UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CYNTHIA FERNANDEZ and MONICA REYNA, on behalf of themselves and all others similarly situated, Plaintiffs, vs. VICTORIA SECRET STORES, LLC, Defendant.	CASE NO. CV 06-04149 MMM (SHx) ORDER APPROVING FINAL SETTLEMENT AND AWARDING ATTORNEYS' FEES AND COSTS

On May 30, 2006, plaintiff Cynthia Fernandez filed this putative class action against defendant Victoria's Secret Stores, LLC in Los Angeles Superior Court, alleging that Victoria's Secret requires job applicants to participate in a "sales tryout" during which they are trained and directed to work in Victoria's Secret stores without pay. Victoria's Secret removed the action on June 29, 2006, invoking federal jurisdiction under the Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4(a), 119 Stat. 9 (codified in relevant part at 28 U.S.C. § 1332(d)(2)). Plaintiff Monica Reyna subsequently joined the action. On November 14, 2006, she and Fernandez filed a second amended complaint pleading four causes of action: (1) failure to pay wages, (2) unfair trade practices, (3) unfair competition, and (4) conversion. The court dismissed the conversion claim on June 25, 2007. On August 2, 2007 the court certified the following class:

All applicants for hourly sales positions (sales associates, sales support associates and

cashiers) of Victoria's Secret Stores in California between March 29, 2002, and the present, who were subjected to unpaid job training and job previews.[1]

After a class was certified, the parties mediated this matter and reached a settlement on August 27, 2007. Plaintiffs now move for final approval of the settlement agreement.

I. FACTUAL BACKGROUND

A. Details of the Litigation

The parties have been litigating this case since March 29, 2006. After the case was removed, Reyna joined the action, and plaintiffs filed first and second amended complaints. Thereafter, the parties began to engage in discovery; they exchanged multiple written discovery requests and numerous documents, and took more than twenty depositions of employees, parties and corporate representatives in California and Ohio.[2] On May 10, 2007, Victoria's Secret filed a motion for summary judgment or, in the alternative, judgment on the pleadings. Plaintiffs opposed the motion, and the court denied it as to all claims except the cause of action for conversion. The court dismissed that claim on June 25, 2007.[3]

On May 21, 2007 (before the court ruled on the motion for judgment on the pleadings), plaintiffs filed a motion for class certification, which defendants opposed. The court granted the motion and certified the class described above on August 2, 2007. On August 13, 2007, plaintiffs designated expert witnesses; they identified an economist, who intended to offer opinions regarding class-wide damages, and a job analysis expert, who was going to opine on hiring procedures. On August 16, 2007, Victoria's Secret filed a petition for permission to appeal the class certification ruling to the Ninth Circuit. During the following week, plaintiffs and defendant filed voluminous cross-motions for summary judgment. While these motions were pending, the parties held a mediation before retired California Supreme Court

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[1]Order Granting Plaintiffs' Motion for Class Certification ("Class Cert. Order"), Docket No. 56 (Aug. 2, 2007).

[2]Plaintiffs' Motion for Final Approval of Class Action Settlement ("Pl.'s Approval Mot.") at 2-3.

[3]Order Granting in Part and Denying in Part Defendant's Motion for Judgment on the Pleadings ("MJP Order"), Docket No. 44 (June 27, 2007).

Justice Edward Panelli. The mediation was successful and the parties entered into a "Confirmation of Key Settlement Terms."[4]

B. Details of the Settlement Process

Plaintiffs were represented by four attorneys at the mediation. In addition, plaintiffs' economist was present to address any damages issues that might arise.[5] In early September 2007, the parties notified the court that they had reached a settlement. On September 24, 2007, plaintiffs filed a motion for preliminary approval of the settlement. This motion referenced the "Confirmation of Key Settlement Terms" that had been signed at the mediation, but not a final settlement agreement, as one had not yet been signed. In the course of memorializing the settlement agreement, certain disputes arose. The court addressed those disputes at a November 21, 2007 status conference, and declined to approve the settlement preliminarily until the issues had been resolved.[6]

On December 7, 2007 the parties engaged in a second mediation with Justice Panelli, at which they were able to resolve the remaining disputes and address the court's concerns. On January 9, 2008, the parties notified the court that they had executed a final settlement agreement. They also notified appropriate state and federal officials of the settlement as required by the Class Action Fairness Act (CAFA).[7]

C. Details of the Settlement Agreement

The settlement agreement provides that defendant will make a maximum amount of $10 million

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[4]Pl.'s Approval Mot. at 3-4.

[5]See *id.* at 4-5.

[6]At the status conference, the court also raised two additional concerns regarding the settlement terms. First, it noted that, under the original agreement, some class members were to receive gift cards valued at $67.50, while others were to receive the same amount in cash. The court noted that there is a difference between the "real economic value" of gift cards and cash. It also noted that the pool of money allocated for class members' recovery appeared to be too small to accommodate the potential claims of all possible class members. The court directed the parties to address these concerns during their subsequent mediation.

[7]Pl.'s Approval Mot. at 6. Plaintiffs report that they have received no responses from any of these officials.

available to pay the claims of class members on a claims made basis.[8] Each class member who submits a valid claim form will receive a gift card from Victoria's Secret in the amount of $67.50. This gift card will not expire, will be freely transferrable, and can be used to purchase products sold at any Victoria's Secret store or online.[9] In lieu of a gift card, each of the named plaintiffs will receive an enhanced payment of $5,000, to compensate them for their efforts on behalf of the class.[10] Defendant agrees that it will not oppose a request that the court award attorneys' fees in an amount up to $3.5 million, and the parties agree that "in the event the Court awards a lesser amount of fees and costs, the Settlement Agreement shall remain in full force and effect and be binding upon the parties."[11] The parties also agree that gift cards will not be distributed to class members until (1) the named plaintiffs receive their enhanced payments and (2) attorneys' fees and costs are paid.[12]

The settlement agreement defines the settlement class in a manner that is consistent with the court's class certification order, but limits the class to individuals who applied for employment at Victoria's Secret between March 29, 2002 and August 7, 2007.[13] The parties agree that the settlement resolves all claims that are or could have been asserted by plaintiffs against Victoria's Secret.[14]

II. DISCUSSION

A. Final Approval of a Class Action Settlement

Rule 23(e)(1)(A) of the Federal Rules of Civil Procedure requires that the parties obtain court "approv[al] [of] any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses

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[8]Declaration of John N. Quisenberry in Support of Plaintiff's Motion for Final Approval of Class Action Settlement and for Attorneys' Fees ("Quisenberry Decl."), Exh. 1 (Class Action Settlement Agreement ("Settlement Agreement")), ¶ 37.

[9]*Id.*, ¶ 21.

[10]*Id.*, ¶ 38(a).

[11]*Id.*, ¶ 38(b).

[12]*Id.*, ¶ 37.

[13]*Id.*, ¶ 22. August 7, 2007 is the day that Victoria's Secret ceased conducting job previews at its stores. (*Id.*, ¶ 29.)

