT OF HIGH QUALITY WORK FOR NEARLY ELEVEN YEARS

Consistent with the Dept. 21 Guidelines, the Declaration of Andrew Thomas Sinclair ("Sinclair Decl.") filed with this motion provides a thorough and detailed description of the work done over nearly eleven years. The Sinclair Declaration breaks out the time spent into ten stages of litigation. (Sinclair Decl. ¶ 7; *see also* Final Approval Guidelines, ¶ 3 ("The court generally finds the declarations of class counsel as to hours spent on various categories of activities related to the action, together with hourly

[1] This figure does not include counsel's work in March or April or thereafter. Below, Petitioners provide an estimate of their anticipated fees between March 1 and the April 10, 2020 hearing ($271,068, which would raise the lodestar to approximately $12,418,573.50 at the time of the final approval hearing). If counsel's actual fees diverge significantly from this estimate, Petitioners will provide an updated lodestar and estimate of counsel's anticipated fees going forward prior to the April 10 hearing.

[2] Because the lodestar exceeds the cap on fees and costs provided in the Settlement Agreement, Petitioners do not seek an additional award of costs. (Settlement Agreement § XII.C.)

billing rate information, to be sufficient, provided it is adequately detailed.") The Declarations of Dov M. Grunschlag, Kathleen V. Fisher and John Stember provide further information regarding their respective firms. (Grunschlag Decl. ¶ 4; Fisher Decl. ¶ 14; Sinclair Decl. ¶ 86 & Exhibit 2.) The time spent by the law firms through February 29, 2020, may be summarized as follows:

Stage	Time Period	Event	Hours
1	3/2009 – 7/2011	Petition for Writ of Mandate to Demurrer	1,263.6
2	7/2011 – 3/2013	First Appeal and *Requa* Opinion	493.8
3	3/2013 – 1/2015	Class Certification and Notice to Class	1,769.9
4	1/2015 – 12/2015	Phase I Trial and Statement of Decision	1,146.1
5	12/2015 – 2/2017	Discovery re "Actual Economic Damages"	1,814.7
6	2/2017 – 8/2017	Order re Complete Class List and Second Notice	1,063.1
7	8/2017 – 11/2017	Decertification	631.4
8	11/2017 – 8/2018	Second Appeal and *Moen* Opinion	1,311.5
9	8/2018 – 12/2019	Mediation, Trial Preparation, and Settlement	6,477.3
10	12/2019 – 1/2020	Post-Settlement to February 29, 2020	846.0
		TOTAL HOURS:	**16,817.4**

(Sinclair Decl. ¶¶ 86 & Exhibit 2.) The time spent by each individual law firm in each stage of the litigation is set forth in Exhibit 2 to the Sinclair Declaration. (*See* Sinclair Decl. ¶ 85 & Exhibit 2; Grunschlag Decl. ¶ 4; Fisher Decl. ¶ 14 & Attachment 2.) What follows is a brief summary of the events described in counsel's declarations that explain the work done, why it was done, and what it produced.

Stage 1: Initial Consultation to First Amended Petition. The University operated the Lawrence Livermore National Laboratory ("LLNL") from 1952 to 2007 under contract with the U.S. Department of Energy ("DOE") and predecessor agencies. In 2007, DOE awarded the contract to Lawrence Livermore National Security ("LLNS"). The Regents transferred retirees who had worked at LLNL to the LLNS Health and Welfare Benefit Plan for Retirees ("LLNS Plan"), a private sector plan that could be terminated at any time. *Moen v. Regents of Univ. of Cal.*, 25 Cal.App.5th 845, 849 (2018). Concerned about the security of their health care, retirees sought legal services. Three law firms entered into an agreement with the retirees. (Sinclair Decl. ¶ 5.) After informal settlement efforts failed, the firms filed a Petition for Writ of Mandate on August 11, 2010. (Sinclair Decl. ¶¶ 9-10.) The Petition presented substantial legal issues that were not settled under California law at the time. (*Id.* ¶ 8.)

The Regents demurred, arguing retirees had no legal right to University-sponsored benefits, which were provided as a matter of policy, *not* contractual obligation. (*Id.* ¶ 11.) *See also Requa v. Regents of Univ. of Cal.*, 213 Cal.App.4th 213, 222 (2012). The demurrer was sustained with leave to amend. Before amending, Petitioners made a Public Records Act request and were able to secure a Resolution adopted by the Regents in 1961 establishing University-sponsored health care benefits for both employees and retirees. (Sinclair Decl. ¶ 12.) The Resolution was incorporated into the First Amended Petition and played a critical role in the appeal. *Requa*, at 227, 228, fn. 11, 232-233.

Stage 2: First Appeal & the Requa Decision**.** The Regents demurred again, and this time the Court sustained the demurrer without leave to amend, ruling that the facts alleged failed to constitute a cause of action for contract, express or implied. Petitioners appealed, and the Court of Appeal reversed, holding that the facts alleged stated a cause of action for impairment of implied contract. *Requa*, at 226-228. The Court of Appeal eventually published the most relevant sections of the opinion, agreeing that it had significance going beyond the case at hand. (Sinclair Decl. ¶ 17.)

Stage 3: Remittitur and First Notice to Class**.** Remittitur issued on March 8, 2013. Based on the strength of the opinion, Petitioners amended to add class allegations and additional class representatives. *Moen*, at 850.[3] Petitioners moved to certify the class on February 20, 2014. (Sinclair Decl. ¶ 22.) The Regents responded with wide-ranging discovery demands, noticing the depositions of all ten Petitioners, and requesting thousands of documents. (*Id.*) The Regents argued the class could not be certified because "contract formation" depended on individualized inquiry into what each retiree subjectively believed was promised – a theory squarely rejected years later in *Moen*, at 858. In the meantime, discovery consumed months. (*Id.*) The Regents filed an extensive opposition to class certification and then invited mediation. Petitioners accepted but the mediation was not successful. (*Id.* ¶¶ 23-24.)

On October 30, 2014, the Court certified a class based on impairment of implied (but not express) contract. (*Id.* ¶ 25.) The Court agreed that the evidence on all key issues of liability was common to the class. (*Id.*; Order re Class Certification Granted (10/30/14), at 7.) The Court appointed Sinclair Law

[3] After Joe Requa withdrew for medical reasons, the case proceeded as *Moen v. Regents of University of California.* (*Id.* ¶ 21.)

Office, Carter Carter Fries & Grunschlag, and Calvo Fisher & Jacob as Class Counsel.[4] (*Id.*) The Court subsequently set the class definition as follows:

> All University of California Retirees who worked at Lawrence Livermore National Laboratory (LLNL), who were eligible for University of California-sponsored group health plan coverage when they retired, and who retired prior to October 1, 2007 and received University sponsored group health plan coverage after retiring until November 30, 2007 in connection with transfer of LLNL's management to Lawrence Livermore National Security (LLNS), and
>
> Spouses, surviving spouses, or dependents, who were eligible for University-sponsored group health plan coverage as a consequence of a University of California employee's retirement after working at LLNL, or death while working at LLNL, and who received University-sponsored group health plan coverage until November 30, 2007 in connection with transfer of LLNL's management to LLNS.

(*See* Order, Application re Other Ex Parte Granted (12/3/14), Ex. A.) Notice was sent to approximately 4,500 putative class members on January 21, 2015. About 150 opted out. (Sinclair Decl. ¶ 28.)

***Stage 4: Phase I Trial and Statement of Decision*.** The Court agreed with a proposal by the Regents to try five issues: "(1) Were the Regents authorized to enter into bilateral contracts governing the employment relationship; (2) Did the Regents enact legislation clearly evincing an intent to create private contract rights; (3) Did the parties' conduct show the formation of an implied contract; (4) Does any such contract include the promise that Retirees would remain in health insurance 'pools' with University employees; and (5) Has any such contract been unconstitutionally impaired." *Moen*, at 850.