[14]*Id.* at 2-3.

of a certified class." Approval under Rule 23(e) involves a two-step process "in which the [c]ourt first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." *Nat'l Rural Telecommunications Cooperative v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004) (citing MANUAL FOR COMPLEX LITIGATION, THIRD, § 30.14, at 236-37 (1995)). In considering whether to grant final approval of a class action settlement, the Ninth Circuit has noted that "there is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Synocor ERISA Litigation*, 516 F.3d 1095, 1011 (9th Cir. 2008); see *id.* ("This policy is also evident in the Federal Rules of Civil Procedure and the Local Rules of the United States District Court, Central District of California, which encourage facilitating the settlement of cases"); *Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 625 (9th Cir. 1982) ("[I]t must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation"), cert. denied, 459 U.S. 1217 (1983).

1. Notice Requirements

Rule 23(e) requires that "notice of the proposed dismissal or compromise [of a class action] shall be given to all members of the class in such manner as the court directs." FED.R.CIV.PROC. 23(e). Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); see also *Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 832, 835 (9th Cir. 1976) ("To comply with the spirit of [Rule 23(e)], it is necessary that the notice be given in a form and manner that does not systematically leave an identifiable group without notice").

The court's role in reviewing a proposed settlement is to represent those class members who were not parties to the settlement negotiation and agreement. See *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F.Supp.2d 1021, 1027 (N.D. Cal. 1999) ("The purpose of Rule 23(e) is to protect 'unnamed class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of the individual claims by a compromise,'" quoting *Amchem Products*, 521 U.S. at 623). One aspect

of this role is to ensure that all class members receive adequate notice of the proposed settlement.

The settlement agreement here provided that potential class members would receive notice both via mail and through publication. Before mailing notices, class counsel hired vendors who traveled to all 116 Victoria's Secret stores in California to copy and scan job applications made during the class period. Class counsel then extracted data from the applications to compile a list of 55,490 records.[15] Defendant gave the claims administrator a list of the most recent addresses of its current and former employees in California during the class period; this list comprised 38,166 persons.[16] Cross referencing data culled from the applications with the data provided by defendant, the class administrator compiled a mailing list of 77,411 potential class members. On May 16, 2008, he mailed notice of the proposed settlement to these individuals.[17] When notices were returned as undeliverable, the claims administrator attempted to resend the notices to new addresses.[18] He reports that, ultimately, the undeliverable rate was lower than is typical in other class actions.[19]

Also on May 16, 2008, the claims administrator published notice in five major California newspapers; a Facebook flyer was also made available to visitors at Facebook.com.[20] The claims administrator established a website and a toll-free number where hundreds of calls were received and answered.[21] The deadline to postmark claim forms and opt-out forms was July 5, 2008. As of July 17,

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[15]Declaration of Class Administrator Matthew Pohl in Support of Motion for Final Approval ("Pohl Decl."), ¶ 4.

[16]*Id.*, ¶ 5.

[17]*Id.*, ¶¶ 6-8.

[18]Of the 77,411 notices sent, 18,110 were returned as undeliverable. The claims administrator forwarded 549 of these to new addresses provided by the post office. and 16,172 to new addresses that he identified. Of the 549, 94 were returned a second time. Of the 16,172 resent notices, 2,889 were returned a second time. Thus, 3,438 of 77,411 mailed notices (or 4.4%) were returned as undeliverable. (*Id.*, ¶¶ 13-15.)

[19]*Id.*, ¶ 16.

[20]*Id.*, ¶¶ 9-10. According to Facebook, the flier was viewed 584,000 times. (*Id.*)

[21]*Id.*, ¶¶ 11-12.

2008, the claims administrator had received 7,280 timely claim forms and 29 timely opt-out forms.[22] The deadline to postmark objections was June 30, 2008; only three objections were filed. One objector, Melinda Percy, sent a letter that did not object to any of the settlement terms, but stated that she felt she had been treated well as a Victoria's Secret employee and would like to be rehired.[23] The other two objectors, Jeanne Sabatino and Christina Leilani Ilac, objected to the fact that they were receiving gift cards rather than direct monetary compensation.[24]

The court is satisfied that the efforts of the parties and the claim administrator have been effective in providing notice of the settlement to potential class members. Not only did the class administrator mail notice to an extensive list of individuals who were subject to a job preview, he also made a concerted (and largely successful) effort to *re*send notice after mail was returned. Indeed, it appears that notice was successfully delivered to more than 90% of the potential class members whose addresses were identified. Moreover, notice was published in five major newspapers and on the popular online networking site, Facebook.

These efforts were adequate to ensure that unnamed class members received adequate notice of the settlement and had sufficient opportunity to file a valid claim form, opt out, or object to the settlement. Consequently, the court finds that the notice requirement of Rule 23(e) has been satisfied.

2. Fairness of the Proposed Settlement

"The role of a court . . . reviewing the proposed settlement of a class action under Fed.R.Civ.P. 23(e) is to assure that the procedures followed meet the requirements of the rule and comport with due process and to examine the settlement for fairness and adequacy." *Vaughns v. Board of Educ. of Prince George's County*, 18 F.Supp.2d 569, 578 (D. Md. 1998) (collecting cases). The district court's role, in

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[22]Supplemental Declaration of Robert J. Drexler, Jr. In Support of Motion for Final Approval ("Supp. Drexler Decl."), ¶ 6. According to the claims administrator, a total of 7,454 claim forms were submitted, but 174 of those forms were filed late. (*Id.*) Likewise, a total of 30 opt-out forms were submitted, but only one was filed late. (*Id.*, ¶ 7.)

[23]See Declaration of Robert J. Drexler, Jr. in Support of Motion for Final Approval ("Drexler Decl."), Exh. B. Despite her "objection," Ms. Percy also filed a claim. (*Id.*)

[24]*Id.*, Exhs. C & D. Ms. Sabatino also filed a claim form; Ms. Ilac did not.

reviewing "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." *Officers for Justice*, 688 F.2d at 625.

Plaintiffs argue that the settlement is presumptively fair because it was the result of good faith, arms' length negotiations with defendant. See *National Rural Telecom. Cooperative v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) ("A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair," citing *City Partnership Co. v. Atlantic Acquisition Ltd, P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996)). As plaintiffs note, (1) the parties engaged in substantial discovery, (2) litigated numerous motions, (3) and reached a careful settlement agreement with the help of an able and neutral mediator. The court agrees that the parties' settlement was reached in good faith after a well-informed arms-length negotiation, and that it is entitled to a presumption of fairness. While the court takes this presumption into account in determining whether the settlement should be approved, it must nonetheless assess independently whether the settlement is fair, reasonable and adequate for all concerned.

This determination requires a balancing of the following factors:

> "(1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement." *Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 575 (9th Cir. 2004) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).

This list of factors is not exclusive, "and different factors may predominate in different factual contexts." *Torrisi v. Tuscon Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993); see *Churchill Village*, 361 F.3d at 576 n. 7 ("Because the settlement evaluation factors are non-exclusive, discussion of those factors not relevant to this case has been omitted"); *Young v. Polo Retail, LLC* (*Young II*), No. C-02-4546

VRW, 2007 WL 951821, *3 (N.D. Cal. Mar. 28, 2007) (adding two factors to the list: "(9) the procedure by which the settlements were arrived at, see MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.6 (2004), and (10) the role taken by the plaintiff in that process").

a. Strength of Plaintiffs' Case

Plaintiffs maintain that they have a strong legal claim, but acknowledge certain weaknesses that might have limited or precluded recovery had the litigation proceeded. Specifically, plaintiffs sought waiting time penalties under California Labor Code § 203, alleging that defendant had willfully failed to pay them wages after they were discharged.[25] As plaintiffs concede, such penalties can be recovered only if the defendant does not in good faith dispute the fact that wages are owed. See *Takacs v. A.G. Edwards and Sons, Inc.*, 444 F.Supp.2d 1100, 1126 (S.D. Cal. 2006) ("A willful failure to pay wages within the meaning of Labor Code Section 203 occurs when an employer intentionally fails to pay wages to an employee when those wages are due. However, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203"). Defendant argued that members of the class were merely job applicants and not employees and that it believed in good faith that they were not owed wages. Plaintiffs recognize the force of this argument, and acknowledge that their § 203 claim may not have been strong.

Moreover, at the time the settlement was reached, the parties' cross-motions for summary judgment were pending. The Ninth Circuit has suggested that the pendency of a motion for summary judgment indicates that the strength of plaintiffs' case has not yet been tested and that it favors a finding that the settlement is fair as a result. See *Churchill Village*, 361 F.3d at 576 (approving a settlement and noting that "GE's three summary judgment motions were pending before the court"). Because some elements of plaintiffs' case were questionable, and because motions for summary judgment remained to be decided, the court concludes that this factor weighs in favor of final approval of the settlement.

b. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

Plaintiffs argue that this factor also weighs in favor of approving the settlement because

[25]See Pl.'s Approval Mot. at 14.

significant expenses remained before resolution of the case at trial. Plaintiffs note that expert discovery was not complete at the time of settlement, and that trial preparation and trial remained as well.[26] See *Young II*, 2007 WL 951821 at *3 ("Because this litigation has terminated before the commencement of trial preparation, factor (2) also militates in favor of the settlement"). The court agrees that continued litigation would have entailed significant further expense and that substantial work remained to be done had the case proceeded to trial. Both parties faced the risk that the court would grant their opponent's motion for summary judgment or that they would lose at trial. As plaintiffs note, the issue presented was one of first impression and the outcome of the litigation was far from certain.

Because both parties faced extended, expensive future litigation, and because both faced the very real possibility that they would not prevail, this factor supports approval of the settlement. See *In re Portal Software, Inc. Securities Litig.*, No. C-03-5138 VRW, 2007 WL 4171210, *3 (N.D. Cal. Nov. 26, 2007) (recognizing that the "inherent risks of proceeding to summary judgment, trial and appeal also support the settlement").

c. The Risk of Maintaining Class Action Status Throughout Trial

Whether or not the action would have remained a class action neither weighs in favor of or against a finding that the settlement is fair. As noted in the class certification order, the court concluded that the claims raised in this action were properly resolved on a class-wide basis. Although defendant sought to file an interlocutory appeal challenging certification of a class under Rule 23(f), its petition was denied. Defendant could have filed a motion to decertify the class, or prevailed on an appeal of the issue following entry of judgment; the court thinks it unlikely, however, that either form of relief would have been granted. This factor, therefore, has little bearing on the fairness of the settlement.[27]

d. The Amount Offered in Settlement

As the Ninth Circuit has noted, "it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is

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[26] *Id.* at 16.

[27] Some courts, however, have found that the fact that class treatment is appropriate supports approval of the settlement. See *Young III*, 2007 WL 951821 at *4 ("Factor (3) weighs in favor of settlement because class treatment is generally appropriate in such litigation").

[thus] not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators." *Officers for Justice*, 688 F.2d at 625 (emphasis original). Rather, "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Id.* at 624 (citations omitted). "'The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.'" *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998). Estimations of what constitutes a fair settlement figure are tempered by factors such as the risk of losing at trial, the expense of litigating the case, and the expected delay in recovery (often measured in years).

As noted, the proposed settlement here awards each class member a transferrable gift card in the amount of $67.50 for use at Victoria's Secret stores. While they have a cash value, these gift cards are a form of non-monetary relief and must be carefully scrutinized. See FED.R.CIV.PROC. 23(2)(C)(h), Advisory Committee Note ("Settlements involving nonmonetary provisions for class members . . . deserve careful scrutiny to ensure that these provisions have actual value to the class"). Other courts have approved the use of gift cards or coupons in lieu of monetary compensation in the class action context. See *Young II*, 2007 WL 951821 at *4 (approving the use of gift cards in large part because they are transferrable; "this enables class members to obtain cash – something all class members will find useful"); *States of New York and Maryland v. Nintendo of America, Inc.*, 775 F.Supp. 676, 681 (S.D.N.Y. 1991) (approving a settlement awarding each class member a five dollar coupon and noting that the coupons were fully transferrable and that "[c]ompensation in the form of coupons has been approved by other courts").[28]

Plaintiffs argue that the $67.50 is a generous award given that entry level employees during the class period were paid $6.75 per hour and job previews lasted approximately an hour. Thus, plaintiffs assert, each class member is receiving ten times the wages to which she would have been entitled for her work. Putting the precise value of the gift cards aside, it is clear that the settlement gives each class

[28]The two substantive objections to the settlement both state the objectors' preference for a cash award instead of a gift card. Although "[c]onsumers obviously would prefer a check or cash," *Nintendo of America*, 775 F.Supp. at 681, the gift cards at issue have real value and constitute compensation. As discussed *infra*, in the event a class member prefers cash, she may sell the gift card (albeit likely for a reduced rate).

member significantly more than she would have earned had Victoria's Secret paid her for her work during the job preview. This fact alone argues in favor of approving the settlement.[29]

e. The Stage of the Proceedings and Extent of Discovery Completed

"'The extent of discovery may be relevant in determining the adequacy of the parties' knowledge of the case.'" *DIRECTV*, 221 F.R.D. at 527 (quoting MANUAL FOR COMPLEX LITIGATION, THIRD, § 30.42 (1995)). "'A court is more likely to approve a settlement if most of the discovery is completed because it suggests that the parties arrived at a compromise based on a full understanding of the legal and factual issues surrounding the case.'" *Id*. (quoting 5 W. Moore, MOORE'S FEDERAL PRACTICE, § 23.85[2][e] (Matthew Bender 3d ed.)). The greater the amount of discovery that has been completed, the more the parties have "a clear view of the strengths and weaknesses of their cases.'" *Young II*, 2007 WL 951821 at *4 (quoting *In re Warner Communications Sec. Litig.*, 618 F.Supp. 735, 745 (S.D.N.Y. 1985)). Here, because discovery is almost complete, this factor weighs in favor of approval of the settlement.

f. The Presence of a Governmental Participant

This factor does not apply because no government entities have participated in this case.

g. The Experience and Views of Counsel

"The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 622 (N.D. Cal. 1979) (citations omitted). "Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pacific Enterprises Securities Litigation*, 47 F.3d 373, 378 (9th Cir. 1995).