The trial was bifurcated into Phase I and Phase II. Phase I would address issues (1) and (2). *Id.*, at 850-851. The most important and difficult was issue (2), which required Petitioners to overcome the presumption that "a statutory scheme is not intended to create private contractual or vested rights and a person who asserts the creation of a contract with the state has the burden of overcoming that presumption." *Retired Employees Assn. of Orange County, Inc. v. County of Orange*, 52 Cal.App.4th 1171, 1186 (2011) ("*REAOC*") (quoting *Walsh v. Bd. of Admin*., 4 Cal.App.4th 682, 697 (1992)); *see*

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[4] The Pittsburgh law firm of Stember Feinstein Doyle Payne & Kravec, LLC, acted as counsel to Petitioners from August 2009 to November 22, 2013, when the law firm of Stember Cohn & Davidson-Welling, LLC, was substituted for Stember Feinstein. On May 28, 2014, Stember Cohn withdrew as counsel of record. Calvo Fisher & Jacob, a California law firm with expertise in class actions, appeared in the case on behalf of Petitioners during the same time period. (Sinclair Decl. ¶¶ 5, 19.)

also Requa, at 225-226. To do so, Petitioners had to set forth facts and circumstances showing the Regents intended to enter into a binding contract. (Sinclair Decl. ¶ 34.) To meet this burden, Petitioners obtained, reviewed, and organized, *numerous* documents, including the 1961 Resolution, over 150 benefit booklets, and other documents showing the Regents had provided retiree health care benefits for nearly 50 years, and had used the benefit to recruit and retain employees of the highest quality. (*See* Statement of Decision (12/8/15), at 5-9.) *See also Moen*, at 850-851. (Sinclair Decl. ¶¶ 31-34.) The effort paid off. The Court ruled for Petitioners, finding that "the offer of retiree health benefits was intended to be a contractual obligation, upon which University employees could reasonably rely." (Statement of Decision, at 8-9.) *Moen*, at 850-851. (Sinclair Decl. ¶ 35.)

Stage 5: Discovery re "Actual Economic Damages." Following their success in Phase I, Petitioners were ready to move to Phase II and obtained a trial date of June 24, 2016. But shortly thereafter, the case was side-tracked for well over two years based on a dispute over the law that was not resolved until *Moen* was decided on August 1, 2018 – that is, whether proof of impairment required proof of "actual economic damages." (Sinclair Decl. ¶ 36.) Petitioners argued that the loss of security provided by University-sponsored benefits was enough, but the Court agreed with the Regents, leaving Petitioners with no choice but to ask the Court to postpone Phase II so they could develop a damages model. (*Id.* ¶ 32.) The Court postponed Phase II. Petitioners then embarked on extensive discovery to obtain documents, data and information needed to establish monetary loss by members of the class, lasting over a year. (*Id.*) Discovery proved to be exceptionally laborious and time-consuming. (*Id.* ¶¶ 37-41.) And once obtained, the data had to be reviewed and analyzed by experts and consultants. (*Id.* ¶ 42.)

Stage 6: Order re Complete Class List and Second Notice. During discovery into "actual economic injury," Petitioners learned that the Regents had not provided a complete class list in 2014 – spouses, surviving spouses, dependents and deceased class members had not been included. (Sinclair Decl. ¶ 45.) When Petitioners asked the Regents to provide a complete class list, they declined, thus requiring Petitioners to file a motion for a complete class list. Petitioners prevailed and the Regents produced 4,500 additional names, literally *double* the original number. A second notice was mailed to the "new" class members. Approximately 50 putative class members opted out. (*Id.* ¶ 46.)