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[29]Plaintiffs argue that two other factors enhance the value of the settlement award. First, plaintiffs note that defendant agreed to pay for the costs of providing class notice, resulting in an additional $230,000 paid by defendant that did not come out of the settlement fund. It is unclear that this undertaking by defendant impacts the amount available to pay individual class members. Had class counsel rather than defendant borne the cost of giving notice, counsel's costs would encompass a larger proportion of the proposed fee award, but amounts awarded to individual class members would not change.

Plaintiffs also suggest that the settlement has non-monetary value because defendant has agreed to stop conducting job previews as of August 7, 2007. The court agrees that this result has some value and weighs in favor of approval of the settlement.

The class was represented by three competent law firms and counsel have submitted declarations testifying that the settlement agreement is in the best interests of the class.[30] More specifically, "class counsel balanced the terms of the proposed settlement against the probable outcome of liability and the range of recovery at trial."[31] Both sides litigated this matter vigorously for nearly two years prior to settlement and had a clear view of the strengths and weaknesses of the case, which enhances the persuasive value of counsel's views. Consequently, the court concludes that this factor supports approval of the settlement agreement.[32]

h. Class Members' Reaction to the Proposed Settlement

More than 77,000 notices were mailed to potential class members. In addition, notice was given in print publications and online. Only twenty-nine individuals (or .04% of the class) opted out, and only three (or .004%) objected. By contrast, the claims administrator has received 7,280 claim forms. Plaintiffs argue, and the court agrees, that this response suggests that class members have reacted in an overwhelmingly positive fashion to the proposed settlement.

Courts have approved settlements involving classes of similar size when significantly more individuals objected or opted out. See *Churchill Village*, 361 F.3d at 577 (approving a settlement where "only 45 of the approximately 90,000 [.005%] notified class members objected to the settlement" and 500 [.6%] members opted out); *Portal Software*, 2007 WL 4171201 at *4 (noting that a small percentage of objectors will not undermine a settlement). The small number of objections in this case is further mitigated when one considers that two of the objectors filed claim forms and one raised no substantive objection to the terms of the settlement. As a result, the court concludes that this factor weighs in favor of approving the settlement agreement.

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[30]See Declaration of Cara Eisenberg in Support of Motion for Final Approval ("Eisenberg Decl."), ¶ 8; Quisenberry Decl., ¶ 18.

[31]Pl.'s Approval Mot. at 13.

[32]In *Young II*, Judge Walker declined to accord counsel's views much weight "given their obvious pecuniary interest in seeing the settlement approved." *Young II*, 2007 WL 951821 at *5. While the court agrees that this factor must be discounted to some degree in recognition of the personal interest of class counsel in having the settlement approved, it declines to discount the well-considered views of counsel entirely.

i. Other Factors

As noted, the *Young II* court considered two additional factors: the procedure by which the settlement was reached and the involvement of the named plaintiffs in the process. These factors support approval of the settlement here. The parties reached agreement after intensive arms-length negotiations and thorough litigation. The fact that a distinguished neutral such as Justice Panelli participated in the mediation further legitimizes the process. Plaintiffs represent, moreover, that the class representatives were actively involved both during litigation and settlement.[33] Thus, this factor too supports approval of the settlement.

j. Balancing the Factors

"Ultimately, the district court's determination [of fairness and adequacy] is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." *Officers for Justice*, 688 F.2d at 625 (citation omitted). "[I]t must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation." *Id.* Having considered the relevant factors, the court concludes that the circumstances surrounding the settlement weigh heavily in favor of approval. Accordingly, it finds that the proposed settlement is fair and adequate, and approves it.

B. Attorneys' Fees

In "common-fund" cases such as this one, "where the settlement or award creates a large fund for distribution to the class, the district court has discretion to use either a percentage or lodestar method." *Hanlon*, 150 F.3d at 1029 (citing *In re Washington Public Power Supply System Sec. Litig.*("*WPPSS*"), 19 F.3d 1291, 1295 (9th Cir. 1994)). Whether a court applies the lodestar or percentage method, the Ninth Circuit "'require[s] only that fee awards in common fund cases be *reasonable* under the circumstances.'" *WPPSS*, 19 F.3d at 1295 n. 2 (quoting *Florida v. Dunne*, 915 F.2d 545 (9th Cir. 1990) (emphasis original)).

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[33]See Declaration of Cynthia Fernandez in Support of Motion for Final Approval ("Fernandez Decl."), ¶ 5; Declaration of Monica Reyna in Support of Motion for Final Approval ("Reyna Decl."), ¶ 6. The class representatives remained on telephone standby throughout the mediation and counsel updated them frequently on the course of the negotiations. (See Quisenberry Decl., ¶ 17.)

The lodestar figure is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The lodestar "presumptively provides an accurate measure of reasonable attorney's fees." See *Harris v. Marhoefer*, 24 F.3d 16, 18 (9th Cir. 1994); *Clark v. City of Los Angeles*, 803 F.2d 987, 990 (9th Cir. 1986). A court may increase or decrease the lodestar amount in rare or exceptional cases. See *Blum v. Stenson*, 465 U.S. 886, 898-901 (1984); *Harris*, 24 F.3d at 18; *Clark*, 803 F.2d at 990-91.

A court employing this method to determine the amount of an attorneys' fees award does not directly consider the multi-factor test developed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), and *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975).[34] Rather, as a first step, it determines the lodestar amount, which subsumes certain of the *Kerr/Johnson* factors, i.e., the novelty and complexity of the issues, the special skill and experience of counsel, the quality of the representation, and the results obtained. See *Blum*, 465 U.S. at 898-900; *Clark*, 803 F.2d at 990-91 and n. 3; *Cunningham v. County of Los Angeles*, 879 F.2d 481, 484 (9th Cir. 1988). Next, the court looks to the *Johnson/Kerr* factors that have not been subsumed within the lodestar calculation to determine whether to increase or reduce the presumptively reasonable lodestar fee. See *Clark*, 803 F.2d at 991.

The Ninth Circuit has established 25% of the common fund as a benchmark to use in awarding fees under the the percentage-of-fund method. See *Fischel v. Equitable Life Assurance Society of U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 101, 1311 (9th Cir. 1990). "The benchmark percentage should be adjusted, or replaced by a lodestar calculation, [however,] when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." *Six (6)*

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[34]Under the *Johnson/Kerr* test, the factors to consider in determining the amount of attorney's fees awarded include: "(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases." *Kerr*, 526 F.2d at 70; see also *Johnson*, 488 F.2d at 717-19.