***Stage 7: Decertification and Second Notice of Appeal*.** By mid-2017, Petitioners were ready to proceed to Phase II. But before setting a trial date, the Court set cross-motions for summary adjudication, as well as a motion to decertify. (Sinclair Decl. ¶ 48.) The Court denied both motions for summary adjudication but granted the motion to decertify. The order decertifying the class, announced November 21, 2017, effectively ended the class action. Petitioners appealed. (*Id.* ¶¶ 49-50.)

***Stage 8: Second Appeal and Moen Decision*.** Concerned with the large number of class members passing away *each month* (approximately 25), Petitioners asked the Court of Appeal to expedite the appeal. (Sinclair Decl. ¶ 51.) The court granted the request in part, directing there would be no extensions "absent a showing of exceptional good cause." (*Id.*) The court decided the appeal in record time, reversing the decertification order on August 1, 2018, in a published opinion. (*Id.* ¶ 52.) *See Moen*, 25 Cal.App.5th 845. The opinion settled whether "actual economic damage" was required to prove impairment – it is not – and whether contract formation depends on an individual understanding of the Regents' offer – it does not. *Moen*, at 854-58, 863. *Moen* is the first case to squarely hold that "actual economic damage" is not required to prove impairment. (Sinclair Decl. ¶ 54.)

***Stage 9: Mediation, Trial Preparation, and Settlement Agreement*.** Even before remittitur was issued on October 2, 2018, Petitioners began to explore settlement, first by asking for a settlement conference with Judge Patrick Zika, then through the services of Hon. Maria-Elena James (Ret.), engaging in 15 separate mediation sessions over 15 months and meeting with Petitioners in Livermore an equal number of times. (Sinclair Decl. ¶ 56.) During most of this time, counsel continued to prepare for trial and defend against efforts by the Regents to have the Phase I decisions reconsidered. (*Id.* ¶¶ 58-63.) Agreement was reached in principle on April 26, 2019, but it took eight months of further negotiation and mediation to finalize the agreement. (*Id.* ¶ 73.) Eventually, after overcoming numerous obstacles, the Regents signed the Settlement Agreement on December 11, 2019. (*Id.*) Petitioners filed a motion for preliminary approval, which was granted on December 20, 2019. (*Id.* ¶ 74.)

***Stage 10: Post-Settlement to Present*.** To defray administrative costs, the Regents transferred $500,000 to the preliminarily approved settlement administrator, Archer Systems, LLC ("Archer"), on January 3, 2020. (Sinclair Decl. ¶ 75.) Counsel then began a concerted effort to locate up-to-date contact information for each member of the class, including for the next-of-kin for deceased class members. The

efforts were successful, and Archer was able to mail notices to virtually all members of the class on January 21, 2020. (*Id.* ¶¶ 76-77.) Questions by class members that Archer could not answer have been referred to counsel, which has been productive but time-consuming. (*Id.* ¶ 78.)

III. THE ATTORNEYS' FEES REQUESTED BY PETITIONERS ARE REASONABLE

The Settlement Agreement provides that the Regents will pay up to $12,000,000, in attorneys' fees within 90 days of the Effective Date of the settlement; or alternatively will pay $5,000,000 within 90 days, $5,000,000 one year thereafter, and $2,000,000 two years thereafter. (Settlement Agreement § XII.C; Sinclair Decl. ¶ 96.) If the Regents pay over time, as expected, the present value of the fee award will be approximately $11,510,175. (*Id.*) The resolution of the attorney fee issue is the result of the parties' acceptance of Judge James's mediator proposal on September 25, 2019, well after the substantive terms of the settlement were agreed upon and while the parties awaited the Regents' resolution of its issues with DOE. (*Id.*; *see also* Sinclair Decl. 12/11/19 ¶ 33.)