Mexican Workers, 904 F.2d at 1311. In evaluating the reasonableness of the fee award, the court must take into account all the circumstances of the case. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir.), cert. denied *sub nom. Vizcaino v. Waite*, 537 U.S. 1018 (2002).

In *Dunne*, 915 F.2d 542, where the appellate court approved the district court's use of the lodestar method to award fees in a common fund case, the Ninth Circuit explained:

> "Despite the recent ground swell of support for mandating a percentage-of-the-fund approach in common fund cases, . . . we require only that fee awards in common fund cases be reasonable under the circumstances. Accordingly, either the lodestar or the percentage-of-the-fund approach 'may, depending upon the circumstances, have its place in determining what would be reasonable compensation for creating a common fund.'" See *id.* at 545 (quoting *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989)).

In cases where courts apply the percentage method to calculate fees, they generally also use a rough calculation of the lodestar as a cross-check to assess the reasonableness of the percentage award. See *Vizcaino*, 290 F.3d at 1050 ("Calculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award").[35] By the same token, "a court applying the lodestar method to determine attorney's fees

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[35]In *Young*, Judge Walker explored the utility of using the lodestar method as a check when awarding fees based on a percentage of the common fund. Judge Walker stated:

> "Indeed, the court's independent research into fee award practice in other courts convinces it that the best practice is to assess a percentage fee award not only by using the usual litany of factors bearing on the reasonableness of a fee [citing *Vizcaino*], but also by cross-checking the percentage fee award against a rough fee computation under the lodestar method. See, e.g., *In re GMC Pick-Up Tuck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 820-21 & n. 40 (3d Cir. 1995) (Becker, J). See also *Vizcaino*, 290 F.3d at 1050-51 (approving district court's use of a lodestar cross-check); *In re HPL Techs, Inc., Sec Litig.*, 366 F.Supp.2d 912 (N.D. Cal. 2005).
>
> In contrast to the use of the lodestar method as a primary tool for setting a fee award, the lodestar cross-check can be performed with a less exhaustive cataloging and review of counsel's hours. See *In re Rite Aid Corp. Sec Litig.*, 396 F.3d 294, 306 (3d Cir. 2005) ("The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting."); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) ("Of course, where [the lodestar method is] used as a mere cross-check, the hours

may use the percentage-of-the-fund analysis as a cross-check." *Grays Harbor Adventist Christian School v. Carrier Corp.*, No. 05-05437 RBL, 2008 WL 1901988, *5 (W.D. Wash. Apr. 24, 2008) (citing *Wing v. Asarco Inc.*, 114 F.3d 986, 988-90 (9th Cir. 1994)).

1. Class Counsel's Request

The Settlement Agreement authorizes class counsel to seek up to $3,500,000 in attorneys' fees and costs without opposition from defendant.[36] This is the amount requested in plaintiffs' motion. The figure includes $148,402.82 in costs, leaving a fee award of $3,351,597.20 or 33.52% of the $10,000,000 settlement fund. Class counsel approximate that the lodestar is $1,589,513.00. Thus, the "lodestar multiplier" in this case would be 2.11.[37] The question is whether the resulting fee award is "reasonable" under the circumstances.

2. The Size of the Common Fund

The settlement agreement provides that a maximum of $10 million will be available to pay

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documented by counsel need not be exhaustively scrutinized ."). All that should be required is sworn declarations from the attorney(s) in charge of billing records for the case attesting to (1) the experience and qualifications of the attorneys who worked on the case; (2) those attorneys' customary billing rates during the pendency of the case; and (3) the hours reasonably expended (reduced if necessary in the exercise of professional billing judgment) by those attorneys in prosecuting the case.

Three figures are salient in a lodestar calculation: (1) counsel's reasonable hours, (2) counsel's reasonable hourly rate and (3) a multiplier thought to compensate for various factors (including unusual skill or experience of counsel, or the ex ante risk of nonrecovery in the litigation). In performing a lodestar cross-check, however, the multiplier is implied by the ratio of the proposed percentage fee to the computed lodestar fee. For example, for a proposed percentage fee of $250,000 and a corresponding lodestar fee of $100,000, the implied multiplier is 2.5. This implied multiplier may be assessed for reasonableness. Accordingly, the court need only consider counsel's reasonable hours and counsel's reasonable hourly rate in computing the lodestar." *Id.*

[36]Settlement, ¶ 38(b).

[37]The "lodestar multiplier" is determined by dividing the percentage fee award by the lodestar calculation. Courts apply such "multipliers" to account for the risk that an attorney assumes in taking a case. See *Fischel*, 307 F.3d at 1008 ("A district court generally has discretion to apply a multiplier to the attorney's fees calculation to compensate for the risk of nonpayment"). Indeed, "[i]t is an abuse of discretion to *fail* to apply a risk multiplier [ ] when (1) attorneys take a case with the expectation that they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence that the case was risky." *Id.* (emphasis added) (citing *WPPSS*, 19 F.3d at 1301-02).

settlement awards to class members, enhanced payments to class representatives, and attorneys' fees and costs.[38] Class counsel denominate this a common fund for purposes of calculating their attorneys' fees award.[39] The precise size of the fund, however, is not as straightforward as class counsel suggest.

As noted, payments to class members from the fund will be in the form of gift cards rather than cash. The court indicated at the January status conference that it believed gift cards have a cash value that is less than the face amount of the card. Neither the settlement agreement nor the parties' papers address the difference between the cash value of a gift card and its face value. In a similar case, however, Judge Walker of the Northern District of California found that the "real economic value" of gift cards was 80 percent of their face value. See *Young v. Polo Retail, LLC* (*Young I*), No. C-02-4546 VRW, 2006 WL 3050861, *5 (N.D. Cal. Oct. 25, 2006). In *Young*, a class of employees at various Polo retail stores sued Polo, challenging its practice of mandating that employees purchase and wear Polo clothes while working. As part of the settlement, Polo established a fund of $1 million in cash and $500,000 in Polo gift cards to be paid to class members. *Id.* at *3. Noting that the Rule 23 Advisory Committee Note provides that "[s]ettlements involving nonmonetary provisions for class members . . . deserve careful scrutiny to ensure that these provisions have actual value to the class," *id.* at *5 (citing FED.R.CIV.PROC. 23(2)(C)(h), Advisory Committee Notes), the court questioned the economic value of the gift cards. It concluded that "the real economic value of such a voucher falls short of their printed value." *Id.* After ordering the parties to provide an analysis of the economic value of the gift cards, the court found that "[a]lthough anecdotal, the data suggest that the resale value of the cards ranges from 80 to 85 percent of the printed value." *Id.* Applying this range, the court observed that "this estimation

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[38]Settlement Agreement, ¶ 37.

[39]Use of the "common fund" concept in a case such as this, where each class member can recover only a finite amount, does not affect the calculation of attorneys' fees even if a portion of the fund is not claimed. See *Young II*, 2007 WL 951821 at *4, 8 (finding that the $1.4 million available was a common fund despite the fact that each individual plaintiff's recovery was limited); see also *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (holding that the size of the common fund was the $4.5 million made available for settlement purposes and precluding the district court from considering that only a fraction of that fund had been recovered by class members in awarding attorneys' fees).

fails to account for transaction costs," and applied the low end of the range – 80 percent – as the best approximation of the value of the cards.

The situation in *Young I* is parallel to this case in some ways and distinguishable in others. There, as here, the gift cards being awarded to class members were fully transferrable and had no expiration date. In *Young*, however, the litigation concerned employees' objection to a company policy requiring them to purchase and wear Polo merchandise. As a result, counsel argue, it was less likely in *Young* that class members would actually redeem their gift cards themselves and more likely that they would attempt to sell or transfer them. Here, by contrast, counsel asserts that most class members applied for employment at Victoria's Secret because they were customers of the store. Consequently, counsel urges that they are more likely to redeem the gift cards they receive than the plaintiffs in *Young* and to obtain the full value of the cards without incurring transaction costs. Although the argument is somewhat speculative, the court finds it persuasive, and thus applies the high end of Judge Walker's range of 80-85% in assessing the value of the settlement fund.

The settlement agreement and the parties' papers suggest that each gift card reduces the common fund by the face amount of the card.[40] This inflates the value of the settlement fund. If each gift card is worth only 85 percent of its face value, then its cash value is $57.38,[41] and it should deplete the common fund only by that amount. Because this is not the way the parties conceptualized the fund, the economic value of the settlement is less than the $10 million set forth in the settlement agreement.

In *Young II*, the court dealt with the decreased value of the gift cards by reducing the total value of the settlement fund from $1.5 million to $1.4 million. See *Young II*, 2007 WL 951821 at *3.[42] The court then evaluated the percentage of the fund sought by class counsel against the reduced total. The court endorses this methodology. Since the entire settlement fund here is gift cards, the court must reduce the entire fund by 85 percent to determine its economic value. This results a valuation of $8.5

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[40]As the parties conceive it, the fund has $10,000,000 in it before any claims are paid. The first claim against the fund reduces it by the full face value of the gift card – $67.50 – leaving $9,999,932.50.

[41]$67.50 x .85 = $57.38.

[42]The court reached this result by valuing the $500,000 pool allocated for gift cards at 80 percent, or a total of $400,000. See *Young II*, 2007 WL 951821 at *3.

million. The court will use this number, therefore, for purposes of evaluating counsel's fee request.

3. Whether the Percentage Sought by Class Counsel is Reasonable

Having reduced the value of the common fund, the size of the fee award sought by class counsel now constitutes a greater percentage of the total fund. Counsel seek $3,351,597.20 in fees, or 39.4% of the total settlement fund. Although class counsel contend that their performance merits a higher percentage than the 25% benchmark, their argument presupposes that they seek 33% of the fund. Since the amount of fees sought is, in reality, more than 33%, it must be scrutinized carefully.

As noted, the benchmark in common fund cases is 25 percent. This percentage "can be 'adjusted upward or downward to account for any unusual circumstances involved in [the] case.'" *Fischel*, 307 F.3d at 1006 (quoting *Paul, Johnson, Alston & Hunt*, 886 F.2d at 272). Applying the benchmark percentage to the $8.5 million common fund would result in a fee award of $2.125 million.[43] The question is whether the circumstances of this case justify an up or down adjustment of this figure. In making this determination, "courts often consider the following factors . . . : (1) the result obtained for the class; (2) the effort expended by counsel; (3) counsel's experience; (4) counsel's skill; (5) the complexity of the issues; (6) the risks of non-payment assumed by counsel; (7) the reaction of the class; and (8) comparison with counsel's l[ode]star." *Craft v. County of San Bernadino*, No. EDCV05-00359 SGL, 2008 WL 916965, *3 (C.D. Cal. Apr. 1, 2008) (citing *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, *18 (C.D. Cal. June 10, 2005)). Many of these factors overlap with the factors discussed concerning the fairness of the settlement.

a. The Result Obtained for the Class

Class counsel first assert that they obtained an extremely favorable result for the class. They note: (1) that they obtained a total of $10 million for the class as a whole and (2) that they succeeded in persuading Victoria's Secret to stop the practice of requiring applicants to participate in job previews.[44] As most class members are young, low income persons who were unable to afford attorneys, counsel argue that the results they achieved merit application of a multiplier.

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[43]$8,500,000 x .25 = $2,125,000.

[44]Atty.'s Fees Mot. at 13-14.

As discussed earlier, the size of the settlement fund has no bearing on the individual awards class members will receive, and it is those awards that must be considered in evaluating the results achieved. Similarly, although defendant's decision to stop conducting job previews was undoubtedly a desired goal of the litigation, it is uncertain what value that outcome has for each class member.

Ultimately, class members will receive a gift card that is worth 8.5 times the wages the class member would have received for a single hour of work at a Victoria's Secret store.[45] Given the risks posed by further litigation and the size of the likely recovery that could have been obtained, the court has concluded that the settlement amount each class member will receive is fair, and even generous. Despite this fact, the result is not so favorable as independently to justify increasing the benchmark by some 58%.

b. The Effort Expended by Counsel

There is no doubt that class counsel vigorously and thoroughly litigated this case. They filed multiple amended complaints, conducted written discovery, took and/or defended more than sixteen depositions, successfully opposed a motion to dismiss, successfully moved for certification of a class, successfully opposed defendant's attempt to appeal the class certification order, filed opposition to defendant's motion for summary judgment, participated in extensive mediation sessions in both Los Angeles and San Francisco, and prepared motions for court approval of the settlement.[46]

It is also clear that counsel expended significant time and effort in carrying out these tasks. While this merits a generous award of attorneys' fees, this factor largely duplicates the lodestar calculation, which reflects the hours counsel spent litigating the case. Consequently, the court does not believe that this factor independently justifies a significant departure from the benchmark percentage unless such a result is supported by the lodestar cross-check.

c. Counsel's Experience and Skill

The class was represented by three firms; counsel from all of these firms demonstrated over the

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[45]The real economic value of a gift card, $57.35, divided by an hourly rate of $6.75 equals roughly 8.5.

[46]See Eisenberg Decl., ¶ 11 (also listing other tasks performed by class counsel).

course of the litigation that they are experienced and skilled litigators. John Quisenberry, Robert Drexler and Gary Dordick are experienced litigators whose firms have secured verdicts and settlements in excess of $100,000,000.[47] Cara Eisenberg is an experienced employment law litigator, whose efforts have resulted in verdicts and settlements in excess of $10,000,000.[48] All class counsel are qualified, experienced, and skilled attorneys, who prosecuted this action effectively. As a consequence, this factor weighs in favor of a generous fee award.

d. Complexity of the Issues

Class counsel argue that the case was complicated because it involved a novel fact situation – i.e., defendant's nationwide policy of conducting unpaid job previews. Although California's requirement that work be remunerated was clear, it was uncertain whether that requirement applied to the job previews in which plaintiffs participated. Counsel note that both class certification and the availability of summary judgment turned on fact-intensive questions. Given the fact-intensive nature of the inquiry, and the uncertainty of the law, they assert that they had to analyze the policy and practice behind the job previews and craft a novel legal argument that the previews violated California law.