A. Counsel's Requested Fees Are Reasonable under the Lodestar Method

The $12,000,000 fee provided by the Settlement Agreement is fully justified by California standards. The settlement amount before attorneys' fees totals $84,500,000. Including fees, the total dollar value of the settlement is $96,500,000. (*See* Order, Mot. for Prelim. Approval of Class Settlement Granted (12/20/19), p. 3.) Under California law, this constitutes a "constructive common fund": the total amount of a settlement where the merits and the fees are negotiated separately, comprising a common fund for purposes of determining whether the fee amount is reasonable. *Lealao v. Beneficial Cal., Inc.*, 82 Cal.App.4th 19, 28 (2000). (*See also* Declaration of Richard M. Pearl ("Pearl Decl.") ¶ 29.)

There are two established methods for determining the appropriateness of a fee award in constructive common fund cases: the percentage of recovery method, and the lodestar-adjustment method. In the former, the award is computed as a percentage of the recovery. In the latter, it is computed by arriving at a lodestar (hours worked multiplied by hourly rates), adjusted by a multiplier (positive or negative). *See*, *e.g., Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 255 (2001) (noting that "[m]ultipliers can range from 2 to 4 or even higher"). The goal under both approaches is to determine a reasonable fee to compensate counsel for their efforts. In general, both federal and

California courts use the two methods as a cross-check one against the other. *Laffitte v. Robert Half Int'l, Inc.*, 1 Cal.5th 480, 504 (2016).

1. **Counsel's Lodestar Is Reasonable**

In determining the appropriateness of a fee award in constructive common fund cases, the starting point is typically the lodestar method. *Lealo*, at 49. Counsels' lodestar is $12,147,505.50 as of February 29. (*See* Sinclair Decl. ¶ 97 & Exhibit 3.) Based on counsels' contemporaneous time records, the total time spent so far, after reductions for some inefficiencies, is 16,817.4 hours:

Law Firm	Hours Claimed	Hours Not Billed	Rate	Total
Sinclair Law Office	6,956.3	99.6	$875	$6,086,762.50
Carter Carter Fries & Grunschlag	823.3	5.2	$975	$802,717.50
Calvo Fisher & Jacob	7,949.2	232.1	$875 - 225	$4,620,522.50
Stember Feinstein	969.0	34.6	$875 - 375	$563,576.00
Stember Cohn	119.6	17.9	$875 - 545	$73,927.00
Total:	**16,817.4**	**389.4**		**$12,147,505.50**

(*See* Sinclair Decl. ¶ 97 & Exhibit 3; Grunschlag Decl. ¶ 5; and Fisher Decl. ¶ 11 & Attachment 1.)

This amount does not include the filing of the motion for final approval and this motion for fees or the ongoing work since February 29 implementing the settlement. Counsel estimates that the following time will be devoted to those tasks:

Law Firm	Estimated Hours through Final Approval	Total
Sinclair Law Office	140.0 (100.0 March / 40.0 April 10)	$122,500
Carter Carter Fries & Grunschlag	30.0 (20.0 March / 10.0 April 10)	$29,250
Calvo Fisher & Jacob	240.0 (200.0 March /40.0 April 10)	$120,909
	Total:	$272,659

Thus, the lodestar anticipated though final approval will be $12,420,164.50 ($12,147,505.50 plus $271,068).

The time spent is reasonable. It reflects the nearly eleven-year span of the case, two trips to the Court of Appeal, many motions (multiple demurrers, motions for class certification and decertification, motions for summary adjudication), elaborate discovery (massive document requests, numerous

subpoenas and related protective orders, Petitioners' depositions, expert depositions), trial of Phase I, preparation for trial of Phase II, work with experts to develop complex damage models and the highly unique settlement structure, and the over-year-long mediation effort.

To demonstrate the reasonableness of this effort, Petitioners have prepared a chart showing the hours spent by each firm in each significant stage of the case. (Sinclair Decl. ¶ 86 & Exhibit 2.) For Calvo Fisher & Jacob, which had multiple timekeepers (unlike the Sinclair Law Office and Carter Carter Fries & Grunschlag, which have one timekeeper each) the time is further broken down by each individual timekeeper in the Fisher Declaration. (*See* Fisher Decl. ¶ 15.) Under California law, this showing along with declarations by class counsel establish that the time spent here was reasonable. *See Laffitte*, at 505; s*ee also* Final Approval Guidelines, ¶ 3 ("The court generally finds the declarations of class counsel as to hours spent on various categories of activities related to the action, together with hourly billing rate information, to be sufficient, provided it is adequately detailed."). The Final Approval Guidelines also provide "It is generally not necessary to submit copies of billing records themselves with the moving papers, but counsel should be prepared to submit such records at the court's request." (*Id.*) Counsel's billing records here are available for the Court's review if needed. (Sinclair Decl. ¶ 97; Grunschlag Decl. ¶ 5; Fisher Decl. ¶ 16.)

The hourly rates submitted by counsel also are reasonable. Petitioners' attorneys are entitled to their requested rates if those rates are "within the range of reasonable rates charged by and judicially awarded comparable attorneys for comparable work." *Children's Hosp. & Med. Ctr. v. Bonta*, 97 Cal.App.4th 740, 783 (2002). "Comparable attorneys" are those of comparable skill and experience handling cases of comparable difficulty and complexity. *See, e.g., Lealao*, at 47; *Heritage Pac. Fin., LLC v. Monroy*, 215 Cal. App. 4th 972, 1009-1010 (2013).

Here, counsel's current hourly rates reflect their extensive experience and expertise in complex cases and particularly those involving the Livermore Laboratory. (Sinclair Decl. ¶ 97; Grunschlag Decl. ¶ 5; Fisher Decl. ¶ 12; Stember Decl. ¶ 4 & Exhibit A.) *See, e.g., City of Oakland v. Oakland Raiders*, 203 Cal.App.3d 78, 82 (1988) (affirming rates awarded to Raiders' attorneys based on rates charged by "top law firms in the Bay Area"); *Robles v. Employment Development Dept.*, 38 Cal.App.5th 191, 205 (2019) (fees may be based on current rates).

The current rates of the principal attorneys are as follows:

Attorney	Years of Experience	Hourly Rate
Sinclair Law Office		
Andrew Thomas Sinclair	44	$875
Carter Carter Fries & Grunschlag		
Dov Grunschlag	54	$975
Calvo Fisher & Jacob LLP		
Kathleen V. Fisher	44	$875
William H. Hebert	27 (as of 2015)[5]	$775
Rodney J. Jacob	30	$775
Maya J. Maravilla	20	$650
Alexander M. Freeman	16	$625
Stember Feinstein Doyle Payne & Kravec LLC and Stember Cohn and Davidson-Welling		
John Stember	38 (as of 2014)	$875
Maureen Davidson-Welling	7 (as of 2014)	$545

The rates of additional time keepers, including both attorneys and highly experienced legal assistants, are set forth in the Sinclair Declaration, as well as the Fisher and Stember Declarations. (Sinclair Decl. ¶ 12 & Exhibit 2.)

As Petitioners' expert, Richard M. Pearl, opines, counsel's rates are well within the range of those charged by comparably experienced attorneys for comparably complex work, as evidenced by recent court awards, relevant surveys, and the standard rates made public by numerous local firms. (Pearl Decl. ¶¶ 12-22.) Indeed, counsel's work was well above average quality, as evidenced by the results: two successful appeals resulting in two published decisions, a successful Phase I trial, and the very substantial

[5] The years of experience for attorneys who stopped working on the case at a particular time (Hebert and Stember) are listed as of the time the attorney stopped working.

settlement benefits, including the future guarantees sought and $84,500,000 in benefits for the class, *plus* their reasonable attorneys' fees. (*See id.* ¶¶ 12, 31-33.)