The court agrees that the case was both legally novel and factually complex. Class counsel processed a large amount of data pertaining to a large potential class. Moreover, they crafted a legal argument that ultimately induced defendant to settle the case and cease the practice of conducting job previews. In short, counsel successfully addressed the complex issues presented by the litigation. As a result, this factor also supports a generous fee award.

e. Risks of Non-Payment

The district court must analyze class counsel's risk of non-payment and determine whether to apply a risk multiplier. It is an abuse of discretion to fail to apply a risk multiplier "when (1) attorneys take a case with the expectation that they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence that the case was risky." *Fischel*, 307 F.3d at

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[47]The Quisenberry Law Firm has obtained more than $225,000,000 in settlements or verdicts. (Quisenberry Decl., ¶¶ 12-14.) Drexler is the head of the firm's class action department. (*Id.*, ¶ 15.) Dordick has obtained more than $100,000,000 in settlements and verdicts. (Dordick Decl., ¶¶ 4-5.)

[48]Eisenberg Decl., ¶ 2.

1008 (citing *WPPSS*, 19 F.3d at 1301-02). Although the risk multiplier applies to the lodestar, the court may also account for such risk in assessing whether or not to depart from the benchmark in a percentage of the fund case.

Counsel took this case on a contingency fee basis and agreed to advance costs.[49] The retainer agreement provided that class counsel would recover "a 35% fee pre-litigation and a 40% fee post litigation."[50] Counsel invested thousands of hours of work although facing the real and substantial risk that they would recover nothing. They have also represented that they declined other work to pursue the case.[51]

It is therefore clear that class counsel undertook plaintiffs' representation with the expectation that they would receive a risk enhancement if they prevailed. As noted, the class members are relatively low income workers who could not afford litigation fees in the absence of a contingency agreement. The contingency fee agreement into which plaintiffs and counsel entered reflects the mechanism available the private legal market to compensate counsel for taking the risk of non-payment. See *Vizcaino*, 290 F.3d at 1051 ("Indeed, 'courts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases.' [ ]This mirrors the established practice in the private legal market of rewarding attorneys for taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning contingency cases," citing *WPPSS*, 19 F.3d at 1299-1300); *id.* ("In common fund cases, 'attorneys whose compensation depends on their winning the case[ ] must make up in compensation in the cases they win for the lack of compensation in the cases they lose," quoting *WPPSS*, 19 F.3d at 1300-01). Given the risks assumed by class counsel, the court concludes that the percentage fee must encompass some risk multiplier to compensate counsel. The court discusses the degree of such multiplier *infra.*

f. Reaction of the Class

As noted, the reaction of the class has been positive. Only three class members objected and

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[49]*Id.*, ¶¶ 5, 7.

[50]Eisenberg Decl., ¶ 5.

[51]See Eisenberg Decl., ¶ 3; Dordick Decl., ¶ 3.

only twenty-nine opted out. This indicates that counsel achieved a favorable result for the class, which in turn suggests that they are entitled to a generous fee.

g. Comparison with Lodestar

The court next turns to an analysis of the lodestar to place its discussion of an appropriate percentage fee in context. As Judge Walker noted, the lodestar "cross-check" need not be as exhaustive as a pure lodestar calculation. See *Young II*, 2007 WL 951821 at *5 ("[T]he lodestar cross-check can be performed with less exhaustive cataloging and review of counsel's hours," citing *Rite Aid*, 396 F.3d at 306). Instead, the lodestar calculation serves as a point of comparison by which to assess the reasonableness of a percentage award. As a result, the lodestar can be approximate and still serve its purpose.

Counsel suggest that a reasonable hourly rate should be determined by the *Laffey* matrix adjusted to account for the cost of living in Los Angeles. The *Laffey* matrix is a "widely recognized compilation of attorney and paralegal rate data" that is used in the District of Columbia. *In re Chiron Corp. Sec. Litig.*, No. C-04-4293 VRW, 2007 WL 4249902, *6 (N.D. Cal. Nov. 30, 2007). The *Laffey* matrix is named after the case in which it was first conceived using a variety of hourly rates to account for different levels of experience. See *id.* (citing *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983)). "The *Laffey* matrix has been regularly prepared and updated by the Civil Division of the United States Attorney's Office for the District of Columbia and used in fee shifting cases, among others." *Id.*

Courts in this circuit are divided as to whether the *Laffey* matrix is an accurate measure of attorneys' fees in mixed rate cases outside the District of Columbia. Compare *id.* ("The *Laffey* matrix is especially useful when the work to be evaluated consists of that by a mix of senior, junior and mid-level attorneys, as well as paralegals"); *Young II*, 2007 WL 951821 at *7 ("One reliable source for rates that vary by experience levels is the *Laffey* matrix used in the District of Columbia") with *Housing Rights Center v. Sterling*, No. CV 03-859 DSF, 2005 WL 3320738, *2 (C.D. Cal. Nov. 1, 2005) ("The Laffey Matrix also does not comport with the reality of Los Angeles firm billing practices. It sets a single rate for associates with one to three years experience, another for four to seven years, another for eight to ten years, another for eleven to nineteen years, and a single rate for all attorneys with twenty

years or greater experience. It also sets a single rate for paralegals, regardless of experience. There is much more variance from year to year in Los Angeles"). Despite this disagreement, where use of the *Laffey* matrix has been disapproved, it has been because it produced a rate that the court determined was *too low*. See *Housing Rights Center*, 2005 WL 3320738 at *3 ("Both the Laffey Matrix rate and the suggested blended rate of $200 are too low in the circumstances of this case and in this community"). Here, it is plaintiffs who propose that the *Laffey* matrix be used to approximate the lodestar. The court therefore accedes to their request.

The most recent version of the *Laffey* matrix sets forth the following rates for attorneys and paralegals.[52]

Paralegal	1-3 Years	4-7 Years	8-10 Years	11-19 Years	20+ Years
$130	$225	$270	$330	$410	$465

Class counsel propose that the court adjust these rates to reflect the higher cost of living in Los Angeles as compared with Washington D.C. See *Young II*, 2007 951821 at *7 (adjusting the *Laffey* matrix to account for the higher cost of living in San Francisco). Counsel note that the cost of living in Los Angeles is 4.37% higher than in the District of Columbia.[53] Adjusting for this differential, the rates are as follows:[54]

Paralegal	1-3 Years	4-7 Years	8-10 Years	11-19 Years	20+ Years
$135.68	$234.83	$281.79	$344.42	$427.91	$485.32

Applying these rates to the hours submitted by class counsel yields the following result:[55]

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[52]See Eisenberg Decl., Exh. 5 (most recent *Laffey* matrix from the Department of Justice).

[53]See *id.*, ¶ 14 (comparing the Judiciary Salary Plans for Washington and Los Angeles).