2. **<u>The Non-Lodestar Factors – Risk, Results, Complexity, Public Benefit – All Support Counsel's Fee</u>**

Because counsels' lodestar exceeds the amount agreed-upon by the parties, counsel do not seek a lodestar multiplier (however, if the Court makes deductions to the lodestar so that it is less than $12,000,000, Petitioners ask the Court to consider a multiplier, as explained in footnote 6 below). It is nevertheless important to show that the factors relating to a multiplier fully support a full $12,000,000 award. *See, e.g., Roos v. Honeywell International, Inc.*, 241 Cal.App.4th 1472, 1495 (2015) (disapproved on other grounds in *Hernandez v. Restoration Hardware, Inc.*, 4 Cal.5th 260 (2018)).

First, the enormous contingent risk justifies a significant multiplier. As the two appeals show, the risk of losing the case on the merits was daunting. *See Cates v. Chiang*, 213 Cal.App.4th 791, 823 (2013) (in evaluating contingent risk, "The mere fact that the trial court ... *granted* summary judgment in favor of the State indicates that the risk to plaintiff's counsel was substantial."); *Sutter Health Uninsured Pricing Cases v. Sutter Health et al.*, 171 Cal.App.4th 495, 512 (2009) (2.52 multiplier affirmed).

Moreover, the case was not brought under a mandatory fee-shifting statute, thus doubling the contingency risk. *See, e.g., Bender v. County of Los Angeles*, 217 Cal.App.4th 968, 988 (2013) (noting "double-contingency" of proving misconduct and establishing violation of a fee-shifting statute). Indeed, there was no statutory guarantee of any fee award even if Petitioners prevailed in the action. To obtain a statutory fee award, counsel would need to prevail under C.C.P. § 1021.5, and make the necessary showing for a "private attorney general" award, which can be difficult when a case involves a substantial monetary recovery. *See, e.g., City of Oakland v. Oakland Police & Fire Retirement Sys.*, 29 Cal.App.5th 688, 699-700 (2018). Moreover, a common fund fee was problematic because the primary relief sought in the action was not monetary – it was a writ of mandate reinstating University coverage – and while the petition sought money damages, the amount was incidental to the main relief, and Petitioners might have been well-advised to forego it in order to obtain reinstatement. Counsel took the risk that they could deliver the result that Petitioners wanted, with no fund against which a contingency percentage could be

assessed. Indeed, since attorneys' fees are subject to the parties' Settlement Agreement, counsel are not seeking a contingency fee from their clients. (Sinclair. Decl. ¶ 6; Sinclair Decl. 12/11/19 ¶ 33.)

Second, the issues were exceptionally novel and complex. This is shown by the two appellate opinions, which the Court of Appeal published. The implied contract claim to health care benefits from a public employer was not settled law when the case was filed. How California law might apply to this case was heavily disputed, and the foundational ruling in Phase I that allowed the case to proceed – that the Regents intended to create a binding contractual obligation – had yet to be reviewed on appeal.

Third, as noted above, the monetary and non-monetary benefits of the settlement accomplish the goals of the litigation. The return to University-sponsored coverage in the event LLNS terminates or materially diminishes its coverage directly responds to what motivated the retirees to seek court relief in the first place: the worry that LLNS – an entity for whom they had not worked and with which they had no contractual relationship – would exercise its right to discard them or to unreasonably reduce their benefits. The $84,500,000 recovery will enhance the value of their coverage under LLNS, and compensate them for past losses. Benefit counseling will enable them to make coverage choices that suit them in their individual circumstances. And the results obtained benefit not only the class in this case, but public employees generally. The precedent-setting holdings in the two published appellate opinions bolster the ability of public employees to enforce contractual rights to post-employment benefits.

Under these facts, a significant multiplier would be justified. *See, e.g., Laffitte*, at 502, 505. Petitioners' expert, Richard M. Pearl, opines that a multiplier of at least 1.3 (or more) would be warranted. (Pearl Decl. ¶¶ 31-33.) The fact that counsel are seeking a fee that is *less* than their lodestar (and *substantially less* the lodestar plus multiplier) only confirms that the agreed-upon fee is reasonable.[6]

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[6] The availability of a multiplier also strongly supports the fact that even if the Court makes deductions from Petitioners' lodestar calculation, it should still award the full $12,000,000. If a multiplier of 1.3 were applied to the lodestar ($12,147,505.50 as of February 29, 2020), the result would be $15,791,757.15. Therefore, even if the Court makes substantial deductions to the lodestar, Petitioners would still have demonstrated their entitlement to an award of the full $12,000,000.

B. Cross-Checking with the Percentage-of-Recovery Method Supports the Fee Requested

The requested $12,000,000 fee award also is supported by cross-checking it against a fee determined by the percentage-of-recovery method. As stated by this Court in its preliminary approval of the fee award, the informal "benchmark" for percentage-based fees is 30% of a total fund. (Order, Motion for Preliminary Approval of Class Settlement Granted (12/20/19) at 3 (citing *Laffitte*, at 495).) At that percentage, applied to the total fund of $96,500,000, the fee award would be $28,950,000. Further, under the existing fee agreement between Class Counsel and Petitioners, Class Counsel are entitled to 20% of their recoveries (although counsel agreed to forego this and instead seek the instant fee award; consistent with this, Petitioners agreed to the settlement based on the express agreement that the attorneys' fees would *not* come out of the $84,500,000 provided to the class under the Settlement Agreement). (Sinclair Decl. ¶ 6; Sinclair Decl. 12/11/19 ¶ 33.) Instead, the amount sought is only 12.4% of the total fund, a strong indication that the lodestar-based fee is reasonable. (Pearl Decl. ¶ 34).

C. The Payment Mechanisms Will Effectuate This Court's Order

The ongoing work to implement the settlement will be supported by this fee request. During the early stages of this case, a non-profit association of Lab retirees was formed – the University of California Livermore Retirees Group ("UCLRG") Legal Defense Fund – to help fund the litigation. UCLRG paid the law firms a total of $446,125.46. (Sinclair Decl. ¶¶ 98-99.) These funds will be returned to UCLRG or a successor and used to help implement and protect the settlement. (*Id.* ¶ 100.) The entity will comply with all applicable statutes and regulations. (*See id.*)

Petitioners have designed the payment mechanisms to serve this re-payment, as well as the "holdback" ordered by the Court when it granted preliminary approval of the settlement and the fee award. In its Order Granting Preliminary Approval of Class Action Settlement and Release (12/20/19) and in its Order Granting Establishment of a Qualified Settlement Fund and Qualified Settlement Fund Administrator (12-20-2019) ("QSF Order"), the Court directed that the Qualified Settlement Fund ("QSF") be established to perform functions in accordance with the terms of the Settlement Agreement and appointed Archer as QSF Administrator. The Court also directed that $500,000 of the fee award be retained by the Settlement Administrator until one year after the final approval of the settlement. (Order,

Motion for Preliminary Approval of Class Settlement Granted (12/20/19), at 3.) To facilitate this, and to ensure that attorneys' fees are not commingled with the rest of the funds, Petitioners request that the Court authorize the creation of a subaccount to the QSF to receive the attorney fee payments. (*See* [Proposed] Final Approval Order and Judgment, submitted herewith, ¶¶ 19-21.)

Archer will maintain the $500,000 holdback in the account until further order by the Court and will make the other payments to UCLRG and to Class Counsel. (Sinclair Decl. ¶¶ 98-100.)

IV. CONCLUSION

The attorneys' fee amount sought in this case is fully justified by the work done and the results achieved. It is reasonable and should be approved.

DATE: March 17, 2020

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