[54]To calculate these adjusted rates, the court has multiplied the original rate by the percentage increase, and added that amount to the original rate. For example ($130 x 0.0437) + $130 = $135.68.

[55]The court uses the hours listed in counsel's Notice of Errata to: (1) Motion for Attorney's Fees and Costs And (2) Declaration of Cara Eisenberg in Support of Motion for Attorney's Fees ("Notice of Errata"). See *id.* at 4-5.

Attorney	Years in Practice	Total Hours	Adjusted *Laffey* Rate	Total Fee
Gary Dordick	21	104.20	$485.32	$50,570.34
David Azizi	9	215.75	$344.42	$74,308.62[56]
Alonso Palencia	Paralegal	65	$135.68	$8,819.20
Cara Eisenberg	24	1227.03	$485.32	$595,502.00
Christie Webb	25	92.50	$485.32	$44,892.10
John Quisenberry	28	101.10	$485.32	$49,065.85
Robert Drexler	25	408.00	$485.32	$198,010.56
Susan Abitanta	25	786.70	$485.32	$381,801.24
Herb Weinstein	19	29.20	$427.91	$12,494.97[57]
Fernando Vincente	5	98.50	$281.79	$27,756.31
Andrew Quisenberry	Clerk	27	$135.68	$3,663.36
Deborah Odessky	Paralegal	108.50	$135.68	$14,721.28
Melanie Ezerzer	Paralegal	65.70	$135.68	$8,914.18
Robert Gonzalez	Paralegal	661.40	$135.68	$89,874.43
Sub-Total				**$1,560,394**
Future Fees (60 Hrs at $485.32)				$29,119.00
Total				**$1,589,513**[58]

[56]In Eisenberg's table, she applied the rate for attorneys with 11-19 years of service to Azizi's hours, despite the fact that Azizi has been practicing only nine years. (See Eisenberg Decl., ¶ 14.) The court's calculation, which uses the appropriate number of years in practice figure, is thus approximately $18,000 less than counsel's.

[57]As with Azizi, class counsel's chart appears to have awarded Weinstein fees at an improper rate. According to the *Laffey* matrix, Weinstein's fees should be calculated at the rate for attorneys with 11-19 years of experience rather than the 20+ rate.

[58]Class counsel not only used inaccurate rates for Azizi and Weinstein, but also miscalculated total fees. The court calculates a total of $1.59 million, just a few thousand dollars less than counsel's suggested lodestar of $1.61 million. Given the approximate nature of the lodestar calculation and the small disparity between the court's and counsel's calculations, the court is satisfied that its calculation represents an appropriate lodestar reference point.

The hours recorded by counsel are reasonable, given the length of the litigation and their vigorous effort on plaintiffs' behalf. As a result, the court finds that $1,589,513 is the proper lodestar to use for purposes of comparison with the percentage award. Were the court were to award counsel the fees they seek, this would reflect use of a 2.11 multiplier. By contrast, if the court were to award the benchmark – i.e., 25% – of the $8,500,000 common fund, fees would be $2,125,000, reflecting a 1.34 lodestar multiplier.

h. Weighing the Factors

Taking all of the relevant factors into consideration, the court concludes that class counsel have shown that "special circumstances indicate that the [benchmark] percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." *Six (6) Mexican Workers*, 904 F.2d at 1311. Counsel assumed a substantial risk litigating this case, and expended a significant amount of time and effort on pretrial activities. Given the novel legal issues raised, the court concludes that the circumstances warrant an award of fees above the 25% benchmark. The court cannot agree, however, that counsel are entitled to fees that equal 39.43% of the common fund.

Having determined that the percentage should be greater than 25% but less than 39.43%, the court must determine, in its discretion, what percentage of the fund would reasonably be awarded in this case. Although they maintain that the relevant factors warrant a greater award, class counsel request that they be awarded roughly 34% of the common fund – which they erroneously valued at $10 million. The court agrees that counsel's assessment of the correct percentage, but applies it to the actual value of the common fund – some $8.5 million. The court believes that a fee award in this range is both fair and reasonable.[59]

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[59]Awarding a percentage fee of 34% is supported by the fact that typical contingency fee agreements provide that class counsel will recover 33% if the case is resolved before trial and 40% if the case is tried. See Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L. Q. 653, 659 n. 11 ("In some jurisdictions, standard contingency fee rates are 33% if the case settles before trial, 40% if a trial commences, and 50% if the trial is completed"). Eisenberg states that the retainer agreement between counsel and plaintiffs provided for a 35% fee "pre-litigation" and a 40% fee "post-litigation." (Eisenberg Decl., ¶ 5.) It appears, therefore, counsel's agreement is consistent with the conventional practice in contingency fee cases. The 34% the court awards is the mid-point between the conventional 33% rate and the 35% rate set forth in the retainer agreement. The fact that the award is essentially consistent with the agreement

Applying a percentage of 34% to the $8,500,000 common fund, the court concludes that counsel should be awarded fees of $2,890,000. This amount is $765,000 more than the $2.125 million award that would flow from application of the 25% benchmark.[60] The award also represents application of a risk multiplier of approximately 1.82 to the lodestar amount.[61] Both of these increases appropriately award class counsel for their risk in taking this case on a contingency basis and litigating the case with diligence and skill.

Considering the circumstances of this litigation, the court concludes that a 34% award is fair and reasonable. Consequently, the court awards class counsel $2,890,000 in attorneys' fees.

i. Costs

As noted, class counsel calculates that they have expended a total of $148,402.82 in costs to date. The court finds that this figure is reasonable and awards this amount in costs over and above the $2,890,000 in fees. The total award to class counsel is thus $3,038,402.80 in fees and costs.

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between counsel and their clients is further evidence that it is reasonable.

[60]The award reduces class counsel's request of $3,351,597.20 by $461,597.20. This reduction is reasonable in light of the fact that the common fund's value was inflated.

[61]The 1.82 multiplier is between the 1.34 multiplier suggested by the benchmark percentage and the 2.11 multiplier suggested by class counsel. It adequately rewards class counsel's risk while simultaneously ensuring a reasonable fee recovery based on the reduced value of the common fund. An increased multiplier is also warranted because the *Laffey* matrix appears to underestimate counsel's hourly rates. At oral argument, Ms Eisenberg stated that she and Mr. Dordick regularly charge $500 per hour, and that Mr. Quisenberry charges $600 per hour. Were the court to utilize these rates rather than the *Laffey* matrix, the lodestar amount would increase by roughly $31,600. This would reduce the multiplier to 1.78. The lodestar amount would increase further (and the multiplier decrease) were the court to use higher (and perhaps more accurate) hourly rates for all of the attorneys representing plaintiffs in this case. This fact also justifies a higher fee award.

III. CONCLUSION

For the foregoing reasons, the court grants plaintiffs' motion for final approval of the settlement agreement. The court awards each of the two named plaintiffs $5,000 in settlement of her claim and in lieu of a gift card. In addition, the court awards class counsel $2,890,000 in fees and $148,402.82 in costs.

DATED: July 21, 2008

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE